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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-3124

ALLEN J. COOPER, APPELLANT,

V.

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

Before ALLEN, *Judge*.

MEMORANDUM DECISION

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

ALLEN, *Judge*: Appellant Allen J. Cooper served the Nation honorably in the U.S. Air Force from September 1994 to September 1998.¹ In the March 13, 2019, decision on appeal, the Board denied (1) a disability rating higher than 50% for appellant's service-connected dysthymia and (2) entitlement to a total disability rating based on individual unemployability (TDIU). Appellant contends that the Board's decision was erroneous because it was unsupported by an adequate statement of reasons or bases and because VA undertook to provide a medical examination, but failed to ensure the examination's adequacy. As we explain, we disagree, so we will affirm.

I. ANALYSIS

The Board must include, in each decision, "a written statement of reasons or bases for its findings and conclusions on all material issues of fact and law."² "To comply with this requirement, the Board must analyze the credibility and probative value of the evidence, account for the evidence that it finds persuasive or unpersuasive, and provide the reasons for its rejection

¹ Record (R.) at 4, 733.

² 38 U.S.C. § 7104(d)(1); *Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1991).

of any material evidence favorable to the claimant."³ The degree of disability assessed is a finding of fact that we review for clear error.⁴ We may overturn the Board's factual findings only if there is no plausible basis in the record for the Board's decision and the Court is "left with the definite and firm conviction that" the Board's decision was in error.⁵

A. Dysthymia

Appellant first contends that the Board's dysthymia rating decision was unsupported by an adequate statement of reasons or bases because the Board failed to consider favorable evidence, which led the Board to award a lower disability rating than was warranted. We find appellant's argument unpersuasive. Appellant does not argue that the Board failed to consider various symptoms in assessing the 50% disability rating. Rather, appellant argues that it was error for the Board not to *cite* to specific pieces of evidence in the record. But the Board is under no obligation to cite to specific pieces of evidence, as long as it considers the information contained in those evidentiary records.⁶ Moreover, the Board explicitly attributed many of the symptoms contained in the allegedly overlooked records to appellant's dysthymia.⁷ It would appear, then, that the Board did not, in fact, overlook evidence as appellant contends.

Appellant also seems to argue that the Board attributed certain symptoms to nonservice-connected conditions instead of to appellant's dysthymia, without providing its reasons or bases for doing so.⁸ To the extent this is appellant's argument, we reject it. For each symptom that the Board attributed to a condition other than appellant's dysthymia, the Board explained why it did so.⁹ Further, where symptoms were attributable to multiple conditions, including dysthymia, the Board considered those conditions to be the product of appellant's dysthymia.¹⁰ Thus, the Board's findings in this regard were supported by an adequate statement of reasons or bases, and where the

³ *Kay v. Principi*, 16 Vet.App. 529, 532 (2002).

⁴ *Johnston v. Brown*, 10 Vet.App. 80, 84 (1997).

⁵ *See Gilbert*, 1 Vet.App. at 52.

⁶ *Newhouse v. Nicholson*, 497 F.3d 1298, 1302 (2007).

⁷ Specifically, the Board attributed appellant's chronic sleep impairment, disturbances of motivation and mood, difficulty in establishing and maintaining effective work and social relationships, and difficulty in adapting to stressful circumstances to his dysthymia in assigning a disability rating. R. at 11.

⁸ Appellant's Brief (Br.) at 12-13.

⁹ *See* R. at 10-13.

¹⁰ *Id.*

Board could not differentiate which symptoms were associated with which condition, the Board properly gave appellant the benefit of the doubt.¹¹

Finally, appellant asserts, in a conclusory fashion, that the Board erroneously weighed the evidence in assigning a disability rating, but appellant has not substantiated that argument by explaining why he is correct. We see no clear error in the Board's weighing of the evidence, and because appellant has not substantiated this argument, we will not consider it further.¹² In sum, the Board did not fail to consider favorable evidence, and we see no indication that the Board's assignment of a 50% disability rating for appellant's dysthymia was clearly erroneous. Thus, we affirm the Board's denial of a rating greater than 50% for appellant's dysthymia.

B. TDIU

Similarly, appellant's argument in favor of TDIU hinges on the idea that the Board improperly attributed certain deficiencies to appellant's nonservice-connected conditions.¹³ Appellant reasons that, had the Board properly attributed these deficiencies to appellant's dysthymia, the Board may have found an award of TDIU appropriate. We have already rejected this argument. The Board provided an adequate statement of reasons or bases for its attribution of various symptoms to appellant's various ailments, and we see no clear error in the Board's weighing of the evidence.

Appellant goes on to argue that the Board failed to consider the effects of appellant's service-connected right ankle condition and painful right ankle scar on his ability to secure and maintain employment.¹⁴ Specifically, appellant now contends that he experiences difficulties with prolonged walking or standing, which affects his ability to perform sedentary work.¹⁵ In support, appellant argues that he is unable to perform "sedentary work," as such work is defined by the *Dictionary of Occupational Titles*. Appellant's argument, in essence, is that because his ability to perform "sedentary work," as defined by the *Dictionary of Occupational Titles*, could be questioned, the Board should have discussed whether he could perform such work.¹⁶ But the Board

¹¹ See *Mittleider v. West*, 11 Vet.App. 181, 182 (1998).

¹² *Pederson v. McDonald*, 27 Vet.App. 276, 281 (2015).

¹³ Appellant's Br. at 14-15.

¹⁴ *Id.* at 18-19.

¹⁵ *Id.*

¹⁶ *Id.*

is not bound by the *Dictionary of Occupational Titles*,¹⁷ and in this case, there is no reason why the Board should have considered non-binding authority that appellant apparently did not raise before the Board.¹⁸ Indeed, "the concept 'sedentary work' . . . is not *necessarily* part of a proper TDIU analysis."¹⁹ Appellant has offered no reason why the concept of "sedentary work" was a necessary component of his claim for TDIU, and we find none. And unlike the situation we confronted in *Withers*,²⁰ the Board here did not discuss the claimant's ability to do sedentary work without defining that term. In other words, the Board here did not introduce the concept into the decision. Appellant seems to be arguing that the Board should have done so, but without any basis for that argument. We therefore reject appellant's argument that remand is required for the Board to reassess whether a TDIU award is appropriate.

C. Medical Examination

Appellant's final argument is that VA erroneously failed to ensure that the medical examinations it afforded appellant were adequate by not ordering that they take place during the winter months, when he contends that his dysthymia symptoms would have been expected to be at their worst.²¹ Additionally, appellant asserts that the Board was obligated to explain why it was unnecessary to order that an exam take place during the winter months, and that the Board erred by failing to provide such an explanation.²² Appellant did not, however, raise his argument as to the timing of the exam before the Board.

The basis for appellant's argument is a notation included in the notes of a September 2016 VA examination recounting the veteran's statement to the examiner that "he gets more depressed in the winter months."²³ Appellant argues that this statement is new evidence that triggered VA's duty to assist and that VA should have scheduled a subsequent examination to occur during the

¹⁷ *Withers v. Wilkie*, 30 Vet.App. 139, 148-49 (2018) (declining to adopt the *Dictionary of Occupational Titles*'s definition of "sedentary work").

¹⁸ The Board noted twice in its decision that appellant did not present argument on the effect that his service-connected ankle conditions have on his ability to work. R. at 16, 19. Appellant does not assert that the Board was mistaken as to this point, and the record does not indicate that appellant presented argument on this issue.

¹⁹ *Withers*, 30 Vet.App. at 148 (emphasis in original).

²⁰ *Id.* at 144.

²¹ Appellant's Br. at 19-22.

²² *Id.* at 22.

²³ R. at 882.

winter months.²⁴ Notably absent from the record, however, is any indication that appellant made this argument before the Board. We will therefore exercise our discretion to decline to entertain this argument for the first time on appeal.²⁵

But we note that even if we were to entertain this argument, we would have trouble adopting appellant's position because a VA psychiatric exam *was* conducted during the winter months, specifically in January 2013.²⁶ Appellant has not alleged any deficiencies with that exam, and we see no reason why the January 2013 exam would not have accurately captured appellant's symptoms, to the extent they may have been more severe during the winter months. Thus, we reject appellant's argument as to the timing of the exam.

II. CONCLUSION

After consideration of the parties' briefs, the governing law, and the record, the Court AFFIRMS the March 13, 2019, Board decision that denied a rating greater than 50% for appellant's service-connected dysthymia and TDIU.

DATED:

Copies to:

Nicholas L. Phinney, Esq.

VA General Counsel (027)

²⁴ Appellant's Br. at 19-22; Appellant's Reply Br. at 7.

²⁵ See *Maggitt v. West*, 202 F.3d 1370, 1378 (Fed Cir. 2000).

²⁶ See R. at 1193-1202.