

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

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**ARMANDO DIAZ,**

**Appellant,**

**v.**

**ROBERT A. MCDONALD,  
Secretary of Veterans Affairs,**

**Appellee.**

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

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**BRIEF OF APPELLEE  
SECRETARY OF VETERANS AFFAIRS**

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

<b>ARMANDO DIAZ,</b>	)	
Appellant,	)	
	)	
v.	)	Vet. App. No. 15-2710
	)	
<b>ROBERT A. MCDONALD,</b>	)	
Secretary of Veterans Affairs,	)	
Appellee.	)	

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

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**BRIEF OF THE APPELLEE  
SECRETARY OF VETERANS AFFAIRS**

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**I. ISSUE PRESENTED**

**Whether the Court should affirm the March 23, 2015, Board of Veterans' Appeals (Board) decision, which denied entitlement to service connection for a cervical spine disability.**

**II. STATEMENT OF THE CASE**

**A. Nature of the Case**

Appellant, Armando Diaz, seeks the Court's review of March 23, 2015, Board decision that denied his claim of entitlement to service connection for a cervical spine disability. Record Before the Agency (R.) at 1-17. The Court may not disturb that aspect of the Board's decision that determined that new and material evidence was received to reopen Appellant's claim of entitlement to

service connection for a psychiatric disorder, as that finding was favorable to Appellant. See R. at 12 (1-17); *Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007) (“The Court is not permitted to reverse findings of fact favorable to a claimant made by the Board pursuant to its statutory authority.”). Additionally, the Board remanded the issues of: entitlement to service connection for a psychiatric disorder; entitlement to service connection for helicobacter pylori infection; and entitlement to an increased evaluation, in excess of ten percent for a duodenal ulcer, such that the Court is without jurisdiction over those issues. R. at 12-17 (1-17); see *Breeden v. Principi*, 17 Vet.App. 475, 478 (2004) (a Board remand “does not represent a final decision over which this Court has jurisdiction”).

### **C. Statement of Relevant Facts**

Appellant entered active duty in February 1964. R. at 990. His service medical records reveal that, in June 1965, Appellant’s right hand was run over by a truck. R. at 2979. Subsequently, Appellant was involved in a February 1966 automobile accident. R. at 2987 (2987-88). A complete physical examination was essentially negative except for a laceration on Appellant’s scalp. *Id.* Appellant was hospitalized for one day as a result of the February 1966 automobile accident. R. at 2974. An x-ray of Appellant’s skull was negative. R. at 1015. No cervical spine injuries were noted during service. Appellant’s June 1966 discharge Report of Medical Examination noted that Clinical Evaluation of his

spine and other musculoskeletal systems were “normal[,]” with the exception of a right index finger deformity. R. at 994 (994-95). On his June 1966 Report of Medical History, Appellant denied ever having recurrent back pain. R. at 996 (996-97). The following month, Appellant was separated from active duty. R. at 990.

A post-service treatment record, from February 1968, noted a complaint of low back pain. R. at 2866. No complaint of neck, upper back, or cervical spine pain was noted in the treatment record. *Id.* Additional complaints of low back pain, without reference to cervical spine pain, were noted, in August 1975. R. at 2564 (2564-65), 2889.

In October 1994, Appellant first reported neck pain. R. at 3283. Appellant reported that he “injured his neck *in September 1994* when he was turned around too quickly.” *Id.* (emphasis added). Since that time he continued to experience neck pain. *Id.* Subsequently, in October 1995, Appellant reported that he was involved in a motor vehicle accident, in April 1995. R. at 3285. Appellant reported that the onset of his neck symptoms was “since a motor vehicle accident on 4/6/95.” *Id.* Appellant, in October 2000, continued to report neck pain. R. at 1998 (1998-99).

Following prompting by his representative, Appellant testified, at an October 2003 Regional Office hearing, that it was conceivable that he could have injured his back in the June 1965 incident where a truck drove over his hand. R. at 2937 (2932-48) (Appellant’s Representative: But you conceivably had impact

to your, hard impact to your shoulder, I mean to your back as a result of this hitting the ground at around 20 miles an hour. Appellant: I would suppose yes sir.). Appellant testified that he injured his neck and back during the February 1966 automobile accident. R. at 2946 (2932-48); R. at 2987 (2897-98). At that time, Appellant indicated that he sought entitlement to service connection for a neck injury resultant from the February 1966 incident. R. at 2947 (2932-48). Appellant filed his claim of entitlement to service connection for a neck condition, related to an in-service automobile accident, in October 2003. R. at 3172.

Appellant was afforded a Department of Veterans Affairs (VA) examination, in June 2004. R. at 2828-33. The examiner noted Appellant's in-service accidents. R. at 2828-29 (2828-33). The examiner noted that x-rays of Appellant's cervical spine revealed degenerative changes in the mid-cervical area. R. at 2829 (2828-33). Following a physical examination, the examiner diagnosed a mild cervical strain, which was likely not related to military service. R. at 2830 (2828-33). A March 2005 Rating Decision was issued that denied Appellant's claim. R. at 2758 (2746-58).

Appellant submitted an April 2006 statement, wherein he asserted that he injured his neck, as a result of being ejected from an open-back truck. R. at (2600-03). Appellant, also, submitted an April 2006 letter from his chiropractor. R. at 2604-08. The chiropractor noted Appellant's report that he was injured, during the July 1965 accident. R. at 2604 (2604-08). Appellant "reported that his neck pain was immediate following his gradual awakening in the army hospital"

and continued to worsen. *Id.* The chiropractor opined that “[t]he mechanism of injury [was] entirely consistent with the clinical presentation.” R. at 2608 (2604-08). The chiropractor, further, opined that “It [was] apparent that [Appellant’s] injury was caused by a forceful and severe trauma Which had its greatest impact on the neck, in which case this is the cause for his current condition of [severe] subluxation with subsequent spinal stenosis of the cervical spine.” *Id.* It was the chiropractor’s “professional opinion that [Appellant] did receive injuries as a result of the truck ejection in 1965 while on active duty in the military.” *Id.*

Appellant submitted a statement, in November 2008, wherein he asserted that he injured his neck during a February 1966 automobile accident. R. at 1972 (1971-72). He asserted that he had severe problems with his neck, “throughout the years[.]” *Id.* Another VA examination was provided, in November 2008. R. at 1954-60. The November 2008 reviewed Appellant’s claims file, which included his objective and subjective medical histories. R. at 1954 (1954-60). The November 2008 examiner noted Appellant’s contentions that his cervical spine disability resulted from an in-service accident. See R. at 1956 (1954-60)] Thereafter, the November 2008 examiner noted Appellant complaints “of pain, stiffness, weakness, fatigability, lack of endurance, and loss of motion in his cervical spine.” R. at 1957 (1954-60). The examiner acknowledged Appellant’s contention that the cervical spine symptoms were “a result of his head injury received in 1966 as noted in the service medical record.” *Id.*

Following consideration of Appellant's medical history, the performance of a physical examination and diagnostic testing, see R. at 1954-60 (1954-60), the examiner diagnosed degenerative disc disease of the cervical spine. R. at 1960 (1954-60). The examiner opined that the claimed cervical spine condition was "not a result of or caused by the condition [Appellant] suffered while on active duty in the United States Army as documented in his service medical record in 1966. *Id.* The examiner explained—

[Appellant had] 40 years of essentially absent medical records for chronicity of his cervical spine. From a review of the records and the available information and evidence, there is no indication that the veteran suffered a significant cervical spine condition in 1966 while on active duty.

*Id.*

A December 2008 Rating Decision was issued that denied Appellant's claim. R. at 1935 (1932-36). The following month, Appellant filed his notice of disagreement (NOD). R. at 1921. A Statement of the Case (SOC) was issued, in September 2010, which continued the previous denial. R. at 1747-48 (1729-49). In November 2010, Appellant appealed to the Board. R. at 1715-16.

On March 23, 2015, the Board issued the decision on appeal. R. at 1-17. Appellant filed his Notice of Appeal with the U.S. Court of Appeals for Veterans Claims, on July 20, 2015.

### III. SUMMARY OF ARGUMENT

The Court should affirm the March 23, 2015, Board decision that denied entitlement to service connection for a cervical spine disability because the Board's determination was properly based upon the evidence of record and not clearly erroneous. Moreover, Appellant failed to demonstrate any ground for finding prejudicial error because Appellant VA fully assisted Appellant in the development of his claim, by affording him an examination that was adequate for rating purposes, and considered all of the applicable provisions of law.

### IV. ARGUMENT

**The Court should affirm the March 23, 2015, Board denial of service connection for a cervical spine disability because it was supported by the evidence of record and not clearly erroneous.**

#### i. Legal Standard

Service connection may be granted for a disability resulting from personal injury suffered or disease contracted in the line of duty, or for aggravation of a pre-existing injury or disease in the line of duty. 38 U.S.C. § 1110; 38 C.F.R. § 3.303(a). In order to establish service connection for a claimed disorder, there must be (1) medical evidence of a current disability; (2) medical, or in certain circumstances, lay evidence of in-service incurrence or aggravation of a disease or injury; and (3) medical evidence of a nexus between the claimed in-service disease or injury and the current disability. See *Hickson v. West*, 12 Vet.App. 247, 253 (1999). Under the provisions of 38 C.F.R. § 3.303(b), for some disabilities, the second and third elements noted above can be satisfied through

(1) evidence that a condition was noted during service or during an applicable presumptive period; (2) evidence showing post-service continuity of symptomatology; and (3) medical or, in certain circumstances, lay evidence of a nexus between the present disability and the post-service symptomatology. See 38 C.F.R. § 3.303(b); see also *Savage v. Gober*, 10 Vet.App. 488, 495-97 (1997).

A finding that a particular disability occurred in or is the result of service is a finding of fact subject to review by this Court under the “clearly erroneous” standard of review. *Irby v. Brown*, 6 Vet.App. 132, 135 (1992); see also 38 U.S.C. § 7261(a)(4). Accordingly, this Court must set aside a finding of fact as “clearly erroneous” only when there is no plausible basis in the record for the Board’s findings at issue. *Gilbert v. Derwinski*, 1 Vet.App. 49, 53 (1990). In addition, the Board is required to provide a written statement of the reasons or bases for its “findings and conclusions [ ] on all material issues of fact and law presented on the record.” 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. See *Gilbert*, 1 Vet.App. at 57. To comply with this requirement, the Board must analyze the credibility and probative value of the evidence, account for the evidence that it finds to be persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the claimant. *D’Aries v. Peake*, 22 Vet.App 97, 104 (2008) (citing *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995)).

## ii. Analysis

In its March 23, 2015, decision the Board determined that entitlement to service connection for Appellant's claimed back disorder was not warranted because he failed to show continuous symptoms, or a nexus between the disorder and his period of military service. R. at 3-4 (1-17); see 38 C.F.R. § 3.303(a), (b). In rendering the determination, the Board, primarily, relied upon a November 2008 medical opinion, which showed that the claimed low back disorder was "not a result of[,] or caused by the condition [Appellant] suffered while on active duty in the United States Army as documented in his service medical record in 1966." R. at 6, 10, 11 (1-17); see R. at 1960 (1954-60). Although Appellant asserts that a June 2004 medical opinion was inadequate, see Appellant's Brief (App. Br.) at 9, 12, the Board, merely, referenced the June 2004 examination report. See R. at 8 (1-17), 2828-2833; see also *Steffl v. Nicholson*, 21 Vet.App. 120, 123 (2007) (quoting *Ardison v. Brown*, 6 Vet.App. 405, 407 (1994) (A medical opinion is adequate where it is "based upon consideration of the veteran's prior medical history and examinations and also describe[d] the disability . . . in sufficient detail so that the Board's 'evaluation of the claimed disability [was] a fully informed one.'")). However, the Board did not rely upon the June 2004 examiner's opinion, as a basis for its denial. In fact, the Board declined to find the examination adequate. See R. at 6 (1-17); see also *Allday v. Brown*, 7 Vet.App. 517, 528 (1995) ("The [Board] must address all relevant medical evidence[.]"). The Board determined that the November 2008

examination, alone, was adequate for adjudication purposes. *Id.* Accordingly, Appellant was not prejudiced by the Board's reference to the June 2004 examination report. See 38 U.S.C. § 7261(b)(2) (requiring this Court to "take due account of the rule of prejudicial error").

To the extent that Appellant asserts that the November 2008 VA examination report was inadequate, see App. Br. at 10-12, his assertion is unavailing. The VA examiner reviewed Appellant's claims file, which included his objective and subjective medical histories. R. at 1954 (1954-60); see *Nieves-Rodriguez*, 22 Vet.App. 295, 304 (2009) (The Court does not require that an examiner refer to each piece of evidence in the claims file, but instead that it be clear from the medical report that the examiner reviewed and is familiar with the claimant's history); see also *Buchanan v. Nicholson*, 451 F.3d 1331, 1336 (Fed. Cir. 2006) (A VA examiner must consider whether lay statements present sufficient evidence of etiology). Although Appellant asserts that the examiner failed to consider his lay evidence, see App. Br. at 10-11, the November 2008 examiner explicitly noted Appellant's contentions that his cervical spine disability resulted from an in-service accident. See R. at 1956 (1954-60) ("[Appellant] was involved in an accident where his hand was run over. Although no record was found which showed complaint, treatment, or diagnosis of his cervical spine disability during service, he contends that his current cervical spine disability is a result of this incident."); see also R. at 1047. Thereafter, the November 2008 examiner, again, noted Appellant complaints "of pain, stiffness, weakness,

fatigability, lack of endurance, and loss of motion in his cervical spine.” R. at 1957 (1954-60). The examiner acknowledged Appellant’s contention that the cervical spine symptoms were “a result of his head injury received in 1966 as noted in the service medical record.” *Id.* Accordingly, Appellant’s assertion that the examiner failed to consider his lay evidence, see App. Br. at 10-11, is contrary to a plain reading of the November 2008 examination report. See *Acevedo v. Shinseki*, 25 Vet.App. 286, 294 (2012) (noting that examination reports “must be read as a whole”).

Following consideration of Appellant’s medical histories, the performance of a physical examination and diagnostic testing, see R. at 1954-60 (1954-60), the examiner diagnosed degenerative disc disease of the cervical spine. R. at 1960 (1954-60). The examiner opined that the claimed cervical spine condition was “not a result of or caused by the condition [Appellant] suffered while on active duty in the United States Army as documented in his service medical record in 1966. *Id.* The examiner explained—

[Appellant had] 40 years of essentially absent medical records for chronicity of his cervical spine. From a review of the records and the available information and evidence, there is no indication that the veteran suffered a significant cervical spine condition in 1966 while on active duty.

*Id.*; see R. at 1047.

Although Appellant asserts that the November 2008 examiner relied upon the absence of evidence for his negative nexus opinion, App. Br. at 10-11, the examiner’s rationale was based upon the evidence of record. See R. at 1956,

1960 (1954-60). The examiner's rationale, clearly, notes that the opinion resulted "[f]rom a review of the records and the available information and evidence[.]" R. at 1960 (1954-60). Moreover, the examiner explained that despite Appellant's lay assertion that he sustained a cervical spine injury, in-service, "no record was found which showed complaint, treatment, or diagnosis of [a] cervical spine disability during service[.]" R. at 1956 (1954-60). Additionally, the November 2008 examiner noted that Appellant's "[s]eparation examination . . . list[ed] normal clinical psychiatric evaluation and no complaints o[r] diagnosis or any cervical spine disability." *Id.* A plain reading of this sentence suggests that the sole premise for the examiner's conclusion was not the lack of notation or treatment of a back injury in service, see *id.*; rather, the examiner's opinion was based upon the *normal* clinical evaluation of Appellant's spine, subsequent to the alleged in-service cervical spine injury. R. at 1956, 1960 (1954-60); see R. at 994 (994-95) (noting a normal clinical evaluation of Appellant's spine at discharge); R. at 996 (996-97) (noting Appellant's lay statement that he did not experience recurrent back pain at discharge); R. at 1039 (noting Appellant's July 6, 1966, Medical Statement Upon Separation that there was no change in his medical condition since his separation examination with no exception); see *also Dalton v. Nicholson*, 21 Vet.App. 23, 39 (2007). Accordingly, contrary to Appellant's assertion, the November 2008 examiner's opinion was not based, solely, upon the absence of medical records; instead, the opinion was the result

of the clinical and lay evidence of record that no cervical spine injury occurred, in-service, or continued through discharge. See R. at 994 (994-95), 996 (996-97).

To the extent that Appellant asserts that the November 2008 examiner's use of the word "significant" rendered the opinion inadequate, see App. Br. at 11, his assertion is inconsistent with a reading of the entire November 2008 examination report. In reading the November 2008 examination report, as a whole, the Nov 2008 examiner explained that "no record was found which showed complaint, treatment, or diagnosis of his cervical spine disability during service[.]" R. at 1956 (1954-60); see *Acevedo*, 25 Vet.App. at 294. Significantly, Appellant fails to demonstrate, or allege, that any service medical record shows any complaint, treatment or diagnosis of a cervical spine injury. See App. Br. at 11-19; see also *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (an appeal bears the burden of demonstrating error on appeal). Accordingly, no prejudice resulted from the examiner's use of the word "significant" because the examiner, further, explained that no service medical records showed any complaint, treatment or diagnosis of any cervical spine injury. R. at 1956 (1956-60).

Although Appellant attempts to show inadequacy in the examiner's opinion that his claimed condition was "not a result of or caused by the condition he suffered while on active duty in the United States Army[.]" by the examiner's general recitation of risk factors, see App. Br. at 11-12, he fails to show what prejudice resulted. See *Hilkert*, 12 Vet.App. at 151; see also 38 U.S.C.

§ 7261(b)(2). Notably, the examiner did not state that Appellant's condition was definitively caused by any one of the risk factors. See R. at 1960 (1954-60)] (noting the "more likely" etiologies for cervical spine degenerative disc disease).

Further, as a presumptively competent medical expert, the examiner was permitted to provide a medical opinion that included potential risk factors for the claimed condition. *Parks v. Shinseki*, 716 F.3d 581, 585 (Fed. Cir. 2013) ("In the case of competent medical evidence, the VA benefits from a presumption that it has properly chosen a person who is qualified to provide a medical opinion in a particular case."). Contrary to Appellant's assertions, see App. Br. at 17-18, there is no reasons or bases requirement imposed on medical examiners, and therefore, recitations of the history of fundamental medical principles is not necessary. See *Moore v. Nicholson*, 21 Vet.App. 211, 218 (2007) ("The medical examiner provides a disability evaluation and the rating specialist interprets medical reports in order to match the rating with the disability."), *rev'd on other grounds, sub nom. Moore v. Shinseki*, 555 F.3d 1369 (Fed. Cir. 2009). Additionally, Appellant's argument, merely, attempts to refute medical principles on the basis of legal assertions. See *Kern v. Brown*, 4 Vet.App. 350, 353 (1993) (explaining that the appellant's attorney was "not qualified to provide an explanation of the significance of the clinical evidence"); *Hyder v. Derwinski*, 1 Vet.App. 221, 225 (1991) (noting that lay hypothesizing "serves no constructive purpose and cannot be considered by this Court").

Accordingly, Appellant fails to demonstrate any inadequacy in the November 2008 examination report because the examiner specifically considered and discussed Appellant's lay assertions that he did not experience recurrent back pain, and provided a competent medical opinion that there were no in-service complaints, treatment or diagnoses of any cervical spine injury, and that, Appellant's cervical spine condition was not related to his period of active duty. See R. at 1960 (1954-60); see also *Buchanan*, 451 F.3d at 1336; *Hilkert*, 12 Vet.App. at 151.

The Board, properly, determined that the November 2008 VA medical opinion was adequate to render an informed decision on Appellant's back claim. R. at 6, 10-11 (1-17); see *Steffl*, 21 Vet.App. at 124. Further, the Board determined that the November 2008 opinion was more probative than the positive nexus opinions of record, which included Appellant's lay opinions. R. at 9, 11 (1-17); see R. at 1954-60.

Appellant's lay evidence asserted that a back disability began in-service and continued since that time. See App. Br. at 13-16 (citing R. at 1879-98; R. at 2444-73] (noting testimony regarding a *low* back injury, during service); R. at 2932-48]). The Board rejected the lay statements of continuity of symptoms, in and following service, because the assertions not inconsistent with his previous assertions of the onset of his disability. R. at 11 (1-17). The Board noted that, in 1966, Appellant, specifically, denied recurrent back pain. *Id.*; see R. at 996 (996-97). Thereafter, Appellant asserted that his condition began in-service and

existed since that time. See R. at 1972 (1971-72), 2604 (2604-08). Regardless of Appellant's subsequent explanations for his decision to provide incorrect information, during service, at discharge and during post-service treatment, see App. Br. at 12-16, the variations are, by definition, inconsistent.<sup>1</sup> "[T]he Board, as fact finder, is obligated to, and fully justified in, determining whether lay evidence is credible in and of itself, i.e., because of possible bias, conflicting statements, etc." *Buchanan*, 451 F.3d at 1337. Accordingly, the Board fully considered Appellant lay assertions of: multiple in-service accidents, R. at 8, 9 (1-17); Appellant's discharge statements that he did not endure recurrent back pain, R. at 11 (1-17), 996 (996-97), 1039; Appellant's October 1994 statement that he injured his neck in September 1994, R. at 8 (1-17), 2655; Appellant's October 1995 report that the onset of his neck symptoms followed an April 1995 motor vehicle accident, R. at 8 (1-17), 3285; and Appellant's opposite assertions that he endured recurrent back pain, in and since service, R. at 11 (1-17), 3172; and, plausibly, determined that his "recent contentions that he [ ] experienced neck problems since service . . . [were] not significantly credible." R. at 11 (1-17); see *Buchanan*, 451 F.3d at 1337; *Rucker v. Brown*, 10 Vet.App. 67, 73 (1997)

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<sup>1</sup> "Inconsistent" is defined as "lacking consistency: as **a** : not compatible with another fact or claim **b** : containing incompatible elements **c** : incoherent or illogical in thought or actions: CHANGEABLE **d** : not satisfiable by the same set of values for the unknowns[.]" MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 631 (11th ed. 2003). "Consistency" is defined as "**a** : agreement or harmony of parts or features to one another or a whole" or in correspondence : "[the] ability to be asserted together without contradiction[.]" MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 266 (11th ed. 2003).

(explaining that statements made to physicians for purposes of diagnosis and treatment are exceptionally trustworthy because the declarant has a strong motive to tell the truth to receive proper care).

In light of the limited credibility of Appellant, the Board determined that there was no history of an in-service neck injury, or a history of neck pain. R. at 10-11 (17). Additionally, the Board determined that the November 2008 examination report was more probative of whether a nexus existed between Appellant's military service and his current condition. R. at 11 (1-17); see R. at 1954-60. As a result of those findings, the Board, plausibly, determined that the preponderance of the probative evidence revealed that service connection was not warranted. See R. at 11 (1-17). The Board provided a thorough statement of reasons or bases for its determination. R. at 1-17. Accordingly, the Board's determination should be affirmed.

## **V. CONCLUSION**

In view of the foregoing argument, Appellee, Secretary of Veterans Affairs, respectfully requests that this Court to affirm the Board's March 23, 2015, decision.

Respectfully submitted,

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