

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

JAMES S. BARES,
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**

LEIGH A. BRADLEY
General Counsel

MARY ANN FLYNN
Chief Counsel

EDWARD V. CASSIDY, JR.
Deputy Chief Counsel

LORI M. JEMISON
Appellate Attorney
U.S. Department of Veterans Affairs
Office of General Counsel (027B)
810 Vermont Avenue, N.W.
Washington, D.C. 20420
(202) 632-8393

Attorneys for the Appellee

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

JAMES S. BARES,)	
)	
Appellant,)	
)	
v.)	Vet. App. No. 15-3921
)	
ROBERT A. MCDONALD,)	
Secretary of Veterans Affairs,)	
)	
Appellee.)	

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

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

I. ISSUES PRESENTED

Whether the Court should decline jurisdiction and dismiss Appellant's appeal for entitlement to service connection for prostate cancer.

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

Appellate jurisdiction is predicated on 38 U.S.C. § 7252, which gives this Court exclusive jurisdiction to review final decisions by the Board.

B. Nature of the Case

Appellant, James S. Bares, seeks the Court's review of the September 18, 2015, Board of Veterans' Appeals (BVA or the Board) decision. In that decision, the Board denied Appellant's claim for entitlement to service connection for diabetes mellitus, type II, and then remanded Appellant's claim for entitlement to service connection for prostate cancer for further development and adjudication. Record Before the Agency (R.) [R. at 1-15].

C. Relevant Factual and Procedural History

Appellant served on active military duty with the United States Navy from November 15, 1965, to November 14, 1967. [R. at 16]. On September 18, 2015, the Board issued a decision denying Appellant's claim for entitlement to service connection for diabetes mellitus, type II, and remanded Appellant's claim for entitlement to service connection for prostate cancer for further development and adjudication. [R. at 1-15]. Appellant filed a Notice of Appeal (NOA) with this Court on October 1, 2015, and subsequently filed an informal brief with this Court on January 28, 2016. In his informal brief, Appellant indicates that the only issue that he is appealing is prostate cancer. Appellant's Brief (AB.) [AB at 1-3].

III. SUMMARY OF THE ARGUMENT

The Secretary maintains the Court should dismiss Appellant's appeal because the Court has no jurisdiction over Appellant's claims for entitlement to service connection for prostate cancer in the absence of a final Board decision.

IV. ARGUMENT

THE COURT DOES NOT HAVE JURISDICTION OVER THE ISSUE ON APPEAL.

At the outset, the Secretary acknowledges that he is mindful of his legal obligation to “give a sympathetic reading” to Appellant’s *pro se* filings in order to determine “all potential claims raised by the evidence, applying all relevant laws and regulations[.]” *Szemraj v. Principi*, 357 F.3d 1370, 1373 (Fed. Cir. 2004) (quoting *Roberson v. Principi*, 251 F.3d 1378, 1384 (Fed. Cir. 2001); thus, in sympathetically reading Appellant’s Informal Brief, the Secretary respectfully submits Appellant is challenging the Board’s decision insofar as it remanded his claims for entitlement to service connection for prostate cancer. [AB at 1-3].

The jurisdiction of this Court derives exclusively from statutory grants of authority provided by Congress and the Court may not extend its jurisdiction beyond that authorized by law. *See Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 818 (1988); *Machado v. Derwinski*, 928 F.2d 389, 391 (Fed. Cir. 1991); *Dudley v. Derwinski*, 2 Vet.App. 602, 603 (1992) (en banc order). Pursuant to 38 U.S.C. § 7266(a), in order for a claimant to obtain review of a Board decision by this Court, that decision must be final and the person adversely affected by that decision must file an NOA within 120 days after the date on which notice of that BVA decision was mailed. “A claimant seeking to appeal an issue to the Court must first obtain a *final* BVA decision on that issue.” *Horowitz v. Brown*, 5 Vet.App. 217, 225 (1993) (emphasis in original). *See* 38

U.S.C. §§ 7266(a), 7252(a). “A BVA remand decision ‘is in the nature of a preliminary order and does not constitute a final Board decision.’ 38 C.F.R. § 20.1100(b).” *Zevalkink v. Brown*, 6 Vet.App. 483, 488 (1994).

In the instant appeal, the Board has not issued a final decision on the issue of entitlement to service connection for prostate cancer because the Board’s September 18, 2015, decision remanded this issue for further development. [R. at 1-15]. Thus, Appellant has not exhausted his administrative remedies. *See In re Quigley*, 1 Vet App. 1 (1990); *Kirkpatrick v. Nicholson*, 417 F.3d 1361 (Fed.Cir.2005) (holding that the Court does not have jurisdiction over remanded claims). Because this matter is not the subject of a final Board decision, the Court may not address it and this case should be dismissed. *See* 38 U.S.C. § 7266(a); *Breeden v. Principi*, 17 Vet.App. 475 (2004) (per curiam order).

Although Appellant is proceeding *pro se*, and the Secretary is mindful of his obligation to sympathetically read his Informal Brief, it is long-established that Appellant still carries the burden of presenting coherent arguments and of providing adequate support for those arguments. *See Mayfield v. Nicholson*, 19 Vet.App. 103, 111 (2005) (noting that “every appellant must carry the general burden of persuasion regarding contentions of error”), *rev’d* 444 F.3d 1328 (Fed. Cir. 2006); *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (“An appellant bears the burden of persuasion on appeals to this Court.”) *aff’d* per curiam, 232 F.3d 908 (Fed. Cir. 2000) (table); *Berger v. Brown*, 10 Vet.App. 166, 169 (1997) (“[T]he appellant ... always bears the burden of persuasion on appeals to this

Court.”). *See also Locklear v. Nicholson*, 20 Vet.App. 410, 416 (2006) (holding that the Court will not entertain underdeveloped arguments); *Coker v. Nicholson*, 19 Vet.App. 439, 442 (2006) (“The Court requires that an appellant plead with some particularity the allegation of error so that the Court is able to review and assess the validity of the appellant's arguments.”)

In sympathetically reading Appellant’s Informal Brief, the Secretary notes that Appellant has not indicated that he is appealing any other portion of the September 18, 2015, Board decision. [AB. at 1-3]. In fact, in response to question #1, Appellant lists “prostate cancer cause by exposure from agent orange while service aboard the Franklyn D. Roosevelt” as the issue that he is appealing. [AB. at 1]. Further, in response to question #7 as to what action he would like this Court to take, Appellant’s response is “overturn denial of the Board of Veterans Affairs Decision to deny my prostate cancer as non-service connected due to agent orange”. [AB. at 3]. Therefore, it is the Secretary’s position that the issue contained in the Board’s September 18, 2015, decision that is the subject of a final decision Board decision, has not been appealed and is not before this Court. *See Breeden, supra*.

V. CONCLUSION

WHEREFORE, for the foregoing reasons, the Secretary respectfully submits that this appeal should be dismissed.

Respectfully submitted,

LEIGH A. BRADLEY

General Counsel

MARY ANN FLYNN

Chief Counsel

/s/ Edward V. Cassidy, Jr.

EDWARD V. CASSIDY, JR.

Deputy Chief Counsel

/s/ Lori M. Jemison

LORI M. JEMISON

Appellate Attorney

Office of General Counsel (027B)

U.S. Department of Veterans Affairs

810 Vermont Avenue, N.W.

Washington, DC 20420

(202) 632-8393

Attorneys for Appellee Secretary of
Veterans Affairs

CERTIFICATE OF SERVICE

On the 28th day of March, 2016, a copy of the foregoing was mailed
postage prepaid, to:

James S. Bares
424 E. Main Street
Havana, Illinois 62644-1436

I certify under penalty of perjury under the laws of the United States of
America that the foregoing is true and correct.

/s/ Lori M. Jemison

LORI M. JEMISON

Counsel for Appellee