No. 20-2067

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Joe A. Lynch

Claimant-Appellant,

v.

Robert L. Wilkie, Secretary of Veterans Affairs,

Respondent-Appellee.

Appeal from the United States Court of Appeals
for Veterans Claims in Case No. 19-3106

APPELLANT'S CORRECTED OPENING BRIEF

Mark R. Lippman, Esq.
Attorney of Record*
Veterans Law Group
13446 Poway Rd., Suite 338
Poway, CA 92064
888-811-0523
mlippman@veteranslaw.com

Adam Luck, Esq.
GLOVERLUCK
1910 Pacific Ave., Suite 13300
Dallas, TX 75201
214-741-2005
adam@gloverluck.com

Kenneth M. Carpenter, Esq.
Carpenter Chartered
1525 SW Topeka Blvd, Ste D
Topeka, KS 66601
785-357-5251
kmcarpenter@mindspring.com

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 20-2067

Short Case Caption Lynch v. Wilkie

Filing Party/Entity Joe A. Lynch

Instructions: Complete each section of the form. In answering items 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance. **Please enter only one item per box; attach additional pages as needed and check the relevant box**. Counsel must immediately file an amended Certificate of Interest if information changes. Fed. Cir. R. 47.4(b).

I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: 01/13/2021

Signature: /s/Mark R. Lippman

Name: Mark R. Lippman

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. ☑ None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities. ☑ None/Not Applicable
Joe A. Lynch		

☐ Additional pages attached

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

☑ None/Not Applicable ☐ Additional pages attached

5. Related Cases. Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

☑ None/Not Applicable ☐ Additional pages attached

6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

☑ None/Not Applicable ☐ Additional pages attached

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STATEMENT OF RELATED CASES

Pursuant to Federal Circuit Rule 47.5, counsel for Appellant, Joe A. Lynch (hereafter "Mr. Lynch"), hereby states that there is no known related case.

Dated: January 13, 2021

/s/Mark R. Lippman
Mark R. Lippman

STATEMENT OF JURISDICTION & APPEALABILITY

Pursuant to Rule 47.6, counsel for appellant, Mr. Lynch states the following:

(a) The statutory basis for jurisdiction of the Court of Appeals for Veterans Claims is 38 U.S.C. § 7252 and 28 U.S.C. § 1651(a).

(b) The statutory basis for jurisdiction of the Court of Appeals for the Federal Circuit to hear this appeal is 38 U.S.C. § 7292.

(c) This appeal is timely because the Notice of Appeal ("NOA") from the judgment of the Court of Appeals for Veterans Claims ("the Veterans Court" or "the lower court") was filed with the Clerk of the Veterans Court on June 29, 2020, within 60 days of the judgment entered on May 12, 2020, as required by Rule 4(a)(1)(B) of the Federal Rules of Appellate Procedure and section 7292. Appx12,14-15.

(d) The Veterans Court's decision of April 17, 2020 is a final order and is otherwise appealable under 38 U.S.C. § 7292(a).

STATEMENT OF ISSUE PRESENTED

I) DID THE HOLDING IN *ORTIZ v. PRINCIPI* MISINTERPRET 38 U.S.C. § 5107(b) AND 38 C.F.R. § 3.102 BY SETTING FORTH AN EQUIPOSE-OF-THE-EVIDENCE STANDARD FOR VETERANS TO PROVE THEIR CLAIMS AND A CORRESPONDING PREPONDERANCE-OF-THE-EVIDENCE-STANDARD FOR THE SECRETARY TO DISPROVE THEM; AND, IF SO, SHOULD PRINCIPLES OF *STARE DECISIS* BE A BAR TO THE *EN BANC* COURT OVERTURNING THIS THREE-JUDGE PANEL DECISION?

STATEMENT OF THE CASE AND THE FACTS

1. Procedure

Mr. Lynch served on active duty for the United States Marine Corps from July 1972 to July 1976.

On August 13, 2016, Department of the Veterans Affairs ("the VA," "the Agency" or "the Department") at the local regional office granted service connection for post-traumatic stress disorder (PTSD) and assigned a disability rating of thirty (30) percent. On April 15, 2019, the Board of Veterans' Appeals ("the Board" or "the BVA") denied a disability rating in excess of thirty (30) percent for PTSD. Appx16-22.[1] The Veterans Court affirmed. Appx1-9.

2. Facts

For the first time in his life, while assigned to the USS Trenton from May 10, 1974 to October 30, 1974, Mr. Lynch found himself far away from home and in very confined and stressful conditions. During his entire time on the *Trenton*, Mr. Lynch was required to sleep at the lower levels of the ship in tightly-spaced bunks, a situation later causing him claustrophobia. Among other traumatic stressors, Mr. Lynch participated in the ship's primary mission of evacuating desperate refugees from war-torn areas, like Cyprus and Beirut, during the

[1] "Appx" refers to the Joint Appendix, filed separately.

Greek/Turkey conflict. Mr. Lynch also witnessed a helicopter crash on the flight deck, killing several passengers. Appx23-24,25-26,27.

Approximately two months after his military discharge, Mr. Lynch noticed he had difficulty adjusting to civilian life, having trouble sleeping in the dark, feeling uncomfortable in cramped enclosed spaces and experiencing episodes of excessive sweating and heart palpitations. He later began to self-isolate to avoid problems interacting with people. Appx26. His wife encouraged him to seek counseling for his symptoms, but he resisted, thinking it might jeopardize his career in law enforcement. Appx30.

At the recommendation of his veteran peer group, Mr. Lynch finally decided to get help, and met with private psychologist Gwendolyn Keith Newsome, Ph.D. on March 6 and 30, 2015. Appx28,26. During his sessions, Mr. Lynch reported symptoms of sleep disturbance, anger, claustrophobia, panic attacks, mood swings, frequent nightmares, sadness and depression, and impairment of memory. Appx25. Mr. Lynch believed that his symptoms were responsible for the failure of his first marriage and for the problems in his current marriage. Appx25. He reported having difficulty developing and maintaining

relationships, preferring to self-isolate in his home. Dr. Newsome assigned a GAF score of 48.[2] Appx26.

> In her report, Dr. Newsome concluded:
>
> His presentation indicates the performance of his jobs functions and social interactions are severely limited due to his military experiences, which resulted in PTSD symptomology. He experiences distress in elevators and offices with no windows and frequently has to excuse himself from these emotionally taxing situations. His lack of social support is increasing because of his inability to control physical and emotional reactions to the stressors that remind him of his military trauma. His family relations, judgment, thinking, and mood are increasing limiting his quality of life.

Appx26.

On August 5, 2016, Mr. Lynch underwent a VA PTSD examination conducted by Roy Etheridge, Ph.D. Appx37-46. On the day of the examination, Mr. Lynch's PTSD symptoms appeared less active, as "[t]here was no evidence of significant social discomfort or anxiety during the interview." Appx44. The examiner found that Mr. Lynch endorsed symptoms of hypervigilance, problems with concentration, chronic sleep impairment and anxiety. Appx43-44. The

[2] Under the Global Assessment of Functioning ("GAF"), which was included in the then-current Diagnostic & Statistic Manual of Mental Disorder (DSM) IV, but removed from DSM-V, a score in the range of 41-50 indicates: **"**Serious symptoms (e.g., suicidal ideation, severe obsessional rituals, frequent shoplifting) *or* any serious impairment in social, occupational, or school functioning (e.g., no friends, unable to keep a job, cannot work)."

examiner concluded that Mr. Lynch's symptoms met the criteria for a diagnosis of PTSD, but they did not interfere with occupational or social functioning. Appx38.

On September 7 and 27, 2017, Mr. Lynch was seen by private psychiatrist H. Jabbour, M.D., who wrote two reports. Appx47-58. Mr. Lynch recalled that, since service, he had become very irritable and increasingly impatient with people and situations, sometimes breaking out into anger outbursts. He recounted dealing with hypervigilance, exaggerated startle response and sleep disturbance. On average, he was getting three or four hours of sleep a night and his lack of sleep was causing him to fall behind in his work as an investigator. Mr. Lynch also reported struggling with claustrophobia, which he believed was caused by the extremely crowded bunking conditions on the *Trenton*. Appx47-48.

Mr. Lynch stated that his impaired focus and concentration were causing problems at work, and so he had been thinking about retiring. Appx49. Dr. Jabbour's report noted that Mr. Lynch became easily irritated when investigating people and that sometimes he would get confused. Mr. Lynch indicated that he worked alone, although he occasionally interviewed people as part of investigatory duties. Dr. Jabbour noted that Mr. Lynch sometimes had "passive death wishes" and suicidal ideation.[3] Appx51,57.

[3] *Bankhead v. Shulkin*, 29 Vet.App. 10. 19 (2017) ("Suicidal ideation is one of the symptoms associated with a 70% disability rating.").

In assessing the severity of Mr. Lynch's PTSD condition, Dr. Jabbour observed: "After a careful assessment of functioning, the patient has a major impairment in several areas of functioning and that include[s]: Impairment in work, and housework." Appx51. Dr. Jabbour concluded that Mr. Lynch's PTSD symptoms caused "occupational and social impairment with reduced reliability productivity," a finding corresponding to a fifty (50) percent disability level under the VA diagnostic code for mental disorders. Appx51. Dr. Jabbour found that Mr. Lynch endorsed depressed mood, anxiety, suspiciousness, chronic sleep impairment, mild memory loss, flattened affect, disturbance of motivation and mood, difficulty in establishing and maintaining effective work and social relationships, difficulty in adapting to stressful circumstances, including work and work like settings, and an inability to establish and maintain effective relationships. Appx57.

On July 20, 2017, Mr. Lynch underwent a VA videoconference examination by Amy K. Mistler, Ph.D. Appx59-69. At the examination, Mr. Lynch reported persistent irritability, difficulty concentrating, exaggerated startle response and hypervigilance. Appx59. Mr. Lynch recounted experiencing panic attacks in the middle of the night three or four times a week and nightmares two to three times a week and stated that he felt irritable three to five times a week and had anger outbursts with his wife once or twice a week. Appx64-65.

As for his employment, Mr. Lynch stated that he was working twenty-nine (29) hours a week as an investigator for the industrial commission and was able to work at home most of the time. On occasion, he was "forced to be around other people" and, in those situations, he tried his best to restrain himself. He had received several complaints about being "too aggressive" at work and had been investigated and counseled by his supervisor. Appx59,62-63.

At the VA's adjudicator's request, Dr. Mistler was asked to resolve the conflicting disability findings of VA examiner Dr. Etheridge and private psychiatrist Dr. Jabbour. Among other things, Dr. Mistler opined that Dr. Jabbours conclusions were more extreme than what the evidence supported. Appx60. Dr. Mistler noted that Dr. Jabbour found that Mr. Lynch had an inability to have relationships with others, but Mr. Lynch reported having friendships and family relationships. Dr. Mistler also observed that Mr. Lynch's reported symptoms during her examination showed less severity than those reported during Dr. Jabbour's examinations. Appx60.

Dr. Mistler ultimately concluded that Mr. Lynch's PTSD symptoms caused "occupational and social impairment with occasional decrease in work efficiency," a finding corresponding to a thirty (30) percent disability level under the VA diagnostic code. Appx61.

Notably, Mr. Lynch was found to be a reliable and credible historian by both of the VA psychologists Etheridge and Mistler and by private psychiatrist Jabbour. Appx44,57,67.

3. Board Decision

In its April 15, 2019 decision, the Board denied a disability rating in excess of thirty (30) percent for Mr. Lynch's PTSD, reasoning:

> While the Veteran has been noted to be hypervigilant and experience hyperarousal, there is no indication from the record that they interfere with his ability to perform activities of daily living, to include having obsessional rituals. The Board acknowledges that the Veteran's private examiners have described more severe impairment than that identified by the VA examiners; however, those findings are not supported by the subjective symptoms provided by the Veteran. Further, while the July 2017 VA examiner did indicate that the Veteran's symptoms were more severe than those reported at his 2016 VA examination, his current symptoms, even when considered as a whole, do not indicate that he has social and occupational impairment manifested by reduced reliability and productivity. In fact, the July 2017 VA examiner specifically noted that the Veteran's PTSD was manifested by occupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks. That is further supported by the Veteran's own statements that he was performing well at work, and that he was able to complete all his assignments without issue. Further, he was able to maintain relationships with family and friends. Therefore, the Board finds that an initial rating in excess of 30 percent for PTSD is not warranted. 38 C.F.R. § 4.130, Diagnostic Code 9411 (2018).

> Accordingly, the Board finds that the *preponderance of the evidence is against the claim* and entitlement to an initial rating in excess of 30 percent for PTSD is not warranted. 38 U.S.C. § 5107 (b) (2012); *Gilbert v. Derwinski*, 1 Vet. App. 49 (1990).

Appx21 (emphasis added).[4]

4. Veterans Court's Decision

Representing himself at the Veterans Court, Mr. Lynch argued for a higher disability rating under the benefit-of-the-doubt rule. Declining a higher

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[4] PTSD is rated under the general rating criteria for mental disorders found at 38 C.F.R. § 4.130, Diagnostic Code (DC) 9411. § 4.130 (2020).

Under DC 9411, a 30% disability is warranted when there is "[o]ccupational 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)."

A 50% disability rating is warranted when a claimant's mental disorder results in "[o]ccupational 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."

The symptoms listed are non-exhaustive and "serve as examples of the type and degree of the symptoms, or their effects, that would justify a particular rating." *Mauerhan v. Principi*, 16 Vet.App. 436, 442 (2002).

rating, the lower court explained that the evidence against the claim had satisfied the Department's burden of proof, the preponderance-of-the-evidence standard:

> The Board, however, explicitly stated that it had considered the *doctrine of reasonable doubt but found it did not apply here because "the preponderance of the evidence is against the claim."* This explanation is understandable and consistent with law.

Appx7 (emphasis added) (citations of record omitted) (citing *Ortiz v. Principi*, 274 F.3d 1361, 1364 (Fed. Cir. 2001) and *Gilbert,* 1 Vet.App. 49, 54 (1990)).

SUMMARY OF ARGUMENT

Mr. Lynch asks the Federal Circuit, sitting *en banc*, to overrule its three-judge panel decision in *Ortiz v. Principi*, 274 F.3d 1361. Fed.Cir.R. 35(a)(1). *Ortiz* was clearly wrongly decided.

Ortiz focused on the word *approximate*, the adjective modifying the noun phrase, *balance of positive and negative evidence* of 38 U.S.C. § 5107(b) and 38 C.F.R. § 3.102 (the benefit-of-the-doubt and reasonable doubt rules, respectively). According to *Ortiz*, these provisions set forth an equipoise-of the-evidence standard for veterans to prove their claims and a corresponding preponderance-of-the-evidence standard for the Agency to disprove them. This construction, however, cannot be reconciled with the plain language of sections 5107(b) and 3.102.

Namely, instead of using precise or absolute modifiers such as *even or equal balance* of the evidence (or, for that matter, omitting a modifier altogether), to describe the quantum of evidence claimants need to prevail on their claims, Congress chose -- and the Secretary adopted without modification -- the more generous term *approximate balance* to define the appropriate standard of proof. By purposefully modifying the phrase *balance of the positive and negative evidence* with the adjective *approximate*, Congress envisioned a standard of proof lower than equipoise-of-the-evidence for veterans, and conversely, higher than preponderance-of-the-evidence for the Department.

Textual considerations aside, the legislative and regulatory histories of 5107(b) and 3.102 demonstrate that they were meant to have broad applicability in VA adjudication, certainly broader than that afforded by the equipoise-of-the-evidence and preponderance-of-the-evidence standards invoked in *Ortiz*.

In short, if the Board and the Veterans Court had applied the correct standard of proof in this case, Mr. Lynch's claim for an increased rating for PTSD in excess of thirty (30) percent would have had a much better chance of success.

JURISDICTIONAL BASIS

38 U.S.C. § 7292(a) provides, in relevant part:

> After a decision of the United States Court of Appeals for Veterans Claims is entered in a case, any party to the case may obtain a review of the decision with respect to the validity of a decision of the Court on a rule of law or of *any statute or regulation* . . . or any interpretation thereof (other than a determination as to a factual matter) that was relied on by the Court in making the decision.

38 U.S.C. § 7292(a) (2020) (italics added).

Here, Mr. Lynch challenges *Ortiz*'s interpretation of sections 5107(b) and 3.102. As such, this appeal involves questions of statutory and regulatory interpretation, questions coming within Federal Circuit jurisdiction. *Carpenter v. Nicholson*, 452 F.3d 1379, 1383 (Fed. Cir. 2006) ("a statutory interpretation [] places this appeal within the Federal Circuit's appellate jurisdiction").

ARGUMENT

I

THE HOLDING IN *ORTIZ v. PRINCIPI* MISINTERPRETED 38 U.S.C. § 5107(b) AND 38 C.F.R. § 3.102 BY SETTING FORTH AN EQUIPOSE-OF-THE-EVIDENCE STANDARD FOR VETERANS TO PROVE THEIR CLAIMS AND A CORRESPONDING PREPONDERANCE-OF-THE-EVIDENCE STANDARD FOR THE SECRETARY TO DISPROVE THEM; *STARE DECISIS* SHOULD NOT BE A BAR TO OVERTURNING *ORTIZ* IN AN *EN BANC* DECISION

Mr. Lynch maintains that *Ortiz v. Principi*, 274 F.3d 1361 (2001) was wrongly decided and should be overturned by an *en banc* panel.

STANDARD OF REVIEW

This appeal challenges *Ortiz*'s interpretation of 38 U.S.C. § 5107(b) and its regulatory companion 38 C.F.R. § 3.102. "This Court reviews such questions of statutory construction de novo." *Flores v. Nicholson*, 476 F.3d 1379, 1382 (2007) (citation omitted).

1. The Standard of Proof Set Forth in *Ortiz v. Principi* Is Inconsistent with the Operative Term *Approximate Balance* under 38 U.S.C. § 5107(b) and 38 C.F.R. § 3.102

Ortiz held that *approximate*, the operative word of 38 U.S.C. § 5107(b) and its regulatory counterpart 38 C.F.R. § 3.102, set forth an equipoise-of the-evidence[5] standard for veterans to prove their claims and a corresponding preponderance-of-the-evidence standard for the Agency to disprove them. 274 F.3d at 1356 (if "the Board determines that the preponderance of the evidence is against the veteran's claim, then it necessarily has been persuaded to find in favor of the VA," and the benefit-of-the-doubt rule does not apply). In so holding, *Ortiz* read the critical modifier *approximate* out of sections 5107(b) and 3.102.

Observing that "[a]ny question of statutory interpretation begins with the language of the statute itself," *id.* at 1364, *Ortiz* identified the word *approximate* as the key to defining the appropriate evidentiary standard for both provisions. *Id*.[6]

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[5] *Skoczen v. Shinseki*, 564 F.3d. 1319, 1324 (Fed. Cir. 2009) (stating that the "benefit of the doubt rule" can "be thought of as an 'equality of the evidence standard'", requiring "that the evidence must rise to a state of equipoise for the claimant to 'win.'").

[6] Section 5107(b) states:

> The Secretary shall consider all information and lay and medical evidence of record in a case before the Secretary with respect to benefits under laws administered by the Secretary. When there is an *approximate balance* of

However, by equating *approximate* balance of the evidence with the equipoise-of-the-evidence-standard for veterans and the corresponding preponderance-of-the-evidence standard for the Agency, *Ortiz* drained all meaning from this term. Indeed, the Court's reading of sections 5107(b) and 3.102 would only make sense without the modifier *approximate*. If that were the case, equipoise-of-the-evidence would indeed be the appropriate standard for breaking evidentiary ties, analogous to the proverbial baseball rule giving the benefit of the doubt to the runner when he "and the ball arrive[] at the base at the same time…". *Ortiz*, 274 F.3d at 1365 (citation omitted); *see also Lovell ex rel. Lovell v. Poway*

> positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant.

§ 5107(b) (2020) (italics added).

> In relevant part, section 3.102 essentially restates section 5107(b):
>
> When, after careful consideration of all procurable and assembled data, a reasonable doubt arises regarding service origin, the degree of disability, or any other point, such doubt will be resolved in favor of the claimant. By reasonable doubt is meant one which exists because of an *approximate balance* of positive and negative evidence which does not satisfactorily prove or disprove the claim.

§ 3.102 (2020) (italics added).

Unified Sch. Dist., 90 F.3d 367, 373 (9th Cir. 1996) ("In general, if the evidence is evenly balanced, such that a decision on the point cannot be made one way or the other, then the party with the burden of persuasion loses.") (citation omitted); *United States v. Di Gilio*, 538 F.2d 972, 988 (3d Cir. 1974) ("Allocation of the burden of proof will be significant, in theory at least, only in the rare case when, assuming the evidence is weighed by the preponderance of evidence standard, the conflicting evidence is in equipoise in the mind of the fact finder."); *United States v. Gigante*, 39 F.3d 42, 47 (2d Cir. 1994), amended, 94 F.3d 53 (2d Cir. 1996) ("The preponderance standard is no more than a tie-breaker dictating that when the evidence on an issue is evenly balanced, the party with the burden of proof loses.") (citations omitted); *Kosakow v. New Rochelle Radiology Assocs*., 274 F.3d 706, 731 (2d Cir. 2001) ("[W]here the burden of proof is a preponderance of the evidence, the party with the burden of proof would lose in the event that the evidence is evenly balanced."); *United States v. Montague*, 40 F.3d 1251, 1253 (D.C. Cir. 1994) ("The preponderance-of-the-evidence standard generally puts evidence on an evenly balanced scale.") (citations omitted); *Yamaha Int'l Corp. v. Hoshino Gakki Co*., 840 F.2d 1572, 1580 n.11 (Fed. Cir. 1988) ("Actually, the ultimate burden of persuasion is only critical in the situation where the evidence is so evenly balanced that no preponderance emerges. In that event, the party having the burden of persuasion necessarily loses.").

But, instead of using precise or absolute modifiers such as *equal or even* balance of the evidence (or, for that matter, omitting a modifier altogether), to describe the quantum of evidence needed for claimants to prove their claims, Congress chose -- and the Secretary adopted without modification -- the more generous term *approximate* balance to define the appropriate standard of proof. By purposefully modifying the phrase *balance of the positive and negative evidence* with the adjective *approximate*, Congress envisioned a standard of proof lower than equipoise-of-the-evidence for veterans, and conversely, higher than preponderance-of-the-evidence for the Department. After all, an *approximate* balance of the evidence means something less[7] than an equal or even balance of the evidence. *Hardwick Bros. Co. v. United States*, 36 Fed. Cl. 347, 384 (1996) ("no inference of exactness could reasonably have been drawn from the use of the word

[7] In general, *approximate* means "more or less" of the referenced subject. *Ortiz*, 274 F.3d at 1364 (quoting *Webster's New World Dictionary* 68 (3d ed. 1988) definition of *approximate*). However, in the present context, an *approximate* balance of the evidence could not mean *more* than an equal or even balance of the evidence. In cases where the evidence supporting the claim reaches a level more or greater than the equipoise-of-the-evidence, then the benefit-of-the-doubt and reasonable doubt rules are rendered moot. As a matter of statutory and regulatory construction, it would be contrary to the benevolent spirit of the VA system to read the phrase *approximate balance* as requiring a level of evidence *more* than equipoise or even-balance of the evidence. Needless to say, sections 5107(b) and 3.102 were designed to operate in favor of veterans. *Compare AZ v. Shinseki*, 731 F.3d 1303, 1322 (Fed. Cir. 2013) ("To the extent that Congress has relaxed evidentiary requirements in the VA context, it did so to *benefit*, not penalize, claimants.") (citation omitted); *see also infra* at 23-24 (discussing pro-claimant canon to resolve statutory and regulatory ambiguity).

'approximate'"); Cambridge On-line Dictionary (defining "approximate" as "not completely accurate but close"), available at: https://dictionary.cambridge.org/it/dizionario/inglese/approximate; Merriam-Webster On-line Dictionary (defining "approximate" as "nearly correct or exact**:** close in value or amount but not precise"); *Outfitter Properties, LLC v. Wildlife Conservation Bd*., 207 Cal. App. 4th 237, 246 (2012) ("'Approximately' means about or nearly; it is the opposite of precisely or exactly.") (citations omitted).

In this respect, *Ortiz* missed the important definitional distinction between *approximate* and such modifiers as *equal* or *even*, terms corresponding to the equality or equipoise-of-the-evidence standard. Noticeable daylight separates the two. For example, the word *virtual* comes closer to the definition of the later, without being synonymous. *Goga v. Ortho Diagnostics*, Inc., 90 A.D.2d 874 (Sup. Ct. N.Y. 3d Dept. 1982) ("Virtually means almost entirely…. Clearly, it does not mean absolute or 100%.") (citation and internal quotations omitted).

That is why *Ortiz*'s comparison of the benefit-of-the-doubt rule to the "true doubt" rule of the Department of Labor is inapposite. 274 F.3d at 1365. The benefit-of-the-doubt rule only requires an *approximate* balance of the evidence; the true doubt rule requires an equal or even balance. *Dir. v. Greenwich Collieries*, 512 U.S. 267, 269 (1994) ("This [true doubt] rule essentially shifts the burden of

persuasion to the party opposing the benefits claim - when the evidence is evenly balanced, the benefits claimant wins."); *Adkins v. Dir. Office of Workers' Comp. Program*, 958 F.2d 49, 52 n.4 (4th Cir. 1992) ("Equally probative evidence creates a 'true doubt,' which must be resolved in favor of the miner") (citation omitted); *Sharondale Corp. v. Ross*, 42 F.3d 993, 999 n.5 (6th Cir. 1994) ("Pursuant to the true doubt rule, when the favorable and unfavorable evidence is evenly balanced, the claimant receives benefits.").

In the final analysis, *Ortiz* rightly understood the importance of the modifier *approximate* -- "the key word in § 5107"[8] – but wrongly failed to give it any effect. By rendering this key word superfluous, *Ortiz* altered the Congressional design of the statute. *Golz v. Shinseki*, 590 F.3d 1317, 1321 (Fed. Cir. 2010) ("To conclude that all medical records or all SSA disability records are relevant would render the word 'relevant' superfluous in the statute. If Congress meant for all medical records or all SSA disability records to be obtained, it could have said 'obtain all records' rather than 'obtaining the following records if *relevant* to the claim.'") (quoting 38 U.S.C. § 5103A(c) (internal citation and quotations omitted); *Mertens v. Hewitt Assocs*., 508 U.S. 248, 258 (1993) ("We will not read the statute to render the modifier superfluous.") (citations omitted); *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 59-60 (2007) (rejecting a statutory

[8] 274 F.3d at 1364.

interpretation rendering an operative modifier superfluous); *see also BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) ("The preeminent canon of statutory construction requires us to presume that [the] legislature says in a statute what it means and means in a statute what it says there.") (citation and internal quotations marks omitted).

Beyond this textual miscue, *Ortiz* overlooked the ambiguity of the term *approximate*. *Garre v. Geryk*, 145 A.2d 829, 831 (Conn. Sup. Ct. of Errors 1958) ("The word 'approximately' is in its nature indefinite. It means 'nearly,' 'about,' or 'close to.' All of these words are elastic and do not indicate certainty. 'Approximately' is used in the sense of an estimate, merely meaning 'more or less.'") (citations omitted). Although *approximate* unquestionably refers to something less than (an even or equal balance of the evidence), just how much less is uncertain. It has a range of definitional possibilities, from meaning very nearly the amount or value of the referenced subject to only a rough estimate of the same. *Supra* at 20-21; BLACK'S LAW DICTIONARY 103 (6th ed. 1990) (defining "approximate" as "[u]sed in the sense of an estimate merely, meaning more or less, but about and near the amount, quantity, or distance specified"); Merriam-Webster Dictionary Online, http://www.merriam-webster.com/dictionary/estimate (last visited on Sept. 6, 2020) (defining "estimate" as to "judge tentatively or approximately");

https://www.macmillandictionary.com/dictionary/british/approximate_1) (last visited on September 6, 2020) (setting forth one definition of approximate as "not exact or accurate, but good enough to be useful").

In cases of statutory or regulatory ambiguity, VA claimants enjoy a unique advantage in the so-called pro-veteran canon for resolving interpretive doubt. While the exact role of the pro-veteran canon has yet to be decided, *Procopio*, 913 F.3d at 1380, a role it definitely has. *See* 38 C.F.R. § 3.102 ("It is the defined and consistently applied policy of the Department of Veterans Affairs to administer the law under a *broad interpretation*") (emphasis added). At a minimum, the canon must figure into the interpretive analysis. *Wright v. Gober*, 10 Vet. App. 343, 351 (1997) (Kramer, J., dissenting) ("[A] construction less beneficial to a veteran, as well as any [] resolution of statutory or regulatory ambiguity, would have to take into account the impact of *Gardner,* that held that 'interpretive doubt is to be construed in the veteran's favor'") (citing *Brown v. Gardner*, 513 U.S. 115, 117-18 (1994)).

Yet, *Ortiz* disregarded this canon of construction altogether, leaving an incomplete and unfavorable interpretation of sections 5107(b) and 3.102.

2. The Legislative and Regulatory Histories of Sections 5107(b) and 3.102 Demonstrate that the Benefit-of-the-Doubt/Reasonable Doubt Rules Should Apply Unless the Evidence Clearly Establishes or Refutes the Claim

Apart from misconstruing the plain text of sections 5107(b) and 3.102, *Ortiz* passed over their legislative and regulatory histories. Yet, these histories reveal important clues to legislative and regulatory intent, even though arguably "what controls now is not the language of prior regulations but the statutory standard of 38 U.S.C. § [5107(b)]." *Gilbert v. Derwinski*, 1 Vet.App. 49, 55 (1990).

According to the VA's commentary in 1985, the language of section 3.102 evolved principally from a 1924 Veterans Bureau[9] General Counsel opinion and a policy statement of the 1930 schedule for Rating Disabilities:

> In 1924, the foundation for the present text of § 3.102 was laid in a Veterans Bureau General Counsel opinion involving a World War I veteran who has applied for compensation for a psychoneurotic disability. There was credible evidence for and against the claim. The General Counsel outlined the "benefit of the doubt" policy and explained it was not to be applied if the truth could be established by a preponderance of the evidence; on the other hand, proof "beyond a reasonable doubt" was never required. In 1930, the policy statement appearing in the schedule for Rating Disabilities in that year was revised

[9] Prior to July 1930, the federal veterans assistance program was named the Veterans Bureau, later changed to the Veterans Administration. *See* https://www.va.gov/about_va/vahistory.asp (giving a brief historical overview of the VA) (last viewed on September 5, 2020).

> to reflect the General Counsel opinion. As so revised, it was the predecessor of 38 CFR 3.102.

50 Fed. Reg. 34452, 38 C.F.R. § 3.102 (August 1985); Appx72.

This historical overview, however, misrepresents the General Counsel opinion and the VA's policy statement. For several reasons, neither laid "the foundation for the present text of § 3.102" or infused the regulation with the preponderance-of-evidence-standard.

In its 1924 opinion, the General Counsel addressed two questions about the reasonable doubt rule:

> [Q.] "In the event the evidence is conflicting, as in this case, are we justified in our attempts to adjudicate to apply the rule or policy in favor or (sic) resolving the doubts in favor of the claimant?"
>
> A. Not if you can determine the true state of facts by a preponderance of the evidence.
>
> [Q.] "Is a claimant obliged to establish the service origin or degree of his disability to a mathematical certainty or is proof to a moral certainty sufficient to justify action in his favor by the Bureau?"
>
> A. The claimant is not required to establish service origin or degree of disability to either a "mathematical" or "moral" certainty. *He is required to establish these matters by a preponderance of the evidence*. He is not required to prove his case beyond a reasonable doubt, any more than he would be required to prove, in court, any other kind of claim beyond a reasonable doubt. This, in general, is what is meant by "resolving the doubt in favor of the claimant."

Veterans Bureau General Counsel opinion (1924); Appx74-75 (emphasis added).

This response is largely inconsistent and pointless. It purports to define the VA's unique evidentiary rule in favor of veterans, but antithetically imposes the burden of persuasion upon them and then sums up the VA's special rule as merely the same standard of proof applied in all legal actions.

Six years later, the VA's policy statement of the 1930 schedule for Rating Disabilities significantly redefined the reasonable doubt rule, in spite of quoting the General Counsel opinion -- first, by placing the burden of persuasion upon the VA, and second, by raising the evidentiary bar to *clear* rather than simple preponderance-of-the-evidence standard:

> By "reasonable doubt" is meant a substantial doubt, one within a range of probability and not based solely upon pure speculation or mere speculation. If the claim is supported by substantial evidence,[10] the mere fact that certain other evidence raises a doubt to the claimant's right would not justify a disallowance of the claim. Such disallowance will be in order *only* where the evidence is of such character and weight that there is created a *clear preponderance* of the evidence against the claimant.

Appx78 (emphasis added); *compare In re Disciplinary Proceeding Against Allotta*, 748 P.2d 628, 630 (Sup.Ct. Washington 1988) ("'Clear preponderance' is an

[10] *Pierce v. Underwood*, 487 U.S. 552, 564-65 (1988) ("That phrase [substantial evidence] does not mean a large or considerable amount of evidence, but rather such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.") (citation and internal quotations marks omitted).

intermediate standard of proof . . . requiring greater certainty than 'simple preponderance'"); *Labay v. Commissioner*, 55 T.C. 6, 13 (1970) ("It is apparent that Congress intended to impose a burden greater than a mere preponderance of the evidence by using in the statute the descriptive word 'clearly' preceding the word 'establish.'") (emphasis removed).

Aside from its shifting and confusing interpretation of the reasonable doubt rule, the VA's would-be preponderance-of-the-evidence standard never found its way into the text of section 3.102. In 1961, the reasonable doubt doctrine was enacted as 38 C.F.R. § 3.102 (1961),[11] and was later amended in 1985[12] and again in 2001.[13] Throughout its history, section 3.102 conspicuously left out the preponderance-of-the-evidence standard from its definition of reasonable doubt. *But see Gilbert v. Derwinski*, 1 Vet. App. 49, 55 (1990) (relying in part upon the VA's unreliable 1985 commentary of the 1924 General Counsel opinion and the VA 1930 policy statement in setting a preponderance-of-the-evidence standard).

Indeed, the 1985 amendment to section 3.102 tracked the operative language of Congress' first version of the benefit-of-the-doubt rule, Section 2(13) of the Veterans Dioxin and Radiation Exposure Compensation Standards Act of

[11] 26 Fed. Reg. 1568 (Feb. 24, 1961).
[12] 50 Fed. Reg. 34458 (Aug. 26, 1985) (emphasis added).
[13] 66 Fed. Reg. 45620, 45630 (Aug. 29, 2001).

1984. Pub. L. No. 98-542, 98 Stat. 2727 (Oct. 24, 1984). That provision set forth the critical *approximate balance* locution:

> It has always been the policy of the Veterans' Administration and is the policy of the United States, with respect to individual claims for service connection of diseases and disabilities, that when, after consideration of all evidence and material of record, there is an *approximate balance* of positive and negative evidence regarding the merits of an issue material to the determination of a claim, the benefit of the doubt in resolving each such issue will be given to the claimant.

Appx80 (emphasis added).

In adding the *approximate balance* wording to the 1985 amendment to section 3.102, the Agency clarified its meaning for the reasonable doubt rule: When there is credible evidence on both sides of the evidentiary scale, the reasonable doubt rule should apply unless the evidence is "clearly preponderant" for or against the claim:

> As indicated above, we have determined to retain § 3.102's present text with one clarification. This clarification provides a guideline as to when the reasonable doubt policy is to be followed. In situations where the evidence for or against the claim is *clearly preponderant*, this policy does not apply. *It should be carefully adhered to, however, when there is credible evidence on both sides of a material issue.*

50 Fed. Reg. 34452 (Aug. 1985); Appx72 (emphasis added).

Whether used in a legal or more general sense, the term "clearly preponderant" can only reasonably be read to impose a higher evidentiary

threshold than the simple preponderance-of-the-evidence standard. *Compare Pic Oil Co. v. Grisham*, 702 P.2d 28, 32 (Ok. Sup. Ct. 1985) ("if the evidence is so clearly preponderant that it reasonably admits but one conclusion"); *Bracken v. Koch*, 404 S.W.2d 201, 203 (Miss. Ct. App. 1966) ("Whether or not a litigant has been guilty of negligence is a question for the jury to answer, unless, upon the basis of undisputed or clearly preponderant evidence, reasonable men could not differ.") (citation omitted); *Carpenelli v. Scranton Bus Co*., 38 A.2d 44, 46 (Pa. Sup. Ct. 1984) ("when liability is admitted by the defendant, or when the evidence is clearly preponderant in favor of the plaintiff"); *Committee on Legal Ethics v. Pietranton*, 99 S.E.2d 15, 26 (Sup.Ct. W.V. 1957) ("We have, however, examined the entire evidence relating to such contentions, and are of the view that such evidence is not so clearly preponderant, either for or against the position of the committee, as to be given controlling effect in the determination of the question as to the sufficiency of the evidence to fully and clearly establish the charges contained in the complaint of the committee."); *Southern Pacific Co. v. Pool*, 160 U.S. 438, 440 (1896) ("There is also no doubt, where the facts are undisputed or clearly preponderant, that the question of negligence is one of law."); *Labay v. Commissioner*, 55 T.C. 6, 13 (1970) ("It is apparent that Congress intended to impose a burden greater than a mere preponderance of the evidence by using in the statute the descriptive word 'clearly' preceding the word 'establish.'") (emphasis

removed); *with* Cambridge On-line Dictionary (defining "clearly" as in a manner "that is easy to see, hear, read or understand"); Collins On-line Dictionary (defining "clearly" as in a "distinct or obvious manner").

In 1988, as part of the Veterans Judicial Review Act ("VJRA"), Congress codified the reasonable doubt rule under former 38 U.S.C. § 3007(b),[14] changing its name to the "benefit-of-the-doubt rule." Pub. L. No. 100-687, 102 Stat. 4113 (November 1988). In fashioning the bill provision which was later to become section 3007(b), the Senate Committee of Veterans Affairs rejected much of the wording of section 3.102, but expressly affirmed the *approximate balance* terminology:

> *After extensive consultations with the VA in past Congresse*s with respect to the current VA interpretation of the rule and practices under it, the Committee bill provision has been fashioned to require that where the totality of the evidence is such that *"there is an approximate balance of positive and negative evidence* regarding the merits*"* of a material issue, the doubt is to be resolved in the claimant's favor. Thus, under the provision in the Committee bill, where on the basis of all the relevant evidence an element of a claim is neither *clearly established nor clearly refuted*, the benefit of the doubt is to be given to the claimant. Where the evidence *clearly* calls for a finding of fact for or against the claimant, such a rule would be unnecessary and would

[14] Section 3007(b) was later renumbered Section 5107(b). Pub. L. 102-40, § 402(b)(1), (d)(1), 105 Stat. 238, 239 (1991).

> thus not apply; the finding would simply follow the clear direction of the evidence.

110th Cong., 2d Sess., Sen. Report No. 100-418, *Veterans Administration Adjudication Procedure & Judicial Review Act* (July 7, 1988), at 33; Appx84 (emphasis added).[15] Remarkably, the Senate Committee report is strikingly similar to the VA's 1985 commentary to section 3.102: *i.e.*, the benefit-of-the-doubt rule, much like the reasonable doubt rule, was designed to apply in the general run of cases, unless the evidence *clearly established or refuted* the claim. *Supra* at 28-29.

Moreover, the report's reference to "extensive consultations with the VA in past Congresses" reveals much about the history and intended meaning of the chosen phrase *approximate balance of positive and negative evidence*. In 1979, the Senate Committee of Veterans' Affairs held hearings on several unsuccessful bills presented under the title Veterans' Administration Adjudication Procedure and Judicial Review Act. Like the VJRA, the 1979 Act numbered the

[15] *See* Gluck & Bressman, Statutory Interpretation From the Inside—An Empirical Study of Congressional Drafting, Delegation and the Canons: Part I, 65 Stan. L. Rev. 901, 977 (2013) ("By far, the types of legislative history viewed as most reliable were committee reports and conference reports in support of the statute."); *In re Swanson*, 540 F.3d 1368, 1376 (Fed. Cir. 2008) ("In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which '[represent] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.") (quoting *Garcia v. United States*, 469 U.S. 70, 79 (1984)).

reasonable doubt provision as section 3007(b).[16] *Veterans' Administration Adjudication Procedure and Judicial Review Act on S. 303 Before the Committee on Veterans' Affairs*, 96th Congress, (January 15, 1979); Appx85-87.

During the March 22, 1979 hearing, Guy H. McMichael, the VA General Counsel, was asked to provide the VA's recommended text for section 3007(b) to clarify the applicable standard of proof. Appx88. In response, the VA submitted a prepared statement, which included the following proposed text for section 3007(b):

> (b) When, after consideration of all evidence and material of record in any proceedings before the Veterans Administration, there is positive and negative evidence *so balanced as to make impossible a determination free of doubt*, the benefit of the doubt will be resolved in favor of the claimant, but nothing in this section shall be construed as shifting from a claimant to the Administrator the burden described in subsection (a) of this section.

(VA written submission) (emphasis added), Appx89.

The underscored language – "so balanced as to make impossible a determination free of doubt" – comes noticeably closer to the equipoise-of-the-evidence standard than does the *approximate balance* terminology ultimately selected by Congress for section 3007(b). By choosing the *approximate balance* terminology over the VA's proposed wording, Congress could not have intended to

[16] Senator Alan Cranston was the sponsor of the VJRA and the 1979 Act and chaired the Senate Committees hearings for both Acts.

incorporate *sub silentio* the later and, *a fortiori,* not the stricter equipoise-of-the-evidence standard. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) ("Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.") (citation omitted); *Hamdan v. Rumsfeld*, 548 U.S. 557, 579-80 (2006) ("Congress' rejection of the very language that would have achieved the result the Government urges here weighs heavily against the Government's interpretation."); *See Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200 (1974) (Congress's failure to enact a proposed version of a statute "strongly militates against a judgment that Congress intended a result that it expressly declined to enact").

All said, the legislative and regulatory histories of sections 5107(b) and 3.102 argue for their prominent role in VA adjudication. Yet, *Ortiz*'s equipoise-of-the-evidence and preponderance-of-the-evidence standards reduce these provisions to largely inconsequential theories. *Compare Grizzle v. Pickands Mather & Co*., 994 F.2d 1093, 1097 (4th 1993) ("Very seldom will the evidence in support of and against entitlement be *equally* probative and *equally* persuasive. Indeed, it would seem to be the unusual case in which an ALJ intent on properly weighing the competing evidence, will come to the conclusion that neither side's evidence was slightly more convincing than the other's.") (citation omitted)

(emphasis in original) *with Cigaran v. Heston*, 159 F.3d 355, 357 (8th Cir. 1998) ("The shifting of an evidentiary burden of preponderance is of practical consequence only in the rare event of an evidentiary tie: If the evidence that the parties present balances out perfectly, the party bearing the burden loses.").

3. Principles of *Stare Decisis* Should Not be a Bar to Overturning the *Ortiz* Decision

Mr. Lynch maintains that the three-judge panel decision in *Ortiz* was clearly wrongly decided and should be corrected by the Federal Circuit *en banc* court.

The Supreme Court has set forth several factors to guide its determination whether to overturn one of its own wrongly decided opinions. While these factors certainly inform the same question facing federal circuits, they do not apply to the same degree.

Namely, *stare decisis* has less force where, as urged here, an *en banc* court questions the continuing viability of one of its three-judge panel decisions, and this principle follows from the different reviewing postures of the Supreme Court and the federal circuits. Whereas the Supreme Court always decides cases with the full participation of its members, the federal circuits review cases in panels of three judges, engaging the full court only for *en banc* review. As such, stare decisis is accorded less weight to three-judge panel decisions than to *en banc* opinions. *Compare Lighting Ballast Control LLC v. Philips Elecs. North Am.*

Corp., 744 F.3d 1272, 1282 (Fed. Cir. 2014) (en banc) ("The principles and policies of stare decisis operate with full force where, as here, the en banc court is considering overturning its own en banc precedent.") *with McKinney v. Pate*, 20 F.3d 1550, 1565 n. 21 (11th Cir 1994) (en banc) ("Since we have determined that our precedent is incorrect, we must also determine what weight to give to that albeit errant precedent. It must be recalled that this is the first time this court sitting en banc has addressed this issue; thus, the implications of stare decisis are less weighty than if we were overturning a precedent established by the court en banc."); *see United States v. Games-Perez*, 695 F.3d 1104, 1124 (10th Cir. 2012) (Gorsuch, J., dissenting from denial of rehearing en banc) ("[I]t is surely uncontroversial to suggest that the point of the *en banc* process, the very reason for its existence, is to correct grave errors in panel precedents when they become apparent, even if the panel precedents in question happen to be old or involve questions of statutory or regulatory interpretation.") (citation omitted); *Riccio v. Sentry Credit, Inc*., 954 F.3d 582, 591 (3d Cir. 2020) (en banc) ("[P]rior en banc decisions carry more stare decisis weight than prior panel decisions."); *id*., quoting the Letter from Justice Antonin Scalia to Ret. Justice Byron R. White (Aug. 21, 1998), *published in Ninth Circuit Review* 72 ("[T]he function of en banc hearings . . . is not only to eliminate intra-circuit conflicts, but also to correct and deter panel opinions that are pretty clearly wrong. . . . The disproportionate segment of [the

Supreme Court's] discretionary docket that is consistently devoted to reviewing [a court of appeals'] judgments, and to reversing them by lop-sided margins, suggests that this error-reduction function is not being performed effectively."); *Vooys v. Bentley*, 901 F.3d 172, 184 (3d. Cir. 2018) (en banc) ("Thus, stare decisis does not compel us to follow a past decision when its rationale no longer withstands careful analysis. If [our] precedent's reasoning was clearly wrong, then stare decisis loses some (though not all) of its force. Indeed, en banc review serves a very important institutional purpose for just that reason. It provides a vehicle by which we can revisit prior decisions when appropriate.") (citations and internal quotations omitted).

This overarching principle forms a critical backdrop to the question of *Ortiz*'s viability. For starters, a primary consideration "in determining whether a precedent should be overruled is the quality of its reasoning." *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2479 (2018) (citations omitted). Here, *Ortiz* failed to give effect to the key statutory and regulatory phrase *approximate balance*, ignored the relevant statutory and regulatory histories and disregarded the pro-veteran canon to resolve interpretive doubt in favor of veterans. *Compare Hubbard v. United States*, 514 U.S. 695, 713 (1995) ("We think the text of [the provision] forecloses any argument that we should simply ratify the body of cases adopting the judicial function exception. We are, however, persuaded that the

clarity of that text justifies a reconsideration of [the prior decision]"); *Shi Liang Lin. v. United States DOJ*, 494 F.3d 296, 310 (2d Cir. 2007) (en banc) ("The fact that we have failed to follow the plain language of a law of Congress for ten years does not require that we do so indefinitely.") *McCarthan v. Dir. of Goodwill Indus.-Suncoast*, 851 F.3d 1076, 1096 (11th Cir. 2017) (en banc) (noting that the *en banc* court has overturned its precedent when "inconsistent with the text of the statute") (citation and internal quotation marks omitted) *with Wilson v. United States*, 917 F.2d 529, 536 (Fed. Cir. 1990) (en banc) (*en banc* court overturning a prior 3-judge panel opinion based upon a reconsideration of the legislative history of the relevant provision).

Indeed *Ortiz,* which compromises a core beneficial doctrine, scarcely fits the paternalistic, pro-claimant spirit of the VA adjudication system. "[I]n the context of veterans' benefits where the system of awarding compensation is so uniquely pro-claimant, the importance of systemic fairness and the appearance of fairness carries great weight." *Hodge v. West*, 155 F.3d 1356, 1363 (Fed. Cir. 1998); *Barrett v. Nicholson*, 466 F.3d 1038, 1044 (Fed. Cir. 2006) ("Congress' intent in crafting the veterans benefits system is to award entitlements to a special class of citizens, those who risked harm to serve and defend their country. This entire scheme is imbued with special beneficence from a grateful sovereign.") (citation and internal quotations omitted).

As such, the Agency has no *legitimate* reliance interest in perpetuating *Ortiz*'s misguided holding, a critical factor in the *stare decisis* calculus. *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2410-11 (2015). "Given the particular [paternalistic] relationship between veterans and the government," the VA has no legitimate interest in seeing veterans receive anything less than their full procedural protections. *Bailey v. West*, 160 F.3d 1360, 1365 (Fed. Cir. 1998) (*en banc*). "Both the Supreme Court and [the Federal Circuit] have long recognized that the disputes that arise in this system are subject to procedural and other rules that are distinctly advantageous to the veteran claimant." *Bailey*, 160 F.3d at 1369 (Michel, J., concurring). "The government's interest in veterans cases is not that it shall win, but rather that justice shall be done, that all veterans so entitled receive the benefits due to them." *Barrett*, 466 F.3d at 1044 (citation omitted); *see also Kisor v. Wilkie*, 139 S. Ct. 2400, 2447 (2020) (Gorsuch, J., dissenting) (observing that agencies have "no serious reliance interests" in denying the rights of citizens to a full court determination).

Moreover, where, as here, a challenged precedent involves a rule of evidence, *stare decisis* is at its weakest. *Payne* v. *Tennessee*, 501 U.S. 808, 828, (1991) ("Considerations in favor of *stare decisis*" are at their weakest in cases "involving procedural and evidentiary rules").

In the end, longevity is *Ortiz*'s only virtue; yet age cannot be its salvation. *Brown v. Gardner*, 513 U.S. 115, 122 (1994) ("Age is no antidote to clear inconsistency with a statute."); *United States v. Games-Perez*, 695 F.3d at 1124 (Gorsuch, J., dissenting from denial of rehearing en banc) ("the *en banc* process . . . is to correct grave errors in panel precedents when they become apparent, even if the panel precedents in question happen to be old or involve questions of statutory or regulatory interpretation"). Although *Ortiz* has been on the books for nearly twenty years, without a *legitimate* reliance interest in its favor, *Ortiz* has a very weak claim to *stare decisis*. *South Dakota v. Wayfair Inc.*, 138 S. Ct. 2080, 2098 (2018) ("*stare decisis* accommodates only "legitimate reliance interest[s]") (citation and internal quotations marks omitted).

Nor is *Ortiz*'s longevity a measure of its persuasiveness or analytical value. *Ortiz* was the first Federal Circuit panel to interpret sections 5107(b) and 3.102, and so subsequent panels[17] were compelled to follow its holding. *Hart v. Massanari*, 266 F.3d 1155, 1175 (9th Cir. 2001) ("Appellate courts often tolerate errors in their caselaw because the rigors of the en banc process make it impossible to correct all errors. A system of strict binding precedent also suffers from the defect that it gives undue weight to the first case to raise a particular issue. This is

[17] *See Fagan v. Shinseki*, 573 F3d 1282, 1287 (Fed. Cir. 2009), *Skoczen v. Shinseki*, 564 F.3d 1319, 1324 (Fed. Cir. 2009).

especially true in the circuit courts, where the first panel to consider an issue and publish a precedential opinion occupies the field, whether or not the lawyers have done an adequate job of developing and arguing the issue.") (footnote omitted).

"In such circumstances, where a wrong turn has been taken, back is the shortest way forward." *United States v. Anderson,* 885 F.2d 1248*,* 1255 (5th Cir. 1989) (citation omitted). This is true even for cases interpreting statutes. The Federal Circuit has "never applied *stare decisis* mechanically to prohibit overruling [its] earlier decisions determining the meaning of statutes." *Procopio*, 913 F.3d at 1380 n.7 (citation and internal quotation marks omitted). While amending a statute is certainly easier than amending a constitutional provision, nonetheless convincing Congress and the President to revise a statute is no mean feat. *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2418 (2015) (Alito, J., dissenting.) ("Passing legislation is no easy task. A federal statute must withstand the finely wrought procedure of bicameralism and presentment.") (citations and internal quotation marks omitted); *Clark v. Suarez Martinez*, 543 U.S. 371, 402 (Thomas J., dissenting) ("The mere fact that Congress can overturn our cases by statute is no excuse for failing to overrule a statutory precedent of ours that is clearly wrong, for the realities of the legislative process often preclude readopting the original meaning of a statute that we have upset.").

Given what is at stake – applying the correct standard of proof for all claims of disabled veterans and their dependents – this Court should not "place on the shoulders of Congress the burden of the Court's own error." *Procopio*, 913 F.3d at 1380 n.7 (citation and internal quotations omitted).

CONCLUSION

For the stated reasons, Mr. Lynch respectfully asks that the Veterans Court's decision be reversed.

Dated: January 13, 2021

Respectfully,

/s/Mark R. Lippman
Mark R. Lippman, Esq.
13446 Poway Rd, Suite 338
Poway, CA 92064
(858) 456-5840

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies under Federal Rules of Appellate Procedure Rule 32(a)(7) that this brief is written 14-point type face and contains 8,808 words.

Respectfully submitted,

Dated: January 13, 2021

/s/Mark R. Lippman
Mark R. Lippman

PROOF OF SERVICE

I hereby certify under penalty of perjury that on the 13th day of January, 2021, a copy of the foregoing:

APPELLANT'S CORRECTED OPENING BRIEF

was filed electronically. This filing was served electronically to all parties by operation of the Court's electronic filing system.

U.S. Court of Appeals for the Federal Circuit
Clerk of the Court
717 Madison Place, NW
Washington, DC 20439

Department of Justice
Commercial Litigation

/s/Mark R. Lippman
Mark R. Lippman, Esq.
13446 Poway Rd, Suite 338
Poway, CA 92064
(858) 456-5840

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-3106

JOE A. LYNCH, APPELLANT,

V.

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

Before SCHOELEN, *Senior Judge*.[1]

MEMORANDUM DECISION

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

SCHOELEN, *Senior Judge*: The pro se appellant, Joe A. Lynch, appeals an April 15, 2019, Board of Veterans' Appeals (Board) decision that denied a disability rating greater than 30% for post-traumatic stress disorder (PTSD). Record (R.) at 3-9. This appeal is timely and the Court has jurisdiction to review the Board's decision pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). Single-judge disposition is appropriate. *Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the following reasons, the Court will affirm the Board's decision.

I. BACKGROUND

The appellant served on active duty in the U.S. Marine Corps from June 1972 to July 1976. R. at 334.

On March 2, 2016, he filed a claim for PTSD, R. at 375-76, and in support submitted a private treatment report from Dr. Newsome, who evaluated him on two separate occasions in March 2015, R. at 365-66. The appellant reported symptoms of sleep problems, anger, phobias about confined spaces, panic attacks, mood swings, frequent nightmares, feelings of sadness and

[1] Judge Schoelen is a Senior Judge acting in recall status. *In re: Recall of Retired Judge*, U.S. VET. APP. MISC. ORDER 04-20 (Jan. 2, 2020).

depression, memory problems, lack of friendships, social isolating, and antisocial behaviors outside the home. R. at 365. Dr. Newsome reported that the appellant completed the PTSD checklist and that the results supported a diagnosis of PTSD. R. at 366. She further opined that the appellant's "performance of his job functions and social interactions are severely limited due to his . . . PTSD symptomatology"; that "his lack of social support is increasing because of his inability to control physical and emotional reactions"; and that "[h]is family relations, judgment, thinking, and mood are increasingly limiting his current quality of life." *Id.*

On August 5, 2016, the appellant underwent a VA PTSD examination. R. at 164-74. The examiner diagnosed PTSD with symptoms of anxiety and chronic sleep impairment but noted that the appellant "is not reporting occupational or social functional impairment." R. at 166, 171. The appellant reported a social and family history, specifically that he found his 24-year marriage to his current wife "generally fulfilling and supportive"; that he currently felt an emotional connection to his wife, children, and family; and that he "remain[ed] socially connected to his church and with friends at this time." R. at 166. He "described his current work performance as 'excellent'[;] . . . that he is in good standing with his current employer[;] and [that his] relationships with co-workers and supervisors through the years were characterized as typically positive and productive." *Id.* The examiner opined that the appellant's symptoms were "not severe enough either to interfere with occupational and social functioning or to require continuous medication." R. at 165. Finally, the examiner reviewed Dr. Newsome's treatment report and opined that

> [t]he level of impairment observed by Dr. Newsome was not observed or reported during today's exam. For example, the claimant described his current work performance as a fraud investigator as "excellent." Dr. Newsome characterized his job performance ability as "severely limited."

R. at 166.

In August 2016, the RO granted service connection for PTSD and assigned a 30% disability rating, effective March 2, 2016. R. at 124. In October 2016, the appellant filed a Notice of Disagreement, along with Dr. Jabbour's September and October 2016 private psychological evaluations as supporting evidence. R. at 70-87. At the September 2016 initial evaluation, the appellant reported symptoms of recurring nightmares, insomnia, irritable mood, and difficulty concentrating. R. at 76-77. Regarding his social adaptability, he reported that his relationship with his two children from his first marriage had been distant for some time, but that his relationship with his daughter from his second marriage was very close and loving; that he and immediate

family members were not as close as they had been; that his friendships had declined over time; and that his self-isolation had affected marital intimacy. *Id.* He also reported that at work he experienced problems with focus and concentration, noting that "I can't compete at work or in the environment that I'm in any longer." R. at 77. Dr. Jabbour diagnosed PTSD and prescribed medication to treat it. *Id.*

At the appellant's second evaluation in October 2016, Dr. Jabbour documented PTSD symptoms of depressed mood, anxiety, suspiciousness, disturbances of motivation and mood, difficulty in establishing and maintaining effective work and social relationships, difficulty in adapting to stressful circumstances including work or a work-like setting, inability to establish and maintain effective relationships, and suicidal ideation. R. at 86. He diagnosed the appellant with PTSD and noted that "[s]ome of his symptoms present as quite notable, e.g.[,] [d]ifficulty sleeping and dreams about his past traumas, [a]nhedonia, irritability and inability to focus." R. at 87.

In July 2017, the appellant underwent a second VA PTSD examination. R. at 47-57. He reported difficulty showing emotions to his wife and family, social isolation, anxiety attacks, insomnia, irritability, anger outbursts, nightmares, paranoia, and memory difficulties. R. at 52-53. The examiner noted PTSD symptoms of anxiety and suspiciousness, R. at 55, and she also addressed the conflicting medical evidence regarding the severity of the appellant's PTSD symptoms, noting that

> [i]t appears that the Veteran did report more social and occupational problems at his 2016 appointments with Dr. Jabbour, although Dr. Jabbour's conclusions on a DBQ [VA Disability Benefits Questionnaire] were more extreme than what was supported by available evidence. For example, Dr. Jabbour . . . indicat[ed] that the Veteran has an "inability" to have relationships with others, although he had reported having friendships and family relationships. Dr. Jabbour . . . indicat[ed] that the Veteran has difficulty with social and work relationships, although the Veteran reported no problems with work relationships and reported having friendships. At the current . . . exam[ination], the Veteran reported that his family is "close," which contradicts Dr. Jabbour's documentation about distance in family relationships. At the current . . . exam[ination], the Veteran reported that he is efficient in his work, which contradicts Dr. Jabbour's statement that he has problems with reliability and productivity. Integrating these findings, the Veteran's social and occupational impairment appears to be currently . . . worse than what was reported at the 2016 [VA] exam[ination] . . . but less severe than Dr. Jabbour's 2016 conclusions.

R. at 48. The examiner found the appellant's occupational and social impairment represented by "occasional decrease in work efficiency and intermittent periods of inability to perform

occupational tasks, although generally functioning satisfactorily, with normal routine behavior, self-care and conversation." R. at 49.

The RO issued a Statement of the Case in August 2017 continuing the 30% rating, R. at 45, and the appellant filed a timely Substantive Appeal, R. at 31. In the April 2019 decision here on appeal, the Board found that the appellant's occupational and social impairment was "manifested by occasional decrease in work efficiency and intermittent inability to perform occupational tasks, although generally functioning satisfactorily with normal routine behavior, self-care, and conversation." R. at 3.

II. ANALYSIS

The appellant argues that, in denying a disability rating greater than 30% for PTSD, the Board misapplied 38 U.S.C. § 5107(b) and 38 C.F.R. § 3.303 and wrongly found that he was not entitled to the benefit of the doubt. Appellant's Informal Brief (Br.) at 2. He also argues, based upon the two private examinations of record, that his PTSD symptoms were more serious than the Board found. *Id.* at 4 ("Attachment #2"). Finally, he refers to a Board decision granting service connection for PTSD to another claimant, alleging that had the "luck of the draw" been different and another veterans law judge assigned to his own case, his claim would have been decided favorably. *Id.* at 4-5.

The Secretary responds that the Court should affirm the Board's decision because the appellant's contentions are nothing more than a disagreement with the Board's weighing of the evidence. Secretary's Br. at 7. He also contends that "the Board also addressed other PTSD symptoms, which may be indicative of a higher rating, but indicated that there was no evidence that such symptoms interfered with his ability to perform activities of daily living." *Id.* at 7-8.

Under the current rating schedule for mental disorders, including PTSD, a 50% disability rating is warranted when there is

> [o]ccupational 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.

38 C.F.R. § 4.130, Diagnostic Code (DC) 9411 (2019). A 70% disability rating is warranted when there is

> [o]ccupational 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.

Id.

In *Vazquez-Claudio v. Shinseki*, the Federal Circuit held that assignment of disability ratings under § 4.130, DC 9411 requires a two-part analysis: (1) An "initial assessment of the symptoms displayed [. . .] and if they are the kind enumerated in the regulation," (2) "an assessment of whether those symptoms result in occupational and social impairment." 713 F.3d 112, 117-18 (Fed. Cir. 2013). In *Mauerhan v. Principi*, the Court held that the symptoms listed in DC 9411 are "not intended to constitute an exhaustive list, but rather are to serve as examples of the type and degree of symptoms, or their effects, that would justify a particular rating." 16 Vet.App. 436, 442 (2002). The Board is required to "consider all symptoms of a claimant's condition that affect the level of occupational and social impairment," not just those listed in the regulation. *Id.* at 443. Thus, when the Board determines a disability rating, the veteran's symptoms are the Board's "primary consideration." *Vazquez-Claudio*, 713 F.3d at 118. However, "a veteran may only qualify for a given disability rating under § 4.130 by demonstrating the particular symptoms associated with that percentage, or others of similar severity, frequency, and duration." *Id.* at 117. "The regulation's plain language highlights its symptom driven nature" and "symptomatology should be the fact finder's primary focus when deciding entitlement to a given disability rating." *Id.* at 116-17.

The Board's determination of the appropriate degree of disability is a finding of fact subject to the "clearly erroneous" standard of review set forth in 38 U.S.C. § 7261(a)(4). *See Smallwood v. Brown*, 10 Vet.App. 93, 97 (1997); *Johnston v. Brown*, 10 Vet.App. 80, 84 (1997). "A factual finding 'is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been

committed.'" *Hersey v. Derwinski*, 2 Vet.App. 91, 94 (1992) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

Further, the Board is required to provide a written statement of the reasons or bases for its findings and conclusions on all material issues of fact and law presented on the record; the statement must be adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court. *See* 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990). To comply with this requirement, the Board must analyze the credibility and probative value of the evidence, account for the evidence it finds persuasive or unpersuasive, and provide its reasons for rejecting any material evidence favorable to the claimant. *See Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table); *Gabrielson v. Brown*, 7 Vet.App. 36, 39-40 (1994). "The need for a statement of reasons or bases is particularly acute when [Board] findings and conclusions pertain to the degree of disability resulting from mental disorders such as PTSD." *Mitchem v. Brown*, 9 Vet.App. 138, 140 (1996).

In this case, the Board determined that a disability rating higher than 30% was not warranted. R. at 7-8. The Board first addressed the conflicting evidence regarding the severity of the appellant's symptoms, thoroughly summarizing the private and VA examinations of record and noting that the March 2015 and September 2016 private evaluations painted a more severe picture of the appellant's PTSD symptomatology than did the August 2016 and July 2017 VA examinations. R. at 4-7. The Board further noted that the July 2017 VA examiner commented on this conflicting evidence and that the examiner expressly found that "the conclusions drawn by the Veteran's [September 2016] private provider, [Dr. Jabbour,] were more extreme than what was supported by the available evidence." R. at 7; *see* R. at 48 (July 2017 VA examiner's comment that "Dr. Jabbour . . . indicat[ed] that the Veteran has an 'inability' to have relationships with others, although he had reported having friendships and family relationships . . . [and] that the Veteran has difficulty with social and work relationships, although the Veteran reported no problems with work relationships and reported having friendships"). The Board then relied on this evidence to conclude that the more serious findings in the private evaluation reports "are not supported by the subjective symptoms provided by the Veteran." R. at 8.

Turning to the appellant's contentions, he argues that his PTSD symptoms were more serious than the Board found based upon the two private examinations of record. Appellant's Informal Br. at 4 ("Attachment #2"). However, the appellant's general disagreement with the Board's weighing of the evidence is insufficient to demonstrate that the Board's findings were clearly erroneous or otherwise inadequately explained. *See* 38 U.S.C. § 7261(a)(4); *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (holding that the appellant has the burden of demonstrating error), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000) (table); *Berger v. Brown*, 10 Vet.App. 166, 169 (1997) (the appellant "always bears the burden of persuasion on appeals"); *Allday*, 7 Vet.App. at 527; *Gilbert*, 1 Vet.App. at 52, 56-57. A review of the record and the Board's decision shows that the Board adequately explained its reliance on the two VA examinations of record and its discounting of the severity of the symptoms found in the two private evaluations.

The appellant also suggests that, per the "luck of the draw," had a different veterans law judge been assigned to his case, he or she would have resolved reasonable doubt in the appellant's favor by according him the benefit of the doubt. The Board, however, explicitly stated that it had considered the doctrine of reasonable doubt but found it did not apply here because "the preponderance of the evidence is against the claim." R. at 8. This explanation is understandable and consistent with law. *See Ortiz v. Principi*, 274 F.3d 1361, 1364 (Fed. Cir. 2001) ("[T]he benefit of the doubt rule is inapplicable when the preponderance of the evidence is found to be against the claimant."); *Gilbert*, 1 Vet.App. at 54 ("A properly supported and reasoned conclusion that a fair preponderance of the evidence is against the claim necessarily precludes the possibility of the evidence also being in 'an approximate balance.'"); *see also Allday*, 7 Vet.App. at 527. His luck-of-the-draw argument also fails because he has not identified any information or evidence that the Board failed to consider that could have led to a different result. His speculative and unsupported argument is therefore unavailing. *See Hilkert*, 12 Vet.App. at 151; *Berger*, 10 Vet.App. at 169.

However, the Court concludes that the Board erred in its treatment of the evidence showing that the appellant had some symptoms indicative of a higher rating, including suicidal ideation, hypervigilance, and hyperarousal. R. at 8. The Board addressed these symptoms but found that "there is no indication from the record that they interfere with his ability to perform activities of daily living." *Id.* In dismissing these symptoms as such, the Board ignored this Court's directive that, because the DC's "plain language highlights its symptom driven nature," then "symptomatology should be the fact finder's primary focus when deciding entitlement to a given

disability rating." *Vazquez-Claudio*, 713 F.3d. at 116-17. Moreover, an inability to care for himself is not required to obtain a higher rating of 50% or 70%, and even a rating of 100% requires only "intermittent inability to perform activities of daily living." 38 C.F.R. § 4.130.

Yet having so concluded, the Court further finds that the appellant has not met his burden to show prejudice, even when liberally construing the pro se appellant's informal brief. *See* 38 U.S.C. § 7261(b)(2) (requiring the Court to "take due account of the rule of prejudicial error"); *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) (finding prejudice not demonstrated when appellant did not explain, and Court could not discern, how error could have made a difference in outcome); *De Perez v. Derwinski*, 2 Vet.App. 85, 86 (1992) (liberally construing pro se arguments).

Prejudice is not evident here because, when determining whether a higher disability rating for PTSD was warranted, the Board, overall, considered all evidence of record concerning the appellant's PTSD symptoms, including the March 2015 and September 2016 private evaluations and the August 2016 and July 2017 VA examinations. *See Newhouse v. Nicholson*, 497 F.3d 1298, 1301 (Fed. Cir. 2007) (holding that this Court may make factual findings in reviewing for prejudicial error). Further, the appellant has not shown how the Board's proper treatment of the relevant symptoms could have resulted in the assignment of a higher rating. *See id.*; *Hilkert*, 12 Vet.App. at 151; *Berger*, 10 Vet.App. at 169; *see also Cacciola v. Gibson*, 27 Vet.App. 45, 57-58 (2014) (noting that when "an appellant states that he is appealing the Board's decision on an issue, but then makes . . . insufficient arguments, challenging the Board's determination[,] . . . the Court generally affirms the Board's decision as a result of the appellant's failure to plead with particularity the allegation of error and satisfy his burden of persuasion on appeal to show Board error"). Thus, the appellant fails to demonstrate prejudicial error in the Board's denial of a disability rating higher than 30% for PTSD.

III. CONCLUSION

Upon consideration of the foregoing analysis, the record of proceedings before the Court, and the parties' pleadings, the April 15, 2019, Board decision is AFFIRMED.

DATED: April 17, 2020

Copies to:

Joe A. Lynch

VA General Counsel (027)