APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

APPENDIX A

United States Court of Appeals for the Federal Circuit

JOSHUA E. BUFKIN,
Claimant-Appellant

v.

DENIS MCDONOUGH, SECRETARY OF VETERANS AFFAIRS,
Respondent-Appellee

2022-1089

Appeal from the United States Court of Appeals for Veterans Claims in No. 20-3886, Judge Michael P. Allen.

Decided: August 3, 2023

KENNETH M. CARPENTER, Law Offices of Carpenter Chartered, Topeka, KS, argued for claimant-appellant.

SARAH E. KRAMER, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for respondent-appellee. Also represented by BRIAN M. BOYNTON, PATRICIA M. MCCARTHY, LOREN MISHA PREHEIM;

CHRISTINA LYNN GREGG, BRIAN D. GRIFFIN, Office of General Counsel, United States Department of Veterans Affairs, Washington, DC.

Before MOORE, *Chief Judge*, HUGHES and STOLL, *Circuit Judges*.

HUGHES, *Circuit Judge*.

Joshua Bufkin appeals the final decision of the United States Court of Appeals for Veterans Claims denying service connection for an acquired psychiatric disorder. Because we find no legal error in the Veterans Court's interpretation of its standard of review and the benefit of the doubt rule, we affirm.

I

Mr. Bufkin served in the U.S. Air Force from September 2005 to March 2006. In July 2013, he filed a claim for service connection for several conditions, including an acquired psychiatric disorder. In support, he submitted VA medical records reflecting his visits with a VA psychiatrist, Dr. Robert Goos, between February 21 and June 21, 2013. In his notes, Dr. Goos stated that "in every aspect he meets [the] criteria for [post-traumatic stress disorder ("PTSD")]," J.A. 20, but he could not identify the specific stressor or whether the stressor relates to Mr. Bufkin's military service. In March 2014, a VA regional office denied service connection for PTSD because "[t]he available medical evidence [was]

insufficient to confirm a link between [his] symptoms and an in-service stressor." J.A. 23.

In July 2014, Mr. Bufkin submitted a lay statement for his service connection claim for PTSD. Subsequently, VA scheduled an examination with a VA psychiatrist, who opined that his "symptoms do not meet the diagnostic criteria for PTSD." J.A. 26. In an August 2015 decision, VA continued the denial of service connection for lacking a PTSD diagnosis. Mr. Bufkin filed a notice of disagreement, arguing that Dr. Goos' favorable 2014 opinion and the VA examiner's unfavorable 2015 opinion were in equipoise, and therefore, VA was legally obligated to grant service connection.

In April 2018, Mr. Bufkin underwent another VA examination with a different examiner. The second examiner also concluded that his symptoms "do[] not meet [the diagnostic] criteria for PTSD." J.A. 54. In May 2018, VA issued a statement of the case, continuing the denial of service connection for an acquired psychiatric disorder. He appealed that decision to the Board. While his appeal was pending, VA received a statement from another VA psychiatrist. The third examiner opined that in addition to a severe anxiety disorder, he "suffers from chronic PTSD due to a number of issues, but … [s]ome examiners do not consider this to be PTSD." J.A. 103.

In February 2020, the Board issued a decision denying service connection for an acquired psychiatric disorder. The Board found that the preponderance of evidence supported a finding that Mr. Bufkin does not have PTSD.

The Veterans Court affirmed. The Veterans Court found no error in the Board's application of the benefit of the doubt rule under 38 U.S.C. § 5107(b). Section 5107(b) provides that "[w]hen 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." In other words, if the competing evidence is in "approximate balance" or "nearly equal," then the benefit of the doubt rule requires the Board to rule in favor of the veteran. *Lynch v. McDonough*, 21 F.4th 776, 781 (Fed. Cir. 2021) (en banc). The Veterans Court explained that the Board considered conflicting medical statements but found Dr. Goos' diagnosis of PTSD less persuasive than the conflicting June 2015 opinion "because the June 2015 opinion provided a more comprehensive review of appellant's military and medical history." J.A. 8. The Veterans Court concluded that this "finding is not clearly erroneous. And thus, the benefit of the doubt doctrine does not apply here." *Id.* (footnote omitted).

Mr. Bufkin now appeals.

II

We review de novo the Veterans Court's interpretation of law. *Bazalo v. West*, 150 F.3d 1380, 1382 (Fed. Cir. 1998). Unless an appeal from the Veterans Court decision presents a constitutional issue, this Court may not review "a challenge to a factual determination," or "a challenge to a law or regulation as applied to the facts of a particular case." 38 U.S.C. § 7292(d)(2)(A)-(B).

Because Mr. Bufkin argues that the Veterans Court wrongly interpreted 38 U.S.C. § 7261(b)(1), we have jurisdiction.

A

This case is another in a series challenging various aspects of the benefit of the doubt rule. *See, e.g.*, *Mattox v. McDonough*, 56 F.4th 1369 (Fed. Cir. 2023); *Roane v. McDonough*, 64 F.4th 1306 (Fed. Cir. 2023). In *Mattox*, we held that "when conducting a benefit-of-the-doubt-rule analysis, as in other settings, the Board is required to assign probative value to the evidence" rather than simply identifying and labeling each piece of evidence as positive or negative. *Mattox*, 56 F.4th at 1378. In *Roane*, we held that the Veterans Court reviews "the Board's factual determinations for *clear error* while taking due account of the Board's application of the benefit of the doubt rule." *Roane*, 64 F.4th at 1311 (emphasis added).

Here, Mr. Bufkin raises two related legal arguments: first, whether § 7261(b)(1) requires the Veterans Court to take due account of the Secretary's application of the benefit of the doubt rule without consideration of the Board's application; and second, whether § 7261(b) requires a de novo, non-deferential review of how the benefit of the doubt rule was applied.

Mr. Bufkin first argues that the Veterans Court erred by taking due account of the *Board*'s application of § 5107(b) rather than taking due account of the *Secretary*'s application of § 5107(b). Pet. Br. 9. In

support, he points to the plain text of § 7261(b)(1), which states "the Court shall … take due account of the *Secretary*'s application of section 5107(b) (emphasis added)." Section 5107(b), as quoted above, codifies the benefit of the doubt rule. He contends that § 7261(b)(1)'s use of the term "Secretary," not Board, requires the Veterans Court to review how the benefit of the doubt rule was applied throughout the claims process, rather than the Board's consideration of that issue.

When construing the plain meaning of the statute, we "must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). Here, reading the statutory text in a broader context, we hold that the term "Secretary" in § 7261(b)(1) includes the Secretary acting in his capacity as the Board for the purpose of making a final agency decision.

The term "Secretary" in § 7261(b)(1) simply mirrors the same term in § 5107(b), which states "the *Secretary* shall give the benefit of the doubt to the claimant (emphasis added)." *See Atl. Cleaners & Dryers, Inc v. United States*, 286 U.S. 427, 433 (1932) ("[T]here is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning."). Under § 5107(b), "the Secretary" reviews the record to determine whether the benefit of the doubt rule should apply. We have long interpreted "the Secretary" in § 5107(b) to refer to the Board. *See, e.g., Lynch,* 21 F.4th at 781 (holding that the application of the benefit of doubt rule under § 5107(b) depends

on whether the *Board* is persuaded by the evidence); *Roane*, 64 F.4th at 1310-11 (explaining that the "take due account" language in § 7261 requires the Veterans Court to review the *Board*'s application of the benefit of doubt rule). Hence, when § 7261(b)(1) refers to "the *Secretary*'s application of section 5107(b)," the term Secretary encompasses the Board acting on behalf of the "Secretary" in § 5107(b). Curiously, in parts of his brief, Mr. Bufkin concedes that the "Secretary" in § 7261(b)(1) refers to the Board. Pet. Br. 13 ("[W]hen Congress refers in § 7261(b)(1) to 'the application of the provision of § 5107(b)' this Court must assume that Congress was referring to the Secretary acting in his capacity as the Board.").

This understanding is also consistent with how the term Secretary was defined in the jurisdictional statute, § 7104(a). Section 7104(a) reads, "[a]ll questions … subject to decision by the Secretary shall be subject to *one review on appeal to the Secretary* (emphasis added)." When we previously considered the meaning of "one review on appeal to the Secretary," we understood it to mean a review by the Board acting on behalf of the Secretary. *Disabled Am. Veterans v. Sec'y of Veterans Affs.*, 327 F.3d 1339, 1347 (Fed. Cir. 2003). "By statute, the Board is an agent of the Secretary," *id.*, and its jurisdictional authority stems from delegation by the Secretary. Hence, "the Secretary" is an umbrella term that encompasses the Board in certain contexts.

Apart from the statutory text of § 7261(b)(1), Mr. Bufkin also points to a different statutory provision, § 7252(b), as evidence that Congress intended the

Veterans Court to review the entire records before the Secretary, not just the Board. Pet. Br. 13-14. Section 7252(b) reads, "[r]eview in the [Veterans] Court shall be on the record of proceedings *before the Secretary and the Board* (emphasis added)." He argues that the review by the Veterans Court necessarily includes the application of the benefit of doubt rule, and therefore, the Veterans Court erred by only reviewing the record of proceedings before the Board. However, his interpretation reads out the rest of § 7252(b), which states "[t]he extent of the review [under § 7252(b)] shall be limited to the scope provided in section 7261 of this title."

The Veterans Court clearly can review the entire record as long as its review is confined to the scope prescribed in § 7261. *See Tadlock v. McDonough,* 5 F.4th 1327, 1331-32 (Fed. Cir. 2021); *see also Bowling v. McDonough*, 38 F.4th 1051, 1057 (Fed. Cir. 2022); *Euzebio v. McDonough*, 989 F.3d 1305, 1318 (Fed. Cir. 2021). For instance, in *Bucklinger v. Brown*, the Veterans Court reviewed the *entire* record, including those parts not explicitly relied on by the Board, to determine if a plausible basis existed for the Board's factual determination. 5 Vet. App. 435, 439 (1993). Unable to find one, the Veterans Court reversed the Board's decision, explaining that a reversal is warranted under both the benefit of the doubt rule *and* clearly erroneous standard applied to a finding of fact under § 7261(a)(4). *Id.* This interpretation is consistent with our understanding of the Veterans Court's review in a parallel provision, § 7261(b)(2), which also directs the Veterans Court to *take due account* of the Board's application but for rule of prejudicial error. There, we explained that "the take

due account" provision authorizes the Veterans Courts to "consult the full agency record, including facts and determinations that could support an alternative ground for affirmance." *Tadlock*, 5 F.4th at 1334.

So we agree with Mr. Bufkin that the Veterans Court can review the entire record of proceedings before the Secretary in determining whether the benefit of the doubt rule was properly applied. Where we part ways is with his expansive interpretation of § 7261(b)(1) that would *require* the Veterans Court to sua sponte review the entire record to address the benefit of the doubt rule even if there was no challenge to the underlying facts found by the Board or to the Board's application of the benefit of the doubt rule. Section 7261(a) explicitly prohibits such an expansive interpretation of the Veterans Court's jurisdiction. It states, in relevant parts, that the Veterans Court "shall decide" issues only "when presented." § 7261(a). We similarly observed that this express jurisdictional limit in § 7261(a) shows Congress's intent not to "grant the Veterans Court sua sponte powers that would set it apart from other [Article III] courts." *Dixon v. McDonald*, 815 F.3d 799, 803 (Fed. Cir. 2016). Therefore, if no issue that touches upon the benefit of the doubt rule is raised on appeal, the Veterans Court is not required to sua sponte review the underlying facts and address the benefit of the doubt rule.

Section 7252(b) cannot serve as an independent basis to expand the Veterans Court's scope of review beyond what is prescribed in § 7261. All that is required under § 7261(b)(1) is for the Veterans Court

to review the Board's application of the benefit of the doubt rule. Of course, in the context of that review, the Veterans Court can review the entire record, but it does so in the context of whether the Board's application of the benefit of the doubt rule was correct. The Veterans Court did not err by refusing to examine independently how the benefit of the doubt rule was applied during the claims process at the regional office.

B

Mr. Bufkin next argues that § 7261(b) requires the Veterans Court to conduct a "de novo, non-deferential" review of the Board's application of the benefit of the doubt rule. We recently addressed the same issue in *Roane*. There, the veteran also argued that the "take due account" language in § 7261(b) requires the Veterans Court to conduct an "additional and independent non[-]deferential review" of the Board's application of the benefit of the doubt rule. *Roane*, 64 F.4th at 1309. We specifically "decline[d] to adopt [such a] far-reaching interpretation of the phrase 'take due account.'" *Id.* We explained that the scope of the Veterans Court's review is limited by § 7261(c) and § 7261(a): § 7261(c) expressly prohibits de novo review of material facts by the Veterans Court; and § 7261(a) allows the Veterans Court to review facts only under the clearly erroneous standard. *Id.* at 1310. Accordingly, we held that the Veterans Court properly reviewed the Board's factual determination for clear error while taking due account of the Board's application of the benefit of the doubt rule. *Id.* at 1311.

Here, the Veterans Court properly considered the Board's application of the benefit of the doubt rule. The Veterans Court explicitly noted the Board's consideration of conflicting medical opinions and the Board's conclusion that "the June 2015 opinion [finding that he did not have PTSD] [is] more persuasive than the opinions showing a diagnosis of PTSD." J.A. 8. The Veterans Court concluded that the Board did not misapply the benefit of the doubt rule, because, as the Board explained, "the June 2015 opinion provided a more comprehensive review of [Mr. Bufkin]'s military and medical history." J.A. 8; *Lynch*, 21 F.4th at 781 (holding that the benefit of the doubt rule "does not apply when [the Board] is *persuaded* by the evidence to make a particular finding"). The Veterans Court also found that the underlying facts supporting the Board's conclusion are not clearly erroneous. J.A. 8. Hence, the Veterans Court applied the appropriate standard of review, clear error, and properly took account of the Board's application of the benefit of the doubt rule.

III

Because we conclude that the Veterans Court did not err by taking due account of the Board's application of the benefit of the doubt rule and applied the appropriate standard of review under § 7261(b)(1), we affirm.

AFFIRMED

COSTS

No costs.

APPENDIX B

NOTE: This disposition is nonprecedential.

United States Court of Appeals
for the Federal Circuit

NORMAN F. THORNTON,
Claimant-Appellant

v.

DENIS MCDONOUGH, SECRETARY OF VETERANS AFFAIRS,
Respondent-Appellee

2021-2329

Appeal from the United States Court of Appeals for Veterans Claims in No. 20-882, Judge Joseph L. Falvey, Jr.

Decided: August 9, 2023

KENNETH M. CARPENTER, Law Offices of Carpenter Chartered, Topeka, KS, argued for claimant-appellant.

EVAN WISSER, Commercial Litigation Branch, Civil Division, United States Department of Justice,

Washington, DC, argued for respondent-appellee. Also represented by BRIAN M. BOYNTON, ELIZABETH MARIE HOSFORD, PATRICIA M. MCCARTHY; CHRISTOPHER O. ADELOYE, Y. KEN LEE, Office of General Counsel, United States Department of Veterans Affairs, Washington, DC.

Before LOURIE, CLEVENGER, and STARK, *Circuit Judges*.

CLEVENGER, *Circuit Judge*

Norman F. Thornton appeals from the final decision of the United States Court of Appeals for Veterans Claims ("Veterans Court") affirming the decision of the Board of Veterans' Appeals ("Board"), which denied his claim for a rating above 50% for his service-connected disability from post-traumatic stress disorder ("PTSD"). *Thornton v. McDonough*, No. 20-0882, 2021 WL 2389702 (Vet. App. June 11, 2021). For the reasons set forth below, we affirm the final decision of the Veterans Court.

I

Section 5107(b) of Title 38 provides that "[w]hen 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." If the competing evidence on a material issue is in "approximate balance" or "nearly equal," the benefit of the doubt rule requires the Board to decide the material issue in favor of the veteran. *Lynch v.*

McDonough, 21 F.4th 776, 781 (Fed. Cir. 2021) (en banc).

In this case, Mr. Thornton argued to the Board that he was entitled to the benefit of the doubt regarding the issue of his entitlement to an increased rating for his PTSD. After assessing the evidence of record concerning the severity, frequency, and duration of Mr. Thornton's symptoms, the Board concluded that "[t]here is no doubt to be resolved; a higher rating is not warranted. 38 U.S.C. § 5107(b)."

Mr. Thornton appealed the Board's adverse decision to the Veterans Court. The scope of the Veterans Court's review authority is set forth in 38 U.S.C. § 7261. Relevant to this case, § 7261(a)(4) requires the Veterans Court to review adverse material fact determinations by the Board for clear error. In testing such fact determinations for clear error, § 7261(b) requires the Veterans Court to review the entire record of proceedings in the case before the Secretary, including the parts of the record before the Board, and, as part of that review, to "take due account of the Secretary's application of section 5107(b) of this title." 38 U.S.C. § 7261(b)(1).

Because the overall evidence on the degree of Mr. Thornton's PTSD was not in approximate balance, the Veterans Court concluded that the benefit of the doubt rule did not apply—the same conclusion reached by the Board after its assessment of the record. Thus, on review by the Veterans Court, no clear error was shown in the Board's assessment of the balance of the factual evidence concerning the severity of Mr. Thornton's PTSD.

II

Mr. Thornton's appeal to this court argues that the Veterans Court misinterpreted § 7261(b)(1)'s requirement that the Veterans Court, when undertaking review pursuant to § 7261(a), "take due account of the Secretary's application of section 5107(b) of this title." In addition to the § 7261(a) review of Mr. Thornton's claim of entitlement to the benefit of the doubt which the Veterans Court conducted, Mr. Thornton argues that "taking due account" of the benefit of the doubt rule requires the Veterans Court to conduct an additional separate and independent de novo review of the entire record, to assure that the veteran has not improperly been denied the benefit of the doubt. Further, Mr. Thornton argues that "taking due account" requires that this additional level of review be conducted sua sponte by the Veterans Court even if the veteran has not challenged a Board's determination that the benefit of the doubt rule does not apply.

The same interpretation questions Mr. Thornton raises in this case recently were presented to and decided by this court in *Bufkin v. McDonough*, No. 2022-1089 (Fed. Cir. Aug. 3, 2023). As the decision in *Bufkin* explains, the statutory command that the Veterans Court "take due account" of the benefit of the doubt rule does not require the Veterans Court to conduct any review of the benefit of the doubt issue beyond the clear error review required by § 7261, and "if no issue that touches upon the benefit of the doubt rule is raised on appeal, the Veterans Court is not required to sua sponte review the

underlying facts and address the benefit of the doubt rule." *Bufkin*, slip op. at 7-9.

Because Mr. Thornton's preferred interpretation of § 7261(b)(1) was rejected in *Bufkin*, we must also reject it in this appeal. Other than the statutory interpretation issue, Mr. Thornton does not fault the decision of the Veterans Court, and we thus affirm the Veterans Court's decision.

AFFIRMED

COSTS

No costs.

APPENDIX C

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 20-3886

JOSHUA E. BUFKIN, APPELLANT,

V.

DENIS MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before ALLEN, *Judge*.

MEMORANDUM DECISION

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

ALLEN, *Judge*: Appellant Joshua E. Bufkin served the Nation honorably in the United States Air Force from September 2005 to March 2006.[1] In this appeal, which is timely and over which the Court has jurisdiction,[2] he contests a February 6, 2020, Board of Veterans' Appeals decision that denied him entitlement to service connection for an acquired psychiatric disorder, including PTSD, depression, intermittent explosive disorder, and chronic

[1] Record (R.) at 1487.

[2] *See* 38 U.S.C. §§ 7252(a), 7266(a).

adjustment disorder.[3] Because the Board applied the correct legal principles, did not clearly err with respect to its factual determinations, and provided an adequate statement of its reasons or bases, we will affirm the February 2020 Board decision.

I. ANALYSIS

Appellant makes several arguments concerning purported errors in the Board's decision, for which he seeks reversal. First, appellant argues that the Board's denial of entitlement to service connection for PTSD was arbitrary, capricious, and not in accordance with law.[4] Second, he contends that the Board's denial of service connection for an acquired mental disorder other than PTSD was arbitrary, capricious, and not in accordance with law.[5] Third, appellant asserts that the Board misapplied the standard of proof defined in *Gilbert v. Derwinski*, 1 Vet.App. 49 (1990). Finally, he argues that the Board misapplied the "benefit of the doubt" doctrine set forth in 38 U.S.C. § 5107(b). The Secretary defends the Board's decision in full and urges that we affirm. We agree with the Secretary.

At the outset, the Court notes that appellant's arguments are interrelated and overlap in significant respects. Therefore, instead of addressing each argument separately, we will address some of these

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[3] R. at 5-15.

[4] Appellant's Brief (Br.) at 4-8.

[5] Appellant's Br. at 8-11.

arguments jointly to take into account the overlap among them.

A. The General Legal Landscape

Establishing service connection generally requires evidence of (1) a current disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a nexus between the claimed in-service disease or injury and the present disability.[6] The Court reviews the Board's findings regarding service connection for clear error.[7] The Board must provide "a written statement of reasons or bases for its findings and conclusions on all material issues of fact or law."[8] To comply with its requirement to provide an adequate statement of reasons or bases, "the Board must analyze the credibility and probative value of the evidence, account for the evidence it finds persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the claimant."[9] Moreover, the Board must address evidence favorable to appellant, which includes

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[6] *See Hickson v. West*, 12 Vet.App. 247, 253 (1999); 38 C.F.R. § 3.303(a) (2021).

[7] 38 U.S.C. § 7261(a)(4); *Dyment v. West*, 13 Vet.App. 141, 144 (1999).

[8] 38 U.S.C. § 7104(d)(1). *Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1990).

[9] *Kahana v. Shinseki*, 24 Vet.App. 428, 433 (2011) (citing *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995)); *Gilbert*, 1 Vet.App. at 56-57.

competent medical and lay evidence.[10] If the Board fails to do so, remand is appropriate.[11]

B. Acquired Psychiatric Conditions

Appellant crafts several arguments attempting to explain why the Board's denial of service connection for both PTSD and various acquired psychiatric disorders other than PTSD is arbitrary, capricious, and otherwise unlawful. First, appellant highlights a fair bit of conflicting evidence that the Board addressed. He contests the Board's finding that a June 2015 VA examiner's opinion was more comprehensive and persuasive than other medical evidence of record. Specifically, appellant asserts that the Board ignored medical opinions and PTSD diagnoses by his VA treating psychiatrist, "Dr. G."[12] In addition, appellant asserts that the Board failed to a make a competency determination regarding Dr. G's PTSD diagnosis.[13] As we will explain more below, this is not the case. The Secretary counters that the Board explained why the June 2015 opinion was more persuasive and had more probative value than others.

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[10] *Kahana*, 24 Vet.App. at 433.

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

[12] Appellant's Br. at 6-7. The Board referred to appellant's VA psychiatrist as "Dr. G." We note that Dr. G examined appellant on various occasions, including February 2013, May 2013, and June 2015.

[13] Appellant's Br. at 6.

We find the Secretary's argument persuasive in this regard.

It is the Board's prerogative as factfinder to assess the evidence of record and determine the credibility and weight to be assigned to that evidence.[14] The Board must address evidence favorable to appellant, which includes both competent medical and lay evidence.[15] The Board reviewed conflicting evidence of record as to whether appellant had a PTSD diagnosis, including VA treatment records showing treatment and diagnosis for PTSD in May 2013 and December 2019. Contrary to appellant's assertions, the Board's statement of reasons or bases for denying appellant service connection for PTSD is adequate for one principal reason, which concerns the Board's assessment of Dr. G's findings as compared to conflicting medical evidence of record. As we mentioned above, the Board must provide reasons for rejecting material evidence favorable to the claimant.[16] That is precisely what the Board did here. Namely, the Board weighed appellant's PTSD diagnosis against other relevant evidence. Unlike Dr. G, two other VA examiners opined that appellant had intermittent explosive disorder and chronic adjustment disorder instead of

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[14] *See Madden v. Gober*, 125 F.3d 1477, 1481 (Fed. Cir. 1997); *Owens v. Brown*, 7 Vet.App. 429, 433 (1995).

[15] *Kahana v. Shinseki*, 24 Vet.App. at 433 (citing *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995)); *Gilbert*, 1 Vet.App. at 56-57.

[16] *Id.*

PTSD.[17] The Board understood that Dr. G's statements were material, relevant, and at times favorable to appellant's claim. The Board recited Dr. G's findings that appellant "suffered from PTSD as a direct result of his treatment by the military,"[18] recognizing that appellant expressed powerlessness because he felt "forced by his superiors to" choose "between divorcing his spouse or leaving the military."[19] On the other hand, the Board assessed the June 2015 VA examiner's opinion in substantial detail because the June 2015 examiner highlighted important differences when compared with Dr. G's findings.

To begin with, the June 2015 opinion is unfavorable to appellant's claim because the examiner opined that appellant's psychiatric disabilities were not related to his service.[20] The Board recounted the June 2015 examiner's opinion that appellant's behavior and thoughts did not meet the Diagnostic and Statistical Manual of Mental Disorders (DSM-5) requirements for a PTSD diagnosis and instead he "suffered from adjustment disorder with mixed disturbance of emotion and

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[17] R. at 12 (citing R. at 270 (Jan. 2018 medical opinion)); R. at 183 (Jun. 2015 medical opinion).

[18] R. at 10.

[19] R. at 7.

[20] R. at 11.

conduct."[21] The Board pointed to the examiner's opinion that appellant's only intrusive memory was his anger towards the military for what appellant perceived to be the military's hostility towards him when his wife made suicidal threats concerning appellant's continued military service.[22] As the Board explained, the examiner opined that this event did not constitute a PTSD-trauma-event because it was not unwanted or intrusive; appellant "reported he *wanted* to think about these memories."[23] The June 2015 examiner explained that the suicidal threats appellant's spouse made did not meet the criteria for PTSD.

Moreover, the Board weighed the examiners' differing assessments of appellant's behavioral symptoms. Dr G. opined that appellant "was hypervigilant and paranoid."[24] In contrast, the June 2015 examiner found that appellant "did not exhibit hypervigilance" but instead, he showed personality traits that fueled his paranoia.[25] The Board found the June 2015 opinion more persuasive because the June 2015 examiner, unlike Dr. G., reviewed appellant's file more fully and considered appellant's military and

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[21] R. at 8.

[22] *Id*.

[23] *Id*. (emphasis added).

[24] R. at 9.

[25] *Id*.

medical history.[26] The Board's finding is consistent when reviewing the evidence of record. A snapshot of the relevant medical opinions shows that the June 2015 VA psychologist provided a thorough and complete review of appellant's file and produced a detailed opinion explaining why appellant's symptoms correspond with intermittent explosive disorder and chronic adjustment disorder.[27] And although appellant does not mention this, the Board's recounting of the June 2015 examiner's findings is consistent with Dr. G's other findings that appellant's "symptoms [are] consistent with [PTSD] but [the examiner] could not ascertain the primary trauma" and whether appellant's PTSD "is related to military or growing up is not clear."[28] Given the detailed and comprehensive nature of the June 2015 opinion, the Court can discern why the Board rejected Dr. G's opinions. Thus, we find that the Board adequately explained its reasons and bases for doing so. And the Board's assessment of this competing evidence is not clearly wrong.

We also note that appellant's argument concerning a competency determination regarding Dr. G's opinions is misplaced. Appellant asserts that determining whether evidence is competent is a "threshold determination" that "does not require the Board … to weigh competing facts," but rather "to assess … whether evidence exists … whether that

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[26] R. 8.

[27] *See generally* R. at 183-94.

[28] R. at 944, 951.

evidence is competent."[29] Appellant is, perhaps, correct as a theoretical matter that an adjudicator must determine whether evidence is competent. But that proposition is neither here nor there in the context of this appeal. There is no way to read the Board decision other than that the Board considered Dr. G's opinion to be competent medical evidence. After all, why would the Board have spent so long balancing that evidence against the VA medical opinion? If the Board had not considered Dr. G's evidence competent, there would have been no need to weigh it against other evidence. It is the Board's role to weigh competing evidence and to support the weight it assigns to such evidence.[30] Here, the Board did precisely what it is charged to do. The Board identified relevant medical treatment records, including February 2014, June 2015, June 2018, and December 2019 examination reports. The Board assessed these reports, noting that it did not find "any competent opinions supported by a rationale" that provided a positive nexus between appellant's current psychiatric diagnoses and his service.[31] Appellant clearly disagrees with *how* the Board assessed the facts before it. We have considered appellant's arguments about the Board's factual determinations concerning PTSD and conclude that the Board did not clearly err in weighing the evidence.

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[29] Appellant's Br. at 6 (emphasis omitted).

[30] *See Madden v. Gober*, 125 F.3d 1477, 1481 (Fed. Cir. 1997); *Owens v. Brown*, 7 Vet.App. 429, 433 (1995).

[31] R. at 12.

Next, we address appellant's arguments concerning service connection for a psychiatric condition other than PTSD. Appellant first asserts that the Board allegedly required a chronic condition to exist *during* service for service connection to be established.[32] With respect to this argument, appellant refers to the Board's finding that a "chronic psychiatric disorder was not shown in service."[33] Although the Board does make this finding and reiterates it again in its decision,[34] the Board provides a comprehensive rationale as to why it denied appellant entitlement service connection for his psychiatric conditions other than PTSD. It did not simply deny appellant service connection based on a lack of a chronic condition during service. As we explained above, the Board considered several relevant medical opinions and adequately explained why it found the June 2015 opinion most persuasive, thereby finding that appellant's conditions are not related to service.

With regard to these opinions, appellant makes a secondary argument suggesting that the Board favored the opinions of "VA examiners" over that of appellant's VA psychiatrist Dr. G.[35] Each examiner the Board refers to possessed the expertise to report on the circumstances of appellant's service and the

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

[33] Reply Br. at 6 (citing R. at 5).

[34] *See, e.g.*, R. at 12.

[35] Appellant's Br. at 9, 10; Reply Br. at 8.

status of his psychiatric conditions. Here, the Court can discern what weight the Board attributed to each VA examiner's opinion—regardless of whether they were a psychiatrist or psychologist. The Board correctly identified the material and relevant medical opinions that address appellant's claim for service connection and provided coherent assessments for each. Overall, appellant has not met his burden of demonstrating error in the Board's decision.

C. Benefit of the Doubt

Finally, also regarding the Board's assessment of the evidence, appellant raises two interrelated arguments asserting that the Board misapplied the benefit of the doubt doctrine when it weighed the evidence.[36] Appellant contends that the Board misapplied the standard of proof as defined in *Gilbert v. Derwinski*, 1 Vet.App. 49 (1990), alleging that when there are two competing opinions, appellant must prevail on the merits if one of those opinions is favorable.[37] Second, appellant argues that the Board misapplied the benefit of the doubt doctrine under 38 U.S.C. § 5107. We see little, if any, distinction between these arguments. So, we will address them together.

The benefit of the doubt doctrine states that "[w]hen there is an approximate balance of positive and negative evidence regarding any issue …, the Secretary shall give the benefit of the doubt to the

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[36] *See*, *e.g.*, Appellant's Br. at 11-19.

[37] Reply Br. at 8-9.

claimant."[38] But "the benefit of the doubt rule is inapplicable when the preponderance of the evidence is found to be against the claimant."[39] In other words, when such preponderance of the evidence is found to weigh against an appellant's claim, the Board "'necessarily has to determine that the evidence is 'not nearly equal' or 'too close to call,' and the benefit of the doubt rule therefore has no application.'"[40]

In *Mattox*, the Court addressed the function of the benefit of the doubt doctrine and its application to a set of facts that is very similar to the facts presented on appeal here.[41] The veteran in *Mattox* sought entitlement to service connection for PTSD. There were two relevant medical opinions pertaining to the veteran's claim—one in which he received a PTSD diagnosis and another which contained no such diagnosis.[42] The veteran argued that because one medical opinion consisted of a PTSD diagnosis, the

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[38] 38 U.S.C. § 5107(b); *see* 38 C.F.R. § 3.102 (2021).

[39] *Ortiz v. Principi*, 274 F.3d 1361, 1366 (Fed. Cir. 2001); *Lynch v. McDonough*, 999 F.3d 1391, 1395 (Fed. Cir. 2021) ("[I]f 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").

[40] *Mattox v. McDonough*, __ Vet.App. __ __, 2021 WL 1604717, at *10 (Apr. 26, 2021) (citing *Ortiz v. Principi*, 274 F.3d 1361, 1365 (Fed. Cir. 2001)).

[41] Appellant's counsel also represented the veteran in *Mattox*, where counsel presented a benefit-of-the-doubt argument similar to that on appeal here.

[42] *Mattox*, __ Vet.App. __, 2021 WL 1604717, at *10.

evidence was in equipoise such that the benefit of the doubt applied. However, the *Mattox* Court rejected the veteran's argument, stating that he overlooked the weight assigned to the PTSD diagnosis and the Board's finding that "the diagnosis was not based on [the veteran's] full disability picture."[43] The Court further explained that the benefit of the doubt doctrine "considers the *quality* of the evidence, not merely the *quantity*."[44] In *Mattox*, the Court concluded that it need not apply the benefit of the doubt rule where the Board found that the preponderance of the evidence weighed against the veteran's claim.[45]

Here, the Board found that the preponderance of the evidence weighed against the claim.[46] Similar to *Mattox*, appellant received a PTSD diagnosis by at least one examiner but other examiners did not make such a diagnosis. And, importantly, the Board here found the June 2015 opinion more persuasive than the opinions showing a diagnosis of PTSD because the June 2015 opinion provided a more comprehensive review of appellant's military and medical history. As we concluded above, that finding is not clearly

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[43] *Id*.

[44] *Id*. (emphasis in original).

[45] *Id*.

[46] R. at 13.

erroneous.[47] And thus, the benefit of the doubt doctrine does not apply here.[48]

In sum, the Board fully explained the bases for its decision, allowing us to engage in meaningful judicial review. We have carefully reviewed the evidence and the Board's assessment of it, and we conclude that the Board's decision to deny service connection for an acquired psychiatric disorder, which includes posttraumatic stress disorder (PTSD), depression, intermittent explosive disorder, and chronic adjustment disorder is not clearly wrong and is supported under relevant legal principles.

II. CONCLUSION

After consideration of the parties' briefs, the governing law, and the record, the Court AFFIRMS the Board's February 6, 2020, decision.

DATED: July 27, 2021

Copies to:

Kenneth M. Carpenter, Esq.

VA General Counsel (027)

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[47] *See* 38 U.S.C. § 7261(a)(4); *Gilbert*, 1 Vet.App. at 53.

[48] *See Ortiz*, 274 F.3d at 1366.

APPENDIX D

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 20- 0882

NORMAN F. THORNTON, APPELLANT,

V.

DENIS MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before FALVEY, *Judge*.

MEMORANDUM DECISION

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

FALVEY, *Judge*: Army veteran Norman F. Thornton through counsel appeals a January 23, 2019, Board of Veterans' Appeals decision denying a rating above 50% for post-traumatic stress disorder (PTSD) and denying a rating above 40% for a disability manifested by fatigue, joint pain, gastrointestinal bleeding, headaches, shortness of breath, nausea, body shakes, and diarrhea as due to an undiagnosed illness.[1] The appeal is timely, the

[1] The Board granted entitlement to a total disability rating based on individual unemployability (TDIU). Record (R.) at 5. This is a

Court has jurisdiction to review the Board decision, and single-judge disposition is appropriate. *See* 38 U.S.C. §§ 7252(a), 7266(a); *Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990).

As for the PTSD claims, we are asked to decide whether the Board incorrectly applied the rating schedule, the benefit of the doubt doctrine, the rule on the assignment of the higher of two ratings, and the duty to maximize benefits, and whether the Board gave an adequate statement of reasons or bases. As for the undiagnosed illness claim, we are asked to decide whether the Board incorrectly selected an analogous rating or incorrectly applied 38 C.F.R. § 4.88b, Diagnostic Code (DC) 6354, and whether the Board gave an adequate statement of reasons or bases. For the reasons below, we will affirm the Board's decision.

I. BACKGROUND

Mr. Thornton served on active duty from October 1988 to December 1991. R. at 1357. In November 1994, VA granted service connection for a "disability manifested by fatigue, joint pain, gastrointestinal bleeding, headaches, night sweats, nightmares, shortness of breath, nausea, numbness in both hands, body shakes, and diarrhea due to an undiagnosed illness (Environmental Hazard in Gulf War/Undiagnosed Illness) [hereinafter 'the undiagnosed illness']," with a 40% rating. *See* R. at

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favorable finding that this Court cannot disturb. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007).

1932. In February 2005, the regional office (RO) granted service connection for PTSD with a 10% rating. R. at 1928. In February 2015, Mr. Thornton applied for increased ratings for PTSD and the undiagnosed illness (listed as Gulf War Syndrome) and for service connection for a disconnect (dissociative) disorder. R. at 1679.

In a July 2015 VA examination to evaluate the undiagnosed illness, the VA examiner noted that the illness was undiagnosed but completed an examination form for chronic fatigue syndrome (CFS). R. at 1300-03. Mr. Thornton reported that he "[wore] out real easy," and could work for only six to seven hours on a typical day. *Id*. Mr. Thornton also reported that he could not distinguish his tiredness from his PTSD. R. at 1301. The examiner concluded that CFS restricted Mr. Thornton's routine daily activities to 50% to 75% of his pre-illness level, but that he had no incapacitation. R. at 1302. The examiner noted that Mr. Thornton had slept poorly since returning from the Gulf War, where he had chemical exposure, and that he also suffered joint aches, muscle spasms, limb numbness, carpal tunnel syndrome, PTSD, and depressive symptoms likely due to his PTSD, *id*., but had not suffered gastrointestinal bleeding in a "long time" and experienced less nausea, R. at 1303. The examiner concluded that, "[b]ased on his [neuropsychological] testing and veteran's own testimony, a fair amount of his symptoms are related to his PTSD and therefore, not undiagnosed symptoms." *Id*.

Also in July 2015, he underwent a VA examination to evaluate his PTSD. R. at 1304-13. The

examiner found that Mr. Thornton suffered occupational and social impairment with reduced reliability and productivity. R. at 1305. The examiner noted that Mr. Thornton was married but separated, had a good relationship with his two children, and participated in medieval reenactment events with friends. R. at 1307. Mr. Thornton reported that he had done some "side jobs" in the prior five years, but that the biggest barrier to employment was "sudden intense fatigue that comes out of nowhere," and that memory lapses also hindered his work. R. at 1308. The examiner found that Mr. Thornton exhibited symptoms of PTSD such as depressed mood, anxiety, sleep impairment, and "difficulty in adapting to stressful circumstances." R. at 1310-11.

In July 2015, the RO increased the PTSD rating to 50%, continued the 40% rating for the undiagnosed illness, and denied service connection for a disconnect (dissociative) disorder. R. at 1074.

In a December 2015 VA examination to evaluate the undiagnosed illness, the examiner noted that Mr. Thornton had gone through a series of maintenance and service jobs. R. at 951. The examiner described his symptoms as debilitating fatigue, headaches, migratory joint pains, sleep disturbances, episodic chills, and weight loss (which Mr. Thornton attributed to dietary changes). R. at 951-52. Mr. Thornton denied having gastrointestinal, bowel, or bladder symptoms. R. at 952. The examiner determined that the veteran's routine daily activities were restricted to 50% to 75% of his pre-illness level, but he had no periods of incapacitation. *Id*.

In a December 2015 VA PTSD examination, the examiner found that Mr. Thornton had occupational and social impairment with reduced reliability and productivity. R. at 944. The examiner noted that he was still separated from his wife but had a new girlfriend, had good relationships with his children, and continued to participate in medieval reenactment with friends. R. at 945. Mr. Thornton reported that he was supposed to work in summer 2015 but had a "memory lapse" and forgot to report to the job. R. at 946. The examiner noted that Mr. Thornton exhibited sleep disturbances, depressed mood, anxiety, mild memory loss, "difficulty in adapting to stressful circumstances," and nightmares, slept only three to four hours a night, and felt depressed "a lot," and anxious up to four or five days a week. R. at 947-48. But the examiner found that Mr. Thornton was alert and oriented, appropriately groomed, and had no psychotic symptoms. R. at 948. The examiner determined that Mr. Thornton had moderate impairment in reliability and productivity. R. at 949.

In December 2015, the RO continued the 50% rating for PTSD and the 40% rating for the undiagnosed illness. R. at 918. In December 2016, Mr. Thornton filed his Notice of Disagreement. R. at 875-82. That same month, the RO issued a Statement of the Case (SOC), continuing the 50% rating for PTSD and the 40% rating for the undiagnosed illness. R. at 767-801. In February 2017, Mr. Thornton perfected his appeal. R. at 765-66.

In an April 2017 VA examination evaluating the undiagnosed illness, the examiner noted that the veteran's fatigue was "frequently intertwined with his

PTSD" and that it would be "mere speculation" to estimate how the conditions affected each other. *Id.* The examiner found that Mr. Thornton's undiagnosed illness restricted his routine daily activities by less than 25% of his pre-illness level.[2] R. at 755. In September 2017, the RO issued a Supplemental SOC (SSOC), which continued the 50% rating for PTSD and the 40% rating for the undiagnosed illness. R. at 695-703.

In January 2019, the Board found that the evidence weighed against an increased rating for the undiagnosed illness claim and that Mr. Thornton's overall level of occupational and social impairment was most consistent with the 50% rating and so denied an increased rating for PTSD. R. at 12, 17-18. This appeal followed.

II. ANALYSIS

To begin, we note that Mr. Thornton argues that the Secretary has not shown that the Board correctly applied the law. Reply Brief (Br.) at 4, 5. This implies that the Secretary bears the burden of showing no error. But Mr. Thornton, as the appellant, has the burden of showing error—that the Board incorrectly applied the law. *See Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (holding that the appellant has the burden of showing error), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000) (table). With that in mind, we now turn to Mr. Thornton's specific arguments.

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[2] The examiner explained that this meant that "more than 75% of the pre-illness level of activities are not restricted." R. at 755.

A. The PTSD Claim

1. Rating Criteria

Mr. Thornton argues that the Board erred when it continued the 50% rating for PTSD and that a correct application of the rating schedule entitles him to a 70% rating. Appellant's Br. at 4, 11. He argues that the Board did not assess the severity, frequency, or duration of his PTSD symptoms, and that it did not assess the occupational and social impairment caused by those symptoms. *Id*. at 6-7. He argues that the Board's failures mean that it did not determine his overall disability picture and so it could not have properly applied the rating criteria. *Id*. at 10-11. He does not challenge the Board's underlying findings of fact. Reply Br. at 3. The Secretary argues that, because Mr. Thornton does not challenge the adequacy of the VA examinations or argue that the Board overlooked any evidence, he has not shown that the Board's application of the rating criteria was prejudicial error. Secretary's Br. at 8-9.

PTSD is evaluated under 38 C.F.R. § 4.130, DC 9411. That provision provides that a 50% disability rating is warranted when PTSD causes

> [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, DC 9411 (2020) (emphasis added). A 70% disability rating is warranted when PTSD causes

> [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. (emphasis added).

When deciding a mental health rating, VA must engage in a "holistic" analysis that assesses symptoms according to their severity, frequency, and

duration. *Bankhead v. Shulkin*, 29 Vet.App. 10, 22 (2017). In particular, "[t]he 70 percent disability rating regulation contemplates initial assessment of the symptoms displayed by the veteran, and if they are of the kind enumerated in the regulation, an assessment of whether those symptoms result in occupational and social impairment with deficiencies in most areas." *Vazquez-Claudio v. Shinseki*, 713 F.3d 112, 118 (Fed. Cir. 2013); *see also Emerson v. McDonald*, 28 Vet.App. 200, 212 (2016).

Here, we do not find that the Board failed to properly apply the rating criteria for PTSD under § 4.130. The Board considered Mr. Thornton's symptoms and the resulting level of impairment. *See Vazquez-Claudio*, 713 F.3d at 118. The Board determined that, based on a combination of the VA examiners' opinions and Mr. Thornton's lay statements, his memory issues most closely approximated impairment of short- and long-term memory loss, a characteristic of the 50% rating. R. at 16; *see* § 4.130. Because Mr. Thornton himself said that his chronic fatigue was the main obstacle to steady employment, the Board determined that his memory lapses due to PTSD did not alone cause significant occupational impairment. R. at 17; *see* R. at 1308 (July 2015 examination). And given his good relationships with his children and participation in social or recreational activities, the Board found his social impairment due to PTSD to be minimal. R. at 17. The Board acknowledged that both VA examiners found that he had "difficulty in adapting to stressful circumstances," a characteristic of the 70% rating. *Id.*; *see* R. at 948, 1311. But the Board noted that those same examiners still found that his occupational

impairment was best characterized as reduced reliability and productivity, which fits the 50% rating criteria. R. at 17; *see* R. at 949, 1305. The Board correctly noted that it must engage in a holistic analysis, considering not only the presence of symptoms but also the level of impairment. *Id*. (citing *Bankhead*, 29 Vet.App. at 20); *see Vazquez-Claudio*, 713 F.3d at 118. Throughout its analysis, the Board not only took note of his symptoms but, crucially, considered their impact on his occupational and social functioning, thus complying with the legal requirements for determining the degree of disability. R. at 15-17; *see Vazquez-Claudio*, 713 F.3d at 118. Thus, Mr. Thornton has not shown that the Board's application of § 4.130 was erroneous. *See Hilkert*, 12 Vet.App. at 151.

2. Benefit of the Doubt

Mr. Thornton argues that the Court must undertake two reviews. He argues that the Court must first review whether the Board's application of 38 C.F.R. § 4.3 was "arbitrary, capricious, an abuse of discretion, or not otherwise an in accordance with law," and whether it was supported by an adequate statement of reasons or bases. Appellant's Br. at 16-17 (citing 38 U.S.C. § 7261(a)(3)(A)). He argues that under this review the Board failed to correctly apply § 4.3 and assign a 70% rating for his PTSD. *Id*. at 16, 22. He argues that the Court must then conduct a review under 38 U.S.C. § 7261(b)(1), which requires the Court to take due account of the Board's application of 38 U.S.C. § 5107(b), the statutory basis for giving the claimant the benefit of the doubt. *Id*. at 17. He argues that a reasonable doubt arose over the

degree of his PTSD disability and thus the Board erred when it did not resolve the doubt in his favor by assigning a 70% rating. *Id*. at 18-19. In response, the Secretary argues that Mr. Thornton is effectively asking the Court to use section 7261(b)(1) to reweigh the evidence, which the Court cannot do. Secretary's Br. at 11-12.

Both the statute and the regulation require that, if there is an approximate balance of evidence for and against the claimant's position, then the Secretary must decide the matter in the claimant's favor, with § 4.3 referring specifically to doubt about the claimant's degree of disability.[3] But if the Board finds that the evidence is not approximately balanced, then there is no doubt to resolve, and if the Board thus does not apply § 4.3, that decision is not arbitrary, capricious,

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[3] Section 5107(b) requires that, "[w]hen 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." Section 4.3 requires that, "[w]hen after careful consideration of all procurable and assembled data, a reasonable doubt arises regarding the degree of disability such doubt will be resolved in favor of the claimant." A "reasonable doubt" exists where there is "an approximate balance of positive and negative evidence which does not satisfactorily prove or disprove the claim" 38 C.F.R. § 3.102 (2020). "Balance" means a state of "equipoise" or "to be equal in value," and so an "approximate balance" is "when the evidence in favor of and opposing the veteran's claim is found to be almost exactly or nearly equal." *Ortiz v. Principi*, 274 F.3d 1361, 1364 (Fed. Cir. 2001); *see also Lynch v. McDonough*, ___ F.3d ___, ___, No. 20-2067, slip op. at 8 (Fed. Cir. June 3, 2021) ("[I]f 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.").

an abuse of discretion, or not otherwise in accordance with law. *Mayhue v. Shinseki*, 24 Vet.App. 273, 282 (2011). Although the Court must "take due account of the Secretary's application of" that provision, 38 U.S.C. § 7261(b)(1), the Board's determination under section 5107(b) of whether the evidence is approximately balanced is a factual one that the Court reviews for clear error. *Mariano v. Principi*, 17 Vet.App. 305, 313 (2003); *Roberson v. Principi*, 17 Vet.App. 135, 146 (2003).

Mr. Thornton fails to show that the Board erred in its application of either provision. *See Hilkert*, 12 Vet.App. at 151. He does not explain how the evidence is approximately balanced and thus caused a reasonable doubt over whether he warranted a 50% or a 70% rating. The Board did not forget to consider either section 5107(b) or § 4.3; it simply found that there was no doubt to resolve. R. at 18. In one instance, the Board found a reasonable doubt over whether Mr. Thornton's memory lapses were due to his PTSD and it resolved that doubt in his favor by finding that his memory lapses were attributable to that condition. R. at 15. But the Board found that overall the evidence showed a moderate degree of impairment better contemplated by the 50% rating than by the 70% rating, R. at 17; that the evidence was not approximately evenly balanced, R. at 16; and that there was no doubt to be resolved on that issue, R. at 18.

As the overall evidence was not in approximate balance, § 4.3 simply did not apply, and thus the Board's decision not to apply the provision was not arbitrary, capricious, an abuse of discretion, or not

otherwise an in accordance with law. *See Mayhue*, 24 Vet.App. at 282. In accordance with section 7261(b)(1), the Court takes due account of the Board's application of section 5107(b)—and finds no error. The Board was required by section 5107(b) to determine whether a reasonable doubt existed, and it complied, finding no doubt to resolve. R. at 18. The outcome of that analysis is a factual finding, *see Mariano*, 17 Vet.App. at 313; *Roberson*, 17 Vet.App. at 146, and Mr. Thornton does not challenge the Board's factual findings, Reply Br. at 3. Thus, he has not shown error in the Board's application of section 5107(b). *See Hilkert*, 12 Vet.App. at 151.

3. Choosing Between Two Ratings

Mr. Thornton also argues that the Board failed to correctly apply 38 C.F.R. § 4.7 and assign the higher 70% rating. Appellant's Br. at 14. He argues that the Board failed to define what it meant by his "disability picture," *id*. at 14-15, and that without identifying or describing his disability picture the Board could not have correctly applied § 4.7, *id*. at 16. Mr. Thornton argues that "disability picture" should be given its ordinary meaning, which he says is "what, for the individual veteran[,] his or her disability looks like to an outside observer." *Id*. at 15. The Secretary argues that the Board properly considered his disability picture, noting his symptoms and resulting impairment, and properly found that his disability picture warranted a 50% rating. Secretary's Br. at 10-11.

Mr. Thornton has not shown that the Board's failure to define "disability picture" is prejudicial

error. Although the Board did not define "disability picture," it discussed his symptoms and their level of impairment; by his own standard, the Board gave an image of what his disability "look[ed] like to an outside observer." *See* R. at 16-17; Appellant's Br. at 15. Thus, we are unpersuaded that the Board's failure to define the phrase "disability picture," when it still discussed his condition in detail, rises to the level of prejudicial error. *See Waters v. Shinseki*, 601 F.3d 1274, 1278 (Fed. Cir. 2010) (holding that the appellant has the burden of showing prejudicial error).

And we do not find the Board's application of § 4.7 erroneous. The regulation does not mandate the choice of the higher rating in every instance, but only when the higher rating "more nearly approximates the criteria required for that rating." 38 C.F.R. § 4.7 (2020). Here, the Board found that Mr. Thornton's condition did not "more nearly approximate" the 70% rating. R. at 17. The Board noted that he exhibited one symptom—difficulty adapting to stressful circumstances—characteristic of a 70% rating, but his condition as a whole was more consistent with a 50% rating because his other symptoms resulted only in moderate impairment. R. at 17. When the claimant's condition more closely matches the lower rating, then the regulation precludes assigning a higher rating. 38 C.F.R. § 4.7; *see also Bankhead*, 29 Vet.App. at 19. The Board's choice among ratings complied with § 4.7, and so Mr. Thornton has not shown the Board's decision on that point was erroneous. *See Hilkert*, 12 Vet.App. at 151.

4. Duty to Maximize Benefits

Mr. Thornton also argues that the Secretary's obligation to maximize benefits under 38 C.F.R. § 3.103(a) is manifested in the provisions of §§ 4.3 (resolving doubt in favor of the veteran) and 4.7 (assigning the higher of two evaluations). Appellant's Br. at 11. He appears to argue that the Board, by not resolving doubt in his favor and assigning a rating higher than 50% for PTSD, failed to maximize benefits. Although he is correct about the obligation to maximize benefits, that maximization is limited to what "can be supported in law while protecting the interests of the Government." 38 C.F.R. § 3.103(a) (2020). Because we find that the Board did not err when applying §§ 4.3 and 4.7, we thus do not find that the Secretary failed in his obligation under § 3.103(a).

5. Reasons or Bases

Mr. Thornton also argues that the Board gave an inadequate statement of reasons or bases for its determination that the preponderance of the evidence was against a 70% PTSD rating. Appellant's Br. at 16-17. In response, the Secretary argues that the Board gave an adequate statement of reasons or bases, particularly when it noted consistencies between the July and December 2015 VA examinations and when it noted that, although one of Mr. Thornton's symptoms aligned with a 70% rating, the evidence as a whole warranted a 50% rating. Secretary's Br. at 10-11.

As with any finding on a material issue of fact and law presented on the record, the Board must support

its determination of the appropriate rating with an adequate statement of reasons or bases that enables the claimant to understand the precise basis for that determination and facilitates review in this Court. 38 U.S.C. § 7104(d)(1); *Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1990). To comply with this requirement, the Board must analyze the credibility and probative value of evidence, account for evidence it finds persuasive or unpersuasive, and provide reasons for rejecting material evidence favorable to the claimant. *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table).

We find that the Board gave an adequate statement of reasons or bases. The Board summarized the findings of the July and December 2015 VA examinations. R. at 14-15. The Board acknowledged his difficulty doing work but found, based on his own reports, that his occupational impairment was due to his chronic fatigue rather than his PTSD, and that PTSD's effects were "mild to moderate," not the level contemplated by the 70% rating. R. at 16-17. It also acknowledged that, although he displayed a symptom characteristic of the 70% rating, "difficulty adapting to stressful circumstances," it explained that it must engage in a holistic analysis and on balance his symptoms were more closely contemplated by a 50% rating. R. at 17. It noted that both the July and December 2015 examiners found that his occupational impairment was best characterized as reduced reliability and productivity, which is consistent with the criteria for a 50% rating. R. at 17. The Board accounted for the favorable evidence and gave the precise bases for its determinations, so we find that its statement of reasons or bases was

adequate. *See Caluza*, 7 Vet.App. at 506; *Gilbert*, 1 Vet.App. at 56-57.

B. Undiagnosed Illness

1. Choice of Diagnostic Code

Mr. Thornton argues that the Board incorrectly applied 38 C.F.R. § 4.20 by analogizing his undiagnosed illness to CFS, rated under 38 C.F.R. § 4.88b, DC 6354. Appellant's Br. at 22-23. He argues that, because the undiagnosed illness includes symptoms like gastrointestinal bleeding, a more closely analogous rating would be post-gastrectomy syndrome[4] under 38 C.F.R. § 4.114, DC 7308. *Id*. at 23-24. He asks the Court to reverse the Board's decision to select DC 6354 and direct the Board to assign DC 7308. *Id*. at 24.[5] The Secretary argues that Mr. Thornton's current symptoms are indeed more analogous to CFS and so the Board correctly assigned DC 6354. Secretary's Br. at 13-14.

An unlisted condition may be rated under the DC for a different disease if the conditions are "closely analogous." 38 C.F.R. § 4.20 (2020); *see also Vogan v. Shinseki*, 24 Vet.App. 159, 161 (2010); *Lendenmann v. Principi*, 3 Vet.App. 345, 351 (1992). The Court may

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[4] Gastrectomy is the removal of all or part of the stomach. DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 754 (33d ed. 2020).

[5] Although Mr. Thornton observes that DC 7308 provides for both 40% and 60% ratings, Appellant's Br. at 23-24, he does not specify which rating he wants the Board to choose.

set aside the Board's choice of DC only if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Stankevich v. Nicholson*, 19 Vet.App. 470, 472 (2006); *Butts v. Brown*, 5 Vet.App. 532, 538-39 (1993).

CFS is rated as 40% disabling where "debilitating fatigue" and cognitive impairments (including forgetfulness) are "nearly constant and restrict daily activities from 50 to 75 percent of the pre-illness level." 38 C.F.R. § 4.88b, DC 6354 (2020). Post-gastrectomy syndrome is rated as 40% disabling where there are "less frequent episodes of epigastric disorders with characteristic mild circulatory symptoms after meals but with diarrhea and weight loss." 38 C.F.R. § 4.114, DC 7308 (2020). It is rated as 60% disabling where there is "nausea, sweating, circulatory disturbance after meals, diarrhea, hypoglycemic symptoms, and weight loss with malnutrition and anemia." *Id*.

Here, we do not find that the Board's choice of DC 6354 to rate by analogy the undiagnosed illness was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. The Board considered the July and December 2015 and the April 2017 VA examinations, all of which assessed Mr. Thornton for CFS. R. at 9-11. The Board noted that he suffered nightmares and night-sweats but found that those were due to his PTSD and not the undiagnosed illness. *Id*. It also found that he had not suffered gastrointestinal bleeding for years and that there was limited evidence about diarrhea and nausea. *Id*. Indeed, in the July 2015 examination, Mr. Thornton himself reported that he had not suffered

gastrointestinal bleeding in a "long time" and was experiencing less nausea. R. at 1302-03. In the December 2015 examination, he denied any gastrointestinal problems and, although reporting weight loss, he attributed it to dietary changes, not to the undiagnosed illness. R. at 952. The record shows that symptoms of CFS, like fatigue and forgetfulness, were consistently present, but that several symptoms of post-gastrectomy syndrome, like gastrointestinal problems and circulatory problems, were not. Thus, we cannot say that the Board's choice of DC 6354 (CFS) was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *See Stankevich*, 19 Vet.App. at 472; *Butts*, 5 Vet.App. at 538-39.

Although Mr. Thornton also invokes the Board's duty to provide an adequate statement of reason or bases for its choice of DC, he does not provide any argument that the Board's reasons or bases were inadequate in this regard. Appellant's Br. at 24. Thus, we find his argument on this point to be undeveloped, and so we will not consider it. *See Locklear v. Nicholson*, 20 Vet.App. 410, 416 (2006).

2. Application of DC 6354

Mr. Thornton argues in the alternative that, even if the choice of DC 6354 were correct, the Board's application of DC 6354 was clearly erroneous. Appellant's Br. at 25, 28. He argues that the Board failed to define "pre-illness level" or "incapacitation" as used in the rating criteria, meaning that the Court cannot determine whether the Board correctly applied the rating criteria of DC 6354. *Id.* at 25, 26-

27. The Secretary argues that the Court should simply abide by the ordinary meaning of "pre-illness" level and no further definition from the Board was necessary. Secretary's Br. at 15-16. He also argues that "incapacitation" is defined in the regulation. *Id*. at 16.

We may easily dispose of Mr. Thornton's arguments about the definition of "incapacitation." DC 6354 rates debilitating fatigue that either restricts routine daily activities or that results in periods of "incapacitation." § 4.88b. The regulation states that "incapacitation exists only when a licensed physician prescribes bed rest and treatment." *Id*. The Board twice noted this definition in its decision, R. at 5, 11, but found that Mr. Thornton never experienced any periods of incapacitation, R. at 11. (Both the July and December 2015 examiners found no incapacitation due to CFS. R. at 952, 1302.) Instead, he was rated based, not on incapacitation, but on the restriction of his routine daily activities. *Id*. (Similarly, both the July and December 2015 examiners found that his routine daily activities were restricted to 50% to 75% of his pre-illness level. R. at 952, 1302.) The term "incapacitation" was already defined in the regulation, the Board repeated that definition, and incapacitation was not an issue before the Board. Thus, Mr. Thornton has shown no error. *See Hilkert*, 12 Vet.App. at 151.

"Pre-illness level" is not defined in the regulation or in the Board decision, but, as the Secretary argues, unless otherwise directed, the ordinary meaning of a phrase controls. Secretary's Br. at 15 (citing *Prokarym v. McDonald*, 27 Vet.App. 307, 310 (2015)

("In the absence of an express definition, words are given their ordinary meaning.")). He argues that the "pre-illness level" means the level of routine daily activities that the claimant engaged in before the illness. Secretary's Br. at 15. "[I]f the meaning of the regulation is clear from its language, then that is the end of the matter." *Tropf v. Nicholson*, 20 Vet.App. 317, 320 (2006). Further discussion is needed only when there is ambiguity, which arises "when the application of the ordinary meaning … of the regulation fails to answer the question at issue." *Roby v. Wilkie*, 31 Vet.App. 91, 98-99 (2019) (citing *Tropf*, 20 Vet.App. at 321 n.1). By the plain language of the phrase, "pre-illness level" simply means the state of a claimant's routine daily activities before the onset of CFS symptoms; there is no ambiguity to address. *See Tropf*, 20 Vet.App. at 320. Thus, we agree with the Secretary that the ordinary meaning governs.

Mr. Thornton cites *Johnson v. Wilkie*, 30 Vet.App. 245, 255 (2018), arguing that the Board must disclose the standard under which it is operating. Appellant's Br. at 26. But *Johnson* focused on a situation where the Board failed to define a term of degree (specifically, "very frequent") that could be applied inconsistently across similar cases without a clear definition. 30 Vet.App. at 255. "Pre-illness" is a term whose meaning is apparent: before the illness. *See Prokarym*, 27 Vet.App. 310. Although the "level" of claimants' pre-illness routine daily activities may vary, the degree of impairment looks at the effect of CFS symptoms on the individual claimant's employment and daily life as compared to that claimant's employment and daily life before the illness. *See Vazquez-Flores v. Shinseki*, 24 Vet.App.

94, 106 (2010) (noting that DC 6354's assessment of how fatigue restricts routine daily activities is not objective evidence but "more general evidence" discussing "the impact upon employment or daily life"). This assessment does not require further definition like "very frequent" did in *Johnson v. Wilkie*.

The veteran also cites *Hood v. Brown*, 4 Vet.App. 301, 302 (1993), which dealt with the Board's failure to define a term that the Court found "qualitative" rather than "quantitative" in nature, *see id.* at 303. But he does not make any argument about whether the phrase "pre-illness level" is qualitative or quantitative, and so we will decline to address it. *See Locklear*, 20 Vet.App. at 416. Thus, Mr. Thornton has not shown that the Board erred when it did not define "pre-illness level." *See Hilkert*, 12 Vet.App. at 151.

III. CONCLUSION

On consideration of the above, the appealed parts of the January 23, 2019, Board decision are AFFIRMED.

DATED: June 11, 2021

Copies to:

Kenneth M. Carpenter, Esq.

VA General Counsel (027)

APPENDIX E

BOARD OF VETERANS' APPEALS

FOR THE SECRETARY OF VETERANS AFFAIRS

IN THE APPEAL OF SS [REDACTED]
JOSHUA E. BUFKIN Docket No. 18-28 418A
Represented by
KENNETH M. CARPENTER, Attorney

DATE: February 6, 2020

ORDER

Entitlement to service connection for an acquired psychiatric disorder, to include posttraumatic stress disorder (PTSD), depression, intermittent explosive disorder, and chronic adjustment disorder is denied.

FINDINGS OF FACT

1. The preponderance of the evidence fails to establish the Veteran has been diagnosed with PTSD at any time during the appeal period or proximate thereto.

2. A chronic psychiatric disorder was not shown in service; and, the preponderance of the evidence fails to establish that the Veteran's diagnosed depression, intermittent explosive disorder, and chronic adjustment disorder are etiologically related to his active service.

CONCLUSION OF LAW

The criteria for service connection for acquired psychiatric disorder, to include PTSD, depression, intermittent explosive disorder, and chronic adjustment disorder have not been met. 38 U.S.C. §§ 1110, 1131; 38 C.F.R. §§ 3.102, 3.159, 3.303, 3.304.

REASONS AND BASES FOR FINDINGS AND CONCLUSION

The Veteran served in the United States Air Force September 2005 through March 2006.

This matter comes before the Board of Veterans' Appeals (Board) on appeal from a rating decision issued by a Department of Veterans Affairs (VA) Regional Office (RO) in Boise, Idaho.

The Veteran has submitted new evidence pertaining to this appeal; he waived Agency of Original Jurisdiction (AOJ) review of such evidence in January 2020. 38 C.F.R. § 20.1304(c).

The Veteran was denied entitlement to service connection for these matters in a March 2014 rating decision. Service records relevant to the claimed disabilities have been associated with the claims file since then. Under 38 C.F.R. § 3.156(c), at any time after VA issues a decision on a claim, if VA receives or associates with the claims file relevant official service department records that existed and had not been associated with the claims file when VA first decided the claim, VA will reconsider the claim, notwithstanding the requirement under subpart (a)

that there first be new and material evidence to reopen the claim. *See also Vigil v. Peake*, 22 Vet. App. 63 (2008). In light of the aforementioned records, the Board will consider the service connection claims on the merits, without addressing any threshold issue of whether new and material evidence has been received to reopen the claims. *See* 38 C.F.R. § 3.156(c).

A February 2014 memo notes that service treatment records are missing from the Veteran's claim file; his service and VA treatment records have been obtained and associated with his claims file. *See* 38 U.S.C. § 5103A; 38 C.F.R. § 3.159(c).

Entitlement to service connection for PTSD and depression with anxiety, intermittent explosive disorder, and chronic adjustment disorder with disturbances of emotions and conduct.

Service connection may be granted for a disability resulting from disease or injury incurred in or aggravated by active military, naval, or air service. 38 U.S.C. § 1131; 38 C.F.R. § 3.303(a). Service connection may be granted for any disease initially diagnosed after service when all the evidence, including that pertinent to service, establishes that the disease was incurred in service. 38 C.F.R. § 3.303(d). Service connection for a disability requires evidence of: (1) a current disability; (2) a disease or injury in service, and; (3) a relationship or nexus between the current disability and any injury or disease during service. *Shedden v. Principi*, 381 F.3d 1163 (Fed. Cir. 2004).

Establishing service connection for PTSD generally requires: (1) medical evidence diagnosing PTSD;

(2) credible supporting evidence that the claimed in-service stressor actually occurred; and (3) medical evidence of a link between current symptomatology and the claimed in-service stressor. 38 C.F.R. § 3.304(f); *see also Cohen v. Brown*, 10 Vet. App. 128 (1997).

The Veteran contends that combat training, the death of a fellow servicemember, and his spouse's mental health caused his PTSD. In January 2014, the Joint Services Records Research Center informed the Veteran it could not verify his alleged stressors.

The Veteran's medical records contain conflicting information as to whether he has been diagnosed with PTSD. VA medical center (VAMC) records note a diagnosis of PTSD. However, there is no indication that the author subjected the Veteran's stressors to DSM-5 criteria for PTSD.

The Veteran submitted a medical report from Dr. R. G., M.D., a VA staff psychiatrist, who diagnosed the Veteran with PTSD. Dr. G stated that the Veteran's spouse suffered from depression. The Veteran reported he felt forced by his superiors to make a choice between divorcing his spouse or leaving the military. The Veteran chose to leave the military because he refused to abandon his spouse and contribute to her death. His anger and powerlessness for having to make this decision never left him. The Veteran suffered from hypervigilance, distrust of others, irritability, nightmares, avoidance, emotional numbing, hyperarousal, anxiety, fear, sleep disturbance, and violent anger. Dr. G. opined that the Veteran met every criterion for PTSD. He also opined

that the primary stressor was the perceived threat to his spouse's life.

The Veteran underwent two VA examinations. A June 2015 VA examiner determined the Veteran did not meet the diagnostic criteria for PTSD under DSM-5 and that the Veteran suffered from adjustment disorder with mixed disturbance of emotion and conduct, persistent form. The examiner stated that there are three diagnostic requirements for PTSD which must be present: (1) exposure to a PTSD trauma that meets the DSM-5 definition; (2) problems due to persistent reexperiencing trauma in the form of intrusive unwanted memories of the trauma/event, or recurring nightmares of the event, or flashbacks of the event; and (3) avoidance of stimuli associated with the event. Unless all three are present, no diagnosis of PTSD can be given.

The only intrusive memory of a trauma the Veteran identified was that he was mad at the military for the way he was treated and thought of his discharge as a personal affront to his abilities in the Air Force. The examiner stated no matter how "unfairly" or "uncaring" or "rejecting" the Veteran perceived the military's actions to be, these actions in no way meet the DSM-5 definition of a PTSD trauma event. Additionally, in order to meet the DSM-5 definition of intrusive memories, the memories have to be unwanted. The Veteran reported he wanted to think about these memories, thus, they are not intrusive as defined by the DSM. Finally, with regards to the avoidance requirement, the Veteran stated he made no effort to avoid memories of "how the military treated him." He stated he did not want to forget these

memories, dwelling on them daily to remind himself of how he was "mistreated" by the military.

The examiner addressed Dr. G.'s letter in support of the Veteran's claim for PTSD. The examiner believed that if Dr. G. reviewed the Veteran's military and medical history, particularly the Air Force psychiatrist treatment document and training record note, Dr. G.'s ultimate diagnosis would have been impacted. The VA examiner noted that the Veteran's military record indicates he joined the Air Force, did well in basic training, married his wife, and entered individual training to become a Security Forces airman. The Veteran began repeatedly failing his required training classes and could not progress to job assignment, likely leading to separation from the military. His instructors met with him to determine why he was having problems and the Veteran requested a meeting with a psychiatrist. The Veteran informed the psychiatrist that his wife did not want him to be in the military and began making suicidal threats. This conflict resulted in significant stress, making it difficult to focus. The examiner noted that the Chief of the Behavioral Evaluation Service concluded that the Veteran was recommended for separation with an opportunity to return to active duty at a later date if his humanitarian situation were lessened to the point where he could be effective. The examiner noted that the Veteran believed it was in the best interest of his family and Air Force that he be separated from service. Paradoxically, the Veteran reported to Dr. G. that the Air Force forced him to choose between his wife and a hardship discharge.

Addressing the Veteran's spouse's threats of suicide, the examiner stated that the threat of suicide could possibly meet DSM-5 requirements but there is no indication that there was a suicide attempt in this case. Suicide threats and gestures, especially when there is a long history of these behaviors without actual suicide attempts, as indicated by the Veteran, do not meet the PTSD trauma definition. The Veteran did not report having intrusive memories, nightmares, and flashbacks of his spouse's suicidal gestures or threats. Additionally, the Veteran's perception that the military did not care whether the spouse lived or died is not relevant to the definition of PTSD. The examiner expanded upon this statement by explaining the Veteran's spouse did not live with the Veteran nor did she live on base, she did not seek medical treatment from the military, and was reportedly uncooperative with treatment efforts. The examiner noted that the military was powerless of her actions. Even if the Veteran's perception that the military was uncaring towards his spouse was accurate, the examiner stated that it is irrelevant to the definition of a PTSD trauma event.

Dr. G stated that the Veteran was hypervigilant and paranoid. The VA examiner explained, superficially the Veteran's symptoms may sound like PTSD, however, hypervigilance in the context of PTSD refers to protecting one's self from a re-occurrence of the trauma event. The Veteran did not exhibit hypervigilance, rather his behavior indicated underlying personality traits that do not rise to the level of a personality disorder but do fuel his paranoia. The examiner believed these behaviors, attitudes, and thoughts are often not caused by

conscious decisions but are instead below the level of the patient's awareness. The examiner ultimately opined that the Veteran's claimed condition was less likely than not caused by service because the Veteran does not meet the DSM-5 diagnostic requirements for PTSD.

The Veteran underwent an April 2018 VA examination. The examiner found that the Veteran's symptoms do not meet the diagnostic criteria for PTSD under DSM-5. The Veteran was diagnosed with intermittent explosive disorder and adjustment disorder. The examiner opined that the Veteran's claimed stressor did not meet Criterion A of DSM-5 and was inadequate to support a diagnosis of PTSD. The examiner opined that the Veteran's claimed condition was less likely than not incurred in or caused by service. He opined that the Veteran's symptoms started a year after discharge and there is no evidence supporting a diagnosis of PTSD.

The Veteran also submitted a medical opinion dated in December 2019 from Dr. C. M., M.D., a VA staff psychiatrist, who diagnosed the Veteran with PTSD due to a number of issues. Dr. M. opined that the primary issue was that the Veteran was forced out of the military due to intense family problems. Dr. M. further opined that some examiners do not consider that to be PTSD, but it was clearly traumatic for the Veteran and that, at a minimum, he developed a severe anxiety disorder.

The Board finds that the preponderance of the evidence supports a finding that the Veteran does not suffer from PTSD. The Veteran underwent several

examinations to determine the exact nature of the Veteran's disability and two VA examiners opined that the Veteran's claimed stressors do not meet the criteria set forth in the DSM-5 for PTSD. The Board finds the June 2015 VA examiner's findings especially persuasive. As explained by the examiner, the Veteran does not suffer from problems due to persistent re-experiencing of trauma in the form of intrusive unwanted memories of the trauma, flashbacks of the event, or avoidance of stimuli associated with the event because the Veteran wants to think about these past experiences and makes no effort to avoid memories. The examiner found that the Veteran dwells on his memories.

Although the Veteran submitted a report by Dr. G. indicating the Veteran suffered from PTSD as a direct result of his treatment by the military, the Board finds that the June 2015 VA examiner more than adequately explained why Dr. G's diagnosis would have been impacted had he been provided an opportunity to review the Veteran's Air Force psychiatric report and training record note, both of which provide specific details leading up to the Veteran's Hardship Discharge.

The Veteran submitted the statement of S.B., his mother and a registered nurse. She opined that the Veteran displayed symptoms of PTSD ever since separating from the military. Although S.B. is a medical professional, there is no indication that she subjected the Veteran's symptoms to the diagnostic criteria as set forth in DSM-5. As such, the Board finds her statement to have no probative value.

Consideration has been given to the Veteran and his spouse's personal assertion that he has PTSD that is proximately due to his service. To that point, lay persons are competent to provide opinions on some medical issues, *see Kahana v. Shinseki*, 24 Vet. App. 428, 435 (2011). However, as to the specific issues in this case, the diagnosis and etiology of PTSD, this falls outside the realm of common knowledge of a lay person. *See Jandreau v. Nicholson*, 492 F.3d 1372, 1377 n.4 (Fed. Cir. 2007). Importantly, the record does not demonstrate that the Veteran nor his spouse have special training or acquired any medical expertise in evaluating psychiatric disorders such as PTSD. *See King v. Shinseki*, 700 F.3d 1339, 1345 (Fed.Cir.2012). Accordingly, this lay evidence does not constitute competent medical evidence and lacks probative value.

Turning to the claim for service connection for depression with anxiety and chronic adjustment disorder with disturbances of emotions and conduct the Veteran has been diagnosed with depression with anxiety, intermittent explosive disorder, and chronic adjustment disorder. Element (1) of *Shedden* has been met.

Turning to elements (2) and (3) of *Shedden*. Two VA examiner's opined that the Veteran's psychiatric disabilities were less likely than not related to active service.

The June 2015 examiner diagnosed the Veteran with depression, anxiety, and chronic adjustment disorder. Based on his review of the evidence, he concluded this condition was not present while the Veteran was on

active service. The examiner believes that the onset began after leaving the military. The VA examiner also believed that the Veteran spouse's opposition to his staying in the military and her attempts to convince him to leave ultimately led to his Hardship Discharge. Specifically, the examiner opined the Veteran's explosive anger is a significant factor in his life and the underlying cause is a key diagnostic issue. The examiner believed that the Veteran's understandable anger towards his wife's coercion to leave the military is viewed by the Veteran as unacceptable and he displaced this anger onto the military.

The January 2018 examiner diagnosed the Veteran with intermittent explosive disorder and chronic adjustment disorder with mixed disturbance of emotion and conduct, persistent form. The 2018 examiner opined that the Veteran's symptoms started one year after his discharge and she did not find any evidence indicating his claimed disabilities were incurred in or cause by military service. The 2019 opinion from Dr. M. indicating a severe anxiety disorder does not contain an opinion supported by a rationale clearly relating that to service. The Board notes that the record does not contain any competent opinions supported by a rationale relating a currently diagnosed psychiatric disorder to the Veteran's military service.

Consideration has been given to the Veteran and his spouse's personal assertion that his psychiatric symptoms developed during service. However, the diagnosis and etiology of an acquired psychiatric disorder falls outside the realm of common knowledge

of a lay person. *See Jandreau*, 492 F.3d at 1377 n.4. As noted above, the record does not demonstrate that the Veteran nor his spouse have special training or acquired any medical expertise in evaluating psychiatric disorders. *See King*, 700 F.3d at 1345. Accordingly, this lay evidence does not constitute competent medical evidence and lacks probative value.

For these aforementioned reasons, the Board finds that the preponderance of the evidence is against the Veteran's claim of service connection for PTSD and depression with anxiety and chronic adjustment disorder with disturbances of emotions and conduct. In reaching these conclusions, the Board notes that under the provisions of 38 U.S.C. § 5107(b); 38 C.F.R. § 3.102, a reasonable doubt is to be resolved in the claimant's favor in cases where there is an approximate balance of positive and negative evidence in regard to a material issue. However, as the preponderance of the evidence is against the Veteran's claim, that doctrine is not applicable. *See Gilbert v. Derwinski*, 1 Vet. App. 49 (1990). The claims are denied.

/s/ L. Barstow
L. BARSTOW
Acting Veterans Law Judge
Board of Veterans' Appeals

Attorney for the Board — M. Mahmoudi, Associate Counsel

The Board's decision in this case is binding only with respect to the instant matter decided. This decision is not precedential, and does not establish VA policies or interpretations of general applicability. 38 C.F.R. § 20.1303.

APPENDIX F

BOARD OF VETERANS' APPEALS

DEPARTMENT OF VETERANS AFFAIRS

IN THE APPEAL OF [REDACTED]
NORMAN F. THORNTON Docket No. 17-09 054
Represented by
Shannon K. Holstein, Attorney

DATE: January 23, 2019

ORDER

Entitlement to a rating in excess of 40 percent for a disability manifested by fatigue, joint pain, gastrointestinal bleeding, headaches, shortness of breath, nausea, body shakes, and diarrhea as due to an undiagnosed illness is denied.

Entitlement to a rating in excess of 50 percent for posttraumatic stress disorder (PTSD) is denied.

Entitlement to a total disability rating based on individual unemployability (TDIU) is granted.

FINDINGS OF FACT

1. The Veteran's disability manifested by fatigue, joint pain, gastrointestinal bleeding, headaches, shortness of breath, nausea, body shakes, and diarrhea is not shown to be manifested by symptoms that restrict his routine daily activities to less than 50

percent of his pre-illness level and have not resulted in periods of incapacitation.

2. During the appeal period, the Veteran's PTSD more nearly approximated occupational and social impairment with reduced reliability and productivity due to such symptoms as: depressed mood, anxiety, chronic sleep impairment, mild memory loss, impairment of short and long-term memory, and difficulty in adapting to stressful circumstances.

3. The Veteran's service-connected PTSD and chronic fatigue syndrome have precluded him from securing or maintaining substantially gainful employment.

CONCLUSIONS OF LAW

1. The criteria for a rating in excess of 40 percent for disability manifested by fatigue, joint pain, gastrointestinal bleeding, headaches, shortness of breath, nausea, body shakes, and diarrhea have not been met. 38 U.S.C. §§ 1155, 5107; 38 C.F.R. §§ 4.1, 4.2, 4.3, 4.6, 4.7, 4.10, 4.88b; Diagnostic Code (DC) 6354.

2. The criteria for a rating in excess of 50 percent have not been met. 38 U.S.C. §§ 1155, 5107; 38 C.F.R. §§ 4.1-4.16, 4.130, DC 9411.

3. The criteria for a TDIU have been met. 38 U.S.C. §§ 1155, 5107; 38 C.F.R. §§ 3.102, 3.340, 3.341, 4.16, 4.19.

REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

The Veteran served on active duty in the U.S. Army from October 1988 to December 1991.

This matter comes before the Board of Veterans' Appeals (Board) on appeal from July 2015 and September 2015 rating decisions of a Department of Veterans Affairs (VA) Regional Office (RO).

The Veteran did not submit a notice of disagreement to these decisions; however, additional VA treatment records and a VA examination report were received within the year of their issuance. Since the RO never determined whether the additional evidence constituted new and material evidence with respect to the July and September 2015 rating decisions, they never became final and are the ones currently on appeal to the Board. See *Beraud v. Shinseki*, 766 F.3d 1402, 1407 (Fed. Cir. 2014); *Buie v. Shinseki*, 24 Vet. App. 242, 251-52 (2010)(even in increased rating claims, when VA receives new and material evidence within one year of a rating decision, 38 C.F.R. § 3.156 (b) requires any subsequent decision to relate back to the original claim).

The Board notes that the matter of whether a routine future examination is warranted for the Veteran's undiagnosed illness was included in a September 2017 supplemental statement of the case. This is not an appealable issue. Thirty-eight C.F.R. § 3.327(b) provides general guidelines about when reexamination is not necessary. Thirty-eight C.F.R. § 3.327(a) states that paragraph (b) does not limit

VA's authority to request reexamination ("Paragraphs (b) and (c) of this section provide general guidelines for requesting reexaminations, but shall not be construed as limiting VA's authority to request reexaminations, or periods of hospital observation, at any time in order to ensure that a disability is accurately rated."). Also, as the Court noted in *Collier v. Derwinski*, it has never held that 38 CFR § 3.327(b) confers any sort of substantive right on an appellant to avoid being scheduled for a future VA examination, if necessary. *See Collier v. Derwinski*, 2 Vet. App. 247, 251 (1992).

In January 2018, the appellant submitted additional evidence after the most recent supplemental statement of the case in September 2017. Waiver of RO consideration of the additional evidence is presumed given the date of the Veteran's substantive appeal. *See* 38 U.S.C. § 7105(e).

Increased Rating

Ratings are based on a schedule of reductions in earning capacity from specific injuries or combination of injuries. The ratings shall be based, as far as practicable, upon the average impairments of earning capacity resulting from such injuries in civil occupations. 38 U.S.C. § 1155. Generally, the degrees of disability specified are considered adequate to compensate for considerable loss of working time from exacerbations or illnesses proportionate to the severity of the several grades of disability. 38 C.F.R. § 4.1.

Where there is a question as to which of two evaluations shall be applied, the higher evaluation will be assigned if the disability picture more nearly approximates the criteria required for that rating. Otherwise, the lower rating will be assigned. 38 C.F.R. § 4.7. When, after careful consideration of all procurable and assembled data, a reasonable doubt arises regarding the degree of disability such doubt will be resolved in favor of the claimant. 38 U.S.C. § 5107(b); 38 C.F.R. §§ 3.102, 4.3.

1. Entitlement to a rating in excess of 40 percent for a disability manifested by fatigue, joint pain, gastrointestinal bleeding, headaches, shortness of breath, nausea, body shakes, and diarrhea.

The Veteran seeks a rating in excess of 40 percent for his disability manifested by fatigue, joint pain, gastrointestinal bleeding, headaches, shortness of breath, nausea, body shakes, and diarrhea. The appeal period before the Board begins on February 23, 2014, one year prior to the date VA received the claim for an increased rating. *Gaston v. Shinseki*, 605 F.3d 979, 982 (Fed. Cir. 2010). As noted in the Introduction, new and material evidence was added within one year of the July 2015 rating decision. 38 C.F.R. § 3.156(b).

The rating code does not include an entry for the Veteran's undiagnosed illness manifested by fatigue, joint pain, gastrointestinal bleeding, headaches, shortness of breath, nausea, body shakes, and diarrhea. Therefore, his disability has been rated by analogy under the rating code for chronic fatigue syndrome, as this disability has symptoms that are

nearly identical to the Veteran's undiagnosed illness. 38 C.F.R. § 4.20. DC 6354 provides ratings for chronic fatigue syndrome consisting of debilitating fatigue, cognitive impairments (such as inability to concentrate, forgetfulness, confusion), or a combination of other signs and symptoms.

A 40 percent disability rating is assigned for signs and symptoms of chronic fatigue syndrome that are nearly constant and restrict routine daily activities to 50 to 75 percent of the pre-illness level, or the signs and symptoms wax and wane, resulting in periods of incapacitation of at least four but less than six weeks total duration per year. 38 C.F.R. § 4.88b, DC 6354.

A 60 percent disability rating is assigned for signs and symptoms of chronic fatigue syndrome that are nearly constant and restrict routine daily activities to less than 50 percent of the pre-illness level, or signs and symptoms that wax and wane, resulting in periods of incapacitation of at least six weeks total duration per year. *Id.*

A maximum 100 percent disability rating is assigned for signs and symptoms of chronic fatigue syndrome that are nearly constant and so severe as to restrict routine daily activities almost completely and which may occasionally preclude self-care. *Id.*

For the purpose of rating chronic fatigue syndrome, the condition will be considered incapacitating only while it requires bed rest and treatment by a physician. *Id.*

Turning to the evidence of record, the Veteran underwent VA examinations for his undiagnosed illness in July 2015, December 2015, and April 2017. During the July 2015 VA examination, he reported that he "wears out real easy" and was not working. The examiner noted that migratory joint pains and sleep disturbance were attributable to his undiagnosed illness. The Veteran also reported that he gets so exhausted that all he wants to do is sleep. He reported that he walks for exercise for one half to one mile every day or every other day which does not cause excessive fatigue. The examiner also noted that he reported some shortness of breath with exercise, primarily when walks up a hill but noted that he is an old smoker and does have some obstruction on his pulmonary function tests in 2011. He also reported being seen for migraine headaches. The examiner generally attributed these signs and symptoms to his undiagnosed illness. The examiner found that there was no cognitive impairment attributable to the Veteran's undiagnosed illness, his symptoms did not result in periods of incapacitation, and that his symptoms wax and wane. The examiner opined that the Veteran's symptoms restrict his routine daily activities to 50 to 75 percent of the pre-illness level. The Veteran reported that he is rejuvenated with a 15 to 30-minute nap during the day and that he can return to his project or job after a nap. The Veteran also reported night sweats, occasional shakes, shortness of breath, and occasional nausea and vomiting. The Veteran also reported that he will occasionally have spurts of diarrhea, about once a month, he will have a day where he has two or three loose stools. The examiner opined that the Veteran's

chronic fatigue syndrome/ undiagnosed illness impacted his ability to work. However, he has been able to work part-time jobs, and was currently working.

During the December 2015 VA examination, the examiner noted debilitating fatigue, headaches, joint pain, and sleep disturbance as signs and symptoms attributable to his chronic fatigue syndrome. The Veteran reported that after awakening in the morning, he will sometimes return to bed after 30 minutes because of fatigue and stays in bed until early afternoon. He otherwise would take naps two to three times per week for 30 minutes. He did not require continuous medication for control of his symptoms. The Veteran also reported generalized joint pain and episodic chills but denied gastrointestinal, bowel, and bladder symptoms. The examiner found that the Veteran did not have any cognitive impairment due to his chronic fatigue syndrome, his symptoms do not result in periods of incapacitation, and that the Veteran's symptoms wax and wane. The Veteran reported that he is able to be more active on some days as opposed to others without known reasons or patterns. He informed the examiner that he generally tried to stay busy, work on hobbies (such as woodworking, medieval re-enactment projects, jewelry work). He reported that he was able to do his own activities of daily living, keep his trailer clean. His trailer has a small area (about 30-60") to mow and/or shovel, and he reported that he was sometimes able to mow it in one session. The examiner opined that the Veteran's symptoms restrict his routine daily activities to 50 to 75 percent of the pre-illness level. The examiner opined that the

Veteran's chronic fatigue syndrome impacted his ability to work.

VA treatment records show the Veteran was engaged in horseback riding during the appeal. He was shown to have sustained some injuries in May 2016 after falling from his horse.

An opinion regarding the effect of the Veteran's symptoms on his routine daily activities was obtained in March 2017. The examiner reviewed the claims file and the prior examination reports; an in-person examination was not conducted. The VA examiner opined that the Veteran's headaches, shortness of breath, and fatigue remain as due to an undiagnosed illness and not to the Veteran's nonservice-connected obstructive sleep apnea. A cogent rationale was provided for the opinion. The examiner also opined that the Veteran's nightmares and night sweats are due to his service-connected PTSD rather than his chronic fatigue syndrome. The VA examiner opined that the Veteran's symptoms of his chronic fatigue syndrome restrict his routine daily activities by less than 25 percent of the pre-illness level. The examiner explained that the Veteran's mental health provider, and the December 2015 examiner, found his nightmares and night sweats are related to his PTSD, not his undiagnosed illness. The examiner indicated that the Veteran's records have been negative for gastrointestinal bleed and/or body shakes for many years and there is limited documentation in the record regarding diarrhea and nausea. This Board notes this confirmed by a review of the record. The examiner also noted that the Veteran's ability to ride a horse would take a fair amount of stamina and

coordination which would not be expected in someone with significant chronic fatigue.

In light of the foregoing, the Board finds that a rating in excess of 40 percent for the Veteran's disability is not warranted. The evidence does not show that the Veteran's symptoms nearly constant and restrict routine his daily activities to less than 50 percent of his pre-illness level. All of the VA examiners who interviewed him, and reviewed the evidence in the claims file, opined that his symptoms restricted his routine daily activities to no less than 50 percent of his pre-illness level. The Board also finds it notable, as did the March 2017 examiner, that the Veteran is able to ride horses. A July 2015 VA PTSD examination report shows he participates in medieval re-enactments and attends two to three events per year, as well as meetings and practice sessions between events. His chronic fatigue syndrome has also not been found to result in periods of incapacitation (i.e., requiring bed rest and treatment by a physician). At the July 2015 examination, the Veteran reported that he is rejuvenated by a short nap. The examiner also specifically determined that his symptoms did not result in periods of incapacitation. The December 2015 examiner likewise opined that his symptoms do not result in periods of incapacitation. The Board also notes that the March 2017 VA examiner opined that the Veteran's nightmares and night sweats are due to his service-connected PTSD rather than his undiagnosed illness. As such, those symptoms are more appropriately considered in the evaluation of his PTSD.

The Board acknowledges the contention raised by the Veteran's representative in a January 2018 correspondence that the Veteran, in addition to being rated under DC 6354, should also receive separate evaluations for his symptoms attributable to his chronic fatigue syndrome/undiagnosed illness such as headaches, joint paint, gastrointestinal issues, and carpal tunnel syndrome which affect separate body systems. However, the Board finds that separate evaluations are not warranted. In light of the fact that DC 6354 provides ratings based upon the extent to which all manifestations of chronic fatigue syndrome (specifically including fatigue, cognitive impairments, and "a combination of other signs and symptoms") restrict routine daily activities, result in periods of incapacitation, or require treatment with medication, separate ratings for such manifestations would be inappropriate.

The Board also acknowledges the representative's reference to the VA Adjudication Procedures Manual (M21-1) which provides guidance for rating qualifying chronic disabilities. *See* January 2018 Correspondence. However, the M21-1 provisions are not substantive rules and are not binding on the Board. *See Overton v. Wilkie*, No. 17-0125, 2018 U.S. App. Vet. Claims LEXIS 1251 (Sept. 19, 2018).

For these reasons, the preponderance of the evidence is against the Veteran's claim, there is no reasonable doubt to be resolved, and the claim must be denied. 38 U.S.C. § 5107(b); 38 C.F.R. §§ 3.102, 4.3, 4.7; *Hart v. Mansfield*, 21 Vet. App. 505 (2007). Neither the Veteran nor his representative has raised any other issues, nor have any other issues been reasonably

raised by the record. *See Doucette v. Shulkin*, 28 Vet. App. 366 (2017).

2. Entitlement to a rating in excess of 50 percent for PTSD.

The Veteran seeks a rating in excess of 50 percent for his PTSD. As with the claim for an increased rating for undiagnosed illness, the appeal period before the Board begins on February 23, 2014, one year prior to the date VA received the claim for an increased rating. *Gaston*, 605 F.3d at 982.

The Veteran's PTSD has been evaluated under the General Rating Formula for Mental Disorders. 38 C.F.R. § 4.130, DC 9411.

Under DC 9411, a 50 percent rating is warranted for occupational 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. *Id.*

A 70 percent rating is warranted when there is occupational 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 work-like setting); inability to establish and maintain effective relationships. *Id.*

A 100 percent rating is warranted when there is total occupational and social impairment, due to such symptoms as: gross impairment in thought processes or communication; persistent delusions or hallucinations; grossly inappropriate behavior; persistent danger of hurting self or others; intermittent inability to perform activities of daily living (including maintenance of minimal personal hygiene); disorientation to time or place; memory loss for names of close relatives, own occupation, or own name. *Id.*

The rating of psychiatric disorders is ultimately based upon their resultant level of occupational and social impairment. 38 C.F.R. § 4.130; *Vazquez-Claudio v. Shinseki*, 713 F.3d 112, 117-18 (2013). The evaluation, however, is symptom-driven, meaning that the symptomatology should be the fact-finder's primary focus in determining the level of occupational and social impairment. *Vazquez-Claudio*, 713 F.3d at 116-17. This includes consideration of the frequency, severity, and duration of those symptoms. 38 C.F.R. § 4.126(a); *Vazquez-Claudio*, 713 F.3d at 117.

Significantly, however, the symptoms enumerated in the rating criteria are merely examples of those that would produce such level of impairment; they are not exhaustive, and VA is not required to find the presence of all, most, or even some of the enumerated symptoms to assign a particular evaluation. *Vazquez-Claudio*, 713 F.3d at 115; *Mauerhan v. Principi*, 16 Vet. App. 436, 442-43 (2002).

Turning to the evidence of record, the Veteran underwent a psychiatric VA examination in July 2015. With regards to the Veterans' social functioning, he reported that he has a good relationship with his children and speaks to them almost daily. He also reported that he has two siblings, and has a great relationship with his mother. While he reported that he is not close to his father, it appears the reasoning is due to issues unrelated to the Veteran's PTSD. The Veteran reported having friends, including four to five close friends that he sees on a regular basis. The Veteran participates in medieval re-enactments through a world-wide club and attends two to three events per year, as well as meetings and practice sessions between events. As for occupational impairment, the Veteran reported that he has done mostly "side jobs" over the past four to five years. The Veteran reported that while working at a motel doing handyman and maintenance jobs, he reported that he was accused of being unreliable.

The examiner reported that the following symptoms were present: depressed mood, anxiety, chronic sleep impairment, mild memory loss, and difficulty in adapting to stressful circumstances. The examiner noted that the Veteran was alert and oriented to

person, place, and time. He interacted in a logical, coherent manner. His speech was normal, and there were no signs of a thought disorder, hallucinations, or delusions. The Veteran appeared plainly groomed and casually dressed. The Veteran reported that his concentration is pretty good "most of the time." The Veteran also reported that he has had memory lapses where he does things and does not remember what he was doing. He reported that these lapses vary in frequency. The Veteran reported nightmares at various frequencies. The examiner opined that the Veteran's PTSD manifested in occupational and social impairment with reduced reliability.

The Board notes that the July 2015 VA examiner indicated that the Veteran's periods of confusion and memory lapses may not be due to his PTSD. However, the only explanation provided by the examiner was that the episodes do not appear to be trauma based and that those with PTSD do not dissociate unless they are in the middle of a flashback. Additionally, the examiner reported that the Veteran did not have any other mental disorder diagnosis, and he did not provide any other diagnosis or disorder that could cause the Veteran's memory lapses. Essentially, the VA examiner indicated that the Veteran's memory lapses may not be due to his PTSD, but he did not provide any other potential etiology for such episodes.

Moreover, a 2012 neurology consult did not find any diagnosis that could be etiologically related to the Veteran's memory lapses. Thus, because the Veteran's treating VA psychiatrist has attributed these memory lapses to his PTSD, and memory issues are known to be associated with PTSD, resolving

reasonable doubt in favor of the Veteran, the Board finds that the Veteran's episodes of confusion and memory loss are attributable to his PTSD and will be considered in this evaluation.

The Veteran underwent another VA psychological examination in December 2015. Regarding the Veteran's social functioning, he reported that he has a girlfriend of six months and that the relationship is going well. He again reported that he has a good relationship with his children and that his daughter is living with him. The Veteran also reported that he sees his mother several days per week and has three to four close friends, one of whom he speaks to a few times per week. He also reported belonging to a society. As for occupational impairment, the Veteran reported that he is not currently working, and that while he was supposed to work in the summer of 2015, he had a memory lapse and forgot he was supposed to work.

The examiner noted the following symptoms: depressed mood, anxiety, chronic sleep impairment, mild memory loss, and difficulty in adapting to stressful circumstances. The examiner reported that the Veteran was alert and oriented to person, place, and time. He was casually dressed and appropriately groomed, with speech and eye contact within normal limits. His affect was constricted. The examiner did not find any signs of a thought disorder, hallucinations, or delusions. The examiner opined that the Veteran's PTSD manifested with occupational and social impairment with reduced reliability.

The examiner also noted that the Veteran's PTSD resulted in moderate impairment of short-term memory, concentration, mood, reliability, and productivity. The examiner found no significant impairment of his judgment, abstract thinking, self-care, or ability to interact with supervisors or coworkers.

The Veteran has received ongoing VA treatment for his PTSD. VA treatment records during the appeal period are generally consistent with the symptoms endorsed by the Veteran during the July and December 2015 VA examinations.

The records during that time frame show that the Veteran appeared well groomed. The Veteran had fair memory, insight, and judgment. He was oriented to time, place, and person. The Veteran consistently denied any suicidal or homicidal ideations. He also denied any delusions and hallucinations. The Veteran's speech was relevant and coherent. An August 2015 VA treatment record shows that the Veteran reported he had been busy the past month as he had friends come and visit him. The same record also notes that the Veteran reported occasional episodes of amnesia that last about an hour or so. A May 2016 VA treatment record shows that the Veteran reported that he was moving in with his girlfriend and maintained good contact with all of his family members.

The Board finds that the Veteran's PTSD has been properly evaluated at the 50 percent level throughout the appeal period. The Veteran's PTSD has been manifested by symptoms such as mood disturbances

including depression and anxiety, sleep impairment, and impairment of short and long-term memory. The Board notes that the July and December 2015 VA examiners reported mild memory loss rather than long-term memory loss as a symptom. However, after review of the record, including the Veteran's lay statements regarding his memory lapses, the Board finds that the Veteran's memory issues more closely approximate impairment of short and long-term memory rather than mild memory loss.

The Veteran's symptoms have not more nearly approximated the criteria for a rating in excess of 50 percent at any time, and the evidence is not approximately evenly balanced. Throughout the appeals period, the Veteran was alert, well oriented, and well groomed. Speech was normal and he showed no psychotic symptoms. Significantly, the Veteran did not exhibit illogical, obscure, or irrelevant speech; near-continuous panic or depression affecting the ability to function independently, appropriately and effectively; suicidal ideation; impaired impulse control; spatial disorientation; or neglect of personal appearance and hygiene.

In terms of occupational impairment, the effects of PTSD are relatively mild to moderate. Although the Veteran reports that his memory lapses have affected his occupational functioning, the evidence does not demonstrate significant occupational impairment due solely to his PTSD symptoms. The Veteran has reported that he has only worked "side jobs" for the past four to five years, but he attributes that primarily to "sudden intense fatigue" due to his chronic fatigue syndrome. *See* July 2015 VA

Examination. Additionally, the December 2015 VA examiner found moderate impairment in reliability and productivity. Thus, while the Board acknowledges that the Veteran's memory lapses due to his PTSD affects his occupational functioning, his PTSD symptoms alone do not cause significant occupational impairment such as that contemplated by the 70 or 100 percent rating criteria.

Moreover, throughout the appeal period, the Veteran has had good relationships with his children and mother. He also has several close friends and participates in social activities. The Veteran also has a good relationship with his girlfriend and has moved in with her. Additionally, the Veteran does not report any significant difficulties in establishing and maintaining effective relationships. Overall, any effect on his social functioning appear to be minimal.

The Board acknowledges that the July 2015 and December 2015 VA examiners reported that the Veteran has difficulty in adapting to stressful circumstances which is a symptom enumerated in the 70 percent criteria. However, the presence of a single symptom is not dispositive of any particular disability level. VA must engage in a holistic analysis in which it assesses the severity, frequency, and duration of the signs and symptoms, quantifies the level of occupational and social impairment caused by those symptoms, and assigns an evaluation that more nearly approximates that level of occupational and social impairment.). *See Bankhead v. Shulkin*, 29 Vet. App. 10, 20 (2017). Despite noting that the Veteran has demonstrated difficulty in adapting to stressful circumstances, the VA examiners both opined that his

overall level of occupational and social impairment is best characterized as reduced reliability and productivity. Their opinions are considered competent and highly probative as they are skilled to render such assessments and as they reviewed the claims file and conducted interviews and evaluations of the Veteran. The cumulative evidence of record shows that the Veteran's overall level of occupational and social functioning is consistent with the moderate degree of impairment that is contemplated by a 50 percent rating.

The Board also acknowledges the representative's contention that the VA examinations of record are not a sufficient basis to deny an increased evaluation. *See* January 2018 Submission of Argument and Evidence. However, the Board finds that the VA examinations of record are adequate for ratings purposes as the opinion and findings were based upon consideration of the Veteran's prior medical history and examinations, it described the disability in sufficient detail so that the Board's evaluation is a fully informed one, and it contained reasoned explanations. The examiner specifically noted the Veteran's reported history and current symptoms in detail. There is no indication that the examinations were not sufficient for ratings purposes, particularly when considered along with the other evidence of record.

In sum, the severity, frequency, and duration of the Veteran's symptoms do not result in of the level of occupational and social impairment contemplated by a rating in excess of 50 percent. There is no doubt to be resolved; a higher rating is not warranted. 38

U.S.C. § 5107(b); 38 C.F.R. §§ 3.102, 4.3, 4.7; *Hart v. Mansfield*, 21 Vet. App. 505 (2007). There are no other issues expressly or reasonably raised by the record.

3. Entitlement to a total disability rating based on individual unemployability.

The Veteran seeks entitlement to a TDIU. Specifically, he contends that his PTSD and chronic fatigue syndrome preclude him from obtaining or maintaining substantially gainful employment, or in the alternative, that his chronic fatigue syndrome alone precludes him from such. *See* September 2015 VA 21-8940; January 2018 Submission of Argument and Evidence.

Total disability ratings for compensation may be assigned when a veteran is unable to secure and follow a substantially gainful occupation. *See* 38 U.S.C. § 1155; 38 C.F.R. §§ 3.340, 3.341, 4.16. In reaching such a determination, the central inquiry is "whether the Veteran's service connected disabilities alone are of sufficient severity to produce unemployability." *Hatlestad v. Brown*, 5 Vet. App. 524, 529 (1993); *see Van Hoose v. Brown*, 4 Vet. App. 361, 363 (1993) (the ultimate question is whether the Veteran is capable of performing the physical and mental acts required by employment, not whether he can find employment). Consideration may be given to the Veteran's level of education, special training, and previous work experience when arriving at this conclusion; factors such as age or impairment caused by nonservice-connected disabilities are not to be considered. 38 C.F.R. §§ 3.341, 4.16, 4.19.

Section 4.16(a) provides a rating hurdle for schedular consideration of a TDIU. If there is only one such disability, this disability shall be ratable at 60 percent or more; if there are two or more disabilities, there shall be at least one disability ratable at 40 percent or more, and sufficient additional disability to bring the combined rating to 70 percent or more. *Id.*

The Board notes that the Veteran meets the schedular requirements for a TDIU. He is service-connected for: (1) PTSD rated 50 percent from February 23, 2015; and (2) a disability manifested by fatigue, joint pain, gastrointestinal bleeding, headaches, shortness of breath, nausea, body shakes, and diarrhea rated 40 percent from January 16, 2001. His combined evaluation is 70 percent from February 23, 2015. As such, he meets the schedular criteria for a TDIU from February 23, 2015, the date of the increased rating claim.

The Veteran evidence shows that the Veteran completed training for cabinet making and received a bachelor's degree in business and marketing. *See* September 2015 and January 2018 Veteran's Application for Increased Compensation Based on Unemployability (VA Form 21-8940). With regards to the Veteran's occupational history, a review of the record shows that he has worked in retail and as a contract carpenter for several years. *See* September 2015 VA Form 21-8940; July 2015 VA PTSD Examination. The Veteran also has reported that he has worked "side jobs" for the past four to five years, such as doing handyman or maintenance work, light plumbing, roof repair, and mowing grass.

A July 2015 VA PTSD examination report shows that the Veteran reported that his main barrier to work is the sudden intense fatigue. He also reported that part of the reason he is unable to work is due to his memory, i.e. he forgets to go places. During a December 2015 VA examination, the Veteran reported that he was supposed to work in the summer of 2015 but had a memory lapse and forgot he was supposed to work.

During a July 2015 VA examination for the Veteran's undiagnosed illness, he reported that he gets so exhausted and all he wants to do is sleep. He reported that he can be up for a complete day and will then sleep 12-24 hours. At a December 2015 VA examination, the Veteran reported that he will sometimes go back to bed after waking up and stay in bed until early afternoon.

VA treatment records show that the Veteran has reported that he is unable to hold a job consistently mainly due to his chronic fatigue. In a February 2016 VA treatment record, the Veteran reports that when he has episodes of PTSD issues or fatigue he is usually relieved from his job.

Issues regarding the Veteran's memory lapses are described in detail above.

The December 2015 VA examiner found that the Veteran's undiagnosed illness impacted his ability to work. The examiner noted that the Veteran should avoid overly strenuous and/or stressful activities. She indicated that light (non-labor intensive) work

allowing regular breaks would not be a limiting factor.

The Veteran submitted a private vocational opinion in January 2018 by A.J. A.J. opined that it was more likely than not that the Veteran is unable to secure and follow substantial gainful employment due to his service-connected disabilities. A.J. reviewed the Veteran's VA claims file, medical history, and education and work history. A cogent rationale was provided for her opinion.

Based on a review of all of the evidence of record, and resolving reasonable doubt in the Veteran's favor, the Board finds that the combined impact from his service-connected PTSD and disability manifested by fatigue, joint pain, gastrointestinal bleeding, headaches, shortness of breath, nausea, body shakes, and diarrhea together reasonably preclude him from securing or maintaining substantially gainful employment.

In coming to this conclusion, the Board acknowledges the Veteran's reports that he has worked "side jobs" over the last four to five years. However, the record shows that such work has been sporadic at best, and the ability to work sporadically is not substantially gainful employment. *Moore v. Derwinski*, 1 Vet. App. 356, 358 (1991).

Resolving all reasonable doubt in the Veteran's favor, a TDIU is warranted. Accordingly, the claim for TDIU is granted.

/s/ D. Johnson

D. Johnson
Veterans Law Judge
Board of Veterans' Appeals

ATTORNEY FOR THE BOARD — E. Mortimer, Associate Counsel

APPENDIX G

Not Published

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO: 20-3886

JOSHUA E. BUFKIN, APPELLANT,

V.

DENIS MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

JUDGMENT

The Court has issued a decision in this case. The time allowed for motions under Rule 35 of the Court's Rules of Practice and Procedure has expired.

Under Rule 36, judgment is entered and effective this date.

Dated: August 18, 2021

FOR THE COURT:

GREGORY O. BLOCK
Clerk of the Court

By: /s/ Anthony R. Wilson
Deputy Clerk

Copies to:
Kenneth M. Carpenter, Esq.
VA General Counsel (027)

APPENDIX H

Not Published

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO: 20-882

NORMAN F. THORNTON, APPELLANT,

V.

DENIS MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

JUDGMENT

The Court has issued a decision in this case. The time allowed for motions under Rule 35 of the Court's Rules of Practice and Procedure has expired.

Under Rule 36, judgment is entered and effective this date.

Dated: July 6, 2021

FOR THE COURT:

GREGORY O. BLOCK
Clerk of the Court

By: /s/ Anne P. Stygles
Deputy Clerk

Copies to:
Kenneth M. Carpenter, Esq.
VA General Counsel (027)

APPENDIX I

United States Code
Title 38. Veterans' Benefits

38 U.S.C. § 5107

§ 5107. Claimant responsibility; benefit of the doubt

(a) Claimant responsibility.— 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.

(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.

APPENDIX J

United States Code
Title 38. Veterans' Benefits

38 U.S.C. § 7261

§ 7261. Scope of review

(a) In any action brought under this chapter, the Court of Appeals for Veterans Claims, to the extent necessary to its decision and when presented, shall—

(1) decide all relevant questions of law, interpret constitutional, statutory, and regulatory provisions, and determine the meaning or applicability of the terms of an action of the Secretary;

(2) compel action of the Secretary unlawfully withheld or unreasonably delayed;

(3) hold unlawful and set aside decisions, findings (other than those described in clause (4) of this subsection), conclusions, rules, and regulations issued or adopted by the Secretary, the Board of Veterans' Appeals, or the Chairman of the Board found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or

(D) without observance of procedure required by law; and

(4) in the case of a finding of material fact adverse to the claimant made in reaching a decision in a case before the Department with respect to benefits under laws administered by the Secretary, hold unlawful and set aside or reverse such finding if the finding is clearly erroneous.

(b) In making the determinations under subsection (a), the Court shall review the record of proceedings before the Secretary and the Board of Veterans' Appeals pursuant to section 7252(b) of this title and shall—

(1) take due account of the Secretary's application of section 5107(b) of this title; and

(2) take due account of the rule of prejudicial error.

(c) In no event shall findings of fact made by the Secretary or the Board of Veterans' Appeals be subject to trial de novo by the Court.

(d) When a final decision of the Board of Veterans' Appeals is adverse to a party and the sole stated basis for such decision is the failure of the party to comply with any applicable regulation prescribed by the Secretary, the Court shall review only questions raised as to compliance with and the validity of the regulation.

APPENDIX K

Code of Federal Regulations
Title 38. Pensions, Bonuses, and Veterans' Relief

38 C.F.R. § 3.102

§ 3.102 Reasonable doubt.

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.