

Vet.App. No. 15-4408

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

HANS W. JACOBSON,
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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Secretary of Veterans Affairs,)	
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Appellee.)	

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

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

I. ISSUES PRESENTED

1. Whether the Court should affirm the Board of Veterans' Appeals' (Board) September 25, 2015, decision that denied Appellant's claim of entitlement to service connection for cervical spondylosis and degenerative joint disease (DJD) (a neck disorder), to include as secondary to residuals of back strain bilateral L5 lumbar spine spondylosis, degenerative changes at L2-3 and L3-4 with lumbar myofascial pain syndrome (a low back disability).

2. Whether the Court should affirm the Board's September 25, 2015, decision that denied Appellant's claim of entitlement to service connection for headaches, including basilar artery migraines, common migraines, mixed migraines, analgesic rebound headaches, tension headaches, sinus headaches, and cervicogenic headaches.

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

This Court has jurisdiction under 38 U.S.C. § 7252(a) to consider the Board's decision.

B. Nature of the Case

Appellant, Hans W. Jacobson, appeals the Board's September 25, 2015, decision that denied his claims of entitlement to: service connection for cervical spondylosis and DJD (a neck disorder), to include as secondary to residuals of back strain bilateral L5 lumbar spine spondylosis, degenerative changes at L2-3 and L3-4 with lumbar myofascial pain syndrome (a low back disability); and service connection for headaches, including basilar artery migraines, common migraines, mixed migraines, analgesic rebound headaches, tension headaches, sinus headaches, and cervicogenic headaches. [Record (R.) at 1-27].

C. Statement of Relevant Facts

Appellant served on active duty from May 1984 to November 1987. [R. at 3312]. Appellant was in a motor vehicle accident (MVA) in service in 1984, and a radiology report following the accident reflected normal alignment of the cervical vertebral bodies and was negative for any injury to, or diagnosis of, the cervical spine. [R. at 3251-52]. There was "very minimal" anterior displacement of the L5-S1 vertebrae of the lumbar spine, which suggested "spondylolysis and minimal spondylolisthesis at L5-S1." [R. at 3252]. In June 1985, Appellant complained of headaches and blurred vision. [R. at 3455 (3316-3486)]. In a

December 1986 service treatment record (STR), Appellant complained of lower back, neck, and upper thoracic pain. [R. at 3355 (3316-3486)]. Appellant denied acute injury and stated that his pain was secondary to heavy lifting. *Id.* In a December 1986 STR, Appellant complained of neck pain that was relieved by stretching. [R. at 3345 (3316-3486)]. During a March 1987 Medical Board report, Appellant reported that he did not have any back problems until he was injured by a load of frozen meat falling on him nine months prior. [R. at 3339-44 (3316-3486)]. He stated that his low back pain worsened with lifting and prolonged sitting or standing. *Id.* The Medical Board recommended that Appellant be disqualified from further military service due to his lower back condition, and he was honorably discharged due to physical disability. *Id.*; see [R. at 3312].

During a July 1988 VA examination, Appellant did not complain of any neck pain and the examiner found that Appellant had full range of motion of his back. [R. at 6421-32]. In October 1988, the Regional Office (RO) granted Appellant's claim of entitlement to service connection for low back pain due to muscle spasms and denied entitlement to service connection for spondylosis as it found that to be a developmental abnormality. [R. at 6417-18]. Appellant reported headaches, but did not complain of any cervical problems in a January 1991 examination. [R. at 6343-49]. Appellant did not complain of any cervical pain during a June 1994 VA spine examination. [R. at 6289-90].

Appellant reported neck pain in a December 2001 VA neurology clinical visit. [R. at 126-27]. In a December 2002 VA neurology clinical visit, Appellant again complained of neck pain and stated that he had occasional spasms of the left neck muscles. [R. at 123-24]. During a March 2003 VA neurology consultation, Appellant reported that his headaches began six or seven years prior. [R. at 2087 (2086-88)]. In April 2004, Appellant reported that his headaches began after he was hit in the head by a 2x4 earlier in the week. [R. at 2067-68]. During an October 2007 VA neurology consultation, the examiner assessed Appellant with a “classic picture” of basilar migraine type with a positive family history for migraines and on topiramate medication and ibuprofen as a rescue medication. [R. at 2027-28]. In a February 2008 VA treatment note, the examiner noted that Appellant’s daily headaches may be attributed to his daily use of acetaminophen. [R. at 1834 (1831-35)].

Appellant filed his claims of entitlement to service connection for a cervical spine disorder as directly related to service and as secondarily related to his service-connected lumbar condition and for migraines as secondary to his service-connected back condition in July 2008. [R. at 5320]. During a September 2008 VA examination, Appellant reported neck pain, stiffness, and tightness. [R. at 1754 (1754-59)]. Appellant stated that he saw a chiropractor for the past 15 years primarily for his low back condition and that he could not report how long he had been experiencing neck pain. *Id.* The examiner opined that Appellant’s cervical spine condition was less likely than not caused or aggravated

by his service-connected lumbar spine disability. [R. at 1758-59 (1754-59)]. Appellant also reported that he had migraine headaches for the past 15 to 20 years. [R. at 1757 (1754-59)]. The examiner also opined that Appellant's migraine condition was not related to his lumbar spine condition. [R. at 1758-59 (1754-59)].

During a May 2009 VA examination, the examiner determined that Appellant's migraine headaches were less likely as not secondary to or permanently aggravated by the medications prescribed for his service-connected conditions, specifically the pain medications for his back disability. [R. at 1616 (1614-17)]. The examiner based his opinion on Appellant's treatment for migraines since 1998 and his daily opiate use for lower back pain beginning in 2004 or 2005. [R. at 1617 (1614-17)]. The examiner also noted that a review of medical literature indicated no link between Appellant's prescribed medications and migraine headaches. *Id.*

In October 2008, the RO denied Appellant's claims of entitlement to service connection for a spinal cord condition and for migraines. [R. at 5225-30)]. In his March 2009 appeal to the Board, Appellant reported that he injured his neck at the same time that he injured his low back in service. [R. at 4214-25]. During a June 2009 Decision Review Officer (DRO) hearing, Appellant reported that he received treatment for his back in service and could not remember if he also received treatment for his neck condition. [R. at 4145-46 (4144-48)].

Appellant also reported having some form of migraines for as long as he can remember. [R. at 4146 (4144-48)].

In a February 2010 VA examination, the examiner stated that there was no medical evidence linking migraine headaches to degenerative disease of the lumbar spine. [R. at 4061 (4054-61)]. During an October 2011 VA examination, the examiner noted that Appellant's records reflect that he did not complain of neck pain following his 1984 MVA and that Appellant's physician stated that Appellant did not report back pain in the three years following the MVA. [R. at 3895 (3895-3902)]. Appellant reported that the earliest he was seen for his neck pain was nine years prior to the examination, around 2002. *Id.* Appellant stated that he "claims the low back is causing the neck pain" and the examiner noted that Appellant stated that he did not develop neck issues in service. *Id.* The examiner found that it was "overwhelmingly unlikely" that Appellant would develop neck pain twenty years after the MVA and that degenerative disease of the lumbar spine would not cause degenerative disease of the cervical spine. [R. at 3900 (3895-3902)].

The examiner for a November 2012 VA examination opined that it was less likely than not that Appellant's headaches were related to his service-connected low back disability. [R. at 3672 (3665-74)]. The examiner explained that Appellant had two kinds of headaches: migraine headaches that he had since he was a child and chronic daily headaches. [R. at 3667 (3665-74)]. He noted that Appellant "has multiple reasons for chronic daily headache[s]," and found that the

most likely reason for Appellant's morning headaches was non-compliance with his sleep apnea treatment, and that Appellant's chronic daily headaches seem to stem from his non-service-connected neck and shoulder discomfort. [R. at 3672 (3665-74)]. The examiner also explained that Appellant's medication use had changed so that his chronic daily headaches were not likely to stem from medication use. *Id.*

In an April 2013 letter, Appellant's private chiropractor, Dr. Harry Wallace, noted that Appellant complained of low back pain and a secondary complaint of cervical pain with DJD in the cervical, thoracic, and lumbar spine. [R. at 3696]. The chiropractor opined that Appellant's persistent pain was likely related to progressive changes from his military injury. *Id.* The chiropractor elaborated in a May 2014 statement that his opinion was based on Appellant having no history of impairment or back problems prior to service. [R. at 2815-16].

During an October 2013 VA examination, the examiner noted that review of medical references did not indicate any causal relationship between DJD of the lumbar spine and DJD of the cervical spine. [R. at 3571 (3555-71)]. During the examination, Appellant stated that he did not have problems with his neck in service and that his neck issues developed ten years prior to the examination. [R. at 3561 (3555-71)]. The examiner noted that Appellant's STRs did not reflect any chronic neck or cervical spine disorder and found that the cervical spine symptoms mentioned in STRs were consistent with musculoskeletal pain as the pain improved with stretching and range of motion. [R. at 3571 (3555-71)]. The

examiner opined that Appellant's cervical spine condition was less likely as not caused by or aggravated by service or his service-connected lumbar spine disability. *Id.*

During a May 2014 Board hearing, Appellant reported that he hurt his back when 700 pounds of frozen meat fell on top of him and that his neck injury is related to that incident. [R. at 6694 (6692-6707)]. He reported that he continued treatment since that time. [R. at 6695 (6692-6707)]. Appellant also stated that his medication for his lower back condition caused his headaches and stated that his private physician linked his migraines to hydrocodone use. [R. at 6695-96 (6692-6707)]. In July 2014, the Board remanded Appellant's claim for additional development, specifically for an adequate medical examination regarding Appellant's cervical spine and headaches. [R. at 3491-3502].

In a December 2014 VA examination, the examiner reviewed Appellant's medical history and conducted an in-person examination. [R. at 2586-95 (2586-2621)]. Appellant reported that his neck problems began 10 to 15 years prior to the examination and that he injured his neck on the ship and in a couple of car accidents. [R. at 2596-97 (2586-2621)]. The examiner found that there was no nexus to support a continued cervical spine disability since service as Appellant's neck did not become problematic until 10 to 15 years prior to the examination. [R. at 2609-2610 (2586-2621)]. The examiner considered Dr. Wallace's positive nexus opinion, but noted that there was nothing in the medical, non-chiropractic, credible, peer-reviewed literature that supports his opinion. [R. at 2611 (2586-

2621)]. The examiner noted that cervical spondylosis is a common degenerative condition of the cervical spine and that the role of occupational trauma was controversial. [R. at 2610 (2586-2621)]. The examiner also noted that lumbar pathology does not cause the cervical spine to degenerate and that because Appellant's complaints of cervical pain in service resolved by stretching, this indicates a muscular type of problem that was self-limiting in nature. [R. at 2611 (2586-2621)]. The examiner found that "[if] he had sustained any acute boney injury to his spine [in] June-July 1986, then the bone scan would have been abnormal due to healing process in that boney area," which was not true in Appellant's case; he therefore concluded that the only condition Appellant sustained in service was chronic low back pain, which was not a cause for future development of degenerative arthritis, disc disease, etc. [R. at 2610 (2586-2621)].

As for his headaches, Appellant told the December 2014 VA examiner that his headaches began around 2000-2002. [R. at 2605 (2586-2621)]. The examiner noted that Appellant's episodes of headaches in service were short-lived and self-limited and did not develop into a chronic disability and found that Appellant's headaches were not related to service or to his service-connected back condition. [R. at 2613 (2586-2621)]. The examiner explained that Appellant had a strong family history of migraine headaches and that he was diagnosed with migraine headaches when he was not taking medications for his lower back condition. *Id.*

In a March 2015 Supplemental Statement of the Case, the RO continued the denial of Appellant's claim of entitlement to service connection for cervical spondylosis and for headaches. [R. at 46-59]. The Board issued the decision on appeal in September 2015. [R. at 1-27].

III. SUMMARY OF THE ARGUMENT

The Board correctly found that the December 1, 2014, VA examination was adequate and that Appellant was not entitled to service connection for a neck disorder or for headaches as the preponderance of the evidence was against Appellant's claims of entitlement to service connection.

IV. ARGUMENT

An adequate medical opinion must be based upon a consideration of the relevant evidence and must provide the Board with a foundation sufficient enough to evaluate the probative worth of that opinion. *See Ardison v. Brown*, 6 Vet.App. 405, 407 (1994) (adequate medical examination 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). 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." *Stefl 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

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”). But this obligation is not insurmountable and an examination report need not “explicitly lay out the examiner’s journey from facts to a conclusion.” *Monzingo v. Shinseki*, 26 Vet.App. 97, 106 (2012) (holding that a medical examination report must be read as a whole). Whether a medical examination is adequate and to 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).

Appellant’s only argument on appeal is that the Board erred in relying on the December 1, 2014, VA examination because he argues the examination relied on an inaccurate factual premise that he did not injure his back in service. Appellant’s Brief (App. Br.) at 6-11. Contrary to Appellant’s argument, the December 2014 VA examiner did not rely on an inaccurate factual premise or a “reality contrary to the event in-service.” App. Br. at 9. While the examiner noted that Appellant’s STRs did not record the event in which hundreds of pounds of meat fell on Appellant, a point which Appellant does not dispute, the examiner ultimately concluded that the bone scan conducted five to six months after the incident would have been abnormal had Appellant injured his cervical spine during such an incident and the bone scan was normal and, thus, Appellant’s cervical spine condition was not related to service. [R. at 2610 (2586-2621)]; see

[R. at 3323 (3316-3486)]; see also *Monzingo*, 26 Vet.App. at 106. Appellant points to no evidence showing an abnormal bone scan of his cervical spine during service. See *Martinak v. Nicholson*, 21 Vet.App. 447, 451 (2007) (“The appellant bears the burden of demonstrating on appeal any prejudice caused by a deficiency in an examination”). Accordingly, the December 2014 VA examiner’s opinion is not based on facts contradicted by the record. Instead, the examiner provided a thorough review of the record, noting the relevant facts within the record and found that Appellant’s cervical condition was not related to service directly or secondary to his low back condition. [R. at 2610 (2586-2621)]; *Steffl*, 21 Vet.App. at 124

As for Appellant’s argument that it has been “favorably adjudicated” that Appellant injured his back in service and was released due to this injury, this is not in dispute. App. Br. at 9. However, Appellant was released from duty due to his lower back condition and subsequently granted service-connected benefits for his lower back condition, not his cervical spine condition. [R. at 3312]; [R. at 3339-44 (Medical Board report for “low back pain”)]; [R. at 6417-18 (October 1988 RO decision granting entitlement to service connection for residuals of a back injury in the lumbar area)]. Appellant appears to argue that because the Board found that his lower back was injured during service that his cervical spine was also injured. However, as the December 2014 VA examiner explained, Appellant’s chronic mechanical low back pain would not cause the cervical spine to degenerate and lumbar DJD is not a risk factor for developing cervical DJD.

[R. at 2611 (2586-2621)]. Appellant's cervical spine condition is a separate condition from his service-connected low back injury without the same in-service etiology as evidenced by the lack of complaints of cervical pain in Appellant's STRs and the numerous medical examinations finding that Appellant's low back condition did not cause or aggravate his cervical spine condition. See [R. at 1758-59 (1754-59) (September 2008 VA examination); 2610 (2586-2621) (December 2014 VA examination); 3316-3486 (STRs), 3900 (3895-3902) (October 2011 VA examination); 3571 (3555-71) (October 2013 VA examination)]; see also *Monzingo*, 26 Vet.App. at 107 ("Furthermore, even if a medical opinion is inadequate to decide a claim, it does not necessarily follow that the opinion is entitled to absolutely no probative weight).

Contrary to Appellant's argument that the December 2014 VA examiner's opinion is "opposite of both the medical record and adjudicatory history of Appellant's" lower back condition, as his lower back condition has been characterized by degenerative changes, the examiner specifically stated that DJD, a degenerative condition, of the lumbar/lower spine is not a risk factor for developing DJD of the cervical spine, a separate area of the spine. App. Br. at 9; [R. at 2610 (2586-2621)]. As reflected in Appellant's separate claims of entitlement to service connection and as discussed previously, disabilities of the lumbar spine and cervical spine are separate conditions. As the December 2014 VA examiner correctly stated and as is consistent with the medical record and adjudicatory history, the only condition Appellant sustained in service was

chronic mechanical lower back pain, which is not cause for the cervical condition Appellant developed around 2000. [R. at 2609-2610 (2586-2621)]. The December 2014 VA examiner provided a thorough review of the evidence of record and relevant medical articles; the Board did not err by relying on the December 2014 VA examiner's opinion to deny Appellant's claim of entitlement to service connection for a neck disorder. See *Monzingo*, 26 Vet.App. at 106.

Appellant only argues that the Board erred in denying his claim of entitlement to service connection for headaches because it erred in denying his claim of entitlement to service connection for a cervical condition by relying on the December 2014 VA examination. App. Br. at 11. For the reasons set forth above, Appellant's argument fails and the Board was not clearly erroneous in its reliance on the December 2014 VA examination. See *Nolen*, 14 Vet.App. at 184. As the Board stated, the December 2014 VA medical examiner considered the Appellant's claims file, his contentions, the medical evidence of record, and conducted a complete physical examination before finding that Appellant's headache condition was not caused by or related to his active duty service. [R. at 24-25 (1-27)]. Appellant points to no evidence that the Board failed to discuss that could be favorable to his case. *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995); see *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (appellant bears the burden of demonstrating error); see also *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) (holding that the appellant bears the burden of demonstrating prejudicial error). As the Board correctly found, the preponderance of the

evidence is against Appellant's claim of entitlement to service connection for a headache disorder. [R. at 25 (1-27)]; see [R. at 1616 (1614-17) (May 2009 VA examination); 2613 (2586-2621) (December 2014 VA examination); 3672 (3665-74) (November 2012 VA examination); 4061 (4054-61)] (February 2010 VA examination)].

The Board did not err in finding that the December 2014 VA examination also complied with the July 2014 Board remand, which directed that VA provide an examination in which the examiner was ordered to opine as to whether it was at least as likely as not that any cervical spondylosis was etiologically related to Appellant's active service or proximately due to or aggravated by a service-connected disability and discuss relevant evidence. [R. at 5 (finding that the July 2014 "remand instructions issued by the Board have been substantially complied with")]; see [R. at 3493-96 (3491-3502)]. As discussed, the December 2014 VA examiner provided a thorough review of Appellant's claims file, specifically reviewing relevant evidence concerning Appellant's neck disorder, but found that Appellant's neck disorder was not related to his injury in service or to his service-connected back condition. [R. at 2610 (2586-2621)]. The July 2014 Board remand also ordered that VA provide an examination in which the examiner was ordered to opine as to whether it was at least as likely as not that Appellant's headaches are etiologically related to Appellant's active service or proximately due to or aggravated by a service-connected disability and discuss relevant evidence. [R. at 3496-3501 (3491-3502)]. The December 2014 VA examiner

provided a thorough review of all evidence relevant to Appellant's headache disorder and found that Appellant's headache disorder was not related to service or to Appellant's low back condition or treatment for his low back condition and that Appellant had a strong family history of migraine headaches. [R. at 2610-16 (2586-2621)]. The Secretary notes that Appellant only argues that the December 2014 VA examination did not comply with the July 2014 Board remand because it was inadequate as he argues that it relied on an inaccurate factual premise, which, as discussed, is incorrect. App. Br. at 6-11; see *Hilkert*, 12 Vet.App. at 151; see also *Sanders*, 556 U.S. at 409. As the December 2014 VA examination was adequate and complied with the July 2014 Board remand, the Board was not clearly erroneous in its reliance on the December 2014 VA examination or its finding that Appellant was not entitled to service connection for a neck disorder or for a headache disorder. See *Gilbert v. Derwinski*, 1 Vet.App. 49, 52-53 (1990) (a finding of fact may not be disturbed unless clearly erroneous).

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); see also *Woehlaert v. Nicholson*, 21 Vet.App. 456, 463 (2007) ("This Court has consistently held that it will not address issues or arguments that counsel for the appellant fails to adequately develop in his or her opening brief."). 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

For the foregoing reasons, the Secretary respectfully asserts that the Court should affirm the Board's September 25, 2015, decision that denied his claims of entitlement to: service connection for cervical spondylosis and degenerative joint disease, to include as secondary to residuals of back strain bilateral L5 lumbar spine spondylosis, degenerative changes at L2-3 and L3-4 with lumbar myofascial pain syndrome; and service connection for headaches, including basilar artery migraines, common migraines, mixed migraines, analgesic rebound headaches, tension headaches, sinus headaches, and cervicogenic headaches.

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