IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

BRUCE E. HOOPLE,
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

FEDERAL CASES

FEDERAL STATUTES

RECORD CITATIONS

IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

BRUCE E. HOOPLE,	)	
	)	
Appellant,	)	
	)	
v.	)	Vet.App. No. 19-0105
	)	
ROBERT L. WILKIE,	)	
Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

ON APPEAL FROM
THE BOARD OF VETERANS' APPEALS

BRIEF OF APPELLEE
SECRETARY OF VETERANS AFFAIRS

ISSUE PRESENTED

Should the Court affirm the September 11, 2018, decision of the Board of Veterans' Appeals (Board) that denied entitlement to service connection for penile shortening?

STATEMENT OF THE CASE

Nature of the Case

Appellant appeals the September 11, 2018, Board decision that denied entitlement to service connection for penile shortening. [R. at 4 (3–13)].[1]

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[1] The Board remanded claims for entitlement to service connection for: bilateral lower and upper extremity peripheral neuropathy; chloracne; bilateral hearing loss; a nose disorder; a sinus disorder; a left toe disorder; and hypertension, secondary to service-connected coronary artery disease; obstructive sleep apnea (OSA),

Statement of Relevant Facts

Appellant served on active duty from December 1965 to November 1967. [R. at 1745].

In April 2010, Appellant underwent a radical prostatectomy to treat prostate cancer. [R. at 2103–2104]; *see* [R. at 2107]. Later that year, in August 2010, the VA Regional Office (RO) in Philadelphia, Pennsylvania, granted entitlement to service connection for prostate cancer, status post operative radical prostatectomy. [R. at 1979-1983]; [1986–1991]; *see also* [R. at 1868-1871]; [1876–1879].

In May 2011, a VA urologist noted on physical examination: "[e]xternal genitalia reveal a circumcised penis with adequate meatus" and a normal scrotum. [R. at 1432].

In November 2015, Appellant, through his current law firm, filed a claim for service connection for penile shortening secondary to the April 2010 radical prostatectomy. [R. at 739–740]; *see* [R. at 798–802] (Dec. 2015 VA Form 21-22a).

Appellant underwent a VA examination for this condition in March 2016. [R. at 338–342]. Following an in-person examination and review of Appellant's VA claims file and e-folder, the examiner opined that Appellant's "current prostate

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claimed as secondary to in-service nasal fracture; and impaired cognitive abilities, secondary to non-service connected OSA. [R. at 4–5]. These claims are not before the Court. *Breeden v. Principi*, 17 Vet.App. 475, 478 (2004) (per curiam order).

shortening (the prior measurements of which [he was] not privy, not having now nor previously measured his penis) secondary to the radical prostatectomy" was "less likely [than] not (50% or greater probability) the result of prostate cancer post operative status radical prostatectomy." *Id.* at 342. The examiner explained that the removal of the prostate "does not incur removal of the testes nor the adrenal gland and thus does not per se reduce the male hormones unless associated with hormonal or chemotherapy of which he was not subjected." *Id.*

In March 2016, the RO denied Appellant's claim for entitlement to service connection for penile shortening. [R. at 257–273]. Appellant, through his current law firm, filed a notice of disagreement (NOD) in January 2017, and included two article abstracts. [R. at 170–171]; [R. at 172–180]. One abstract, titled "Penile shortening after radical prostatectomy and Peyronie's surgery," noted that "[t]he majority of men undergoing radical prostatectomy for prostate cancer have a measured loss of penile length." [R. at 170]. Another abstract, titled "Reduced Penile Size and Treatment Regret in Men with Recurrent Prostate Cancer After Surgery Radiotherapy Plus Androgen Deprivation, or Radiotherapy Alone," noted that in a study "[o]f 948 men, 25 (2.63%) complained of a reduced penile size", and that "[t]he incidence of reduced penile size stratified by treatment was 3.73% for surgery (19 of 510), 2.67% for [radiotherapy] plus [androgen deprivation therapy], and 0% for [radiotherapy] without [androgen deprivation therapy]." [R. at 171].

In November 2016, a VA physician assistant noted that "Appellant was "trying to have a C&P claim approved for penile shortening following [radical prostatectomy] but so far it has been denied" and "[e]xplained that this is a likely and somewhat expected outcome of a radical prostatectomy." [R. at 50–51]. In a January 2017 addendum, the VA physician assistant, following review of "[m]ed[ical] records from MI urologist," noted that [t]here is no mentioning of possible penile shortening as a complication of [radical prostatectomy] and there is no discussion on the pre[-]op vs post-op length of the penis." *Id.* at 49.

In January 2018, VA provided Appellant a Statement of the Case (SOC) and Appellant, through his current law firm, appealed to the Board. [R. at 70 (70–72)]; [R. at 96–112]. Appellant's current law firm also requested a requested "a copy of all documents in contained in [Appellant's] VA claims folder and Virtual VA EFolder." [R. at 87 (87–88)]. The VA Records Management Center provided Appellant a copy of the records in April 2018. [R at 20].

Five months later, on September 11, 2018, the Board denied entitlement to service connection for penile shortening. [R. at 4].

ARGUMENT

A. The Court Should Decline to Entertain Appellant's Challenge to the Adequacy of the March 2016 VA Examination Because He Declined to Raise this Argument Below

The Court should find the doctrine of issue exhaustion appropriate in this case because Appellant and his current law firm had the opportunity to assert

below that the March 2016 VA examination was inadequate but declined to do so until Appellant filed his brief with the Court. *Massie v. Shinseki*, 25 Vet.App. 123, 126–28 (2011) (finding that representation by counsel before the agency is a significant factor for the Court to consider in exercising its discretion to entertain an argument raised for the first time on appeal); *see also Maggitt v. West*, 202 F.3d 1370, 1377 (Fed. Cir. 2000) (discussing the exhaustion of administrative remedies doctrine in the VA disability claims context). Appellant argues for the first time on appeal that the March 2016 VA examination is inadequate "because the opinion is unclear and internally inconsistent." Appellant's Br. at 6. If Appellant or his attorney believed the May 2016 VA examination to be inadequate they should have raised this issue in the January 2017 NOD, in response to the January 2018 SOC, or thereafter in a brief to the Board. *See Dickens v. McDonald*, 814 F.3d 1359, 1361 (Fed. Cir. 2016) (affirming the Court's decision not to review a duty-to-assist argument that was not raised before the Board); *Massie*, 25 Vet.App. at 127; *Maggitt*, 202 F.3d at 1377. In total, Appellant and his attorney had 914 days, or 2 years and 6 months, to assert *some* error with the March 2016 VA examination, including 5 months between obtaining a copy of Appellant's file and the Board issuing the decision on appeal. But they chose not to do so. [R. at 3–13].

Invoking the requirement of issue exhaustion is appropriate where, as here, Appellant and his attorney had multiple opportunities to raise issues before the agency and the Board, but declined to do so, and where Appellant was

represented by legal counsel throughout the appeals process. *See Bozeman v. McDonald*, 814 F.3d 1354, 1358 (Fed. Cir. 2016); *Massie*, 25 Vet.App. at 126–28; *see also Dickens*, 814 F.3d at 1361 (finding issue exhaustion appropriate where the claimant waited 3 years to raise an argument despite earlier opportunities to do so). Appellant's current law firm has represented him since he filed a claim for service connection for penile shortening in November 2015, through the September 2018 Board decision now on appeal, and the Court has found the presence of an attorney throughout the claims process below to be a key consideration when finding issue exhaustion appropriate. *See* [R. at 4] ("John S. Berry, Attorney"); [R. at 739–740] ("Supplemental Claim for Compensation Dated November 16, 2015" submitted by John S. Berry); *see Massie*, 25 Vet.App. at 127.

Following the March 2016 examination and opinion, and the RO's rating decision, Appellant filed an NOD but raised no actual arguments regarding the March 2016's examination. While Appellant provided three paragraphs reciting general boilerplate principles about what makes an examination adequate, he failed to make any specific allegation about the March 2016 VA examination. [R. at 175 (172–180)]. Appellant's substantive appeal is similarly vague. [R. at 70–71]. Although he identifies the claim being appealed, he does not make any specific assertions of error. *See* 38 U.S.C. § 7105(d)(3) (requiring that, in a Substantive Appeal, a claimant "set out specific allegations of error of fact or law," which "are related to specific items in the statement of the case"); *see also Rivera*

v. Shinseki, 654 F.3d 1377, 1381 (Fed. Cir. 2011) (acknowledging that, although some degree of specificity is required, "[s]ection 7105(d)(3) does not prescribe a particular format for the veteran's appeal or a particular degree of specificity that must be provided"). Instead, he asserts only, in a general and boilerplate fashion, that he "takes exception to and preserves for appeal all errors the VA Regional Office may have made or the Board may hereafter make in deciding this appeal" and that "[t]his includes all legal errors, errors in fact-finding, failure to follow Manual M21-1, failure to discharge the duty to assist, and any other due process errors." [R. at 70]. This statement is entirely unhelpful to the Board and runs contrary to the requirements of section 7105(d)(3). What is more, Appellant's current law firm requested Appellant's claims file in January 2018 and received a copy of those records in April 2018, which necessarily included a copy of the March 2016 examination and the January 2018 SOC. [R. at 20]; [R. at 87 (87–88)]. Still, they chose not to raise any argument to the Board about the adequacy of the March 2016 VA examination.

While there are many reasons why a medical examination may be inadequate, Appellant and his attorney chose not to allege *any* inadequacy until his case reached this Court, despite having numerous opportunities to do so. Had Appellant raised some argument below, the Board could have addressed it. As such, the Court should find issue exhaustion appropriate in this case. *See Massie*, 25 Vet.App. at 134 (highlighting the Court's concern that "the current system

provides very little incentive for an attorney practicing before VA to present all available arguments to the agency in one comprehensive appeal to the Board where veterans' claims can be resolved in a timely manner"); *Maggitt*, 202 F.3d at 1377.

B. Appellant Fails to Show that the Board Clearly Erred When It Relied on the March 2016 VA Examination

The Board relied primarily on the March 2016 VA examiner's explanation that a prostatectomy could cause penile shortening only if associated with chemotherapy or hormonal therapy, and that he not did undergo either treatment. [R. at 6–7]; *see* [R. at 342]. Appellant asserts that the Board's reliance was in error, arguing that "[t]he Board failed to ensure that the duty to assist was satisfied when it relied on an inadequate March 2016 VA medical opinion." Appellant's Br. at 5. But, as noted above Appellant asserted no error with this medical opinion below or any specific error with VA's duty to assist at any point during his appeal of the March 2016 rating decision. *See* [R. at 257–273]. Nevertheless, it is apparent, based on the Board's discussion of the probative value of the March 2016 VA examination, that it found the March 20016 VA examination adequate. [R. at 6]; *see Janssen v. Principi*, 15 Vet.App. 370, 379 (2001) (per curiam) (holding that a Board decision must be read "as a whole").

The Court reviews the Board's finding that an examination is adequate for clear error. *See D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008). Under this standard, the Court "may not reverse just because [it] 'would have decided the

[matter] differently.'" *Cooper v. Harris*, 137 S. Ct. 1455, 1465 (2017) (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985)). "A finding that is 'plausible' in light of the full record—even if another is equally or more so—must govern." *Cooper*, 137 S. Ct. at 1465. Medical examination reports are adequate "when they sufficiently inform the Board of a medical expert's judgment on a medical question and the essential rationale for that opinion." *Monzingo v. Shinseki*, 26 Vet.App. 97, 106 (2012).

Here, the Board noted that the March 2016 VA examiner diagnosed Appellant with penile shortening but "opined that [Appellant's] penile shortening was not caused by his service-connected prostate cancer, status post-operative radical prostatectomy because prostate removal does not incur removal of the testes or adrenal gland, and accordingly, does not reduce the male hormones unless associated with hormonal or chemotherapy which the veteran did not undergo." [R. at 6]; *see* [R. at 342]. As noted by the Board, the underlying medical reasoning provided by the March 2016 VA examiner was "that shortening may be cause by hormonal treatment or chemotherapy because of the reduction of male hormones." [R. at 6]. Appellant fails to show any clear error with the Board's evaluation of or reliance on the March 2016 VA examination. *See D'Aries*, 22 Vet.App. at 104; *Hilkert v. West*, 12 Vet.App. 145, 151 (1999); *aff'd*, 232 F.3d 908 (Fed. Cir. 2000) (holding that the appellant has the burden of demonstrating error in the Board's decision).

Appellant asserts, for the first time on appeal, that the examination is internally inconsistent because the examiner noted in the Disability Benefits Questionnaire (DBQ) that a "shortened prostate" was a residual condition or complication "due to the neoplasm (including metastases) or its treatment, other than those already documented in the report above." Appellant's Br. at 7–8 (citing [R. at 342]. The Board, however, discerned no internal inconsistency in this opinion and apparently, neither did Appellant nor his attorney until after they appealed the Board decision to this Court. Nevertheless, the Board found that the March 2016 examiner clearly explained under what circumstances penile shortening may occur and that Appellant's surgery did not involve any hormonal or chemotherapy. [R. at 342]. So, this annotation does not impair the examiner's rationale for his negative nexus opinion. Moreover, while the examiner used the term "prostate shortening" in his opinion, the Board understood the examiner to be providing an opinion on penile shortening in the context of that very sentence in the examiner's rationale. *See* [R. at 342] ("The current prostate shortening (the prior measurements of which I am not privy, having now not previously measured his penis) secondary to the radical proctectomy. . . ."). Reading the examiner's opinion as a whole, this reading is plausibly based in the record. *See Monzingo*, 26 Vet.App. at 106 (holding that a medical examination report must be read "as a whole").

Appellant also appears to assert that the examiner's use of the term "per se" in his opinion somehow renders it ambiguous. *See* Appellant's Br. at 8–9. It does not, because the examiner explained that penile shortening only occurs if a claimant underwent hormonal therapy or chemotherapy. [R. at 342]. The Board summarized the examiner's medical rationale in its decision: "shortening may be caused hormonal treatment or chemotherapy because of the reduction of male hormones." [R. at 6]. And likewise, the Court should find Appellant's assertion that the examination was based on an inaccurate factual unpersuasive. [R. at 9]. The abstracts submitted by Appellant along with his NOD do not undermine the examiner's conclusion. The examiner explained that surgery could cause penile shortening if "associated with hormonal or chemotherapy." [R. at 342]. This is not inconsistent with the abstracts' general premise. [R. at 170–171]. Again, if Appellant believed that there was a problem with the March 2016 VA examination, he should have brought it to the Board's attention. But he never did, nor does he explain why he failed to do so. *See Dickens*, 814 F.3d at 1361.

C. Appellant Fails to Show that the Board's Statement of Reasons or Bases are Inadequate

Appellant asserts that the Board's statement of reasons or bases are inadequate because the Board did not address the abstracts Appellant attached to his January 2017 NOD or ask for clarification from the November 2016 VA physician assistant. Appellant's Br. at 10–13; [R. at 49–51]; [R. at 170–71]. Appellant fails to show that the Board's statement precludes effective judicial

review or explain how he was prejudiced by these alleged errors. *See Hilkert*, 12 Vet.App. at 151.

The legal requirements governing the Board's statement are that the Board (1) address the material issues raised by the appellant or reasonably raised by the evidence, (2) explain its rejection of materially favorable evidence, (3) discuss potentially applicable laws, and (4) otherwise provide an explanation for its decision that is understandable and facilitative of judicial review." *Johnson v. Shinseki*, 26 Vet.App. 237, 264 (2013) (Kasold, C.J., dissenting), *rev'd on other grounds sub nom.*, *Johnson v. McDonald*, 762 F.3d 1362 (Fed. Cir. 2014). And a deficiency in the Board's statement warrants remand only where it would preclude effective judicial review or where Appellant shows that he suffered harm. *See Mayfield v. Nicholson*, 19 Vet.App. 103, 129 (2005) (providing that 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).

Here, the Board discussed the two competing pieces of medical evidence of record, the March 2016 VA examination and the November 2016 physician assistant note, but found the March 2016 VA examination more probative because the examiner explained under what circumstances a prostate surgery would cause penile shortening. *See* [R. at 6]. It found the November 2016 physician assistant's opinion "that penile shortening after a prostatectomy [was] 'likely and somewhat

expected'" less probative "because it does not provide a rationale specific to [Appellant]." *Id.* The Board explained "[w]hile it may be likely, she did not discuss the underlying medical reason given by the VA examiner: that shortening may be caused by hormonal treatment or chemotherapy because of the reduction of male hormones" and that "[a]s [Appellant's] operation did not reduce the male hormones, the physician's assistant did not explain why the procedure would cause shortening." *Id.* The Board appropriately relied on the March 2016 examiner's opinion as it considered Appellant's particular medical situation and explained under what circumstances penile shortening could occur, which it found not to apply to Appellant's condition. *See Bailey v. O'Rourke*, 30 Vet.App. 54, 60 (2017) (noting an examiner's discussion of facts and circumstances specific to an appellant as a relevant factor in a probative value analysis).

Appellant highlights a line in an abstract noting that "[t]he majority of men undergoing radical prostatectomy for prostate cancer have a measured loss of penile length" and asserts that the Board erred because it did not specifically address it. [R. at 170]. But merely because the Board did not refer to these abstracts by name in its decision does not establish error nor does not it automatically mean that the Board did not consider them. *See Newhouse v. Nicholson*, 497 F.3d 1298, 1302 (Fed. Cir. 2007) (noting that the Board is not required to comment on every piece of evidence contained in the record and is presumed to have considered all evidence of record). Indeed, the Board's decision

reflects that it entertained the possibility that prostate cancer treatments may cause penile shortening in certain cases, which appears to be the premise of the abstracts, but it found that the competent evidence of record did not show such a case in Appellant's specific situation. *See* [R. at 6]. To that end, the limited, general information provided in these abstracts also appears to conform with the March 2016 VA examiner's opinion that penile shortening may occur with hormonal or chemotherapy, which Appellant did not undergo. *Compare* [R. at 171] *with* [R. at 342].

At most, the Board's omission is harmless error because these two abstracts provide only general information not specific to Appellant, similar to the November 2016 VA physician assistant's note. *See generally Bailey*, 30 Vet.App. at 60. The abstracts submitted by Appellant suffer from the same deficiency of reasoning by providing no information as to Appellant's specific circumstances and do not rebut the March 2016 VA examiner's medical reasoning. 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) (holding that the harmless error analysis applies to the Court's review of Board decisions and that the burden is on the appellant to show that he suffered prejudice as a result of VA error); *Simmons v. Wilkie*, 30 Vet.App. 267, 279 (explaining that prejudice is established where the error "affected or could have affected the outcome of the determination"); *see also*

Vogan v. Shinseki, 24 Vet.App. 159, 161 (2010) (noting that the Board's prejudicial error analysis inquiry is not restricted to findings made by the Board).

In this case, counsel below possessed Appellant's entire claims file and was equipped to raise specific arguments to the Board to ensure that the Board discussed these articles. *See* [R. at 20] (Apr. 2018 Response to Appellant's Privacy Act Request). To remand for the Board to discuss these two abstracts would simply encourage further piecemeal litigation. *See id.*

Appellant also asserts that the Board should have sought clarification from the November 2016 physician assistant who opined that penile shortening is a "likely and somewhat expected outcome of a radical prostatectomy." [R. at 50 (49–51)]; *see* Appellant's Br. at 12–13. Appellant overlooks that the same physician assistant provided an addendum in January 2017. *Id.* at 49. The physician assistant stated: "Med records from MI urologist reviewed. There is no mentioning of possible penile shortening as a complication of RP and there is no discussion on the pre[-]op vs post-op length of the penis." [R. at 49]. This addendum certainly does not favor Appellant as the physician assistant found no evidence of penile shortening due to his prostatectomy. *Id.* So, the examiner already provided clarification and seeking further discussion on this point would not likely benefit Appellant. *See Lamb v. Peake*, 22 Vet.App. 227, 234 (2008) (remand is not warranted where it "would serve no useful purpose."); *Soyini v. Derwinski*, 1 Vet.App. 540, 546 (1991) (declining to remand for additional reasons or bases

because it would impose additional burdens on the agency with no benefit flowing to the veteran).

Moreover, the Board was not required to seek clarification from the November 2016 VA physician assistant. *See* Appellant's Br. at 12–13; *Carter v. Shinseki*, 26 Vet.App. 534, 545 (2014) (noting that the Board need not seek clarification "where there are competent medical records that adequately address [the appellant's] condition), *overruled on other grounds by Carter v. McDonald*, 794 F.3d 1342 (Fed. Cir. 2015). The March 2016 VA examination, along with the extensive VA treatment notes of record, provided the Board sufficient information regarding Appellant's current condition. *See id.* As noted above, the March 2016 examiner explained how a prostate surgery could lead to penile shortening and explained that those circumstances did not apply in Appellant's case. [R. at 20]. It is unclear what further information Appellant seeks from the physician assistant, particularly in light of the physician assistant's January 2017 addendum. Accordingly, the Court should find that Appellant fails to show that the Board's statement of reasons or bases are inadequate, or that he suffered prejudice as a result of any omission from the Board's discussion. *See Hilkert*, 12 Vet.App. at 151.

CONCLUSION

For the above reasons, the Secretary respectfully requests that the Court affirm the September 11, 2018, Board decision.

Respectfully submitted,

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