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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