

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

JOHN H. GREENE,
Appellant,

v.

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

ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS

BRIEF OF THE APPELLEE
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determination that the Court may not disturb. See *Medrano v. Nicholson*, 21 Vet.App. 165, 171 (2007).

Additionally, the Board remanded Appellant's claims of entitlement to service connection for hypertension, sleep apnea, a left knee disorder, entitlement to an initial compensable rating for a surgical scar of the back, and entitlement to a compensable rating for service-connected surgical scar of the anterior trunk. (R. at 37-38 (2-40)). Because the remanded issues are not final decisions, those issues are not before the Court. *Kirkpatrick v. Nicholson*, 417 F.3d 1361, 1364 (Fed. Cir. 2005). Appellant makes no argument regarding the Board's denial of entitlement to service connection for bilateral hearing loss, tinnitus, and a rating in excess of 10 percent prior to July 16, 2005, for DDD of the lumbar spine. Accordingly, such issues have been abandoned. See *Cacciola v. Gibson*, 27 Vet.App. 45, 47 (2014) (holding that when Appellant expressly abandons an appealed issue or declines to present arguments as to that issue, 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 Appellant's arguments are without merit, and he fails to carry his burden of demonstrating error, much less prejudicial error, the Court should affirm the Board's decision.

C. STATEMENT OF RELEVANT FACTS

Appellant served on active duty from June 1976 to October 1986. (R. at 2049). In July 2010, Appellant underwent a VA examination. (R. at 1020-26). The examiner reported that Appellant had active range of motion (ROM) of the thoracolumbar spine of 45 degrees of flexion and 20 degrees of extension with evidence of pain on motion. (R. at 1023 (1020-26)). After repetitive ROM testing, Appellant had flexion to 35 degrees and extension to 20 degrees as well as additional limitations after such testing. *Id.* The examiner reported that Appellant did not have flare-ups and that “[i]t would require speculation to determine the additional ROM loss when the back is used repeatedly over a period of time.” (R. at 1025 (1020-26)).

The Regional Office (RO), in an August 2010 Decision Review Officer Decision (DRO), granted an increased rating to 20 percent, effective October 1, 2007, for Appellant’s service-connected intervertebral disc syndrome. (R. at 988-93). The next month, Appellant submitted a Notice of Disagreement (NOD), (R. at 915-17), and the Board, in its January 2011 decision, remanded the claim for further development. (R. at 885-97). Specifically, the Board instructed the RO to obtain a new VA examination. (R. at 895-96 (885-97)).

Thereafter, Appellant underwent a VA examination in March 2013. (R. at 427-34). Appellant related to the examiner that he does not experience flare-ups and the examiner noted that Appellant was able to perform repetitive-use testing with no additional ROM limitations. (R. at 428-29 (427-34)). Furthermore, the

examiner reported that although Appellant did not have additional limitation in ROM of the thoracolumbar spine following repetitive-use testing, he did have functional loss and/or functional impairment including less movement than normal, and pain on movement; nevertheless, the examiner found that Appellant's subjective complaints during the examination "appeared . . . out of proportion to objective exam findings." (R. at 429 (427-34)). The examiner also reported that Appellant occasionally used a cane, and walker for support. (R. at 432 (427-34)). The examiner opined that Appellant's DDD impacted his ability to work, but stated that Appellant's back condition "should not preclude light duty or sedentary employment" and that activities requiring operating heavy machinery or other hazardous operations such as climbing, lifting, carrying, bending, kneeling, squatting, or strenuous physical exertion should be limited given Appellant's significant limitation of ROM at the thoracolumbar spine. (R. at 434 (427-34)).

In its August 2013 decision, the Board again remanded Appellant's claim of entitlement to an increased rating for his lumbar spine condition and ordered a new examination "with an examiner other than the one who conducted the March 2013 examination to determine the current nature and severity of his disability." (R. at 343 (337-45)). The Board directed the examiner to express the degree of additional ROM lost due to functional impairment on use or during flare-ups and to describe the effect of the condition on Appellant's employment. (R. at 343-44 (337-45)).

Thereafter, the March 2013 VA examiner conducted another VA examination in July 2014. (R. at 243-54)). She related that Appellant related “no new injury, just daily pain, no flare-ups” since his last VA examination. (R. at 244 (243-54))). She noted that Appellant did not report that flare-ups impact the functioning of his spine. (R. at 245 (243-54)). The examiner further stated that Appellant did not have additional limitation of ROM of the thoracolumbar spine after repetitive-motion testing, but that he had functional loss and/or functional impairment including less movement than normal and pain on movement. (R. at 247 (243-54)). She stated that because Appellant was not having a flare-up that day, “it would only be speculative to report whether pain, weakness, fatigability, or incoordination could significantly limit functional ability during flare-ups, or when the joint is used repeatedly over a period of time” and that the available medical records “show no objective evidence of ‘a flare up’ limiting functional ability[,] if any.” (R. at 254 (243-54)). The examiner additionally noted that Appellant’s back condition impacted his ability to work. (R. at 252 (243-54)).

Subsequently, Appellant underwent another VA examination in January 2015, performed by an examiner other than the March 2013/July 2014 examiner. (R. at 91-102). The January 2015 examiner stated that Appellant did not report any flare-ups, functional loss or functional impairment of his back, regardless of repetitive use. (R. at 92 (91-102)). He also reported that pain was noted on examination, but it “does not result in/cause functional loss.” (R. at 93 (91-102)). The examiner observed that Appellant was able to perform repetitive use testing

with at least three repetition and that there was no additional loss of function or ROM after such repetitions. *Id.* Additionally, he stated that the “examination neither supports nor contradicts [Appellant’s] statements describing functional loss with repetitive use over time.” *Id.* The examiner also stated that he was unable to say without mere speculation whether pain, weakness, fatigability or incoordination significantly limit Appellant’s functional ability with repeated use over a period time. *Id.* He explained,

[f]unction and condition is based upon a careful and complete review of C-file and other available records, in addition to today’s assessment and exam, it would only be speculative to report additional [range of motion] loss and whether pain, weakness, fatigability, or incoordination could significantly limit functional ability during flare-ups, or when the joint is used repeatedly over a period of time when it has not been documented in the actual records or when reported symptoms are incongruent to findings on imaging and clinical exam.

(R. at 93-94 (91-102)). He reported that the examination was not conducted during a flare-up and that Appellant did not report any flare-ups, therefore, “[t]he examination neither supports nor contradicts [Appellant’s] statements describing functional loss during flare-ups.” (R. at 94 (91-102)). Moreover, the examiner stated that he was unable to say without mere speculation whether pain, weakness, fatigability or incoordination significantly limit functional ability with flare-ups and restated that,

[f]unction and condition is based upon a careful and complete review of C-file and other available records, in addition to today’s assessment and exam, it would only be speculative to report additional [range of motion] loss and whether pain, weakness, fatigability, or incoordination could significantly limit functional ability

during flare-ups, or when the joint is used repeatedly over a period of time when it has not been documented in the actual records or when reported symptoms are incongruent to findings on imaging and clinical exam.

(R. at 94 (91-102)). The VA examiner also noted that appellant regularly used a fabric lumbar support. (R. at 97-102).

The Board, in its decision on appeal, denied entitlement to a rating in excess of 20 percent for Appellant's condition from October 1, 2007. (R. at 2-40). This appeal ensued.

III. SUMMARY OF ARGUMENT

Appellant's arguments fail to demonstrate that the Board committed error, let alone prejudicial error. Additionally, the Board based its decision on a plausible basis in the record, and therefore, this Court should affirm the Board's July 27, 2015, decision.

IV. ARGUMENT

A. Applicable Law

The Court should reject Appellant's arguments and affirm the Board's decision. The Board's determination of the degree of disability under a rating code is a finding of fact that the Court reviews under the "clearly erroneous" standard of review. 38 U.S.C. § 7261(a)(4); *Cullen v. Shinseki*, 24 Vet.App. 74, 78 (2010). A finding of material fact is clearly erroneous when the Court, after reviewing the entire evidence, "is left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.*, 333 U.S. 364,

395 (1948); *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990). When applying this standard, if, after reviewing the record in its entirety, the Board's finding of fact is supported by a plausible basis, “the [Court] may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently.” *Gilbert*, 1 Vet.App. at 53 (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74 (1985)).

The Board must also support its findings with an adequate statement of reasons or bases. *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); see also 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.” *Id.* However, § 7104(d)(1) does not require the Board to use any particular statutory language or “terms of art.” *Jennings v. Mansfield*, 509 F.3d 1362, 1366 (Fed. Cir. 2007). When adjudicating a claim for an increased rating, the Board’s statement of reasons and bases will be adequate when it thoroughly discusses the claimant’s disability picture and explains why his or her symptoms more nearly approximate one disability rating than another. *Mayhue v. Shinseki*, 24 Vet.App. 273, 283-84 (2011). Where there is a question as to which of two evaluations should be applied, the higher evaluation will be assigned if the disability picture more nearly approximates the criteria required for that rating. 38 C.F.R. § 4.7. Otherwise, the lower rating will be assigned. *Id.*

Appellant’s lumbar back condition is rated under 38 C.F.R. § 4.71a, pursuant to the General Rating Formula for Disease and Injuries of the Spine,

which provides that (with or without symptoms such as pain (whether or not it radiates), stiffness, or aching in the area of the spine affected by residuals of injury or disease) a 20 percent rating is warranted when forward flexion of the thoracolumbar spine is greater than 30 degrees but not greater than 60 degrees; and a 40 percent rating is warranted for forward flexion of the thoracolumbar is 30 degrees or less; or there is favorable ankyloses of the entire thoracolumbar spine.

Finally, it is Appellant's burden to demonstrate error on appeal. See *Overton v. Nicholson*, 20 Vet.App. 427, 435 (2006) (citing *Berger v. Brown*, 10 Vet.App. 166, 169 (1997); *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc), *aff'd* 232 F.3d 908 (Fed. Cir. 2000). The Supreme Court has clearly stated that the burden of demonstrating harm falls solely and squarely on the appellant. *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) (holding that the appellant bears the burden of demonstrating prejudicial error). Furthermore, Congress has expressly mandated that this Court take "due account of the rule of prejudicial error." 38 U.S.C. § 7261(b)(2).

B. The Board's decision is based on a plausible basis in the record, the examinations it relied on are adequate, and it provided an adequate statement of reasons or bases in support of its determination that Appellant was not entitled to a rating in excess of 20 percent for his lumbar spine disability. Appellant has failed to demonstrate otherwise.

Appellant is incorrect in his assertion that the Board failed to ensure its duty to assist was satisfied when relying on the VA examinations for its decision

and the evidence of record does not support a higher rating. Essentially, Appellant argues that the pain he experienced at a specific point in ROM testing equates to an actual limitation of ROM at that point. In other words, he asserts that because he experienced pain at 20 degrees of forward flexion in the July 2010 examination, he should be compensated as if he had *actual* limitation of flexion at 20 degrees. App. Br. at 9; (R. at 1024 (1020-26)). However, Appellant's argument ignores the fact that painful motion does not automatically equate to limited motion under the rating schedule. See *Mitchell v. Shinseki*, 25 Vet.App. 32, 38-40 (2011) (holding that pain itself does not constitute functional loss).

Moreover, Appellant's argument completely ignores the fact that pain is contemplated by the General Rating Formula for Diseases and Injuries of the Spine and its corresponding regulations. See 38 C.F.R. § 4.71a, DCs 5235-5243. When rating a spine disability, unlike other joint disabilities, a rating is assigned "[w]ith or without symptoms such as pain (whether or not it radiates), stiffness, or aching in the area of the spine affected by residuals of injury or disease." 38 C.F.R. § 4.71a. As such, even accepting the fact that Appellant experiences pain at 20 degrees of forward flexion, his 20 percent rating already adequately contemplates any such pain. See 68 Fed. Reg. 51,454, 51,454-55 (Aug. 27, 2003) (explaining the addition of the introductory language "[w]ith or without symptoms such as pain," and noting that, "[i]n the case of spine disabilities, it would be rare for pain not to be present. Pain is often the primary

factor limiting motion, for example, and is almost always present when there is muscle spasm. Therefore, the evaluation criteria provided are meant to encompass and take into account the presence of pain, stiffness, or aching, which are generally present where there is a disability of the spine.”).

Additionally, Appellant’s rating represents his actual limitation of motion, with or without pain, which here, was consistently recorded at levels that fall within the criteria for a 20 percent rating or less. *See Thompson v. McDonald*, 815 F.3d 781, 785-86 (Fed. Cir. 2016) (holding that although 38 C.F.R. § 4.40 demonstrates that functional loss can be due to pain, the ultimate rating is to be understood and completed in terms of the criteria and range of motion thresholds in 38 C.F.R. § 4.71a); *see also Bethea v. Derwinski*, 2 Vet.App. 252, 254 (1992) (recognizing that the Court of Appeals for Veterans Claims is bound to follow the precedent of the Federal Circuit and the Supreme Court of the United States). Indeed, the evidence shows that Appellant’s had flexion of 0 to 45 degrees and extension of 0 to 20 degrees of his thoracolumbar spine on ROM testing at the July 2010 VA examination. (R. at 1023 (1020-1026)). At the March 2013 VA examination, Appellant had forward flexion to 45 degrees and extension to 20 degrees. (R. at 428 (427-34)). Additionally, Appellant had forward flexion to 80 degrees and extension of 30 degrees or greater at the July 2014 VA examination, (R. at 245 (243-54)), and forward flexion to 70 degrees and extension to 30 degrees ROM at the January 2015 VA examination. (R. 92 (91-102)).

Consequently, the Board's findings are supported by a plausible basis in the record and Appellant's argument amounts to a misreading of the July 2010 examination, a misapplication of the law, and a mere disagreement with how the Board weighed the evidence, which cannot be the basis for remand, let alone reversal. It is expressly within the purview of the Board to weigh the relative value of the evidence of record when determining the appropriate rating. See *Singleton v. Shinseki*, 23 Vet.App. 376, 381 (2010) (holding that it is the Board's duty to "assess the credibility and probative weight of the evidence" of record); *Washington v. Nicholson*, 19 Vet.App. 362, 368 (2005).

Additionally, when read together, the March 2013, July 2014 and January 2015 VA examinations are adequate. An examination is adequate when it is "based upon consideration of the veteran's prior medical history and examinations and also describes the disability in sufficient detail so that the Board's 'evaluation of the claimed disability will be a fully informed one.'" *Barr v. Nicholson*, 21 Vet.App. 303, 310-11 (quoting *Ardison v. Brown*, 6 Vet.App. 405, 407 (1994)) (internal quotation marks omitted). A medical examination report cannot merely draw conclusions from data; rather, it should include "a reasoned medical explanation connecting the two." *Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 301 (2008); see also *Monzingo v. Shinseki*, 26 Vet.App. 97, 105 (2012) ("[E]xamination 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.").

In asserting error, Appellant simply ignores the majority of the VA examiners' reports and selectively focuses on only parts of the opinions in support of his argument. See *Acevedo v. Shinseki*, 25 Vet.App. 286, 294-95 (2012) (medical report must be read as a whole). Although the July 2014 VA examination did not entirely comply with the Board's remand instructions because the examination was not conducted by an examiner other than the March 2013 VA examiner, see (R. 343 (338-45)), any such defects and errors were cured by the January 2015 VA examination. (R. at 91-102). Indeed, the January 2015 VA examiner stated that Appellant's physical examination revealed forward flexion to 70 degrees, extension to 30 degrees, right and left lateral flexion to 25 degrees, and right and left lateral rotation to 30 degrees. (R. at 92-93 (91-102)). The examiner noted that Appellant had pain with range of motion testing on forward flexion, extension, right lateral flexion, left lateral flexion, right lateral rotation, and left lateral rotation, but indicated that such pain did not result in or cause functional loss. (R. at 93 (91-102)).

The fact that the examiner failed to note the exact point in which Appellant's pain occurred is harmless error because, as noted above, a rating for diseases and injuries of the spine is assigned "[w]ith or without symptoms such as pain[.]" 38 C.F.R. § 4.71a. Furthermore, the examiner unequivocally stated that any pain on range of motion did not cause any functional limitations. (R. at 93 (91-102)); see *Thompson*, 815 F.3d at 785; *Mitchell*, 25 Vet.App. at 38 (pain alone is not a compensable disability). Accordingly, any inadequacy or

inconsistency with regard to the January 2015 VA examiner's failure to provide the exact point in which Appellant experiences pain on ROM testing is harmless error because the examination report as a whole is otherwise clear and provides a sufficient basis for the Board to weigh in reaching its decision, specifically, that Appellant does not have any functional limitations due to pain. See *Steffl v. Nicholson*, 21 Vet.App. 120, 123 (2007) (holding that an adequate medication opinion "must support its conclusion with an analysis that the Board can consider and weigh against contrary opinions"). In other words, a plain reading of the January 2015 VA examination report directly refutes Appellant's contentions, and thus, Appellant has failed to demonstrate error, much less prejudicial error. *Sanders*, 556 U.S. at 406-10.

Moreover, the January 2015 VA examination cures any defect in the March 2013 and July 2014 VA examinations with regard to the examiner's error in failing to fully discuss the extent of any functional loss caused by Appellant's disability due to weakness, excess fatigability, incoordination, or pain on use described in terms of degree of additional range of motion lost by clearly stating that, while Appellant has pain, he has no functional loss as the result of such pain. (R. at 93 (91-102)). Additionally, he noted that Appellant has no additional loss in ROM after three repetitions and, with regard to whether there could be pain limiting functional ability due to flare-ups or repeated use over time, the examiner noted that he could not say for certain without speculation because no additional limitation has been documented anywhere in the record and Appellant's reported

symptoms are not consistent with what was found during the examination. (R. at 93-94 (91-102)). Appellant has not identified any conflicting medical opinion - or even any conflicting medical evidence – showing that he has additional functional loss due to pain, repetitive use or flare-ups. In fact, he specifically denied flare-ups, functional loss or functional impairment at the January 2015 VA examinations. (R. at 92, 94 (91-102)).

Appellant's next argument is equally unpersuasive. Contrary to Appellant's contentions, the Board did not err in failing to specifically consider whether his 20 percent rating adequately compensates him for the use of medications, cane, fabric corset, TENS unit and his antalgic posture, and that such was contemplated by the rating criteria. See App. Br. at 13-14. An extraschedular rating is appropriate where the case presents an exceptional or unusual disability picture with related factors such as marked interference with employment. 38 C.F.R. § 3.321(b). "The determination of whether a claimant is entitled to an extraschedular rating ... is a three-step inquiry." *Thun v. Peake*, 22 Vet.App. 111, 115 (2008), *aff'd sub nom. Thun v. Shinseki*, 572 F.3d 1366 (Fed.Cir.2009); see *Anderson v. Shinseki*, 22 Vet.App. 423, 427 (2009) (clarifying that, although the Court in *Thun* identified three "steps," they are, in fact, necessary "elements" of an extraschedular rating).

The first step in the inquiry is to determine whether "the evidence before VA presents such an exceptional disability picture that the available schedular evaluations for that service-connected disability are inadequate." *Thun*, 22

Vet.App. at 115; see *Sowers v. McDonald*, 27 Vet.App. 472, 478 (2016) (“The rating schedule must be deemed inadequate before extraschedular consideration is warranted.”). “Therefore, initially, there must be a comparison between the level of severity and symptomatology of the claimant's service-connected disability with the established criteria found in the rating schedule for that disability.” *Thun*, 22 Vet.App. at 115. If the adjudicator determines that the available schedular ratings are inadequate, the second step of the inquiry requires the adjudicator to “determine whether the claimant's exceptional disability picture exhibits other related factors,” such as marked interference with employment or frequent periods of hospitalization. *Id.* at 116.

Then, if the first two steps have been satisfied, the adjudicator must refer the claim to the Under Secretary for Benefits or the Director of the Compensation Service for a determination of whether an extraschedular rating is warranted. *Id.* In *Yancy v. McDonald*, the Court explained that “the first *Thun* element compares a claimant's symptoms to the rating criteria, while the second addresses the resulting effects of those symptoms.” 27 Vet.App. 484, 494 (2016). Indeed, although the first and second *Thun* elements are interrelated, they “involve separate and distinct analyses,” and “[i]f either element is not met, then referral for extraschedular consideration is not appropriate.” *Id.* at 494-95.

First and foremost, Appellant fails to explain how the use of medications, cane, fabric lumbar support and TENS unit and his antalgic gait is so unusual or exceptional in nature such that referral for an extraschedular rating was required.

An appellant bears the burden of demonstrating error on appeal. *Overton v. Nicholson*, 20 Vet.App. 427, 435 (2006). This requires that an appellant not only show that an error was committed, but that, but for the error, the outcome of the Board decision might have been different. *Sanders*, 556 U.S. at 409 (holding that the harmless error analysis applies to the Court's review of Board decisions and that the burden is on Appellant to show he suffered prejudice as a result of VA error) . It is not enough that an appellant merely allege error and harm. An appellant bears the responsibility to adequately develop his arguments and to plead any allegations contained therein sufficiently. *Id.*; *Leonard v. Principi*, 17 Vet.App. 447, 452-53 (2004) (an appellant must support his or her arguments with reasons and citations to supporting authority). Here, Appellant has not carried his burden of demonstrating error and prejudice. *Hilkert*, 12 Vet.App. at 151. Consequently, the Court should reject Appellant's argument.

To the extent that Appellant argues that the Board failed to provide any discussion of how it determined that his functional loss caused by his low back disability was adequately contemplated by a 20 percent rating, Appellant again fails to demonstrate prejudice. Specifically, he fails to point to any evidence of record demonstrating that he has *any* functional loss caused by his low back condition. In fact, at the January 2015 VA examination Appellant specifically **denied** any functional loss. (R. at 92 (91-102)). Accordingly, because the evidence does not demonstrate that Appellant has any functional loss due to his service-connected disability, any discussion as to this is merely harmless error

because Appellant was not prejudiced by such error. Appellant has failed to demonstrate otherwise.

Finally, regarding Appellant assertions that the Board misapplied the second element in *Thun*, such arguments are unavailing. Here, the Board found that Appellant's "symptomatology is fully addressed by the rating criteria under which such disabilities are rated." (R. at 35-36 (2-40)). It went on to state, "[i]n this regard, all of [Appellant's] symptomatology is contemplated by the rating criteria, to include those symptoms which are not specifically enumerated such as the impact of medications on concentration and limitations in mobility." (R. at 36 2-40)). Given the Board's determination that the first step of *Thun* was satisfied, it did not err in determining that referral for extraschedular consideration was not warranted. See *Yancy*, 27 Vet.App. at 494. Because the Board found that the first element in *Thun* was not satisfied there was no need for the Board to discuss the second step and, more importantly, Appellant fails to demonstrate that any failure by the Board to address the effects his back disability had on his employment rendered its analysis of the first *Thun* step inadequate. *Id.* at 494-95; see also *Hilkert*, 12 Vet.App. at 151. Accordingly, his argument lacks the necessary foundation to warrant judicial consideration and, to the extent that it is nevertheless considered, Appellant's contentions should be rejected. See *Woehlaert v. Nicholson*, 21 Vet.App. 456, 463 (2007) ("The Court has consistently held that it will not address issues or arguments that counsel fails to adequately develop in his or her opening brief.").

Any arguments not raised in Appellant's opening brief are abandoned. It is axiomatic that issues not raised on appeal are abandoned. See *Disabled American 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"); *Winters v. West*, 12 Vet.App. 203, 205 (1999); *Williams v. Gober*, 10 Vet.App. 447, 448 (1997) (BVA determinations unchallenged on appeal deemed abandoned). Accordingly, the Secretary has limited his response to only those arguments raised by Appellant in his opening brief, and, as such, urges this Court to find that Appellant has abandoned all other arguments. See *Pieczenik v. Dyax Corp.*, 265 F.3d 1329, 1332-33 (Fed. Cir. 2001); *Norvell v. Peake*, 22 Vet.App. 194, 201 (2008). The Secretary, however, does not concede any material issue that the Court may deem Appellant adequately raised and properly preserved, but which the Secretary did not address, and requests the opportunity to address the same if the Court deems it necessary.

V. CONCLUSION

Upon review of all of the evidence and Appellant's arguments, this Court should affirm the Board's July 27, 2015, decision denying entitlement to rating in excess of 20 percent for (DDD) of the lumbar spine from July 16, 2005, to July 31, 2007, and from October 1, 2007, for the above stated reasons.

Respectfully submitted,

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