IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

Vet. App. No. 19-5355

HENRY WILSON, JR.,

Appellant,

v.

ROBERT L. WILKIE
Secretary of Veterans Affairs,

Appellee.

ON APPEAL FROM THE BOARD OF VETERANS' APPEALS

BRIEF OF THE APPELLEE SECRETARY OF VETERANS AFFAIRS

WILLIAM A. HUDSON, JR.
Acting General Counsel

MARY ANN FLYNN
Chief Counsel

ANNA WHITED
Deputy Chief Counsel

JACQUELINE KERIN
Appellate Attorney
Office of the General Counsel (027F)
U.S. Department of Veterans Affairs
810 Vermont Avenue, NW
Washington, DC 20420
(202) 632-5994

Attorneys for Appellee

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	)	
v.	)	Vet. App. No. 19-5355
	)	
ROBERT L. WILKIE,	)	
Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS

BRIEF OF THE APPELLEE
SECRETARY OF VETERANS AFFAIRS

ISSUE PRESENTED

Did the Board of Veterans' Appeals (Board) provide an adequate statement of reasons or bases for denying entitlement to a total disability rating based on individual unemployability due to service-connected disabilities (TDIU)?

STATEMENT OF THE CASE

A. Jurisdictional Statement

The U.S. Court of Veterans Appeals for Veterans Claims has jurisdiction over the instant appeal pursuant to 38 U.S.C. § 7252.

B. Nature of the Case

Appellant, Henry Wilson, Jr., appeals the May 10, 2019, Board decision that denied entitlement to TDIU. [Record Before the Agency (R.) at 5-11].

C. Statement of Facts

Appellant served in the U.S. Airforce from September 1962 to September 1982. [R. at 554].

Appellant is service connected for hypertension and hypertensive heart disease associated with hypertension. [R. at 123 (120-24)]. Appellant's hypertensive heart disease has been rated 60% from August 28, 2009, and his hypertension has been rated 10% since October 1, 1982. *Id.*

In May 2010, Appellant underwent a Compensation and Pension (C&P) examination of his hypertension and hypertensive heart disease. [R. at 3913-22]. The examiner stated that a METs test could not be conducted because Appellant had a severe lumbar condition that required three surgeries and the last surgery occurred less than one month prior to the C&P examination. [R. at 3915]. The examiner estimated Appellant's METs level to be more than three but less than or equal to five and summarized Appellant's estimated activity level as the following:

> [Appellant] is able to walk at an average pace (he [] slow[s] his pace when low back pain increase[s] in intensity while walking but not due to [shortness of breath] [(]SOB[)], chest pain or dizziness); light use of hand tools, driving, walking[, and] carrying light articles. Unable to dance, paint, moderate to heavy lifting, swimming, etc. He develops sensation of general tiredness and fatigue with these activities.

[R. at 3915]. The examiner also discussed Appellant's work history and noted that Appellant retired in 2002 because he was eligible by age or duration of work and because of his low back condition. [R. at 3917].

In January 2011, Appellant submitted an application for increased compensation based on unemployability, in which he claimed his hypertensive heart disease and hypertension prevented him from securing or following substantially gainful occupation. [R. at 3883-84]. Appellant stated that he retired in 2002 from a position in quality control and that he did not leave his last job because of his disabilities. [R. at 3883]. Appellant did not list a date that he became too disabled to work but stated that "[s]ince retiring from federal service in 2002[,] [I] have had three back surg[er]ies, neck[ ]surgery for a bulging disc and prostrate [sic] surgery." [R. at 3883-84].

In March 2011, Appellant underwent a C&P examination. [R. at 3824-31]. The examiner stated that Appellant was "not able to undergo a treadmill evaluation due to history of several spine surgeries," and the examiner summarized his activity level as follows:

> [Appellant] walks up to 1 mile three times per week, very slowly due to low back pain, and presents no shortness of breath or dizziness. He has to stop intermittently due to low back pain associated to numbness in right leg and feet as well as pain sensation in right knee.

[R. at 3824]. The examiner estimated Appellant's METs level as three through five but that his METs were limited primarily due to his lower back condition. *Id.* The examiner offered the following opinion regarding Appellant's ability to work:

> [Appellant] is unable to work in a physical occupation due to his service connected hypertension and hypertensive heart disease. However, based on his normal [ejection fraction] [(]EF[)] and recent normal myocardial perfusion studies, he is able to work in a sedentary occupation despite these service connected conditions. [Appellant]'s non-service connected lower back condition limits him from working in a physical or sedentary occupation due to chronic pain and limited mobility.

[R. at 3828].

The examiner provided an addendum opinion in April 2012. [R. at 3820]. He stated that Appellant's METs would be estimated as seven through ten, based solely on his cardiac condition. *Id.* The examiner also revised his 2010 opinion regarding Appellant's employability:

> It is the opinion of the examiner that [Appellant] is unable to work in a physical or sedentary occupation due to his lower back condition, which is NOT a service connected condition. Based on his normal EF and recent normal myocardial perfusion studies, his service connected hypertension and hypertensive heart disease DO NOT preclude him from working in a physical or sedentary occupation. The previous opinion given in March 2011 was reviewed with the C&P director and reworded today on April 11, 2012.

Id.

In June 2012, the Department of Veterans Affairs (VA) regional office (RO) issued a rating decision denying entitlement to TDIU. [R. at 3803 (3799-3803)] (rating decision); [R. at 3790 (3789-91)] (letter).

Later that month, Appellant submitted a notice of disagreement (NOD), in which he disagreed with the decision regarding unemployability due to

hypertensive heart disease associated with hypertension. [R. at 3785]. He, further, explained that:

> I failed to summit the information regarding the four back surgeries, neck and prostrate [sic] surgeries. The neck surgery was accomplished to prevent me from becoming paralyzed, titanium clips were inserted in my middle back to support my vertebrates, I have also had a spinal fusion. Due to prostrate [sic] problem part of my prostrate [sic] was removed. . . . It was explained to me by the VA examiner the non connected service disabilities would be taken into [c]onsideration, it appears these considerations were not given. After my last surgery in 2010 Hydroquinone (Norco) and gabapentin due to the continuing back and leg pain even after all the surgeries. It is my hope that you will reconsider your decision regarding my employability disability. It is not possible for me to be employable under the health conditions mentioned above.

Id.

Appellant's representative submitted a letter from Dr. Bela Desai in July 2012. [R. at 2844]; [R. at 2842] (cover letter from Appellant's representative). Dr. Desai explained that Appellant suffered from cervical disc disease, chronic low back pain, gastroesophageal reflux disease, hyperlipidemia, hypertension, left ventricular atrophy, lumbar radiculopathy, cervical myelopathy, osteoarthritis of his knees, and lumbar fusion. [R. at 2844]. He concluded that, "[d]ue to the complexity of the listed diagnoses, [Appellant] would not be able to work now or in the future due to his debilitating condition." *Id.*

In March 2014, the RO issued a Statement of the Case (SOC) that denied entitlement to TDIU, [R. at 2814-31], and, the following month, Appellant submitted his substantive appeal, [R. at 2759].

A letter from Dr. Z. Sorrano, dated May 2014, was submitted. [R. at 359]. Dr. Sorrano stated that Appellant had chronic lower back pain (LBP), hypertension, and anemia and that, "because of his LBP, he was unable to work/unemployable." *Id.*

A letter from Dr. Curtis Lee Witcher, dated October 2016, was also submitted. [R. at 345]. The letter stated that Appellant "currently suffers from hypertension and left ventricular hypertrophy. I do not believe he is fit for employment at this time." *Id.*

A Board hearing was conducted in March 2017, during which Appellant stated that he had last worked in 2003 and did not look for more work because of his heart condition. [R. at 325, 329 (323-34)].

In August 2017, the Board remanded the issue of TDIU for further development, including a new VA examination to reconcile the conflicting opinions as to what disability or combination of disabilities caused Appellant to be unable to obtain or maintain substantially gainful employment. [R. at 265-67 (262-68)].

In January 2019, Appellant underwent another C&P examination. [R. at 57-65]. Appellant stated during the examination that he retired in 2002 "primarily due to location changes, elevated blood pressure due to stress and back problems." [R. at 62]. The examiner reviewed all the available evidence, including the

evidence available in the Veterans Benefits Management System (VBMS) and the Computerized Patient Record System (CPRS), and evaluated the previous medical opinions of record. [R. at 57]; [R. at 62-63]. The examiner found that relevant tests reflected that Appellant was able to achieve a METs of seven and did not indicate ischemia, renal failure, pathologic wall motion abnormalities, or renal disease due to hypertension. [R. at 63]. She further stated that Appellant's possible left ventricular hypertrophy had not changed significantly since the prior C&P examination, which reflected possible left ventricular hypertrophy that "would not be expected to provide any significant limitation to light physical work and certainly no limitation to sedentary or semi sedentary work." [R. at 63 (62-63)]. The examiner explained that Appellant's fatigue in 2010 was largely due to his back problems and his atypical chest pain in 2018 was not due to cardiac disease. [R. at 62-63]. She explained that Appellant's blood pressure readings were somewhat elevated but that a review of the records did not show persistently elevated blood pressure readings, so that Appellant's hypertension did not affect his ability to work. [R. at 65]. The examiner concluded that, taking into consideration only Appellant's hypertension and heart condition, "he would be expected to function adequately in sedentary work settings, semi sedentary work settings and very light physical labor." [R. at 63].

On May 10, 2019, the Board issued a decision in which it denied entitlement to TDIU. [R. at 5-11]. The Board assigned great probative value to the April 2012 C&P examination addendum and the January 2019 C&P examination and

moderate probative value to the March 2011 C&P examination, and it found that such evidence did not reflect that Appellant's service-connected disabilities alone precluded substantially gainful employment. [R. at 8-11]. The Board explained that the probative evidence of record indicated that Appellant's non-service-connected disabilities, particularly his back disability, impacted his ability to obtain and maintain substantially gainful employment and that Appellant's service-connected disabilities alone were not sufficiently severe to render him unable to secure or maintain substantially gainful employment. *Id.*

SUMMARY OF THE ARGUMENT

The Board provided adequate reasons or bases for finding TDIU not warranted. In denying TDIU, the Board appropriately considered the functional impairment caused by Appellant's service-connected disabilities and adequately explained its weighing of the evidence, findings, and conclusions. While Appellant requests for this Court to re-weigh the evidence of record, it is the Board, not the Court that is responsible for weighing the evidence of record. Further, Appellant argues that he should be afforded the benefit of the doubt under 38 C.F.R. § 3.102. However, such regulation is not applicable because the Board found the preponderance of the evidence against finding entitlement to TDIU warranted. Because the Board's weighing of the evidence was plausible and its reasons or bases for its decision were adequate, the Court should affirm the Board's decision.

ARGUMENT

I. The Board provided adequate reasons or bases for finding entitlement to TDIU not warranted

The Board provided adequate reasons or bases for finding entitlement to TDIU not warranted. An award of TDIU requires that the claimant show an inability to undertake substantially gainful employment as a result of a service-connected disability or disabilities. 38 C.F.R. § 4.16. In determining whether a claimant is unable to secure or follow a substantially gainful occupation, the central inquiry is "whether the veteran's service-connected disabilities alone are of sufficient severity to produce unemployability." *Pederson v. McDonald*, 27 Vet.App. 276, 286 (2015) (citing *Hatlestad v. Brown*, 5 Vet.App. 524, 529 (1993)). In all claims, the Board is required to provide a written statement of its reasons or bases for its findings and conclusions. *Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1990). The Board's statement of reasons or bases "generally should be read as a whole, and if that statement permits an understanding and facilitates judicial review of the material issues of fact and law presented on the record, then it is adequate." *Johnson v. Shinseki*, 26 Vet.App. 237, 247 (2013) (en banc) (citations omitted), *reversed on other grounds sub nom Johnson v. McDonald*, 762 F.3d 1362 (Fed. Cir. 2014). When deciding the issue of TDIU, the Board "must adequately explain how the record evidence supports its determination that the combined effects of multiple disabilities do not prevent substantially gainful employment." *Floore v. Shinseki*, 26 Vet.App. 376, 382 (2013). Whether a claimant is unable to secure or

follow substantially gainful employment is a finding of fact that the Court reviews under the "clearly erroneous" standard. *Id.*; 38 U.S.C. § 7261(a)(4). Under this deferential standard of review, the Court cannot substitute its judgment for that of the Board and must affirm the Board's factual findings so long as they are supported by a plausible basis in the record. *Gilbert*, 1 Vet.App. at 52-53.

The Board found that "that the preponderance of the evidence of record is against a finding that [Appellant] is unable to obtain or maintain substantially gainful employment because of his service-connected disabilities." [R. at 10]. The Board explained that the most probative evidence of record, the April 2012 C&P examination addendum and the January 2019 C&P examination, reflected that Appellant's service-connected hypertension and hypertensive heart disease alone did not preclude Appellant from maintaining or obtaining substantially gainful employment. [R. at 10-11]; *see* [R. at 8] (discussing 2012 C&P examination addendum, which found Appellant's hypertension and hypertensive heart disease did not preclude either physical or sedentary occupation); [R. at 10] (discussing 2019 C&P examination, which found Appellant's hypertension and hypertensive heart disease did not preclude sedentary work or semi-sedentary work settings that involved very light physical labor). The Board, further, found that Appellant's non-service-connected conditions, most notably his back disability, interfered with his ability to obtain and maintain substantially gainful employment. [R. at 11]. This, as the Board found, was supported by the March 2011 C&P examination, which the Board found moderately probative, the 2012 C&P examination addendum, and

the 2019 C&P examination. [R. at 8] (discussing the March 2011 C&P examiner's finding that Appellant's lower back condition limited him from working in a physical or sedentary occupation due to chronic pain and limited mobility and clarification in the April 2012 C&P addendum by the same examiner that Appellant's inability to work was only due to his lower back condition); [R. at 10] (summarizing the January 2019 C&P examiner's discussion of the various contributing factors to Appellant's unemployability, including non-service connected disabilities). The Board explained that Appellant's lay statements also supported its finding that Appellant's ability to obtain and maintain substantially gainful employment was affected by numerous disabilities, including his non-service-connected back, neck, and prostate conditions. [R. at 10] (summarizing and analyzing Appellant's lay statements). The Board concluded that, to the extent Appellant was unable to secure and maintain substantially gainful employment, this inability was not solely caused by his service-connected hypertensive heart disease and hypertension. [R. at 9-10]. The Board's findings and conclusions are plausible based on the record, adequately explained, and should be upheld. *See Gilbert*, 1 Vet.App. at 52-53.

Appellant argues that the letter from Dr. Curtis Lee Witcher supports his assertion that TDIU is warranted. Appellant's Brief (App. Br.) at 2. However, the Board explicitly addressed this evidence. *See* [R. at 9]. As the Board explained, the letter states that Appellant had a diagnosis of hypertension and left ventricular hypertrophy but "does not expressly state that the noted diagnoses were the cause

of unemployability. However, even if the Board were to construe this statement in such a manner, the opinion contains no rationale for such an opinion. The Board therefore finds that this letter has no probative value." [R. at 9]. The Board is given wide latitude in deciding matters of fact. Factual findings may be derived from credibility determinations, physical or documentary evidence, or inferences drawn from other facts. *See Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 574 (1985). "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Id.* The Board's interpretation of Dr. Curtis Lee Witcher's letter as not saying that Appellant's diagnosis of hypertension and left ventricular hypertrophy caused his unemployability was at least plausible. *See id.*; [R. at 345] (Dr. Curtis Lee Witcher's letter stating that Appellant "currently suffers from hypertension and left ventricular hypertrophy. I do not believe he is fit for employment at this time"). Further, the Board's determination that the medical opinion did not have adequate rationale and was, accordingly, entitled to no probative value was appropriate. *See Horn v. Shinseki*, 25 Vet.App. 231, 240-42 (2012) (stating that under caselaw "an unexplained conclusory opinion is entitled to no weight in a service-connection context"). The Board may favor one medical opinion over another as long as it provides an adequate explanation for why it did so. *Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 300 (2008) (citing *Owens v. Brown*, 7 Vet.App. 429, 433 (1995)). The Board, here, assigned high probative weight to the 2012 C&P examination addendum opinion and the 2019 C&P examination because of the examiners' thorough review

and consideration of Appellant's history and robust rationales. [R. at 8] (finding that the examiner who conducted both the 2011 and 2012 C&P examinations considered Appellant's medical history and reports regarding his functional limitations and that the examiner adequately explained the effects of Appellant's various service-connected and non-service-connected disabilities); [R. at 10] (finding that the 2019 C&P examiner "provided a comprehensive review of [Appellant]'s medical history and considered the various contributing factors to his unemployability, to include the nonservice-connected disabilities" and conducted a "thorough review and consideration of the record"). While the 2011 C&P examination required clarification in 2012, the Board explained that it was still entitled to a moderate degree of probative value because it "reflect[ed] consideration of [Appellant]'s medical history and considered [Appellant]'s reports regarding his functional limitations." [R. at 8]. The Board explained that the letter by Dr. Curtis Lee Witcher was, by contrast to the C&P examinations, entitled to no probative weight because it lacked both a clear conclusion and an adequate rationale for its opinion. [R. at 9]. The Board explanation of its weighing of the evidence was appropriate, plausible, and adequately explained. *See Horn*, 25 Vet.App. at 240-42; *Nieves-Rodriguez*, 22 Vet.App. at 300. While Appellant may disagree with the Board's findings, he fails to identify error in the Board's decision. *See 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) ("An appellant bears the burden of

persuasion on appeals to this Court."), *aff'd* 232 F.3d 908 (Fed. Cir. 2000); *see also Overton v. Nicholson*, 20 Vet.App. 427, 435 (2006) (stating the appellant bears the burden of demonstrating error on appeal).

A. Appellant fails to demonstrate error in the Board's consideration of his hypertensive heart disease

Appellant fails to demonstrate error in the Board's consideration of his hypertensive heart disease. Appellant argues that the Board did not consider the effects of his hypertensive heart disease such as chronic fatigue, depression, and shortness of breath but does not point to specific evidence that the Board did not consider. *See* App. Br. at 3. The Secretary was unable to find any mentions of depression in the record. In fact, Appellant was repeatedly screened for depression as a part of routine preventative health visits and was found not to experience depression. *See e.g.*, [R. at 117 (116-19)] (October 2018 medical record reflecting Appellant's response of "not at all" when asked if he felt down, depressed, or hopeless, or had little interest or pleasure in doing things and finding Appellant did not experience depression); [R. at 194 (193-94)] (September 2016 medical record stating the same); [R. at 222 (221-23)] (January 2015 medical record stating the same); [R. at 238 (237-239)] (February 2013 medical record stating same); [R. at 3854 (3853-54)] (June 2010 medical record stating same); [R. at 298] (November 2002 medical record reflecting negative depression screening). To the extent Appellant argues for the first time before this Court that he experiences depression as a result of his service-connected conditions, the

Court should decline to consider his assertions. This Court is precluded from considering any material that is not contained in the record before the agency. *See* 38 U.S.C. § 7252(b) ("Review in the Court shall be on the record of proceedings before the Secretary and the Board."); *Kyhn v. Shinseki*, 716 F.3d 572, 578 (Fed. Cir. 2013) (holding that this Court is prohibited from considering evidence that was not in the record before the Board); *Rogozinski v. Derwinski*, 1 Vet.App. 19, 20 (1990) (holding that the Court was precluded by statute from considering medical records not contained in the record before the Board). Thus, Appellant's argument that his depression be considered is misguided. *See* 38 U.S.C. § 7252(b); *Kyhn*, 716 F.3d at 578; App. Br. at 3.

Appellant's argument that the Board did not adequately consider his fatigue is also without merit. *See* App. Br. at 3. The Board acknowledged that Appellant reported fatigue during some activities in the May 2010 C&P examination. [R. at 7]; *see* [R. at 3915] (stating that Appellant is "[u]nable to dance, paint, moderate to heavy lifting, swimming, etc. He develops sensation of general tiredness and fatigue with these activities"). However, as the 2019 C&P examiner explained, this fatigue was likely multifactorial, with Appellant's back disability predominantly contributing to such symptoms. [R. at 62]. Based on a variety of tests and examinations, and including consideration of Appellant's reports of fatigue, the 2019 C&P examiner concluded that taking into consideration only Appellant's hypertension and heart condition, "he would be expected to function adequately in sedentary work settings, semi sedentary work settings and very light physical

labor." [R. at 63]. The Board found the January 2019 C&P examination highly probative and deferred to the examiner's evaluation of the etiology of and the effects of his fatigue. *See* [R. at 10]; *see also Johnson*, 26 Vet.App. at 247 (stating that the Board's reasons or bases should be read as a whole). To the extent Appellant asks that the Board instead find, contrary to the examiner's assessment, that his fatigue was purely due to heart condition, or the functional impairment caused by the part of his fatigue due to his heart condition was more severe than the examiner found, he asks the Board to make an impermissible medical judgment. *See Colvin v. Derwinski*, 1 Vet.App. 171, 175 (1991) (finding the Board may not "refut[e] the expert medical conclusions in the record with its own unsubstantiated medical conclusions"). Further, even if the Board had not adequately explained its handling of Appellant's fatigue, he fails to demonstrate prejudice. The Court must duly consider the prejudicial error rule before it concludes vacatur of the decision of the Board is necessary as "an unquestioning, blind adherence" to 38 U.S.C. § 7104(d)(1) would run afoul of 38 U.S.C. § 7261(b)(2) and "result in this Court's unnecessarily imposing additional burdens on the [Board] . . . with no benefit flowing to the veteran." *Soyini v. Derwinski*, 1 Vet.App. 540, 546 (1991); *see also Mayfield v. Nicholson*, 19 Vet.App. 103, 129 (2005) (explaining that, where judicial review is not hindered by deficiency of reasons or bases, a remand for reasons or bases error would be of no benefit to the appellant and would therefore serve no useful purpose). Appellant stated that he experienced fatigue when dancing, painting, lifting moderate to heavy objects,

swimming, and with similar activities. [R. at 3915]. Even if such fatigue was completely due to Appellant's service-connected conditions, Appellant fails to demonstrate how an inability to perform these activities would preclude all substantially gainful employment. Thus, Appellant fails to demonstrate either error or prejudice in the Board's decision. *See Bryant v. Shinseki*, 23 Vet.App. 488, 498 (2010) ("[T]he assessment of prejudice generally is case specific, demonstrated by the appellant and based on the record."); *see also Johnson*, 26 Vet.App. at 247; *Overton*, 20 Vet.App. at 435.

Appellant also argues that the Board failed to consider his shortness of breath. *See* App. Br. at 3. The record indicates that Appellant largely did not experience shortness of breath. *See e.g.*, [R. at 3824] (March 2011 C&P examination that stated that Appellant "presents no shortness of breath"); [R. at 3918] (May 2010 C&P examination that stated that Appellant "presents no shortness of breath"); [R. at 2031 (2031-33)] (July 2010 medical record, in which Appellant denied shortness of breath); [R. at 1325 (1322-26)] (May 2009 medical record finding no shortness of breath). To the extent shortness of breath is noted in the record, there is no indication that it is due to his hypertension or heart condition. *See* [R. at 1788 (1787-92)] (complaining of shortness of breath in August 2008, but the examiner found this to be "due to increasing abdominal distention" following a lumbar surgery). Further, none of the examiners found that Appellant experienced shortness of breath as a result of his hypertensive heart disease or hypertension, and Appellant did not allege that any of the examiners

erred by not considering such symptom. *See* [R. at 57-65] (2019 C&P examination); [R. at 2759] (2014 VA Form 9, in which Appellant declined to mention shortness of breath); [R. at 3820] (2012 C&P examination addendum); [R. at 3785] (2012 NOD, in which Appellant declined to mention shortness of breath); [R. at 3824-31] (2011 C&P examination, explicitly finding no shortness of breath); [R. at 3913-22] (2010 C&P examination, explicitly finding no shortness of breath). Appellant fails to demonstrate that the record indicates that he experiences shortness of breath as a result of service-connected conditions, and, to the extent he asks this Court to consider his assertions in his informal brief as evidence, this should fail. *See* 38 U.S.C. § 7252(b) ("Review in the Court shall be on the record of proceedings before the Secretary and the Board."); *Kyhn*, 716 F.3d at 578; (holding that this Court is prohibited from considering evidence that was not in the record before the Board); *Rogozinski*, 1 Vet.App. at 20 (holding that the Court was precluded by statute from considering medical records not contained in the record before the Board). Further, even assuming that Appellant experienced shortness of breath as a result of his service-connected conditions, Appellant fails to demonstrate that such symptom was of sufficient severity to preclude substantially gainful employment. *See Bryant*, 23 Vet.App. at 498 (2010). Accordingly, Appellant fails to demonstrate either error or prejudice. *See Hilkert*, 12 Vet.App. at 151; *see also Overton*, 20 Vet.App. at 435.

B. This Court should decline to re-weigh the evidence

To the extent Appellant asks this Court to reweigh the evidence, the Court should decline this request. *See* App. Br. at 3. The Board has wide latitude when it comes to deciding matters of fact. How it interprets the evidence of record, the probative weight it assigns to that evidence, and what, if any, inferences and conclusions it draws from that evidence, are subject to review only for clear error. 38 U.S.C. § 7261(a)(4). "The Court of Appeals for Veterans Claims, as part of its clear error review, must review the Board's weighing of the evidence; it may not weigh any evidence itself." *Deloach v. Shinseki*, 704 F.3d 1370, 1380 (Fed. Cir. 2013); *see* 38 U.S.C. § 7261(c) ("In no event shall findings of fact made by the Secretary or the Board of Veterans' Appeals be subject to trial de novo by the Court."); *see also Kyhn*, 716 F.3d at 575 (noting 38 U.S.C. § 7261(c) "'prohibits the Veterans Court from making factual findings in the first instance.'" (quoting *Andre v. Principi*, 301 F.3d 1354, 1362 (Fed. Cir. 2002)). Thus, to the extent Appellant requests this Court re-evaluate the evidence, the Court does not have the jurisdiction to grant this request. *See* 38 U.S.C. § 7261(c).

C. The benefit of the doubt was not for application

While Appellant argues he is entitled to the benefit of the doubt, the benefit of the doubt was not for application. *See* App. Br. at 2. "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 ("When,

after careful consideration of all procurable and assembled data, a reasonable doubt arises regarding service origin, the degree of disability, or any other point, such doubt will be resolved in favor of the claimant."). The benefit of the doubt is only relevant if the evidence is in equipoise and does not apply if the preponderance of the evidence is against the claim. *See Schoolman v. West*, 12 Vet.App. 307, 311 (1999) (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"); *see also Hayes v. Brown*, 5 Vet.App. 60, 70 (1993) ("If a fair preponderance of the evidence is against a veteran's claim, the claim will be denied, and the rule has no application."). Here, the Board found that the preponderance of the evidence was against finding that Appellant was unable to obtain or maintain substantially gainful employment because of his service-connected disabilities. [R. at 10]. The benefit of the doubt rule, accordingly, did not apply. *See* 38 U.S.C. § 5107(b); 38 C.F.R. § 3.102; *Gilbert*, 1 Vet.App. at 56 ("[I]f a fair preponderance of the evidence is against a veteran's claim, it will be denied and the 'benefit of the doubt' rule has no application")).

II. 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 v.*

Dyax Corp., 265 F.3d 1329, 1332-33 (Fed. Cir. 2001); *Norvell v. Peake*, 22 Vet.App. 194, 201 (2008).

CONCLUSION

WHEREFORE, in light of the foregoing reasons, the Court should affirm the May 10, 2019, Board decision that denied entitlement to TDIU.

Respectfully submitted,

WILLIAM A. HUDSON, JR.
Acting General Counsel

MARY ANN FLYNN
Chief Counsel

/s/ Anna Whited
ANNA WHITED
Deputy Chief Counsel

/s/ Jacqueline Kerin
JACQUELINE KERIN
Appellate Attorney
Office of the General Counsel (027F)
U.S. Department of Veterans Affairs
810 Vermont Avenue, NW
Washington, DC 20420
(202) 632-5994

Attorneys for Appellee
Secretary of Veterans Affairs

CERTIFICATE OF SERVICE

On February 11, 2020, a copy of the foregoing was mailed postage prepaid to:

Henry Wilson, Jr.
6352 Longdale Drive
North Highlands, CA 95660

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

/s/ Jacqueline Kerin
JACQUELINE KERIN
Counsel for Appellee