Vet. App. No. 16-1561

IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

EVANIE E. ATENCIO,
Appellant,

v.

DAVID J. SHULKIN, M.D.,
Secretary of Veterans Affairs,
Appellee.

ON APPEAL FROM THE BOARD OF VETERANS' APPEALS

BRIEF OF THE APPELLEE, SECRETARY OF VETERANS AFFAIRS

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BRIEF OF THE APPELLEE SECRETARY OF VETERANS AFFAIRS

I. ISSUE PRESENTED

Whether the Court should affirm a March 28, 2016, decision of the Board of Veterans' Appeals (Board), which denied a claim of entitlement to service connection for gastroesophageal reflux disease (GERD), to include as secondary to service-connected sinusitis.

II. STATEMENT OF THE CASE

A. Jurisdiction Statement

The Court has proper jurisdiction pursuant to 38 U.S.C 7252(a).

B. Nature of the Case

Appellant, Evanie E. Atencio, appeals the March 28, 2016, decision of the Board that denied entitlement to VA benefits based on service connection for

GERD, to include as secondary to service-connected sinusitis, or as an undiagnosed illness. (Record Before the Agency (R.) at 1-15). Appellant cites three errors in the Board's decision. First, Appellant asserts that the Board misinterpreted 38 C.F.R. § 3.317 in determining that service connection for GERD could not be awarded under this regulation. Second, Appellant argues the Board failed to properly apply the law and relied on an inadequate medical opinion in denying service connection for GERD on a direct basis. Third, Appellant argues the Board relied on an inadequate 2014 VA examination report, which does not adequately address the issue of aggravation. (Appellant's Brief (App. Br.) at 1-19). The Secretary disputes these contentions.

C. Statement of Relevant Facts

Appellant served on active duty from March 1988 to May 1988 and from January 1991 to July 1991. (R. at 1236-37, 1700-01). During her second period of service, she served in Operation Desert Shield/Storm. (R. at 1700-01).

In June 2000, the Regional Office (RO) awarded service connection for sinusitis and assigned a non-compensable rating, (R. at 1435 (1435-58)), but denied entitlement to service connection for other disorders, including GERD. (R. at 1443). On March 6, 2001, Appellant appealed, among other disabilities, the denial of her GERD claim. (R. at 1432 (1432-34)). A Statement of the Case (SOC) was issued in June 2003 continuing the denial of her GERD claim. (R. at 1137 (1125-38)). However, Appellant failed to perfect this appeal to the Board.

On February 7, 2006, Appellant requested to re-open her claim of entitlement to service connection for GERD. (R. at 1011-12). In November 2006, the RO denied reopening the previously denied claims of entitlement to service connection for GERD, as well as posttraumatic stress disorder (PTSD), with depression and asthma. (R. at 862-68). Appellant filed a timely notice of disagreement (NOD) on January 18, 2007. (R. at 835-37). An SOC was issued on August 29, 2007. (R. at 824-32). Appellant perfected her appeal to the Board on September 13, 2007. (R. at 823).

On April 22, 2010, Appellant testified before the Board. (R. at 683-710). Appellant testified that around 1993 or 1994, she experienced GERD-like symptoms, such as having a burning sensation in the chest, which continued for a few years. She testified that these symptoms were confused with indigestion, and as a result, she medicated with a bottle of Tums a day for many years. (R. at 703-4). Appellant's husband testified she was told by her doctor that her esophagus looked like it had "blisters on it." (R. at 704).

On February 18, 2011, the Board remanded the case to the RO for additional evidentiary development. (R. at 658-60). The RO issued Supplemental SOC (SSOC) dated August 15, 2012. (R. at 491-510). Appellant's appeal was again remanded in November 2012 to afford her a new hearing. (R. at 460-63). A hearing was held in April 2013. (R. at 449-57). The Board reopened Appellant's claim of entitlement to service connection for GERD in a

July 2013 decision, but remanded the claim for additional development, to include a VA examination. (R. at 441-43 (425-45)).

Appellant underwent a VA examination on April 9, 2014. (R. at 173-182). The examiner opined her GERD condition was not directly related to her military service, and that it was not caused by any of her service-connected conditions. (R. at 174). In a May 2014 SSOC, the RO continued the denial of Appellant's claim. (R. at 159 (148-61)). The appeal was returned to the Board and denied in a decision dated March 30, 2015. (R. at 94-104). Appellant appealed this decision to the Court, and the parties agreed to a Joint Motion for Remand (JMR) on the basis that the Board failed to consider Appellant's claim under the Gulf War presumption provisions of 38 C.F.R. § 3.317. (R. at 36-40). The Court remanded the case on November 18, 2015. (R. at 34).

The Board issued the decision on appeal on March 28, 2016, denying Appellant's claim. (R. at 1-15). The Board found Appellant has a history of GERD, a clinically diagnosed condition. However, the Board also found the preponderance of the evidence was against a finding that the GERD was related to any period of active service, to her service-connected asthma and/or sinusitis, or that it could be deemed an undiagnosed illness under 38 C.F.R. 3.317. The Board also noted that Appellant's GERD does not fall under the presumptive provisions because it falls within the excluded structural gastrointestinal diseases and is not a functional gastrointestinal disorder as the symptoms are explained by the diagnostic test results. (R. at 1-15). This appeal ensued.

III. SUMMARY OF THE ARGUMENT

The Court should affirm the Board's March 28, 2016, decision because the law of the case precludes any challenge to the issue of whether GERD was directly connected to active duty or was secondary to service connected sinusitis. *See Carter v. Shinseki*, 26 Vet.App. 534 (2014). Additionally, Appellant failed to show that the Board misinterpreted 38 C.F.R. § 3.317 or that the medical opinion relied on by the Board was incomplete or inadequate. Therefore, Appellant has failed to meet her burden of demonstrating prejudicial error in the March 28, 2016, decision. *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) (holding that Appellant bears the burden of demonstrating prejudicial error). *Hilkert v. West*, 12 Vet.App. 145, 151 (1991) (holding that Appellant bears the burden of demonstrating error);

IV. ARGUMENT

A. The Board properly interpreted 38 C.F.R. § 3.317 to preclude service connection for GERD because the Board properly considered whether Appellant's condition was otherwise characterized as a medically unexplained chronic multisymptom illness.

It is undisputed that Appellant served in Operation Desert Shield/Storm from January 1991 to July 1991 (R. at 1700-01) and qualifies as a Persian Gulf Veteran pursuant to 38 C.F.R. § 3.317(e). According to 38 C.F.R. § 3.317, VA will grant service connection to a Persian Gulf War veteran who exhibits objective indications of a qualifying chronic disability that manifest "during active duty in the Armed Forces in the Southwest Asia theater of operations during the Persian Gulf War" or to a degree of 10% or more during the relevant presumptive period. 38 U.S.C. § 1117; *see Gutierrez*

v. Principi, 19 Vet.App. 1, 7 (2004); 38 C.F.R. § 3.317(a)(1)(i) (2016) (implementing regulation).

There are two conditions for which VA may grant benefits on a presumptive basis under 38 C.F.R. § 3.317: an undiagnosed illness, or a medically unexplained chronic multisymptom illness. *See* 38 C.F.R. § 3.317(a)(2)(i)(A) and 38 C.F.R. § 3.317(a)(2)(i)(B). The regulation defines a medically unexplained chronic multisymptom illness as "a diagnosed illness without conclusive pathophysiology or etiology that is characterized by overlapping symptoms and signs and has features such as fatigue, pain, disability out of proportion to physical findings, and inconsistent demonstration of laboratory abnormalities." 38 C.F.R. § 3.317(a)(2)(ii).

The regulation sets forth three non-exhaustive examples of conditions that may be considered a medically unexplained chronic multisymptom illness: chronic fatigue syndrome, fibromyalgia, and functional gastrointestinal disorders (excluding structural gastrointestinal diseases). 38 C.F.R. § 3.317(a)(2)(i)(B).

Appellant asserts that the Board misinterpreted 38 C.F.R. § 3.317. (App. Br. at 1-19). Appellant argues that although she has been diagnosed with GERD, its etiology remains unsolved, and as such, she is entitled to service connection on a presumptive basis pursuant to 38 C.F.R. § 3.317 as a medically unexplained chronic multisymptom illness. Appellant argues that her GERD, although a structural gastrointestinal disease, as defined under the Note to § 3.317(a)(2)(i)(B)(3) and explicitly excluded from the presumption, may still qualify

as a medically unexplained chronic multisymptom illness under § 3.317(a)(2)(ii). (App. Br. at 6-7). She asserts that the Secretary's comments in the Federal Register support this conclusion and does not exclude service connection for structural gastrointestinal disorders (such as GERD or Inflammatory bowel disease (IBD)) under the regulation, but rather, it simply excluded them from the presumption of entitlement as functional gastrointestinal disorder. (App. Br. at 7, citing Presumptive Service Connection for Diseases Associated with Service in the Southwest Asia Theater of Operations During the Persian Gulf War: Functional Gastrointestinal Disorders, 76 Fed. Reg. 41,696, (final rule Jul. 15, 2011)). However, Appellant provides no legal support for her theory.

First, Appellant's argument—that the Board misinterpreted 38 C.F.R. § 3.317 in determining that service connection for GERD could not be awarded under this regulation—stems from a misreading of the regulation. As a threshold matter, because Appellant has been diagnosed with a chronic disability (GERD), her claim does not fall under 38 C.F.R. § 3.317(a)(1)(ii), which is explicitly applicable only to those disabilities that "[b]y history, physical examination, and laboratory tests cannot be attributed to any known clinical diagnosis." *See Stankevich v. Nicholson*, 19 Vet. App. 470, 472 (2006) ("The very essence of an undiagnosed illness is that there is no diagnosis."); *Gutierrez*, 19 Vet.App. at 10 (explaining that "claimed symptoms by history, physical examination, and laboratory tests cannot be related to any known clinical diagnosis for compensation to be awarded under section 1117" (emphasis in original)).

Second, Appellant does not argue that her GERD should be considered as a functional gastrointestinal disorder, (App. Br. at 6-7), rather, she argues that the Board erred by failing to consider her GERD as a "medically unexplained chronic multisymptom illness" under § 3.317(a)(2)(ii), separate and apart from consideration as a functional gastrointestinal disorder under § 3.317(a)(2)(i). (App. Br. at 7). Again, Appellant provides no legal support for this distinction. Appellant does not dispute that her GERD is a structural gastrointestinal disease; as such, structural gastrointestinal diseases, including GERD, are expressly excluded from presumptive service connection under § 3.317. *See* 76 Fed. Reg. at 41,696 (explaining that VA considers GERD, a structural, rather than functional, gastrointestinal disorder, precluding it from qualifying as a medically unexplained chronic multisymptom illness under 38 C.F.R. § 3.317(a)(2)(i)(B)(3)). The final rule also notes that inflammatory bowel diseases, such as ulcerative colitis or Crohn's disease and GERD are considered "organic" or structural diseases and not functional gastrointestinal diseases. 76 Fed. Reg. at 41,696.

Therefore, Appellant's GERD, which is a structural, rather than functional, gastrointestinal disorder, is precluded from qualifying as a medically unexplained chronic multisymptom illness under § 3.317(a)(2)(i)(B)(3). As a result, Appellant's GERD does not fall under any of the requirements of 38 C.F.R. § 3.317.

Therefore, contrary to Appellant's argument, the Board did not misinterpret 38 C.F.R. § 3.317. As indicated above, there is no dispute regarding Appellant's

diagnosed GERD being a structural gastrointestinal disease. Therefore, the Board properly applied the regulation to the facts of this case by noting Appellant's history of GERD, diagnosed in 1998, (R. at 6, 173 (173-182), 268, 1421, 1423), but concluded that the presumption could not be considered because it was a gastrointestinal disease explainable by endoscopic signs of injury or disease, and diagnosed as a result of an endoscopy and upper GI series. (R. at 5). Therefore, the Board correctly concluded that Appellant's GERD fell squarely within the excluded structural gastrointestinal disease and was not a functional gastrointestinal disorder, as the symptoms were explained by the diagnostic test results. (R. at 5-6).

The drafting and language of the regulation makes it clear that VA decided to consider gastrointestinal disorders as either functional gastrointestinal disorders or structural gastrointestinal diseases. *See* 38 C.F.R. § 3.317(a)(2)(i)(3), Note; 76 Fed. Reg. at 41,696. Under 38 U.S.C. § 501, Congress granted the Secretary general rule-making authority "to prescribe all rules and regulations [that] are necessary or appropriate to carry out the laws administered by the Secretary." 38 U.S.C. § 501. Here, as articulated by the regulation, the Secretary clearly defined functional gastrointestinal disorders to be considered, and specifically excluded structural gastrointestinal diseases. *See King v. Shinseki*, 26 Vet.App. 484, 488 (2014) (noting that in assessing the meaning of a regulation, words should not be read in isolation, but should be read in the context of the regulatory structure and scheme). As such, Appellant's

attempt to seek consideration under § 3.317(a)(2)(ii) rather than (a)(2)(i) is misguided.

Additionally, Appellant's argument that the etiology of her GERD is inconclusive, thereby warranting the presumptions of § 3.317, is nothing more than a red herring. (App. Br. at 8). As noted above, Appellant's GERD has been excluded from consideration under "medically unexplained chronic multisymptom illness," because it is a structural gastrointestinal disease. *See* 38 C.F.R. § 3.317(a)(ii)(2)(i). The Board properly addressed this argument by noting that while presumptive provisions do apply to a "medically unexplained chronic multisymptom illness" which is diagnosed, but "without conclusive pathophysiology or etiology," the regulation also specifically excludes "structural gastrointestinal diseases" and goes on to define the functional gastrointestinal diseases that are contemplated by the regulation as "medically unexplained chronic multisymptom illness" which is unexplained by any structural, endoscopic, laboratory, or other objective signs of injury or disease related to the gastrointestinal tract. (R. at 6-7). The Board concluded that Appellant's GERD has been diagnosed based on endoscopy and an upper GI series, and therefore, her case falls squarely within the excluded structural gastrointestinal diseases and is not a functional gastrointestinal disorder, as the symptoms are explained by the diagnostic test results; as such, it is not a "medically unexplained chronic multisymptom illness." (R. at 6-7).

However, even assuming Appellant's GERD was not excluded and that consideration of etiology was relevant, the section Appellant cites to in support of her argument clearly excludes disabilities with "partially understood etiolog[ies]." 38 C.F.R. § 3.317 (a)(ii)(2)(ii). Additionally, to be a medically unexplained chronic multisymptom illness, there must be evidence that the disability is out of "proportion to the physical findings and inconsistent demonstrations of laboratory abnormalities. . ." C.F.R. § 3.317 (a)(ii)(2)(ii). Here, Appellant points to a variety of symptoms, but does not show they equate to the requirements for a medically unexplained chronic multisymptom illness. (App. Br. at 8). Rather, defined medially, GERD is "any condition . . . that results from gastroesophageal reflux ranging in seriousness from mild to life-threatening; principal characteristics are heartburn and regurgitation." *See* DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 384, 533 (32nd ed. 2012) (DORLAND'S). There could also be damage to the esophageal epithelium. *Id*. Gastroesophageal reflux includes "reflux of the stomach and duodenal contents into the esophagus." DORLAND'S at 1616.

Appellant's argument is underdeveloped because she has not provided any evidence that these symptoms qualify for consideration under the requirements for a medically unexplained chronic multisymptom illness, other than to blandly state that the variety of symptoms equates to a "cluster of signs and symptoms." (App. Br. at 8). *See Locklear v. Nicholson*, 20 Vet.App. 410 (2006) (providing that an appellant's brief must contain "an argument . . . and the reasons for [it], with citations to the authorities . . . relied on"). *See Hyder v.*

Derwinski, 1 Vet.App. 221, 225 (1991) (holding that "[l]ay hypothesizing, particularly in the absence of any supporting medical authority, serves no constructive purpose, and cannot be considered"); *see also Evans v. West*, 12 Vet.App. 22, 31 (1998) (Court will not consider unsupported contention absent evidence and argument); *Brewer v. West*, 11 Vet.App. 228, 236-37 (1998) (Court need not deal further with appellant's vague argument which was actually a mere assertion made without citations to legal support). *See Kern v. Brown*, 4 Vet.App. 350, 353 (1993) "[a]ppellant's attorney is not qualified to provide an explanation of the significance of clinical evidence").

So while there is no dispute that Appellant's GERD is characterized by multiple symptoms and a partially understood etiology, it is properly characterized as a structural gastrointestinal disorder, specifically excluded from the presumption for a medically unexplained chronic multisymptom illness; and Appellant has not shown her GERD otherwise meets the threshold requirements for consideration as a medically unexplained chronic multisymptom illness under § 3.317(a)(ii)(2)(ii). As such, Appellant's argument must fail.

B. The "law of the case" doctrine precludes the re-adjudication of Appellant's direct and secondary theories of entitlement for service connection for GERD.

On March 30, 2015, the Board adjudicated the issue of entitlement to service connection for GERD, to include as directly related to Appellant's service and as secondary to her service-connected sinusitis. (R. at 99) ("The Veteran contends that the GERD is a result of direct service or as a result of service-

connected sinusitis on a secondary theory of service connection."). (R. at 99). The Board determined that Appellant's GERD was not directly related to her service. (R. at 100). Additionally, the Board determined that it was "less likely than not that the Veteran's [GERD was] either proximately due to or aggravated by service-connected sinusitis." (R. at 100). The Board denied Appellant's claim on these grounds. (R. at 97, 101, 102). Appellant appealed this determination to this Court in June 2015. (R. at 83-87). The June 2015 appeal was resolved by issuance of a JMR in November 2015. (R. at 34, 36-40). The appeal was remanded to the Board solely to consider whether the provisions of 38 C.F.R. § 3.317 were applicable. (R. at 36-40). The JMR specifically directed that "the Board should consider whether Appellant is a Persian Gulf Veteran as contemplated by 38 U.S.C. § 1117 and, if so, whether presumptive entitlement to service connection based on that statute and the regulatory provisions of 38 C.F.R. § 3.317 is warranted." (R. at 38). There was no mention of entitlement on a direct basis or as secondary to service-connected sinusitis.

The Secretary notes that Appellant's current counsel represented her before the Court in that appeal and negotiated the terms of the November 2015 JMR. (R. at 39). This is pertinent because Appellant now raises an argument not previously challenged. However, the law-of-the-case doctrine precludes Appellant from raising this argument. "Where a case is addressed by an appellate court, remanded, then returned to the appellate court, the 'law of the case' doctrine operates to preclude reconsideration of identical issues." *Johnson*

v. Brown, 7 Vet.App. 25, 26 (1994) (citing *In re United States Steel Corp*., 479 F.2d 489, 493-94 (6th Cir. 1973)). The purpose of the doctrine is to preclude re-litigation of a question already considered. *Id*. at 27; *see also Browder v. Brown*, 5 Vet.App. 268, 270 (1993) ("Under the doctrine of 'law of the case,' questions settled on a former appeal of the same case are no longer open for review."); *Augustine v. Principi*, 343 F.3d 1334, 1339 (Fed. Cir. 2003) (holding that the "law of the case" doctrine applies to a legal issue that has actually been decided); *Intergraph Corp. v. Intel Corp.*, 253 F.3d 695, 699 (Fed. Cir. 2001) (holding that, under law-of-the-case doctrine, courts of appeals are generally "bound by findings" "made by court of appeals in a prior appeal of the same case") (quoting *Ellard v. Ala. Bd. of Pardons and Paroles*, 928 F.2d 378, 381 (11th Cir. 1991)).

The doctrine "operates to protect the settled expectations of the parties and promote orderly development of the case." *Augustine*, 343 F.3d at 1339 (quoting *Suel v. Sec'y of Health & Human Servs.*, 192 F.3d 981, 984 (Fed. Cir. 1999)). To hold otherwise in this case would also create a tension with the Court's holding in *Carter*, 26 Vet.App. at 534, where the Court held "when represented parties enter into a joint motion for remand of an appeal from this Court to the Board, the parties must give clear direction to the Board of the errors that they agree were raised by the record and specify what further action the Board must take with respect to the claim." *Id*. at 547. Here, the Board relied on the determination that there was no error in the previous analysis, except for the

failure to consider the provisions of sections 38 U.S.C. § 1117 and 38 C.F.R. § 3.317.

Furthermore, the March 30, 2015, decision relied on the April 2014 Compensation and Pension examination opinion of Janet E. Sanchez, M.D. (R. at 100), which is the same opinion relied on by the Board in this current decision. (R. at 9). This is a reasonable reliance given that Appellant did not contest this examination and there was no error in the March 30, 2015, decision, except for the failure to consider the provisions of sections 1117 and 3.317. As a result, no new development was undertaken since the March 30, 2015, decision because the adequacy of Dr. Sanchez's examination and opinion was not challenged in the November 2015 JMR. (R. at 36-40). However, Appellant now questions the adequacy of Dr. Sanchez's examination. (App. Br. at 17).

Nonetheless, in the interest of completeness, and if the Court finds that the "law of the case" doctrine is not applicable, the Secretary will address the remainder of Appellant's concerns.

C. Dr. Sanchez's examination opinion was complete and adequate and the Board properly relied on it to furnish an adequate statement of reasons and bases for its finding that Appellant was not entitled to a direct service connection for GERD.

Appellant argues that the Board relied on an inadequate medical opinion in finding that the evidence weighed against direct service connection. (App. Br. at 9). Appellant makes five arguments in alleging that Dr. Sanchez's opinion is inadequate: First, Appellant contends Dr. Sanchez relied on medical literature

regarding nexus. Second, Appellant argues that Dr. Sanchez's statement that there is "insufficient evidence to determine whether an association exists between deployment to the Gulf War and structural gastrointestinal diseases" does not address the facts of this case. Third, Appellant argues Dr. Sanchez relied on the lack of treatment in service. Fourth, Appellant argues Dr. Sanchez relied on delayed diagnosis of esophageal reflux until 1998. Fifth, Appellant asserts Dr. Sanchez relied on lack of nexus opinion from other treatment records. (App. Br. at 9-18).

Appellant's arguments equate to nothing more than mere disagreements with Dr. Sanchez's medical judgment, which is not sufficient to demonstrate that an examination is inadequate. *Stefl v. Nicholson*, 21 Vet.App. 123 (2007) (finding that mere disagreement with an examiner's medical judgment is insufficient to demonstrate that an examination is inadequate); *Ardison v. Brown*, 6 Vet.App. 407 (1994); *Green v. Derwinski*, 1 Vet.App. 124 (1991); *see also Monzingo v. Shinseki*, 26 Vet.App. 97, 106 (2012) (recognizing that the "general presumption of competence includes a presumption that physicians remain up to date on medical knowledge and current medical studies") (citing *AMERICAN MEDICAL ASSOCIATION CODE OF MEDICAL ETHICS, PRINCIPLE OF MEDICAL ETHICS V*).

In addition, Appellant confuses the duties of a medical examiner with those of a VA adjudicator. *See Monzingo*, 26 Vet.App. at 105. A medical examiner is not required "to explicitly lay out the examiner's journey from the facts to a conclusion." *Id*. at 106. Rather, a medical examiner need only explain the basis

of his or her conclusion. *Id*.; (explaining that medical examination reports are adequate "when they sufficiently inform the Board of a medical expert's judgment on a medical question and the essential rationale for that opinion"). *See also Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 301 (2008) (providing that an adequate examination report must contain a "reasoned medical explanation" connecting its conclusions with supporting data). Whether a medical opinion is adequate is a finding of fact subject to review under the deferential clearly erroneous standard. *See D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008) (whether a medical opinion is adequate is a finding of fact reviewed under the clearly erroneous standard).

Appellant's first argument—that it was incorrect for Dr. Sanchez to rely on medical literature to support nexus—is not persuasive. Clearly, this Court, in *Nieves-Rodriguez*, 22 Vet.App. at 303, found review of pertinent medical literature may furnish information relevant to diagnostic and nexus issues. Dr. Sanchez appropriately used medical literature and Appellant's medical records to support her findings, noting that medical literature shows that sinusitis can result from GERD, but evidence-based medical literature does not show that chronic or recurrent sinusitis commonly results in or aggravates a condition of GERD. (R. at 175). Therefore, based on *Nieves-Rodriguez*, 22 Vet.App. at 303, it was proper for Dr. Sanchez to refer to medical literature. *See also*, *Rucker v. Brown*, 10 Vet.App. 67, 74 (1997) (holding that evidence from a scientific journal combined with a physician's statement was "adequate to meet the threshold test

of plausibility"). Medical examiners have broad discretion in making medical judgments and selecting the clinical methods they deem most appropriate to address the medical issues presented. *See Allin v. Brown*, 6 Vet.App. 207, 214 (1994).

Second, Appellant argues that Dr. Sanchez improperly based her conclusion that there is no link between Appellant's service in Southwest Asia and Appellant's disorders, on the fact that the National Academy of Sciences did not find sufficient evidence to conclude that structural gastrointestinal disorders should be presumed to be due to Gulf War service. (App. Br. at 15; R. at 175). Appellant cites *Stefl*, 21 Vet.App. at 123, alleging that the Court in *Stefl* found an opinion inadequate because the "expert should have explained whether it was at least as likely as not that the claimant's herbicide exposure caused his sinus disorder." (App. Br. 14; *Stefl*, 21 Vet.App. at 124). However, this case is readily distinguishable from *Stefl* because, here, in response to the RO remand instruction, Dr. Sanchez considered direct service connection and explicitly stated that it was less likely than not that Appellant's current GERD disorder was either proximately due to or aggravated by service connected asthma and/or sinusitis or that the current GERD disorder began during service. (R. at 174). In contrast, the examiner in *Stefl* did not respond to a remand instruction and only discussed presumptive service connection, but did not discuss direct service connection or whether it was likely as not that exposure caused the condition. *Stefl*, 21 Vet.App. at 123-124.

Appellant also compares this case to *Polovick v. Shinseki*, 23 Vet.App. 48, 55 (2009), arguing that the Board in *Polovick* relied on an opinion that indicated a claimant's brain tumor was not related to active service solely because the National Academy of Sciences did not list it as a condition caused by herbicide exposure. (App. Br. at 14; *Polovick*, 23 Vet.App. at 55). However, again, this case is readily distinguishable from *Polovick* because, here, Dr. Sanchez did not "solely" rely on the findings of the National Academy of Sciences. On the contrary, Dr. Sanchez relied on totality of the record, including medical history, medical literature, and lay statements, which is consistent with the holding in *Polovick* that the findings of the National Academy of Sciences cannot be the sole basis for an examiner's determination and that a medical professional's opinion cannot be rejected simply because the opinion is based in part on statistical analysis. Rather, it is the total analysis provided by the medical professional that must be weighed and considered by the Board. *Polovick*, 23 Vet.App. at 54.

In addition, Appellant argues that an examiner is tasked with considering the specific facts of a case, but Appellant does not acknowledge that Dr. Sanchez did exactly that. Here, Dr. Sanchez considered Appellant's medical history, as detailed above, and used other factors, such as medical literature, statistical findings, lay statements, and her medical expertise in formulating her opinion. Therefore, Appellant selectively reads portions of Dr. Sanchez's report, as opposed to reading the opinion as a whole, as legally required. *See*

Monzingo, 26 Vet.App. at 105 (holding that a medical examination must be read as a whole).

Appellant also argues that, contrary to Dr. Sanchez's opinion, the 1998 opinion of Kajsa T. Harris, M.D., was based on the facts of Appellant's specific case and therefore, Dr. Sanchez improperly found it was not supported. (App. Br. at 16). Appellant avers that Dr. Harris indicated that her esophageal burns likely occurred as a result of chemical exposure in service. (App. Br. at 16; R. at 1378, 1865). However, contrary to Appellant's argument, Dr. Harris did not associate Appellant's GERD with service. (R. at 1378). Rather, Dr. Harris cited to Appellant's subjective report that a laparoscopic Nissan procedure was performed and then noted that it was performed because chemical exposure in service may have caused damage to the esophagus. (R. at 1378). Dr. Harris did not state whether this damage caused GERD or whether there was a positive association determined after the procedure. (R. 1865, 1378). Therefore, Appellant's use of Dr. Harris's statement to support a direct relationship of GERD to service is not probative or persuasive.

In addition, contrary to Appellant's suggestion, Dr. Sanchez did not find Dr. Harris's opinion not supported merely because statistical analysis does not support a link. (App. Br. at 16). Rather, Dr. Sanchez found Dr. Harris's opinion not supported by any evidence, which includes Appellant's medical history, medical literature, statistical analysis, and lay statements. (R. at 175).

Third, Appellant's argument that it was incorrect for Dr. Sanchez to rely on lack of treatment in service, is not persuasive. Appellant cites to *Buchanan v. Nicholson*, 451 F.3d 1331, 1337 (Fed. Cir. 2006) to argue that lack of contemporaneous records is not a basis to reject the probative value of lay testimony and that the Board did not explain why Appellant's lack of complaint of GERD prior to her diagnosis with the condition is evidence against her claim (App. Br. at 11-12). However, Appellant misapplies *Buchanan*, because the Board does not rely on lack of evidence, but rather relies on explicit statements from Appellant stating that she had no symptoms. (R. at 10, 1709 (1707-1715), 1716, 1728 (1728-1732)). While the Board noted that the records are silent for any complaints of symptoms related to GERD during Appellant's active service, the Board also provided several instances where Appellant affirmatively denied symptoms related to GERD and other medical health issues (R. at 9-10, 1716), which directly contradicts Appellant's assertion that her GERD was related to service.

For example, the Board noted that an August 1987 enlistment examination shows no report of gastrointestinal issues. In fact, the Board properly noted Appellant reported being in excellent health and was not on any medication. (R. at 6-7, 1716). Similarly, on March 1, 1988, Appellant stated that there were no changes in her medical status since her August 1987 examination. (R. at 1709, 1728). In her next examination during active service in January 1991 for medical clearance prior to deployment, no issues or symptoms associated with GERD

were seen or noted in the record. Further, during deployment, the record is silent for any GERD related issues. (R. at 6, 1872 (1872-1889)). The Board also noted that even after return from deployment, although Appellant claimed she had acid reflux at that time, a November 1991 periodic examination report revealed no such issues. (R. at 6, 1755). On the contrary, her gastrointestinal symptoms were normal, she stated she was in excellent health, and on no medications, and she explicitly denied having, or ever having, frequent indigestion or stomach, liver, or intestinal trouble. (R. at 6-7, 1755 (1753-1757)). Therefore, the above evidence does not support Appellant's use of *Buchanan* and her allegation of a direct service connection for GERD. In addition, the above evidence conflicts with Appellant's assertion that the Board did not provide adequate reasons and bases for its findings.

Fourth, Appellant's argument that it was incorrect for Dr. Sanchez to rely on delayed diagnosis of esophageal reflux until 1998, is not persuasive. Appellant asserts that Dr. Sanchez failed to explain why the date of diagnosis ruled out a positive nexus determination. (App. Br. at 12-13; R. at 175). However, contrary to Appellant's argument, Dr. Sanchez explained why the date of diagnosis ruled out a positive nexus determination because she noted that even though there are numerous medical records for other conditions after service; service records are silent for symptoms or history of esophageal reflux, heartburn, or dyspepsia until 1998, seven years after service. (R. at 174). Dr. Sanchez also noted that the specialist Gastroenterologist and surgeon reports do

not relate esophageal symptoms to service. (R. at 174). Dr. Sanchez further noted that records show Appellant was first empirically treated for probable gastroesphageal reflux (with Prilosec) for an unknown period of time beginning in June 1998, but there was no evidence of esophagitis or esophageal erosions until the Endoscopy in January 1999. (R. at 175).

As a result, based on Dr. Sanchez's findings above, the date of diagnosis is relevant because, not only are medical records silent for complaints of GERD symptoms before the diagnosis, but there are explicit denials of such symptoms and any medical problems in general, and there are explicit reports of excellent health. (R. at 1755, 1707-1715, 1872).

Fifth, Appellant's argument that it was incorrect for Dr. Sanchez to rely on the lack of nexus opinion from other treatment providers because these records are irrelevant, is not persuasive. (App. Br. at 13). This argument is similar to the above two arguments. Appellant asserts that earlier treatment providers did not diagnose GERD for service connection purposes, and so there was no reason they should have made that determination. *Id*. However, regardless of whether providers diagnosed GERD for service connection purposes or not, the fact that many medical records after service were also silent for symptoms related to heart burn, esophageal reflux, or dyspepsia until 1998—which is seven years after service—indicates no nexus. (R. at 174, 254, 1658). The lack of nexus evidence is also consistent with records cited by the Board that show Appellant was in excellent health. (R. at 6-8, 173-178, 1707-1715). The Board, therefore,

properly concluded this is convincing evidence when weighed against Appellant's statements years later that her GERD began in 1991. (R. at 8).

Accordingly, Dr. Sanchez's report is adequate for adjudication purposes, as it was based upon Appellant's medical history, medical literature, statistical analysis, and lay statements, and describes the disability in sufficient detail. Because Dr. Sanchez's examination report was adequate, the Board's reliance on such report was proper. In addition, the Board's decision includes an adequate statement of reasons and bases for its factual findings and conclusions of law that is understandable to Appellant and facilitates Court's review. *Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990).

D. Dr. Sanchez's examination opinion that the Board relied on was complete and adequate and the Board furnished adequate statement of reasons and bases for its finding that there was no secondary service connection due to service-connected sinusitis and that service-connected sinusitis did not aggravate Appellant's GERD disorder.

Service connection may be awarded on a secondary basis if a claimant suffers a disability that is "proximately due to or the result of a service-connected disease or injury." *See* 38 C.F.R. § 3.310(a).

Appellant argues that although the Board considered whether GERD could be directly related to sinusitis, it did not consider whether GERD was aggravated by sinusitis and it relied on Dr. Sanchez's opinion, which does not adequately address aggravation. (App. Br. at 17). To demonstrate prejudice, Appellant points to lay evidence that her ailments manifested as sinusitis first, and then

heartburn. (App. Br. at 17). She also points to evidence from Dr. Sanchez's examination that her GERD symptoms improved after a procedure, while her sinusitis did not. (App. Br. at 17). This evidence, according to Appellant, shows a relationship between GERD and sinusitis. Appellant also argues that it is unclear how the chronologies of her symptoms suggest that her sinusitis did not act to aggravate her GERD. (App. Br. at 18).

Appellant's arguments are not persuasive as again, they are nothing more than mere disagreements with Dr. Sanchez's medical judgment, which is not sufficient to demonstrate that an examination is inadequate. *Stefl,* 21 Vet.App. at 123; *Ardison*, 6 Vet.App. at 407; *Green*, 1 Vet.App. at 124.

Appellant's argument that the literature cited by Dr. Sanchez does not address aggravation in any way is also not persuasive because Dr. Sanchez used literature as one factor among other factors, in formulating an opinion about aggravation. Again, Appellant selectively reads portions of Dr. Sanchez's report. *See Monzingo*, 26 Vet.App. at 105.

Contrary to Appellant's argument, Dr. Sanchez provided a well-supported and detailed rationale for her opinion regarding secondary service-connection and aggravation. Regarding the causal relationship and chronology of her impairments, Dr. Sanchez opined that a medical literature review indicates that since gastroesophageal reflux is "so common, it may simply be a coexisting condition without a causal relationship" to conditions such as asthma, chronic cough, and chronic sinusitis. (R. at 174-175). This contradicts Appellant's

argument that because her sinusitis and asthma developed before GERD, these conditions somehow contributed to GERD. (App. Br. at 17). Therefore, just because an individual has more than one of these conditions does not mean a medically causal relationship exists. (R. at 11, 174-175). Dr. Sanchez also noted that medical literature shows asthma and sinusitis can develop from GERD, but not vice versa—that sinusitis can result in or aggravate GERD. (R. at 11, 175). The Board, therefore, properly found Dr. Sanchez's opinion was not inadequate because she relied on the medical history provided by Appellant as to chronology of her symptoms and also provided a rationale that since Appellant's asthma and sinusitis did not improve after surgery for GERD, those symptoms have a different etiology. (R. at 11, 175).

Appellant also relies on *El-Amin v. Shinseki*, 26 Vet.App. 136, 140 (2013) to argue that the Court found a medical opinion inadequate where the examiner focused on direct causation and attributed the cause of the claimed condition to other factors. (App. Br. at 17). Appellant argues that the Board committed the same error because it did not provide specific rationale as to how it interpreted Dr. Sanchez's statements as having considered aggravation. (App. Br. at 17). However, Appellant's argument is not persuasive.

Importantly, this case is readily distinguishable from *El-Amin*, where the examiner's opinion focused solely on direct causation and did not consider the issue of aggravation. *El-Amin*, 26 Vet.App. at 140. Here, as detailed above, Dr. Sanchez specifically addressed aggravation, noting that medical literature shows

that sinusitis can result from GERD, but evidence-based medical literature does not show that chronic or recurrent sinusitis commonly results in, or aggravates, a condition of GERD. (R. at 174-175).

The above explanations conflict with Appellant's assertion that Dr. Sanchez provided a conclusory statement and did not provide any rationale regarding aggravation. On the contrary, Dr. Sanchez relied on the totality of the evidence—including Appellant's medical records, which discussed chronology of symptoms, and medical literature, which discussed causation—to reach her conclusion regarding aggravation and she provided a detailed, well supported explanation to support her findings.

Therefore, Dr. Sanchez's examination's report is adequate because it is based on totality of the evidence of record.

E. Appellant has abandoned all issues not argued in her brief.

It is axiomatic that issues or arguments not raised on appeal are abandoned. *See Disabled Am. Veterans v. Gober*, 234 F.3d 682, 688 n. 3 (Fed. Cir. 2000) (stating that the Court would "only address those challenges that were briefed"). Any and all issues that have not been addressed in Appellant's Brief have therefore been abandoned.

V. CONCLUSION

WHEREFORE, for the foregoing reasons, the Secretary respectfully submits that the Board's March 28, 2016, decision contains no clear error and it provided an adequate statement of reasons or bases for finding Appellant is not entitled to service-connection for GERD, and the Board's decision should be affirmed.

Respectfully submitted,

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