

Vet. App. No. 15-4060

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

KENT S. HUGHES,
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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**IN THE UNITED STATES COURT OF APPEALS
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Appellant,)	
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ROBERT A. McDONALD,)	
Secretary of Veterans Affairs,)	
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Appellee.)	

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

BRIEF OF THE APPELLEE

I. ISSUE PRESENTED

Whether the Court should affirm a September 28, 2015, decision of the Board of Veterans' Appeals (the Board), to the extent that it denied entitlement to service connection for hypertension.

II. STATEMENT OF THE CASE

A. NATURE OF THE CASE

Appellant contests only that part of the Board decision that denied entitlement to service connection for hypertension. [Appellant's Brief (App. Br.) at 2]. He has not raised any argument as to the denial of entitlement to service connection for hidradenitis suppurativa (previously claimed as a

glad condition). The Court should not review the merits of the abandoned issue and should dismiss Appellant's appeal as to that issue. See *Pederson v. McDonald*, 27 Vet.App. 276, 283-85 (2015), *amended*, No. 13-1853, 2015 WL 674734 (Vet. App. Feb. 18, 2015) (en banc); *Ford v. Gober*, 10 Vet.App. 531, 535-536 (1997) (claims not addressed by the appellant in pleadings before the Court found to be abandoned); see also *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.") The Board also remanded Appellant's claim of entitlement to an initial evaluation in excess of 10 percent for hepatitis C. [R. at 15-16]. The Court is without jurisdiction over that issue. See *Breeden v. Principi*, 17 Vet.App. 475 (2004) (stating that a Board remand decision is not a final decision over which this Court has jurisdiction); 38 U.S.C. §§ 7252(a), 7266(a).

B. STATEMENT OF THE FACTS

Appellant had active duty service from March 1972 to June 1973. [R. at 145]. He filed a claim for entitlement to service connection for hypertension in July 2009. [R. at 592 (586-96)]. His service treatment records (STRs) show that his body systems were clinically normal upon entry to service, and he had a blood pressure reading of 134/84. [R. at 166-67]. Appellant was hospitalized in August 1972 and was found to have high blood pressure during evaluation for an allergic reaction. [R. at

186-88]. Blood pressure readings from August 1 and August 3, 1972 were 150/100 and 170/108, respectively. [R. at 226 (August 1, 1972 treatment record); 192 (August 3, 1972, treatment record)]. The hospitalization clinical summary documents that Appellant was admitted normotensive, and remained normotensive during the entire hospitalization, with a current blood pressure reading of 110/70. [R. at 186, 188]. The final diagnosis was hypertension by history, not found at present. [R. at 188]. Appellant was to be discharged to duty for periodic follow up of blood pressure for further evaluation at that time. [R. at 188]. Appellant's examination in preparation for separation from military service documents that all body systems were clinically normal, and he had a blood pressure reading of 120/80. [R. at 171-72]. Medical records from May and June 1973 document blood pressure readings of 120/80 and 140/80 respectively. [R. at 507; 157].

Appellant's post-service medical treatment records show that he was diagnosed with hypertension NOS in January 2003. [R. at 142]. He was provided with a VA examination in June 2010. [R. at 527-29]. The examiner noted that in 1972, Appellant was found to have elevated blood pressure while being seen for an allergic reaction, and was then referred to the hospital, where he received a work up, to include IVP renal arteriogram and finally renal artery catheterization. [R. at 527]; see [R. at 196] ("Arteriogram totally WNL [within normal limits]"); [R. at 223] (renal

angiography report). The examiner noted that the last test revealed no abnormalities. [R. at 527]. The examiner also noted that Appellant was never started on medication and was discharged with the final diagnosis of hypertension by history not found at present, and was instructed to have periodic follow up. [R. at 527].

Appellant reported that about 6 years ago—i.e., approximately 2004—when he was seen by his primary care physician for hidradenitis, he was noted to have a high blood pressure. [R. at 527]. The examiner noted Appellant was diagnosed with hypertension in 2004, and that progress notes show that he has taken atenolol and Lisinopril since 2005. [R. at 527]. Blood pressure readings during the examination were 134/90, 134/90, and 132/90. [R. at 528].

The VA examiner noted that he reviewed the c-file, including STRs and CPRS records. [R. at 529]. The examiner opined that Appellant's elevation of blood pressure in 1970s is unrelated to the hypertension with which he was diagnosed 30 years later. [R. at 529]. The examiner explained that Appellant's work-up for hypertension in the 1970s was negative, and Appellant was never started on medication. [R. at 529]. Additionally, he began taking hypertensive medications in 2004, when he was diagnosed with hypertension, and has been on medication since. [R. at 529].

Appellant's claim for entitlement to service connection for hypertension was denied in a September 2010 Rating Decision. [R. at 523 (520-26)]. He filed a timely notice of disagreement in November 2010. [R. at 494 (493-95)]. Following issuance of a statement of the case in April 2014, [R. at 318 (296-319)], he perfected his appeal in April 2014. [R. at 266]. In a September 2015 decision, the Board denied entitlement to service connection for hypertension. [R. at 15 (1-18)]. Appellant now appeals that decision.

III. SUMMARY OF THE ARGUMENT

The Board's September 28, 2015, decision should be affirmed to the extent that it denied entitlement to service connection for hypertension. Appellant was provided with an adequate examination. The Board's findings as to the adequacy of the examination to satisfy the Secretary's duty to assist and entitlement to service connection for hypertension are plausibly based upon the evidence of record and are not clearly erroneous. *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990). Appellant has not demonstrated that the Board committed prejudicial error that would warrant any action by the Court other than affirmance. See *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (holding that appellant has the burden of demonstrating error), *aff'd*, 232 F.3d 908 (Fed. Cir. 2000); *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009) (explaining that the burden of

demonstrating prejudice normally falls upon the party attacking the agency's determination)

IV. ARGUMENT

A. The June 2010 VA examination was adequate.

An adequate medical opinion is one that is based on consideration of veteran's prior medical history and describes his or her condition with a level of detail sufficient to allow the Board to make a fully informed decision on the relevant medical question. *Ardison v. Brown*, 6 Vet.App. 405, 407 (1994). This requires the examiner to not only render a clear conclusion on the relevant medical question but to support that conclusion "with an analysis that the Board can consider and weigh against contrary opinions." *Steffl v. Nicholson*, 21 Vet.App. 120, 124 (2007) (holding that "a mere conclusion by a medical doctor is insufficient to allow the Board to make an informed decision as to what weight to assign to the doctor's opinion"). See also *Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 301 (2008) (examiner must provide "not only clear conclusions with supporting data, but also a reasoned medical explanation connecting the two"). An examination report need not "explicitly lay out the examiner's journey from facts to a conclusion" but must be read as a whole. *Monzingo v. Shinseki*, 26 Vet.App. 97, 106 (2012). Whether a medical examination is adequate and the extent to which, if any, it is probative of the relevant medical questions, are factual determinations that may not be disturbed unless

clearly erroneous. See *Nolen v. Gober*, 14 Vet.App. 183, 184 (2000). Mere disagreement with an examiner's medical judgment is insufficient to demonstrate that an examination is inadequate. *Stefl*, 21 Vet.App. at 123; *Ardison*, 6 Vet.App. at 407; *Green v. Derwinski*, 1 Vet.App. 121, 124 (1991).

The June 2010 VA examination and opinion were adequate to adjudicate the claim for service connection for hypertension. The examiner based her opinion on consideration of Appellant's prior medical history, as well as his lay testimony of onset and symptomatology of his hypertension. [R. at 527]. The examiner provided a well-reasoned medical explanation as to why Appellant's current hypertension is not related to the history of hypertension noted during service. [R. at 529]. Specifically, the examiner explained that although Appellant was given a hypertension work up during service, he was never started on medications for hypertension nor even diagnosed with that condition at that time. [R. at 527; 529]. Rather, he was diagnosed with hypertension *by history*, which was not present upon examination, and was not actually diagnosed with hypertension until 2004. [R. at 527]; *but see* [R. at 142] (noting diagnosis of hypertension NOS on January 31, 2003). Moreover, it is worth noting, as the examiner did, that Appellant's hospitalization, during which high blood pressure readings were recorded, was in the context of seeking treatment for an allergic reaction. [R. at 186-88].

In its September 2015 decision, the Board found that the June 2010 VA examination and opinion were adequate to adjudicate the claim for service connection for hypertension, and that VA's duties to assist Appellant had been satisfied. [R. at 5-6]. Specifically, the Board found that the examiner reviewed Appellant's past medical history, recorded his complaints, conducted appropriate evaluations, and rendered an appropriate diagnosis and opinion consistent with the evidence of record. [R. at 5].

Nonetheless, Appellant contends that the examiner's rationale is insufficient because the lapse in time between the elevated blood pressure readings during service and the current diagnosis of hypertension does not adequately explain why the two are not related. [App. Br. at 7-8]. However, the examiner did not solely rely on the significant amount of time between service and the post-service diagnosis of hypertension. Rather, the examiner also explained that Appellant's in-service work up was negative, and that he was not diagnosed with or medicated for hypertension during service. [R. at 529]. The examiner's opinion provided sufficient detail to allow the Board to make a fully informed decision. *Ardison*, 6 Vet.App. at 407.

Appellant also contends that the examiner's opinion was based on a factually inaccurate premise because the examiner did not discuss the blood pressure reading of 140/80 from June 26, 1973. [App. Br. at 8]; see

[R. at 157]. However, a medical examiner need not comment on every piece of evidence in the claims file, even evidence favorable to an appellant's claim. See *Moore v. Nicholson*, 21 Vet. App. 211, 218 (2007), *rev'd sub nom. Moore v. Shinseki*, 555 F.3d 1369 (Fed. Cir. 2009); *Roberson v. Shinseki*, 22 Vet.App. 358, 366 (2009), *aff'd*, 607 F.3d 809 (Fed. Cir. 2010). The examiner noted that she reviewed the claims file, and is therefore presumed to have considered that specific treatment record. [R. at 527; 529]; *Miley v. Principi*, 366 F.3d 1343, 1347 (Fed.Cir. 2004) ("The presumption of regularity provides that, in the absence of clear evidence to the contrary, the court will presume that public officers have properly discharged their official duties.") Furthermore, although arguably elevated, that blood pressure reading alone is insufficient to diagnose hypertension. See 38 C.F.R. § 4.104, Diagnostic Code 7101, Note (1) (providing that a hypertension diagnosis must be confirmed by blood pressure readings taken two or more times on three different days). Appellant has not established any erroneous factual predicate for the examiner's opinion, how a discussion of the June 1973 blood pressure reading undermines the examiner's opinion, or why the Board would be required to demand that the examiner discuss this evidence in particular, which is generally in accord with the opinion expressed. See *Monzingo*, 26 Vet.App. at 106 (emphasizing that an examination report must be read as a whole).

The June 2010 examination and opinion were adequate for adjudicating the hypertension claim, and the Board's finding in that regard is not clearly erroneous. See *D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008); *Nolen*, 14 Vet.App. at 184. The Board provided an adequate statement of reasons or bases for its conclusion that the duty to assist was satisfied, explaining that the examination report was sufficient for the Board to adjudicate the claims. [R. at 5-6]; see *Allday v. Brown*, 7 Vet.App. 517, 527 (1995). Appellant bears the burden of demonstrating error on appeal, but in this case, he has not established that the Board committed error warranting remand. See *Shinseki*, 556 U.S. at 406; *Hilkert*, 12 Vet.App. at 151.

B. The Board provided adequate reasons and bases for finding that Appellant's hypertension was not incurred in or a result of military service.

A Board decision must be supported by an adequate statement of reasons or bases which explains the basis of all material findings and conclusions. 38 U.S.C. § 7104(d)(1). This requires the Board to analyze the probative value of the evidence, account for that which it finds persuasive or unpersuasive, and explain why it rejected evidence materially favorable to the claimant. *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd*, 78 F.3d 604 (Fed. Cir. 1996). The Board's statement of reasons or bases must simply be sufficient to enable the claimant to understand the basis of its decision and to permit judicial review of the

same. *Gilbert*, 1 Vet. App. at 57. A deficiency in the Board's statement of reasons or bases necessitates remand only where such deficiency is preclusive of effective judicial review or otherwise shown to have caused harm to the claimant. See *Mayfield v. Nicholson*, 19 Vet.App. 103, 129 (2005) (where judicial review is not hindered by deficiency of reasons or bases, a remand for reasons or bases error would be of no benefit to the appellant and would therefore serve no useful purpose), *rev'd other grounds*, 444 F.3d 1328 (Fed. Cir. 2006).

To warrant a grant of service connection, a claimant must generally prove the existence of a current disability, the in-service incurrence or aggravation of a disease or injury, and a causal relationship between the current disability and the disease or injury incurred or aggravated in service. *Shedden v. Principi*, 381 F.3d 1163, 1166-67 (Fed. Cir. 2004). If a disability for which service connection is sought is a chronic condition as recognized by the Secretary under 38 C.F.R. § 3.309(a), the in-service incurrence of a disease or injury and relationship between the current disability and service may be established by competent and persuasive evidence of a continuity of symptomatology. *Walker v. Shinseki*, 708 F.3d 1331 (Fed. Cir. 2013). To establish a continuity of symptomatology, the evidence must show that a condition was "noted" in service, continuous post-service symptomatology, and competent evidence of a nexus

between the present disability and that post-service symptomatology. *Savage v. Gober*, 10 Vet.App. 488, 496 (1997).

Appellant contends that “[t]he Board wholly neglected to consider or discuss” the regulation regarding chronicity of symptomatology, and that the Board’s findings are flawed because a lapse in time is irrelevant to determining whether a claimant is entitled to service connection for hypertension on the basis of chronicity. [App. Br. at 10-11]. However, the Board expressly found that “the weight of the evidence is against a finding of continuity of symptomatology since service.” [R. at 11]. Notably, the Board found that the record showed no clinical findings or diagnoses of hypertension during service or until 2004.¹ [R. at 10]. A lapse in time between an alleged injury and onset of a condition is relevant to the issue of chronicity where there is no evidence of continuous symptomatology. *Savage*, 10 Vet.App. at 496. The Board’s finding is not clearly erroneous as Appellant’s service separation examination showed normal blood pressure, clearly establishing a break in any claimed continuity of elevated blood pressure readings since service. See [R. at 171-72] (March 1973 separation examination documenting a blood pressure reading of 120/80). Moreover, the Board expressly found Appellant not credible to the extent

¹ The Secretary acknowledges that Appellant’s medical treatment records indicate that he was diagnosed with hypertension NOS on January 31, 2003. [R. at 142]. However, the earliest record of treatment does not appear to be until September 2004. See [R. at 407].

that he asserted a continuity of symptomatology since service. [R. at 11]. Appellant fails to demonstrate any evidence of record which documents continuous post-service symptomatology.

Appellant has not shown the Board's decision is clearly erroneous or that the Board committed any prejudicial error warranting remand. See *Hilkert*, 12 Vet.App. at 151 (holding that appellant has the burden of demonstrating error); *Shinseki*, 556 U.S. at 409-10 (explaining that the burden of demonstrating prejudice normally falls upon the party attacking the agency's determination); *Gilbert*, 1 Vet.App. at 52 (because credibility determinations are determinations of fact, the Board's findings as they relate to the credibility of layperson testimony must be upheld unless there is no plausible basis for such findings in the record.)

V. CONCLUSION

WHEREFORE, Appellee, Robert A. McDonald, Secretary of Veterans Affairs, respectfully submits that the September 28, 2015, decision of the Board should be affirmed to the extent that it denied entitlement to service connection for hypertension.

Respectfully submitted,

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