

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

DONNA K. COBURN,

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

CHRISTOPHER W. WALLACE
Deputy Chief Counsel

ABIGAIL J. SCHOPICK
Appellate Attorney
Office of the General Counsel (027G)
U.S. Department of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, D.C. 20420
(202) 632-7132

Attorneys for Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
I. ISSUES PRESENTED	1
II. STATEMENT OF THE CASE	1
A. Jurisdictional Statement	1
B. Nature of the Case	2
C. Statement of Relevant Facts	3
III. SUMMARY OF ARGUMENT	4
IV. ARGUMENT	5
A. THE BOARD HAD NO REASON TO DISCUSS GENDER BIAS AND PROVIDED FULLY ADEQUATE REASONS OR BASES FOR ITS DENIAL OF SERVICE CONNECTION FOR A PSYCHIATRIC DISORDER	5
V. CONCLUSION	10
VI. CERTIFICATE OF SERVICE	11

TABLE OF AUTHORITIES

Cases

<i>Berger v. Brown</i> , 10 Vet.App. 166 (1997)	7
<i>Caluza v. Brown</i> , 7 Vet.App. 498 (1995).....	5
<i>Coker v. Nicholson</i> , 19 Vet.App. 439 (2006)	7, 8
<i>D'Aries v. Peake</i> , 22 Vet.App. 97 (2008)	9
<i>Degmetich v. Brown</i> , 8 Vet.App. 208 (1995).....	10
<i>De Perez v. Derwinski</i> , 2 Vet.App. 85 (1992)	7, 8
<i>Disabled Am. Veterans v. Gober</i> , 234 F.3d 682 (Fed. Cir. 2000)	10
<i>Evans v. West</i> , 12 Vet.App. 22 (1998).....	9
<i>Gilbert v. Derwinski</i> , 1 Vet.App. 49 (1990).....	5, 7, 10
<i>Hilkert v. West</i> , 12 Vet.App. 145 (1999)	7, 9
<i>Mayfield v. Nicholson</i> , 19 Vet.App. 103 (2005)	6, 7
<i>McLendon v. Nicholson</i> , 20 Vet.App. 79 (2006)	9
<i>Newhouse v. Nicholson</i> , 497 F.3d 1298 (Fed. Cir. 2007)	5
<i>Ortiz v. Shinseki</i> , 23 Vet.App. 353 (2010)	7
<i>Overton v. Nicholson</i> , 20 Vet.App. 427 (2006)	7
<i>Shedden v. Principi</i> , 381 F.3d 1163 (Fed. Cir. 2004)	6
<i>Shinseki v. Sanders</i> , 556 U.S. 396 (2009)	8
<i>Sondel v. Brown</i> , 6 Vet.App. 218 (1994)	8
<i>Williams v. Principi</i> , 15 Vet.App. 189 (2001)	10
<i>Woehlaert v. Nicholson</i> , 21 Vet.App. 456 (2007)	9

Statutes

38 U.S.C. § 1110.....	6
38 U.S.C. § 7104(d)(1).....	5
38 U.S.C. § 7252(a)	1
38 U.S.C. § 7252(b).....	2

Regulations

38 C.F.R. § 3.303(a)	6
38 C.F.R. § 3.304(f)	6
38 C.F.R. § 3.304(f)(5)	6

Record Before the Agency

R. at 7-27 (Board decision, June 4, 2019)	2, 4, 9
R. at 28-35 (Board hearing transcript, October 16, 2018)	4, 8
R. at 58 (VSO statement, February 2018)	4
R. at 116-17 (Veteran statement, June 2017)	4, 8
R. at 496-506 (SSOC, March 15, 2017)	4
R. at 1496-1508 (Board decision, July 15, 2016)	4
R. at 1511-12 (VSO statement, April 2016)	4
R. at 1528-40 (SSOC, March 10, 2015)	4
R. at 1647-49 (Medical record)	4
R. at 1783 (Deferred rating decision, January 8, 2015)	4
R. at 1784-85 (VA examination, December 2014)	4
R. at 1810-13 (CAVC docket 14-0710, Motion to Dismiss)	4
R. at 1837-38 (CAVC docket 14-0710, Order)	4
R. at 1839-42 (CAVC docket 14-0710)	4
R. at 2702-03 (DD-214)	3
R. at 3074-3112 (Service records)	3
R. at 3132-47 (Service records)	3
R. at 3151-60 (Service records)	3
R. at 3231-49 (Board decision, February 12, 2014)	4
R. at 3252-82 (Board hearing transcript, August 21, 2013)	4
R. at 3398-3404 (SSOC, May 9, 2013)	3
R. at 3825-26 (Veteran statement, January 2013)	3, 8
R. at 3863-64 (VA examination, September 2012)	3
R. at 4035 (Deferred rating decision, October 9, 2011)	3
R. at 4373-81 (VA examination, April 2011)	3
R. at 4589-90 (Medical record)	3
R. at 4616-17 (Appeal, June 2010)	3
R. at 4632-50 (SOC, May 25, 2010)	3
R. at 4708 (Appeal, October 2009)	3
R. at 4716-30 (Rating decision, November 23, 2009)	3
R. at 4756-62 (VA examination, October 2009)	3
R. at 4905-08 (Medical record)	3
R. at 4966 (Medical record)	3
R. at 5122-23 (Veteran statement, September 2008)	3

R. at 5134-35, 5137-43 (Rating decision, March 6, 2006)	3
R. at 5170-71, 5176-81 (Rating decision, September 20, 2005).....	3
R. at 5205-06, 5211-18 (PTSD information)	3
R. at 5250-54, 5260-68 (Rating decision, March 23, 2005)	3
R. at 5281-85 (VA examination, January 2005).....	3
R. at 5319-21 (Medical record)	3
R. at 5343 (Medical record)	3
R. at 5380 (Service records)	3
R. at 5397 (Service records)	3
R. at 5405-10 (Service records).....	3
R. at 5433 (Service records)	3
R. at 5443-44 (Service records).....	3
R. at 5449 (Service records)	3
R. at 5452 (Service records)	3
R. at 5456 (Service records)	3
R. at 5469 (Medical record)	3
R. at 5494-95 (Medical record).....	3
R. at 5577-96 (Medical record).....	3
R. at 5634-37 (Veteran statement, January 2009)	3

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

DONNA K. COBURN,)	
)	
Appellant,)	
)	
v.)	Vet. App. No. 19-5101
)	
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 of Appeals for Veterans Claims (Court or CAVC) should affirm the June 4, 2019, Board of Veterans' Appeals (Board or BVA) decision denying entitlement to service connection for an acquired psychiatric disorder, to include post-traumatic stress disorder (PTSD) and depression, to include as due to military sexual trauma (MST).

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

The Court has jurisdiction over this appeal pursuant to 38 U.S.C. § 7252(a), which grants the Court exclusive jurisdiction to review final decisions of the Board.

B. Nature of the Case

Donna K. Coburn (Appellant) seeks the Court's review of a June 4, 2019, Board decision denying entitlement to service connection for a psychiatric disorder. [Record Before the Agency (R.) at 7-27]. Appellant requests the Court's review but provides no actual assertions as to error in the Board decision. *See generally* [Appellant's brief (AB) at 1-7].¹ She appears to indicate that the Board should have addressed gender bias, but she provides no explanation as to what bias she believes existed, or why the Board would have addressed it. *See generally* [AB at 1-3]. Additionally, she indicates that the Board's discussion regarding her alleged MST excluded facts and "was highly edited[,] but the Board provided significant discussion regarding her alleged MST, and she fails to indicate what the Board allegedly excluded or edited out. *See generally* [AB at 1-3]. As Appellant fails to establish error in the instant Board decision, the Court should affirm the decision herein on appeal.

¹ Pages 4 to 7 of Appellant's brief consist of a page of references to outside sources that were not before the Board, [AB at 4], Appellant's consent to release her records, [AB at 5], and various copies of newspaper articles, [AB at 6-7]. The Secretary avers that these documents have no bearing on the issue at hand and should be not be considered by the Court. 38 U.S.C. § 7252(b) (the Court is precluded from considering any material that was not contained in the "record of proceedings before the Secretary and the Board.").

C. Statement of Relevant Facts

Appellant served on active duty in the United States Army from April 1969 to June 1975, including service in Vietnam. [R. at 2702-03]. *See, e.g.*, [R. at 3074-3112, 3132-47, 3151-60, 5380, 5397, 5405-10, 5433, 5443-44, 5449, 5452, 5456].

In September 2008, Appellant attempted to reopen a previously denied claim for a psychiatric disorder.² [R. at 5122-23]; *see also* [R. at 5634-37]; [R. at 4966]. VA provided her with a psychiatric examination in October 2009. [R. at 4756-62]. In November 2009, the Regional Office (RO) reopened Appellant's claim, but denied it on the merits. [R. at 4716-30]. Appellant filed a timely notice of disagreement (NOD). [R. at 4708]. In a May 2010 statement of the case (SOC), the RO denied Appellant's claim. [R. at 4632-50]. Appellant timely perfected her appeal. [R. at 4616-17]; *see also* [R. at 4589-90]; [R. at 3825-26]. In April 2011, the RO provided Appellant with another VA examination. [R. at 4373-81]. An addendum opinion was obtained in September 2012. [R. at 3863-64]; *see also* [R. at 4035]. The RO continued the denial in a May 2013 supplemental SOC (SSOC). [R. at 3398-3404].

In August 2013, Appellant testified before a Veterans Law Judge (VLJ). [R.

² Appellant's claim was previously denied in March 2005, [R. at 5250-54, 5260-68], September 2005, [R. at 5170-71, 5176-81], and March 2006, [R. at 5134-35, 5137-43]. *See also* [R. at 5281-85]; [R. at 5205-06, 5211-18]; [R. at 5577-96]; [R. at 5319-21]; [R. at 5469]; [R. at 5494-95]; [R. at 5343]; [R. at 4905-08].

at 3252-82]. In February 2014, the Board confirmed that new and material evidence had been submitted to warrant reopening the claim and remanded the claim on the merits. [R. at 3231-49]; *see also* [R. at 1810-13, 1837-38, 1839-42]. On remand, the RO obtained an additional addendum opinion in December 2014. [R. at 1784-85]; *see also* [R. at 1783]; [R. at 1647-49]. The denial was continued in a March 2015 SSOC. [R. at 1528-40]; *see also* [R. at 1511-12]. In July 2016, the Board again remanded Appellant's claim. [R. at 1496-1508]. In March 2017, the Appeals Resource Center (ARC) continued to deny Appellant's claim. [R. at 496-506]. Appellant testified before another VLJ in October 2018. [R. at 28-35]; *see also* [R. at 58]; [R. at 116-17].

On June 4, 2019, the Board issued a decision denying entitlement to service connection for a psychiatric disorder. [R. at 7-27]. This appeal ensued.

III. SUMMARY OF ARGUMENT

In her informal brief, Appellant seemingly asserts that the Board erred because it did not address gender bias. There is no indication, however, either in the record or in Appellant's brief, as to why the Board would have provided such a discussion, or what gender bias Appellant is alluding to. Additionally, to the extent Appellant also avers that the Board edited or omitted facts regarding her

alleged MST, again, she has failed to provide any indication as to what was allegedly missing in the Board's extensive discussion. As Appellant has failed to establish error in the Board's decision, this Court should affirm the Board decision herein on appeal.

IV. ARGUMENT

A. THE BOARD HAD NO REASON TO DISCUSS GENDER BIAS AND PROVIDED FULLY ADEQUATE REASONS OR BASES FOR ITS DENIAL OF SERVICE CONNECTION FOR A PSYCHIATRIC DISORDER

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 v. Nicholson*, 19 Vet.App. 103, 129 (2005) (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), *rev'd on other grounds*, 444 F.3d 1328 (2006).

To warrant a grant of service connection, a claimant must generally prove the existence of a current disability, the in-service incurrence or aggravation of a disease or injury, and a causal relationship between the current disability and the disease or injury incurred or aggravated in service. *Shedden v. Principi*, 381 F.3d 1163, 1166-67 (Fed. Cir. 2004); *see also* 38 U.S.C. § 1110; 38 C.F.R. § 3.303(a). Establishing service connection for PTSD generally requires evidence of a current diagnosis of PTSD, credible supporting evidence that a claimed in-service stressor actually occurred, and medical evidence of a causal nexus between the claimed in-service stressor and current PTSD symptomatology. 38 C.F.R. § 3.304(f). If the claimed in-service stressor is a personal assault, such as MST, credible evidence that might corroborate the alleged incident, such as service personnel records (SPR), statements from friends or family, or medical evidence may be considered. 38 C.F.R. § 3.304(f)(5). 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). Questions of law are reviewed de novo without deference to the Board's conclusions. *Ortiz v. Shinseki*, 23 Vet.App. 353, 356 (2010) (the Court reviews questions of law under the de novo standard).

Briefs submitted by *pro se* litigants are liberally construed, but *pro se* litigants still must provide assertions of error for the Secretary or the Court to adequately respond. *De Perez v. Derwinski*, 2 Vet.App. 85, 86 (1992); *see also Coker v. Nicholson*, 19 Vet.App. 439, 442 (2006). An appellant, whether *pro se* or represented, carries the burden of presenting coherent arguments and of providing adequate support for those arguments. *See Mayfield*, 19 Vet.App. at 111 (noting that "every appellant must carry the general burden of persuasion regarding contentions of error"); *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).

In her brief, Appellant appears to want this Court to issue a decision on the issue of gender bias. [AB at 1-3]. She does not, however, provide any actual explanation as to what the gender bias she is alleging is, nor does she provide any discussion as to why the Board should have considered it. Although *pro se* briefs are liberally construed, without any explanation regarding the alleged error, the Secretary cannot assume what Appellant means, and therefore, cannot adequately respond. *De Perez*, 2 Vet.App. at 86; *Coker*, 19 Vet.App. at 442 (“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”).

Appellant has never raised the issue of bias, nor does she appear to be asserting that the VLJ was biased. *See, e.g.*, [R. at 28-35, 116, 3825-26]. She simply appears to be asserting that the Board should have addressed the issue of gender bias. As that issue was not reasonably raised by the record or explicitly raised by Appellant, however, the Board had no obligation to provide any discussion on that point. *See Sondel v. Brown*, 6 Vet.App. 218, 220 (1994) (when issue is not reasonably

raised, Board is not required to “conduct an exercise in prognostication”).

Appellant also appears to aver that the Board decision omitted facts and that the information provided regarding PTSD and MST “was highly edited.” [AB at 1]. Appellant, however, provides no explanation as to what facts or other information was allegedly omitted from the Board’s decision. *Hilkert*, 12 Vet.App. at 151; *see also Woehlaert v. Nicholson*, 21 Vet.App. 456, 463 (2007) (rejecting the appellant’s argument because it was underdeveloped). In this matter, the Board issued a lengthy decision. [R. at 7-27]. The decision includes numerous discussions by the Board regarding Appellant’s assertions of MST, statements and diagnoses from her treating providers, and the opinions of VA examiners. [R. at 9-24]. It is unclear, and Appellant fails to address, what is allegedly missing from this discussion. *Evans v. West*, 12 Vet.App. 22, 31 (1998) (the Court will not consider a “vague assertion” or an “unsupported contention” of error).

Moreover, Appellant fails to acknowledge the Board’s finding that her testimony was not credible. [R. at 19-23]; *see D’Aries v. 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); *McLendon v. Nicholson*, 20 Vet.App. 79, 84 (2006) (the Board may dismiss competent layperson testimony if it is found to be mistaken or to

otherwise lack credibility). The Board's assignment of probative weight to the evidence, to include its specific credibility determinations, may not be disturbed unless clearly erroneous. *See Gilbert*, 1 Vet.App. at 52.

As Appellant has failed to establish that there was any error in the Board's decision, the Court should affirm the decision herein on appeal.

Because Appellant has limited her allegations of error to those noted above, Appellant has abandoned any other arguments, and therefore, it would be unnecessary for this Court to consider any other error not specifically raised. *See Disabled Am. Veterans v. Gober*, 234 F.3d 682, 688 n.3 (Fed. Cir. 2000); *Degmetich v. Brown*, 8 Vet.App. 208, 209 (1995); *Williams v. Principi*, 15 Vet.App. 189, 199 (2001) ("ordinarily the Court will not review issues that are not raised to it.").

V. CONCLUSION

Based upon the foregoing, the Secretary respectfully submits that the Court should affirm, the June 4, 2019, decision of the Board.

Respectfully submitted,

WILLIAM A. HUDSON, JR.
Acting General Counsel

MARY ANN FLYNN
Chief Counsel

/s/ Christopher W. Wallace
CHRISTOPHER W. WALLACE
Deputy Chief Counsel

/s/ Abigail J. Schopick
ABIGAIL J. SCHOPICK
Appellate Attorney
Office of the General Counsel (027G)
U.S. Department of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, D.C. 20420
(202) 632-7132

Dated: February 27, 2020

VI. CERTIFICATE OF SERVICE

On the 27th day of February 2020, a copy of the foregoing was mailed, postage prepaid, to:

Donna K. Coburn
PO Box 309
Albertyon, MT 59820-0309

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

/s/ Abigail J. Schopick
ABIGAIL J. SCHOPICK
Counsel for Appellee