

**IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS**

MARLON V. PHILLIPS,
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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Appellant)	
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v.)	Vet.App. No. 19-2953
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ROBERT L. WILKIE,)	
Secretary of Veterans Affairs)	
)	
Appellee)	

**ON APPEAL FROM
THE BOARD OF VETERANS' APPEALS**

**BRIEF OF APPELLEE
SECRETARY OF VETERANS AFFAIRS**

I. ISSUES PRESENTED

Whether the Court should affirm the February 19, 2019, Board of Veterans' Appeals (Board) decision, which denied entitlement to service connection for an acquired psychiatric disorder, not including posttraumatic stress disorder (PTSD), claimed as depression, and for alcohol abuse disorder and cannabis abuse disorder.

II. STATEMENT OF THE CASE
Jurisdictional Statement

The Court has proper jurisdiction pursuant to 38 U.S.C. § 7252(a).

Nature of the Case

Appellant appeals a February 19, 2019, Board decision, which denied entitlement to service connection for an acquired psychiatric disorder, not

including PTSD, claimed as depression (hereinafter “acquired psychiatric disorder”), and for alcohol abuse disorder and cannabis abuse disorder. Record (R) at 5-16; see Appellant’s Brief (App. Br.) at 1-20.

Statement of Relevant Facts

Appellant served on active duty from June 24, 1996, to November 13, 1996 (less than five months). (R. at 1970).

Appellant’s entrance examination and report of medical history in April 1996 revealed no psychiatric abnormalities. (R. at 2018-21).

A June 1996, dental health questionnaire, Appellant indicated that he did not have any nervousness. (R. at 2023). His recruit evaluation cards during service indicated that he was counseled regarding “what [wa]s expected of him” and his responsibilities in September 1996. (R. at 2609 (2609-12)). Four days later, a September 13 notation indicated that he “seem[ed] to be having difficulty with the fundamentals of marksmanship” and was “constantly corrected in shooting positions.” *Id.* Later in the same month, Appellant failed to qualify at the rifle range and was then counseled on his failure to qualify with the rifles. *Id.* Appellant continued to fail to qualify on his weapon throughout September and October 1996. *Id.* In October 1996, Appellant was counseled on being “recycled” to another platoon due to his failure to qualify with his M16A2 (service rifle). *Id.* at 2610. He reported that he informed his mother that he was being separated from the Marine Corps. *Id.* at 2611. On October 21, Appellant was counseled on being “dropped to casual due to incapability.” *Id.* His captain

noted that Appellant failed to qualify after twelve attempts, he was also an unqualified swimmer, had a lackadaisical attitude, and was ready to go home. *Id.*

Appellant denied depression or excessive worry, loss of memory or amnesia, nervous trouble of any sort, and frequent trouble sleeping in his report of medical history at separation in October 1996. (R. at 1996 (1996-97)). He stated that he was “in good health.” *Id.* His separation examination revealed no psychiatric abnormalities. (R. at 2000 (2000-2001)).

Appellant’s DD Form 214 shows that he separated from service due to “Entry Level Performance and Conduct” and that his character of service was uncharacterized. (R. at 1970).

In April 2006, Appellant reported that he had been “greatly traumatized by [his] experiences in boot camp” to include his experiencing a “recruit shooting himself while on the rifle range” and a “drill instructor [that] kicked [him] in [his] legs.” (R. at 2724-26). He complained that his “self esteem ha[d] greatly diminished” since his time at boot camp. *Id.* at 2726. He filed his claim for PTSD, severe depression, insomnia, and an inability to cope with any stressful situations, *inter alia*, that same month. (R. at 2689).

The next month, Appellant submitted his PTSD in-service stressors. (R. at 2499-2502). He reported that he “experience[d] a recruit inflict a gun shot wound to himself, which was a traumatic experience for [him].” *Id.* at 2499. He also stated that while in boot camp he complained about swelling of his neck and ankles, and that his drill instructor kicked him on the ankles. *Id.* at 2501.

The Regional Office (RO) denied service connection for PTSD in an October 2006 rating decision. (R. at 2405-06, 2410-14). Appellant filed his notice of disagreement (NOD) in November 2006, (R. at 2401), and the RO issued a statement of the case (SOC) in June 2007, continuing the denial of his claim for PTSD, (R. at 2369-87).

At a mental health psychological evaluation in February 2008, Appellant reported that his “troubles began when he was prematurely discharged from the military only six months in boot camp.” (R. at 2272 (2267-2273)). He also reported that his symptoms began after his discharge from the military. *Id.*

In October 2008, Appellant filed a claim for reopening. (R. at 2364). The RO reopened his claim and continued the denial of his claim of entitlement to service connection for PTSD in a September 2009 rating decision. (R. at 2207-2215). Thereafter, Appellant filed a new claim for PTSD and depression in March 2012. (R. at 2192). The RO denied the claim in a January 2013 rating decision, finding no new and material evidence had been submitted. (R. at 2094-96, 2111-14).

He filed a claim for service connection for depression in April 2014. (R. at 2082 (2080-84)). In a November 2014 rating decision, the RO denied his claim, characterized as PTSD to include depression, finding that evidence submitted was not new and material. (R. at 1472-79). Appellant filed his NOD in January 2015. (R. at 1446).

Appellant's mother, Deborah Phillips, submitted a statement, dated in June 2015, in support of his claim. (R. at 1409-10). She stated that his "experience in boot camp was something he never had experienced in his life." *Id.* at 1410. Every letter, card, and phone call "was horrific because [her] son was not mentally stable (just by hearing his voice)." *Id.* She said that the moment she saw her son after his release from the military, she "knew that he was not the same person." *Id.*

The RO issued a SOC in July 2016, denying reopening of Appellant's claim of entitlement to service connection for PTSD, to include depression, (R. at 1364-87), and Appellant submitted his substantive appeal in September 2016, (R. at 1244). The Board issued its February 2019 decision reopening his claim for entitlement to service connection for PTSD and denying Appellant's claims of service connection for an acquired psychiatric disorder and for alcohol abuse and cannabis abuse disorders. (R. at 5-16). This appeal followed.

III. SUMMARY OF ARGUMENT

The Court should affirm the Board's February 2019, decision because the Board provided an adequate statement of reasons and bases for rejecting the credibility of Appellant's and his mother's statements. Appellant reported that in-service incidents caused his psychiatric disorder, however, the record indicates that he was discharged from service due to failure to meet the requirements at boot camp and that explicitly he attributed his early discharge from service as the

causal connection to his current disability. Due to record inconsistencies with both his and his mother's statements, the Board found their lay evidence lacked credibility and denied the claim. Appellant has not demonstrated that the Board decision is clearly erroneous or the product of a prejudicial error, with respect to those claims, and instead merely disagrees with the Board's weighing of the evidence. Thus, the Board decision should be affirmed.

IV. ARGUMENT

A. The Board's statement of reasons or bases for rejecting the credibility of lay evidence was adequate.

Appellant argues that the Board improperly determined that both his and his mother's statements lacked credibility. App. Br. at 9-19. Appellant's arguments fail to show error and the Board decision should be affirmed, for the reasons discussed below.

A credibility determination is a factual finding reviewed for clear error. *Smith v. Shinseki*, 24 Vet.App. 40, 48 (2010). The Court can overturn a factual finding only when there is no plausible basis for it in the record. *Wood v. Nicholson*, 21 Vet.App. 105 (2006). And the Board's statement of reasons or bases is adequate when it allows a claimant to understand the precise basis for the Board's determinations and facilitates review by this Court. *Sharp v. Shulkin*, 29 Vet.App. 26, 31 (2017).

Indeed, the Board may not dismiss lay evidence simply because it is not supported by contemporaneous medical records. *Fountain v. McDonald*, 27

Vet.App. 258, 272 (2015). But here, the Board did not rely solely on the lack of contemporaneous medical records to discount Appellant's lay evidence of in-service incurrence. See (R. at 11-12 (5-16)). It relied on the internal inconsistency in Appellant's statements. *Id.* For instance, in February 2008, Appellant reported that his "troubles began when he was prematurely discharged from the military only six months in boot camp." (R. at 2272 (2267-73)); *see also* (R. at 1970 (DD Form 214 indicates that he separated from service due to "Entry Level Performance and Conduct")). Appellant specifically related his own onset to post-service discharge. *Id.* Thus, the record contains inconsistent statements made by Appellant as the source of his troubles indicating that military discharge, rather than in-service incidents, affected his mental state. These statements, which Appellant made to a treatment provider for the purpose of obtaining treatment for the very condition at issue here, stand in stark contrast to his statement that his psychiatric disorder actually arose during his brief period of service. *Compare* (R. at 2272 (2267-73)) *with* (R. at 2724-26).

Apart from simple inconsistencies in Appellant's portrayal of the onset of his disability, the Board also noted additional areas where Appellant's allegations lack support in the record. For instance, the Board relied on the fact that at his separation examination, he explicitly denied psychiatric symptoms, stated that he was "in good health," and his clinical examination revealed no psychiatric abnormalities, to support its finding that Appellant's claim that he experienced psychiatric trauma in service was not credible. (R. at 11 (5-16), 1996 (1996-97),

2000 (2000-01)). The utter silence with respect to Appellant's purported psychiatric distress at separation thus strongly undercuts the notion that he experienced symptomatology of a psychiatric disorder at that time. See *Buczynski v. Shinseki*, 24 Vet.App. 221, 224 (2011) (noting that silence in a record can support the nonexistence of that which is not mentioned, if there is reason to expect that, had that something been present, it would be documented).

These observations by the Board all speak directly to the credibility and probative value of Appellant's statements in support of his claim. Further, these sorts of inconsistencies are a permissible basis for the Board to discount a claimant's credibility. See, e.g., *Gardin v. Shinseki*, 613 F.3d 1374, 1379-80 (Fed. Cir. 2010); *Madden v. Gober*, 125 F.3d 1477, 1481 (Fed. Cir. 1997) (noting the Board's "authority to discount the weight and probity of evidence in the light of its own inherent characteristics and its relationship to other items of evidence."). The Board appropriately assessed the probative value of Appellant's allegations, and its discussion supports its ultimate rejection of those allegations.

Appellant complains that the Board erred by relying on the absence of evidence as substantive evidence in support of its denial of Appellant's claim. App. Br. at 10-12, 16-17. Appellant is mistaken. With respect to its elucidated evidence showing no psychiatric issues during service or at separation, the Board did not, as Appellant states, reason from silence. Quite to the contrary,

the Board correctly noted that the separation examination documented an affirmative finding of normalcy, as well as Appellant's own statements explicitly denying psychiatric conditions. (R. at 11 (5-16)). This is affirmative evidence against the proposition that Appellant was experiencing psychiatric issues during service.

Moreover, to the extent that Appellant argues that his personnel records are consistent with his reports and support his claim, see App. Br. 17, the opposite is again true. The personnel records support the fact that Appellant was simply not meeting the requirements for service, not that he had psychiatric issues, symptomatology, or events causing psychiatric disorders. Appellant very clearly struggled passing requisite training during his brief period of service. See (R. at 2609-12). He was continuously counseled on his failure to qualify at basic training, particularly at the rifle range, and he was even given twelve opportunities to qualify. *Id.* He ultimately failed to qualify as a Marine, and his captain even noted that he was unqualified as a swimmer, had a lackadaisical attitude, and was ready to go home. *Id.* at 2611. Rather than supporting his claim that he experienced in-service events that gave rise to a psychiatric disability, the personnel records support his statement provided at the mental health psychological evaluation in February 2008: namely, that his troubles began when he was prematurely discharged from the military only six months into boot camp (and not before separation) and that onset of symptomology began post-service. (R. at 2272 (2267-73)).

Appellant also argues that the Board's statement of reasons or bases is "unclear" regarding what it "found to be 'vague' in the statements provided by [Appellant's] mother." App. Br. at 17. Ms. Phillips stated that Appellant's "experience in boot camp was something he never had experienced in his life." (R. at 1410 (1409-10)); see also (R. at 2836 (where she reported that he was experiencing difficulty in qualifying for tests in service)). She reported that his letters, cards, and phone calls were "horrific because [her] son was not mentally stable" and that she could tell by "just [] hearing his voice." (R. at 1410 (1409-1410)). She also stated that she "knew that he was not the same person" after his discharge from service. *Id.* Her statements do not indicate that Appellant suffered an in-service event or injury that would otherwise support his claim that he has a service-connected psychiatric disorder, rather, her statements support that he was not qualified to become a Marine, just as his personnel records show. (R. at 1409-10, 2836). Moreover, Ms. Phillips's statement is inconsistent with histories and notations in the STRs, as the Board correctly determined. (R. at 11 (5-16)). While she reported that he was crying uncontrollably and not mentally stable, see (R. at 1410 (1409-1410)), Appellant's separation examination showed no psychiatric issues. (R. at 1996 (1996-97), 2000 (2000-01)). In fact, Appellant explicitly denied symptoms, reported that he was in good health, and an examiner found no psychiatric conditions upon clinical examination. *Id.* Just as the Board stated, Ms. Phillips's statement is entirely

inconsistent with contemporaneous examinations showing the diametric opposite. (R. 11 (5-16)).

Finally, Appellant argues that his claim for entitlement to service connection for alcohol and cannabis abuse disorders should be remanded as inextricably intertwined with his claim of entitlement to service connection for an acquired psychiatric disorder. App. Br. at 18-19. However, for the reasons discussed above, this Court should affirm the Board's denial of Appellant's claim for an acquired psychiatric disorder. As Appellant has alleged no other basis for a remand of his claim for alcohol and cannabis abuse, and because the Court should affirm the denial of his acquired psychiatric disorder claim, Appellant's contention relying upon the doctrine of inextricable intertwinement should also fail.

In summary, Appellant frames his argument as an inadequacy in the Board's statement of reasons or bases regarding the Board's finding regarding the credibility of lay evidence, but the Board's explanation is clear, and Appellant has not shown that the purported error is anything other than a mere disagreement with how the Board weighed the evidence of record. See *Atencio v. O'Rourke*, 30 Vet. App. 74, 89 (2018) (holding a mere disagreement with the Board's weighing of the evidence is not clear error). The Board's findings relating to its unfavorable credibility determination are supported by the record. While Appellant has attributed the onset of his psychiatric disorder to incidents in service, the evidence he offered in support of that theory conflicts with other

statements he has made to a February 2008 mental health treatment provider, as well as with contemporaneous service-derived evidence showing failure to meet the requirements of boot camp and denial of psychiatric conditions in service. See (R. at 1996-97, 2000-01, 2267-73, 2609-12). The record plausibly supports all of the Board's determinations, and its discussion adequately conveys to Appellant the basis for the Board's finding that his allegations lack credibility. See *Allday v. Brown*, 7 Vet.App. 517, 527 (1995) (The Board's statement of reasons or bases is adequate when it enables the appellant to understand the precise basis for the decision rendered and facilitates judicial review). And, when the Board explains its choice from among two equally plausible interpretations of the evidence, the Court cannot reject that choice simply because it may have made a different one. *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990). As such, this Court should affirm the Board's decision.

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

It is axiomatic that issues not raised on appeal are abandoned. See *Disabled Am. Veterans v. Gober*, 234 F.3d 682, 688 n.3 (Fed. Cir. 2000) (stating that the Court would "only address those challenges that were briefed"); *Winters v. West*, 12 Vet.App. 203, 205 (1999); *Williams v. Gober*, 10 Vet.App. 447, 448 (1997) (deeming abandoned BVA determinations unchallenged on appeal); *Bucklinger v. Brown*, 5 Vet.App. 435, 436 (1993). Thus, any and all other issues that have not been addressed in Appellant's Brief, have therefore been abandoned.

V. CONCLUSION

In view of the foregoing arguments, Appellee, the Secretary of Veterans Affairs, respectfully requests that the Court affirm the February 19, 2019, Board decision denying entitlement to service connection for an acquired psychiatric disorder, not including PTSD, claimed as depression, and for alcohol abuse disorder and cannabis abused disorder.

Respectfully submitted,

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