

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

LUCIOUS WRIGHT
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**

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

LUCIOUS WRIGHT,)	
)	
Appellant)	
)	
v.)	Vet. App. No. 15-3603
)	
ROBERT A. MCDONALD,)	
Secretary of Veterans Affairs)	
)	
Appellee)	

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

APPELLEE'S BRIEF

I. ISSUES PRESENTED

Whether the Court should affirm the Board of Veterans' Appeals (the Board) July 27, 2015, decision which denied entitlement to service connection for neck and low back disabilities where the Board provided an adequate statement of reason or bases for its decision to deny his claims.

II. STATEMENT OF THE CASE

Jurisdictional Statement

The Court has proper jurisdiction pursuant to 38 U.S.C. §§ 7252(a) and 7266(a).

Nature of the Case

Lucious Wright (Appellant) appeals the July 27, 2015, decision of the Board, which denied entitlement to service connection for neck and low back disabilities. (R. at 2-17). A 50 percent evaluation for headaches was granted and Appellant has not listed in his brief this as an issue that he is appealing. *Id.* Thus, the Court should hold that Appellant has effectively abandoned this claim. See *Cromer v. Nicholson*, 19 Vet.App. 215, 217 (2005) (“[I]ssues not raised on appeal are considered abandoned.”).

Statement of Relevant Facts

Appellant served on active duty from January 1966 to January 1968. (R. at 1094).

Appellant’s service medical records (SMR) does not reflect any complaints, treatment, or diagnosis for neck or back related problems. (R. at 67-97).

In September 2006, Appellant submitted an application for compensation for entitlement to service connection for back and neck disabilities. (R. at 1081 (1076-85)).

An October 2006 treatment record, noted complaints of pain in Appellant’s cervical and lumbar area and he was diagnosed with cervical arthritis. (R. at 1061).

In a June 2007 rating decision, Appellant's claims for back and neck conditions were denied. (R. at 1034-35 (1026, 1028-29, 1032-37)). Appellant submitted a Notice of Disagreement (NOD) in July 2007. (R. at 1024-25).

In a February 2008 statement, Appellant's primary care physician, Dr. Kennedy Ganti, noted that Appellant had problems with neck and back pain. (R. at 987 (987-88)). Dr. Ganti stated that Appellant had "sustained multiple injuries to these areas during his military service career." *Id.*

In a May 2008 statement, Dr. Ganti noted that Appellant had extensive bilateral arm, shoulder and neck pain. (R. at 906). He stated that Appellant had "a significant history of physical trauma endured while serving during his military tenure" and that he "suffered from head, neck and shoulder trauma." *Id.*

A Statement of the Case (SOC) was issued in August 2008 (R. at 887-900) and Appellant appealed to the Board later that month. (R. at 872). Appellant asserted that his neck and low back disabilities were caused as a result of an in-service jeep accident. *Id.* He explained that during service, he was a passenger in a jeep that was carrying a water tank and that while the jeep was going around a curve, the jeep went out of control and rolled into a ditch. *Id.* Appellant stated that he hit his head and has had back and neck pains since the accident. *Id.*

In a May 2010 statement, Dr. Ganti noted that he had been treating Appellant for the past several years for numerous medical conditions, including neck and low back pain, and that his musculoskeletal problems continued to worsen despite treatment. (R. at 453 (453-54)). He stated that "[m]uch of

[Appellant's] disability stems from issues encountered during his years of military service.” *Id.* Dr. Ganti repeated this opinion in an October 2011 statement. (R. at 333 (333-34)).

A June 2012 medical opinion from Dr. S. Manzoor Abidi, a private neurologist, noted that Appellant reported having a history of closed head trauma and injury to his neck in 1966 when he was involved in an accident while traveling in an Army jeep which went into a ditch and turned over. (R. at 256 (256-57)). Dr. Abidi, referring to a cervical spine x-ray, opined that Appellant had cervical spondylosis and degenerative changes with radiculopathy and that his disabilities were “directly related to the injuries sustained by [him] in the accident [during service].” *Id.*

A July 2012 private examination documented that Appellant reported his history of low back pain following his in-service jeep accident. (R. at 266 (266-68)). Appellant explained that the low back pain had occurred on and off since his accident. *Id.* The examiner diagnosed Appellant with lumbar degenerative disc disease (DDD) stenosis with radiculopathy. *Id.* at 267.

In June 2013, Dr. Ganti submitted a medical opinion noting that Appellant had been his patient for 6 years and that Appellant had provided him with a very detailed report about his injury from a motor vehicle accident (MVA) during his service that he did not reveal to authorities. (R. at 160). Dr. Ganti found that Appellant had extensive cervical and lumbar disc disease with canal and foraminal stenoses at multiple levels that he believed were service related. *Id.*

In May 2014, Appellant was afforded VA examinations for his cervical and thoracolumbar spines. (R. at 135-51). The VA examiner noted Appellant's reported history of his in-service jeep accident and his symptomatology of neck and low back pain. *Id.* at 136. He stated that Appellant had reported the incident to the mess Sergeant and the Sergeant had Appellant prepare the "chow" for the other soldiers. *Id.* He never was on sick call and there is no record of any medical evaluation of the accident. *Id.* The VA examiner diagnosed Appellant with degenerative joint disease (DJD) and DDD of the cervical spine and DDD of the lumbar spine. *Id.* at 136, 144. The examiner found that it was less likely than not that the alleged jeep incident resulted in neck and low back injuries. *Id.* at 143. The VA examiner found it significant that the extent of Appellant's injuries, by his own report, were "insufficient to prevent him immediately continuing on active duty" immediately following the accident. *Id.* He further noted that there was no evidence to indicate that there was anything other than "a self limited condition" that allowed him to immediately resume his regular duty. *Id.* The VA examiner also found no evidence of an injury sufficiently severe to cause his currently diagnosed cervical and lumbar spine disabilities. *Id.* Although the VA examiner cited the 2008 and 2010 opinions of Dr. Ganti, the VA examiner found that the opinions were not consistent with Appellant's statements. *Id.* at 142-43. The VA examiner noted that Dr. Ganti stated that Appellant's disabilities stemmed from his years of military service, but the VA examiner pointed out that Appellant reported, during his VA examination, that his neck and low back

disabilities occurred as a result of one jeep accident during service. *Id.* Thus, the VA examiner noted that “this discrepancy casts doubt on the veracity of Dr. Ganti’s statements.” *Id.* at 143.

Appellant submitted July 2014 and February 2015 medical opinions from his private treating physician, Dr. Batool Razvi. (R. at 48; 58). The opinions referred to Appellant’s reported history of sustaining chronic back and neck pain following his in-service MVA and opined that his cervical and lumbar spine disabilities were service related. *Id.*

During a May 2015 Board hearing, Appellant testified that after his in-service accident, he was able to get out of the jeep and go back to where he was stationed. (R. at 27-28 (23-40)). He reported the accident to his mess sergeant, who told him to return to his duties in the mess hall. *Id.* at 28. Appellant explained that as a first cook, his duties were already light and he did not have to carry or lift much. *Id.* Appellant stated that he never sought treatment for his injuries while in service. *Id.* at 28-29. After his discharge, Appellant worked as a supervisor at a steel company. *Id.* at 31. While Appellant was working, he testified that he went to doctors for his neck and back “off and on . . . every six months or twice a year.” *Id.* at 36.

III. SUMMARY OF ARGUMENT

The Court should affirm the July 27, 2015, decision of the Board, which denied entitlement to service connection for neck and low back disabilities

because the Board provided an adequate statement of reason or bases for its decision to deny his claims.

IV. ARGUMENT

THE BOARD PROVIDED AN ADEQUATE STATEMENT OF REASONS OR BASES FOR ITS DECISION TO DENY APPELLANT'S CLAIMS.

Service connection may be granted for a disability resulting from disease or injury incurred in or aggravated by a veteran's active service. 38 U.S.C. § 1110; 38 C.F.R. § 3.303. Generally, “[t]o establish a right to compensation for a present disability, a veteran must show: ‘(1) the existence of a present disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a causal relationship between the present disability and the disease or injury incurred or aggravated during service’—the so-called ‘nexus’ requirement.” *Holton v. Shinseki*, 557 F.3d 1362, 1366 (Fed. Cir. 2009). It is the veteran’s “general evidentiary burden” to establish all elements of his claim, including the nexus requirement. *Id.* at 1368. The determination as to whether these requirements are met is based on an analysis of all the evidence of record and the evaluation of its credibility and probative value. *See Jones v. Principi*, 16 Vet.App. 219, 225 (2002).

Factual determinations made by the Board are entitled to deference and reviewed only for clear error. 38 U.S.C. § 7261(a)(4). Under this standard of review, the Court cannot substitute its judgment for that of the Board and must affirm the Board’s factual determinations so long as they are supported by a

plausible basis in the record. *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990); See also *Deloach v. Shinseki*, 704 F.3d 1370, 1380 (Fed. Cir. 2013) (“The Court of Appeals for Veterans Claims, as part of its clear error review, must review the Board’s weighing of the evidence; it may not weigh any evidence itself.”). The Board has wide latitude when it comes to deciding matters of fact and its factual determinations may be derived from any number of sources, to include credibility determinations, physical or documentary evidence, or inferences drawn from other facts. See *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 574, 105 S.Ct. 1504 (1985). The mere fact that the evidence could be viewed differently does not render the Board’s interpretation of the evidence clearly erroneous. *Id.* (“Where there are two permissible views of the evidence, the factfinder’s choice between them cannot be clearly erroneous.”).

Appellant argues that the Board provided an inadequate statement of reasons or bases when it afforded more probative weight to the May 2014 VA examination than the multiple positive private opinions. (Appellant’s Brief (App. Br.) at 8-12). Appellant’s argument is without merit.

Although, Appellant argues that the Board improperly discounted the favorable medical opinions of record because they were based on information provided by him (App. Br. at 7-9), he fails to note that the Board explained that there was an inaccurate factual premise in those opinions and the primary reason that those favorable opinions were afforded low probative value was because they provided no rationale to support their conclusions. (R. at 12-13 (2-

17)); See *Nieves-Rodriguez v. Peake*, 22 Vet.App. 295 (2008) (noting that the probative value of a medical opinion comes from the factually accurate, fully articulated, and sound reasoning for the conclusion). In its decision, the Board noted that the June 2012 medical opinion by Dr. Abidi noted a history of closed head trauma while in service (R. at 256 (256-57)), but the Board explained that there is no evidence in the record of such trauma, establishing that the opinion is based on an inaccurate factual premise. (R. at 12 (2-17)). The Board also noted that Dr. Ganti's June 2013 medical opinion suffered from a similar deficiency when he suggested that Appellant had not reported his MVA to authorities during service (R. at 160), even though he expressly testified that he reported the accident to his mess Sergeant after it occurred. (R. at 12 (2-17)) *citing* (R. at 28 (23-40) (May 2015 Board hearing)). Moreover, the May 2014 VA examiner noted that Dr. Ganti stated that Appellant's disabilities stemmed from his years of military service (R. at 453 (453-54) (May 2010 medical opinion), (R. at 906) (May 2008 medical opinion)), but the VA examiner pointed out that Appellant reported, during his VA examination, that his neck and low back disabilities occurred as a result of one jeep accident during service. (R. at 142-43 (135-51)). Therefore, there was plausible probative evidence of record for the Board to discount these private medical opinions due to an inaccurate factual premise. See *Hood v. Shinseki*, 23 Vet.App. 295, 299 (2009) ("The Court reviews factual findings under the 'clearly erroneous' standard such that it will not disturb a Board finding

unless, based on the record as a whole, the Court is convinced that the finding is incorrect.”).

Additionally, the Board explained that the June 2012 (R. at 256-57), June 2013 (R. at 160), July 2014 (R. at 58), and February 2015 (R. at 48) private medical opinion all neglected to provide a rationale or basis for their medical opinions that Appellant’s neck and lumbar conditions are related to service. (R. at 12-13 (2-17)). Indeed, none of the positive private medical opinions explain why it is more likely than not that Appellant’s conditions are related to his MVA in service. *Id.* Alternatively, the Board meticulously explained that the May 2014 VA opinion was based on Appellant’s entire factual medical history and the examiner reasoned that because Appellant was able to return to his duties immediately after his MVA, this indicated that Appellant’s injuries were not severe enough to cause his current conditions. (R. at 13 (2-17)) *citing* (R. at 143 (135-51)) *See Monzingo v. Shinseki*, 26 Vet.App. 97, 105 (2012) (per curiam) (“[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.”). Therefore, the Board appropriately determined that the May 2014 VA opinion held greater probative weight than the other medical opinions of record because it provided a rationale for its conclusion. (R. at 12-13 (2-17)); *See D’Aires v. Peake*, 22 Vet.App. 97, 107 (2008) (recognizing that it is the responsibility of the Board to evaluate the evidence and that it may properly favor certain evidence over other evidence); *see also Owens v. Brown*, 7 Vet.App. 429,

433 (1995) (“It is not error for the [Board] to favor the opinion of one competent medical expert over that of another when the Board gives an adequate statement of reasons and bases” for doing so.).

As such, Appellant has not substantiated his argument, nor has he shown how his assertions of error resulted in any prejudice to his claim and therefore has not shown how the Board erred in its decision. *Shinseki v. Sanders*, 556 U.S. 396 (2009) (appellant bears the burden of demonstrating prejudice on appeal).

V. CONCLUSION

Upon review of all the evidence, as well as consideration of the arguments advanced by Appellant, the Secretary submits that, the Court should affirm Board’s decision in accordance with the above discussion.

Respectfully submitted,

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