IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

CURTIS E. KLEFSTAD,
Appellant,

v.

DENIS MCDONOUGH,
Secretary of Veterans Affairs,
Appellee.

ON APPEAL FROM THE BOARD OF VETERANS' APPEALS

BRIEF OF APPELLEE SECRETARY OF VETERANS AFFAIRS

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IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

CURTIS E. KLEFSTAD,	)	
	)	
Appellant	)	
	)	
v.	)	Vet. App. 20-5351
	)	
DENIS MCDONOUGH,	)	
Secretary of Veterans Affairs	)	
	)	
Appellee	)	

ON APPEAL FROM THE BOARD OF VETERANS' APPEALS

APPELLEE'S BRIEF

I. ISSUE PRESENTED

Whether the Court should affirm the March 27, 2020, Board of Veterans' Appeals (Board or BVA) decision denying entitlement to a total disability rating based on individual unemployability due to service-connected disabilities (TDIU), where the Board's findings are plausibly based on the evidence of record and supported by VA statutes and current caselaw, as well as an adequate statement of reasons or bases and where Appellant fails to meet his burden to show prejudicial error.

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

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

B. Nature of the Case

Curtis E. Klefstad (Appellant) appeals the March 27, 2020, decision of the Board that denied entitlement to TDIU. (Record (R.) at 1-18).

On appeal to this Court, Appellant raises a sole allegation of error: that the Board erred by failing to support its March 2020 decision with an adequate statement of reasons or bases. Appellant's Brief (App. Br.) at 4. The Secretary disputes this contention.

C. Statement of Relevant Facts

Appellant had active service with the United States Marine Corps from April 1963 to July 1966. (R. at 436). In November 2012, he filed an application for TDIU with a Department of Veterans Affairs (VA) regional office (RO). (R. at 714-718). In this application, he stated that he was "unable to understand with clarity customers[']comments/questions." (R. at 718). Appellant then underwent a VA audiological examination in December 2012. (R. at 632-640). That same month, both Appellant and his wife submitted lay statements describing how Appellant's service-connected hearing loss had caused various difficulties at work and at home. (R. at 661 (661-662), 642). After deferring the issue of entitlement to TDIU in a February 2013 rating decision, the RO obtained an opinion in March 2013 addressing Appellant's ability to secure and maintain substantially gainful employment. (R. at 587-590, 528-530).

Appellant then underwent another VA audiological examination in September 2013. (R. at 476-482). With respect to functional limitations, the examiner explained that Appellant's hearing loss may make it difficult for him to speak on the phone, participate in group conversations, or perform any

work requiring verbal and auditory communication without the use of hearing aids. (R. at 480). However, the examiner clarified that with appropriate workplace accommodations, such as hearing aids, an amplified phone, and/or other assistive technology, Appellant's hearing should not prevent him from obtaining gainful employment. *Id*. That same month, the RO issued a rating decision denying Appellant entitlement to TDIU because the evidence "did not show [that Appellant was] unable to secure or follow a substantially gainful occupation as a result of service-connected disabilities." (R. at 460 (458-462)). At the time, Appellant was in receipt of a 60% rating for bilateral hearing loss from May 30, 2012, a 20% rating for type II diabetes mellitus from July 27, 2006, and a 10% rating for tinnitus from May 30, 2012. (R. at 461). Thus, Appellant was in receipt of a combined rating of 70% from May 30, 2012. *Id*.

Appellant timely submitted an informal Notice of Disagreement in September 2014. (R. at 444 (444-445)). In November 2016, the RO generated a Statement of the Case (SOC) again denying entitlement to TDIU. (R. at 343-358). Appellant perfected an appeal to the Board in a January 2017 VA Form 9 and requested a Board videoconference hearing at a local VA office. (R. at 222-223).

In May 2018, Appellant submitted testimony during a Board videoconference hearing. (R. at 68-84). During that hearing, Appellant reported that he sold his business due to his hearing problems. (R. at 73).

He also indicated that he had worked in the home remodeling section of a store but had to resign because he could not work if there was any background noise. (R. at 75).

In January 2019, the Board issued a decision denying entitlement to TDIU. (R. at 45-58). An appeal of this decision resulted in a September 2019 Joint Motion to Remand (JMR) that was granted the following month. (R. at 34-38). In the JMR, the parties directed the Board to consider and address evidence of Vocational Rehabilitation and Employment (VR&E) benefits, specifically a May 2014 VR&E evaluation noting in part that Appellant's service-connected disabilities significantly impaired his ability to prepare for, obtain, and/or retain employment. (R. at 35, 171-174).

In March 2020, the Board issued a decision again denying entitlement to TDIU. (R. at 1-18). The Board chronologically reviewed the evidence of record; it preliminarily described the results of July and December 2012 VA examinations; and it considered lay evidence provided by Appellant and his wife that same month. (R. at 8-10). It then summarized the March 2013 VA opinion, a private July 2013 audiological examination and the September 2013 VA audiological examination and opinion. (R. at 10-12).

The Board next addressed employment evidence from 2014. Specifically, it noted that in a March 2014 email to his store supervisor, Appellant resigned from his employment because he could not communicate with anyone in an environment where there is background noise or music.

(R. at 12, 108). The Board then indicated that Appellant's supervisor sent him a reply email expressing a desire for Appellant to remain at his job and asking if there was anything they could do to accommodate him. (R. at 12, 108).

The Board then acknowledged that the following month, Appellant applied for VR&E benefits, and underwent a VR&E evaluation in May 2014. (R. at 12, 171-174). After describing the findings of this evaluation, it noted that in a January 2015 email correspondence, a Veteran Assistance Program Counselor/Representative referred Appellant for three separate jobs, that Appellant indicated he would apply for all three. (R. at 13, 143). The Board then explained that Appellant was referred for three more jobs, but that it was not clear if he applied for them, and that his VR&E paperwork recommended several areas where he would be qualified to seek employment based on his stated interests and aptitudes. (R. at 13, 144-151, 175-178).

The Board specified that in February 2015, VA sent Appellant a letter notifying him that because he did not pursue assistance in obtaining work activity or follow up with attempted assistance, his vocational rehabilitation was being interrupted. (R. at 13, 140-142). It noted that VA sent Appellant a letter the following month notifying him that his vocational rehabilitation was discontinued. (R. at 13, 138-139). It then elaborated on the findings of a March 2015 VA diabetes mellitus examination, lay evidence submitted in

January 2017 and January 2020, and lay evidence elicited during the May 2018 Board hearing. (R. at 13-14, 106 (106-107), 23-24).

The Board found that the evidence of record reflected that Appellant ended his self-employment "of his own volition." (R. at 14). After reiterating that the September 2013 VA examiner noted that with appropriate accommodations Appellant should be able to obtain gainful employment, the Board found that the evidence showed that his prior employer expressed a desire to retain him as an employee and offered to accommodate him. (R. at 14-15). Citing to the VR&E evidence of record, the Board determined that Appellant was "provided with an opportunity to obtain vocational rehabilitation but chose not to follow through on it," and that in light of his resume and education, he had transferable skills. (R. at 15). It then acknowledged that Appellant's hearing loss and tinnitus made it more difficult to work, but it found that "the evidence does not show that [he] is unable to obtain substantially gainful employment." *Id*. This appeal followed.

III. SUMMARY OF ARGUMENT

The Court should affirm the Board's denial of Appellant's claim for entitlement to TDIU because the Board properly considered the evidence of record and engaged in the requisite analysis in arriving at the plausible conclusion that entitlement to TDIU is not warranted. Contrary to Appellant's

contentions, the September 2013 VA examiner did not opine that Appellant would not be prevented from gaining substantially gainful employment with the sole accommodation of his hearing aids. Further, the Board relied upon, and extensively referenced, evidence generated subsequent to the September 2013 VA opinion, including a May 2014 VR&E evaluation, in its TDIU analysis, and it provided an adequate statement of reasons or bases in support of its conclusions. Thus, Appellant's arguments cannot succeed.

IV. ARGUMENT

A. Standard of Review

Questions of law, that is, those involving statutory and regulatory interpretation, are reviewed *de novo*. *Bowers v. Shinseki*, 26 Vet.App. 201, 204 (2013). Factual findings, on the other hand, are subject to the clearly erroneous standard of review. *Cathell v. Brown*, 8 Vet.App. 539, 543 (1996); *see also* 38 U.S.C. § 7261(a)(4). "Under this standard, the Court can overturn the BVA decision only when there is no 'plausible basis in the record' for the decision." *Smallwood v. Brown*, 10 Vet.App. 93, 97 (1997) (quoting *Gilbert v. Derwinski*, 1 Vet.App. 49, 53 (1991)). The application of law to fact, however, is reviewed under the "arbitrary and capricious" standard of review. *Burden v. Shinseki*, 25 Vet.App. 178, 187 (2012). Under the "arbitrary and capricious" standard of review, the decision being reviewed is presumptively valid and will be affirmed "if a rational basis for [its] decision is presented." *Envtl. Def. Fund v. Costle*, 657 F.2d 275, 283

(D.C. Cir. 1981) (internal citations omitted); *see also Butts v. Brown*, 5 Vet.App. 532, 539 (1993). This Court has acknowledged that the line between the clearly erroneous and the arbitrary and capricious standards of review can become "blurred." *Burden*, 25 Vet.App. at 187; *see also Munn v. Sec'y of Dept. of Health and Human Servs.*, 970 F.2d 863, 871 (Fed. Cir. 1992) (noting that the difference between the "arbitrary and capricious" standard versus the "clearly erroneous" standard "is a matter for academic debate"). Still, the Court has held that both standards are deferential. *Elkins v. West*, 12 Vet.App. 209, 217-18 (1999).

Proceedings before the Court of Appeals for Veterans Claims' proceedings are adversarial in nature. *Forshey v. Principi*, 284 F.3d 1335, 1355 (Fed. Cir. 2002) (en banc). This means that Appellant bears the burden of first demonstrating the existence of an error. *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (holding that appellant had burden of demonstrating error in Board decision), *aff'd per curiam* 232 F. 3d 908 (Fed. Cir. 2000); *see also Mayfield v. Nicholson*, 19 Vet.App. 103, 111 (2005), *rev'd on other grounds*, 444 F.3d 1328 (Fed. Cir. 2006) ("[E]very appellant must carry the general burden of persuasion regarding contentions of error."); *Berger v. Brown*, 10 Vet.App. 166, 169 (1997) ("[T]he appellant . . . always bears the burden of persuasion on appeals to this Court"); *see also Dingess v. Nicholson*, 19 Vet.App. 473, 484 (2006). Once he carries the burden of demonstrating the existence of an error, he

generally also bears the burden of demonstrating prejudice resulting from that error. *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) (*Sanders II*); *Mayfield*, 19 Vet.App. at 119. Here, he fails to carry that burden.

The Board must also support its findings with an adequate statement of reasons or bases. *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *see also* 38 U.S.C. § 7104(d)(1). This does not require the Board to discuss all evidence of record. *Newhouse v. Nicholson*, 497 F.3d 1298, 1302 (Fed. Cir. 2007). Instead, the Board must "analyze the credibility and probative value of the evidence, account for evidence it finds persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the claimant." *McDowell v. Shinseki*, 23 Vet.App. 207, 215-16 (2009) (citing *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995)).

Appellant raises no other allegations of error and the Secretary urges the Court to consider any such arguments abandoned. *See Cromer v. Nicholson*, 19 Vet.App. 215, 217 (2005) ("[I]ssues not raised on appeal are considered abandoned."), *aff'd*, 455 F.3d 1346 (Fed. Cir. 2006); *Pieczenik v. Dyax Corp.*, 265 F.3d 1329, 1332-33 (Fed. Cir. 2001) ("It is well settled that an appellant is not permitted to make new arguments that it did not make in its opening brief."); *Cacciola v. Gibson*, 27 Vet.App. 45, 56 (2014) (holding that the Court will deem any issues not raised in an appellant's brief to be abandoned).

B. The Board Properly Considered Evidence from Multiple Sources in the Record as well as Appellant's Assertions and Provided an Adequate Statement of Reasons or Bases to Support its Plausible Conclusion that Entitlement to TDIU is not Warranted.

The Court should dismiss Appellant's assertion that the Board did not adequately address his reports of hearing loss symptoms because it did not address his May 2018 Board hearing testimony that he was having trouble hearing even while wearing hearing aids, App. Br. at 6, as this assertion had previously been made on multiple occasions and the Board had already considered it. Further, the Board thoroughly addressed the May 2014 VR&E evaluation as required by the September 2019 JMR; it extensively addressed additional employment evidence over and above what the JMR directed; and it also discussed lay evidence submitted after the May 2018 Board hearing.

The Board's findings with respect to whether one is able to engage in a "substantially gainful occupation" are factual in nature and subject to deference under the clearly erroneous standard. *Bowling v. Principi,* 15 Vet.App. 1, 6 (2001); *see also* 38 U.S.C. § 7261(a)(4). Therefore, if the Board's account of the evidence is plausible in light of the record viewed in its entirety, this Court cannot reverse the Board's findings even if it would have weighed the evidence differently. *Gilbert*, 1 Vet.App. at 52.

In order to meet the requirements set out in 38 C.F.R. § 4.16(b), Appellant's service-connected disabilities, alone, must be sufficiently severe

to produce unemployability. *Hatlestad v. Brown*, 5 Vet.App. 524, 529 (1993). In *Van Hoose v. Brown*, 4 Vet.App. 361 (1993), the Court recognized that the sole fact that a claimant is unemployed or has difficulty obtaining employment is not sufficient to demonstrate that his case is outside of the norm. *Id*. at 363. Compensation for impairments to occupation and earning capacity are already provided under the ratings system, and "[a] high rating in itself is a recognition that the impairment makes it difficult to obtain and keep employment." *Id*.; *see also* 38 C.F.R. § 4.1. Thus, the critical question in TDIU cases is whether the veteran is *capable* of performing the physical and mental acts required by employment. *Van Hoose*, 4 Vet.App. at 363 (emphasis in original); *see Faust v. West*, 13 Vet.App. 342, 354 (2000) (distinguishing between "employment" and "employability"). This Court has expressly held that a combined-effects medical examination report or opinion is not required to evaluate a claim of entitlement to a TDIU evaluation and that the Board may base its decision on information obtained from multiple sources of evidence. *Floore v. Shinseki*, 26 Vet.App. 376, 382 (2013).

Appellant preliminarily asserts that the Board erred by not addressing his May 2018 Board testimony that he has difficulty hearing even when wearing his hearing aids, and that this evidence refutes the September 2013 VA examiner's opinion that the simple use of hearing aids would allow him to obtain and engage in substantially gainful employment. App. Br. at 6

(citing to (R. at 480)). However, this contention characterizes the September 2013 opinion as if the examiner implied that solely using hearing aids would suffice as an accommodation to facilitate employment, when a reading of the September 2013 opinion reflects that this is not at all the case.

Indeed, in the September 2013 opinion, the examiner specified that with *multiple* accommodations, Appellant's hearing loss should not prevent him from gainful employment. (R. at 480). Further, the examiner specifically indicated the types of accommodations that could be made for Appellant, including "an amplified phone," "masking devices," "noise generators," and/or "other assistive technology." *Id*. By suggesting these options as possible employment accommodations, in addition to Appellant's hearing aids, the examiner clearly considered that Appellant's hearing aids may not suffice as the sole method by which his hearing would not prevent him from gaining substantially gainful employment. Thus, Appellant's implication that the examiner opined "that the simple use of hearing aids to allow [Appellant] to engage in substantially gainful employment," App. Br. at 6, is factually incorrect and cannot succeed. Appellant's argument amounts to a disagreement with the September 2013 examiner's assessments. Further, as discussed *infra*, a review of the Board's shows that it did not rely solely on the September 2013 examination in finding Appellant capable of substantially gainful employment; it also relied on multiple sources of

evidence, including VR&E evidence reflecting that Appellant was referred for several jobs but then chose not to apply for them.

Further, the evidence reflects that Appellant's May 2018 contention that he has difficulty hearing even while wearing hearing aids is not a new one. Prior to his Board hearing, Appellant contended that his hearing aids were insufficient in a January 2017 statement where he reported that he "took a job working a minimum of thirty hours per week," where he was "talking with and meeting with potential customers," and that his prescribed hearing aids did not "stop the excessive ringing nor clear up all the tones that [allowed him] to hear safely in [his] surroundings." (R. at 106). The Board decision reflects that while it mistakenly referred to this statement as having been submitted in July 2017 instead of January, it clearly considered Appellant's prior contention in the January 2017 statement that his hearing aids were insufficient to address his hearing loss symptomatology. (R. at 13-14). Further, because Appellant had previously asserted having difficulty hearing even while wearing hearing aids, his reiteration of this contention during the May 2018 Board hearing is cumulative of evidence that the Board had already considered.

Thus, Appellant's argument that the Board did not consider this specific assertion from his May 2018 Board hearing cannot succeed because the Board's analysis reflects it had considered it (albeit in Appellant's January 2017 statement) and not specifically citing to this

assertion does not render the March 2020 decision inadequate. *Newhouse*, 497 F.3d at 1302. Nor does this omission preclude judicial review, as the Board provided an extensive explanation beyond merely citing to the September 2013 VA opinion as to why Appellant is not entitled to TDIU. *Mayfield,* 19 Vet.App. at 129. Appellant's argument is essentially a mere disagreement with how the Board weighed the evidence. But he fails to show clear error, as the Board noted his testimony explained that Appellant's statements do not show an inability to perform substantially gainful work, especially in light of the September 2013 VA examiner's opinion that Appellant could perform substantially gainful work. (R. at 14-15); *see Gilbert*, 1 Vet.App. at 52.

Appellant next asserts that his May 2014 VR&E evaluation, which noted that his "service-connected disabilities significantly impair his ability to prepare for, obtain and/or retain employment," and "severely limits his employability," "paints a very different picture than what is address by the September 2013 examiner." App. Br. at 11. Appellant next contends that the "Board did not view the evidence in totality and consider the evidence subsequent to the medical opinion relied upon to the deny [Appellant's] claim." *Id*. A reading of the March 2020 decision reflects that this argument, which characterizes the Board's analysis as if it was solely predicated upon the September 2013 VA opinion, is also factually incorrect. Appellant is once again disagreeing with how the Board weighed the evidence.

First, the Board specifically acknowledged that "in May 2014, [Appellant] underwent an evaluation for . . . VR&E benefits," and stated that this evaluation "noted that the [Appellant's] service-connected disabilities significantly impair his ability to prepare for, obtain, and/or retain employment." (R. at 12). The Board further noted that the evaluation indicated that Appellant "'has not overcome the effects of his impairment through further education, transferable skills, or obtaining and maintaining equitable work;'" that it "'prevents him from being able to communicate effectively in most environments;'" and that "his last job terminated because he was unable to perform the essential functions of the position due to his service-connected disabilities." (R. at 12 (citing to (R. at 173))).

Second, Appellant's argument omits the fact that after noting the findings of the May 2014 VR&E evaluation, the Board then clarified that afterwards, a counselor/representative working with VR&E referred Appellant for several jobs in January 2015 and indicated that Appellant told him he would apply for them. (R. at 13, 143). The Board also noted that Appellant was referred for more jobs, but it was not clear if he had applied for them, and that VA sent him a letter in February 2015 notifying him that it was interrupting VR&E because he had not pursued help to obtain work activity, maintained contact, or followed up with attempted assistance. (R. at 13, 140-142). It also cited to a subsequent March 2015 VA letter notifying Appellant that VR&E was being discontinued, and a review of this letter

reflects that the reason for discontinuation was that Appellant did "not pursue the services outlined in [his] plan and did not respond to attempted contacts." (R. at 13, 138-139).

Third, the Board also noted that prior to Appellant's May 2014 VR&E evaluation, Appellant had worked at a retail job but had resigned, stating in a March 17, 2014, email that "when he's in an environment where there is background music or noise his hearing disability will not let him communicate with anyone." (R. at 12, 108). The Board further pointed out that in response, Appellant's supervisor "asked whether there was 'anything [they] can do to make this work for [him],' and expressed a desire to keep [Appellant] at his job." (R. at 12 (citing to (R. at 108))). It also referenced Appellant's January 2017 statement that he ended his self-employment due to the combined effects of his hearing loss and tinnitus. (R. at 13, 106).

Fourth, the Board discussed subsequent lay evidence submitted by Appellant's wife in January 2020 where it noted that she asserted that Appellant had difficulty hearing in sporting, church, and home environments, that he had to wear a headset to watch television, and that he needed help with telephone calls. (R. at 14 (citing to (R. at 24))).

Aside from its extensive discussion of this evidence, the Board's analysis clearly demonstrates that it did not solely rely on the September 2013 VA opinion in plausibly concluding that entitlement to TDIU is not warranted. *Floore*, 26 Vet.App. at 382; *Gilbert*, 1 Vet.App. at 52. Indeed, it

reasonably concluded that the evidence showed, over and above the September 2013 examiner's opinion, that Appellant had "ended his self-employment of his own volition," and that his store employer offered to accommodate Appellant's hearing disability in order to retain him as an employee. (R. at 14-15). The Board's analysis also cited to VR&E evidence showing that he was given the opportunity to obtain vocational rehabilitation, where he was referred for jobs requiring minimal interpersonal contact that were commensurate with his stated aptitudes and interests. (R. at 15). It cited to Appellant's subsequent choice not to follow through with his VR&E plan, and that per his resume and education, he possessed transferable skills. *Id*.

Ultimately, the Board plausibly concluded, based on multiple sources of evidence, that "the evidence did not show that [Appellant] is unable to obtain substantially gainful employment." *Id*.; *Floore*, 26 Vet.App. at 382; *Gilbert*, 1 Vet.App. at 52. The Board also noted that per *Gary v. Brown*, "VA is not obligated to show that a veteran is incapable of performing specific jobs in considering a claim for [TDIU]." (R. at 15) (citing to *Gary v. Brown* 7. Vet.App 229 (1994)). As this conclusion is plausibly based on the evidence of the record, the Court should decline to find them clearly erroneous. *Smallwood*, 10 Vet.App. at 97.

Appellant's contention that remand is warranted and that another opinion should have been obtained, App. Br. at 6, does not account for this

Court's holding in *Moore v. Nicholson* that it is the duty of the VA adjudicators, not medical examiners, to apply the appropriate legal standard. *Moore v. Nicholson*, 21 Vet.App. 211, 218 (2007), *rev'd on other grounds sub nom Moore v. Shinseki*, 555 F. 3d 1369 (Fed. Cir. 2009). Thus, the Board, as the appropriate adjudicator, correctly engaged in the requisite analysis of multiple sources of evidence and provided an adequate statement of reasons or bases in plausibly concluding that entitlement to TDIU is not warranted. *Id*.; *Floore*, 26 Vet.App. at 382; *Gilbert*, 1 Vet.App. at 52; *Smallwood*, 10 Vet.App. at 97. Appellant's arguments to the contrary are simply disagreements with the Board evaluated this evidence. *Gilbert*, 1 Vet.App. at 52. Accordingly, the Court should find that a reading of the Board's decision as a whole reflects that it provided adequate reasons and bases in arriving at the plausible conclusion that entitlement to TDIU is not warranted.

V. CONCLUSION

Upon review of all the evidence, as well as considering the arguments advanced by Appellant, he has not demonstrated that the Board committed any error, much less prejudicial error. Because Appellant has failed to satisfy his burden of demonstrating the existence of a prejudicial error, the Court should affirm the Board's decision.

Respectfully submitted,

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