Vet.App. No. 19-2247

IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

SIDNEY F. MEDFORD
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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I. ISSUE PRESENTED

Whether the Court should affirm the Board of Veterans' Appeals' (Board) December 10, 2018, decision which denied entitlement to an evaluation in excess of 30% from January 20, 2010, to May 27, 2015, for posttraumatic stress disorder (PTSD), where the Board's findings are plausibly based the evidence of record, Department of Veterans Affairs (VA) statutes, current regulations, and case law, as well as an adequate statement of reasons or bases.

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

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

B. Nature of the Case

On December 10, 2018, the Board issued the decision on appeal, denying Mr. Sidney F. Medford (Appellant) entitlement to an evaluation in excess of 30% from January 20, 2010, to May 27, 2015, for PTSD. [Record Before the Agency (R.) at 1-17].

C. Statement of Facts and Procedural History

Appellant served in the United States Army from October 7, 1967, to October 7, 1970. [R. at 2389]. His service awards include a Purple Heart and a Bronze Star Medal with Valor. *Id*. In a November 6, 2006, decision, the Regional Office (RO), granted service connection for PTSD at a 10% evaluation. [R. at 3453-57]. Appellant did not appeal this decision and it became final.

Four years later, Appellant sought an increased evaluation for his PTSD, reporting that his condition had become worse. [R. at 3214-18 (January 20, 2010, Application)]. In a June 13, 2012, VA examination, Appellant reported that he had been married to his fifth wife for four years and that he continued to work part-time as a real estate agent. [R. at 2597 (2595-2601)].[1] He stated that his wife had encouraged him to "seek help [with his PTSD] because of his difficulty sleeping, nightmares, anxiety, and irritability." [R. at 2598]. The examiner found that Appellant expressed symptoms of a depressed mood, anxiety, suspiciousness,

1. Appellant cites to two separate places in the record for the June 2012 VA examination. [R. at 2595-2601] and [R. at 397-406]. The Secretary will cite to the former for consistency.

chronic sleep impairment, and disturbances in motivation and that his PTSD caused occupational and social impairment with occasional decrease in work efficiency. [R. at 2597, 2600-01].

On July 17, 2012, the RO granted a 30% evaluation from January 20, 2010, for PTSD. [R. at 2587-92]. Appellant timely filed a notice of disagreement, the RO provided the statement of the case, and Appellant timely submitted his substantive appeal. [R. at 2557-69 (July 31, 2012, Notice of Disagreement); 2488-2511 (December 26, 2012, Statement of the Case); 2469-78 (January 3, 2013, Substantive Appeal)]. On April 22, 2015, the Board remanded Appellant's claim for a new examination. [R. at 1856 (1843-61)].[2]

Relevant to the procedural development of Appellant's claim on appeal, but outside the window of the period on appeal for his 30% evaluation, Appellant obtained a new examination on May 27, 2015. [R. at 1774-83]. On February 22, 2016, Appellant submitted correspondence that detailed his symptoms of his PTSD. [R. at 1689-93]. On April 11, 2016, the Board remanded Appellant's PTSD claim a second time. [R. at 1681-86]. The RO subsequently granted a 50% evaluation for PTSD effective May 27, 2015, [R. at 1437-39], and issued a supplemental statement of the case on September 15, 2016, [R. at 1399-1418].

2. Appellant cites to [R. at 1825-40] for the April 2015 Board Remand, but those citations do not contain the date of the Board Remand. The Secretary cites to [R. at 1843-61] for the same Board Remand, complete with the date the Board Remand was issued.

The Board issued a decision on May 4, 2017. [R. at 211-32]. In a memorandum decision, the Court found that remand was necessary for the issue of an evaluation in excess of 30% from January 20, 2010, to May 27, 2015, for PTSD "because the Board failed to discuss or provide adequate reasons or bases for rejecting potentially favorable evidence from, at least, appellant's June 2012 VA examination." [R. at 174 (172-79) (May 22, 2018, Memorandum Decision)]. The Court noted that "in a confusing brief," Appellant had pointed out that the Board had failed to discuss the June 2012 examiner's finding that he could only work part-time. *Id*. The Court affirmed the Board's decision that denied entitlement to an effective date before January 20, 2010, for a 30% evaluation for PTSD. [R. at 172].

On December 10, 2018, the Board denied an evaluation in excess of 30% from January 20, 2010, to May 27, 2015, for PTSD. [R. at 1-17]. The Board noted that the June 2012 examiner found that Appellant continued to work part-time and that "the Veteran did not exhibit markedly diminished interest or participation in significant activities. Rather, the Veteran reported that he continued to perform activities as he was physically able but did notice that he had less patience with is clients than before." [R. at 10]. Appellant timely appealed the Board's decision on April 3, 2019.

III. SUMMARY OF THE ARGUMENT

The Court should affirm the Board's December 10, 2018, decision because the Board considered all favorable evidence of record and provided adequate

reasons or bases in denying an evaluation in excess of 30% from January 20, 2010, to May 27, 2015, for PTSD. On appeal, Appellant offers the same arguments that he presented to the Court in his previous appeal; the Board failed to consider all potentially favorable evidence. As the Board discussed all favorable evidence, Appellant merely disagrees with how the Board weighed the evidence and the Court should affirm the Board's decision.

IV. ARGUMENT

The Board Considered All Favorable Evidence and Provided Adequate Reasons or Bases

Appellant argues that the Board failed to discuss, or alternatively failed to weigh properly, three specific symptoms related to his PTSD: irritability, suicidal ideation, and occupational impairment. Appellant's Brief (App. Br.) at 6-12. Appellant's characterization of these symptoms, however, are either incorrect or based on evidence outside the applicable appeal period. As the Board considered all favorable evidence for the period from January 20, 2010, to May 27, 2015, his arguments are not persuasive.

First, Appellant states that "while the Board did correct its previous failure to discuss some of the evidence within the June 2012 VA examination… the Board failed to note Appellant's irriability." App. Br. at 7. Plainly, the Board noted that Appellant had disturbances in motivation and mood, [R. at 10], symptoms of hyperviglance and suspiciousness, *Id*., and had been "quick to anger," which is the exact phrase used in the 2012 examination. [R. at 8; 1780]. Based on a review of

these symptoms, the Board found that Appellant presented symptoms that were associated with 30%, 50%, and even 100% evaluations, but that the severity, frequency, and duration of these sypmtoms, including his disturbances in mood, more approximated the 30% criteria. [R. at 12]. It is clear that the Board considered the favorable evidence related to Appellant's irritability. *See Caluza v. Brown*, 7 Vet.App. 498, 510-11 (1995), ***aff'd per curiam***, 78 F. 3d 604 (Fed. Cir. 1996).

Even more broadly, Appellant's argument is not persuasive because the Board is under no obligation to explicitly lay out every piece of evidence in the record, specifically recount each and every instance of irritability shown in the record, or use the word "irritability" instead of "anger" or other similar words. *Gonzales v. West*, 218 F.3d 1378, 1380-81 (Fed. Cir. 2000). Appellant's argument that the Board erred in failing to discuss the irritability reported by his wife is not persuasive. *Id*. The Board's statement of reasons or bases must simply be sufficient to enable the claimant to understand the basis of its decision and to permit judicial review of the same. *Gilbert v. Derwinski,* 1 Vet.App. 49, 57 (1990). It's clear that the Board considered the frequency, severity, and duration of his mood symptoms and found that they most closely approximated a 30% evaluation, to include that his anger did not rise to the level to warrant an increased evaluation. [R. at 12].

Appellant posits that his irritability is "contemplated in the 70% criteria under the General Rating Formula for Mental Disorder" because it demonstrated

"impaired impulse control (such as unprovoked irritability with periods of violence)." App. Br. at 8 (empahsis in original). But the Board specifically ruled this out, finding that Appellant did not show symptoms of impaired impulse control such as unprovoked irritability with periods of violence. [R. at 14]. Appellant fails to demonstrate that the Board's finding is not plausible based on the record. *Gilbert*, 1 Vet.App. at 52. Both the June 2012 and May 2015 examiners found that Appellant did *not* experience unprovoked irritability with periods of violence. [R. at 1782; 2601]. There is nothing in the evidence nor does Appellant point to any evidence that would support Appellant's bald contention that his irritability was akin to *unprovoked* irritability *with periods of violence*.

Even Appellant's reliance on evidence outside the appeal period does not support his argument. App. Br. at 9. He cites to February 2016 correspondence, submitted outside the appeal period, which shows that he reported that he had not hit anyone, but was simply told that he had a "short fuse." [R. at 1690]. Appellant also cites to the September 2006 VA examination, again outside the appeal period, to argue that he had unprovoked irritability with periods of violence. App. Br. at 9. But the September 2006 examiner only found that "he is irritable." [R. at 3461]. There is nothing in the September 2006 examination or February 2016 correspondence that would show that he had impaired impulse control, *unprovoked* irritability, or periods of violence. [R. at 3458-62]. Even if Appellant had found notations of violence in this 2006 VA examination or in the 2016 correspondence, this evidence is outside the applicable appeal period, and has no

bearing on his appropriate evaluation for the period on appeal. *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (appellant bears the burden of demonstrating error); *see Valiao v. Principi,* 17 Vet.App. 229, 232 (2003) (holding that an error is nonprejudicial "where the facts averred by a claimant cannot conceivably result in any disposition of the appeal other than affirmance of the Board decision").

Without any support to contest the Board's plausible findings, his argument is merely a request for the Court to reweigh the evidence the Board already considered and found warranting a 30% evaluation. *See Deloach v. Shinseki*, 704 F.3d 1370, 1380 (Fed. Cir. 2013); *Washington v. Nicholson*, 19 Vet.App. 362, 368 (2005) (holding it to be the responsibility of the Board to assess the probative weight of the evidence); *Owens v. Brown,* 7 Vet.App. 429, 433 (1995). ("It is the responsibility of the BVA, not this Court, to assess the credibility and weight to be given to evidence"). His arguments regarding irritability are not persuasive.

Second, Appellant argues that evidence demonstrates that he had suicidal ideation that the Board failed to discuss. Again, his citation is to evidence not in the appeal period; but even further, this evidence fails to show any suicidal ideation during the appeal period. In the February 22, 2016, correspondence, Appellant reported that he experienced some suicidal thoughts "in the 70's, but my son cured those thoughts…. Suicide is not an option!" [R. at 1691]. This correspondence was sent after the period on appeal and described his sypmtoms in the 1970's, forty years before the period on appeal. In other words, there is nothing in this evidence, submitted after the current appeal period, that would have any bearing

on the severity of his symptoms for the current appeal period. The Board was under no obligation to specifically discuss this irrelevant evidence. *Dela Cruz v. Principi*, 15 Vet.App. 143, 149 (2001) (finding the Board is only required to discuss the relevant evidence).

Third, Appellant argues that the Board was clearly erroneous in finding that there was "no indication that he reduced his working hours due to his service-connected PTSD." [R. at 12]. But Appellant fails to idenitfy any prejudicial error in the Board's decision, because ultimately "resolving doubt in favor of the Veteran, the Board finds that [his reduction in work hours was] at least partially due to his PTSD symptoms, especially as the [May 2015] examiner opined that the Veteran 'would likely have a considerably harder time functioning in a traditional civilian work setting.'" [R. at 13]. Based on this finding and a review of symptoms, the Board still found that a 30% evaluation was warranted. [R. at 13-14]. It seems that Appellant was aware of the Board's finding, but presents no argument for how this finding was in error. App. Br. at 11.

In other words, the Board made a finding as Appellant argues it should have: that his reduction in work to part-time was at least partially due to his PTSD, and not just his advancing age. [R. at 2596 (noting that Appellant was reducing work hours and approaching retirement)]. Therefore, Appellant has not demonstrated any prejudicial error or persuasive argument for remand. *See Lamb v. Peake*, 22 Vet.App. 227, 235 (2008) (holding that there is no prejudicial error when a remand for a decision on the merits would serve no useful purpose); *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); *Soyini v. Derwinski*, 1 Vet.App. 540, 546 (1991) (concluding that where evidence is overwhelmingly against a claim, remand for reasons or bases deficiency would result in unnecessary additional burdens on the Board and VA with no benefit to the veteran). Appellant's arguments again appear to either be based on a failure to read the Board's decision or a mere disagreement with the conclusions reached by the Board, which cannot constitute error warranting remand.

V. CONCLUSION

WHEREFORE, in light of the foregoing, the Court should affirm the December 10, 2018, Board decision.

Respectfully submitted,

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