IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

ANDREW W. TODD,
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

Other

RECORD CITATIONS

IN THE UNITED STATES COURT OF APPEALS
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ANDREW W. TODD,	)	
	)	
Appellant	)	
	)	
v.	)	Vet. App. 19-4436
	)	
ROBERT L. WILKIE,	)	
Secretary of Veterans Affairs	)	
	)	
Appellee	)	

ON APPEAL FROM
THE BOARD OF VETERANS' APPEALS

APPELLEE'S BRIEF

I. ISSUE PRESENTED

Whether the Court should affirm the September 6, 2018, Board of Veterans' Appeals denial of entitlement to service connection for an acquired psychiatric disability.

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

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

B. Nature of the Case

Appellant, Andrew W. Todd, appeals the September 6, 2018, Board decision denying entitlement to service connection for an acquired psychiatric disability. Appellant makes no specific assertion of error in the Board's decision, but rather generally argues that the Board decision is wrong because there is evidence that

he is disabled as the result of military service. (Appellant's Brief (App.Br.) at 3.) The Secretary maintains that the Board's denial is not clearly erroneous, and therefore, the Court should affirm the decision herein on appeal.

C. Statement of Relevant Facts

Appellant served on active duty from February 1980 to May 1980, with additional service in the Navy Reserve through 1985. [R. at 968]; [R. at 986.] Appellant filed his original claim for benefits seeking service connection for an acquired psychiatric condition, claimed as depression/anxiety in June 2002. [R. at 1462-1474.]

In a July 2003 rating decision, the Regional Office (RO) denied entitlement to service connection based on a lack of nexus between any current psychological condition and military service. [R. at 1187-1188.] Appellant did not appeal this decision and it became final. In December 2006, Appellant sent additional medical records to VA, referencing the July 2003 rating decision. [R. at 1178.] The RO notified Appellant that the appeal period for that decision had expired, and it therefore treated Appellant's correspondence as a new claim to reopen a previously final denial. [R. at 1140-1145.] In a July 2007 rating decision, the RO declined to reopen the claim and continued the previous denial of service connection, determining that new and material evidence had not been received. [R. at 1026-1030.] Appellant subsequently sent a Statement in Support of Claim to the RO in which he noted his disagreement with the July 2007 rating decision. [R. at 993-994.] Although this statement was dated December 2007, it was not

received at the RO until September 2008. *Id.* As such, the RO notified Appellant that it would not accept the statement as a valid Notice of Disagreement (NOD), but rather that it would again initiate a new claim to reopen a previously final denial. [R. at 985.]

In March 2009, the RO issued a new rating decision in which it again declined to reopen the claim and continued the previous denial of service connection, determining that new and material evidence had not been received. [R. at 858-860.] After this decision, Appellant submitted additional authorization and consent to release medical information to the RO. The RO treated this release as a request to reconsider its March 2009 decision and informed Appellant of such. [R. at 848-849.] In June 2010, the RO again issued a rating decision in which it declined to reopen Appellant's claim for service connection for lack of new and material evidence. [R. at 603-607.] In June 2011, Appellant wrote a letter to the RO asking to appeal the June 2010 rating decision. [R. at 591-594.] The RO accepted this letter as a timely NOD. [R. at 586-588.] In May 2013 the RO issued a Statement of the Case (SOC) which continued the denial of reopening of the claim. [R. at 550-562.] Appellant then filed a VA Form 9 and timely perfected his appeal to the Board. [R. at 547-548.]

On January 25, 2017, the Board issued a decision in which it determined that new and material evidence had been received sufficient to reopen Appellant's claim for service-connection for an acquired psychiatric disorder, to include anxiety and depression, and remanded the case back to the RO for additional

development and readjudication. [R. at 465-474.] In July 2017, the RO issued a Supplemental Statement of the Case (SSOC) denying Appellant's claim, citing the lack of a relationship between Appellant's military service and any current psychiatric disorder. [R. at 20-33.] On September 6, 2018, the Board issued a decision in which it denied Appellant's claim for service-connection. [R. at 3-11.] This appeal followed.

III. SUMMARY OF ARGUMENT

Appellant provides no actual arguments as to error in the Board's decision. At most, Appellant takes issue with the Board's weighing of the evidence, contending generally, and without support, that the evidence demonstrates that he is disabled as the result of military service. The Secretary notes that even construed liberally, Appellant fails to sufficiently allege error such that the Court is capable of reviewing and assessing Appellant's arguments. Further, the Secretary contends that even if the Court were to determine Appellant has raised an argument, a mere disagreement with the manner in which evidence is weighed, absent any further argument or allegation of error, is insufficient to demonstrate clear error. However, should the Court determine that review of the Board decision is necessary, the Board appropriately determined that service connection was not warranted for an acquired psychiatric disorder. Specifically, although Appellant has a current psychiatric disability, the Board properly exercised its role as fact-finder in determining that the competent, credible evidence did not demonstrate that the condition began in or was otherwise related to service.

IV. ARGUMENT

A. Appellant Fails to Provide Any Actual Allegation of Error in the Board's Decision

An appellant carries the burden of presenting coherent arguments and of providing adequate support for those arguments. *See Mayfield v. Nicholson,* 19 Vet.App. 103, 111 (2005) (noting that "every appellant must carry the general burden of persuasion regarding contentions of error"), *rev'd on other grounds,* 444 F.3d 1328 (2006); *Hilkert v. West,* 12 Vet.App. 145, 151 (1999) (en banc) ("An appellant bears the burden of persuasion on appeals to this Court"); *Berger v. Brown,* 10 Vet.App. 166, 169 (1997) (recognizing that "the appellant [] always bears the burden of persuasion on appeals to this Court"). It is the appellant's burden, and the appellant's burden alone, to demonstrate error in the Board decision. *See Overton v. Nicholson,* 20 Vet.App. 427, 435 (2006) (the appellant bears the burden of demonstrating error on appeal). In addition to demonstrating that the Board erred, however, an appellant also must demonstrate that any error by the Board was prejudicial. *See Shinseki v. Sanders*, 556 U.S. 396, 409 (2009). To meet this burden of presenting coherent arguments to the Court, an appellant must provide arguments that are fully developed. *See Woehlaert v. Nicholson,* 21 Vet.App. 456, 463 (2007) (rejecting the appellant's argument because it was underdeveloped). "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." *See Coker v. Nicholson*, 19 Vet.App.

439, 442 (2006), *rev'd on other grounds sub nom. Coker v. Peake*, 310 F. App'x 371 (Fed. Cir. 2008) (per curiam order). The Court will not consider a "vague assertion" or an "unsupported contention" of error. *See Evans v. West*, 12 Vet.App. 22, 31 (1998). An appellant's brief must contain his or her "contentions with respect to the issues and the reasons for those contentions, with citations to the authorities and pages of the record[.]" *See* U.S. Vet. App. R. 28(a)(5). Where a claimant does not assert any error as to an issue within a Board decision, that issue should be deemed abandoned, and any appeal as to that issue dismissed. *See Ford v. Gober,* 10 Vet.App. 531, 535-36 (1997) (claims not addressed by the appellant in pleadings before the Court found to be abandoned); *Bucklinger v. Brown,* 5 Vet.App. 435, 436 (1993) (abandonment of claims not addressed by the appellant before the Court); *see also Grivois v. Brown,* 6 Vet.App. 136, 138 (1994) (issues or claims not argued on appeal are considered abandoned).

The Secretary argues that Appellant, in his informal brief to this Court failed to assert any error in the instant Board decision. [App.Br. at 1-3]; *see Leonard v. Principi*, 17 Vet.App. 447, 452-53 (2004) (an appellant must support his or her arguments with reasons and citations to supporting authority); *Chase v. West*, 13 Vet.App. 413, 414 (2000) (per curiam order) (an appellant's contention must fail when he does not cite to authority to support it). The Secretary acknowledges that briefs submitted by *pro se* litigants are liberally construed, but *pro se* litigants still must provide assertions of error in order for the Secretary or the Court to

adequately respond. *De Perez v. Derwinski*, 2 Vet.App. 85, 86 (1992); *see also Coker*, 19 Vet.App. at 442.

In his informal brief to the Court, Appellant indicates that he does not believe the Board incorrectly applied the law or the facts in its decision. (App.Br. at 1-2.) When asked what action he wants the Court to take, Appellant again does not identify any error in application of fact or law, but rather indicates that the Court could ask him to further develop the record and provide additional lay statements supporting his contentions[1]. (App.Br. at 3.) Ultimately, the closest that Appellant comes to presenting an actual argument is by stating that "…there has been evidence that I have been disabled from being in the military." *Id.* Appellant cites no pages in the RBA, nor indeed even references the name, description, or general type of evidence which he believes supports this contention. *Id.* At best, this statement is a bare disagreement with the Board's weighing of the evidence, however it is highly vague and unsupported, without so much as even indicating what about the Board's treatment of the evidence he believes is in error. As such, even construed liberally, this single sentence does not amount to a sufficiently plead allegation of error. *See Coker*, 19 Vet.App. at 442. Moreover, even assuming that this is the argument Appellant were attempting to advance, a mere disagreement with the manner in which the Board weighed the evidence of record, absent any other argument, does not amount to error regardless. *See D'Aires v.*

[1] The Secretary notes that while Appellant proposes this action by the Court, he also takes no issue with VA's satisfaction of its duty to assist by obtaining documents and/or records. (App.Br. at 2.)

Peake, 22 Vet.App. 97, 107 (2008) (it is the responsibility of the Board to assess the credibility and weight to be given to evidence.)

The Secretary avers that Appellant has made no arguments as to error in the Board decision. As such, the Court should dismiss any appeal as to the Board decision. *See Ford*, 10 Vet.App. at 535-36. To the extent the Court deems substantive review of the Board decision necessary, the Secretary's response follows.

B. The Board's Decision Was Supported by the Record, and is Therefore Not Clearly Erroneous

A Board decision must be supported by statements of reasons or bases that adequately explain the basis of the Board's material findings and conclusions. 38 U.S.C. § 7104(d)(1). This requires the Board 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. *Caluza v. Brown,* 7 Vet.App. 498, 506 (1995). The Board, however, need not comment upon every piece of evidence contained in the record. *Newhouse v. Nicholson*, 497 F.3d 1298, 1302 (Fed. Cir. 2007). Rather, it must simply provide sufficient discussion to enable both the claimant and this Court to understand the basis of its decision and permit judicial review of the same. *Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990). A deficiency in the Board's statement of reasons or bases necessitates remand only where such deficiency is preclusive of effective judicial review or otherwise shown to have caused harm to the claimant. *See Mayfield*, 19 Vet.App. at 129 (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).

Service connection may be granted for a disability resulting from personal injury suffered or disease contracted in the line of duty, or for the 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 competent medical, or in certain circumstances, lay evidence of a current disability, an in-service incurrence or aggravation of an injury or disease, and a nexus between the claimed in-service injury or disease and the current disability. *See Hickson v. West*, 12 Vet.App. 247, 253 (1999). The Board's determination of service connection is a question of fact subject to review under the clearly erroneous standard. *See Gilbert*, 1 Vet.App. at 52-53 (finding of fact is not clearly erroneous if there is a plausible basis for it in the record).

In the instant case, the Board acknowledged that Appellant has a current psychiatric disability which has been variously diagnosed, to include both depressive disorder and generalized anxiety disorder. [R. at 5.] With a present disability established, the Board then turned to the question of a nexus between the disability and Appellant's military service. The Board reviewed Appellant's Service Treatment Records (STRs) and noted no psychiatric abnormalities on the entrance exam, nor any pertinent complaints on the report of medical history, as well as "no complaints, treatment, or diagnoses pertaining to any type of

psychiatric disability" on any STR. [R. at 6]; *see also generally* [R. at 491-528.] The Board also reviewed Appellant's Social Security Administration (SSA) records, which include numerous psychiatric examination reports. [R. at 7.] The Board noted that Appellant had been diagnosed with an affective disorder, personality disorder, and history of substance abuse, but that in multiple psychiatric evaluations no mental health professional ever indicated a link between Appellant's psychiatric disorders and his military service. *Id.*, *see also generally* [R. at 44-134.] In fact, the Board noted, not one of these mental health professionals ever so much as mentioned any aspect of Appellant's military service other than noting that he was a veteran. [R. at 7.]

The Board also considered Appellant's lay statements that his psychiatric disability was due to military service but concluded that he was not competent to render an opinion concerning the etiology of that disability. [R. at 8]; *see also Jandreau v. Nicholson*, 492 F.3d 1372, 1377, 1377 n.4 (Fed. Cir. 2007) (recognizing that the competence of a layperson to offer evidence on a medical issue is limited to where doing so does not require reliance on specialized medical knowledge or expertise); *Kahana v. Shinseki*, 24 Vet.App. 428, 438 (2011). Specifically, the Board noted that in this instance, where the weight of the evidence demonstrated that there were no continuous post-service symptoms, it would require specialized medical training and experience to provide an opinion as to the etiology of complex acquired psychiatric disabilities. [R. at 8]; *see Kahana*, 24 Vet.App. at 438 (noting that such inquires should be decided on a case-by-case

basis and be mindful of observable symptomatology.) Moreover, the Board found that Appellant's STRs and psychiatric treatment reports, which were silent for any evidence of a psychiatric disorder for years after service, were more probative that recent lay statements from Appellant and his mother concerning the presence or absence of symptoms in service. [R. at 7.] The Board noted that, not only are the treatment records more contemporaneous than the recent lay statements, but that the fact that Appellant sought treatment for other conditions in or following service while not seeking treatment for an acquired psychiatric disorder weighed against the credibility of recent lay statements asserting that symptoms had persisted since his discharge. *Id.*, *see Maxson v. Gober*, 230 F.3d 1330, 1333 (Fed. Cir. 2000) (evidence of prolonged period without medical complaint can be considered, along with other factors concerning the veteran's health and medical treatment during and after military service, in assessing service-connection claim).

The Board also noted that the record in this matter does not include a medical opinion on the matter of service connection but determined that VA satisfied its duty to assist. [R. at 8.] The duty to assist requires the Secretary to provide a medical examination if there is (1) competent evidence of a current disability or persistent or recurrent symptoms of a disability; (2) evidence that the an event, injury or disease occurred in service; (3) an indication that the disability or persistent or recurrent symptoms of a disability may be associated with the established in-service event, injury or disease or with another service-connected disability; and (4) there is insufficient competent medical evidence on which to

decide the claim. See 38 C.F.R. § 3.159(c)(4); *see also McLendon v. Nicholson*, 20 Vet.App. 79, 85-86 (2006). Here, the Board concluded that there was no indication of a link between Appellant's current disability and his military service, and therefore no examination was necessary. [R. at 8-9.] Indeed, the only evidence of record which in any way offers an indication of a link to service are generalized and unsupported lay statements, which are insufficient to trigger the duty to provide an examination. *See Waters v. Shinseki*, 601 F.3d 1274, 1278 (Fed. Cir. 2010) ("conclusory generalized statement" as to association between service and current disability insufficient to trigger duty to provide medical examination).

Finally, the Board addressed two specific instances in the record where Appellant was diagnosed with psychiatric conditions other than the claimed conditions of depression and anxiety. Initially, the Board noted that Appellant has previously been diagnosed with a personality disorder, but that VA regulations provide that personality disorders are not diseases or injuries for the purpose of providing VA compensation benefits. [R. at 6]; [R. at 1386-1387]; *see* 38 C.F.R. §§ 3.303 (c), 4.9, 4.127. The Board acknowledges that service connection may be warranted if evidence demonstrates that an acquired psychiatric disorder was incurred or aggravated in service and further superimposed upon a pre-existing personality disorder, however it found that no evidence supports such a finding in this instance. [R. at 6]; 38 C.F.R. §§ 4.9, 4.125(a), 4.127; *see also Carpenter v. Brown*, 8 Vet. App. 240, 245 (1995) (discussing the history and interpretation of §

4.127 and the limited circumstances allowing for the superimposition of personality disorders onto psychiatric disabilities.) Second, the Board noted that there was one private treatment note in the record diagnosing Appellant with posttraumatic stress disorder (PTSD). [R. at 6]; [R. at 1315.] The Board found that not only was this record a single isolated diagnosis, but that the record itself contained no reference to a military stressor or even military service generally. *Id.* Further, the Board noted that a stressor is an indispensable component of a PTSD claim and that Appellant has never provided an alleged PTSD stressor, nor has evidence of record ever indicated one. [R. at 6]; *see* 38 C.F.R. § 3.304 (f).

The Board considered and weighed the evidence of record, to include medical evidence and Appellant's lay contentions, and adequately explained why Appellant is not entitled to benefits. *See Gilbert v. Derwinski*, 1 Vet.App. 49 (1990). As such, the Secretary asks that the Court affirm the Board's decision.

V. CONCLUSION

In offering this response, the Secretary has limited himself to only those arguments raised by a liberal reading of Appellant's opening brief. Appellant bears the burden of demonstrating error. *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009). As such, it is for Appellant to present argument as to the specific errors involved in the adjudication of his claim. *Id.; See also Hilkert v. West*, 12 Vet.App. 145, 151 (1999); *aff'd*, 232 F.3d 908 (Fed. Cir. 2000); *Henderson v. Shinseki*, 562 U.S. 428, 434 (2011) ("Courts do not usually raise claims or arguments on their own . . . and are generally limited to addressing the claims and arguments advanced by the

parties.") As such, the Secretary 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 to have adequately raised and properly preserved, but which the Secretary did not address herein, and he requests the opportunity to address the same if the Court deems it to be necessary. In view of the foregoing arguments, the Secretary respectfully requests that the Court affirm the Board's September 6, 2018 decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify under the penalty of perjury under the laws of the United States of America that, on this day, the 25th day of February 2020, a copy of the foregoing was mailed, postage prepaid, to:

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