Vet. App. No. 18-6026

IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

MICHELLE K. MERCURIO,

Appellant,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,

Appellee.

ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS

BRIEF OF APPELLEE SECRETARY OF VETERANS AFFAIRS

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TABLE OF CONTENTS

Table of Authorities

Cases

Statutes

Regulations

Other authorities

RECORD CITATIONS

IN THE UNITED STATES COURT OF APPEALS
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MICHELLE K. MERCURIO, Appellant	)	
	)	Vet. App. No. 18-6026
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ON APPEAL FROM THE BOARD OF VETERANS' APPEALS

APPELLEE'S BRIEF

I. ISSUE PRESENTED

Whether the Court should remand that portion of the Board of Veterans' Appeals (BVA or Board) September 27, 2018, decision that denied entitlement to service connection for hallux valgus, and entitlement to service connection for vertigo.

Whether the Court should affirm those portions of the Board's September 27, 2018, decision that denied Appellant's petition to reopen claims of entitlement to service connection for left and right breast fibroadenoma based on new and material evidence.

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

This Court has jurisdiction over the instant appeal pursuant to 38 U.S.C. § 7252(a) and § 7266(a).

B. Nature of the Case

Appellant appeals that portion of the Board's September 27, 2018, decision that denied entitlement to service connection for hallux valgus, and entitlement to service connection for vertigo, and the Board's denial of Appellant's petition to reopen claims of entitlement to service connection for left and right breast fibroadenoma based on new and material evidence (Appellant's brief (AB at 1-19); [Record (R.). at 3-22]. The Secretary concedes that remand is warranted for Appellant's claims for entitlement to service connection for hallux valgus and vertigo, which the Secretary discusses further below.

As to the petitions to reopen claims of entitlement to service connection for left and right breast fibroadenoma, Appellant requests a remand. The Secretary posits that Appellant has failed to provide convincing arguments that there is prejudicial error warranting such remand, and avers that the Court should affirm the Board's denial of the claims. In addition, Appellant has not offered any arguments for reversal, or even requested a remedy of a reversal, for the petitions to reopen claims of entitlement to service connection for left and right breast fibroadenoma. (AB at 1-19). Therefore, the Secretary argues that Appellant has abandoned the remedy of reversal for those claims. *See 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"); *Degmetich v. Brown*, 8 Vet.App. 208, 209 (1995), *aff'd*, 104 F.3d 1328 (Fed. Cir. 1997) (issues

or claims not argued on appeal are deemed to be abandoned); *Williams v. Principi*, 15 Vet.App. 189, 199 (2001) ("ordinarily this Court will not review issues that are not raised to it."); *Woehlaert v. Nichols*on, 21 Vet.App. 456, 463 (2007) (Court will not consider issues or arguments that counsel fails to raise in his opening brief).

Insofar as the Board granted Appellant's petition to reopen a claim of service connection for status post stress fracture right femur, the Secretary does not wish that grant disturbed. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007) (recognizing that the Court will not disturb factual findings by the Board that are favorable to claimants). In addition, the Board remanded Appellant's claims for, (1) service connection for status post stress fracture right femur, (2) service connection for bilateral hearing loss, (3) service connection for tinnitus, (4) service connection for migraines, (5) service connection for carpal tunnel syndrome, (6) increased rating for low back strain, (7) increased rating for left knee disability, and (8) increased rating for residuals of cervical spine strain. Given the Board's remand of those claims, the Court has no jurisdiction over them. *See Breeden v. Principi*, 17 Vet.App. 475, 478 (2004) ("[T]he Board's remand does not represent a final decision over which this Court has jurisdiction.").

C. Statement of Relevant Facts

Appellant served honorably in the United States Marine Corps from August 1999 until December 2003. [R. at 6 (3-22), 2766]. In October 2003, Appellant applied for disability compensation from multiple claimed disabilities, to include bilateral breast tumors. [R. at 2792 (2787-2796)]. A January 2004, rating decision denied Appellant's claim for breast tumors. [R. at 2762 (R. at 2750−2765)]. Appellant did not appeal that decision and it became final.

At the time of the denial, the evidence reflected that Appellant reported as part of her entrance examination that she was diagnosed with bilateral breast tumors prior to service. [R. at 2454-2456]. Appellant's service treatment records (SMRs) show that she sought treatment due to the presence of tumors on January 25, 2002. [R. at 2107]. On May 8, 2002, Appellant underwent surgery to have tumors removed. [R. at 2323-2324]. On July 23, 2003, a new tumor appeared, but one that had been previously viewed was static in size. [R. at 2299]. In Janyary 2004, the Regional Office (RO) denied the claim. [R. at 2762 (2750-2765)]. In 2006 Appellant received treatment for upper respiratory and ear problems. [R. at 2524-2526].

On July 19, 2011, as part of a supplemental claim to a compensation application she initially filed on July 18, 2011, Appellant requested service connection for vertigo. [R. at 2701 (Veteran's Supplemental Claim for Compensation of July 19, 2011)]. On April 25, 2012, Appellant submitted an additional supplemental claim, this time requesting that VA reopen her claim for

service connection for breast tumors and grant a new claim for secondary service connection for hallux valgus. [R. at 2668 (Amended Veteran's Supplemental Claim for Compensation of Apr. 25, 2012)]. A June 21, 2013, Rating Decision denied, *inter alia*, all three claims. [R. at 727-745, 2482-2498].

Appellant filed a Notice of Disagreement (NOD) with the June 21, 2013, Rating Decision. [R. at 1886-1893]. In July 2015, Appellant was provided a VA examination for hallux valgus. [R. at 1536-1537]. VA issued a Statement of the Case (SOC) in August 2015. Appellant filed a substantive appeal. [R. at 1390-1438]. In May 2018, the RO issued a rating decision on other claims, which showed Appellant's service-connected disabilities in the code sheet. [R. at 91-99]. In the decision now on appeal, the Board continued to deny the claims for service connection for vertigo, secondary service connection for bunions, and the request to reopen the claim for bilateral breast tumors. [R. at 3-22]. Appellant appealed the decision.

III. SUMMARY OF ARGUMENT

The Secretary concedes remand is appropriate for Appellant's claims of entitlement to service connection for hallux valgus, and entitlement to service connection for vertigo. However, the Secretary argues Appellant has failed to show prejudicial error warranting remand for Appellant's petition to reopen claims of entitlement to service connection for left and right breast fibroadenoma based on new and material evidence, and the Court should affirm the Board's denial of those two claims.

IV. ARGUMENT

Under 38 U.S.C. § 7104(d)(1), a "decision of the Board shall include . . . a written statement of the Board's 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." *Reyes v. Nicholson,* 21 Vet.App. 370, 377 (2007); *Gilbert* 1, Vet.App. at 56. The Board is required to consider, and discuss in its decision, all "potentially applicable" provisions of law and regulation. *Roper v. Nicholson,* 20 Vet.App. 173, 181-82 (2006); 38 U.S.C. § 7104(a).

A. Claims warranting remand

1. Service connection for hallux valgus

i. Reasons or bases

In the decision on appeal, the Board did not address entitlement to service connection for hallux valgus (bunions) secondary to service-connected fractures of the feet. [R. at 12-13 (3-22); 95, 96 (91-99)]. However, Appellant filed a supplemental statement arguing that the bunions were related to her fractures, and there are adjudicative documents noting the question of secondary service connection. [R. at 91-99; 2668; 729, 733 (727-745)]. Thus, the issue of entitlement to service connection for hallux valgus was reasonably raised, and the Board erred by not adjudicating the claim. *Schroeder v. West*, 212 F.3d, 1265, 1271 (Fed.Cir.2000); *Robinson v. Mansfield*, 21 Vet.App. 545, 553 (2008), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1355 (Fed.Cir.2009). Therefore, vacatur and remand is warranted for the Board to address that theory.

ii. Duty to assist

The Secretary agrees that the medical opinion the Board relied on to deny entitlement to service connection for hallux valgus on a direct basis is inadequate, warranting remand for a new examination and opinion. Generally, a medical opinion is adequate where it is based upon consideration of the Veteran's prior medical history and examinations and also describes the disability in enough detail so that the Board's evaluation of the claimed disability will be a fully informed one. *D'Aries v. Peake,* 22 Vet.App. 97, 104 (2008); *see Stefl v. Nicholson,* 21 Vet.App. 120, 124 (2007) (a medical opinion "must support its conclusion with an analysis that the Board can consider and weigh against contrary opinions"); *Nieves–Rodriguez v. Peake,* 22 Vet.App. 295, 301 (2008) ("[A] medical examination report must contain not only clear conclusions with supporting data, but also a reasoned medical explanation connecting the two."). Ultimately, once VA undertakes the effort to provide an examination, even if not statutorily obligated to do so, the Secretary must provide an adequate examination or notify the claimant why one will not or cannot be provided. *Barr v. Nicholson,* 21 Vet.App. 303, 311-12 (2007).

The examination the Board relied on is inadequate because it did not have any opinion on aggravation, even though the opinion itself actually puts it in issue. [R. at 1536-1537]. In addition, the rationale for direct service connection is wholly inadequate and does not really say why Appellant's condition is not

related to service. *Id.* Given the foregoing, vacatur and remand is warranted for the Board to provide Appellant a new examination and medical opinion.

2. Service connection for vertigo.[1]

In the decision that is on appeal, the Board remanded Appellant's claims for entitlement to service connection for hearing loss and tinnitus. [R. at 4 (3-22)]. Evidence of record indicates that Appellant sought treatment for dizziness in 2006 and indicated poor hearing and popping, with eustachian tube issues. [R. at 2524-2526]. Given that there is evidence of dizziness in the context of poor hearing with inner ear issues, and that Appellant's claims for hearing loss and tinnitus were remanded, the Secretary avers that the claim for entitlement to service connection for vertigo is inextricably intertwined with those claims, warranting remand. *See Tyrues v. Shinseki*, 23 Vet.App. 166, 178–179 (2009) (remand generally appropriate when matter on appeal is inextricably intertwined with matters being adjudicated below), *modified on other grounds by* 26 Vet.App. 31 (2012); *Henderson v. West*, 12 Vet.App. 11, 20 (1998) ("[W]here a decision on one issue would have a significant impact upon another ..., the two claims are inextricably intertwined." (internal quotation marks omitted)).

Because the Secretary concedes remand is warranted for Appellant's claims of entitlement to service connection for vertigo and hallux vulgas, the

[1] **Vertigo** is defined as "an illusory sense that either the environment or one's own body is revolving; it may result from diseases of the inner ear or may be due to disturbances of the vestibular centers or pathways in the central nervous system." Dorland's Illustrated Medical Dictionary, page 2080 (31st ed.).

remedy which Appellant also requests, he respectfully posits that the Court need not entertain any other arguments offered by Appellant. *Best v. Principi*, 15 Vet.App. 18, 20 (2001).

B. Claims that should be affirmed

1. The Board's denial of Appellant's petitions to reopen claims for entitlement to service connection for left and right breast fibroadenoma based on new and material evidence should be affirmed

Here, Appellant argues that the Board's statement of reasons or bases is inadequate regarding her petitions to reopen claims for entitlement to service connection for left and right breast fibroadenoma based on allegedly new and material evidence. (AB at 12-17). Based on this argument, Appellant's requests remand for her petitions to reopen her claims. (AB at 12-17, 18).

As relevant to this appeal, the regulation that implements 38 U.S.C. § 5108 defines "new and material evidence" as evidence not previously submitted to agency decision makers which is neither cumulative nor redundant of evidence previously of record, and which by itself or when considered with previous evidence of record, relates to an unestablished fact necessary to substantiate the claim, and which raises a reasonable possibility of substantiating the claim. 38 C.F.R. § 3.156(a). New evidence means existing evidence not previously submitted to agency decision makers. 38 C.F.R. § 3.156(a). Material evidence means existing evidence that, by itself or when considered with previous evidence of record, relates to an unestablished fact necessary to substantiate the

claim. *Id*. New and material evidence can be neither cumulative nor redundant of the evidence already of record and must raise a reasonable possibility of substantiating the claim. 38 C.F.R. § 3.156(a); *see also Shade v. Shinseki*, 24 Vet. App. 110 (2010) (new and material evidence must relate to an unestablished fact and provide a reasonable possibility of substantiating the claim).

During the pendency of Appellant's service connection claims for left and right breast adenoma, the regional office had denied them in a January 2004 rating decision based on the pre-existence of the condition to service, despite noting tumors in service. [R. at 10 (3-42), 2107, 2323-2324, 2456 (2454-2456), 2762 (2750-2765)]. That decision became final, and Appellant not only does not contest that finality, but concedes it. (AB at 13); *Degmetich*, 8 Vet.App. 209. Appellant sought to reopen those final decided claims in 2012. [R. at 2668].

Upon appealing to the Board, the Board denied Appellant's petitions. In reviewing Appellant's petitions for reopening, the Board found that,

> The January 2004 rating decision denied service connection finding that the Veteran's fibroadenoma of the bilateral breasts preexisted her active duty military service and was not aggravated by her active duty military service. The October 2003 examiner found that the Veteran's right and left breast fibroadenoma was characterized by the presence of lumps without any additional symptoms of functional impairment. She was not receiving treatment for these conditions at that time.
>
> Since the January 2004 rating decision, the Veteran has submitted evidence of ongoing fibroadenomas and has argued that the development of new fibroadenomas during service evinces an aggravation of her bilateral breast fibroadenoma during service. The record at the time of the January 2004 rating decision included evidence of current right and left breast fibroadenoma diagnoses

> and the Veteran's service treatment records related to the fibroadenomas discovered during service. As such, this evidence is essentially duplicative of the evidence of record at the time of that denial. Thus, the additional evidence does not relate to an unestablished fact that may provide a reasonable possibility of substantiating the claim. *See Shade*, 24 Vet. App. 110. Accordingly, the Board concludes that the criteria for reopening a claim of service connection for right and left breast fibroadenoma have not been met.

[R. at 11-12 (3-22)].

Here, Appellant argues she submitted supplemental evidence that is new and material, and sufficient to reopen her claims, to include: (1) Lay testimony that she was exposed to radiation and agued that is could have caused new tumors in her breast during service, that is aggravating her condition [R. at 1392 (1390-1438)]; (2) Internet articles regarding environmental exposure, including radiation, causing tumors [R. at 1404 (1390-1438)]; (3) A 2018 medical report noting a new mass [R. at 36-37]; and, (4) Evidence of scarring because of surgery in service. [R. at 1393 (1390-1438)]. (AB at 14). Appellant argues that, pursuant to *Shade*, the delineated evidence creates a reasonable possibility of substantiating the claims, because VA would be required to grant and examination under the case of *McLendon v. Nicholson*, 20 Vet.App. 79 (2006). (AB at 15-16). Appellant's argument is not convincing and should be rejected by the Court because, regardless of whether it is new, it is not material because it does not raise a reasonable possibility of substantiating the claim.

First, Appellant restricts the meat of her argument to the question of the relevance of the internet article and her lay testimony, and fails her pleading

burden to explain in any cogent manner how the notation of a new tumor in 2018 and evidence of scarring would function to reopen here claims under *Shade* and *McLendon*. *Locklear v. Nicholson*, 20 Vet.App. 410, 416-417 (2006) (terse or undeveloped argument does not warrant detailed analysis by Court and is considered waived); *Shinseki v. Sanders*, 129 S.Ct. 1686, 1704 (2009) ("[T]he burden of showing that an error is harmful normally falls upon the party attacking the agency's determination."); *Overton v. Nicholson*, 20 Vet.App. 427, 435 (2006) (appellant carries burden of persuasion regarding contentions of error); *Hilkert v. West,* 12 Vet.App. 145, 151 (1999) (en banc) (holding that appellant bears burden of demonstrating error on appeal); *Woehlaert*, 21 Vet.App. at 463. Moreover, simply because Appellant developed additional tumors during service does not in and of itself indicate that the condition was aggravated by such service.

Second, Appellant's argument that the appearance of new tumors in service, coupled with her submission of new lay statements that she was exposed in service to radiation, *etc*., raises the specter of whether such exposure caused new tumors, and therefore her claims should be reopened, must be rejected out of hand. To the extent that Appellant is attempting to revisit the question of whether there is a basis for direct service causation to service based on exposure to environmental aspects in service, that argument must fail as the question of direct service connection causation, as opposed to aggravation, was already adjudicated. In other words, the question of tumors in Appellant's breasts

is something that was found to exist prior to service, despite the existence of tumors in service. That is, the question of direct service connection was replaced with the question of whether such tumors were aggravated by service. (Appellant appears to conflate aggravation with direct service connection, or simply does not explain her theories well enough to understand). 38 C.F.R. § 3.322; *Wagner v. Principi*, 370 F.3d 1089, 1096 (Fed.Cir.2004). However, Appellant provides no new medical opinion or similar evidence, specific to her, that indicates any such possibility.

Third, regardless of whether Appellant is arguing under a theory of aggravation or direct service connection, Appellant hangs her hat on treatise information and her own speculative lay statements, neither of which can function to help substantiate her claims under *McLendon*. As to treatise information, such vague boiler information as provided by Appellant, devoid of any relationship to her or her claim, cannot be enough to substantiate her claim. [R. at 1404-1407(1390-1438)]; *see Sacks v. West*, 11 Vet. App. 314, 317 (1998) (where medical treatise information discusses the relationship between two conditions in generic terms and provides evidence only of increased risk but not evidence of causality, the treatise, without the combined support of an opinion of a medical professional, is insufficient to meet the nexus requirement).

As to Appellant's lay hypothesizing about any causation or aggravation by alleged exposure to radiation (even if such exposure is considered true under *Justus*), is neither competent for fulfilling the nexus opinion of service connection,

nor the "indication of a connection to service" prong from *McLendon*. *Hyder v. Derwinski*, 1 Vet.App. 221, 225 (1991) ("Lay hypothesizing, particularly in the absence of any supporting medical authority, serves no constructive purpose and cannot be considered by this Court."); *see also*, *Waters v. Shinseki*, 601 F.3d 1274, 1278-1279 (Fed. Cir. 2010). Similarly, Appellant's counsel's attempts at introducing post hoc "medical evidence" in the guise of musings, also cannot function to provide the low bar of the third prong of *McLendon. Kern v. Brown*, 4 Vet.App. 350, 353 (1993) (attorney not competent to provide explanation of clinical evidence). Merely, "begging the question," as Appellant's counsel puts it, does not create any type cognizable indication of a nexus. (AB at 15). Ultimately, all Appellant has provided is mere speculation, and such speculation is not sufficient to demonstrate prejudicial error warranting remand. *Innogenetics, N.V. v. Abbott Laboratories,* 512 F.3d 1363, 1374 (Fed. Cir. 2008). There simply is no new and material evidence to indicate aggravation of Appellant's "long history" [R. at 2323] of breast masses, nor direct service connection. The Court should affirm the Board's denial.

Finally, to the extent that the Court would ready any of Appellant's arguments as equitable ones, such an argument must be rejected, as the Court has previously held that it is not one that holds equitable powers. *See Moffitt v. Brown*, 10 Vet.App. 214, 225 (1997); *Mason v. Brown*, 8 Vet.App. 44, 59 (1995). Indeed, the power to grant equitable relief for administrative error that leads to a denial of benefits is reserved to the Secretary of Veterans Affairs alone. 38

U.S.C. § 503; 38 C.F.R. § 2.7. Moreover, the Board and Court even lack the jurisdiction to review the grant of, or refusal to grant, equitable relief under section 503(a). *See Smith v. Gober*, 14 Vet.App. 227, 231 (2000). Therefore, equity can play no part in the Court's decision.

The Secretary does not concede any material issue that the Court may deem Appellant adequately raised, argued and properly preserved, but which the Secretary may not have addressed through inadvertence, and reserves the right to address same if the Court deems it necessary for its decision. *But cf. MacWhorter v. Derwinski*, 2 Vet.App. 133, 136 (1992). Furthermore, the Secretary requests that the Court take due account of the rule of prejudicial error wherever applicable in this case. 38 U.S.C. § 7261(b)(2); *Edenfield v. Brown*, 8 Vet.App. 384, 390-91 (1995) (the proper course of action is for the Court to affirm nonprejudicial errors). Because Appellant has limited her allegations of error to those noted above, Appellant has abandoned any other arguments, and therefore, it would be unnecessary for this Court to consider any other error not specifically raised by him. *See Disabled American Veterans*, 234 F.3d at 688 n.3; *Degmetich*, 8 Vet.App. 209; *Williams*, 15 Vet.App. at 199.

V. CONCLUSION

For the foregoing reasons, the Secretary asserts that the Court should remand that portion of the Board's September 27, 2018, decision that denied entitlement to service connection for hallux valgus, and entitlement to service connection for vertigo, and affirm those portions of the Board's September 27,

2018, decision that denied Appellant's petition to reopen claims of entitlement to service connection for left and right breast fibroadenoma based on new and material evidence.

Respectfully submitted,

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