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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 22-1199

RICHARD R. BERDY, APPELLANT,

V.

DENIS MCDONOUGH,
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 Richard R. Berdy served the Nation honorably in the United States Army from August 1969 to March 1971.[1] In this appeal, which is timely and over which the Court has jurisdiction,[2] he contests a November 3, 2021, Board of Veterans' Appeals decision that granted a 50% disability rating, but not higher, for his service-connected PTSD before April 25, 2017.[3] Appellant argues that the Board erred by not granting him a higher disability rating during this period.

On January 24, 2023, this matter was submitted to a panel of the Court principally to address whether the General Rating Formula for Mental Disorders (General Rating Formula) under 38 C.F.R. § 4.130 (2021) contemplates the effects of medication at *all* rating levels. We ordered the parties to submit supplemental briefing on the issue, and oral argument was scheduled for April 25, 2023. On April 7, 2023, an additional counsel, unrelated to the counsel who submitted the briefs in this appeal, filed his appearance for appellant.

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[1] Record (R.) at 3200.

[2] 38 U.S.C. §§ 7252(a), 7266(a).

[3] R. at 5-16. The grant of a 50% disability rating for PTSD before April 25, 2017, is a favorable finding that the Court may not disturb. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007).

In appellant's principal and supplemental briefs, he argued that the Board inappropriately considered the effects of medication when denying a disability rating greater than 50% for PTSD before April 25, 2017.[4] The Secretary disagreed, arguing that the effects of medication are contemplated at all rating levels of the General Rating Formula.[5] During oral argument, however, the seemingly wide gap between the parties shrunk. Through his additional counsel who appeared in this case after it was referred to a panel, appellant argued that he is not contesting the Board's evaluation of appellant's symptoms while medicated (i.e., the ameliorative *effects* of medication); instead, appellant is contesting the Board's acknowledgment that medication improved the symptomatology he exhibited.[6] Ultimately, this change in position rendered the need for a precedential decision moot, and the panel unanimously determined that single-judge disposition is appropriate.[7]

The Court now holds that even if we assume (and that is all we do) that the Board erred when it acknowledged that medication had ameliorated the effects of his psychiatric condition, appellant has not demonstrated that any such error was prejudicial. We also reject appellant's other arguments on appeal because the Board provided an adequate statement of reasons or bases for its decision by considering all of appellant's reported symptoms and relying on a report of a January 2015 VA medical examination, and the Board did not commit clear error in assessing the evidence. Accordingly, we will affirm the Board's decision.

I. BACKGROUND

In August 2013, appellant, acting without representation, filed various claims for disability compensation, none of which included PTSD.[8] In January 2014, appellant appointed counsel who filed this appeal to represent him,[9] and the next month filed an informal claim seeking service connection for PTSD.[10]

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[4] Appellant's Brief (Br.) at 9; Appellant's Supplemental (Suppl.) Br. at 7-9.

[5] Secretary's Br. at 10-13; Secretary's Suppl. Br. at 1-15.

[6] Oral Argument (OA) at 23:00-:58, *Berdy v. McDonough*, U.S. Vet. App. No. 22-1199 (oral argument held Apr. 25, 2023), https://www.youtube.com/watch?v=hoO3mxpWXUs.

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

[8] R. at 3201-02.

[9] R. at 3003-04.

[10] R. at 3006.

In January 2015, appellant underwent a VA medical examination and was diagnosed with PTSD.[11] VA subsequently granted appellant service connection for PTSD with a 10% disability rating, effective February 3, 2014.[12] Appellant filed a Notice of Disagreement (NOD) in January 2016 and requested review by a decision review officer (DRO).[13]

In March 2017, the DRO issued a decision granting appellant an increased disability rating of 30%, but not higher, for PTSD effective February 3, 2014.[14] VA issued a Statement of the Case (SOC) implementing the increased rating and also denying a disability rating greater than 30%.[15] Appellant filed an NOD in May 2017.[16]

In October 2017, the RO issued a rating decision that granted appellant an increased disability rating of 100% for PTSD effective April 25, 2017.[17] The RO immediately followed with a Supplemental Statement of the Case (SSOC) confirming the increased rating to 100% for PTSD effective April 25, 2017.[18] Appellant challenged the SSOC and filed an NOD with the Board, appealing the effective date of the 100% rating.[19]

In February 2019, the Board denied an initial rating greater than 30% before April 25, 2017.[20] Appellant appealed to the Court, leading to a January 2020 joint motion for partial remand (JMPR), which the Court granted on January 17, 2020.[21] On remand, the Board issued a September 2020 decision that again denied an initial disability rating greater than 30% for PTSD before April

[11] *See* R. at 2748-55.

[12] R. at 2735-37.

[13] R. at 2684-86.

[14] R. at 2404-06.

[15] R. at 2396-98.

[16] R. at 2321-23. In April 2017, appellant also appealed the March 2017 SOC to the Board by filing a VA Form 9. R. at 2332-34. The record isn't clear about what happened, if anything, to appellant's appeal to the Board; but neither party raises the issue or even addresses this part of the procedural history.

[17] R. at 1673-75.

[18] R. at 1687-88.

[19] R. at 1611-13, 1629-31.

[20] R. at 1555-61.

[21] R. at 578-84.

25, 2017.[22] Appellant again appealed to the Court and, again, the parties entered into a JMPR that the Court granted on July 14, 2021.[23]

On remand, the Board issued the November 3, 2021, decision currently on appeal. The Board increased appellant's initial disability rating from 30% to 50% before April 25, 2017, but denied a higher rating for this period.[24] The Board found, among other things, that the evidence showed appellant's "reported PTSD symptoms were managed successfully with medications throughout [the relevant] time period."[25] This appeal followed, and on November 30, 2022, the Court ordered the parties to provide supplemental briefing addressing whether the Board may or may not consider the ameliorative effects of medication when determining a proper disability rating greater than 10% under 38 C.F.R. § 4.130, including whether the General Rating Formula is successive, under this Court's decision in *Johnson v. Wilkie*.[26]

II. ANALYSIS

A. The Board's Reference to Medication

We are asked to decide whether the Board erred by referring to the ameliorative effects of medication when it denied appellant a disability rating greater than 50% for PTSD before April 25, 2017.[27] As we mentioned earlier, this was not the original question posed before the Court. Appellant's principal brief argued, in one paragraph, that the Board erred by focusing on the improvement of appellant's PTSD symptoms from medication.[28] Appellant contended that this part of the Board's decision violated *Jones v. Shinseki*, in which the Court set the baseline rule that it is error for the Board to take into consideration the ameliorative effects of medication when assigning a disability rating if the diagnostic code at issue does not specifically contemplate the use of such medication.[29] Because appellant's argument was presented only in a single paragraph, the Court

[22] R. at 47-58.

[23] R. at 34-39.

[24] R. at 5-16.

[25] R. at 14.

[26] 30 Vet.App. 245 (2018).

[27] OA at 23:00-:58.

[28] Appellant's Br. at 9.

[29] *See* 26 Vet.App. 56, 61-63 (2012).

ordered supplemental briefing on the issue.[30] There, appellant elaborated that the General Rating Formula only discusses medication at the 0% and 10% rating levels, and therefore the Board violated *Jones* by considering the ameliorative effects of medication above the 10% rating level.[31] Additionally, appellant argued that the General Rating Formula is not successive.[32] The Secretary defended the Board decision in full and urged affirmance. Relying on *Jones v. Shinseki* and *McCarroll v. McDonald*,[33] the Secretary contended that the General Rating Formula contemplates the effects of medication at all rating levels, and that the Board did not err when considering them to deny a disability rating greater than 50% before April 25, 2017.[34]

During oral argument, things became a bit turned around. Up until that point, the Court was under the impression that appellant's argument was that it was error for VA to consider the effects of medication when rating a condition under the General Rating Formula at any level above 10%.[35] In other words, VA could not consider the ameliorative effects medication had on appellant's symptoms above the 10% rating level. Apparently, we were under the wrong impression. With new counsel at oral argument, appellant contended that the Board erred by considering that appellant used medication and that such use affected his symptoms as a factor of the 30% to 100% rating levels under the General Rating Formula. Appellant did *not* argue that the Board's error was considering the ameliorative *effects* of medication on appellant's symptoms at those same rating levels.[36] In other words, appellant agreed that it was proper for VA to rate appellant's disability under the General Rating Formula by considering appellant's medicated state without discounting for whatever affect the medication had on appellant's symptomatology.[37] With this new argument, it became clear to the Court that the parties were proceeding under the shared assumption that under the General Rating Formula VA looks at the symptoms appellant exhibits—which may include symptoms ameliorated by medication.[38] As a result, the need for a precedential

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[30] *See* Appellant's Br. at 9.

[31] Appellant's Suppl. Br. at 7-9.

[32] *Id.* at 1-7.

[33] 28 Vet.App. 267 (2016).

[34] Secretary's Br. at 10-13; Secretary's Suppl. Br. at 1-15.

[35] *See* Appellant's Br. at 9; Appellant's Suppl. Br. at 7-9.

[36] OA at 16:07-17:45.

[37] OA at 21:19-22:20.

[38] *See* OA at 16:07-17:45, 23:00-:53.

decision to determine whether the General Rating Formula contemplates the effects of medication at all rating levels was rendered moot, and the panel determined that single-judge disposition is appropriate.[39] Now, the Court will turn to the clarified contention appellant framed at oral argument, namely that the Board erred by referencing appellant's medication use (and the fact that such use improved his symptoms) when denying a disability rating greater than 50% for PTSD before April 25, 2017. Ultimately, we hold that appellant has failed to demonstrate prejudicial error even if we assume that the Board erred along the lines appellant suggests.[40]

In its November 2021 decision, the Board determined that appellant was not entitled to a disability rating greater than 50% for PTSD before April 25, 2017.[41] At various times, the Board referred to appellant's medication use over the appeal period.[42] Appellant now contends that the Board erred when it considered his medication use as it relates to his auditory hallucinations.[43] He highlights the portion of the Board decision that stated:

> The Board acknowledges and has considered . . . [appellant's] reports of auditory hallucinations. However, the Board does not find that this warrants a higher rating. Although persistent hallucinations are listed as a symptom to consider under a 100[%] . . . disability rating, there is no evidence in the record that . . . [appellant's] hallucinations have any impact on his social or occupational functioning.[44]

Appellant argues that the critical error stems from the Board determining that there was no evidence of social or occupational impairment.[45] Specifically, appellant contends that the criteria for a 100% rating under the General Rating Formula only mentions persistent hallucinations—not the ameliorating effects of medication—and therefore the Board evaluated appellant's PTSD using criteria other than that permitted by § 4.130.[46] But even if we assume—without deciding—that the

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[39] *See Frankel*, 1 Vet.App. at 25-26. Because the panel determined that the parties were proceeding under the shared assumption that under the General Rating Formula VA looks at the symptoms appellant exhibits, which may include symptoms ameliorated by medication, the Court doesn't need to venture into the law concerning the contemplation of the ameliorative effects of medication under *Jones* and *McCarroll*.

[40] We stress again that we are *not* deciding that the Board errs when it mentions medications as part of evaluating a claimant's symptomatology as part of rating a mental condition. We are only assuming that it is error to do so for purposes of deciding this appeal.

[41] R. at 5-16.

[42] *See* R. at 9-11, 13-15.

[43] *See* OA at 01:08:05-:09:09.

[44] R. at 15 (emphasis added); *see* OA at 1:08:05-:09:09.

[45] OA at 01:08:05-:09:09.

[46] *See* OA at 01:11:04-:12:57, 01:14:30-:15:42.

Board shouldn't have mentioned the ameliorative effects of medication at all and only described appellant's symptoms (even if those symptoms were the result of a medicated state), appellant has failed to show prejudicial error.

The Court is required to "take due account of the rule of prejudicial error."[47] Although the burden showing prejudice is generally placed on appellant, it is not overwhelming.[48] Indeed, the Supreme Court has observed that appellant's prejudicial burden isn't a "particularly onerous requirement."[49] The Supreme Court explained that a mere "estimation of the *likelihood* that the result would have been different" is a potential factor for consideration when determining whether appellant's burden has been met.[50] Here, appellant fails to meet this minimal burden.

First, appellant doesn't explain how the Board mentioning the ameliorative effects of medication is even related to the Board's determination that his persistent hallucinations did not impact social or occupational functioning.[51] Indeed, the "critical" paragraph appellant points to doesn't mention appellant's past medication use whatsoever.[52] So it's hard for us to understand how mentioning medication impacted this portion of the decision. Second, appellant doesn't point to anything that demonstrates even a mere likelihood that the result would have been different if the Board didn't mention the ameliorative effects of medication.[53] He only argues that mentioning the ameliorative effects of medication "muddies the water in terms of an analysis of the symptoms" under the General Rating Formula.[54] But this is a mere conclusion without an explanation. Here, the Board determined that even though "persistent hallucinations are listed as a symptom to consider under a 100[%] . . . disability rating," that didn't mean that a 100% rating was warranted because there wasn't evidence that appellant's "hallucinations have any impact on his social or

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[47] 38 U.S.C. § 7261(b)(2); *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) (explaining that "the burden of showing that an error is harmful normally falls upon the party attacking the agency's determination"); 38 C.F.R. § 3.303(b) (2022).

[48] *See Slaughter v. McDonough*, 29 F.4th 1351, 1355 (Fed. Cir. 2022) ("'[P]rejudice . . . can be shown by demonstrating that the error . . . affected *or could have affected* the outcome of the determination.'" (emphasis added) (quoting *Simmons v. Wilkie*, 30 Vet.App. 267, 279 (2018), *aff'd*, 964 F.3d 1381 (Fed. Cir. 2020))).

[49] *See Sanders*, 556 U.S. at 410.

[50] *See id.* at 411.

[51] *See* OA at 01:11:04-:12:57, 01:14:30-:15:42.

[52] R. at 15.

[53] *See* Appellant's Br. at 7-11.

[54] OA at 01:07:58-:08:05.

occupational functioning."[55] Though appellant urges the Court to determine that this conclusion was erroneous, he doesn't explain why the Board was wrong (let alone *clearly* wrong) to determine that his "hallucinations [don't] have any impact on his social or occupational functioning," particularly as it relates to its previous mentioning of the ameliorative effects of medication.[56] And appellant had many opportunities to do so. During oral argument, appellant was explicitly asked how he was harmed by the Board mentioning the ameliorative effects of medication, and with the exception of what we have discussed concerning hallucinations, he only stated that the Board considered it as a factor not listed in the General Rating Formula.[57] This explanation, if we can even call it that, fails to indicate a likelihood that the decision may have been different if the Board didn't note that appellant used medication that improved his symptoms. After all, appellant agreed that it was proper for VA to rate his disability by considering the symptoms he exhibited as they appeared in his medicated state. Accordingly, appellant has failed to show that he was harmed by the Board noting he used medication to improve his symptoms, and we will affirm.[58]

B. Appellant Otherwise Fails to Establish Error

Appellant contends that the Board was clearly wrong when it denied a rating greater than 50% before April 25, 2017, for PTSD on bases beyond the medication issue, and also that the Board provided an inadequate statement of reasons or bases.[59] Specifically, appellant argues that

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[55] R. at 15; *see Vazquez-Claudio v. Shinseki*, 713 F.3d 112, 117 (Fed. Cir. 2013); *see also Emerson v. McDonald*, 28 Vet.App. 200, 212 (2016) (assessing whether a 70% evaluation is warranted for a mental disorder requires a two-part analysis that assesses (1) the symptoms displayed by the claimant, and whether the symptoms are those enumerated by the regulation; and (2) whether those symptoms result in occupational and social impairment with deficiencies in most areas).

[56] R. at 15.

[57] OA at 24:00-27:50; *see* OA at 01:09:20-:09:50, 01:10:00-:12:57, 01:13:05-:15:40. We acknowledge that during oral argument appellant also briefly argued that the Board disregarded his reports of suicidal ideation. *See* OA at 24:30-26:08. But as it relates to prejudice, appellant again only determined that the harm in mentioning the ameliorative effects of medication was that the Board utilized a factor outside the General Rating Formula. *Id.* Moreover, as we explain in more detail below, the Board did not disregard appellant's reports of suicidal ideation.

[58] *See* 38 U.S.C. § 7261(b)(2); *Sanders*, 556 U.S. at 409; 38 C.F.R. § 3.303(b); *see also Locklear v. Nicholson*, 20 Vet.App. 410, 416-17 (2006). During oral argument, the Secretary addressed, for the first time, that VA published proposed rulemaking in the *Federal Register* in February 2022 seeking to revise 38 C.F.R. § 4.130. OA at 52:40-54:15. Under the proposed rule, the General Rating Formula includes a note that expressly permits rating specialists to contemplate of the ameliorating effects of medication. *See* Department of Veterans Affairs, Schedule for Rating Disabilities: Mental Disorders, 87 Fed. Reg. 8498, 8504 (Feb. 15, 2022). We want to stress that the proposed regulatory change played no role in our decision today. First, the Court is befuddled that it took the Secretary until oral argument to even acknowledge the proposed rule. Second, and more importantly, the Secretary never explained how the proposal affected *this* case.

[59] *See* Appellant's Br. at 7-11.

the Board disregarded his reported symptoms of auditory hallucinations, suicidal ideations, irritability, anger, and difficulty dealing with others.[60] The Secretary contends that the Board considered all of appellant's reported symptoms, and that his argument amounts to nothing more than a disagreement with how the Board weighed the evidence.[61] We agree with the Secretary.

The Board's determination of the appropriate degree of disability is a finding of fact we review for clear error.[62] For all its findings on a material issue of fact and law, the Board must support its factual determinations and legal conclusions with a written statement of reasons or bases that is "adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court."[63] If the Board fails to do so, remand is appropriate.[64]

As an initial matter, appellant's argument makes a subtle, but critical mistake that trips up even the most seasoned practitioners. As a result, we must take a moment to address appellant's conflation between an argument that asserts that the Board provides an inadequate statement of reasons or bases for its findings and conclusions, and one that asserts that the Board's factual findings and conclusions, in and of themselves, are clearly wrong. All of appellant's arguments fall under the heading titled "WHETHER THE BOARD FAILED TO PROVIDE ADEQUATE REASONS OR BASES."[65] For parts of appellant's brief, he frames his argument in accord with the heading he used by contending that the Board did not support its factual determinations and legal conclusions with a written statement of reasons or bases that is "adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court."[66] However, at times in this same section of the brief, appellant changes his argument in an important way. Specifically, he argues that the Board's factual conclusions were made in error.[67] The problem is that challenging the Board's factual determinations is analytically distinct from

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[60] *Id.*

[61] Secretary's Br. at 10-21.

[62] *See Tedesco v. Wilkie*, 31 Vet.App. 360, 363 (2019); *Smallwood v. Brown*, 10 Vet.App. 93, 97 (1997).

[63] *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *see Gilbert v. Derwinski*, 1 Vet.App. 49, 53 (1990).

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

[65] Appellant's Br. at 7. We also see this in appellant's "Summary of the Argument," in which he argues that the Board provided inadequate reasons or bases for its decision by failing to consider certain evidence. *Id.* at 6-7.

[66] *Id.* at 7-10; *see Allday*, 7 Vet.App. at 527.

[67] *See* Appellant's Br. at 10 ("The Board's denial of a rating greater than 50[%] . . . is error."), 11 (arguing that the report of the January 2015 VA medical "examination is inadequate").

challenging the Board's statement of reasons or bases with respect to its findings and conclusions. And the difference between these arguments is not merely academic. The Court decides on its own whether the Board provided adequate reasons or bases because the issue only arises on appeal.[68] In contrast, we deferentially review for clear error the Board's factual determinations such as the appropriate degree of disability[69] and adequacy of a medical examination or opinion.[70] In sum, because the question of whether the Board supported its findings and conclusions with an adequate statement of reasons or bases is a separate inquiry from whether the Board's factual findings and conclusions themselves are clearly wrong, counsel need to be precise when they make an argument before the Court. Fairly read, appellant's brief makes both arguments here. That is, appellant challenges the Board's factual determinations concerning the appropriate degree of disability and adequacy of the January 2015 VA medical examination, and also challenges the Board's reasons or bases for its findings and conclusions.[71] With these distinctions in mind, we will first turn to appellant's contentions that the Board was clearly wrong when it denied a rating greater than 50% before April 25, 2017, for PTSD, and also that the Board provided an inadequate statement of reasons or bases. Then, we will turn to appellant's challenge concerning the adequacy of the January 2015 VA medical examination.

1. Auditory Hallucinations

As we have discussed, the Board determined that appellant's auditory hallucinations and delusions were not persistent in frequency, severity, and duration such that appellant was entitled to a disability rating greater than 50% before April 25, 2017.[72] The Board explained that it considered appellant's various reports of auditory hallucinations and "[a]lthough persistent hallucinations are listed as a symptom to consider under a 100[%] . . . disability rating, there is no evidence in the record that . . . [appellant's] hallucinations have any impact on his social or occupational functioning."[73] We disagree with appellant's contention that the Board failed to explain why his symptoms do not warrant a 100% disability rating.

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

[69] *See Tedesco*, 31 Vet.App. at 363; *Smallwood*, 10 Vet.App. at 97.

[70] *D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008).

[71] *See* Appellant's Br. at 7-11.

[72] R. at 13-14.

[73] R. at 15.

Here, the Board thoroughly reviewed and summarized appellant's reports of auditory hallucinations before April 25, 2017.[74] This includes appellant's October 2016 and January 2017 treatment records noting that he experienced auditory hallucinations "every night," and sometimes during the day in quiet settings.[75] However, the Board's review also included appellant's denials of auditory hallucinations in treatment records from April 2015, January 2017, and April 2017.[76] The Board also recognized that appellant's medication had improved his auditory hallucinations before April 25, 2017.[77]

As factfinder, it's the Board's responsibility to weigh and assess the evidence.[78] In its November 2021 decision, the Board weighed the evidence and concluded that appellant was not entitled to a disability rating greater than 50% for PTSD before April 25, 2017. And the Board adequately explained its reasoning so that we may engage in meaningful judicial review. The crux of appellant's argument is that the Board failed to define "persistent" when it concluded that appellant's symptoms did not amount to "persistent" hallucinations, despite recognizing that appellant suffered from daily auditory hallucinations.[79] But appellant's argument misses the mark. True, "[w]ithout established benchmarks for . . . subjective terms, the Court is left without standards upon which to review the Board's decision."[80] But appellant's argument doesn't take into account the Board's finding that even though "persistent hallucinations are listed as a symptom to consider under a 100[%] . . . disability rating," that doesn't matter because there isn't evidence that appellant's "hallucinations have any impact on his social or occupational functioning."[81] Appellant does not challenge this finding, nor does he point to any evidence that shows otherwise.[82] In sum,

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[74] *See* R. at 9-16.

[75] R. at 12-13.

[76] R. at 10-13; *see* R. at 1354-55 (Apr. 2015 medical examination), 1193-94 (Jan. 2017 medical examination), 1078-79 (Apr. 2017 medical examination).

[77] R. at 14; *see* R. at 1948 (Oct. 2016 medical examination), 1193-94 (Jan. 2017 medical examination).

[78] *See D'Aries*, 22 Vet.App. at 107.

[79] *See* Appellant's Br. at 8-9.

[80] *Chavis v. McDonough*, 34 Vet.App. 1, 17 (2021).

[81] R. at 15; *see Vazquez-Claudio*, 713 F.3d at 117; *see also Emerson*, 28 Vet.App. at 212 (assessing whether a 70% evaluation is warranted for a mental disorder requires a two-part analysis that assesses (1) the symptoms displayed by the claimant, and whether the symptoms are those enumerated by the regulation; and (2) whether those symptoms result in occupational and social impairment with deficiencies in most areas).

[82] *See* Appellant's Br. at 7-11.

we are not persuaded by appellant's argument and conclude that the Board provided an adequate statement of reasons or bases for its decision.[83]

2. Remaining PTSD Symptoms

Next, appellant takes issue with the Board's handling of reports of difficulty dealing with others, irritability, anger, and suicidal ideations.[84] Again, this argument falls under the section of appellant's brief concerning the Board's statement of reasons or bases—and *some* of this argument is in line with the heading.[85] But in this same section, the majority of appellant's argument actually challenges the Board's factual determination concerning the degree of his disability.[86] To ensure that we accurately address the issues appellant challenges, we will review each of his contentions as they are actually argued in his brief.

We start with reports of appellant's difficulty dealing with others. In its November 2021 decision, the Board concluded that evidence was "against a finding that . . . [appellant] had difficulty establishing and maintaining effective work and social relationships" because, among other things, appellant reported during the appeal period that he was retired and happy in his retirement.[87] Appellant argues that Board should not have focused on his retirement, as it does not fully evaluate his actual social and occupational impairment during that time.[88] We aren't persuaded; the Board addressed more than just appellant's retirement. Specifically, the Board also noted that appellant reported he was "content in the company of his wife and/or children and that they occasionally socialized with other people."[89] True, appellant may have "prefer[ed] to avoid people," but that doesn't mean the Board failed to address all of the evidence, nor that the Board was clearly wrong when it determined appellant could establish social relationships.[90] Ultimately, appellant's argument amounts to a disagreement with how the Board weighed the evidence, which doesn't establish clear error.

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[83] *See* 38 U.S.C. § 7261(b)(2) (requiring the Court to "take due account of the rule of prejudicial error"); *Sanders*, 556 U.S. at 409; 38 C.F.R. § 3.303(b).

[84] Appellant's Br. at 9-11.

[85] *Id.*

[86] *Id.* at 10 ("The Board's denial of a rating greater than 50 percent is error.").

[87] R. at 14.

[88] Appellant's Br. at 9.

[89] R. at 14.

[90] Appellant's Br. at 9; *see* R. at 2749.

The same is true for appellant's contention that the Board failed to sufficiently address his irritability, which includes "road rage" and thoughts of retaliation against others.[91] Appellant's varying reports of irritability and isolating behavior were among the many symptoms the Board considered.[92] The Board found that appellant's PTSD "is primarily manifested by complaints of depression and anxiety, nightmares, irritability, and auditory hallucinations," but still does not support a rating greater than 50%.[93] Again, appellant's argument merely amounts to a disagreement with how the Board weighed the evidence, and that the Board did not give his reports of irritability more weight.[94] Overall, appellant has failed to show that the Board was clearly wrong when it determined his overall disability picture did not warrant a disability rating greater than 50% or that its statement of reasons or bases was somehow deficient.

This brings us to appellant's reports of suicidal ideation. He contends that the Board's refusal to "assess at minimum a 70[%] . . . rating based on [suicidal ideation] does not give him the benefit of the doubt under 38 C.F.R. § 4.3 and violates *Colvin v. Derwinski*, 1 Vet.App. 171, 174 (1991) because . . . the Board . . . [made] a medical judgment that [appellant's] PTSD is not as severe as noted" in his medical examinations.[95] But again, as factfinder, the Board plausibly considered and weighed the evidence to determine that appellant's symptoms did not warrant a disability rating greater than 50% before April 25, 2017.[96] The Board acknowledged appellant's February 2014 report of passive suicidal ideation.[97] However, the Board also recognized appellant's repeated and consistent denials of suicidal ideation during the appeal period.[98] Weighing the evidence, the Board concluded that appellant's "noted suicidal thoughts appear to have occurred in isolation. Indeed, suicidal ideation was denied on multiple occasions, and the

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[91] Appellant's Br. at 9-10; *see* R. at 219.

[92] *See* R. at 9, 12, 13.

[93] R. at 13.

[94] Even if the Board failed to sufficiently address appellant's reports of irritability, it would be difficult for us to find the error prejudicial when appellant admits that he *avoids* such behavior "due to his wife." *See* Appellant's Br. at 9-10. This cuts against his contention that the evidence indicates impaired impulse control—after all, he's able to control his impulse and avoid it. *See* Appellant's Br. at 9-10; R. at 219; *see also* 38 U.S.C. § 7261(b)(2) (requiring the Court to "take due account of the rule of prejudicial error"); *Sanders*, 556 U.S. at 409; 38 C.F.R. § 3.303(b).

[95] Appellant's Br. at 10.

[96] *D'Aries*, 22 Vet.App. at 107.

[97] R. at 9; *see* R. at 219 (noting appellant endorsed passive suicidal ideation, but that he denied plan or intent).

[98] *See* R. at 9-13, 15-16; *see also, e.g.*, R. at 2867, 2188, 2180, 2175, 2012, 1960, 1354, 1193-94, 1078-79.

evidence does not show that . . . [appellant's] PTSD is productive of symptoms causing occupational and social impairment with deficiencies in most area[s]."[99] Appellant doesn't explain how this conclusion amounts to the Board rendering an independent medical judgment, nor how there is reasonable doubt to trigger the application of § 4.3. Rather, it's clear that the Board relied on appellant's numerous medical examinations that predominantly denied suicidal ideation.[100]

In sum, the Board considered appellant's overall disability picture and plausibly determined that appellant is not entitled to a disability rating greater than 50% before April 25, 2017. In rendering its decision, the Board weighed appellant's reports of irritability, anger, difficulty dealing with others, and suicidal ideations. Moreover, the Board permissibly considered the ameliorative effects medication had on appellant's PTSD symptoms. And the Board fully explained its reasoning such that appellant can understand what the Board did and this Court can review the Board's finding. The Court is sympathetic to appellant's belief that his symptoms warrant a higher disability rating. However, he has not shown that the Board failed to consider appellant's reported PTSD symptoms, and that the Board was clearly wrong in its determination of appellant's degree of disability.

C. The January 2015 VA Examination

This brings us to appellant's final argument, in which he contends that the Board erred by relying on a report of a January 2015 VA medical examination.[101] Specifically, appellant contends that the January 2015 VA examiner overlooked symptoms when concluding that appellant's PTSD was "mild."[102] The Secretary urges the Court to decline to address this argument in the first instance under the issue exhaustion doctrine.[103] We agree with the Secretary. Because appellant did not raise this argument appropriately before the Agency, and the argument is underdeveloped in any event, we will decline to address it now.

Traditionally, when presented with an argument newly raised on appeal over which we have jurisdiction, the Court has discretion to hear the argument, decline to address it, or remand

[99] R. at 15.

[100] *See* R. at 9-13.

[101] Appellant's Br. at 10-11.

[102] *Id.*; *see* R. at 2749.

[103] Secretary's Br. at 21-25.

the matter as appropriate.[104] Exercising this discretion entails a case-by-case analysis that weighs prejudicial delay and other individual interests against institutional interests, such as protecting the Agency's administrative authority and promoting judicial efficiency.[105] The law continues to recognize the longstanding "importance of issue exhaustion with respect to administrative tribunals," because "'orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while [the agency] has opportunity for correction in order to raise issues reviewable by the courts.'"[106]

We decline to address appellant's argument that the Board erred by relying on the January 2015 VA medical examination. We acknowledge that the situation we face is not the common one in which issue exhaustion principles come into play. That is so because appellant raised the issue of adequacy in his January 2016 NOD.[107] However, appellant never again mentioned the adequacy of the January 2015 medical opinion. He did not raise the issue to the Board following two JMPRs in January 2020 and July 2021.[108] Nor did appellant raise the issue in his September 2021 90-day Board Response that preceded the November 2021 Board decision.[109] Additionally, as the Secretary points out, the Board's analysis of the January 2015 VA examination is "effectively identical" to that of the September 2020 Board decision, which was the subject of the parties' July 2021 JMPR.[110] Appellant was represented by counsel throughout the proceedings before the Agency, and appellant, through his counsel, has not raised the argument since 2016.[111] There simply was no indication that appellant maintained an argument that the January 2015 VA medical opinion was inadequate in the years following his 2016 NOD.

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[104] *Maggitt v. West*, 202 F.3d 1370, 1377-89 (Fed. Cir. 2000); *see also* 38 U.S.C. § 7252(a).

[105] *Maggitt*, 202 F.3d at 1377-89.

[106] *Scott v. McDonald*, 789 F.3d 1375, 1377 (Fed. Cir. 2015) (quoting *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952)). The Court recognizes the Supreme Court's recent decision in *Carr v. Saul*, which held that it was error for a court of appeals to impose an issue-exhaustion requirement to constitutional challenges not raised before the Social Security Administration (SSA). 141 S. Ct. 1352, 1359-62 (2021). However, the Federal Circuit recently "decline[d] to read *Carr* as upending . . . well-established precedents and eliminating the exhaustion requirement before the Board." *Morris v. McDonough*, 40 F.4th 1359, 1364 (Fed. Cir. 2022).

[107] *See* R. at 2686.

[108] *See* R. at 579-82, 34-38.

[109] *See* R. at 23-24.

[110] Secretary's Br. at 22; *compare* R. at 53, 56-57, *with* R. at 10, 14-15.

[111] *See, e.g.*, R. at 684, 579-83, 34-38, 23-24.

To be clear, declining to address appellant's argument is not due to the fact, in and of itself, that the parties agreed to JMPRs that did not address the issue. After all, the JMPRs provided that appellant was "entitled to submit additional evidence and argument in support of [his] claim."[112] So, the significance of the JMPRs is that appellant never gave the Board any reasons to believe he was maintaining a challenge to the adequacy of the January 2015 opinion because he never made an argument about the issue on remand. Entertaining the argument now has the same effect as if appellant never raised the argument in 2016: pulling the rug out from under VA because there was no reason for the Agency to address an argument appellant appeared to no longer be pursuing.

In sum, appellant has been represented by counsel at all relevant periods and chose not to challenge the examination after multiple opportunities to do so. Appellant also has not provided the Court with a reason why we should consider his newly raised matter.[113] Accordingly, after carefully balancing the interests of the veteran and the Agency, the Court concludes that VA's institutional interests prevail, and we will not entertain this argument.

Even if issue exhaustion principles did not counsel against considering appellant's argument about the 2015 VA medical opinion, there is another independent reason why we would decline to address the argument: appellant's argument is woefully underdeveloped and conclusory.[114] The entirety of appellant's argument is a single paragraph with limited analysis, and ultimately boils down to two points: (1) the evidence described throughout appellant's brief purportedly supports his contention that the January 2015 examiner ignored evidence of severe PTSD symptoms that were not "mild;" and (2) "VA's assessment of a 30[%] . . . rating effective February 3, 2014[,] . . . confirms that this examination is inadequate and may not be used to deny . . . [appellant] a higher rating than 50[%]."[115] Such conclusory statements are not what arguments

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[112] R. at 581; *see* R. at 37 ("On remand, [a]ppellant should be free to submit additional evidence and argument regarding his claim."); *see also Carter v. Shinseki*, 26 Vet.App. 534, 542-43 (2014), *rev'd on other grounds sub nom. Carter v. McDonald*, 794 F.3d 1342 (Fed. Cir. 2015).

[113] Filing a reply brief is not mandatory under the Court's Rules of Practice and Procedure. U.S. VET. APP. R. 28(c). But this is a situation where the Court may have benefited from appellant's considered views.

[114] *See, e.g.*, *Woehlaert v. Nicholson*, 21 Vet.App. 456, 462-63 (2007); *Locklear*, 20 Vet.App. at 416; *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc), *aff'd,* 232 F.3d 908 (Fed. Cir. 2000); *Evans v. West*, 12 Vet.App. 22, 31 (1998); *Marciniak v. Brown*, 10 Vet.App. 198, 201 (1997); *Parker v. Brown*, 9 Vet.App. 476, 481 (1996); *see also Hernandez v. Starbuck*, 69 F.3d 1089, 1093 (10th Cir. 1995) (noting that the courts of appeals are "not required to manufacture appellant['s] argument"); *Wilson v. Jotori Dredging, Inc.*, 999 F.2d 370, 372 (8th Cir. 1993) (holding that where an appellant has failed to demonstrate error, a court is not required to search the record for an error).

[115] *See* Appellant's Br. at 10-11.

are made of.[116] So, whether we do so based on issue exhaustion or the failure to develop the argument, the result is the same. We decline to address appellant's arguments concerning the adequacy of the January 2015 VA medical opinion on the merits.

III. CONCLUSION

After consideration of the parties' briefs, the governing law, oral argument, and the record, the Court AFFIRMS the November 3, 2021, Board decision.

DATED: May 17, 2023

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[116] *Locklear*, 20 Vet.App. at 416-17 (stating that the Court will not entertain underdeveloped arguments).