

Vet. App. No. 19-2729

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

ANTHONY A. KOMENDA,
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**

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Appellant,)	
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ROBERT L. WILKIE,)	
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**ON APPEAL FROM THE
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**BRIEF OF THE APPELLEE,
SECRETARY OF VETERANS AFFAIRS**

I. ISSUES PRESENTED

Does Appellant fail to show that a Department of Veterans Affairs (VA) examination is inadequate where the examiner conducted an in-person examination and considered Appellant's service-connected disabilities?

Where Appellant points to no relevant evidence that the Board of Veterans' Appeals (Board) overlooked, does Appellant fail to show that the Board did not adequately explain why it denied entitlement to a total disability rating based on individual unemployability (TDIU)?

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

The Court has jurisdiction under 38 U.S.C. § 7252(a), which grants the United States Court of Appeals for Veterans Claims exclusive jurisdiction to review final decisions of the Board.

B. Nature of the Case

Appellant, Anthony A. Komenda, appeals the Board's December 28, 2018, decision denying entitlement to TDIU. [Record Before the Agency (R.) at 4-19].

Appellant specifically abandons any appeal of, or argument relating to, the parts of the Board decision finding no clear and unmistakable error in June and October 1970 rating decisions assigning a noncompensable rating for a thyroglossal duct cyst excision scar, and a July 2001 rating decision that assigned an effective date of May 17, 2000, for service connection for dysphagia. See Appellant's Brief (Br.) at 1, n.1; see also *Ford v. Gober*, 10 Vet.App. 531, 535-36 (1997) (finding that claims not addressed in Appellant's brief had been abandoned on appeal).

C. Statement of Relevant Facts

Appellant served in the United States Army from April 1968 to April 1970. [R. at 1299]. Since his separation from service, Appellant has been granted service connection for several conditions, including dysphagia secondary to thyroglossal duct surgery. See [R. at 499-500 (494-501)] (rating code sheet). He has had a combined evaluation of 90% since October 2014. [R. at 14].

Appellant first filed a claim for TDIU in September 2003. [R. at 3269-70]. The VA regional office (RO) denied the claim in a February 2004 rating decision, which Appellant eventually appealed to the Board. [R. at 3236-39]; see [R. at 3101-03 (October 2004 Notice of Disagreement (NOD)), 2946-61 (January 2005 Statement of the Case (SOC)), 2928-29 (March 2005 substantive appeal)]. The Board initially remanded the claim for notification deficiencies, [R. at 2783 (2769-89)], but it later denied the claim for TDIU in a February 2009 decision, [R. at 2362-86].¹

In January 2010, Appellant filed another claim for TDIU. [R. at 2212-15]. The next month, he submitted a formal claim form with an attached statement that addressed two specific form questions. [R. at 2204-11]. In it, Appellant stated that his service-connected disabilities forced him to stop working in 1997 and will prevent him from obtaining substantially gainful employment. [R. at 2210]. He noted that he had “a hard time eating enough calories to have a whole lot of energy to perform physical activities” as a result of his dysphagia, and that he clears his throat constantly. *Id.*

The RO denied entitlement to TDIU in September 2010. [R. at 1969-74]. Thereafter, Appellant filed an NOD through his current counsel. [R. at 1916-32]. And, after the RO issued an SOC continuing the denial, Appellant perfected his appeal to the Board. [R. at 1659-77 (April 2011 VA Form 9), 1740-54 (April 2011

¹ Appellant appealed the parts of the February 2009 Board decision denying service connection for various disabilities. See [R. at 1953-56]. In a September 2010 Memorandum Decision, the Court affirmed in part and remanded in part the February 2009 decision. *Id.*

SOC)]. See *also* [R. at 1506-09 (July 2011 Supplemental SOC (SSOC)), 1409-11 (October 2011 SSOC)].

In March 2012, the Board issued a decision that denied entitlement to TDIU. [R. at 1379 (1344-81)]. Appellant did not appeal that decision.

In March 2015, Appellant filed a new claim for TDIU through his current counsel. [R. at 1093-95]. The RO denied that claim in July 2015. [R. at 494-501]. Thereafter, Appellant filed an NOD, [R. at 464-72], the RO issued an SOC, [R. at 382-403], and Appellant perfected his appeal to the Board, [R. at 151-52].

While his claim was pending, Appellant underwent a May 2016 VA esophageal condition examination. [R. at 199-207]. The VA examiner conducted an in-person examination of Appellant's fractured nasal septum, thyroglossal duct cyst removal with dysphagia, and his thyroglossal duct cyst scar. *Id.* As to the thyroglossal duct cyst removal with dysphagia, the examiner noted Appellant's history of dysphagia and current regurgitation. [R. at 199-200]. The examiner opined that the esophageal condition did not impact Appellant's ability to work. [R. at 200]. The examiner also listed Appellant's other service-connected conditions and opined that they "would not limit functional activities." [R. at 206]. The examiner reasoned that Appellant hunts, fishes, and "still drives an automobile." *Id.* (noting that Appellant "is quite physically fit" and "well tanned"). The examiner also stated that Appellant had "no demonstrable problems with [activities of daily living]." *Id.*

In December 2018, the Board denied entitlement to TDIU. [R. at 13-16]. This appeal followed.

III. SUMMARY OF THE ARGUMENT

The Court should affirm the Board's decision. First, Appellant does not show that the 2016 VA esophageal examination is inadequate. Although he asserts that the VA examiner did not examine him or consider his service-connected disabilities, the examination report clearly shows that the VA examiner conducted an in-person examination and considered Appellant's service-connected disabilities, to include his esophageal condition with dysphagia.

Second, Appellant does not show that the Board overlooked relevant evidence. He cites only to evidence that was before the Board in March 2012, when it finally denied his January 2010 claim for TDIU. The Board was not required to readjudicate the January 2010 claim and, therefore, Appellant's argument is an attempt to circumvent the final March 2012 Board decision. And because the Board properly explained that TDIU was not warranted where service-connected disabilities alone do not prevent substantially gainful employment, Appellant fails to show that the Board improperly focused on non-service-connected disabilities.

IV. ARGUMENT

A. Standard of review

The Court reviews the Board's findings of fact, including its service connection determinations, under the "clearly erroneous" standard of review. 38 U.S.C. § 7261(a)(4); see *Solomon v. Brown*, 6 Vet.App. 396, 402 (1994); *Gilbert*

v. Derwinski, 1 Vet.App. 49, 52 (1990). Under this deferential standard of review, the Court must affirm the Board's factual findings if they are "plausible in light of the record." *Gilbert*, 1 Vet.App. at 52.

B. The 2016 VA examiner's opinion is adequate because it is based on an in-person examination and consideration of Appellant's service-connected conditions, including his dysphagia symptom

The Board properly relied in part on an adequate May 2016 VA esophageal examination to find that Appellant is not entitled to TDIU. A medical opinion is adequate "where it is based upon consideration of the veteran's prior medical history and examinations and also describes the disability, if any, in sufficient detail so that the Board's 'evaluation of the claimed disability will be a fully informed one.'" *Steffl v. Nicholson*, 21 Vet.App. 120, 123 (2007) (quoting *Ardison v. Brown*, 6 Vet.App. 405, 407 (1994)) (internal quotation marks omitted). Whether a medical opinion is adequate is a finding of fact subject to review under the deferential "clearly erroneous" standard. *D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008).

As the Board explained, the 2016 VA esophageal examiner "found no impact on the Veteran's ability to work due to his esophageal conditions" and opined that the combined effects of Appellant's service-connected disabilities do not limit his ability to function in an occupational environment. [R. at 15]. Appellant asserts that this opinion is "meaningless" because it is based on individuals with similar disabilities, rather than his specific disabilities and symptoms, and because the VA examiner did not conduct an examination. See Appellant's Br. at 3. But this argument is not convincing because it is belied by the examination report, which

shows that the examiner conducted an in-person examination and considered Appellant's service-connected conditions, to include Appellant's description of his functional abilities.

The 2016 VA examiner reviewed the record and conducted an in-person examination of Appellant's service-connected thyroglossal duct cyst removal with dysphagia and thyroglossal duct scar. See [R. at 199-200 (199-207)]. The examiner noted that relevant medical history included "problems with dysphagia," meaning trouble swallowing, and that Appellant had both dysphagia and regurgitation. [R. at 199-200]. But the examiner opined that the esophageal condition did not impact Appellant's ability to work. [R. at 200]. In addressing employability, the examiner noted that Appellant is also service-connected for traumatic nasal function with rhinoplasty and mild deviated septum, tinnitus, and sleep apnea. [R. at 206]. The examiner then concluded that "[t]he veteran[']s [service-connected] issues would not limit functional activities." *Id.* The examiner reasoned that Appellant was still able to perform functional activities because, as Appellant attested, he mows his yard, hunts, fishes, and "still drives an automobile." *Id.* The examiner also found probative that Appellant appeared "quite physically fit" and had "no demonstrable problems with ADLs" (activities of daily living). *Id.*

As the 2016 VA examination report shows that the VA examiner conducted an examination and considered Appellant's service-connected conditions, to include his symptom of dysphagia and his own reported functional capabilities,

Appellant fails to show that the examination is inadequate. See Appellant's Br. at 3; see also *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) ("An appellant bears the burden of persuasion on appeals to this Court.").

C. Appellant fails to show that the Board overlooked any relevant evidence or that its analysis is otherwise inadequate

Appellant fails to show that the Board did not discuss any relevant evidence or that its decision is otherwise inadequate. The Board's decision must include a statement of reasons or bases for its factual findings and conclusions of law that is understandable by the claimant and facilitates review by this Court. 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995). To comply with this requirement, the Board must analyze the probative value of evidence, account for evidence it finds persuasive or unpersuasive, and explain why it rejected evidence materially favorable to the claimant. *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995). The Board is not required to address each item of evidence, however, as it is presumed to have considered all evidence of record. *Newhouse v. Nicholson*, 497 F.3d 1298, 1302 (Fed. Cir. 2007). And because it is the Board's responsibility to assess the credibility and probative weight of evidence, *Washington v. Nicholson*, 19 Vet.App. 362, 368 (2005), the Court may only overturn the Board's probative value determinations if they are clearly erroneous, *Smith v. Shinseki*, 24 Vet.App. 40, 48 (2010). See *Deloach v. Shinseki*, 704 F.3d 1370, 1380 (Fed. Cir. 2013) (explaining that the Court "may not weigh any evidence itself").

Appellant asserts that the Board ignored “favorable evidence in the record regarding the effect of Appellant’s dysphagia on his ability to work,” but he points to no evidence during the relevant appeal period that the Board did not address. Appellant’s Br. at 3. Rather, he cites to evidence documenting esophageal symptoms in 2004 and 2006, as well as a lay statement in support of his January 2010 claim for TDIU. See *id.* But that evidence was before the Board when, in March 2012, it finally denied Appellant’s January 2010 claim for TDIU. See [R. at 1376] (March 2012 Board decision denying the January 2010 claim of entitlement to TDIU despite reports of dysphagia, “coughing, hacking, and postnasal drip,” difficulty swallowing and constant throat-clearing that would “interfere with [Appellant’s] employability”). The Board’s March 2012 decision is final because it was not appealed. See [R. at 13] (noting that TDIU was “most recently denied by the Board in March 2012” and that the decision “was not appealed and is final”). Therefore, although the Board here presumably considered all evidence of record, it was not required to address evidence that is irrelevant to the appeal period or to readjudicate the issue of entitlement to TDIU for the period prior to 2015 (the date Appellant filed a new claim for TDIU). See *Newhouse*, 497 F.3d at 1302; see also [R. at 1093] (March 2015 claim for TDIU). Appellant’s argument to the contrary is merely an attempt to circumvent the final March 2012 Board decision.

Appellant also fails to show that the Board provided no support for finding that he has “some degree of industrial impairment as a result of his service-connected disabilities.” Appellant’s Br. at 4 (quoting [R. at 16]). The Board

supported this finding by explaining that disability ratings are intended to represent impairment in earning capacity, and thus Appellant's disability ratings show that Appellant has some industrial impairment. [R. at 16] (citing 38 C.F.R. § 4.1) (finding, however, that the service-connected conditions alone do not preclude gainful employment). This rationale is both understandable and accurate.

Finally, the Court should reject Appellant's argument that the Board prejudicially erred by focusing on a non-service-connected disability in its TDIU analysis. Appellant's Br. at 4 (asserting that the Board erred by noting that he retired as a result of non-service-connected wrist osteoarthritis); see [R. at 16] (explaining that the March 2012 Board decision found that Appellant stopped working as a result of non-service-connected disabilities); see *also* [R. at 1377] (March 2012 Board decision rejecting Appellant's contention that he cannot work due to service-connected disabilities, and noting that he previously reported that he could not work due to non-service connected degenerative joint disease and "[t]herefore, based on his own admission, the Veteran cannot work due to his non-service connected disabilities"). Appellant contends that the reason for his retirement is irrelevant because "the central question with regard to TDIU 'is whether Appellant's service-connected disabilities alone are of sufficient severity to provide unemployability'" and "even when non-service connected disabilities affect an Appellant's employability, the Board must still decide whether Appellant's service-connected disabilities are sufficiently incapacitating to render him

unemployable.” Appellant’s Br. at 4 (quoting *Floore v. Shinseki*, 26 Vet.App. 376, 383 (2013)); see 38 C.F.R. § 4.16(a).

The Board’s mere notation that Appellant retired as a result of a non-service-connected condition is not prejudicial because it does not show that the Board failed to correctly evaluate whether Appellant is entitled to TDIU based on service-connected disabilities alone. Indeed, the Board explicitly stated that non-service-connected disabilities may not be considered. [R. at 14-15] (stating that the Board may not consider “impairment caused by nonservice-connected disabilities” and that “evidence must show that his service-connected disabilities alone preclude him from engaging in substantially gainful employment”). And by noting that “appellant is not service connected for osteoarthritis,” the Board was merely indicating that such a condition could not support entitlement to TDIU. [R. at 14, 16]. This is evidenced by the next paragraph in the Board’s decision, which explains that “*as a result of his service-connected disabilities, the evidence preponderates against finding that these disorders alone preclude gainful employment.*” *Id.* (emphasis added). Accordingly, Appellant fails to show that the Board did not “decide whether Appellant’s service-connected disabilities” render him unemployable, or that the Board’s analysis is deficient for any reason. See *Hilkert*, 12 Vet.App. at 151 (1999).

The Secretary has limited his response to only those arguments raised by Appellant in his opening brief and submits that any other arguments or issues

should be deemed abandoned. See *Carbino v. West*, 168 F.3d 32, 34 (Fed. Cir. 1999).

V. CONCLUSION

WHEREFORE, for the foregoing reasons, the Secretary respectfully submits that the Board's December 28, 2018, decision should be affirmed.

Respectfully submitted,

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