

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

JOHN CORDOVA,
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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**IN THE UNITED STATES COURT OF
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JOHN CORDOVA,)	
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Appellant,)	
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v.)	Vet. App. No. 19-5076
)	
ROBERT L. WILKIE,)	
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 should affirm the April 9, 2019, decision of the Board of Veterans' Appeals (Board), which denied entitlement to a rating in excess of 50% for post-traumatic stress disorder (PTSD).

II. STATEMENT OF THE CASE

A. JURISDICTIONAL STATEMENT

The Court has exclusive jurisdiction to review final decisions of the Board under 38 U.S.C. § 7252(a).

B. NATURE OF THE CASE

This case is on appeal from an April 9, 2019, Board decision. The Board found that the criteria for a rating higher than 50% for PTSD have not been met. [Record Before the Agency (R.) at 5 (2-12)]. The issue presented in this appeal is whether the Board provided an adequate statement of reasons or bases for its decision.

C. STATEMENT OF RELEVANT FACTS

John Cordova (Appellant), served on active duty from July 1971 to December 1972. [R. at 671].

In March 2017, Appellant filed a claim for service connection for PTSD. [R. at 946-49 (944-54)]. He was afforded a Department of Veterans Affairs (VA) examination on May 25, 2019. [R. at 821-29]. The examiner noted symptoms of depressed mood, anxiety, chronic sleep impairment, mild memory loss, disturbances of motivation and mood, and inability to establish and maintain effective relationships. [R. at 828 (821-29)]. Appellant's symptoms resulted in occupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks, although generally functioning satisfactorily, with normal routine behavior, self-care and conversation. [R. at 822 (821-29)].

Appellant was granted service connection in a June 2017 rating decision. [R. at 785 (785-88)]. He filed a notice of disagreement (NOD) about one month later. [R. at 646-54]. In an October 2017 Statement of the Case, the Regional

Office (RO) granted an increase to 50% for his service-connected PTSD. [R. at 154 (138-56)]. The RO issued a decision review officer decision on October 3, 2017, implementing the decision. [R. at 134-37]. Later that month, Appellant appealed this decision to the Board. [R. at 119-20].

On April 9, 2019, the Board issued the decision currently on appeal that denied a rating in excess of 50% for PTSD. [R. at 5 (2-12)]. The Board found, throughout the claim period, Appellant's PTSD has been manifested by, at worst, occupational and social impairment with reduced reliability and productivity; his symptoms did not rise to the level of deficiencies in most areas. [R. at 5 (2-12)].

III. SUMMARY OF THE ARGUMENT

The Board considered the relevant evidence of record and properly applied the statutory and regulatory requirements regarding Appellant's rating for PTSD. The evidence of record supports the Board's findings that Appellant's PTSD resulted, at worst in occupational and social impairment with reduced reliability and productivity; the evidence does not represent symptoms reflective of occupational and social impairment with deficiencies in most areas. [R. at 5 (2-12)]. Appellant has failed to show prejudicial error warranting remand; accordingly, the Board's decision should be affirmed.

IV. ARGUMENT

The general rating formula for mental disorders is outlined in 38 C.F.R. § 4.130, Diagnostic Code 9411. The criteria for a 100% rating require total occupational and social impairment. 38 C.F.R. § 4.130. The criteria for a 70%

rating require occupational and social impairment with deficiencies in most areas. *Id.* The criteria for a 50% rating require occupational and social impairment with reduced reliability and productivity. *Id.* For each rating, the regulation provides a list of symptoms that may be considered. *Id.* The language “*such symptoms as*” within the general rating formula indicate that the symptomology lists are not exhaustive. *Mauerhan v. Principi*, 16 Vet.App. 436, 442 (2002) (symptoms included “are to serve as examples of the type and degree of the symptoms, or their effects, that would justify a particular rating.”) (emphasis added). Hence, the language of the regulation is flexible enough to include additional symptomology.

A determination by the Board as to the proper evaluation of a disability is a factual determination subject to review under the deferential clearly erroneous standard. 38 U.S.C. § 7261(a)(4); *Pierce v. Shinseki*, 18 Vet.App. 440, 443 (2004). 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 v. Derwinski*, 1 Vet.App. 49, 52-53 (1990). 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, 105 S.Ct. 1504 (1985). “Where there are two permissible views of the evidence, the factfinder’s choice between them cannot be clearly erroneous.” *Id.* Additionally, where the Board bases its determination on all of a claimant’s symptomatology, a plausible basis in the record exists for that decision. *Mauerhan*, 16 Vet.App. at 444.

The Board provided adequate reasons or bases for deciding that Appellant did not meet the criteria for a rating higher than 50%

The U.S. Court of Appeals for the Federal Circuit explained that when deciding the appropriate evaluation of a mental health disorder under 38 C.F.R. § 4.130, “symptomatology should be the fact-finder’s primary focus.” *Vazquez-Claudio v. Shinseki*, 713 F.3d 112, 118 (Fed. Cir. 2013). As the Federal Circuit discussed, entitlement to an evaluation requires that the record demonstrate “particular symptoms associated with that percentage, or others of similar severity, frequency, and duration.” *Id.* at 117. If the veteran is shown to experience the particular symptoms listed in the diagnostic criteria or symptoms of the same kind, then the inquiry turns to whether and to what degree those symptoms result in social and occupational impairment. *Id.* at 118. See, e.g., *Reizenstein v. Peake*, 22 Vet.App. 202, 210 (2008). Importantly, “the presence or lack of evidence of a specific sign or symptom listed in the evaluation criteria is not *necessarily* dispositive of any particular disability level.” *Bankhead v. Shulkin*, 29 Vet.App 10, 22 (2017); *Vazquez-Claudio*, 713 F.3d at 117 (The mere presence of symptoms is not enough, rather the symptoms must actually cause occupational and social impairment to warrant the questioned disability rating.).

The Court should reject Appellant’s arguments because the Board adequately addressed the relevant evidence and explained why it did not support a finding of occupational and social impairment with deficiencies in most areas (i.e., a rating in excess of 50%). [R. at 8 (2-11)]. Contrary to Appellant’s argument,

the Board correctly applied the law and did not solely focus on the areas of work, judgment or thinking in its decision. AB at 8 (1-12); [R. at 8-10 (2-11)]. The Board discussed Appellant's ability to establish and maintain effective work and familial relationships, ability to adapt to stressful situations, his "attention, concentration, and memory[.]" his lack of suicidal ideations, hallucinations, or obsessional rituals, and his grooming, behavior, and mood – to include his anger and irritability. [R. at 8-9 (2-11)]. The Board also acknowledged Appellant's descriptions of depression and isolation and considered his lay assertions but found the VA examiner's discussion of the impact of his symptoms on his functional impairment more probative. [R. at 9-10 (2-11)].

In his brief, Appellant argues that the Board failed to consider whether his anger and irritability could have been contemplated by the impaired impulse control symptom listed within the 70% rating criteria. AB at 9-10 (1-12). However, the Board did discuss Appellant's irritability and anger. [R. at 8-9 (2-11)]. The Board found that although he experiences anger and irritability and his anger affects his relationship with one of his daughters, his mood did not cause him to experience deficiencies in the areas of work, judgment or thinking. [R. at 9 (2-11)]. Thus, his symptoms more closely approximated the 50% rating, which accounts for significant occupational impairment as a result of PTSD. [R. at 9 (2-11)]; 38 C.F.R. § 4.130. Appellant's argument essentially considers the evidence anew and engages in a renewed weighing of the evidence when he references Appellant's anger, irritability, reasons for retirement, part-time employment, and familial

relationships. AB at 9 (1-12). But the Court has consistently instructed against this type of inappropriate action. *Atencio v. O'Rourke*, 30 Vet.App. 74, 89 (2018) (citing *Madden v. Gober*, 125 F.3d 1477, 1481 (Fed. Cir. 1997) ("it is the 'duty [of] the Board to analyze the credibility and probative value of evidence' sua sponte, when making its factual findings"); *Owens*, 7 Vet.App. 429, 433 (1995); see *Cline v. Shinseki*, 26 Vet.App. 18, 28 (2012); *Jones v. Derwinski*, 1 Vet.App. 210, 216 (1991); *Gilbert*, 1 Vet.App. at 52.

Ultimately, the Board was not required to match Appellant's symptoms to the examples provided in the rating criteria nor was it required to address the symptoms in the same manner that Appellant suggests. *Mauerhan v. Principi*, 16 Vet.App. at 442; see also *Cline*, 26 Vet.App. at 28. The Board provided more than enough analysis of Appellant's symptoms to show that his disability more closely approximated the 50% rating because his symptoms did not show more severe social or occupational impairment. [R. at 4-11 (2-12)]. Since Appellant has made no case for clear error in the Board's factfinding, the Court should reject his invitation to reweigh the evidence and affirm the Board's decision. *Sanden v. Derwinski*, 2 Vet.App. 97, 101 (1992); *Gilbert*, 1 Vet.App. at 53.

Appellant asserts that the Court should reverse the Board's decision; however, he provides no support for an argument that reversal is appropriate. AB at 5,11 (1-12). Generally, if the Board incorrectly applied the law or failed to provide an adequate statement of reasons or bases, the proper remedy is remand. *Tucker v. West*, 11 Vet.App. 369, 374 (1998) ("Generally, where the Board has

incorrectly applied the law, failed to provide an adequate statement of reasons or bases for its determinations, or where the record is otherwise inadequate, a remand is the appropriate remedy.”) (citing *Johnson v. Brown*, 9 Vet.App. 7, 10 (1996) (reversal is the appropriate remedy when the only permissible view of the evidence is contrary to the Board’s decision)). Here, however, neither remand or reversal is appropriate where the Board considered the relevant evidence and provided an adequate explanation for why a rating in excess of 50% is not warranted. Because Appellant has failed to demonstrate error in the Board’s decision, the Court should affirm. See *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (holding that Appellant bears the burden of demonstrating error on appeal), *aff’d* 232 F.3d 908 (Fed. Cir. 2000).

V. CONCLUSION

In offering this response, the Secretary has limited himself 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 to have adequately raised and properly preserved, but which the Secretary did not address herein, and the Secretary requests the opportunity to address the same if the Court deems it to be necessary. Considering the foregoing, Appellee, Robert L. Wilkie, Secretary of Veterans Affairs, asks the Court to affirm the April 9, 2019, Board decision.

Respectfully submitted,

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