IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

Vet. App. No. 19-2240

JOSEPH E. RUSSELL,
Appellant,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,
Appellee.

ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS

BRIEF OF APPELLEE SECRETARY OF VETERANS AFFAIRS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Record Before the Agency (R.) Citations

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	)	
Appellant,	)	
	)	
v.	)	Vet. App. No. 19-2240
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ROBERT L. WILKIE,	)	
Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

ON APPEAL FROM THE BOARD OF VETERANS' APPEALS

BRIEF OF THE APPELLEE SECRETARY OF VETERANS AFFAIRS

I. ISSUES PRESENTED

Whether the U.S. Court of Appeals for Veterans Claims (Court) should dismiss the appeal of or, in the alternative, affirm that part of the March 21, 2019, decision of the Board of Veterans' Appeals (Board) that denied entitlement to service connection for an anxiety disorder.

Whether the Court should vacate that part of the March 21, 2019, decision of the Board that denied entitlement to service connection for posttraumatic stress disorder (PTSD).

II. STATEMENT OF THE CASE

A. Nature of the Case

Appellant, Joseph E. Russell, appeals, *pro se*, the March 21, 2019, Board decision that denied entitlement to service connection for an anxiety disorder and

PTSD. (Record Before the Agency (R.) at 4-12); *see* Appellant's Informal Brief (App. Inf. Br.). As will be addressed below, the Secretary concedes that remand is warranted as to the issue of entitlement to service connection for PTSD.

To the extent that the Board found that new and material evidence had been submitted regarding the claims for service connection for an anxiety disorder and PTSD and reopened those claims, (R. at 3-4, 6-8 (3-13)), the Court should not disturb these favorable findings. *See Roberson v. Principi*, 17 Vet.App. 135, 139 (2003) (per curiam order) (noting that the Court lacks authority to disturb favorable findings).

Appellant does not challenge the Board's finding that the claim for service connection for an unspecified depressive disorder or depression was not part of the current appeal. *See* App. Inf. Brief; (R. at 5 (3-13)). Therefore, any appeal of this issue has been abandoned. *See Pieczenik v. Dyax Corp.*, 265 F.3d 1329, 1332-33 (Fed. Cir. 2001); *Norvell v. Peake*, 22 Vet.App. 194, 201 (2008).

Additionally, although Appellant states that he is appealing the Board's decision denying entitlement to an anxiety disorder and PTSD, his arguments relate only to the Board's denial of service connection for PTSD. *See* App. Inf. Br. He does not provide any argument or allegation of error with regard to the Board's denial of entitlement to service connection for an anxiety disorder. *See id.* He has therefore abandoned his appeal of this issue, and the Court should dismiss the appeal as to this abandoned issue. *See Pederson v. McDonald*, 27 Vet.App. 276, 281-86 (2015) (en banc) (declining to review the merits of an issue not argued and

dismissing that portion of the appeal); *Cacciola v. Gibson*, 27 Vet.App. 45, 48 (2014) (same). In the alternative, the Secretary requests that the Court otherwise affirm the Board's March 21, 2019, decision denying entitlement to service connection for an anxiety disorder.

B. Statement of Facts

Appellant served on active duty from July 1981 to November 1991, including service in Saudi Arabia. (R. at 1681); *see* (R. at 2183 (2183-85)). He served as a Combat Signaler. (R. at 1681).

Post-service medical records document various diagnoses. An October 2000 Department of Veterans Affairs (VA) mental health treatment record documents a diagnosis of situation stress, to include work-related stress. (R. at 2538 (2538-41)). An October 2001 VA mental health treatment record notes a diagnosis of insomnia anxiety. (R. at 2569 (2568-70)). A December 2003 VA mental health evaluation by a psychiatrist notes that there were "no distinct symptoms characteristic of a PTSD disorder," and he was diagnosed with depression, not otherwise specified (NOS), instead. (R. at 246, 248 (245-50)). A December 2006 VA treatment record notes a prior medical history of PTSD. (R. at 1032 (1031-34)). A July 2014 VA mental health treatment record notes treatment for major depression, moderate, recurrent, and PTSD (provisional). (R. at 420 (420-21)); *see also* (R. at 389 (388-89)). The treatment provider, a psychology resident, noted that Appellant "is scheduled for a psychology

assessment in Salisbury (referred by Dr. Cotoman) to help clarify diagnosis." (R. at 420).

In September 2014, Appellant's VA mental health provider, Dr. Dan N. Cotoman, M.D., referred him for a psychology diagnostic evaluation, specifically requesting an evaluation for PTSD. *See* (R. at 378 (378-81)). A VA clinical psychologist, Cheri R. Anthony, Ph.D., provided the psychology consult. *Id.* After diagnostic interview of Appellant, apparent review of at least some records, and review of testing results, Dr. Anthony provided a diagnostic impression of PTSD. *Id.* at 380; *see also* (R. at 415-16). Under "summary and recommendations," she provided:

> Mr. Russell's diagnosis comes down to consideration of a mixed anxiety and depression disorder or PTSD. He presents with symptoms in both spectrums. His reported PTSD traumatic event was different than is frequently seen in PTSD. However[,] based on DSM 5 [Diagnostic and Statistical Manual of Mental Disorders Fifth Edition (DSM-5)] criteria[,] which is as follows: "exposure to actual or threaten death, serious injury or sexual violence." His jumps, viewing of dead bodies, threatened death while driving in convoys and threats experienced while administering drug test do appear to meet that criteria. He also appears to have intrusive symptoms including nightmares and intrusive thoughts. He reports efforts to avoid reminders and thoughts. He reports negative alteration in cognitions including negative beliefs and increased anger. In terms of alteration and arousal he reports irritability and hypervigilance. Therefore at this time he is given a PTSD diagnosis.

(R. at 380).

In November 2014, Appellant filed a claim for, *inter alia*, service connection for PTSD/Anxiety. (R. at 1412; 1405 (1405-06)). He received a VA Compensation and Pension (C&P) initial PTSD examination in April 2015. (R. at 1321-31). The

VA psychologist reviewed Appellant's electronic VA file and conducted an in-person evaluation of Appellant using the DSM-5. *Id.* at 1321, 1331. Based on review of his records and his self-report that day, the psychologist found that Appellant did not meet the criteria for a diagnosis of PTSD that conforms to DSM-5 criteria. *Id.* at 1321, 1331. The psychologist noted that he had a history of excessive anger prompted by situational stressors and found that it was less likely than not that his irritability incurred in or was caused by combat during service. *Id.* at 1331.

In a May 2015 rating decision, a VA regional office (RO), *inter alia*, denied service connection for an unspecified depressive disorder, PTSD, and anxiety. (R. at 1203, 1205-06 (1182-87, 1199-1207)). Appellant filed a timely Notice of Disagreement (NOD) in May 2015, indicating that he disagreed with the RO's denial of service connection for PTSD and anxiety disorder. (R. at 108-09 (106-10)). His NOD did not mention that he disagreed with the denial of service connection for a depressive disorder. *See id.* He argued that he had "been diagnosed with PTSD by Salisbury VAMC [(VA Medical Center)]" and that "[h]is PTSD diagnosis is based on experiences Operation Desert Shield/Desert Storm." *Id.* at 109. He concludes that his "PTSD claim must be granted as a matter of law." *Id.*

Subsequently, in September 2016, the RO issued a Statement of the Case (SOC) continuing the denial of service connection for anxiety and PTSD. (R. at 74-75 (59-76)). Appellant filed a timely substantive appeal in October 2016, again

stating the issue he was appealing was "[s]ervice connection for PTSD/Anxiety Disorder." (R. at 57-58).

In March 2019, the Board issued the decision here on appeal. (R. at 3-13). The Board found that "as VA clearly and expressly adjudicated each psychiatric diagnosis separately and [Appellant] clearly identified two of those diagnoses only in his NOD and VA Form 9, the Board finds the claim for a depressive disorder is not within the scope of the claims on appeal." *Id.* at 5. The Board found that new and material evidence had been received sufficient to reopen the claims for service connection for an anxiety disorder and PTSD, *id.* at 6-8, and denied the claims on the merits, *id.* at 8-12. This appeal followed.

III. SUMMARY OF THE ARGUMENT

The Court should either dismiss the appeal of or, in the alternative, affirm that part of the Board's March 2019 decision that denied entitlement to service connection for an anxiety disorder. Appellant presents no argument or assertion of error with regard to the Board's denial of service connection for an anxiety disorder. As such, any appeal of that issue should be deemed abandoned, and the Court should dismiss the appeal of that abandoned issue. To the extent that the Court construes Appellant's informal brief as making any argument with respect to the Board's denial of service connection for an anxiety disorder, such argument is unavailing. As he fails to demonstrate error warranting remand, the Court should affirm the Board's decision.

The Secretary concedes, however, that the Board erred in failing to provide an adequate statement of reasons or bases for its determination that Appellant is not entitled to service connection for PTSD. Accordingly, the Secretary asserts that the Court should vacate and remand that portion of the Board's March 2019 decision that denied service connection for PTSD.

IV. ARGUMENT

A. The Secretary concedes that vacatur and remand are warranted for the issue of entitlement to service connection for PTSD because the Board provided an inadequate statement of reasons or bases.

The Secretary concedes that remand is warranted of the claim for service connection for PTSD, as the Board provided an inadequate statement of reasons or bases for its decision. (R. at 3-13); *see* 38 U.S.C. § 7104(d)(1). The Board's statement of reasons or basis is adequate when it enables the appellant to understand the precise basis for the decision rendered and facilitates judicial review. *See Allday v. Brown*, 7 Vet.App. 517, 527 (1995). As factfinder, the Board is free to assign higher probative weight to one medical opinion over another; it just must provide an adequate statement of reasons or bases for doing so. *See D'Aries v. Peake*, 22 Vet.App. 97, 107 (2008) (per curiam); *Owens v. Brown*, 7 Vet.App. 429, 433 (1995).

The Secretary notes that, in weighing the September 2014 VA treatment record and the April 2015 VA C&P examination, the Board misstated the qualifications of the September 2014 VA clinician. (R. at 11 (3-13); 378-81). The Board stated that "the 2014 diagnosis [of PTSD] was given by a resident, and while

she is certainly a mental health professional, it cannot be said that her diagnosis is entitled to the same probative weight as that of the VA examiner, who is a psychologist. A resident is, by definition, an individual wo is working under the supervision of a more experienced medical professional and is still in the learning portion of his/her career, while a psychologist has successfully fulfilled all the requirements to get licensed to practice independently and therefore has more experience than a resident." (R. at 11). However, the September 2014 PTSD diagnosis was given by a psychologist, (R. at 378, 380 (VA psychology consult record, provided and signed by Cheri R. Anthony, Ph.D., "Clinical Psychologist")), not by a resident as stated by the Board, (R. at 11).[1]

In light of that, the Board failed to adequately analyze the probative value of this evidence. Accordingly, the Secretary concedes that remand is warranted. *See D'Aries*, 22 Vet.App. at 107; *Owens*, 7 Vet.App. at 433; *Allday*, 7 Vet.App. at 527.

[1] There are other records from around this time period that appear to be authored by a resident. *See* (R. at 439-46 (July 7, 2014, VA psychology note signed by Heidi J. Erickson, Psy.D., "Psychology Resident"); 420-21 (July 21, 2014, VA mental health note signed by Heidi J. Erickson, Psy.D., "Psychology Resident"); 414-15 (August 11, 2014, VA mental health note signed by Heidi J. Erickson, Psy.D., "Psychology Resident"); 388-89 (September 2, 2014, VA mental health note signed by Heidi J. Erickson, Psy.D., "Graduate Psychologist")). In the July 21, 2014, record, Dr. Erickson notes Appellant is being seen for "Major depression, Moderate, Recurrent, [and PTSD] (Provisional)" and that Appellant "is scheduled for a psychology assessment in Salisbury (referred by Dr. Cotoman) to help clarify diagnosis." (R. at 420). Appellant notes at the September 2, 2014, visit that "he is still waiting for results from psychology assessment to clarify mental health diagnoses." (R. at 389).

B. The Court should dismiss the appeal as to the issue of service connection for an anxiety disorder or, in the alternative, affirm the Board's denial.

1. Appellant presents no arguments or assertions of error regarding the Board's denial of service connection for an anxiety disorder, and the Court should therefore dismiss the appeal as to that abandoned issue.

Appellant has submitted an informal brief, and the Secretary has attempted to discern, to the extent possible, Appellant's arguments on appeal. App. Inf. Br. at 1-3 & Attachment #2; *see De Perez v. Derwinski*, 2 Vet.App. 85, 86 (1992) (when reviewing the Board's decision, the Court liberally construes arguments made by pro se appellants). However, pro se appellants, like any other appellant, must raise specific arguments demonstrating perceived Board error. *See Coker v. Nicholson*, 19 Vet.App. 439, 442 (2006) ("The Court requires that an appellant plead with some particularity the allegation of error so that the Court is able to review and assess the validity of the appellant's arguments."), *vacated on other grounds sub nom. Coker v. Peake*, 310 F. App'x 371 (Fed. Cir. 2008) (per curiam order). And pro se appellants, like any other appellant, still "bear[] the burden of persuasion on appeals to this Court." *Berger v. Brown*, 10 Vet.App. 166, 169 (1997); *see also Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) (holding that the appellant bears the burden of demonstrating prejudicial error); *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (noting that appellant bears the burden of demonstrating error), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000) (table).

Here, while Appellant lists the issues being appealed as "service connection for PTSD/Anxiety," App. Inf. Br. at 1,[2] his arguments pertain only to the Board's denial of service connection for PTSD, *see id.* at 1-3 & Attachment #2. He argues that the Board incorrectly stated facts, asserting that the Board was not correct in stating that he did not have a DSM-5 diagnosis of PTSD. App. Inf. Br. at 1 & Attachment #2. He makes a general assertion that the Board failed to apply the benefit of the doubt and that he was entitled to have his claim decided on all the evidence. App. Inf. Br. at 2 (citing 38 U.S.C. § 5107(b) and 38 C.F.R. § 3.303). He asserts that the Board decision is wrong citing his "argument at [(R.] at 108[)]." App. Inf. Br. at 3. This is his NOD, in which he asserts that he meets the requirements of service connection for PTSD: (1) a medical diagnosis of PTSD, (2) verified and verifiable in-service stressor, and (3) causal nexus, and concludes that his "PTSD claim must be granted as a matter of law." (R. at 109 (106-09)). He makes no arguments in the NOD regarding service connection for an anxiety disorder. *See* (R. at 106-09). His informal brief concludes with a request that the Court grant service connection for PTSD. App. Inf. Br. at 3.

As addressed above, the Secretary concedes that remand is warranted of the Board's denial of service connection for PTSD. As Appellant makes no arguments regarding the Board's denial of service connection for an anxiety

[2] Appellant states that his appeal is as follows: "Service connection for PTSD/Anxiety – Record Before The Agency (R.) 57 & 108." App. Inf. Br. at 1. These record cites are to his October 2016 substantive appeal, (R. at 57 (57-58)), and May 2015 NOD, (R. at 108 (106-09)).

disorder, this aspect of the appeal has been abandoned and should be dismissed. *See Pederson*, 27 Vet.App. at 281-86 (declining to review the merits of an issue not argued and dismissing that portion of the appeal); *Cacciola*, 27 Vet.App. at 48 (same).

2. Alternatively, the Court should affirm the Board's denial of service connection for an anxiety disorder as Appellant fails to demonstrate error.

To the extent that the Court construes Appellant's assertion that the benefit of the doubt should have been applied and that he was entitled to have his claim decided on "all" of the evidence, App. Inf. Br. at 2, as also pertaining to his claim for service connection for an anxiety disorder, he fails to demonstrate any such error.

The Board is presumed to have considered all the evidence of record in making its determination. *See Newhouse v. Nicholson*, 497 F.3d 1298, 1302 (Fed. Cir. 2007); *Gonzales v. West*, 218 F.3d 1378, 1381 (Fed. Cir. 2000). In order to show otherwise, the claimant must provide specific evidence to the contrary. *See Gonzales*, 218 F.3d at 1380-81 (holding that "absent specific evidence indicating otherwise," VA is presumed to have reviewed all evidence in the record when making a determination). Here, Appellant fails to provide any such evidence. *See generally* App. Inf. Br.; *see Sanders*, 556 U.S. at 409; *Hilkert*, 12 Vet.App. at 151. Accordingly, he fails to demonstrate that the Board failed to consider all the evidence and his argument is unavailing.

Further, to the extent that Appellant argues that the Board erred in failing to apply the benefit of the doubt doctrine, *see* App. Inf. Br. at 2, this argument also is unavailing. "When there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit-of-the-doubt to the claimant." 38 U.S.C. § 5107(b); *see also* 38 C.F.R. § 3.102. If "there is a plausible basis in the record for the Board's decision that the preponderance of the evidence was against the appellant's claim, the benefit of the doubt doctrine does not apply." *Schoolman v. West*, 12 Vet.App. 307, 311 (1999).

Here, after considering the evidence of record, the Board permissibly found that the preponderance of the evidence was against the claim for service connection for an anxiety disorder. (R. at 12 (3-13)); *see Gilbert*, 1 Vet.App. at 55 (it is the obligation of the Board to determine whether the evidence supports the claim or is in relative equipoise, or whether a fair preponderance of the evidence is against the claim). The Board's determination has a plausible basis in the record. *See Gilbert*, 1 Vet.App. at 53; (R. at 10; 1321 (1321-31) (April 2015 VA C&P examination report diagnosing unspecified depressive disorder)). Accordingly, because there is a plausible basis in the record for the Board's determination that the preponderance of the evidence was against Appellant's claim for service connection for an anxiety disorder, the benefit-of-the-doubt doctrine was not for application and the Board correctly determined that the claim must be denied. (R. at 12); *see* 38 U.S.C. § 5107(b); 38 C.F.R. § 3.102; *Ortiz v.*

Principi, 274 F.3d 1361, 1364 (Fed. Cir. 2001) (holding that "the benefit of the doubt rule is inapplicable when the preponderance of the evidence is found to be against the claimant"); *McGrath v. Gober*, 14 Vet.App. 28, 34 (2000) (finding that the Board did not err with regard to the benefit of the doubt doctrine because the Board found that the preponderance of the evidence did not support the claim); *Schoolman*, 12 Vet.App. at 311 (explaining that the benefit of the doubt doctrine does not "come into play unless the evidence of record is in equipoise" and "has no application in those cases where the preponderance of the evidence is against the appellant's claim"); *Gilbert*, 1 Vet.App. at 55, 58.

Thus, to the extent that the Court construes Appellant's informal brief as presenting an argument regarding the Board's denial of entitlement to service connection for an anxiety disorder, any such argument is unavailing and the Court should affirm the Board's decision. *See Sanders*, 556 U.S. at 409; *Hilkert*, 12 Vet.App. at 151.

C. Appellant has abandoned all issues not argued in his brief.

The Secretary has limited his response to only those arguments reasonably construed to have been raised by Appellant in his opening brief and submits that any other arguments or issues should be deemed abandoned. *See Pieczenik*, 265 F.3d at 1332-33; *Norvell*, 22 Vet.App. at 201.

V. CONCLUSION

WHEREFORE, in light of the foregoing reasons, the Court should (1) dismiss the appeal of or, in the alternative, affirm that part of the March 21, 2019,

Board decision that denied entitlement to service connection for an anxiety disorder and (2) vacate that part of the March 21, 2019, Board decision that denied entitlement to service connection for PTSD and remand that claim to the Board for readjudication.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On January 23, 2020, a copy of the foregoing was mailed, postage prepaid, to:

Joseph E. Russell
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I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

/s/ Shannon E. Leahy
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