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

No. 15-2885

RICHARD ESTRELLO, APPELLANT,

v.

ROBERT A. McDONALD,  
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before LANCE, *Judge*.

**MEMORANDUM DECISION**

*Note: Pursuant to U.S. Vet. App. R. 30(a),  
this action may not be cited as precedent.*

LANCE, *Judge*: The appellant, Richard Estrello, served in the U.S. Army from June 1976 to August 1976. Record (R.) at 1150. He appeals, through counsel, a July 17, 2015, Board of Veterans' Appeals (Board) decision that, in part, denied entitlement to service connection for a lumbar spine disorder with associated lower extremity radiculopathy, claimed as bilateral spondylolysis with grade I spondylolisthesis with secondary bilateral lower extremity radiculopathy. R. at 1-28.<sup>1</sup> Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). This appeal is timely, and the Court has jurisdiction over the case pursuant to 38 U.S.C. §§ 7252(a) and 7266. For the reasons that follow, the Court will affirm the July 17, 2015, decision.

The appellant presents two arguments on appeal. First, he asserts that a November 2013 VA medical opinion and its July 2014 addendum are inadequate, as the examiner failed to discuss his reports of continuity of symptomatology in violation of a May 2014 Board remand. Appellant's Brief (Br.) at 5-8. Second, he contends that the Board improperly discounted a December 2008 private medical opinion. *Id.* at 9-11. In response, the Secretary argues that the November 2013 VA

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<sup>1</sup> The Court lacks jurisdiction over the claim for entitlement to service connection for headaches that was remanded and it will not be addressed further. *See* 38 U.S.C. §§ 7252(a) and 7266(a); *Howard v. Gober*, 220 F.3d 1341, 1344 (Fed. Cir. 2000).

medical opinion and July 2014 addendum are adequate, that the Board provided an adequate statement of reasons or bases for finding the December 2008 private opinion has diminished probative value, and that the appellant has not demonstrated prejudicial error. Secretary's Br. at 6-10.

In the decision on appeal, the Board found "that the presumption of soundness applies . . . in this case[,] as neither a low back nor lower extremity defect or diagnosis was shown on [the appellant's] service enlistment examination in April 1976." R. at 13. However, the Board found that the presumption of soundness had been rebutted, as "the record contains clear and unmistakable . . . evidence showing that the claimed disability existed prior to service" and "the record contains persuasive evidence . . . that the claimed condition was not aggravated by the [appellant]'s period of service." *Id.* In doing so, the Board considered the appellant's "arguments that (1) an obstacle course injury in service aggravated his preexisting disorder of the low back and lower extremities, and (2) he has had continuity of low back symptoms dating to the obstacle course injury in service." R. at 11. Although the Board found the appellant "competent to report his symptoms and treatment," it found his "report of aggravation and suggestion of continuity of symptomatology [] not credible in view of [his] history given in 1993 and 1994, wherein he denied any past significant chronic medical conditions and did not mention any obstacle course injury in service." *Id.*

Conversely, the Board explained that the November 2013 VA medical opinion and July 2014 addendum are "probative on the matter of whether there is clear and unmistakable evidence that the disorder was not aggravated by service." R. at 10. The Board explained that the examiner provided "a complete rationale predicated on the medical history provided by the [appellant] and available clinical findings," "in addition to a comprehensive review of the entire claims file." *Id.* The Board found the November 2013 VA medical opinion and July 2014 addendum "adequate for purposes of adjudicating the [appellant]'s claim." R. at 24.

Turning to the appellant's first argument, he asserts that the November 2013 VA opinion and July 2014 addendum are inadequate, as the examiner failed to consider his statements regarding his "continual and increasing pain since service." Appellant's Br. at 7. Notably, the appellant does not challenge the Board's credibility determinations, and the Court will not disturb those findings. *See Mason v. Shinseki*, 25 Vet.App. 83, 95 (2011) (holding that "the Court will not invent an argument for a represented party who had ample opportunity and resources to make that same argument, but,

for whatever reason—be it strategy, oversight, or something in between—did not do so"); *Cromer v. Nicholson*, 19 Vet.App. 215, 217 (2005) ("[I]ssues not raised on appeal are considered abandoned."), *aff'd*, 445 F.3d 1346 (Fed. Cir. 2006); *see also Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (holding that the appellant bears burden of demonstrating error on appeal), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000) (table). Assuming without deciding that the November 2013 VA examiner erred by failing to comment on the appellant's lay statements regarding the continuity of symptomatology, any error by the examiner in that regard is necessarily harmless, as the Board found the appellant's lay statements regarding the continuity of symptomatology not credible. R. at 11; *see* 38 U.S.C. § 7261(b)(2) (requiring the Court to "take due account of the rule of prejudicial error"); *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) ("[T]he burden of showing that an error is harmful normally falls upon the party attacking the agency's determination."). As the appellant presents no alternative basis to discount the November 2013 VA medical opinion and July 2014 addendum,<sup>2</sup> the Court holds that the appellant has not demonstrated that the Board's determination that the November 2013 VA medical opinion and July 2014 addendum are adequate is the product of clear error or otherwise inadequately explained. *See Hilkert*, 12 Vet.App. at 151; *see also* 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995) (holding that the Board's statement of reasons or bases "must be adequate to enable claimant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court").

Turning to the appellant's second argument, although he asserts that the Board improperly discounted the December 2008 private medical opinion, Appellant's Br. at 10, his argument is misplaced. The Board "considered the favorable medical opinion . . . dated in December 2008" and found that it "has diminished probative value." R. at 11. The Board explained that the December 2008 medical provider did not identify which medical records he reviewed, indicate if he reviewed the appellant's service medical records, provide any supporting rationale for his opinion that the appellant's in-service injury caused progressive worsening of his pre-existing condition, or acknowledge the significant injuries that the appellant sustained as a result of the 1993 motor vehicle accident. *Id.* Contrary to the appellant's contention, the Board did not "improperly downgrade" the December 2008 opinion solely because the private medical provider failed to state what records he

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<sup>2</sup> The Court notes that the appellant did not file a reply brief disputing any of the Secretary's arguments.

reviewed or mention the 1993 motor vehicle accident. Appellant's Br. at 4-5, 9-10. Rather, the Board explained its assessment of the competing medical opinions and found the December 2008 opinion to be less probative for multiple reasons. R. at 9-20. The Court is not persuaded that the Board's reasons or bases supporting its determination regarding the probative value of the December 2008 private medical opinion are inadequate. *See Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 310-05 (2008) (holding that the Board may attribute less probative value to a private medical opinion if it provides an adequate statement of reasons or bases for doing so); *Owens v. Brown*, 7 Vet.App. 429, 433 (1995) (holding that the Board is free to favor one medical opinion over another if it provides an adequately articulated rationale for its decision); *see also* 38 U.S.C. § 7104(d)(1); *Allday*, 7 Vet.App. at 527.

Finally, to the extent that the appellant asserts that VA had an obligation to contact the December 2008 private examiner for clarification of his opinion, Appellant's Br. at 11, he fails to cite any law or authority for this proposition.<sup>3</sup> Moreover, his argument is legally incorrect, as the Court in *Savage v. Shinseki*, 24 Vet.App. 259, 270 (2010), "explicitly limited VA's duty to seek clarification of private medical reports to situations where 'the missing information is relevant, factual, and objective—that is, not a matter of opinion.'" *Carter v. Shinseki*, 26 Vet.App. 534, 545 (2014) (citing *Savage*, 24 Vet.App. at 270). As the information sought in this case is a matter of opinion, it falls outside the limited scope of *Savage*. Further, the November 2013 VA medical opinion and July 2014 addendum address the precise issues which the Board decision found were wanting in the December 2008 private opinion. Thus, even without clarification from the December 2008 private medical provider, there is competent medical evidence answering the question at issue and the Board was not required to seek clarification from the December 2008 examiner. *See Carter*, 26 Vet.App. at 545.

After consideration of the appellant's and the Secretary's briefs, and a review of the record, the Board's July 17, 2015, decision is AFFIRMED.

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<sup>3</sup> Indeed, the Court notes that, aside from general boilerplate citations in the introductions to his two argument subsections, the appellant's arguments in his brief do not contain *any* citations to controlling statutes, regulations, or cases. *But see* U.S. VET. APP. R. 28(A)(5) (requiring the appellant's brief to contain "an argument . . . containing the appellant's contentions . . . and the reasons for those contentions, with citations to the authorities"). The Court cautions the appellant's counsel to more diligently review and ensure compliance with the Court's Rules in the future. *See* MODEL RULES OF PROF'L CONDUCT 1.1 (Competence), 1.3 (Diligence); U.S. VET. APP. R. ADM. & PRAC. 4(a) (adopting the Model Rules of Professional Conduct as the disciplinary standard of the Court).

DATED: November 30, 2016

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