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

No. 18-5538

STEVEN P. KIVARI, APPELLANT,

V.

ROBERT L. WILKIE,  
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before BARTLEY, *Chief Judge*.

**MEMORANDUM DECISION**

*Note: Pursuant to U.S. Vet. App. R. 30(a),  
this action may not be cited as precedent.*

BARTLEY, *Chief Judge*: Self-represented veteran Steven P. Kivari appeals a June 11, 2018, Board of Veterans' Appeals (Board) decision that denied entitlement to special monthly compensation (SMC). Record (R.) at 4-11.<sup>1</sup> For the reasons that follow, the Court will affirm the June 2018 Board decision.

**I. FACTS**

Mr. Kivari served on active duty in the U.S. Army from May 1970 to May 1972. R. at 207.

In a January 2010 rating decision, a VA regional office (RO) granted Mr. Kivari an increased 50% evaluation for his service-connected psychiatric condition and revised the assigned diagnosis. R. at 689-92. In his January 2011 Notice of Disagreement, Mr. Kivari asserted that the stigma of his misdiagnosis had "prevented [him] from being employed commensurate with [his] education," R. at 649, and requested compensatory damages "equivalent to what [he] might have made and [been] making had [he] not been attacked and maligned as [he has] by both the military

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<sup>1</sup> In the same decision, the Board granted entitlement to a total disability based on individual unemployability (TDIU). R. at 5-9. Because that determination is favorable to the veteran, the Court will not disturb it. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007) ("The Court is not permitted to reverse findings of fact favorable to a claimant made by the Board pursuant to its statutory authority.").

and VA," R. at 651. After additional development not at issue here, in a December 2017 decision the Board granted an increased 70% evaluation for Mr. Kivari's service-connected psychiatric condition and remanded for further development entitlement to TDIU, as raised by the record and part and parcel of Mr. Kivari's increased evaluation claim. R. at 183-93.

In the June 2018 decision on appeal, the Board granted entitlement to TDIU. R. at 5-9. The Board also noted that, although Mr. Kivari "did not file a claim for SMC . . . the Board properly has jurisdiction to consider entitlement to SMC" without the need for a separate claim. R. at 5 (citing *Bradley v. Peake*, 22 Vet.App. 280, 294 (2008)). As regards SMC, the Board noted that TDIU may satisfy the statutory requirement that a veteran have at least one disability evaluated at 100%. R. at 10. However, because Mr. Kivari did not have a second disability independently evaluated at 60% or more, and because there was no evidence that he was bedridden, housebound, or in need of regular attendance because of his service-connected condition, he was not entitled to SMC. R. at 10-11. This appeal followed.

## **II. JURISDICTION AND STANDARD OF REVIEW**

Mr. Kivari's appeal is timely, and the Court has jurisdiction to review the June 2018 Board decision pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990).

The Board's determination regarding whether a veteran is entitled to SMC is a finding of fact subject to the "clearly erroneous" standard of review. 38 U.S.C. § 7261(a)(4); *see Breniser v. Shinseki*, 25 Vet.App. 64, 68 (2011); *D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008); *Prejean v. West*, 13 Vet.App. 444, 447 (2000). "A factual finding 'is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Hersey v. Derwinski*, 2 Vet.App. 91, 94 (1992) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)); *see Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990).

The Board must support its material determinations of fact and law with adequate reasons or bases. 38 U.S.C. § 7104(d)(1); *Pederson v. McDonald*, 27 Vet.App. 276, 286 (2015); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Gilbert*, 1 Vet.App. at 56-57 (1990). To comply with this requirement, the Board must analyze the credibility and probative value of evidence, account for evidence it finds persuasive or unpersuasive, and provide reasons for its rejection of material

evidence favorable to the claimant. *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table).

### III. ANALYSIS

Even liberally construed, *see De Perez v. Derwinski*, 2 Vet.App. 85, 86 (1992), Mr. Kivari's informal brief does not argue that the Board erred in denying entitlement to SMC, *see* Appellant's Informal Brief (Br). at 10 (questioning why the Board raised the issue of entitlement to SMC); *see also Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (appellant bears the burden of demonstrating error on appeal), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000) (table), nor does the Court discern any error in that regard. Accordingly, the Court deems that matter abandoned and will dismiss Mr. Kivari's appeal as to that issue. *See Pederson*, 27 Vet.App. at 281-85; *Cacciola v. Gibson*, 27 Vet.App. 45, 48 (2014).

To the extent that Mr. Kivari raises additional arguments in his informal brief, he has not demonstrated that they are within the Court's jurisdiction, *see Bethea v. Derwinski*, 2 Vet.App. 252, 255 (1992) (the burden of establishing jurisdiction rests with the appellant), because his arguments concern matters not addressed in the June 2018 Board decision on appeal. This Court's jurisdiction derives exclusively from statutory grants and is limited to appeals from final decisions of the Board. *See* 38 U.S.C. § 7252; *Breeden v. Principi*, 17 Vet.App. 475, 477 (2004). When the Board has not rendered a decision on a particular issue, the Court generally has no jurisdiction under section 7252(a) to consider the matter. *See Evans v. Shinseki*, 25 Vet.App. 7, 10 (2011); *see also Ledford v. West*, 136 F.3d 776, 779 (Fed. Cir. 1998) (holding that "the court's jurisdiction is premised on and defined by the Board's decision concerning the matter being appealed"). Consequently, the Court holds that these arguments are not properly before the Court at this time.

Moreover, to the extent that he asks the Court to direct that VA alter its approach to treating and compensating victims of military sexual trauma, including providing "damage awards" instead of disability compensation based on psychiatric impairment, Appellant's Informal Br. at 17, absent specific exceptions not at issue here, this Court is precluded from reviewing the content of the rating schedule. *See Wingard v. McDonald*, 799 F.3d 1354, 1356-57 (Fed. Cir. 2015); *Wanner v. Principi*, 370 F.3d 1124, 1129 (Fed. Cir. 2004).

In his informal brief, Mr. Kivari also raises arguments related to the Court's June 12, 2019, order denying his request for an additional extension of time to file his informal brief. Appellant's

Informal Br. at 11. To the extent that he disagrees with the Court's order denying his extension request, that argument is moot as his informal brief was filed on August 11, 2019. Consequently, the Court holds that such argument is not relevant to the matter on appeal and declines to consider it further.

Ultimately, the only matters addressed in the June 2018 Board decision on appeal were entitlement to TDIU, which the Board granted, and entitlement to SMC, which the Board denied. R. at 4-11. Because Mr. Kivari raises no argument with respect to the unfavorable portion of the June 2018 Board decision, and because the Court discerns no error in that regard, the Board's decision will be affirmed.

As a final matter, also before the Court is Mr. Kivari's January 29, 2020, motion to redact from public view the contents of the record before the agency. Because neither the record before the agency nor the record of proceedings are included in the public docket, and thus are not open to public view, the Court will deny as moot Mr. Kivari's motion to redact the record.

#### **IV. CONCLUSION**

Upon consideration of the foregoing, Mr. Kivari's January 29, 2020, motion to redact the record is denied as moot. In addition, the June 11, 2018, Board decision is **AFFIRMED**.

DATED: April 29, 2020

Copies to:

Steven P. Kivari

VA General Counsel (027)