Vet.App. No. 15-3389

IN THE UNITED STATES COURT
OF APPEALS FOR VETERANS CLAIMS

TODD N. VANDERVORT,
Appellant,

v.

ROBERT A. MCDONALD,
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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Appellant,	)	
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ROBERT A. MCDONALD,	)	
Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS

BRIEF OF THE APPELLEE
SECRETARY OF VETERANS AFFAIRS

I. ISSUES PRESENTED

A. Should the Court affirm the June 5, 2015, Board Decision that denied entitlement to a separate disability rating under Diagnostic Code 5257 where there is no competent evidence of lateral instability of Appellant's knees?

B. Should the Court affirm the Board's decision to deny a separate rating under Diagnostic Code 5258 where the Board found that Appellant did not exhibit frequent episodes of locking or effusion into the joint of the left knee?

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

This Court has jurisdiction under 38 U.S.C. § 7252(a), which grants the U.S. Court of Appeals for Veterans Claims (Court) exclusive jurisdiction to review Board decisions.

B. Nature of the Case

Appellant, Todd N. Vandervort, appeals the Board's decision that denied entitlement to an initial schedular disability rating in excess of ten percent for left knee patellofemoral pain syndrome, as well as separate ratings under Diagnostic Codes (DC) 5257 and 5258. [Record Before the Agency (R.) at 3-16].

C. Statement of Facts

Appellant served on active duty from August 1979 to July 1981. [R. at 4]. Thirty years after service, in December 2008, he applied for compensation for a for a left knee injury/pain. [R. at 448 (443-452)]. Two months later, the Department of Veterans Affairs (VA) provided Appellant a joints examination. [R. at 423-429]. Appellant reported experiencing moderate flare-ups precipitated by moving his left knee in a certain way, which lasted for hours and occurred every two to three weeks. [R. at 424]. The examiner noted no episodes of dislocation or subluxation, no episodes of effusions, but did note locking that occurred several times a year, but less than monthly. [R. at 424]. While Appellant seems to have reported instability, upon examination, the examiner noted that joint findings were negative for instability. [R. at 424-425].

In April 2009, the VA Regional Office (RO) awarded Appellant a ten percent disability rating for service connection for left knee patellofemoral pain syndrome. [R. at 413 (409-416)]. Appellant filed a Notice of Disagreement in August of that year, requesting that his left knee be re-evaluated. [R. at 375-376]. VA then provided him another examination in October 2009. [R. at 332-337]. He reported experiencing flare-ups three to four times a year. [R. at 333]. He reported experiencing locking several times per week, and that sometimes he felt his left knee would give out. [R. at 333]. The examiner noted that there was no swelling in the left knee. [R. at 334]. The following month, the RO continued his ten percent rating, prompting him to file a Notice of Disagreement in January 2010. [R. at 324 (321-329); 317].

Appellant then underwent knee surgery in March 2010, resulting in a temporary 100% rating from March 4, 2010, to June 1, 2010. [R. at 278; 224; 185 (183-189); 233 (229-237)]. A follow-up treatment record noted a small, palpable effusion that was typical two weeks after the surgery. [R. at 242]. Appellant then filed a substantive appeal later that month. [R. at 239-240]. In October 2010, a primary care treatment record noted no signs of swelling or edema. [R. at 162-163].

In April 2012, Appellant appeared before the Board for a hearing. [R. at 33-41]. He testified as to his knee conditions, reporting the use of a cane, and claiming that there were numerous times where either one of his knees would give out, and that he would have fallen, but for his cane. [R. at 36]. He testified

that both of his knees have a tendency to give out several times a month or more. [R. at 37]. A September 2012 orthopedic consultation noted no joint instability upon examination of either knee. [R. at 717-718]. The Board subsequently remanded Appellant's claim for a new examination. [R. at 29 (17-32)].

VA then provided Appellant that examination in March 2013. [R. at 96-107]. Appellant reported experiencing no flare-ups. [R. at 98]. The examiner noted that Appellant used a cane regularly, but found that there were no objective signs of instability or subluxation on physical examination. [R. at 102, 106]. The examiner also noted frequent episodes of joint pain, but not frequent episodes of locking or effusion into the joint. [R. at 104].

In June 2015, the Board issued the decision currently on appeal. [R. at 3-16]. It declined to assign a higher rating for his current service-connected disability, evaluated as ten percent disabling under DCs 5260 and 5261. [R. at 5]. The Board also declined to assign a separate rating under DC 5257, noting Appellant's complaints of instability and giving way, but finding that his descriptions were more akin to buckling and reflected "the normal [ ] working movement of the joint, rather than the lateral motion contemplated under [DC] 5257." [R. at 8]. The Board noted that the February 2009 and March 2013 VA examination reports, along with VA treatment records, showed no objective signs of instability or subluxation. [R. at 8].

The Board also denied a separate or higher rating under DC 5258. It found that the evidence did not reveal frequent episodes of locking or effusion into the joint of his left knee. [R. at 11]. It considered the February 2009, October 2009, and March 2013 VA examination reports. [R. at 11]. This appeal followed.

III. SUMMARY OF THE ARGUMENT

Appellant has not shown clear error in the Board's determination. The Board sufficiently explained that the evidence failed to show that Appellant's symptoms were akin to the lateral motion contemplated by DC 5257. Associating the "buckling" he experiences to such instability, which the medical evidence fails to show, is beyond his competency. Furthermore, the Board adequately explained that he is not entitled to a separate rating under DC 5258 because the medical evidence fails to show that he exhibits all of the required symptoms. Consequently, the Court should affirm the Board's decision.

IV. ARGUMENT

A. Standard of Review.

The Court reviews the Board's evaluation of degree of disability under the "clearly erroneous" standard of review. *See Smallwood v. Brown*, 10 Vet.App. 93, 97 (1997); *Gilbert v. Derwinski*, 1 Vet.App. 49, 53 (1990). A determination of whether a claimant should be granted entitlement to service-connected benefits is reviewed under this standard as well. *Lennox v. Principi*, 353 F.3d 941, 946 (Fed. Cir. 2003). The Supreme Court has held that a finding is clearly erroneous

"when although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985) (explaining how an appellate court reviews factual findings under the "clearly erroneous" standard) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 564, 595 (1948)); *see Padgett v. Nicholson*, 19 Vet.App. 133, 146 (2005) (quoting same). In addition, the Supreme Court has held that under the clearly erroneous standard of review, "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Id.* at 574.

The Court also reviews whether the Board supported its decision with 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). Section 7104(d)(1) does not, however, require the Board to use any particular statutory language or "terms of art." *Jennings v. Mansfield*, 509 F.3d 1362, 1366 (Fed. Cir. 2007). Additionally, the Board is presumed to have considered all the evidence of record, even if the Board does not specifically address each item of evidence. *Newhouse v. Nicholson*, 497 F.3d 1298, 1302 (Fed. Cir. 2007).

It is relevant to the Court's standard of review that an appellant generally bears the burden of demonstrating error in a Board decision. *Hilkert v. West*, 12 Vet.App. 145, 151 (1999), *aff'd* 232 F.3d 908 (Fed. Cir. 2000). An appellant's burden also includes the burden of demonstrating that any Board error is

harmful. *Waters v. Shinseki*, 601 F.3d 1274, 1278 (Fed. Cir. 2010). Furthermore, arguments not raised in the initial brief are generally deemed abandoned, and the Court should find that Appellant has abandoned any argument not presented in his initial brief. *See Carbino v. West*, 168 F.3d 32, 34 (Fed. Cir. 1999) ("courts have consistently concluded that the failure of an appellant to include an . . . argument in the opening brief will be deemed a waiver of the . . . argument").

B. There is no competent evidence that Appellant experiences lateral instability as contemplated by DC 5257.

Despite Appellant's arguments to the contrary, the Board properly determined that he is not entitled to a separate disability rating under DC 5257. *See* Appellant's Brief (App. Br.) at 6-11. As the Board explained, his symptoms are not reflective of the lateral instability contemplated by DC 5257, and he is not a medical professional competent to opine otherwise. There was no clear error in this determination.

As the fact-finder, "[t]he Board has the duty to weigh the evidence. . . . In doing so, the Board must assess the credibility and probative weight of the evidence." *Singleton v. Shinseki*, 23 Vet.App. 376, 381 (2010); *see Washington v. Nicholson*, 19 Vet.App. 362, 367-68 (2005) (holding that it is the Board's responsibility to "assess the credibility of, and weight to be given to," the evidence of record). Also, the Board must consider lay evidence if it is submitted during the evaluation of a claim. *Buchanan v. Nicholson*, 451 F.3d 1331, 1337

(Fed. Cir. 2006). In certain situations, lay evidence may be used to diagnose a claimant's medical condition. *See Davidson v. Shinseki*, 581 F.3d 1313, 1316 (Fed. Cir. 2009) (rejecting the view that competent medical evidence is required when the determinative issue involves medical etiology or a medical diagnosis); *Jandreau v. Nicholson*, 492 F.3d 1372, 1377 (Fed. Cir. 2007) (providing situations in which lay evidence may be used to diagnose a condition); *Barr v. Nicholson*, 21 Vet.App. 303, 307 (2007) (stating that "[l]ay testimony is competent . . . to establish the presence of observable symptomatology and 'may provide sufficient support for a claim of service connection'" (quoting *Layno v. Brown*, 6 Vet.App. 465, 469 (1994))). But this is a factual determination to be made by the Board, and the Court may only overturn it if finds that finding to be clearly erroneous. *Davidson*, 581 F.3d at 1316 (reiterating that the Board may find a claimant not competent to render a nexus opinion as a matter of fact, but not as a matter of law). *See Owens v. Brown*, 7 Vet.App. 429, 433 (1995); *Sanden v. Derwinski*, 2 Vet.App. 97, 101 (1992) ("The Court can overturn findings of fact made by the B[oard] only if those findings, including findings regarding credibility, are clearly erroneous"). There is no such error in this case.

Diagnostic Code 5257 provides a disability rating for recurrent subluxation or lateral instability, rated as slight, moderate, or severe. 38 C.F.R. § 4.71a, DC 5257. The Agency has elaborated on the type of lateral instability contemplated by the DC, finding that "[l]ateral instability, as referred to in 38 CFR 4.71a, DC 5257 includes evaluations based on posterior or anterior instability." MANUAL

M21-1 (M21-1), III.iv.4.A.3.f. Consequently, the Board found that there was no objective medical evidence of such lateral instability, and that his symptoms were, instead, reflective of buckling, and not the lateral motion contemplated by DC 5257. [R. at 8]. Indeed, the Board noted that VA examination reports reflected no objective signs of instability or subluxation upon examination, and that the tests for such instability or subluxation were negative. [R. at 8; 425; 101-103, 106]. The Board also referenced a September 2012 VA orthopedic consultation in which the orthopedist specifically noted that there was "no joint instability noted on exam on either knee." [R. at 717-718]. Thus, the Board was emphasizing the fact that the medical evidence fails to show instability or subluxation of the type contemplated by DC 5257, and Appellant is not competent to classify the symptoms he experiences (i.e., buckling) as the instability contemplated by the rating schedule. [R. at 8]. Appellant fails to show clear error in this determination.

Appellant raises a series of arguments, and the Court should reject each of them for the following reasons. First, he accuses the Board of offering its own medical opinion without considering independent medical evidence. App Br. at 7. This is inaccurate. The Board underscored the Agency's interpretation of the type of lateral motion contemplated by DC 5257, and referenced various medical records revealing Appellant's failure to exhibit this type of instability. [R. at 8]; M21-1,III.iv.4.A.3.f. In particular, it cited the February 2009 and March 2013 VA

examination reports, as well as the September 2012 orthopedic consultation. Appellant's argument, therefore, is unwarranted.

Second, Appellant claims that the Board erred because even if he did not exhibit lateral instability, it still should have explained whether his buckling constituted posterior or anterior instability (or remanded for a medical opinion) as explained in the M21-1. App. Br. at 7-8. This is unpersuasive. As explained above, the M21-1 explains that the "lateral instability" referenced in DC 5257 already considers evaluations based on posterior or anterior instability. M21-1,III.iv.4.A.3.f. Consequently, the Board already considered such posterior or anterior instability when it found that Appellant's "buckling" is not demonstrative of the "lateral instability" contemplated by DC 5257. [R. at 8]. Thus, this argument does not show error because the Board's finding already considered this point, and Appellant was not entitled to a rating by analogy either because his "buckling" is of a different nature than what is contemplated by the DC. *See* App. Br. at 7-8.

Third, the Court should also reject Appellant's arguments that the Board discounted Appellant's lay statements, and that it made no competency or credibility finding in discounting his statements. App. Br. at 8-10. This is also unpersuasive because it misconstrues the Board's findings. Appellant accuses the Board of discounting his lay statements and erroneously requiring objective evidence of instability. App. Br. at 8-9. But upon analysis, the Board was simply acting within its purview of weighing the evidence as a whole, and finding that the

objective evidence did not show the type of instability or subluxation required for a rating under DC 5257. *Singleton*, 23 Vet.App. at 381; *see Washington*, 19 Vet.App. at 367-368. In this light, Appellant is also incorrect that that Board did not find him incompetent or incredible to discount his lay statements in favor of the objective medical evidence. App. Br. at 9.

Indeed, the Board implied that understanding the nature of his knee instability and classifying the type of lateral movement he experiences was beyond his competence. [R. at 8] (the Board noting his complaints of instability and giving way, but referencing medical evidence and concluding that "it is apparent the motion he is describing is a buckling, and represents the normal (albeit unanticipated) working movement of the joint, rather than the lateral motion contemplated under Diagnostic Code 5257"). While the Board could have made its competency determination more clear on this point, it is clear from its discussion that it did not consider Appellant to have the medical expertise or knowledge to opine on the type of lateral movement exhibited by his knee, particularly in light of the medical evidence that showed he did not demonstrate such instability. *Thompson v. Gober*, 14 Vet.App. 187, 188 (2000) (explaining that the Board's reasons or bases need only enable an appellant to understand the precise basis or bases for its decision in order to be adequate). The Board found that what Appellant was calling instability was not instability for the purposes of the rating schedule. [R. at 8]. Appellant contends that the Board may not find him incredible solely due to the lack of confirmatory medical

evidence, and cited to *Jandreau* in claiming that lay evidence may be competent to identify a medical condition. App. Br. at 9 (noting that the Court in *Jandreau* found that a claimant is competent to identify a simple condition, such as a broken leg); *Jandreau*, 492 F.3d at 1377. But this is unavailing. The Board made no adverse credibility determination. It considered Appellant's reports on his symptomatology to be credible.

Instead, it found that Appellant's reporting was unreliable because what he was calling instability is not considered instability of the joint. Determining the type of instability that Appellant experiences is not a simple matter, such as identifying a broken leg. While Appellant may identify the symptoms that he experiences, as a lay person, he may not classify these symptoms as the type of lateral instability contemplated by DC 5257 without supporting medical evidence. *Id.* Thus, the Board essentially considered the objective medical evidence to be more probative than Appellant's assertions. The Court can overturn this finding only if it is clearly erroneous. *Owens*, 7 Vet.App. at 433; *Sanden*, 2 Vet.App. at 101. But Appellant fails to show such error in light of the Board's determination, and its explanation that the medical evidence fails to show the type of instability that is considered by DC 5257.

Additionally, the Court should reject Appellant's contention that the Board needed to address the impact of buckling either in its functional loss analysis or in its extraschedular analysis. App. Br. at 11. As discussed *supra*, the Board explained that the instability and giving way that he experiences is not the type of

lateral movement contemplated by DC 5257, but is buckling instead. [R. at 8]. These symptoms are already contemplated by his current ten percent rating for left knee patellofemoral pain syndrome. [R. at 5, 6 (Board noting symptoms of "giving way" and "instability" in its increased rating analysis); 414; 325; 269 (246-274)]. Moreover, he has not shown how these symptoms would render his disability exceptional or unusual to warrant extraschedular referral. 38 C.F.R. § 3.321(b); *Yancy v. McDonald*, 27 Vet.App. 484, 495 (2016) (explaining that the issue of whether referral for extraschedular consideration is warranted must be argued by the claimant or reasonably raised by the record"). Accordingly, the Court should reject Appellant's argument.

Lastly, Appellant accuses the Board of misreading the evidence because it concluded that Appellant did not report losing his balance because of his knee disability, yet he indicated as such in the April 2012 hearing. App. Br. at 6; [R. at 36]. Appellant, however, fails to demonstrate how this is prejudicial to his claim. 38 U.S.C. § 7261(b)(2) (requiring that the Court take account of the rule of prejudicial error); *Shinseki v. Sanders*, 556 U.S. 396 (2009); *Mlechick v. Mansfield*, 503 F.3d. 1340, 1345 (Fed. Cir. 2007) (finding that the Court must take into account the rule of prejudicial error when reviewing Veterans' cases); *see also* 38 C.F.R. § 20.1102 ("Any error or defect in any decision by the Board of Veterans' Appeals [that] does not affect the merits of the issue or substantive rights of the appellant will be considered harmless and not a basis for vacating or reversing such a decision."). As discussed *supra*, the Board explained that

Appellant does not experience the type of instability contemplated by DC 5257. Appellant's loss of balance is not demonstrative of this type of instability, so he fails to show how any possible misreading, as alleged, prejudiced his claim. Consequently, the Court should reject his argument and affirm the Board's determination.

C. The Board sufficiently explained that Appellant is not entitled to a separate rating under DC 5258.

The Court should reject Appellant's argument that the Board did not provided an adequate statement of reasons or bases for rejecting a separate rating under DC 5258. App. Br. at 11-13. A disability rating under DC 5258 is warranted when there is dislocation of the semilunar cartilage, with frequent episodes of "locking," pain, and effusion into the joint. 38 C.F.R. § 4.71a, DC 5258. Appellant claims that the Board cited an October 2009 VA treatment record that noted locking several times per week, and the Board erred because it did not explain why "several times per week" would not be considered "frequent." This is unavailing because he still has not demonstrated frequent episodes of effusion into the joint.

As the finder of fact, the Board explained that the medical record failed to meet the requirements of DC 5258, noting the findings in the February 2009 VA examination, the October 2009 VA examination, the March 2013 VA examination, the December 2010 follow-up record, and an October 2010 VA primary care note. [R. at 11; 424; 333; 104; 242; 162-163]. The Board noted

that Appellant previously had a left knee meniscal tear, and that he demonstrated frequent episodes of pain. [R. at 11]. But it concluded that he did not demonstrate frequent episodes of locking or effusion. Because the Board is responsible for making factual determinations, it is entitled to determine that locking that occurs several times per week is not sufficient. *Singleton*, 23 Vet.App. at 381; *Washington*, 19 Vet.App. at 367-368. Consequently, the Board's statement of reasons or bases were sufficient, and it was not entitled to consider the interplay of §§ 4.3, 4.7, and 4.21 as alleged. App. Br. at 12. Appellant has not demonstrated evidence of frequent episodes of effusion into the joint, so the Board correctly found that Appellant fails to satisfy the full criteria needed for entitlement to a disability rating under DC 5258. The Court should affirm the Board's decision.

Accordingly, the Secretary respectfully submits that the Court should affirm the Board's decision that denied entitlement to a higher rating for left knee patellofemoral pain syndrome, and separate ratings under DCs 5257 and 5258. The Secretary submits that the Board has provided an adequate statement of its reasons and bases for its conclusion. Furthermore, as discussed *supra*, the Court should find that Appellant has abandoned any argument not presented in his initial brief. *See Carbino*, 168 F.3d at 34 (holding that the failure of an appellant to include an argument in the opening brief will generally be deemed a waiver of that argument).

CONCLUSION

For the foregoing reasons, the Court should affirm the Board's decision.

Respectfully submitted,

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