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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 18-7385

ALBERT JENKINS, 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 Albert Jenkins served the Nation honorably in the United States Army. He appeals a November 28, 2018, Board decision that denied a disability rating higher than 30% for generalized anxiety disorder. Also, the Board denied appellant's claim for a total disability rating based on individual unemployability (TDIU). We have jurisdiction over this timely appeal.[1]

The Board committed no legal error; the Board's application of relevant law to the facts of appellant's case was neither arbitrary nor capricious; the Board's factual findings are not clearly erroneous; and the Board provided an adequate statement of reasons or bases for its decision. Therefore, we will affirm the decision on appeal.

I. PROCEDURAL BACKGROUND

Appellant's claim history is lengthy and complex. We recount it because it provides important context for the resolution of the appeal before us today.

[1] *See* 38 U.S.C. §§ 7252(a), 7266(a).

Appellant applied for service connection for a nervous condition.[2] Eventually, VA granted service connection for appellant's nervous condition and assigned a 30% disability rating.[3]

In 2006, appellant applied for an increased rating for his nervous condition, which he and VA now called generalized anxiety disorder.[4] VA denied this application,[5] and appellant filed a Notice of Disagreement.[6] After the regional office issued its Statement of the Case continuing a 30% disability rating,[7] appellant appealed to the Board.[8] The Board denied a disability rating higher than 30%.[9] Also, the Board remanded the issue of possible entitlement to TDIU because VA failed to give appellant notice of the type of evidence he needed submit to establish TDIU.[10] Appellant appealed to this Court and challenged the Board's decision on his anxiety disorder. Then, consistent with the parties' joint motion, we remanded the Board's decision.[11]

The Board remanded appellant's claim for a higher disability rating for his anxiety disorder so appellant could have a hearing on his claim.[12] The Board held that hearing[13] and then denied appellant's claim for a disability rating higher than 30%.[14] Appellant again challenged at this Court the Board's decision. Again, consistent with a joint motion, we remanded the Board's decision.[15]

On remand, the Board denied appellant's claim for a disability rating higher than 30% for anxiety disorder.[16] In a separate decision, the Board denied appellant's claim for TDIU.[17]

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[2] Record (R.) at 3544.

[3] R. at 3252.

[4] R. at 2550-51.

[5] R. at 2492-96.

[6] R. at 2460, 2469.

[7] R. at 406-22.

[8] R. at 2418.

[9] R. at 2070-90.

[10] *See id.* Appellant was also service connected for "dyshidrotic eczema of the palms of the hands" (30% disability rating) when the Board issued its decision. R. at 2072.

[11] R. at 2059-67.

[12] R. at 1979-82.

[13] R. at 1352-88.

[14] R. at 1289-1306.

[15] R. at 1278-89.

[16] R. at 858-76.

[17] R. at 280-93.

Appellant challenged separately at this Court both Board decisions. Consistent with another joint motion, we remanded the TDIU claim.[18] Also, in a single-judge memorandum decision, we set aside and remanded the Board's decision on appellant's claim for a higher disability rating for anxiety disorder.[19] We remanded the Board's decision on appellant's anxiety disorder because the Board provided an inadequate statement of reasons or bases for concluding that the record evidence established a 30% disability rating.[20] We stated the following:

> [T]he Board never articulated under what standard it determines whether symptoms of occupational and social deficiency cause a veteran to become occasionally inefficient (30%), have reduced reliability (50%), or have deficiency in all areas (70%).[21]

In a single decision on remand, the Board denied appellant's claims for a higher disability rating for anxiety disorder and TDIU.[22] Appellant now challenges the Board's decision for the fourth time at this Court. It's that decision we consider here.

II. STANDARD OF REVIEW

Before turning to relevant legal principles and appellant's arguments, we must clarify the standards of review that apply to this case. At various points in his briefing, appellant characterizes his argument as the Board committing legal error in its decision and misinterpreting relevant statutes and regulations.[23] This is, of course, in the appellant's interest because we review legal questions de novo.[24] As a result, appellant puts forth the following arguments based on the Board's supposed legal errors: the Board legally erred when it determined that appellant generally functioned satisfactorily despite his problems at work;[25] the Board legally erred when it "required" appellant's anxiety to render him unemployable to obtain a 50% disability rating;[26] the Board

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[18] R. at 265-72.

[19] R. at 85-90.

[20] *See id.*

[21] R. at 89.

[22] R. at 3-35.

[23] *See* Appellant's Brief (Br.) at 9-29; *see also* Appellant's Reply at 10-14.

[24] *See Butts v. Brown*, 5 Vet.App. 532, 539 (1993).

[25] Appellant's Br. at 10-14.

[26] *Id.* at 14-16.

legally erred when it "required" appellant to show that his anxiety caused problems with all aspects of his work to obtain a disability rating higher than 30%;[27] the Board legally erred when it "required" appellant's disabilities to equal a 100% disability rating before awarding TDIU;[28] and the Board "applied the wrong legal standard" for TDIU.[29]

Despite his characterizations, however, appellant's arguments—except one, which we will discuss later in this decision—involve factual issues or issues applying law to fact. We will explain in our "Analysis" section why appellant's arguments raise no legal question. In short, his issues on appeal amount to arguing that the Board incorrectly found that appellant could generally function satisfactorily and the Board "required" appellant's evidence to demonstrate certain shortcomings to obtain higher disability ratings for his anxiety disorder and TDIU claims. The first issue—whether evidence shows appellant generally functioning satisfactorily—is clearly a factual issue.[30] The second type of issue—whether the Board "required" appellant's evidence to show certain shortcomings—presents no legal question because, as explained more below, the Board did no such thing. If it had imposed such a requirement, there could be a purely legal error. Instead, we face a different issue because the Board provided the appropriate criteria for obtaining TDIU and higher disability ratings for anxiety disorder; discussed, analyzed, and weighed evidence favorable and unfavorable to appellant's claims; and determined which rating criteria "the evidence more nearly approximates."[31] Challenging these determinations constitutes arguments about how the Board applied the law governing disability ratings and TDIU to the facts of appellant's case.[32] As a result, appellant's issues on appeal deal with factual issues and applications of law to fact,[33] and single-judge disposition is appropriate.[34]

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[27] *Id.* 16-20.

[28] *Id.* at 24-29.

[29] Appellant's Reply at 10-11.

[30] *See Magusin v. Derwinski*, 2 Vet.App. 547, 551 (1992) (finding no plausible basis to support the Board's factual determination concerning the veteran's "ability to function").

[31] *See* R. at 7.

[32] *Cf. Butts*, 5 Vet.App. at 538-39 (stating that the application of a diagnostic code "involves the application of the law—in this case a regulation—to a specific set of facts—in this case a particular condition affecting a claimant").

[33] To the extent appellant argues that evidence demonstrates entitlement to a 50%, 70%, or 100% disability rating for anxiety disorder, we review those issues for clear error. *See Tedesco v. Wilkie*, 31 Vet.App. 360, 363 (2019).

[34] *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990).

We review factual issues for clear error.[35] The Board clearly errs when, after reviewing its decision, we are left with a definite and firm conviction that the Board committed a mistake.[36] And we set aside the Board's application of law to fact when that application is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[37]

With these standards in mind, we now turn to legal principles relevant to this appeal.

III. RELEVANT LEGAL PRINCIPLES

The Board continued appellant's 30% disability rating for generalized anxiety disorder.[38] Appellant argues that evidence more closely shows that his disability should be assigned a 50% or 70% rating.[39]

The Board assigns a 30% disability rating for generalized anxiety disorder when evidence shows the following:

> Occupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks (although generally functioning satisfactorily, with routine behavior, self-care, and conversation normal), due to such symptoms as: depressed mood, anxiety, suspiciousness, panic attacks (weekly or less often), chronic sleep impairment, mild memory loss (such as forgetting names, directions, recent events).[40]

The Board assigns a 50% disability rating when evidence shows the following:

> Occupational and social impairment with reduced reliability and productivity due to such symptoms as: flattened affect; circumstantial, circumlocutory, or stereotyped speech; panic attacks more than once a week; difficulty in understanding complex commands; impairment of short and long-term memory (e.g., retention of only highly learned material, forgetting to complete tasks); impaired judgment; impaired abstract thinking; disturbances of motivation and mood; difficulty in establishing and maintaining effective work and social relationships.[41]

And the Board assigns a 70% disability rating when evidence shows the following:

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[35] *See Gilbert v. Derwinski*, 1 Vet.App. 49, 53 (1990).

[36] *Id.* at 56-57.

[37] *See Butts*, 5 Vet.App. at 538-39.

[38] R. at 7-23.

[39] *See generally* Appellant's Br. at 9-24.

[40] *See* 38 C.F.R. § 4.130 (2018).

[41] *Id.*

> Occupational and social impairment, with deficiencies in most areas, such as work, school, family relations, judgment, thinking, or mood, due to such symptoms as: suicidal ideation; obsessional rituals which interfere with routine activities; speech intermittently illogical, obscure, or irrelevant; near-continuous panic or depression affecting the ability to function independently, appropriately and effectively; impaired impulse control (such as unprovoked irritability with periods of violence); spatial disorientation; neglect of personal appearance and hygiene; difficulty in adapting to stressful circumstances (including work or a worklike setting); inability to establish and maintain effective relationships.[42]

Appellant argues the Board erred when it denied TDIU.[43] The Board will award TDIU when the veteran cannot obtain or follow substantially gainful employment because of service-connected disabilities.[44] To obtain TDIU on a schedular basis, the veteran must have one disability rated 60% or higher.[45] Or the veteran must have at least one disability rated 40% or higher in addition to one or more other disabilities that, when combined with the first disability, equals a 70% disability rating or higher.[46] The Board may also grant TDIU on an extraschedular basis if a veteran cannot secure or follow substantially gainful employment because of service-connected disabilities but fails to meet the percentage standards for TDIU on a schedular basis.[47] Whether a veteran is entitled to TDIU is a factual determination we review for clear error.[48] Under this standard of review, we may not substitute our judgment on factual issues for the Board's determination unless, even if there is evidence to support it, the Court is convinced a mistake has been made.[49]

The Board has the duty to assess the weight and credibility of evidence.[50] We will affirm the Board's assessment of the evidence unless the Board clearly errs.[51] For all material issues of fact and law, the Board must support its decision with an adequate statement of reasons or bases

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[42] *Id.*

[43] *See* Appellant's Br. at 24-29.

[44] *See Bowling v. Principi*, 15 Vet.App. 1, 5-6 (2001); 38 C.F.R. § 4.16(a) (2019).

[45] *See Bowling*, 15 Vet.App. at 5-6; 38 C.F.R. § 4.16(a).

[46] *See Bowling*, 15 Vet.App. at 5-6; 38 C.F.R. § 4.16(a).

[47] *See* 38 C.F.R. § 4.16(b).

[48] *Bowling*, 15 Vet.App. at 6.

[49] *Miller v. Wilkie*, 32 Vet.App. 249, 254 (2020); *Bowling*, 15 Vet.App. at 6.

[50] *See Madden v. Gober*, 125 F.3d 1477, 1481 (Fed. Cir. 1997); *Owens v. Brown*, 7 Vet.App. 429, 433 (1995).

[51] *See Madden*, 125 F.3d at 1481.

that allows a claimant to understand the precise reasons for the Board's decision and facilitates review in this Court.[52] To comply with this requirement, the Board must analyze the credibility and probative value of evidence.[53] Further, the Board must account for evidence it finds persuasive and unpersuasive and provide reasons for rejecting material evidence favorable to the claimant.[54] If the Board fails to provide an adequate statement of reasons or bases for its decision, remand is appropriate.[55]

Now, with these principles in mind, we turn to appellant's arguments on appeal.

IV. ANALYSIS

Appellant raises four issues on appeal. Three of these issues involve the Board's decision to deny a disability rating higher than 30% for anxiety disorder.[56] First, appellant argues the Board erred when it determined that his anxiety disorder did not cause reduced reliability and productivity (symptoms that would support a 50% disability rating).[57] Second, appellant argues the Board erred when it "required" the evidence to show more than necessary to obtain a disability rating higher than 30%.[58] Third, appellant argues the Board failed to sufficiently address medical opinions favorable to his claim for a higher disability rating.[59]

Appellant's fourth issue contends that the Board erred when it denied TDIU.[60]

We will begin with addressing appellant's arguments about a higher disability rating for anxiety disorder. Then, we will turn to his arguments about TDIU.

A. Higher Disability Rating for Anxiety Disorder

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[52] 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *see* 38 U.S.C. § 7104(d)(1); *see also Gilbert,* 1 Vet.App. at 56-57.

[53] *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996).

[54] *Id.*

[55] *Tucker v. West*, 11 Vet.App. 369, 374 (1998).

[56] Appellant's Br. at 9-24.

[57] *Id.* at 9-14.

[58] *Id.* at 14-20.

[59] *Id.* at 20-24.

[60] *Id.* at 24-29.

Appellant puts forth three types of errors the Board purportedly committed when it denied a disability rating higher than 30% for anxiety disorder.[61] We will address these alleged errors in turn.

1. Reduced Reliability and Productivity

Appellant argues the Board erroneously found that he was generally functioning satisfactorily.[62] According to appellant, the Board arrived at this conclusion because it required more documented instances of personnel action at his job with the New York Department of Motor Vehicles (DMV).[63] Appellant argues that nothing in the rating criterion for a 50% disability rating requires documented personnel actions.[64] Even if the number of personnel actions were relevant to a 50% disability rating, appellant points out that his personnel file was incomplete and he testified that he had more than seven instances of written personnel action.[65]

Also, appellant argues the Board erred when it relied on evidence showing he met with an employment counselor monthly or less than monthly.[66] He argues that he met with a counselor every two weeks and his need for that counseling shows that he had reduced productivity.[67] And appellant points to other evidence showing reduced reliability and productivity, including difficulty concentrating and his desire to improve productivity during his last six months at work.[68] Similarly, appellant argues the Board selectively analyzed his performance reviews that showed him performing well at work "except that he would get negative remarks regarding mistakes."[69] Appellant contends that other evidence, like evidence showing him committing nine mistakes at work, undermines the Board's finding that he performed well at work.[70]

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[61] *Id.* at 9-24.

[62] *Id.* at 10.

[63] *Id.* at 10-11.

[64] *Id.* at 11.

[65] *Id.* at 12-13.

[66] *Id.*

[67] *Id.* at 11, 13.

[68] *Id.* at 11, 13.

[69] *Id.* at 12.

[70] *Id.*

Further, appellant argues the Board erroneously considered his social activities when it found that he did not have reduced reliability and productivity.[71] According to appellant, the Board required evidence showing him engaging in no social activities to qualify for a higher disability rating.[72] Also, appellant claims that the Board erred when it relied on medical treatment notes to determine his disability rating because those records fail to discuss how his anxiety impacted his life.[73] Appellant argues that his lay statements describe that impact.[74]

Lastly, appellant argues that, even using the evidence the Board discussed, that evidence shows reduced reliability and productivity; so he satisfies the requirements for obtaining a 50% disability rating.[75]

To obtain a 30% disability rating for generalized anxiety disorder, evidence must show "occupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks."[76] To obtain a 50% rating, evidence must show "occupational and social impairment with reduced reliability and productivity."[77] The Board noted these standards—as well as the standards for 70% and 100% ratings—before proceeding to determine which rating to assign appellant's anxiety disorder based on what the evidence showed.[78] The Board noted that the symptoms listed to obtain a specific disability rating are not exhaustive.[79]

Then—consistent with this Court's latest decision in appellant's claims stream[80]—the Board provided the standards for determining whether evidence constituted "occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks" (for a 30%

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[71] *Id.* at 11-12.

[72] *Id.*

[73] *Id.* at 13-14.

[74] *Id.* at 14.

[75] *See id.* at 10 ("The veteran meets even the Board's overly-restrictive definition of reduced reliability and productivity.").

[76] *See* 38 C.F.R. § 4.130.

[77] *See id.*

[78] R. at 8-9.

[79] R. at 9.

[80] *See* R. at 248 ("Absent a standard for differentiating between the various thresholds of impairments, e.g., occasional inefficiency, reduced reliability, deficiency in most areas, the Board's decision essentially amounts to: appellant's symptomatology shows occasional impairment 'because I say so.'").

rating) or "reduced reliability and productivity" (for a 50% rating).[81] After analyzing thoroughly the meaning of key regulatory terms, the Board concluded the following:

> [T]he Board finds the standard for a 30[%] rating . . . reflects a disability profile where the evidence most approximately shows the veteran is generally functioning satisfactorily with infrequent decreases in work efficiency and periods of inability to perform occupational tasks, which are episodic and discrete exceptions to generally functioning satisfactorily.[82]

The Board then specified the standard for a 50% rating:

> [T]he 50[%] rating reflects a disability profile where the evidence most approximately shows the veteran is not generally functioning satisfactorily but rather exhibits reduced reliability and productivity that manifests as more generalized and continuous in nature.[83]

In other words, to obtain a 30% rating, the evidence must show that appellant generally functions satisfactorily and that decreases in work efficiency are the exceptions.[84] The evidence must show the opposite to obtain a 50% rating: reduced reliability and productivity is the rule and generally satisfactory functioning is the exception.[85] The Board stated that assigning the correct rating "is determined by the frequency, severity, and duration of [appellant's] symptoms."[86]

The Board then specified that the difference between "reduced reliability and productivity" (50% rating) and "deficiencies in most areas of work" (70% rating) is "generally one of scope."[87] That increase in deficiency, the Board stated, must be "attributable to symptoms of increasing severity, frequency, and/or duration."[88]

This summary of the Board's decision so far shows that the Board carefully and thoughtfully articulated the standards it applied when assigning appellant's disability rating. And, except for one argument about the Board's standard for a 50% rating, appellant does not challenge

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[81] R. at 17-18.

[82] R. at 17.

[83] *Id.*

[84] *See* R. at 18.

[85] *See id.*

[86] *Id.*

[87] *Id.*

[88] *Id.*

the standards the Board articulated.[89] So he waived any other argument about possible errors in the Board's standards.[90]

Appellant's legal argument addresses the Board's suggestion that, to obtain a 50% rating, appellant's reduced reliability and productivity must be "continuous in nature."[91] According to appellant, this is the same as requiring his reduced reliability to render him unemployable.[92] Appellant argues that a "continuous in nature" standard for a 50% rating "is not merely a step above the 'infrequent' or 'exceptions to the rule standard' . . . used for the 30[%] rating."[93] His argument, however, is unavailing.

The Board used *Merriam-Webster Dictionary* to determine what "intermittent" (a key term for determining a 30% rating) means.[94] Using a dictionary to determine an undefined regulatory term's meaning is appropriate.[95] The definition the Board found stated that "intermittent" means "coming and going at intervals; not continuous."[96] The Board concluded that, if to obtain a 30% rating (i.e., the claimant generally functions satisfactorily) appellant's occasional decrease in work efficiency must be noncontinuous, then to obtain a 50% rating (i.e., the claimant not generally functioning satisfactorily) the claimant's reduced reliability and productivity had to be continuous.[97] So, contrary to appellant's argument, the Board's use of "continuous in nature" is consistent with its "exceptions to the rules standard" for 30% and 50% disability ratings. Appellant fails to prove legal error in the Board's standards for assigning 30%, 50%, and 70% ratings.[98]

Turning to his factual arguments, appellant contends that the Board erred when it found him generally functioning satisfactorily. But appellant's arguments about these alleged errors are not convincing.

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[89] Appellant's Br. at 9-29; Appellant's Reply at 1-14.

[90] *See Pederson v. McDonald*, 27 Vet.App. 276, 283-84 (2015) (en banc).

[91] Appellant's Br. at 16; R. at 17.

[92] Appellant's Br. at 16.

[93] *Id.*

[94] R. at 17.

[95] *See Mohamad v. Palestinian Auth.*, 566 U.S. 1702, 1707 (2012); *Nielson v. Shinseki*, 607 F.3d 802, 805 (Fed. Cir. 2010).

[96] R. at 17.

[97] *Id.*

[98] *See Abbott v. O'Rourke*, 30 Vet.App. 42, 48 (2018).

To begin, appellant claims the Board "required" more instances of documented personnel action to determine that he had reduced reliability and productivity. The Board, however, did no such thing. The Board discussed seven instances between 2000 and 2009 when appellant was disciplined at the DMV.[99] The Board noted that five of those instances resulted from issues related to appellant taking leave, one instance resulted from an inappropriate remark to his supervisor, and one instance resulted from his work performance.[100] The Board found the number and timing of these documented actions (spread out across appellant's twelve years at the DMV) "infrequent and discrete in nature, and had only an acute—as opposed to residual or lasting—impact on [appellant's] work."[101] Nowhere does the Board state that a certain number of disciplinary actions are required to cross the threshold from "generally functioning satisfactorily" (30% rating) to "reduced reliability and productivity" (50% rating). Instead, our review of the Board's thorough decision shows that the Board considered the personnel actions along with many other pieces of evidence. The Board must discuss relevant evidence,[102] and appellant's work performance, including disciplinary issues, is certainly relevant to determining whether he generally functions satisfactorily or has reduced reliability and productivity.

Appellant points out that his personnel file before the Board was incomplete. But the Board acknowledged this fact. Specifically, the Board discussed the regional office's attempt to obtain a full personnel file from the DMV.[103] But that attempt proved unsuccessful because the DMV stated that many of appellant's personnel records were destroyed "pursuant to record retention regulations."[104] Further, as he points out in his brief, appellant testified at his Board hearing that his supervisor did not write down most of his disciplinary issues.[105] We presume the Board considered this testimony,[106] especially because the Board member is the one who elicited it.[107]

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[99] R. at 12.

[100] *Id.*

[101] R. at 19; *see also* R. at 20-21.528 (1995).

[102] *See Allday*, 7 Vet.App. at 527.

[103] R. at 6.

[104] *Id.*

[105] R. at 1372-73.

[106] *See Newhouse v. Nicholson*, 497 F.3d 1298, 1302 (Fed. Cir. 2007) ("There is a presumption that VA considered all of the evidence of record.").

[107] *See* R. at 1372-73.

The Board properly considered the available, relevant evidence about disciplinary issues at work, along with other evidence about appellant's symptoms. Appellant's argument on this point is unsuccessful.

Next, appellant argues the Board erroneously found that he met with an employment counselor from Northeast Career Planning monthly because "that is not necessarily correct."[108] For support, appellant cites an April 2009 "Supported Employment Plan" note,[109] a February 2005 profile assessment stating that "[appellant] continues to desire biweekly counseling sessions,"[110] and an April 1999 note from his counselor stating that a counselor "provides support for [appellant] with biweekly visits at this place of employment."[111] That evidence, however, fails to show that the Board clearly erred when it found that appellant met with a counselor monthly or less.[112] This is because appellant testified at his Board hearing that his meetings with a counselor averaged about once a month.[113] The Board cited this testimony when determining the number of appellant's counselor meetings.[114] Further, the evidence in the record does not include a number of counseling notes proving appellant met with a counselor every two weeks.[115] The Board, therefore, had a plausible basis to find that appellant's counseling occurred monthly or less, and that finding is not clearly erroneous.

Appellant's argument that the Board erroneously relied on a part of his performance review is also unsuccessful. Specifically, appellant points out that a May 2015 vocational assessment states that "[appellant] reports that he always did well on his performance reviews, except that he would get negative remarks regarding his mistakes."[116] Appellant argues the Board relied on the

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[108] Appellant's Br. at 11.

[109] R. at 2778.

[110] R. at 2779.

[111] R. at 2985.

[112] *See* R. at 19 ("The evidence shows [appellant] maintained a job . . . with the help of an employment counselor whom he saw monthly or less.").

[113] R. at 1366.

[114] R. at 28.

[115] R. at 1013-14 (May 1996 counseling intake report), 1018 (January 2015 letter from counseling agency about appellant's counseling), 2773 (October 2009 "Supported Employment Plan" note), 2774-77 (February 2003 counseling profile and assessment), 2778 (April 2009 "Supported Employment Plan" note), 2783 (December 2009 "Job/Service Closure Report").

[116] R. at 52.

aspect of that assessment about him performing well but ignored the part about his mistakes. That is simply not the case. When discussing the May 2015 assessment, the Board specifically mentioned the statement at issue: "[Appellant] stated he always did well on performance reviews except for negative remarks about mistakes and inappropriate use of leave."[117] Appellant's argument about the Board's alleged failure to properly consider the May 2015 assessment is unsuccessful.

Appellant argues the Board "required" evidence to demonstrate that he engaged in no social activities to obtain a rating higher than 30% for anxiety disorder. Once again, however, the Board did no such thing. Instead, the Board considered how appellant's anxiety impacted his social interactions.[118] The Board analyzed and discussed evidence favorable and unfavorable to appellant's claim for a higher disability rating.[119] The evidence the Board considered is relevant to determining the appropriate disability rating for appellant's anxiety disorder.[120] And a review of the record shows that the Board did not clearly err when it found that appellant maintained "generally positive social relationships."[121] Appellant's argument fails.

Finally, appellant's other arguments about the Board's alleged failure to properly consider evidence on his concentration difficulties, how his anxiety impacted his life, and his mistakes at work, are also unsuccessful. The Board's decision shows that it considered and analyzed all relevant evidence. And a review of the record shows that the Board committed no clear error when it found that appellant generally functioned satisfactorily.

2. Application of Disability Rating Criteria

Appellant argues the Board misinterpreted and misapplied the rating criteria for anxiety disorder.[122] Specifically, appellant claims the Board misinterpreted "reduced reliability and productivity" (symptoms necessary for a 50% rating) because, under the Board's interpretation,

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[117] R. at 15.

[118] *See* R. at 10.

[119] *See* R. at 10-11, 13-18, 20-22, 31-33.

[120] *See* 38 C.F.R. § 4.130 (stating how a mental disorder must cause social impairment and affect social relationships).

[121] R. at 18.

[122] Appellant's Br. at 14-29.

appellant had to be unemployable to obtain a 50% disability rating.[123] For support, appellant cites *Ray v. Wilkie*[124] as well as Social Security caselaw and regulations.[125]

Appellant's argument is unpersuasive. Despite appellant's characterization of its decision, the Board's standard for assigning a 50% rating did not require his "reduced reliability and productivity" to have a residual or lasting impact on his work. Instead, in analyzing and discussing all relevant evidence, the Board found that appellant's difficulties at work did not rise to the level of reduced reliability and productivity: "The number and timing of both [appellant's] counselor meetings and the personnel actions shows that they were infrequent and discrete in nature, and had only an acute—as opposed to residual or lasting impact—on his work."[126] Although the Board's finding indicates that a greater impact on appellant's work would have suggested that a higher rating was appropriate, that language is consistent with the Board's standard for determining whether a 50% rating is necessary: whether appellant regularly performs at reduced reliability and productivity with satisfactory functioning the exception.[127] In other words, simply observing that appellant's anxiety did not have a residual or lasting impact on his work—a finding relevant to the Board's standards for 30% and 50% ratings—is not the same as requiring a residual or lasting impact on his work. Our review of the Board's decision and the record demonstrates that the Board's application of its standard for a 50% disability rating (i.e., that evidence show appellant regularly performing at reduced reliability and productivity) was not arbitrary or capricious.

Even if the Board required appellant's anxiety to cause "residual or lasting impact" on his work, that requirement is not the equivalent of requiring evidence showing that appellant was unemployable. Considering the context of the Board's finding about a "residual or lasting impact" on his work, if the record contained clear evidence that appellant met with a counselor more than monthly or that he received more disciplinary actions, then the Board might have found reduced reliability and productivity and assigned a 50% rating. Put differently, more frequent counselor meetings or disciplinary actions does not mean that appellant had to be unemployable. We explained earlier why the Board did not clearly err in its findings about appellant's counseling and

[123] *Id.* at 14-15.

[124] 31 Vet.App. 58 (2019).

[125] Appellant's Br. at 15.

[126] R. at 19.

[127] *See* R. at 18.

disciplinary actions. Nothing from *Ray* dictates a different result,[128] and nothing required the Board to consider the Social Security caselaw and regulations appellant cites.[129] Appellant's argument is unsuccessful.

Next, appellant argues the Board erroneously required his symptoms to demonstrate "total deficiency" in areas like adapting to stressful circumstances.[130] Appellant claims that the evidence need only show "some deficiency" in those areas."[131] According to appellant, the Board erred when it found that his anxiety did not cause deficiencies at work despite impairments in areas like judgment and interacting with supervisors.[132] Appellant argues that, by finding his impairments caused no deficiencies at work, the Board required his symptoms to cause deficiencies with all aspects of his work.[133]

To support his argument, appellant cites evidence showing, among other things, his difficulty handling his worries created marital problems and road rage; he needed a counselor to maintain his job with the DMV; and his evening rituals, like obsessively checking his door locks, affected his sleep, which in turn affected his work performance.[134]

The Board, however, in determining whether appellant's impairments caused deficiencies in most areas (necessary for a 70% rating), considered and discussed the evidence appellant cites.[135] Our review of the Board's decision and the record shows that the Board did not clearly err in finding that appellant's anxiety caused no deficiencies in most areas. Further, contrary to appellant's argument, the Board did not require total deficiencies in various areas, like work. Instead, the Board considered evidence showing deficiencies, like appellant's need for an

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[128] *See Ray*, 31 Vet.App. at 67-76 (interpreting "substantially gainful employment" to include economic and non-economic components).

[129] *See Beaty v. Brown*, 6 Vet.App. 532, 538 (1994) ("There is no statutory or regulatory authority for the determinative application of [Social Security] regulations to the adjudication of VA claims.").

[130] Appellant's Br. at 16-20.

[131] *Id.* at 17.

[132] *See id.*

[133] *See id.*

[134] *See id.* at 16-18.

[135] *See, e.g.*, R. at 14, ("[Appellant] reported experiencing . . . road rage, chronic insomnia, vivid dreams"), 19 ("[Appellant maintained a job . . . with the help of an employment counselor"), 20 ("[Appellant] testified he maintains a good relationship with his wife with occasional periods of marital trouble"), 21 ("[T]he evidence does show that [appellant] has complaint of obsessive behaviors such as checking the door repeatedly to ensure it is locked or excessive worry that makes it difficult to sleep").

employment counselor, and evidence showing appellant performing well despite those deficiencies, like receiving generally positive performance reviews. Appellant's argument, therefore, fails to show clear error.

Also, appellant argues the following:

> The Board also pointed to the lack of "symptoms comparable to" impaired thought, judgment, or impulse control; disorientation; suicidal or homicidal ideation; grossly inappropriate behavior; delusions or hallucinations; or an inability to establish and maintain relationships as evidence that his "overall impairment shown" was sufficient to cause deficiencies in most areas. But it could not require [appellant] to establish any of these symptoms to demonstrate that his difficulty dealing with stressful situations caused a deficiency in work, family, thinking, judgment, mood, or school.[136]

What precisely appellant argues is unclear. He cites *Mauerhan v. Principi*[137] for support. That case states that the phrase "such symptoms as" in the rating formula for mental disorders means that the symptoms listed are not exhaustive but provide examples of the symptoms necessary to obtain the relevant disability rating.[138] Nothing in the Board's decision, however, suggests that it treated the symptoms listed in the rating formula as exhaustive. Instead, the Board expressly stated that the listed symptoms were not exhaustive and cited *Mauerhan*.[139] Further, after considering and discussing relevant evidence, the Board stated the following when determining that a rating higher than 30% was not appropriate:

> [T]he Board finds the overall impairment shown, based on [appellant's] statements and the medical records, does not more closely approximate the higher ratings. The record does not show symptoms comparable to impaired or circumstantial speech or thought, flattened affect, impaired judgment, difficulty understanding complex commands, more than a mildly impaired memory, panic attacks or similar symptoms, impaired impulse control, neglect of appearance and hygiene, disorientation to person, place, or time, suicidal ideation, homicidal ideation, grossly inappropriate behavior, delusions or hallucinations, an intermittent ability to perform activities of daily living, or an instability to establish and maintain effective relationships, symptoms that would warrant a 50[%] or higher rating. Although [appellant] reported having intermittent thoughts about harming others .

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[136] Appellant's Br. at 19-20 (internal citations omitted).

[137] 16 Vet.App. 436 (2002).

[138] *See id.* at 442.

[139] R. at 9.

> . . the wealth of VA mental health treatment records show that he denied suicidal ideation, homicidal ideation, and plans/intent to harm others or himself.[140]

Appellant fails to demonstrate any error with the Board's determination.

Lastly, appellant argues the Board conflated the analyses for assigning 50% disability, 70% disability, and 100% disability ratings.[141] Specifically, appellant argues that "the first full paragraph on R-18 combines elements from the 50, 70, and 100[%] ratings."[142]

This argument lacks merit because, in that paragraph, the Board clearly rephrases its standard for determining the difference between a 30% rating and a 50% rating:

> Put another way, the difference between 30[%] and 50[%] is not based on any bright-line threshold of the number of decreases in work efficiency or periods of inability to perform occupational tasks, but rather on whether such instances are generally infrequent in nature such that they are exceptions to the rule of generally functioning satisfactorily [and therefore a 30% rating is appropriate, or whether reduced reliability and productivity is the general rule as opposed to generally satisfactory functioning [and therefore a 50% rating is appropriate], all of which is determined by the frequency severity, and duration of [appellant's] symptoms.[143]

Appellant's argument on this issue is also unsuccessful.

3. Favorable Vocational Opinions

Appellant next argues that the Board failed to sufficiently address arguments he put forth about the May 2015 and July 2016 vocational expert opinions.[144] Also, appellant argues the Board failed to sufficiently address other expert evidence showing that he could not function appropriately.[145] But his arguments are unsuccessful.

To begin, nothing requires the Board to discuss every piece of evidence.[146] That said, our review of the Board's decision shows that it adequately addressed the evidence that appellant argues supports a higher rating.[147] Further, despite appellant's contention, the Board specifically

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[140] R. at 19.

[141] Appellant's Br. at 20.

[142] *Id.*

[143] R. at 18.

[144] Appellant's Br. at 20-21.

[145] *See id.* at 21-24.

[146] *See Gonzales v. West*, 218 F.3d 1378, 1381 (Fed. Cir. 2000) ("[W]e reject the view that all evidence must be discussed.").

[147] *See, e.g.*, R. at 13 (discussing December 2010 VA compensation and pension examination), 19 (same), 20 (discussing appellant's wife's testimony about their marital problems), 28 (discussing records from Northeast Career

and adequately addressed the May 2015 and July 2016 opinions.[148] Although the Board did not expressly state that it addressed appellant's arguments about these opinions (namely, that the Board's rejection of the opinions was inadequate), a review of the Board's decision shows that it provided adequate statements of reasons or bases for finding VA medical opinions more probative.[149] So appellant's arguments on this issue are unsuccessful.

B. Whether Board Erred in Denying TDIU

Appellant puts forth many arguments about why the Board erred when it denied TDIU.[150] None of his arguments, however, succeed.

Appellant argues the Board required a 100% schedular rating before it could award TDIU.[151] This is simply not the case. The Board recognized its ability to award TDIU to unemployable claimants who fail to meet the percentage requirements for TDIU on a schedular basis.[152] Then, after a thorough discussion and consideration of the record evidence, the Board determined that referring appellant's claim for extraschedular consideration was not warranted.[153] The Board arrived at this conclusion because it determined that appellant's job at the DMV did not constitute "employment in a protected environment" under 38 C.F.R. § 4.16(a).[154] Also, the Board determined that appellant's statements about his symptoms failed to demonstrate that referring his claim for extraschedular consideration was appropriate.[155] So, contrary to appellant's argument, the Board did not require a 100% schedular rating before awarding TDIU. Instead, the Board considered referring the claim for extraschedular consideration but, after discussing and

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Planning that note appellant's need for employment counseling).

[148] *See* R. at 15-16, 19-20, 22, 29, 32, 34.

[149] *See* R. at 22 (finding appellant's contemporaneous VA medical records "more accurately reflect [his] symptoms"); *see also Caluza*, 7 Vet.App. at 512 (holding that the Board did not clearly err when it found a contemporaneous statement by the veteran during service more credible than medical evidence submitted forty years after the alleged in-service incident).

[150] *See* Appellant's Br. at 24 ("The Board also erred when it used improperly high standards to deny TDIU, failed to provide the required analysis of his functional limitations, and did not support its conclusions with adequate reasons or bases.").

[151] *Id.*

[152] R. at 27.

[153] R. at 28.

[154] *Id.* Appellant puts forth no argument about the Board's definition of "employment in a protected environment." So he waived any argument on that issue. *See Pederson*, 27 Vet.App. at 283-84 .

[155] R. at 32.

considering the evidence, found that referral not warranted. Appellant's argument on this point fails.

Next, appellant argues that the Board erroneously determined that he could obtain or follow substantially gainful employment.[156] Specifically, appellant claims that the Board assigned too much weight to evidence showing he maintained a good relationship with his wife and took part in social activities.[157] But his social activities and relationship with his wife are relevant to determining which disability rating the Board should assign.[158] Appellant's ratings are, in turn, relevant to whether the Board should award TDIU on a schedular basis.[159] A review of its decision shows that the Board properly considered and discussed evidence favorable and unfavorable to appellant's TDIU claim with respect to his social activities and relationship with his wife.[160] And a review of the record demonstrates that the Board's findings were not clearly erroneous. So appellant's argument on this issue fails.

Appellant argues that the evidence concerning his difficulties in areas like concentration and adapting to stressful circumstances shows he could not obtain or follow substantially gainful employment.[161] Also, appellant argues the Board should have awarded TDIU because he has difficulty getting along with others—an ability necessary for substantially gainful employment.[162] But the Board expressly discussed most of the evidence appellant cites in his brief.[163] Appellant cites a July 2014 progress note, to which the Board did not expressly refer.[164] We presume the Board considered this note, especially in light of the Board's in-depth decision. Further, nothing in the July 2014 note shows the Board clearly erred when it denied TDIU. Instead, the note contains information consistent with the Board's other findings: the veteran reported feeling "pretty good";

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[156] Appellant's Br. at 25-26.

[157] *See id.*

[158] *See* 38 C.F.R. § 4.130 (listing "difficulty in establishing and maintaining effective and social relationships" as symptoms consistent with a 50% rating and "deficiencies . . . in family relations" and "obsessional rituals which interfere with routine activities" as symptoms consistent with a 70% rating).

[159] *See Bowling*, 15 Vet.App. at 5-6; 38 C.F.R. § 4.16(a).

[160] *See* R. at 10-33.

[161] Appellant's Br. at 26.

[162] *Id.* at 26-27.

[163] *See* R. at 13 (discussing December 2010 compensation and pension examination), 14 (discussing November 2013 VA treatment note), 20 (discussing appellant's Board hearing testimony).

[164] Appellant's Br. at 27 (citing R. at 1632).

he got about five hours' sleep every night; he was "getting a bit impatient" with his wife; and he denied entertaining suicidal ideas or plans to harm others.[165] Appellant, therefore, fails to show that the Board erred on this issue.

Lastly, appellant contends that the Board failed to adequately explain why it found probative a January 2007 VA examination and evidence about his retirement age.[166] Contrary to appellant's assertions, the Board provided an adequate statement of reasons or bases when it assigned weight to the January 2007 examination and other evidence about retirement. Specifically, the Board stated that evidence contemporaneous with the relevant time period indicated that appellant retired because of his age.[167] The Board discussed how, during the January 2007 examination, appellant reported that he planned to retire at age sixty-five.[168] The Board found these statements consistent with evidence showing that appellant retired one month after he turned sixty-five.[169] So the Board provided an adequate statement of reasons or bases for determining that appellant retired because of his age—not his anxiety. And a review of the evidence shows that the Board did not clearly err. Appellant's argument is unsuccessful.

C. Summary

Appellant fails to prove legal error with how the Board determined that his reduced reliability and productivity had to be continuous to obtain a 50% disability rating. Also, the Board's application of its standards for disability ratings to the record evidence was neither capricious nor arbitrary. A review of the Board's decision and the record evidence shows that the Board's findings were not clearly erroneous. Finally, the Board provided adequate statements of reasons or bases for denying TDIU and a disability rating higher than 30% for generalized anxiety disorder.

V. CONCLUSION

After consideration of the parties' briefs, governing law, and the record, the Court AFFIRMS the November 28, 2018, Board decision.

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[165] R. at 1632.

[166] Appellant's Br. at 27-29.

[167] R. at 33.

[168] *Id.*

[169] *Id.*

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