United States Court of Appeals
for the Federal Circuit

JOE A. LYNCH,
Claimant-Appellant

v.

DENIS MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS,
Respondent-Appellee

2020-2067

Appeal from the United States Court of Appeals for Veterans Claims in No. 19-3106, Senior Judge Mary J. Schoelen.

Decided: December 17, 2021

(Filed Dec. 17, 2021)

MARK RYAN LIPPMAN, The Veterans Law Group, Poway, CA, argued for claimant-appellant. Also represented by KENNETH M. CARPENTER, Law Offices of Carpenter Chartered, Topeka, KS; ADAM R. LUCK, Gloverluck, LLP, Dallas, TX.

EVAN WISSER, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for respondent-appellee. Also represented by BRIAN M. BOYNTON, ERIC P. BRUSKIN,

MARTIN F. HOCKEY, JR.; CHRISTOPHER O. ADELOYE, Y. KEN LEE, Office of General Counsel, United States Department of Veterans Affairs, Washington, DC.

MELANIE L. BOSTWICK, Orrick, Herrington & Sutcliffe LLP, Washington, DC, for amicus curiae Military-Veterans Advocacy Inc. Also represented by Melanie Hallums, Wheeling, WV; JOHN B. WELLS, Law Office of John B. Wells, Slidell, LA.

STANLEY JOSEPH PANIKOWSKI, III, DLA Piper LLP (US), San Diego, CA, for amici curiae Swords to Plowshares, Connecticut Veterans Legal Center. Also represented by EDWARD HANOVER, East Palo Alto, CA; JESSE MEDLONG, San Francisco, CA.

Before DYK, CLEVENGER, and PROST, *Circuit Judges*.

MOORE, *Chief Judge*, LOURIE, DYK, PROST, TARANTO, CHEN, HUGHES, STOLL, and CUNNINGHAM, *Circuit Judges*, have joined Part II.B of this opinion.

Opinion concurring in part and dissenting in part from Part II.B filed by *Circuit Judge* REYNA, in which *Circuit Judges* NEWMAN and O'MALLEY join.

PROST, *Circuit Judge*.

Joe A. Lynch appeals the final decision of the United States Court of Appeals for Veterans Claims ("Veterans Court") affirming the Board of Veterans' Appeals' ("Board") denial of his claim for a disability rating greater than 30% for service-connected post-traumatic stress disorder ("PTSD"). *Lynch v. Wilkie*,

No. 19-3106, 2020 WL 1899169 (Vet. App. Apr. 17, 2020) ("*Decision*"). In affirming the Board's denial, the Veterans Court relied on *Ortiz v. Principi*, 274 F.3d 1361, 1364 (Fed. Cir. 2001), to determine that the "benefit of the doubt rule" under 38 U.S.C. § 5107(b) did not apply to Mr. Lynch's claim. Mr. Lynch argues that *Ortiz* departs from the "approximate balance" of the evidence standard, as set forth in 38 U.S.C. § 5107(b), to trigger the benefit-of-the-doubt rule, and that *Ortiz* was therefore wrongly decided. Today's opinion, considered and decided in part by the court en banc, addresses *Ortiz*.

BACKGROUND

Mr. Lynch is a veteran who served on active duty in the United States Marine Corps from July 1972 to July 1976. In March 2015, Mr. Lynch presented for counseling upon the recommendation of his veteran peer group and was evaluated on two separate occasions by Dr. Gwendolyn Newsome, a private psychologist. Mr. Lynch described symptoms, including phobias about confined spaces, panic attacks, memory problems, mood swings, frequent nightmares, antisocial behaviors, and depression. J.A. 25–26. He attributed these symptoms to intrusive memories from his time in service and completed the military version of the PTSD Checklist. J.A. 25–26. Dr. Newsome reported that Mr. Lynch's symptoms and the results of the PTSD Checklist supported a diagnosis of PTSD. J.A. 25–26.

In March 2016, Mr. Lynch filed a claim of entitlement to PTSD, accompanied by Dr. Newsome's report,

with the Department of Veterans Affairs ("VA"). In August 2016, Mr. Lynch underwent a VA PTSD examination. The VA examiner confirmed the diagnosis of PTSD but reported that Mr. Lynch's PTSD did not result in symptoms that were severe enough to interfere with occupational or social functioning or to require continuous medication. J.A. 18, 39. The examiner reviewed Dr. Newsome's report but noted that the level of impairment observed by Dr. Newsome was not observed or reported during the VA examination. J.A. 39, 44. The relevant regional office ("RO") of the VA subsequently granted Mr. Lynch's PTSD claim with a 30% disability rating.

In October 2016, Mr. Lynch filed a Notice of Disagreement with the RO disputing the 30% disability rating. In support, Mr. Lynch submitted two additional psychological evaluations conducted by a private psychiatrist, Dr. H. Jabbour. *See* J.A. 49, 58. In July 2017, Mr. Lynch underwent a second VA PTSD examination. The examiner documented Mr. Lynch's symptomatology and addressed the conflicting medical opinions regarding the severity of Mr. Lynch's symptoms, noting, for example, that some of Dr. Jabbour's conclusions "were more extreme than what was supported by available evidence." J.A. 60. In August 2017, the RO continued Mr. Lynch's 30% disability rating.

Mr. Lynch appealed to the Board, arguing that the RO assigned too low a rating for his PTSD because his symptoms are worse than those contemplated by the assigned 30% rating. The Board denied Mr. Lynch's appeal, finding that based on the record—including the

evaluations conducted by Dr. Newsome, Dr. Jabbour, and the two VA examiners—"[Mr. Lynch] does not have social and occupational impairment manifested by reduced reliability and productivity" that would warrant a disability rating greater than 30% for PTSD. *See* J.A. 20. The Board noted that "[Mr. Lynch'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 [Mr. Lynch]." J.A. 21. The Board concluded that "the preponderance of the evidence is against the claim and entitlement" for a disability rating greater than 30% for PTSD. J.A. 21.

Mr. Lynch then appealed the Board's decision to the Veterans Court, arguing in relevant part that the Board misapplied 38 U.S.C. § 5107(b) and wrongly found that he was not entitled to the "benefit of the doubt." *See Decision*, 2020 WL 1899169, at *3. The benefit-of-the-doubt rule is codified at 38 U.S.C. § 5107, which provides:

> 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 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.

38 U.S.C. § 5107(b) (emphasis added). The implementing regulation in turn provides:

> 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.

38 C.F.R. § 3.102 (emphasis added).

The Veterans Court rejected Mr. Lynch's assertion that he was entitled to the benefit of the doubt and affirmed the Board's decision, reasoning that "the doctrine of reasonable doubt . . . d[oes] not apply here because the preponderance of the evidence is against the claim." *Decision*, 2020 WL 1899169, at *5 (internal quotation marks omitted). In support of its reasoning, the Veterans Court relied on *Ortiz*, which stated that "the benefit of the doubt rule is inapplicable when the preponderance of the evidence is found to be against the claimant." 274 F.3d at 1364. Mr. Lynch now appeals the Veterans Court's decision.

DISCUSSION

I

We have limited jurisdiction to review decisions by the Veterans Court. Under 38 U.S.C. § 7292(d)(2), except to the extent that an appeal presents a constitutional issue, we may not "review (A) a challenge to a factual determination, or (B) a challenge to a law or

regulation as applied to the facts of a particular case." But we may "review and decide any challenge to the validity of any statute or regulation or any interpretation thereof" and "interpret constitutional and statutory provisions, to the extent presented and necessary to a decision." 38 U.S.C. § 7292(c). And "we have authority to decide whether the Veterans Court applied the correct legal standard." *Lamour v. Peake*, 544 F.3d 1317, 1321 (Fed. Cir. 2008). We review the Veterans Court's legal determinations de novo. *Gazelle v. Shulkin*, 868 F.3d 1006, 1009 (Fed. Cir. 2017).

II

Mr. Lynch raises two issues on appeal. He argues that *Ortiz* was wrongly decided because it sets forth an "equipoise of the evidence" standard to trigger the benefit-of-the-doubt rule and that this decreased his chance of receiving a disability rating greater than 30% for PTSD. *See* Appellant's Br. 12–13. According to Mr. Lynch, *Ortiz* read the modifier "approximate" out of the term "approximate balance" set forth in 38 U.S.C. § 5107(b) by requiring an equal or even balance of the evidence to give the benefit of the doubt to the claimant. *See* Appellant's Br. 16–19. We have jurisdiction under 38 U.S.C. § 7292(a), (c).

Mr. Lynch's argument is two-pronged. First, he suggests that *Ortiz* expressly requires equipoise of the evidence for a claimant to receive the benefit of the doubt. Second, he contends that *Ortiz*'s statement that "the benefit of the doubt rule is inapplicable when the

preponderance of the evidence is found to be against the claimant," 274 F.3d at 1364, is contrary to the statutory "approximate balance" standard.

A

Contrary to Mr. Lynch's suggestion that *Ortiz* sets forth an equipoise-of-the-evidence standard to trigger the benefit-of-the-doubt rule, *Ortiz* explicitly gives force to the modifier "approximate" as used in 38 U.S.C. § 5107(b). *Ortiz* found § 5107(b) to be "clear and unambiguous on its face" and recited dictionary definitions of the words "approximate" and "balance" in concluding that under the statute "evidence is in approximate balance when the evidence in favor of and opposing the veteran's claim is found to be almost exactly or nearly equal." 274 F.3d at 1364 (cleaned up). Thus, *Ortiz* necessarily requires that the benefit-of-the-doubt rule may be triggered in situations other than equipoise of the evidence—specifically, situations where the evidence is "nearly equal,"[1] i.e., an "approximate balance" of the positive and negative evidence as set forth in § 5107(b) and 38 C.F.R. § 3.102. *Ortiz*, 274 F.3d at 1364–65; *see also Best Power Tech. Sales Corp. v. Austin*, 984 F.2d 1172, 1177 (Fed. Cir. 1993) ("It is a basic principle of statutory interpretation . . . that undefined terms in a statute are deemed to have their ordinarily

[1] Although *Ortiz* also uses the words "too close to call" and a "tie goes to the runner" analogy in discussing the term "approximate balance," the case makes clear that it goes further than mere ties—"nearly equal" evidence triggers the benefit-of-the-doubt rule. 274 F.3d at 1364–65.

understood meaning. For that meaning, we look to the dictionary." (first citing *United States v. James*, 478 U.S. 597, 604 (1986); and then citing *Bd. of Educ. v. Mergens*, 496 U.S. 226, 237 (1990))).

Mr. Lynch further suggests that, post-*Ortiz*, this court has "interpreted the benefit-of-the-doubt rule as setting forth an absolute equality-of-the-evidence or equipoise-of-the-evidence standard." Reply Br. 3 (citing *Skoczen v. Shinseki*, 564 F.3d 1319, 1324 (Fed. Cir. 2009)). Mr. Lynch is mistaken. *Skoczen* interpreted 38 U.S.C. § 5107(a), not 38 U.S.C. § 5107(b), and merely referred to the § 5107(b) standard in passing dicta. *Skoczen*, 564 F.3d at 1324. Accordingly, *Skoczen* does nothing to disturb *Ortiz*.

Amicus curiae Military-Veterans Advocacy Inc. ("MVA") argues that in certain decisions citing *Ortiz*, the Veterans Court has articulated an equipoise-of-the-evidence threshold for giving the veteran the benefit of the doubt. *See* MVA Br. 8. In isolated cases, that may be so. *See*, *e.g.*, *Chotta v. Peake*, 22 Vet. App. 80, 86 (2008) (stating that "[if] the evidence is not in equipoise . . . the benefit of the doubt rule would not apply"). The Veterans Court's recitation in *Chotta* of the standard is incorrect.[2]

So, let us be clear. Under § 5107(b) and *Ortiz*, a claimant is to receive the benefit of the doubt when

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[2] This misstep in *Chotta* does not appear to have negatively affected that veteran's case. *See* 22 Vet. App. at 86 (vacating and remanding on the basis that the Board failed to consider certain lay evidence of record).

there is an "approximate balance" of positive and negative evidence, which *Ortiz* interpreted as "nearly equal" evidence. This interpretation necessarily includes scenarios where the evidence is not in equipoise but nevertheless is in approximate balance. Put differently, if the positive and negative evidence is in approximate balance (which includes but is not limited to equipoise), the claimant receives the benefit of the doubt.

B[3]

As to whether *Ortiz* correctly concluded that the benefit-of-the-doubt rule does not apply when "the preponderance of the evidence is found to be against the claimant," 274 F.3d at 1364, Mr. Lynch argues that *Ortiz* was wrongly decided because "the totality of the . . . evidence can both preponderate in one direction and be nearly or approximately in balance," Reply Br. 3. Mr. Lynch contends that "these two standards cannot co-exist" and that therefore *Ortiz* eliminates any meaning of the word "approximate" in § 5107(b). Reply Br. 3. *Ortiz* rejected such reasoning, stating that "if the Board is persuaded that the preponderant evidence weighs either for or against the veteran's claim, it necessarily has determined that the evidence is not 'nearly equal' . . . and the benefit of the doubt rule therefore has no application." 274 F.3d at 1365. On that

[3] The earlier opinion in this case, reported at 999 F.3d 1391 (Fed. Cir. 2021), is withdrawn, and this opinion substituted therefor. Part II.B of this opinion has been considered and decided by the court en banc. *See* Order in this case issued this date.

basis, the panel ruled on this issue that it was bound by *Ortiz*.

Ortiz correctly established that the benefit-of-the-doubt rule does not apply when a factfinder is *persuaded* by the evidence to make a particular finding. *See* 274 F.3d at 1365–66. And *Ortiz* made clear that, under its formulation, a finding by "the preponderance of the evidence" reflects that the Board "has been persuaded" to find in one direction or the other. 274 F.3d at 1366. But *Ortiz*'s preponderance-of-the-evidence formulation—while correctly viewing the issue as one of *persuasion*—nonetheless could confuse because other cases link "preponderance of the evidence" to the concept of equipoise. *E.g.*, *Medina v. California*, 505 U.S. 437, 449 (1992) (stating that preponderance-of-the-evidence burden matters "only in a narrow class of cases where the evidence is in equipoise"); *see also Goldman Sachs Grp., Inc. v. Ark. Tchr. Ret. Sys.*, 141 S. Ct. 1951, 1963 (2021). Accordingly, to eliminate the potential for confusion going forward, we depart from *Ortiz*'s "preponderance of the evidence" language and determine that the benefit-of-the-doubt rule simply applies if the competing evidence is in "approximate balance," which *Ortiz* correctly interpreted as evidence that is "nearly equal."[4]

[4] The dissent characterizes the majority opinion as reinstituting the preponderance of the evidence standard under a different linguistic formulation. Dissent at 1–2. That is not a correct characterization of the majority opinion.

As a corollary, evidence is not in "approximate balance" or "nearly equal," and therefore the benefit-of-the-doubt rule does not apply, when the evidence persuasively favors one side or the other. To be clear, *Ortiz* (and the instant case) were not wrongly decided.[5] In the instant case, for example, the Board made extensive findings that show it was *persuaded* that Mr. Lynch was not entitled to a disability rating greater than 30% for PTSD. *See*, *e.g.*, J.A. 20–21. And the Veterans Court made plain that the evidence was quite clearly against the veteran, not in approximate balance.[6]

CONCLUSION

We have considered Mr. Lynch's remaining arguments but find them unpersuasive. For the foregoing reasons, we affirm.

AFFIRMED

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[5] Indeed, we are not aware of any case that improperly applied Ortiz in an outcome-determinative manner.

[6] Today's change in our construction of § 5107(b) does not provide grounds for claims of clear and unmistakable error ("CUE") for prior Board decisions. CUE "does not include the otherwise correct application of a statute or regulation where, subsequent to the Board decision challenged, there has been a change in the interpretation of the statute or regulation." 38 C.F.R. § 20.1403(e); *see also George v. McDonough*, 991 F.3d 1227, 1234 (Fed. Cir. 2021) ("CUE must be analyzed based on the law as it was *understood at the time* of the original decision and cannot arise from a subsequent change in the law or interpretation thereof.").

COSTS

No costs.

REYNA, *Circuit Judge*, with whom NEWMAN and O'MALLEY, *Circuit Judges*, join, concurring-in-part and dissenting-in-part from Part II.B.

Today the court takes en banc action directed to this court's precedent articulated in *Ortiz v. Principi*, 274 F.3d 1361 (Fed. Cir. 2001). The purpose of the en banc action is to "clarify" the court's holding in *Ortiz*. The result is that the court departs from its holding in *Ortiz* and sets a new analytical standard for applying the benefit-of-the-doubt rule under 38 U.S.C. § 5107. I agree with the court's decision to reject the preponderance of evidence standard set in *Ortiz*. I cannot, however, agree with the court's installment of a "persuasion of evidence standard," and the refusal to overturn *Ortiz* in its entirety. For the reasons stated below, I concur-in-part and dissent-in-part from the decision of the court.

The majority rejects the preponderance of the evidence rule established in *Ortiz*. Maj. Op. 9. I agree that our holding in *Ortiz* required fixing. This is because *Ortiz* carries the potential for withholding benefits from veterans to which they are otherwise entitled. By providing clarification, the court recognizes the remedial nature of veterans' benefits law, as intended by Congress—including through its statutory expression of the veterans' benefit-of-the-doubt rule. Today's

opinion, therefore, is a step in the right direction, and I am pleased to take that step with my colleagues.

I dissent, however, from the court's refusal to recognize that *Ortiz* was wrongly decided. In *Ortiz*, the court held that the benefit-of-the-doubt rule does not apply in cases where the Board of Veterans' Appeals finds that a preponderance of the evidence is against the veteran's claim. *Ortiz*, 274 F.3d at 1365–66. The court reached this holding after determining that the statute required no interpretation and upon consulting dictionaries to construe the meaning of "approximate" and "balance." *Id.* at 1364–65. Today's en banc decision acknowledges that the preponderance of the evidence formulation carries potential confusion. As a result, "to eliminate the potential for confusion going forward," the majority "depart[s] from *Ortiz*'s 'preponderance of the evidence' language." Maj. Op. 9. This means two things. First, the "preponderance of the evidence" standard is repealed and replaced with a "persuasive evidence" standard. *Id.* at 781–82. Second, the analytical structure underpinning the preponderant evidence rule in *Ortiz* not only remains, but now girds the persuasive evidence standard. Not only is the persuasive evidence standard, like the preponderance rule, not contemplated by the statute, but its analytical framework has as provenance the now-estranged *Ortiz*'s preponderant evidence rule. This result is a far cry from the language contemplated by Congress. Accordingly, I dissent from the court's adoption of the persuasive evidence standard.

As the court maintains *Ortiz*'s analytical framework, we must be vigilant against the possibility that "close cases" may evade review. Where the evidence is close, but the Department of Veterans Affairs (VA) ultimately determines that the evidence "persuasively" forecloses a veteran's claim, the VA can make its determination without explaining that the case was in fact a close call. Put differently, if the VA internally recognizes the evidence is close but finds in the end that the evidence "persuasively" precludes the veteran's claim, the VA does not need to disclose that the evidence may have been "close." There is no requirement to do so, and the majority opinion does nothing to change this. This shields such determinations from meaningful appellate review under § 5107(b). This outcome disincentivizes the agency from fulfilling its duty to provide an adequate administrative record in certain cases and thus hinders appellate review. *See In re Sang Su Lee*, 277 F.3d 1338, 1342 (Fed. Cir. 2002) ("For judicial review to be meaningfully achieved . . . , the agency tribunal must present a full and reasoned explanation of its decision. The agency tribunal must set forth its findings and the grounds thereof, as supported by the agency record, and explain its application of the law to the found facts."). In my view, the VA should be motivated, if not required, to include a statement and explanation in cases where it concludes the evidence is not in approximate balance but thought the case a close call. I would favor such a requirement to ensure that the question of whether the evidence is in approximate balance under § 5107(b) is meaningfully subject to appellate review in all cases.

In sum, I concur-in-part and dissent-in-part with the majority decision. I agree with the decision to repeal the preponderance of evidence rule adopted in *Ortiz*. But I disagree with the decision not to overturn *Ortiz* in its entirety. I also disagree with the new rule the majority has minted, the persuasion of evidence rule, for use in applying the benefit-of-the-doubt provision set out in 38 U.S.C. § 5107.

The words of the statute are no mystery. They are plain and have common meaning and require no further definition. The imperative nature of the statute is also clear. In any issue material to the veteran's claim, the benefit of the doubt shall go to the veteran.

> (b) Benefit of the Doubt.—
>
> 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 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.

38 U.S.C. § 5107(b).

NOTE: THIS ORDER IS NONPRECEDENTIAL.

United States Court of Appeals for the Federal Circuit

JOE A. LYNCH,
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v.

DENIS MCDONOUGH, SECRETARY OF VETERANS AFFAIRS,
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2020-2067

Appeal from the United States Court of Appeals for Veterans Claims in No. 19-3106, Senior Judge Mary J. Schoelen.

ON PETITION FOR REHEARING EN BANC

(Filed Dec. 17, 2021)

Before MOORE, *Chief Judge*, NEWMAN, LOURIE, CLEVENGER*, DYK, PROST, O'MALLEY, REYNA, TARANTO, CHEN, HUGHES, STOLL, and CUNNINGHAM, *Circuit Judges*.

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* Circuit Judge Clevenger participated only in the decision on the petition for panel rehearing.

PER CURIAM.

ORDER

Joe A. Lynch filed a petition for rehearing en banc. A response to the petition was invited by the court and filed by the Secretary of Veterans Affairs. The court also accepted an amicus brief filed by Military-Veterans Advocacy Inc. The petition was first referred as a petition for panel rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc was referred to the circuit judges who are in regular active service. A poll was requested and taken, and the court decided that the appeal warranted en banc consideration.

Upon consideration thereof,

IT IS ORDERED THAT:

(1) The petition for panel rehearing is denied.

(2) The petition for rehearing en banc is granted for the limited purpose of addressing *Ortiz v. Principi*, 274 F.3d 1361 (Fed. Cir. 2001).

(3) The panel's judgment and original opinion entered on June 3, 2021, are vacated and replaced with the accompanying revised opinion, concurrence-in-part and dissent-in-part, and judgment.

FOR THE COURT

December 17, 2021
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

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MARK RYAN LIPPMAN, The Veterans Law Group, Poway, CA, argued for claimant-appellant. Also represented by KENNETH M. CARPENTER, Law Offices of Carpenter Chartered, Topeka, KS; ADAM R. LUCK, Gloverluck, LLP, Dallas, TX.

EVAN WISSER, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for respondent-appellee. Also

represented by ERIC P. BRUSKIN, JEFFREY B. CLARK, ROBERT EDWARD KIRSCHMAN, JR; CHRISTOPHER O. ADELOYE, Y. KEN LEE, Office of General Counsel, United States Department of Veterans Affairs, Washington, DC.

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Before DYK, CLEVENGER, and PROST*, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* PROST.

Opinion concurring in part and
dissenting in part filed by *Circuit Judge* DYK.

PROST, *Circuit Judge*.

Joe A. Lynch appeals the final decision of the United States Court of Appeals for Veterans Claims ("Veterans Court") affirming the Board of Veterans' Appeals' ("Board") denial of his claim for a disability rating greater than 30% for service-connected post-traumatic stress disorder ("PTSD"). *Lynch v. Wilkie*,

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* Sharon Prost vacated the position of Chief Judge on May 21, 2021.

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BACKGROUND

Mr. Lynch is a veteran who served on active duty in the United States Marine Corps from July 1972 to July 1976. In March 2015, Mr. Lynch presented for counseling upon the recommendation of his veteran peer group and was evaluated on two separate occasions by Dr. Gwendolyn Newsome, a private psychologist. Mr. Lynch described symptoms, including phobias about confined spaces, panic attacks, memory problems, mood swings, frequent nightmares, antisocial behaviors, and depression. J.A. 25–26. He attributed these symptoms to intrusive memories from his time in service and completed the military version of the PTSD Checklist. J.A. 25–26. Dr. Newsome reported that Mr. Lynch's symptoms and the results of the PTSD Checklist supported a diagnosis of PTSD. J.A. 25–26.

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Mr. Lynch appealed to the Board, arguing that the RO assigned too low a rating for his PTSD because his symptoms are worse than those contemplated by the

assigned 30% rating. The Board denied Mr. Lynch's appeal, finding that based on the record—including the evaluations conducted by Dr. Newsome, Dr. Jabbour, and the two VA examiners—"[Mr. Lynch] does not have social and occupational impairment manifested by reduced reliability and productivity" that would warrant a disability rating greater than 30% for PTSD. *See* J.A. 20. The Board noted that "[Mr. Lynch'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 [Mr. Lynch]." J.A. 21. The Board concluded that "the preponderance of the evidence is against the claim and entitlement" for a disability rating greater than 30% for PTSD. J.A. 21.

Mr. Lynch then appealed the Board's decision to the Veterans Court, arguing in relevant part that the Board misapplied 38 U.S.C. § 5107(b) and wrongly found that he was not entitled to the "benefit of the doubt." *See Decision*, 2020 WL 1899169, at *3. The benefit-of-the-doubt rule is codified at 38 U.S.C. § 5107, which provides:

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> 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.

38 C.F.R. § 3.102 (emphasis added).

The Veterans Court rejected Mr. Lynch's assertion that he was entitled to the benefit of the doubt and affirmed the Board's decision, reasoning that "the doctrine of reasonable doubt . . . d[oes] not apply here because the preponderance of the evidence is against the claim." *Decision*, 2020 WL 1899169, at *5 (internal quotation marks omitted). In support of its reasoning, the Veterans Court relied on *Ortiz*, which held that "the benefit of the doubt rule is inapplicable when the preponderance of the evidence is found to be against the claimant." 274 F.3d at 1364. Mr. Lynch now appeals the Veterans Court's decision.

DISCUSSION

I

We have limited jurisdiction to review decisions by the Veterans Court. Under 38 U.S.C. § 7292(d)(2), except to the extent that an appeal presents a

constitutional issue, we may not "review (A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case." But we may "review and decide any challenge to the validity of any statute or regulation or any interpretation thereof" and "interpret constitutional and statutory provisions, to the extent presented and necessary to a decision." 38 U.S.C. § 7292(c). And "we have authority to decide whether the Veterans Court applied the correct legal standard." *Lamour v. Peake*, 544 F.3d 1317, 1321 (Fed. Cir. 2008). We review the Veterans Court's legal determinations de novo. *Gazelle v. Shulkin*, 868 F.3d 1006, 1009 (Fed. Cir. 2017).

II

Mr. Lynch raises a single issue on appeal. He argues that *Ortiz* was wrongly decided because it sets forth an "equipoise of the evidence" standard to trigger the benefit-of-the-doubt rule and that this decreased his chance of receiving a disability rating greater than 30% for PTSD. *See* Appellant's Br. 12–13. According to Mr. Lynch, *Ortiz* read the modifier "approximate" out of the term "approximate balance" set forth in 38 U.S.C. § 5107(b) by requiring an equal or even balance of the evidence to give the benefit of the doubt to the claimant. *See* Appellant's Br. 16–19. We have jurisdiction under 38 U.S.C. § 7292(a), (c).

Mr. Lynch's argument is two-pronged. First, he suggests that *Ortiz* expressly requires equipoise of the evidence for a claimant to receive the benefit of the

doubt. But *Ortiz* says no such thing. Second, he contends that *Ortiz*'s holding that "the benefit of the doubt rule is inapplicable when the preponderance of the evidence is found to be against the claimant," 274 F.3d at 1364, leaves no space for a claimant to receive the benefit of the doubt unless the positive and negative evidence is in perfect balance. But *Ortiz* considered and rejected such reasoning, *id.* at 1365–66, and this panel is bound by *Ortiz*. We further address each prong of Mr. Lynch's argument in turn.

A

Contrary to Mr. Lynch's suggestion that *Ortiz* sets forth an equipoise-of-the-evidence standard to trigger the benefit-of-the-doubt rule, *Ortiz* explicitly gives force to the modifier "approximate" as used in 38 U.S.C. § 5107(b). *Ortiz* found § 5107(b) to be "clear and unambiguous on its face" and recited dictionary definitions of the words "approximate" and "balance" in concluding that under the statute "evidence is in approximate balance when the evidence in favor of and opposing the veteran's claim is found to be almost exactly or nearly equal." 274 F.3d at 1364 (cleaned up). Thus, *Ortiz* necessarily requires that the benefit-of-the-doubt rule may be triggered in situations other than equipoise of the evidence—specifically, situations where the evidence is "nearly equal,"[1] i.e., an "approximate balance"

[1] Although *Ortiz* also uses the words "too close to call" and a "tie goes to the runner" analogy in discussing the term "approximate balance," the case makes clear that it goes further than

of the positive and negative evidence as set forth in § 5107(b) and 38 C.F.R. § 3.102. *Ortiz*, 274 F.3d at 1364–65; *see also Best Power Tech. Sales Corp. v. Austin*, 984 F.2d 1172, 1177 (Fed. Cir. 1993) ("It is a basic principle of statutory interpretation . . . that undefined terms in a statute are deemed to have their ordinarily understood meaning. For that meaning, we look to the dictionary." (first citing *United States v. James*, 478 U.S. 597, 604 (1986); and then citing *Bd. of Educ. v. Mergens*, 496 U.S. 226, 237 (1990))).

Mr. Lynch further suggests that, post-*Ortiz*, this court has "interpreted the benefit-of-the-doubt rule as setting forth an absolute equality-of-the-evidence or equipoise-of-the-evidence standard." Reply Br. 3 (citing *Skoczen v. Shinseki*, 564 F.3d 1319, 1324 (Fed. Cir. 2009)). Mr. Lynch is mistaken. *Skoczen* interpreted 38 U.S.C. § 5107(a), not 38 U.S.C. § 5107(b), and merely referred to the § 5107(b) standard in passing dicta. *Skoczen*, 564 F.3d at 1324. Accordingly, *Skoczen* does nothing to disturb *Ortiz*.

Amicus curiae Military-Veterans Advocacy Inc. ("MVA") argues that in certain decisions citing *Ortiz*, the Veterans Court has articulated an equipoise-of-the-evidence threshold for giving the veteran the benefit of the doubt. *See* MVA Br. 8. In isolated cases, that may be so. *See*, *e.g.*, *Chotta v. Peake*, 22 Vet. App. 80, 86 (2008) (stating that "[if] the evidence is not in equipoise . . . the benefit of the doubt rule would not

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mere ties—"nearly equal" evidence triggers the benefit-of-the-doubt rule. 274 F.3d at 1364–65.

apply"). The Veterans Court's recitation in *Chotta* of the standard is incorrect.[2]

So, let us be clear. Under § 5107(b) and *Ortiz*, a claimant is to receive the benefit of the doubt when there is an "approximate balance" of positive and negative evidence, which *Ortiz* interpreted as "nearly equal" evidence. This interpretation necessarily includes scenarios where the evidence is not in equipoise but nevertheless is in approximate balance. Put differently, if the positive and negative evidence is in approximate balance (which includes but is not limited to equipoise), the claimant receives the benefit of the doubt.

B

As to whether *Ortiz* correctly held that the benefit-of-the-doubt rule does not apply when "the preponderance of the evidence is found to be against the claimant," 274 F.3d at 1364, this panel is bound by *Ortiz*.

Mr. Lynch argues that *Ortiz* was wrongly decided because "the totality of the . . . evidence can both preponderate in one direction and be nearly or approximately in balance." Reply Br. 3. He contends that "these two standards cannot co-exist" and that therefore *Ortiz* eliminates any meaning of the word "approximate" in

[2] This misstep in *Chotta* does not appear to have negatively affected that veteran's case. *See* 22 Vet. App. at 86 (vacating and remanding on the basis that the Board failed to consider certain lay evidence of record).

§ 5107(b). Reply Br. 3. But *Ortiz* considered (and rejected) such reasoning, explaining that "if the Board is persuaded that the preponderant evidence weighs either for or against the veteran's claim, it necessarily has determined that the evidence is not 'nearly equal' . . . and the benefit of the doubt rule therefore has no application." 274 F.3d at 1365; *see also id.* at 1365–66 (stating that a finding by "the preponderance of the evidence" reflects that the Board "has been persuaded" to find in one direction or the other). This panel is bound by *Ortiz*.

CONCLUSION

We have considered Mr. Lynch's remaining arguments but find them unpersuasive. For the foregoing reasons, we affirm.

AFFIRMED

COSTS

No costs.

DYK, *Circuit Judge*, concurring in part and dissenting in part.

The majority holds that this court's prior decision in *Ortiz v. Principi*, 274 F.3d 1361 (Fed. Cir. 2001), did not establish an equipoise-of-the-evidence standard for applicability of the benefit-of-the-doubt rule. Maj. Op. 8. I agree. The majority also holds that under *Ortiz*, the

benefit-of-the-doubt rule does not apply when the preponderance of the evidence is found to be for or against a claimant. Maj. Op. 8. Here I disagree. It seems to me that *Ortiz's* preponderance of the evidence standard is inconsistent with the plain text of 38 U.S.C. § 5107(b).

I

As the majority notes, *Ortiz* contains some language suggesting that a veteran is entitled to the benefit of the doubt only when the evidence is "too close to call." Maj. Op. 7 n.1 (quoting *Ortiz*, 274 F.3d at 1365). However, I agree with the majority that *Ortiz* is best understood as holding that veterans are entitled to the benefit of the doubt when the evidence for or against their claims is approximately equal. *See Ortiz*, 274 F.3d at 1364. The benefit-of-the-doubt rule, codified at 38 U.S.C. § 5107(b), provides that a claimant is entitled to the benefit of the doubt when there is an "approximate balance" of positive and negative evidence. To the extent there is dicta in *Ortiz* suggesting that the benefit-of-the-doubt rule applies only in the context of an evidentiary tie, those statements are inconsistent with the plain text of § 5107(b) and should be disregarded.

II

The majority also holds that the benefit-of-the-doubt rule does not apply when the preponderance of the evidence is found to be against a veteran's claim. Maj. Op. 8. In this respect the majority agrees with *Ortiz*'s holding that "if the Board is persuaded that the

preponderant evidence weighs either for or against the veteran's claim, it necessarily has determined that the evidence is not 'nearly equal' or 'too close to call,' and the benefit-of-the-doubt rule therefore has no application." 274 F.3d at 1365. That standard is the one applied by the Veterans Court in this case.

If the preponderance of the evidence favors the claimant, the claimant prevails, and there is no need to reach the benefit-of-the-doubt rule. But the majority holds that the benefit-of-the-doubt rule does not apply when the VA has established that the veteran is not entitled to recover by a preponderance of the evidence. This formulation is first confusing because the statute generally places the burden of proof on the veteran. 38 U.S.C. § 5107(a) ("Except as otherwise provided by law, a claimant has the responsibility to present and support a claim for benefits under laws administered by the Secretary.").

More significantly, the preponderance formulation is not consistent with the statute and disadvantages the veteran. This court has previously explained that "preponderant evidence" simply "means the greater weight of evidence." *Hale v. Dep't of Transp., FAA*, 772 F.2d 882, 885 (Fed. Cir. 1985); *see also Althen v. Sec'y of Health & Hum. Servs.*, 418 F.3d 1274, 1279 (Fed. Cir. 2005) (explaining in the context of the Vaccine Act that "[t]his court has interpreted the 'preponderance of the evidence' standard . . . as one of proof by simple preponderance, of 'more probable than not' causation").

Our sister circuits have similarly explained that preponderant evidence may be found when the evidence only slightly favors one party. *See*, *e.g.*, *Gjinaj v. Ashcroft*, 119 F. App'x 764, 773–74 (6th Cir. 2005) ("A preponderance of the evidence requires only that the government's evidence 'make the scales tip slightly' in its favor."); *Blossom v. CSX Transp., Inc.*, 13 F.3d 1477, 1479 (11th Cir. 1994) (determining that a jury instruction correctly explained that the preponderance of the evidence standard is "like the scales of justice" and can be satisfied as long as a party "tip[s] the scales just one little bit in [their] favor"); *Ostrowski v. Atl. Mut. Ins. Cos.*, 968 F.2d 171, 187 (2d Cir. 1992) ("Instead, the court should instruct the jury that it is to conclude that a fact has been proven by a preponderance of the evidence if it 'finds that the scales tip, however slightly, in favor of the party with the burden of proof' as to that fact." (citation omitted)).

Because preponderant evidence may be found when the evidence tips only slightly against a veteran's claim, that standard is inconsistent with the statute's standard that the veteran wins when there is an "approximate balance" of evidence for and against a veteran's claim. "Approximate" is not the same as "slight." By reframing the statute's standard in terms of preponderance of the evidence, *Ortiz* departed from the clear language of the statute to the disadvantage of the veteran. It is not difficult to imagine a range of cases in which the evidence is in approximate balance between the veteran and the government (and the veteran should recover), but still slightly favors the

government (and under the majority's test, the veteran would not recover).

Ortiz's holding effectively and impermissibly restricts the benefit-of-the-doubt rule to cases in which there is close to an evidentiary tie, a proposition that the majority agrees would be contrary to the "approximate balance" language of the statute. *See* Maj. Op. 8. Indeed, the government appeared to agree at oral argument that when the evidence against a veteran's claim is equal to "equipoise plus a mere peppercorn," denying the benefit-of-the-doubt rule would be contrary to statute. Oral Argument at 23:00-23:16, http://oralarguments.cafc.uscourts.gov/default.aspx?fl=20-2067_04082021.mp3 (but disagreeing that preponderance of the evidence is satisfied under that circumstance).

I respectfully dissent from the majority's conclusion that the preponderance standard is consistent with the statute.

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. Yet. 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.

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[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).

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 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. § 4.13 0, 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

[SEAL] **BOARD OF VETERANS' APPEALS**
DEPARTMENT OF VETERANS AFFAIRS

IN THE APPEAL OF [redacted]
JOE A. LYNCH Docket No. 17-44 610

DATE: April 15, 2019

ORDER

Entitlement to an initial rating in excess of 30 percent for posttraumatic stress disorder (PTSD) is denied.

FINDING OF FACT

The occupational and social impairment resulting from the Veteran's PTSD has been 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.

CONCLUSION OF LAW

The criteria for an initial rating in excess of 30 percent for PTSD have not been met. 38 U.S.C. § 1155 (2012); 38 C.F.R. §§ 4.7, 4.130, Diagnostic Code 9411 (2018).

REASONS AND BASES FOR FINDING AND CONCLUSION

The Veteran had active service in the United States Marine Corps (USMC) from July 1972 to July 1976.

This matter comes before the Board of Veterans' Appeals (Board) on appeal from an August 2016 rating decision issued by the VA Regional Office (RO) in Montgomery, Alabama.

Initial Increased Rating – PTSD

The Veteran asserts that he should have a higher rating for his PTSD as his symptoms are worse than those contemplated by the currently assigned rating.

In a private March 2015 private psychiatric evaluation report, the Veteran was noted to report symptoms of sleep impairment, intrusive memories, difficulty maintaining relationships, anger issues, difficulty with confined spaces, panic attacks, mood swings, and feeling sad and depressed. The Veteran was noted to report that he did not have any real friends, he isolated himself, and displayed antisocial behaviors outside the home. He was noted to report problems with memory. The private examiner diagnosed PTSD and noted that the Veteran's presentation indicated that the performance of his job functions and social interactions were severely limited due to his in-service experiences. The examiner noted that the Veteran's lack of social support was increased as a result of his inability to control physical and emotional reactions to stressors that remind him of his in-service trauma. The examiner noted that the Veteran's family relations, judgment, thinking, and mood were increasingly limiting his quality of life.

At an August 2016 VA examination, the Veteran reported that he experienced anxiety and chronic sleep impairment. The Veteran also reported re-experiencing traumatic events, avoidance behavior, negative alterations in cognition, numbing behavior, and hyperarousal. The Veteran reported that he had been married to his wife for 24 years and characterized his relationship as generally fulfilling and supportive. The Veteran reported that he was emotionally connection to his wife, his children, and his family. He reported that he was socially connected to his church and with friends. The examiner noted that there was no significant social functional impairment. The Veteran reported that his current work performance as a fraud investigator was excellent. He reported that he was in good standing with his current employer, and his relationships with his co-workers and supervisors through the years were characterized as typically positive and productive. The examiner noted that there was no significant occupational functional impairment.

Upon mental status examination, the Veteran was well-groomed, cooperative, and fully oriented. The Veteran maintained good eye contact throughout the interview and he appeared to be a reliable historian. The Veteran's mood was noted as euthymic and his affect was stable. The examiner noted that there was no evidence of significant social discomfort or anxiety during the interview. The Veteran's speech was spontaneous, articulate, and easily understood. There were no abnormal mannerisms observed. There was no evidence that the Veteran exhibited hallucinations, delusions, or

psychoses. The Veteran denied suicidal ideation. The Veteran's attention and concentration were observed as normal and memory recall of service, symptoms, and related interview data appeared to be easily accessed by the Veteran. The examiner confirmed the diagnosis of PTSD, but reported that the Veteran's PTSD did not result in symptoms that were severe enough to interfere with occupational or social functioning, or to require continuous medication. The examiner acknowledged the March 2015 private mental health evaluation report, but noted that the level of impairment identified in that report were not present or observed at the Veteran's examination.

At a September 2016 private psychiatric evaluation, the Veteran reported that he experienced chronic sleep impairment, consisting of fragmented sleep and nightmares. He reported that he averaged 3-4 hours of sleep per night and that his lack of sleep had affected him in the workplace. He reported depressed moods, panic attacks, anxiety, suspiciousness, irritability, intrusive thoughts, mild memory loss, flattened affect, disturbances of mood and motivation, difficulty adapting to stressful circumstances, an inability in establishing and maintaining effective relationships, and past suicidal ideation. The Veteran reported having a strained relationship with his children from his first marriage. He reported that he has a loving relationship with his daughter from his current marriage. He reported that he had difficulty showing affection to his current wife. Further, he reported that he isolated himself and had difficulty engaging in activities outside of the home

because he was easily startled and was hyperalert. In addition, he was irritable, easily agitated, and had angry outburst. Regarding his employment, the Veteran reported that he is behind on his work because he had difficulty focusing and concentrating. In addition, he reported that he did not have the patience to complete his work. He indicated that he did not feel he could work safely or effectively in his work environment and was considering early retirement. In addition, the Veteran reported that he no longer attended church regularly and rarely socializes with friends and extended family.

Upon mental status examination, the Veteran was anxious with a blunted affect and psychomotor retardation. He was cooperative and appropriate without being spontaneous. His speech and thought process was normal. His speech was within normal limits. The examiner noted that the Veteran is impaired in his work. The Veteran denied suicidal and homicidal ideations. There were no delusions or hallucinations. While he reported problems with his memory, he was alert and oriented.

At a July 2017 VA examination, the Veteran reported experiencing intrusive thoughts, physiological responses to trauma, and avoidance. He reported persistent negative emotions and developing negative beliefs about himself. He reported persistent irritability, difficulty concentrating, exaggerated startle response, and hypervigilance. The Veteran reported having a good relationship with family, noting that he had a close family. He reported having a few long-term friends with whom

he spoke with on the phone. He reported that he had been married for over 20 years, but noted that his wife got frustrated that he would not go out with her to crowded places. The Veteran reported he had been working 29 hours per week for the Industrial Commission. He reported that he was able to work mostly alone, and he reported that he did not have any trouble completing his work. He reported that he had been told that he could be "too aggressive" interpersonally with other people at work. He reported that he had to restrain himself and tried to be polite to people when he was working. The examiner noted that based on the subjective complaints, the Veteran had social and occupational impairment manifested by occasional decrease in work efficiency and intermittent inability to perform occupational task, although generally functioning satisfactorily.

Upon mental status examination, the Veteran was polite and cooperative. He put forth a good effort and appeared to be a good informant. He was dressed casually and appropriately and had good hygiene. His speech was within normal limits regarding articulation, rate, tone, volume, and production. His affect was appropriate to the content of the Veteran's speech. He was alert, attentive, and oriented to person, place, time, and situation. Attention and concentration during the evaluation appeared adequate based on the Veteran's ability to complete questionnaires, respond to interview questions, and spell a word forward and backward. His immediate recall abilities were intact, and his remote and recent memory abilities were intact. His mood was

described as "a little tense, a little nervous" and reported that his most significant problem was anxiety attacks that disturbed his sleep. The examiner confirmed the diagnosis of PTSD.

The examiner also provided comment regarding the conflicting medical evidence of record. In that regard, the examiner noted that appeared to have reported more social and occupational problems at his private evaluations than at his VA examinations. However, the VA examiner also noted that the conclusions drawn by the Veteran's private provider were more extreme than what was supported by the available evidence. In that regard, the examiner cited to the fact that the private provider noted that the Veteran had an inability to maintain relationships with others, but that the Veteran himself had reported that he had relationships with friends and family members. Further, the examiner noted that the Veteran had difficulty with work and social relationships, but that the Veteran himself reported that he had not problems with work relationships and that he had friends. Further, the Veteran's current reports of "close" relationships with family, which contradicted the findings of the private examiner. Further, the Veteran reported at the current examination that he was efficient in his work, which contradicted the private examiner's findings that the Veteran had problems with reliability and productivity. In sum, the VA examiner noted that integrating all the findings of record, the Veteran's occupational and social impairment appeared to be currently worse than

reported at the 2016 VA examination, but less severe than the impairment noted by the 2016 private examiner's evaluation. As such, the examiner noted that the Veteran was assessed as having occupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks, although generally functioning satisfactorily.

The Board finds that the Veteran is not entitled to an initial rating in excess of 30 percent for PTSD. In this regard, the Veteran does not have social and occupational impairment manifested by reduced reliability and productivity. In fact, the Veteran reported that his work performance was "excellent." Further, he reported feeling emotionally connected to his wife, children, and family; and a social connection to his friends and church. Further, the Veteran was not noted to have frequent panic attacks, short or long-term memory loss, impaired judgement, impaired abstract thinking, serious disturbances of motivation and mood, or inability maintaining effective work and social relationships. The Veteran has reported that he, on occasion, has experienced suicidal ideation. However, he has not reported any specific thoughts, intent, or plan. In fact, his overall reports were somewhat vague. The Veteran does not have impairment in his speech, he does not have hallucinations, and he does not experience delusions. 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).

/s/ Kristin Haddock
Kristin Haddock
Veterans Law Judge
Board of Veterans' Appeals

ATTORNEY FOR THE BOARD

Christina Quant,
Law Clerk

> **Benefit of the doubt.** 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 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.

38 U.S.C. § 5107(b).

> It is the defined and consistently applied policy of the Department of Veterans Affairs to administer the law under a broad interpretation, consistent, however, with the facts shown in every case. 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. It is a substantial doubt and one within the range of probability as distinguished from pure speculation or remote possibility. It is not a means of reconciling actual conflict or a contradiction in the evidence. Mere suspicion or doubt as to the truth of any statements submitted, as distinguished from impeachment or contradiction by evidence or known facts, is not justifiable basis for denying the application of the reasonable doubt doctrine if the entire, complete record otherwise warrants invoking this doctrine. The reasonable doubt doctrine is also applicable even in the absence of official

> records, particularly if the basic incident allegedly arose under combat, or similarly strenuous conditions, and is consistent with the probable results of such known hardships.

38 C.F.R. § 3.102.