

**IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS**

HARRY J. JOHNSON,
Appellant,

v.

ROBERT A. McDONALD,
Secretary of Veterans Affairs,
Appellee.

**ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS**

**BRIEF OF APPELLEE
SECRETARY OF VETERANS AFFAIRS**

LEIGH A. BRADLEY
General Counsel

MARY ANN FLYNN
Chief Counsel

RICHARD A. DALEY
Deputy Chief Counsel

YVETTE R. WHITE
Appellate Attorney
U.S. Department of Veterans Affairs
Office of the General Counsel (027E)
810 Vermont Avenue, N.W.
Washington, D.C. 20420
(202) 632-5989

Attorneys for Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
TABLE OF RECORD PROCEEDINGS INDEX	iv
ISSUE PRESENTED.....	1
STATEMENT OF THE CASE	1
A. Jurisdictional Statement	1
B. Nature of the Case	2
C. Statement of Facts.....	2
SUMMARY OF ARGUMENT	3
ARGUMENT.....	4
The Court should affirm the Board’s decision because Appellant has not demonstrated prejudicial error sufficient to warrant remand where the evidence does not indicate that a medical examination is warranted.....	4
CONCLUSION	10

TABLE OF AUTHORITIES

CASES

<i>Allday v. Brown</i> , 7 Vet.App. 517 (1995) -----	6
<i>Barrett v. Shinseki</i> , 22 Vet.App. 457 (2009)-----	4
<i>Cacciola v. Gibson</i> , 27 Vet.App. 45 (2015)-----	5
<i>Caluza v. Brown</i> , 7 Vet.App. 498 (1995)-----	9
<i>Clemons v. Shinseki</i> , 23 Vet.App. 1 (2009) -----	2
<i>Dela Cruz v. Principi</i> , 15 Vet.App. 143 (2001)-----	9
<i>Elzour v. Ashcroft</i> , 378 F.3d 1143 (10th Cir.2004) -----	9
<i>Grivois v. Brown</i> , 6 Vet.App. 136 (1994)-----	5
<i>Kern v. Brown</i> , 4 Vet.App. 350 (1993)-----	7
<i>Locklear v. Nicholson</i> , 20 Vet.App. 410 (2006) -----	8
<i>Maxson v. Gober</i> , 230 F.3d 1330 (Fed. Cir. 2000)-----	9
<i>McLendon v. Nicholson</i> . 20 Vet.App. 79 (2006) -----	3, 4, 6, 7
<i>Pederson v. McDonald</i> , 27 Vet.App. 276 (2015)-----	5
<i>Schafrath v. Derwinski</i> , 1 Vet.App. 589 (1991)-----	6
<i>Shinseki v. Sanders</i> , 129 S. Ct. 1696 (2009) -----	4
<i>Stolt-Nielson S.A. v. Animal Feeds International Corp.</i> , 559 U.S. 662 (2010) -----	7
<i>Vogan v. Shinseki</i> , 24 Vet.App. 159 (2010) -----	4
<i>Waters v. Shinseki</i> , 601 F.3d 1274 (Fed. Cir. 2010)-----	8
<i>Woehlaert v. Nicholson</i> , 21 Vet.App. 456 (2007) -----	7

STATUTES

38 U.S.C. § 5103A-----	5
38 U.S.C. § 5103A(d)(1) -----	5
38 U.S.C. § 5103A(d)(2) -----	6
38 U.S.C. § 7104(d)(1) -----	6
38 U.S.C. § 7252(a) -----	1
38 U.S.C. § 7261(a)(3)(A) -----	6
38 U.S.C. § 7261(b)(2) -----	4

RECORD OF PROCEEDINGS INDEX

R. at 2-15(Board decision – Jul 8, 2015).....	<i>passim</i>
R. at 17(Certification of Appeal)	2
R. at 25(VA 9 Appeal)	3
R. at 29-48(SOC)	3
R. at 67(NOD)	3
R. at 68-74(VA Rating Decision)	3
R. at 78-252(VA Progress Notes).....	3, 9
R. at 260-61(VA Memorandum)	3
R. at 331-353(Private Medical Records)	3
R. at 409-410(Statement in Support of Claim)	3
R. at 474-481(Veteran’s Supplemental Claim).....	2, 9
R. at 588-644(Statement of Medical Condition)	2
R. at 769-854, 1409-1410, 1415-1423(STR)	2
R. at 1456(DD Form 214).....	2
R. at 1549-2936(VA Progress Notes)	3

**IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS**

HARRY J. JOHNSON,)	
Appellant,)	
)	
v.)	Vet.App. No. 15-3334
)	
ROBERT A. McDONALD,)	
Secretary of Veterans Affairs,)	
Appellee.)	

**ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS**

**BRIEF OF APPELLEE
SECRETARY OF VETERANS AFFAIRS**

I. ISSUE PRESENTED

Whether the Court should affirm the Board of Veterans' Appeals (Board) decision of July 8, 2015, which denied Appellant's claim of entitlement to service connection for an acquired psychiatric disorder, to include post-traumatic stress disorder (PTSD).

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

The United States Court of Appeals for Veterans Claims (Court) has jurisdiction over the instant appeal pursuant to 38 U.S.C. § 7252(a).

B. Nature of the Case

Appellant, Harry J. Johnson, appeals a July 8, 2015, decision of the Board that denied his claim of entitlement to service connection for an acquired psychiatric disability, to include PTSD. (Record Before the Agency (R.) 2-15). Notably, the claim certified for appeal was entitlement to service connection for PTSD. (R. at 17). However, the Board, based on the Court's holding in *Clemons v. Shinseki*, 23 Vet.App. 1 (2009), explained that the scope of the appeal included entitlement to service connection for an acquired psychiatric disability because the record revealed "the presence of a psychiatric diagnosis other than PTSD." (R. at 4 (2-15)).

On appeal, Appellant asserts that the Board failed to adequately address whether he was entitled to a medical examination and provide an adequate statement of reasons or bases for its determination. (Appellant's Brief (App. Br.) at 4-10). As to be explained below, Appellant has not carried his burden of persuasion. Thus, the Court should affirm the Board's decision.

C. Statement of Facts

Appellant, who had active service from April 1965 to June 1966 (R. at 1456), submitted a claim for entitlement to service connection for PTSD in October 2010. (R. at 475 (474-481)). His service records and service medical records (SMRs) are of record. (R. at 588-644, 769-854, 1409-10, 1415-23). In October 2010, VA received progress notes, which were dated from October 2009 to September 2010. (R. at 411-66). To support his claim, Appellant in November

2010 submitted a statement in support of claim for entitlement to service connection for PTSD form. (R. at 409-10).

In June 2011, VA received medical records from Charter Behavioral Health Systems, Palmetto Mental Health, which reflect that Appellant was diagnosed with, *inter alia*, depression, not otherwise specified. (R. at 338 (331-53)). A memorandum, dated in June 2012, reported that the information required to secure information about Appellant's stressor for the U.S. Army and Joint Services Records Research Center was insufficient. (R. at 260-61). VA received more progress notes in July 2012, which were dated from May 1987 to December 1996. (R. at 78-252). During November 2012, VA denied Appellant's claim for entitlement to service connection for PTSD. (R. at 68-74). Appellant submitted a notice of disagreement (NOD) in December 2012. (R. at 67). Additional progress notes were received in December 2013, which were dated from January 1999 to November 2013. (R. at 1549-2936). A statement of the case (SOC) was issued in January 2014. (R. at 29-48). Appellant submitted his substantive appeal in January 2014. (R. at 25). On July 8, 2015, the Board rendered a final decision, which Appellant appealed to this Court. (R. at 2-15).

III. SUMMARY OF THE ARGUMENT

The Court should affirm the Board's decision because Appellant has failed to carry his burden of persuasion and demonstrate that the Board erred in its determination that a medical examination was not warranted based on the Court's holding in *McLendon v. Nicholson*. 20 Vet.App. 79, 81 (2006).

IV. ARGUMENT

The Court should affirm the Board's decision because Appellant has not demonstrated prejudicial error sufficient to warrant remand where the evidence does not indicate that a medical examination is warranted.

Appellant asserts that the Board erred by failing to obtain a medical opinion pursuant to the Court's holding in *McLendon v. Nicholson*, as it pertains to his claim for entitlement to service connection for a psychiatric disorder. 20 Vet.App. at 81. As to this assertion of error raised by Appellant, the Secretary urges this Court to find it unavailing. Appellant has the burden of demonstrating error in the Board's decision. *Barrett v. Shinseki*, 22 Vet.App. 457, 461 (2009). Typically, he must also demonstrate prejudice resulting from that error. *Shinseki v. Sanders*, 129 S. Ct. 1696, 1706 (2009); see also *Vogan v. Shinseki*, 24 Vet.App. 159, 163 (2010) (noting that the Court must take due account of the rule of prejudicial error); 38 U.S.C. § 7261(b)(2). Appellant, however, does not demonstrate error in the Board's decision, let alone resulting prejudice.

At the outset, Appellant does not argue that the Board committed any error when evaluating the merits of his claim as it pertains to PTSD. See App. Br. at 4-10. The Board separately addressed Appellant's claim for entitlement to service connection for PTSD and determined that he was not entitled to service connection because he did not have a current diagnosis. (R. at 8-10 (2-15)). Appellant has presented no argument to address this denial. App. Br. at 6. Instead, he limits his argument to that part of his claim that pertains to entitlement to service connection for depression. Given such, Appellant has abandoned his

claim as to PTSD, and the Secretary urges the Court to dismiss this part of Appellant's appeal. See *Pederson v. McDonald*, 27 Vet.App. 276, 285 (2015) (en banc) (holding that, where an appellant abandons an issue or claim, the Court will not address it); *Cacciola v. Gibson*, 27 Vet.App. 45, 57 (2015) (holding that, when an appellant expressly waives an appealed issue or declines to present arguments as to that issue, the appellant relinquishes the right to judicial review of that issue, and the Court will not decide it); *Grivois v. Brown*, 6 Vet.App. 136, 138 (1994) (holding that issues or claims not argued on appeal are considered abandoned).

As to his service-connection claim for depression, Appellant asserts that the Board misinterpreted the applicable law regarding whether there was sufficient medical evidence on file to make a decision on the claim. App. Br. at 5. Under 38 U.S.C. § 5103A, the Secretary's duty to assist a claimant includes "providing a medical examination or obtaining a medical opinion when such an examination or opinion is necessary to make a decision on the claim." 38 U.S.C. § 5103A(d)(1). The Secretary's obligation arises when there is (1) competent evidence of a current disability or persistent or recurrent symptoms of a disability; (2) evidence establishing that an event, injury, or disease occurred in service; and (3) an indication that the disability or persistent or recurrent symptoms of a disability may be associated with the Veteran's service or with another service-connected disability; but (4) insufficient competent evidence on file for the Secretary to make a decision on the claim. *McLendon v. Nicholson*, 20 Vet.App.

at 81; see 38 U.S.C. § 5103A(d)(2). The Board's conclusion that a medical examination is not necessary pursuant to section 5103A(d)(2) is reviewed under the "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" standard of review. 38 U.S.C. § 7261(a)(3)(A); *McLendon*, 20 Vet.App. at 81.

Additionally, the Board must provide a "written statement of [its] findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented on the record." 38 U.S.C. § 7104(d)(1). "The statement must be adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court." *Allday v. Brown*, 7 Vet.App. 517, 527 (1995).

Here, Appellant has not satisfied his burden of persuasion of demonstrating that the Board's determination was clearly erroneous. He argues that the Board's review to assess whether the third element of *McLendon* was satisfied was erroneous because the Board reviewed medical evidence of record that was not focused on the etiology of his depression. App. Br. at 6. This argument is unavailing where he is asserting that the Board erred due to its compliance with its duty to review the relevant evidence of record. See *Schafrath v. Derwinski*, 1 Vet.App. 589, 593 (1991). Interestingly, Appellant has not pointed to any evidence that the Board should have reviewed instead of this evidence, and even admits that "there is no other evidence of record [that] speaks to this issue." App. Br. at 8. Indeed, Appellant has not submitted any

support as to why this would be error, especially where the evidence of record consists of only these treatment records. Thus, the Court should not be persuaded by this argument, especially where Appellant does not address how he has satisfied the other elements of *McLendon*. 20 Vet.App. at 81.

Appellant also attempts to compare the error in *McLendon* with this case. However, his argument is meritless where there is absolutely no evidence to indicate a connection between his current disorder and service. Unlike the appellant in *McLendon*, where he submitted evidence that should have been discussed by the Board to ascertain if it indicated a connection between his disability and service, here no such evidence exists. App. Br. at 6-7; 20 Vet.App. at 83. Further, his assertion that, due to his self-medicating in service, there is an inference to draw that his military service may be related to his current depression is unavailing, where the Board determined that he was not competent to make such a medical finding. See (R. at 12 (2-15)). Essentially, saying it is so, does not make it so. See *Stolt-Nielson S.A. v. Animal Feeds International Corp.*, 559 U.S. 662, 675 n7 (2010) (“[M]erely saying something is so does not make it so.”); see also *Kern v. Brown*, 4 Vet.App. 350, 353 (1993) (“Moreover, appellant’s attorney is not qualified to provide an explanation of the significance of the clinical evidence.” (emphasis added)). Moreover, the Court should not address this argument, especially where Appellant is presenting vague assertions without any support for his contention. See *Woehlaert v. Nicholson*, 21 Vet.App. 456, 463 (2007) (“This Court has consistently held that it will not

address issues or arguments that counsel for the appellant fails to adequately develop in his or her opening brief.”). Indeed, the U.S. Court of Appeals for the Federal Circuit expressly rejected the argument that a claimant’s mere allegation that a disability may be related to service is sufficient to invoke the Secretary’s duty to provide an examination or opinion. *Waters v. Shinseki*, 601 F.3d 1274, 1278-79 (Fed. Cir. 2010) (“We reject Waters’ theory that medical examinations are to be routinely and virtually automatically provided to all veterans in disability cases involving nexus issues.”). In fact, the Board relied on *Waters* in its analysis. (R. at 7 (2-15)). The Court should follow suit.

The Court should equally reject Appellant’s statement that the Board relied upon its own medical judgment in assessing the probative value of the evidence (App. Br. at 7), where Appellant is once again presenting vague assertions of error without any explanation. See *Locklear v. Nicholson*, 20 Vet.App. 410, 416 (2006) (holding that the Court will not entertain underdeveloped arguments). Appellant has failed to demonstrate prejudicial error or even argue such; thus, the Court should affirm the Board’s decision.

Appellant asserts that the Board erred because it did not explain how it found the evidence of record adequate to adjudicate whether Appellant was entitled to service connection for depression. App. Br. at 7-8. The Court should find Appellant’s argument baseless where Appellant in the next paragraph undermines his own argument by stating that “the Board provided numerous reasons for discounting the evidence of record.” App. Br. at 8.

Finally, Appellant argues that the Board's credibility finding was erroneous because it lacked "clarity and sufficient support." App. Br. at 9. Appellant's argument cannot be sustained because the Board sufficiently explained that it did not find him credible where it was not until after he had filed a claim for service connection that he connected his depression to service. See (R. at 12 (2-15)). In fact, the Board found that Appellant's statement that it was not until his twelve-step program that he realized the hurt (R. at 478 (474-81)), was contradicted by treatment records dated in 1994 (R. at 201 (78-252)), which reflect that he "clearly indicate[d] that [Appellant] then experienced anger directed towards the military regarding how he was treated therein." (R. at 12 (2-15)); see (R. 78-252)). It is well settled that the passage of time, inconsistency in statements, bias, and absence of medical complaints or treatment over prolonged periods of time are factors that may affect credibility. See, e.g., *Elzour v. Ashcroft*, 378 F.3d 1143, 1152 (10th Cir.2004) ("[A]dverse credibility determination[s] may appropriately be based upon such factors as inconsistencies in the witness' testimony, lack of sufficient detail[,] or implausibility."); *Maxson v. Gober*, 230 F.3d 1330, 1333 (Fed. Cir. 2000) (noting that the Board may consider the absence of medical complaints or treatment over prolonged periods of time); *Dela Cruz v. Principi*, 15 Vet.App. 143, 148 (2001) (inconsistent statements affect credibility and can warrant little or no probative value); *Caluza v. Brown*, 7 Vet.App. 498, 511 (1995) (noting that, when weighing the evidence, the Board

may consider factors such as bias, self-interest, and consistency with other evidence of record).

Here, the Board specifically noted that Appellant provided contradictory statements. (R. at 12 (2-15)). Given that this finding is the basis for a credibility determination, it undermines Appellant's argument to the contrary that the Board did not sufficiently explain why it did not find him credible. In a nutshell, Appellant has failed to argue prejudice, demonstrate prejudice, or even demonstrate error. Thus, the Court should affirm the Board's decision.

V. CONCLUSION

In view of the foregoing, the Secretary respectfully requests that the Court affirm the Board's July 2015 Board decision.

Respectfully submitted,

LEIGH A. BRADLEY
General Counsel

MARY ANN FLYNN
Chief Counsel

/s/ Richard A. Daley
RICHARD A. DALEY
Deputy Chief Counsel

/s/ Yvette R. White
YVETTE R. WHITE
Appellate Attorney
Office of the General Counsel (027E)
U.S. Department of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, D.C. 20420
(202) 632-5989
Counsel for the Secretary