IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

Vet. App. No. 19-3123

DOUGLAS E. LEE
Appellant,

v.

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

ON APPEAL FROM THE BOARD OF VETERANS' APPEALS

BRIEF OF APPELLEE

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	)	
Appellant,	)	
	)	
v.	)	Vet. App. No. 19-3123
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ROBERT L. WILKIE,	)	
Acting Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS

BRIEF OF THE APPELLEE
SECRETARY OF VETERANS AFFAIRS

I. ISSUE PRESENTED

Whether the Court of Appeals for Veterans Claims (Court) should affirm the February 26, 2019, Board of Veterans' Appeals (Board) decision which denied entitlement to service connection for an acquired psychiatric disability, to include posttraumatic stress disorder (PTSD) and major depressive disorder (MDD).

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

This Court's jurisdiction over the case at bar is predicated on 38 U.S.C. § 7252(a), which gives this Court exclusive jurisdiction to review

final decisions by the Board.

B. Nature of the Case

Appellant, Douglas E. Lee, appeals the February 26, 2019, Board decision that denied entitlement to service connection for an acquired psychiatric disability, to include PTSD and MDD. (Appellant's Brief (App. Br.) at iv).

C. Statement of Pertinent Facts and Proceedings Below

Appellant served honorably in the U.S. Air Force from January 1955 to January 1962. (R. at 4777-78)). Appellant's service treatment records (STRs) do not reflect any treatment for a psychiatric condition. (R. at 4833-4900). He indicated on his December 1961 separation report of medical history that he never experienced depression or excessive worry, (R. at 4838 (4838-39)) and during his separation examination he was evaluated as psychiatrically and neurologically normal. (R. at 4861 (4861-62)).

Over fifty years after service, in November 2014, Appellant submitted a claim for compensation, *inter alia,* for PTSD and depression. (R. at 5039-40). The Regional Office (RO) denied the claims in a March 2015 Rating Decision. (R. at 4796-4808, 4812-17). Appellant did not appeal the decision and it became final. *See* 38 U.S.C. § 7105(c).

In January 2015, Appellant submitted a statement in support of his claim for service connection for PTSD where he alleged that while in

service, a Russian pilot hit him in the head with a metal pipe in November 1961. (R. at 4915 (4914-15)). Appellant stated that he received treatment in an army hospital in Berlin, Germany and that ever since this incident, he has had severe memory loss and headaches. *Id.* He also related that after this event, he was declared no longer fit for military duty. In his January 2016 NOD, he related that he lived in a safehouse provided by the U.S. Air Force and U.S. State Department. (R. at 2662). In June 2018, he submitted a statement alleging that while in service, he was kidnapped by Russian Komitet Gosudarstvennoy Bezopasnosti (KGB) agents, taken to Russia for four days, hit in the head by a KGB major and "dumped" back into the U.S. sector of Berlin, Germany. (R. at 2633).

Appellant requested to reopen his claims for PTSD and depression in October 2015 (R. at 4782-85), and the RO denied the claims that same month. (R. at 4715-19). Appellant filed a notice of disagreement (NOD) in January 2016 (R. at 4695-96) and the RO continued to deny the claims in a March 2016 statement of the case (SOC). (R. at 4086-4103). Appellant filed a timely appeal the same month. (R. at 4084).

Appellant submitted a letter in August 2017, from nurse practitioner, Marion C. Creasap, who opined that it was more likely than not that Appellant's PTSD was caused by his traumatic experiences in service. (R. at 135 (135-36)). He stated that Appellant had a history of being shot at, a kidnapping attempt, and being struck with a metal pipe. *Id.*

In December 2017, the Board remanded the claim in order for Appellant to undergo a VA psychiatric examination. (R. at 4036 (4025-37)). Appellant underwent a VA PTSD examination in January 2018. (R. at 2722-28). The examiner opined that Appellant met the MDD diagnostic criteria and his symptoms can be clinically associated with dementia, which makes taking a reliable history impossible. *Id.* at 2723. Appellant indicated that he had been "hit in head with iron pipe by Russian while in Berlin." *Id.* at 2725. A VA addendum opinion was obtained in March 2018 where the clinical psychologist opined that it is less likely than not that the PTSD and MDD had its onset during military service, within one year of service or were due to [an] in service disease, injury or event. (R. at 2716 (2715-16)). The examiner noted Appellant's previous reports of trauma of being kidnapped by KGB, hit over the head with a pipe, and fearing for his life during service in Germany. *Id.* at 2715. The examiner opined that the stressors were not verified, there were no documents of psychiatric treatment or problems in the military and no documentation of psychiatric treatment received within one year of service. *Id*. at 2716.

The RO denied the claims in a March 2018 supplemental SOC (SSOC). (R. at 2697-2713). In May 2018, the Board again remanded the claims for development, instructing the RO to obtain any outstanding medical treatment records pertinent to Appellant's claim from the Air Force Office of Special Investigations (AFOSI) in Berlin, Germany and obtain a

medical addendum opinion from the March 2018 VA examiner if treatment records were obtained. (R. at 2652 (2648-54)). In October and November 2018, the AFOSI issued letters stating that it was unable to find any records for Appellant. (R. at 71, 87). The RO issued another SSOC continuing its denial of the claims. (R. at 42-54).

III. SUMMARY OF ARGUMENT

The Court should affirm the Board's February 2019 decision denying entitlement to service connection for an acquired psychiatric disability, to include PTSD and MDD. Appellant makes four general allegations of error on appeal. *See* (App. Br. at 1-3). First, he argues that the Board committed error by failing to apply the benefit of the doubt rule. *Id.* at 1. Second, he argues that VA failed to meet its duty to assist by not obtaining his records destroyed in a fire, and records in conjunction with a list of names he submitted to VA in November 2015. *Id.* at 1-2. Third, he argues that the December 2017 order was not complied with, *id.* at 3, and fourth he argues that the Board did not sufficiently address his June 23, 1974 letter from the Minneapolis Tribune. *Id.* at 2.

Appellant's argument regarding the benefit of the doubt rule is inapplicable to this case as the evidence was not in equipoise. 38 U.S.C. § 5107. Next, VA met its duty to assist because it obtained all records adequately identified by Appellant. 38 U.S.C. § 5103A(a)(2). Third, VA complied with the remand order by obtaining the January 2018 VA PTSD

exam and March 2018 VA addendum opinion. Finally, the Board provided an adequate statement of reasons and bases for its opinion. Accordingly, Appellant's arguments must fail, and this Court must affirm the Board's February 2019 decision.

IV. ARGUMENT

Generally, service connection may be granted for a disability resulting from personal injury suffered or disease contracted in the line of duty, or for aggravation of a pre-existing injury or disease in the line of duty. 38 U.S.C. § 1110; 38 C.F.R. § 3.303(a). Establishing service connection generally requires evidence of: (1) a current disability; (2) incurrence or aggravation of a disease or injury in service; and (3) a nexus between the claimed in-service injury or disease and the current disability. *See* 38 U.S.C. § 1110; *Shedden v. Principi*, 381 F.3d 1163, 1166-67 (Fed. Cir. 2004); *see also* 38 C.F.R. § 3.303; *Davidson v. Shinseki*, 581 F.3d 1313, 1316 (Fed. Cir. 2009); *Romanowsky v. Shinseki*, 26 Vet.App. 289, 293 (2013). To support a claim of service connection for PTSD, a claimant must present evidence of (1) a current diagnosis of PTSD; (2) credible supporting evidence that the claimed in-service stressor occurred; and (3) medical evidence of a causal nexus between the current symptomatology and the claimed in-service stressor. 38 C.F.R. § 3.304(f).

The Board's determination of whether service connection is warranted is a finding of fact reviewed under the clearly erroneous

standard. *Washington v. Nicholson*, 19 Vet.App. 362, 366 (2005); *see* 38 U.S.C. § 7261(a)(4). Under the "clearly erroneous" deferential standard, "if there is a 'plausible' basis in the record for the factual determinations of the Board, even if this Court might not have reached the same factual determinations, [the Court] cannot overturn them." *Muehl v. West*, 13 Vet.App. 159, 161 (1999); *Gilbert v. Derwinski*, 1 Vet.App. 49, 52-53 (1990); *see also Hensley v. West*, 212 F.3d 1255, 1263-64 (Fed. Cir. 2000). Accordingly, this Court must set aside a finding of fact as "clearly erroneous" only when there is no plausible basis in the record for the Board finding at issue. *Gilbert,* 1 Vet.App. at 53.

The Board is required to provide a written statement of reasons or bases for its findings and conclusion. See 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995). The Board is required to analyze the probative value of the evidence, account for that which it finds persuasive or unpersuasive, and explain why it rejected evidence materially favorable to the claimant. *See Caluza v. Brown*, 7 Vet.App. 498, 506 (1995). The statement must be adequate to ensure a claimant understands the reason for the decision and facilitate review. *Simon v. Derwinski*, 2 Vet.App. 621, 622 (1992).

A. The Board Provided Adequate Reasons and Bases for Denying Service Connection and Appellant Has Failed to Meet His Burden Demonstrating Prejudicial Error.

Appellant argues that the Board erred because it failed to follow the benefit of the doubt rule, despite the fact that the evidence was clearly in equipoise. (App. Br. at 1). He also contends that the Board did not "sufficiently" address the June 23, 1974 letter from the Minneapolis Tribune. *Id.* at 2; (R. at 2660-61). Appellant's argument is unavailing because it misapplies the benefit of the doubt rule and overlooks the evidence of the record.

The benefit of doubt doctrine holds that "[w]hen 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. However, this Court has held that if the Board finds that the evidence is not in equipoise, "but instead [finds] that the preponderance of the evidence [does] not support an entitlement for service connection," it is not required to apply the benefit of the doubt doctrine. *Wensch v. Principi*, 15 Vet.App. 362, 367 (2001) (citing *McGrath v. Gober*, 14 Vet.App. 20, 34 (2000); *Schoolman v. West*, 12 Vet.App. 307, 311 (1999)).

Appellant's argument fails because the Board properly considered the entire record, weighed the evidence, assigned it probative value and found that Appellant is not entitled to service connection for PTSD or MDD

because there is insufficient credible evidence of record to establish the claimed PTSD stressor occurred and the nexus requirement proving that an acquired psychiatric disorder was incurred in service. (R. at 13 (2-14)); *Caluza,* 7 Vet.App. at 506. The Board is presumed to have considered all of the evidence of record "absent specific evidence indicating otherwise," *Gonzales v. West*, 218 F.3d 1378, 1380-81 (Fed. Cir. 2000), and where it is silent as to a specific piece of evidence the Court "must presume that the Board considered this evidence and found it too scant to warrant comment," *Robinson v. Peake*, 21 Vet.App. 545, 555 (2008). There is no evidence that indicates that the Board failed to consider the entire record, including the June 1974 letter. *See* (R. at 7-13 (2-14)).

The Board appropriately weighed the evidence and found that there is no credible evidence that Appellant's claimed in-service stressor occurred. (R. at 13 (2-14)). It found that there is insufficient evidence to prove he engaged in combat with the enemy. *Id.* at 9. The Board concluded that a letter from the Central Intelligence Agency (CIA) director suggests that Appellant was engaged in covert activities, that are unlikely to be combat. (R. at 4047); (R. at 9 (2-14)). It also found that after he separated from service, he remained in Berlin and attended the Free University of West Berlin to study economics. (R. at 10 (2-14)); (R. at 4974-75). The Board concluded that the Wiesbaden Air Base in Germany was silent for records documenting a head injury. (R. at 10 (2-14)); (R. at

4819). It also found that information from AFOSI (R. at 71, 87), his separation examination (R. at 4861-62) and STRs (R. at 4833-4900) are all silent for a head injury. (R. at 11-12 (2-14)).

Further, the Board found that the preponderance of the evidence does not establish that any of his other acquired psychiatric diagnoses were otherwise incurred in service. *Id.* It appropriately determined that there is nothing in Appellant's service treatment or service personnel records that support Appellant's statements. (R. at 10 (2-14)); (R. 4833-4900) (STRs). The Board also weighed Appellant's lay statements, however, it found them largely inconsistent with each other, not credible, and afforded the statements less probative weight than his contemporaneous STRs and personnel records. (R. at 13 (2-14)). *Dalton v. Nicholson*, 21 Vet.App. 23, 38 (2007) (credibility determinations are findings of fact properly made by the Board). The Board found Appellant's report that he was kidnapped by the KGB not credible because his contemporaneous records do not document any abduction or release and there is no indication that he was a prisoner of war pursuant to 38 C.F.R. § 3.1(y). (R. at 10 (2-14)); (R. at 2633). Further, the Board concluded that Appellant requested separation from service for the purpose of attending school in Berlin. (R. at 4974-74).

As the Board found that there was no credible evidence of an in-service stressor and the preponderance of the evidence does not establish

an in-service incurrence of an acquired psychiatric diagnoses, the evidence was not in equipoise, and the Board was not required to apply the benefit of the doubt doctrine. *Wensch*, 15 Vet.App. at 367. Accordingly, the Board provided an adequate statement of reasons and bases and Appellant has failed to meet his burden in proving any clear error in the decision. *Hilkert*, 12 Vet.App. at 151.

B. VA Satisfied its Duty to Assist.

Appellant argues that the Secretary failed to meet its "heightened" duty to assist when it did not obtain his records that were destroyed in a fire and failed to follow up on a list of individuals Appellant indicated that he served with in Berlin, Germany. App. Br. at 2. Appellant's arguments are unavailing--they misrepresent the record and ignore settled case-law.

The Secretary is indeed required to assist a claimant in obtaining evidence necessary to substantiate her claim for benefits. 38 U.S.C. § 5103A(b)(1); 38 C.F.R. § 3.159. This requires that the Secretary make reasonable efforts to obtain all federal and private records adequately identified by the claimant and relevant to her claim. 38 C.F.R. § 3.159; *See Golz v. Shinseki,* 590 F.3d 1317, 1322 (Fed. Cir. 2010) (clarifying that the duty to assist is not boundless in scope). Where SMRs are presumed destroyed, in such a case, the BVA's obligation to explain its findings and conclusions and to consider carefully the benefit-of-the-doubt is

heightened. *Russo v. Brown*, 9 Vet.App. 46, 51 (1996); *Washington*, 19 Vet. App. at 371.

Appellant's arguments must fail because VA satisfied its duty to assist. Despite Appellant's contention that the destruction of his records placed an "undue burden on him," he ignores the fact that the RO was able to obtain these missing records. App. Br. at 1. In a December 2014 letter, the National Personnel Records Center acknowledged that although Appellant's records were in a fire, those "records relevant to the request were among those recovered." (R. at 4779). As VA was able to obtain these records, his argument that there is a heightened duty to assist has no legal merit. Accordingly, Appellant fails to meet his burden demonstrating error in VA's duty to assist obligation or the Board's decision.

Next, although Appellant submitted a list of names in November 2015, he failed to submit any identifying information including addresses, or phone numbers that would have enabled VA to obtain the records. *Id.* VA had no obligation to obtain any records/information from these individuals because they were not adequately identified by Appellant. (R. at 2655-56); 38 C.F.R. § 3.159; *See Tyrues v. Shinseki,* 23 Vet.App. 166, 181 (2009) (recognizing that "an appellant has an obligation to cooperate in the development of evidence pertaining to his claim"). *See also Gober v. Derwinski,* 2 Vet.App. 470, 472 (1992) (holding that the statutory duty to

assist "is not a license for a 'fishing expedition' to determine if there *might* be some unspecified information which could possibly support a claim"). The Board appropriately found that because Appellant did not provide any contact information for any of the names he provided, it would have been unreasonable for VA to determine if these individuals have information they could use to support his claim. (R. at 13 (2-14)). Accordingly, not only was VA not required to obtain these records, it had no way of doing so.

C. Appellant's Other Contentions.

Appellant also contends that the Board's decision "should not carry any weight" because the December 2017 remand directive requiring Appellant to undergo a VA psychiatric examination was not followed. (App. Br. at 3). This argument must fail because Appellant misstates the law and ignores the evidence of the record.

A remand by the Court or the Board "confers on the veteran or other claimant, as a matter of law, the right to compliance with the remand orders." *Stegall v. West,* 11 Vet.App. 268, 271 (1998). While this imposes on the Secretary an obligation to ensure compliance with the terms of a remand order, it is substantial compliance, not strict or absolute compliance that is required. *D'Aires v. Peake,* 22 Vet.App. 97, 105 (2008).

Here, the Secretary complied with the December 2017 remand directive. The Board ordered the RO to schedule Appellant for a VA

psychiatric examination. (R. at 4036 (4025-37)). In January 2018, Appellant underwent a VA PTSD examination where the physician opined that the criteria for MDD was met. (R. at 2723 (2722-28)). Two months later, the Secretary obtained an addendum to the PTSD exam where the physician concluded that based on review of Appellant's electronic record, meeting with him in person, speaking to his private psychiatric provider, Marion Creasap, and reviewing the January 2018 PTSD VA examination, it is less likely than not that his MDD, dementia, trauma, and stressor related disorder were due to service. (R. at 2716 (2715-16)). As the Secretary obtained a psychiatric medical opinion where the examiner provided a sufficient rationale for his opinion, there was substantial compliance with the Board's remand order. *D'Aires,* 22 Vet.App. at 105. Therefore, Appellant's argument has no merit and must be rejected.

The Secretary has limited his response to only those arguments raised by Appellant in his brief, and, as such, urges this Court to find that Appellant has abandoned all other arguments not specifically raised in his opening brief. *See Norvell v. Peake,* 22 Vet.App. 194, 201 (2008). The Secretary, however, does not concede any material issue that the Court may deem Appellant adequately raised and properly preserved, but which the Secretary did not address, and requests the opportunity to address the same if the Court deems it to be necessary.

IV. CONCLUSION

In view of the foregoing arguments, Appellee, the Secretary of Veterans Affairs, respectfully requests that the Court affirm the Board's February 2, 2019, decision denying entitlement to service connection for an acquired psychiatric disability, to include PTSD and MDD.

Respectfully submitted,

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