IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 15-835

WILLIE J. THREATT, JR.,

Appellant,

v.

ROBERT A. MCDONALD,
SECRETARY OF VETERANS AFFAIRS,

Appellee.

APPELLANT'S BRIEF

Aniela K. Szymanski, Esq.
Lewis B. Puller, Jr. Veterans Benefits Clinic
William & Mary Law School
P.O. Box 8795, Patrick Galt House
Williamsburg, VA 23187-8795
(757) 221-7443

William A. M. Burke
Willcox & Savage, P.C.
440 Monticello Ave.
Norfolk, VA 23507
(757) 628-5554
Counsel for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES & REGULATIONS

RECORD BEFORE THE AGENCY CITATIONS

IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

WILLIE J. THREATT, JR.,	)	
	)	
Appellant,	)	
	)	
v.	)	No. 15-835
	)	
ROBERT A. MCDONALD, Secretary of Veterans Affairs	)	
	)	
	)	
Appellee,	)	

ON APPEAL FROM THE

BOARD OF VETERANS' APPEALS

APPELLANT'S BRIEF

ISSUES PRESENTED

I. Whether the 2014 Board Decision is void with respect to Mr. Threatt's hip and back claims because the 2003 Board Decision's finality was abated.

II. Whether the Board erred in finding Mr. Threatt's hip disability was a pre-existing condition.

III. Whether the Board erred in finding Mr. Threatt's fall did not occur.

IV. Whether the Board adequately explained its determination that Mr. Threatt's condition was not aggravated in service.

JURISDICTION

The Court has jurisdiction under 38 U.S.C. § 7252.

NATURE OF THE CASE

The Board's July 7, 2014, decision relied on the finality of its February 20, 2003 decision to conclude that the Appellant, Willie J. Threatt, Jr., was required to offer new and material evidence to support reopening of his claims for service connection of his hip and back disabilities. Because Mr. Threatt had abated the finality of the 2003 Board Decision via a timely misfiled Notice of Appeal, the Court is presented with a question of whether the 2014 Board Decision is of any effect with respect to Mr. Threatt's hip and back claims.

In its 2003 Decision, the Board denied Mr. Threatt's hip and back claims, determining that none of them were incurred or aggravated in service. The Court is presented with the issues of whether the Board should have determined that Mr. Threatt was entitled to the presumption of soundness, whether it erred by giving insufficient weight to his statements and other evidence in the record that he fell from an obstacle in training, and whether it adequately explained its conclusions.

STATEMENT OF RELEVANT FACTS

Willie Threatt served in the Army from June 1968 until January 1970, when he was discharged under honorable conditions. (Record "R." at 625). Prior to entering Basic Training, in March 1968, Mr. Threatt received a pre-induction physical examination that was amended in June 1968. (R. at 1935-36). During the examination, he mentioned a

private physician, Dr. S. K. Ashby, had treated him for pain in his right hip. (R. at 1906 (1905-06)). The examiner requested a letter from Dr. Ashby outlining his treatment of Mr. Threatt. (R. at 1038 (1037-38)). Dr. Ashby responded with a letter stating that he treated Mr. Threatt for a painful right hip in March 1968 (the same month as Mr. Threatt's pre-induction physical), but that the condition was "mild", "[i]mproved", treated with "mild analgesics", and that his X-Rays were normal. (R. at 1037 (1037-38)). The examiner determined that Mr. Threatt's hip problem was "off & on", and concluded that Mr. Threatt was fit for service with "No disqualifying Dx given". (R. at 1936 (1935-36)).

Mr. Threatt entered Basic Combat Training on July 1, 1968 at Fort Benning, Georgia. (R. at 773 (771-74)). Mr. Threatt has repeatedly asserted that shortly thereafter, he fell from an obstacle and was injured. (R. at 1854-57, 1874, 1886-87 (1886-89)). On July 5, 1968, Mr. Threatt was placed on temporary "light duty". (R. at 1933 (1923-34)).[1] Twelve days after that, his "PULHES" physical profile "L" rating was increased from "1" to "T-3". (R. at 1937-38). He was consequently prohibited from "crawling, stooping, running, jumping, prolonged standing or marching" and was instructed to engage in "no strenuous physical activity." (*Id.*).

Mr. Threatt sought treatment for injuries resulting from his fall through July and August 1968. (R. at 1931-33 (1923-34)). On July 16th, an X-Ray revealed mild swelling in his left ankle with no evidence of fracture. (R. at 1947, *see also* R. at 1933 (1923-34)).

[1] The treatment note for this date states that Mr. Threatt "[d]enies any specific trauma", but does not provide the circumstances of this alleged denial.

Approximately one month later, on August 18th, Mr. Threatt returned to the dispensary, a physician found his right hip had become a "continuing problem", and Mr. Threatt was kept on light duty. (R. at 1932 (1923-34)). Approximately one month later, on September 30, Mr. Threatt was transferred to Fort Polk, (R. at 773 (771-74)), after physicians at Fort Benning determined he could not complete Basic training, (R. at 1856 (1854-57)). Over time, Mr. Threatt's injuries healed and he received an "L" rating of "1" with no physical defects or assignment limitations on March 8, 1969. (R. at 745; *see also* R. at 771 (771-74) (same)).

Mr. Threatt first filed a claim for service connection of his right hip, left hip, and lower back disabilities on October 3, 1996; his application was received by VA on October 8, 1996. (R. at 1895 (1895-98), 613). VA requested records from Martin Army Community Hospital, but received a negative reply. (R. at 1842). VA denied his claim, concluding that the above-referenced discussion of a "painful right hip" indicated that his right hip disability predated his service and also that there was "no evidence that the condition permanently worsened as a result of service." (R. at 1883 (1883-85)). Mr. Threatt appealed this decision to the BVA, which denied his appeal on December 16, 1998. (R. at 1785-95). He appealed that decision to this Court, which remanded it to the Board on October 19, 1999, pursuant to a joint motion for remand. (R. at 1772 (1769-75)). The Board then remanded Mr. Threatt's hip and back claims to the RO to comply with his request for a hearing and to develop his claim further. (R. at 1742-44). On remand, the RO again denied Mr. Threatt's claim. (R. at 1523-34). Mr. Threatt again appealed to the Board, which, in February 2003, again affirmed the RO's denial of Mr.

Threatt's hip and back claims, finding that his right hip disorder "was not incurred in or aggravated by service." (R. at 1588 (1586-99), hereinafter, the "2003 Board Decision").

Mr. Threatt contested the 2003 Board Decision via letters sent to the VA through his congressman, which the Court recently determined were sufficient to abate the finality of the 2003 Board Decision and equitably toll the period for noting an appeal to this Court. (Order of May 17, 2016). Mr. Threatt attempted to renew his hip and back claims in 2007, but the RO denied the claim relying on the apparent finality of the 2003 Board Decision. (R. at 656-57, 995-96, 1011, 1013-16 (993-1018), 1048-50 (1045-54)). In March 2010, Mr. Threatt appealed that decision, among others, to the Board. (R. at 662-63). In the 2014 decision challenged here, the Board agreed with the RO: because it considered the 2003 decision final and determined that Mr. Threatt had not presented new and material evidence, it denied reopening of his hip and back claims. (R. at 5-6 (3-17), hereinafter, the "2014 Board Decision").

On October 30, 2014, Mr. Threatt noted his appeal to the 2014 Board Decision, and then to the 2003 Board Decision on March 4, 2015. The Court granted his motion for equitable tolling, deeming his NOA to the Board's 2003 decision timely filed. (Order of May 17, 2016). It then granted his motion to consolidate the two appeals. (Order of Aug. 25, 2016).

SUMMARY OF THE ARGUMENT

The 2014 Board Decision is void with respect to Mr. Threatt's hip and back claims because it was predicated on the finality of the 2003 Board Decision. In the 2003 Board Decision, the Board erred as a matter of law by misconstruing 38 U.S.C. § 1111 and

holding that Mr. Threatt's right hip pain was a pre-existing disability sufficient to deprive him of the presumption of soundness. The Board also erred by discounting Mr. Threatt's statements, despite their corroboration in the record, on the basis of improper inferences from the absence of certain records, and by failing to explain its reasons for doing so adequately. In the alternative, even if the Board did not err regarding the presumption of soundness, it did not adequately explain its reasons for determining that Mr. Threatt's hip condition did not worsen during service.

ARGUMENT

I. The 2014 Board Decision is void with respect to Mr. Threatt's hip and back claims because it was premised on the finality of the 2003 Board Decision.

The 2014 Board Decision denying Mr. Threatt's appeal of the denial to reopen his right hip, left hip, and back claims was based entirely on the Board's impression that the 2003 Board Decision was final. A Board decision based on the finality of an abated prior decision is void. *See Boyd v. McDonald*, 27 Vet.App. 63, 78-79 (2014) (*per curiuam*) (portions of a Board decision relying on the finality of a previous Board decision that was abated at the time are void). The Court has the power to modify Board decisions in appropriate circumstances and this includes the power to strike erroneous or void portions of the decision. *Boyd*, 27 Vet.App. at 78-79 (citing 38 U.S.C. § 7252).

In *Boyd*, a veteran appealed two Board decisions based on two interrelated claim streams, one from 2008 and the other from 2009. *Id.* at 65-68. The 2008 decision denied the first claim stream on its merits, but remanded the second stream to the RO for reevaluation. *Id.* at 67. After remand, the Board took up both claim streams again in the

2009 decision, relying on the finality of the 2008 decision to deny the first stream and affirming the RO's decision after remand on the second stream. *Id.* at 67-68. On appeal, this Court held that the veteran's February 2009 written statement of disagreement abated the finality of the 2008 decision and it accordingly dismissed the appeal to that decision as premature. *Id.* at 75-76 (VA had not acted on the potential motion for reconsideration). The Court affirmed the 2009 decision on its merits, but in so doing, modified the decision to remove the portions that relied on the finality of the 2008 decision. *Id.* at 78-79.

Here, as in *Boyd*, this appeal concerns two sequential Board decisions, with the second relying at least in part on the finality of the first. As in *Boyd*, the Board's latter decision was predicated on the finality of its prior abated decision. Thus, as in *Boyd*, the Board's 2014 decision is void with respect to Mr. Threatt's hip and back claims because it exclusively relied on the finality of the non-final 2003 decision. The Court, thus, should modify the 2014 Board Decision to remove reference to Mr. Threatt's hip and back claims.

II. The Board should have applied the presumption of soundness to Mr. Threatt's right hip claim because his "painful right hip" was not diagnosed as a ratable disability.

Mr. Threatt's current right hip condition was not noted in his pre-induction physical and was not severe enough to qualify as a ratable disability, such that the Board should have applied the presumption of soundness to his right hip claim and, by extension, his left hip and lower back claims. Title 38, Section 1111 of the U.S. Code provides that:

> [E]very veteran shall be taken to have been in sound condition when examined, accepted, and enrolled for service, except as to defects, infirmities, or disorders noted at the time of the examination, acceptance, and enrollment, or where clear and unmistakable evidence demonstrates that the injury or disease existed before acceptance and enrollment and was not aggravated by such service.

This presumption of soundness applies unless the condition at issue was "noted at entrance into service[.]" 38 C.F.R. § 3.304(b). "Only such conditions as are recorded in examination reports are to be considered as noted." *Id.*

A. The pre-induction exam report only noted a recent history of pain and did not include or note a diagnosis of any condition.

First, regardless of how Mr. Threatt's hip issue is classified, the discussion of it in his pre-induction exam report and Dr. Ashby's letter amounts only to annotating his history, not to a diagnosis of any present condition. "Noting only a history of a condition at the time of the entrance examination 'does not constitute a notation' of a preexisting condition." *McKinney v. McDonald*, 28 Vet.App. 15, 23 (2016). Here, in March 1968, Mr. Threatt disclosed that he recently had some trouble with his right hip, not that he had an ongoing chronic condition. According to Dr. Ashby's letter, this issue had onset that same month. Dr. Ashby did not include any report of a diagnosis, noting only that he had been treating Mr. Threatt with mild analgesics and that his condition was "improved". (R. at 1037-38). In fact, in the pre-induction exam, the only mention of any diagnosis was in the examiner's statement that there was "no disqualifying dx given". (R. 1935-36). Accordingly, because Mr. Threatt's pre-induction exam report notes only his recent history of some right hip pain, not a diagnosis of any condition, no condition was "noted" in the exam and he was entitled to the presumption of soundness.

B. Even if a "condition", Mr. Threatt's "painful right hip" was not severe enough to deprive him of the presumption of soundness.

Even if the discussion of Mr. Threatt's right hip pain amounted to a diagnosis of a condition, it was not the sort of condition that, when noted on a pre-induction exam, deprives a veteran of the presumption of soundness because it was not severe enough to be rated under the Secretary's disability rating system. A mere mention of a physical defect does not qualify as notation of a condition for the purposes of 38 U.S.C. § 1111 and 38 C.F.R. § 3.304(b); instead, only a diagnosis of a disability ratable under the Secretary's regulations qualifies. *McKinney*, 28 Vet.App. at 28-29 ("[A] determination as to whether a 'defect,' under section 1111, is or is not noted on an entrance examination will be based on whether disability compensation benefits are available for the condition for which the veteran seeks benefits."); *see also Hensley v. Brown*, 5 Vet.App. 155, 160 (1993) (veteran's left ear hearing loss was a pre-existing disability because it met the standard for a ratable disability at the time he entered service). The proper interpretation of a statute is a question of law subject to *de novo* with no deference to the Board's interpretation. *Lane v. Principi*, 339 F.3d 1331, 1338 (Fed. Cir. 2003).

Here, the Board referred to Mr. Threatt's painful hip as a "right hip disability" and concluded that "[a] right hip disability unequivocally pre-existed service[.]" (R. at 1594 (1586-99)). This formulation is problematic for several reasons. First, as in *McKinney*, a history of a "painful" hip manifestly is insufficient to qualify as a "disability". There is no diagnostic code in the Secretary's disability rating system that corresponds to a diagnosis of a "painful" hip. *See* 38 C.F.R. § 4.71a, Diagnostic Codes 5000-5025 ("Acute,

Subacute, or Chronic Diseases") & 5250-55 ("The Hip and Thigh"). The Board did not refer to any portion of the Secretary's rating system to explain its characterization of Mr. Threatt's hip pain as a "disability", nor did it explain why it considered it to be one. Instead, here, as in *McKinney*, the pre-induction exam report only mentions an issue that indicates that Mr. Threatt had a condition that improved, but does not go so far as to diagnose him with anything, much less a pre-existing ratable disability as is required to deprive him of the presumption of soundness.

Second, the "underlying condition" the Board identified is not a condition at all, but rather only a symptom. A "painful right hip" is quite clearly a description of a symptom, not a diagnosis of a condition. *See Fountain v. McDonald*, 27 Vet.App. 258, 268 (2015) ("'[P]ain alone, without a diagnosed or identifiable underlying malady or condition, does not in and of itself constitute a disability for which service connection may be granted.'") (quoting *Sanchez-Benitez v. West*, 13 Vet.App. 282, 285 (1999)); *accord* 38 C.F.R. § 4.59 ("It is the intention to recognize actually painful, unstable, or malaligned joints, *due to healed injury*, as entitled to at least the minimum compensable rating for the joint.") (emphasis added). The unfairness of this approach, identified by this Court in *McKinney*, is demonstrated by the Board's treatment of Mr. Threatt's "T-3" profile. It determined that this was only a temporary or intermittent flare-up that, under *Hunt v. Derwinski*, 1 Vet.App. 292 (1991), is insufficient to establish aggravation. (R. at 1595 (1586-99)). But the *Hunt* court was careful to distinguish a temporary or intermittent flare up of *symptoms* from "worsening of the underlying condition". 1 Vet.App. at 297. Here, the "underlying condition" the Board identified *is* just a symptom.

Ultimately, the Board's reasoning is circular. It concluded that Mr. Threatt's "painful right hip" was a "disability" and then determined that it was a pre-existing disability. But it did so based on its own medical judgment, not on any established standard or criteria. It is undisputed that Mr. Threatt had a right hip problem on entry, but without any medical evidence to support its conclusion, the Board jumped to the conclusion that the problem identified in the pre-induction exam was the *same* problem that ended up causing Mr. Threatt's current disability. But this presumes the consequent. By assuming that Mr. Threatt's current right hip disability is the same condition that briefly manifested in March 1968, the Board made an implicit finding that the current disability is the result of the *natural progression* of that "painful right hip" problem without the benefit of any medical evidence. Accordingly, at a minimum, the Court should remand the 2003 Board Decision for reevaluation of whether, under *McKinney*, Mr. Threatt was entitled to the presumption of soundness.

C. The Secretary cannot show by clear and unmistakable evidence that Mr. Threatt's hip condition pre-existed his service or that it was not aggravated.

Remand is unnecessary on this issue because the record is sufficient for the Court to reverse the 2003 Board Decision and find that, as a matter of law, if he is able to establish a causal nexus, Mr. Threatt's current disability is service connected. If a condition is not noted in a veteran's pre-induction physical, in determining whether a veteran's condition pre-dates service, the Secretary is required to consider the entire record, including "all other lay and medical evidence concerning the inception, development and manifestations of the particular condition[.]" § 3.304(b)(2) (emphasis

added). Once the presumption of soundness attaches, the burden shifts to the Secretary to show by clear and unmistakable evidence that the veteran's condition predates service *and* that the pre-existing condition was not aggravated in service. *Horn v. Shinseki*, 25 Vet.App. 231, 235 (2012) (clear and unmistakable evidence standard is not satisfied by lack of evidence in favor of veteran; Secretary must show overwhelming affirmative evidence against the veteran). "A bare conclusion, even one written by a medical professional, without a factual predicate in the record does not constitute clear and unmistakable evidence sufficient to rebut the statutory presumption of soundness." *Miller v. West*, 11 Vet. App. 345, 348 (1998). The determination that evidence meets the clear and unmistakable standard is a conclusion of law. *Id.* at 347.

Here, the Board did not find that there was clear and unmistakable evidence of a pre-existing condition, nor could it do so on the record that was before it. It also did not—and could not—find that there was clear and unmistakable evidence, if Mr. Threatt's disability was a pre-existing condition, that it was not aggravated. *See infra*, Part IV. Although the Board noted that Mr. Threatt's amended pre-induction physical report reflects a change in his "L" category physical profile from "1" to "2", (R. at 1589 (1586-99)), it ignored clear evidence that this change was only temporary. First, Mr. Threatt's Enlisted Qualification Record showed his PULHES ratings as "1" in every category as of June 18, 1968. (R. at 771 (771-74); *see also* R. at 2067 (Induction Record showing "L" rating of "1", reporting "none" in Block 16.a. "Physical Defects")). This indicates that his hip problem had resolved by the time he reported for training.

The Board also relied on an unreasonable interpretation of the evidence of Mr. Threatt's treatment by Dr. Ashby. It stated that "[t]he veteran's service medical records show that a right hip disability was being treated by Dr. Ashby in the months immediately preceding active duty[.]" (R. at 1594 (1586-99)). In addition to its unsupported assumption that Mr. Threatt's right hip pain constituted a "disability", *see supra* Part II.B, the Board's conclusion also overstates the content of Dr. Ashby's letter. There is only evidence of treatment in March 1968, the same month Mr. Threatt reported his right hip pain in his pre-induction physical. Mr. Threatt's statement on his pre-induction exam Medical History Report and the examiner's notes both indicate that he had seen Dr. Ashby for an injury to his hip earlier the same month. (R. at 1906 (1905-06) ("painful rt hip – injury – now seeing MD")). Dr. Ashby's June 17 letter refers to an onset date of March 1968, describes the issue as "[c]ontinuous oft [sic] and on since March 1968", and reports that Mr. Threatt told him he missed three weeks of work as a result of the injury. (R. at 1037 (1037-38)). However, it also states that Mr. Threatt was not hospitalized or put on bed rest as a result, that the malady was "mild" and "improved", and indicates that the only treatment was "mild analgesics". (R. at 1937 (1937-38)). Dr. Ashby's letter does not describe Mr. Threatt's hip pain as a condition or disease, but only responds to the Army's form doing so. (R. at 1937-38). Thirty-five years later, however, the Board treated Dr. Ashby's terse letter as a diagnosis, when the letter supports only the conclusion that, as Mr. Threatt told his examiner in March 1968, he was mildly injured but getting better.

Indeed, another Army medical officer confirmed this conclusion on July 17, 1968. A Physical Profile Record executed that day reported a change in Mr. Threatt's PULHES "L" rating from "1" (not "2") to "T-3". (R. at 1937 (1937-38)). The prefix "T" in this rating denotes "a remediable physical defect temporary in nature[.]" *Joyce v. Nicholson*, 19 Vet.App. 36, 48 (2005). If, as the Board assumed, this was merely a manifestation of Mr. Threatt's pre-existing chronic hip condition, the officer assigning him his new "L" rating would not have rated it as a temporary, remediable condition. Instead, a shift from "1" to "T-3" indicates that Mr. Threatt reported for training in healthy condition, and then he was injured, but his injuries were expected to heal.

The Board's conclusion that the "T-3" rating was a manifestation of a chronic pre-existing condition highlights the inconsistency of its treatment of Mr. Threatt's separation physical. In his medical history form for that examination, Mr. Threatt did not record any problems at all. (R. at 1907 (1907-10)). The Board treated this as evidence that there was nothing wrong with him. (R. at 1590, 1595 (1586-99)). But it cannot rationally conclude on one hand that a temporarily increased "L" rating occurring after the start of his Basic Combat Training is evidence that Mr. Threatt's current disability pre-dated his service and on the other that his separation physical proves he had no disability at all. If the right hip disability Mr. Threatt currently suffers from forty-eight years after his March 1968 pre-induction exam predated his service, it would have been just as prevalent and reportable less than two years later in January 1970. The evidence regarding the pre-existence of Mr. Threatt's current disability is thus, at worst, in his favor and far from clearly and unmistakably against him. Because his brief history of mild right hip pain

does not constitute a condition noted in his pre-induction physical as a matter of law, the Board should have applied the presumption of soundness to his claim and its failure to do so was clear error. Accordingly, the Court should reverse the 2003 Board Decision's finding that the presumption of soundness does not apply to Mr. Threatt's hip and back claims.

III. The Board's conclusion that Mr. Threatt's fall did not occur was clearly erroneous and its adverse inference from missing records misapplied the law.

The Board did not adequately consider Mr. Threatt's lay statements attesting that he fell from an obstacle and injured his right hip, leading to his hip and back disorders. The Board must address all issues reasonably raised either by the appellant or by the contents of the record. *See Robinson v. Peake*, 21 Vet.App. 545, 552-56 (2008) ("[T]he VA must consider, inter alia, any evidence of record."). The preponderance of the evidence standard applies to a veteran's claim that he suffered an in-service injury, with the "benefit of the doubt" going to the veteran if the evidence is in equipoise. 38 U.S.C. § 5107(b). The Board's findings of fact are reviewed for clear error. *Buczynski v. Shinseki*, 24 Vet.App. 221, 223 (2011). However, "a question as to the legal sufficiency of the evidence is a question of law[]" to be reviewed *de novo*. *Kent v. Principi*, 389 F.3d 1380, 1383 (Fed. Cir. 2004). And, to facilitate such review, the Board is required to "explain the precise basis for [its] decision[.]" *Kay v. Principi*, 16 Vet.App. 529, 532 (2002).

Here, Mr. Threatt's lay evidence lends strong support to his claim that his current hip and back disorders are the result of a fall from a training obstacle. (*See* R. at 1854-57, 1874, 1886-87 (1886-89)). This evidence establishes that Mr. Threatt was injured in

service and provides the predicate facts to establish a causal nexus between his disorders and his service. Mr. Threatt's lay statements are, therefore, essential to his establishing service connection under 38 C.F.R. § 3.303(b). Because Mr. Threatt's statements are corroborated by the record and not contradicted by any other substantial evidence, the Board's rejection of them was clearly erroneous. Moreover, the Board's conclusion that Mr. Threatt's affirmative evidence was overborne by its improper negative inferences was incorrect as a matter of law. And because the Board did not even explain *why* it ignored Mr. Threatt's account, or why its adverse inferences were appropriate, and it failed even to address the substance of his left hip and lower back claims, it failed to provide an adequate explanation for its decisions.

A. Mr. Threatt's statements are corroborated by other evidence in the record and no evidence contradicts them.

Mr. Threatt's statements are corroborated by other evidence in the record. A VA adjudicator "cannot determine that lay evidence lacks credibility merely because it is unaccompanied by contemporaneous medical evidence." *Buchanan v. Nicholson*, 451 F.3d 1331, 1337 (Fed. Cir. 2006); *see also* 38 C.F.R. § 3.102 ("mere suspicion" and "absence of official records" insufficient to overcome veteran's evidence of an in-service injury, "particularly if the basic incident allegedly arose under combat, or similarly strenuous conditions, and is consistent with the probable results of such known hardships"). Here, although Mr. Threatt's service medical records do not directly describe his fall, his July 5, 1968, treatment note contradicted an August note indicated without explanation that he had been suffering right hip trouble for six months, none of these

conclusively establishes that his fall did not occur. At worst, they are merely conflicting evidence that is overborne by the other evidence in the record that corroborates Mr. Threatt's claim.

As noted above, although Mr. Threatt's pre-induction physical report shows a PULHES "L" rating of "2", other contemporaneous records show that he started training with an "L" rating of "1". Then, not long after he started training, his "L" rating was changed to "T-3". As discussed above, had this been the result of a chronic condition, Mr. Threatt's profile would have been simply "3" or, possibly "3-R" (denoting that the condition was remediable). Instead, the change to "T-3" indicated that something happened to him that reduced his ability to participate in training but that the examining physician considered both temporary and remediable. In other words, he got hurt but it looked like he would heal.

The record also shows that after early July, he sought continuing treatment for his hip and back, as well as other injuries all possibly resulting from the same fall. (R. at 1931-33 (1923-34)). A July 16 X-ray analysis showed that he had "mild soft tissue swelling without evidence of fracture" to his left ankle. (R. at 1947). He returned to the dispensary again on August 18, 1968, when the physician noted that his right hip had become a "continuing problem" and kept him on light duty. (R. at 1932; *see also* R. at 1934 ("Pt. presently on profile") (1923-34)).

Mr. Threatt explains that, during this time, he was held out of basic training and kept in a holding company "for the next seven weeks", until the physicians at Fort Benning determined that he could not complete Basic Training and instead had him sent

on to Fort Polk for further training. (R. at 1856 (1854-57)). This report is corroborated by his assignment record: on August 14, 1968, Mr. Threatt was assigned to a new company at Fort Benning and then, on September 30, he checked in to Fort Polk. (R. at 1835 (1829-31)). Eventually, the symptoms of his injuries appear to have subsided. (*See* R. at 745 (Enlisted Personnel Data Report, showing "L" rating of "1" and noting no physical defects or assignment limitations as of Mar. 8, 1969)). But based on its erroneous assumption that Mr. Threatt had a pre-existing chronic hip condition, the Board made an unsupported medical judgment that the injuries for which Mr. Threatt sought treatment in July and August 1968 were "no more than intermittent flare-ups of symptoms of the pre-service condition[.]" (R. at 1595 (1586-99)). The clear inference from a review of *all* of the facts, however, is that Mr. Threatt had a mild temporary problem with his right hip right before entry into the service which had at least mostly resolved by July 1968. Shortly after starting Basic Training, he fell from an obstacle, injuring that same hip anew.

B. The Board's rejection of Mr. Threatt's statements on the basis of improper adverse inferences was clearly erroneous.

Nevertheless, the Board discounted Mr. Threatt's statements regarding his fall, basing its conclusion mostly on improper inferences from the lack of official records explicitly verifying that the fall occurred and imposing an impossible burden of proof on Mr. Threatt. "[T]he Board may not consider the absence of evidence as substantive negative evidence." *Buczynski*, 24 Vet.App. at 224 (2011) (citing Federal Rule of Evidence 803(7) as persuasive authority); *see also AZ v. Shinseki*, 731 F.3d 1303 (Fed.

Cir. 2013) (citing *Buczynski* and FRE 803(7), and relying on common law evidentiary principles, holding that, unless there was reason to believe an event would be recorded if it occurred, it was not permissible to infer from the absence of a record that it did not occur).

Here, in opposition to Mr. Threatt's evidence regarding his fall, the Board relied on adverse inferences it drew from the lack of certain records, but it did so without establishing any foundation. The Board relied on Mr. Threatt's medical records' failure to mention his fall, but there is no finding that Mr. Threatt's treatment records would have explicitly mentioned his fall if it occurred. (R. at 1595 (1586-99) ("The service medical records are negative for a right hip injury during active duty.")).

Similarly, Martin Army Hospital indicated that it had no records regarding Mr. Threatt's treatment in July 1968, but said nothing about whether it had *any* records dating back that far. (R. at 1842). Nor is there any evidence that in 1968 it even kept records of field hospital treatments like those Mr. Threatt described. Therefore, there is no valid basis to support the inference that the lack of any such recording necessarily means it did not happen. Indeed, there is support for the opposite inference: the July 17 Physical Profile Record was *from* Martin Army Hospital. (R. at 1937-38). Because this record was not found in the hospital's 1997 record search, this indicates that there were records of Mr. Threatt's treatment there, but for whatever reason, the Army no longer had them.

In addition, as discussed above, the Board drew an adverse inference from Mr. Threatt's failure to mention his injuries in his separation physical. (R. at 1595 (1586-99)). But even if the failure to mention his injury has any probative value, (*see supra* Part

II.C), that record shows every indication that it was nothing more than a rushed-through item on an administrative checklist. (*See* R. at 1907 (1907-10)). None of the physical ailments Mr. Threatt checked in his pre-induction physical history report are checked in his separation physical form. (*Compare* R. at 1905 *with* R. at 1909). The report includes no notes or indications of any history or ailments discussed with Mr. Threatt other than the examiner's confirmation that Mr. Threatt was "under psychiatric treatment". (R. at 1905-06). Moreover, the record indicates that, by January 1970, the Army was desperate to be rid of a troublesome soldier and Mr. Threatt was desperate to be free of the Army. (*See* R. at 136-37 (136-45)). Thus, this document evidently was not completed with the purpose of reflecting the true state of Mr. Threatt's health and should not have been relied upon at all. *See* 38 C.F.R. § 3.304(b) (forbidding consideration of in-service statements against veterans' interest in determining whether a condition pre-dates service).

Likewise, the Board apparently made an adverse inference from the lapse of time between Mr. Threatt's service and his first record of treatment for his injuries. (R. at 1595 (1586-99) (noting that records from a short time after separation would have supported an aggravation claim)). But in doing so, it ignored the impact of Mr. Threatt's substantial difficulties, including homelessness, drug-addiction, and PTSD on his ability to obtain treatment sooner. (*See* R. at 1595 (1586-99)).

More tellingly, although the Board made much of Virginia International Terminal's failure to turn over Mr. Threatt's medical records regarding his 1991 neck injury, there is no finding that Mr. Threatt had any means of controlling this. (R. at 1592-93 (1586-99)). Instead, the Board apparently only speculated, without reference to any

medical evidence, that Mr. Threatt's hip and back disabilities *could* be related to his 1991 neck injury. (R. at 1596 (1586-99)). Indeed, in reaching this improper inference, the Board demonstrated its apparent hostility to Mr. Threatt's appeal: "The duty to assist is not a one-way street, and the veteran has not fully cooperated in developing his claim." (R. at 1592-93 (1586-99)). The Board cited no support in the record for this pejorative conclusion that Mr. Threatt was not fully cooperating. (*Id.*). At the time, Mr. Threatt was a serially homeless veteran suffering from severe PTSD and major depressive disorder resulting from a brutal sexual assault and other violent attacks visited on him by his fellow soldiers. (*See* R. at 120 (114-21), 1129 (1123-39), 1577 (1577-83), 1739 (PTSD diagnosis, periods of homelessness)).

By so extensively relying on what some evidence did *not* say to rebut what other evidence *did* say, the Board applied an impossibly high standard of proof to Mr. Threatt's claims. The Secretary has an absolute duty to assist veterans in developing their claims. *See Little v. Derwinski*, 1 Vet.App. 90, 92 (1990) (holding that "[t]he 'duty to assist' is neither optional nor discretionary"). In order to comply with that duty, the VA must facilitate a veteran "obtaining records pertinent to his claim." *Massey v. Brown*, 7 Vet.App. 204, 208 (1994). This duty includes assisting the Veteran in the procurement of relevant medical records. *See* 38 C.F.R. § 3.159(c)(1). It may not be a "one-way street", but the Board cannot disclaim its duty to assist a veteran simply because it feels like he did not sufficiently cooperate. Thus, if any inference is to be drawn from the VA's failure to obtain adequate records of Mr. Threatt's injuries and treatment, it should be one in favor of Mr. Threatt.

Regardless, the few items of affirmative evidence in the record that conflict with Mr. Threatt's account of his injury are far from sufficient to rebut the clear inference created by Mr. Threatt's statements and other corroborating records: he fell from an obstacle in training and injured his hip and that injury led to degeneration and arthritis in his hips and back years later. The VA assumed from the beginning that Mr. Threatt's right hip disability pre-dated his service and then disregarded his statements regarding its origin in his training accident, resulting in him never being given a proper examination to determine if his current right hip disability was caused by his in-service injury. (*Compare* R. at 1830 (1829-31) ("Evidence received in connection with this claim fails to establish any relationship between right hip disability and any disease or injury during military service.") *with* R. at 1886-87 (1886-89) (C&P examination recording Mr. Threatt's account of his injury); *see also Kahana v. Shinseki*, 24 Vet. App. 428, 437 (2011) (failure to address veteran's statements regarding his right knee injury rendered C&P examination inadequate).

Thus, the Board's conclusion that Mr. Threatt did not fall from an obstacle in training and injure his hip is clearly erroneous. Moreover, its conclusion that his affirmative evidence regarding the fall is overborne by its negative inference from the absence of even more corroborating evidence is incorrect as a matter of law. Accordingly, the Court should reverse the Board's finding that Mr. Threatt was not injured in service, find as a fact that Mr. Threatt was injured when he fell from an obstacle in early July 1968, and remand the 2003 Board Decision with instructions that the Secretary assist Mr. Threatt in gathering evidence to support his claim that his current

disability was caused by his in-service injury, to include a new C&P examination expressly aimed at determining if his right hip arthritis could have been caused by the fall.

C. The Board did not adequately explain its rejection of Mr. Threatt's statements and the record evidence that corroborates them.

Even if not clearly erroneous, the Board's rejection of Mr. Threatt's evidence and adverse inferences from the absence of some records are inadequately explained. The Board is required to provide an adequate explanation for its conclusions. 38 U.S.C. § 7104(d)(1). A Board decision is inadequate if it is not sufficiently explained "to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court." *Kay*, 16 Vet.App. at 532. The proper remedy for inadequate explanation is usually remand. *Id.* "[W]hen a Board inference results in a medical determination, the basis for that inference must be independent and it must be cited." *Kahana*, 24 Vet. App. at 435.

In *Kahana*, a veteran appealed the denial of service-connection for his right knee disability. *Id.* at 430. The veteran claimed that, during his service in the mid-1970s, he had injured his right knee during a Tae Kwon Do match and sought treatment for the injury, but neither the injury nor the treatment were reflected in his service treatment records or any other official record. *Id.* at 430-31. The veteran claimed that he injured his right knee because a prior injury to his left knee had not been properly repaired, and characterized the right knee injury as "another ACL injury" like that to his left knee. *Id.* at 431. Following his service and before he filed his claim, the veteran went to work as a

professional stuntman and sustained injuries to his back and knees. *Id.* at 431.

Although his C&P exam report initially indicated that the veteran's right knee was injured in-service, the report was amended, and the examiner eventually concluded that the veteran's right knee was not injured in service on the basis of his post-service injuries and his service medical records' silence regarding his alleged in-service injury. *Id.* at 432. The examiner also concluded that, because the right knee injury was not consistent with overuse, it was not secondary to his left knee injury. *Id.* Relying on this opinion, the Board denied the veteran's appeal. *Id.* In doing so, the Board reasoned that, if the veteran had indeed torn his ACL as he claimed, this injury is such a severe type of injury that it certainly would have been included in his service medical records, that the veteran would have mentioned it during his separation physical, and that he would have included reference to it in his original claim. *Id.* at 434. Because the injury was not mentioned in either record and the veteran did not refer to the injury in his original claim, the Board concluded that the veteran's statement was not credible. *Id.* It similarly concluded that, as a lay person, the veteran was not competent to provide evidence regarding the nexus between his injury and his later symptoms. *Id.* at 435.

This Court rejected both conclusions. *Id.* at 434-35. It held that the Board's explanation for its rejection of the veteran's statement on credibility grounds was inadequate because, instead of citing specific evidence in the record that the injury would have been recorded if it occurred, the Board merely assumed as much based on its own medical judgment of the injury's severity. *Id.* at 434-35. Likewise, the Board's categorical rejection of the veteran's nexus claim was inadequately explained and

contrary to this Court's decisions holding that "a layperson is competent to offer testimony regarding symptoms capable of observation." *Id.* (citing *Charles v. Principi*, 16 Vet. App. 370, 374 (2002)).

Here, as in *Kahana*, the Board categorically rejected Mr. Threatt's statements about the symptoms and causation of his right hip ailment without weighing them against other evidence in the record. It stated that "[t]he weight of the credible medical evidence" is against his claim for aggravation, but did not explain which evidence it considered credible nor why, nor did it explain why that evidence indicated that Mr. Threatt was not injured in service. (*See* R. at 1596 (1586-99)).

Likewise, here, as in *Kahana*, Mr. Threatt's in-service injury is not directly recorded in his service medical records or his separation physical and there is evidence of a post-service injury while performing a physically demanding job. However, in *Kahana* the Board at least made an express finding that the veteran's statement was not credible and made an effort to explain why, although the Court rejected that explanation as insufficient. Here, although the 2003 Board Decision recites Mr. Threatt's account of his fall, it does not state whether the Board gave it any weight, nor whether it found the story credible, let alone why it did so. Instead, the Board just ignored what Mr. Threatt had to say and the evidence corroborating his claim.

And, as discussed above, the Board also did not adequately explain the basis for the negative inferences it drew from the absence of records. In *Kahana*, the Board at least explained its negative inferences by concluding that the veteran's injury was so severe that it should have appeared in the records, although the Court rejected this explanation

as an improper medical judgment. Here, the Board did not make any such findings, and instead just arbitrarily announced the inferences it made.

Additionally, the Board's analysis of Mr. Threatt's left hip and lower back claims is essentially copied and pasted from its analysis of his right hip claim: it notes that his service medical records are silent regarding both maladies, categorically declares his statements incompetent to establish their etiology, and states—without explanation—that "[t]he weight of the credible medical evidence establishes that the left hip and back conditions began many years after service, and these conditions were not caused by any incident of service." (R. at 1596-97 (1586-99)). Yet, in so doing, the Board failed even to address the actual claim, that these conditions were secondary to Mr. Threatt's right hip disability. Nor did the Board address the fact that Mr. Threatt's training accident could have directly caused his *left* hip and lower back disabilities, nor whether the Secretary's failure to explore the results of this in-service injury was a breach of his duty to assist. *See Robinson v. Shinseki*, 557 F.3d 1355, 1362 (Fed. Cir. 2009) (Board must evaluate claims for both primary and secondary service connection if supported by the record). Accordingly, even if not clearly erroneous, the 2003 Board Decision was inadequately reasoned and should therefore be remanded for further development and explanation.

IV. The Board did not adequately explain its determination that Mr. Threatt's condition was not aggravated.

Even if the Board was correct that Mr. Threatt's right hip pain, as described by Dr. Ashby, was a chronic condition sufficient to deprive him of the presumption of soundness, its conclusion that this condition did not worsen in service is inadequately

explained. "A preexisting injury or disease will be considered to have been aggravated by active military . . . service, where there is an increase in disability during such service, unless there is a specific finding that the increase in disability is due to the natural progress of the disease." 38 U.S.C. § 1153. Where the Secretary's rating system is inadequate to describe the potential gradations of a veteran's condition, the veteran need not show that his condition worsened to the extent that its rating would have changed to show worsening in service. *Hensley,* 5 Vet.App. at 162-63. When the Board determines that a pre-existing condition did not worsen during service, it must describe the criteria it used to make that determination. *Id.* at 163.

Here, the Board concluded that Mr. Threatt's shift from an "L" rating of "1" to "T-3" and his continued treatment for his right hip condition through several months after beginning training constituted "no more than intermittent flare-ups of symptoms of the pre-service condition," and that ". . . there was no increase in severity of the underlying pre-service condition." (R. at 1595 (1586-99)). But the "underlying condition" is undefined and the Board did not rely on any established standard in identifying it, nor does it correspond to any diagnostic code in the rating system. Thus, assuming for the sake of argument that hip pain is a condition, it is not one that is susceptible to evaluation for aggravation using the rating schedule.

If Mr. Threatt had a pre-existing disability that consisted of episodic right hip pain, and, as a result of his service, those episodes were longer, more frequent, or more severe, then clearly the condition had worsened. If interpreted consistently with the Board's view of Mr. Threatt's condition, the record indicates that this is exactly what happened. The

"flare-up" to which the Board refers lasted far longer than the three weeks Dr. Ashby's letter described for Mr. Threatt's prior injury and was significantly more severe. Dr. Ashby had treated him with "mild analgesics", but the Army ended up having to restrict his physical activity, roll him from training, provide him prescription pain medication, and even apparently gave him a cortisone injection. Furthermore, the Board cited a treatment note from August 1968 that stated that Mr. Threatt had been seen "uncountable times" and concluded that his right hip had become a "continuing problem". (R. at 1590 (1586-99)). The Board did not make any findings nor cite any evidence that Mr. Threatt was malingering, so these statements can stand only for the proposition that his ailment was indeed continuous and not intermittent at the time.

Furthermore, even if the Board was correct to discount Mr. Threatt's claim that he fell from an obstacle and injured his hip, this should not have prevented it from analyzing whether the characteristics of his service could have aggravated his alleged underlying condition. Dr. Ashby's letter specifically predicted that Mr. Threatt's injury could be aggravated by bending, standing, or stooping, (R. at 1037 (1037-38)), yet the Board ignored the apparent fulfillment of that prediction. Instead, it relied on its erroneous conclusion that his fall did not occur, even though there is no requirement for a veteran to show a specific in-service injury to establish aggravation. Accordingly, even if the Court agrees with the Board's conclusion that Mr. Threatt's hip disability is a pre-existing condition, it should remand the 2003 Board Decision for further explanation and development.

CONCLUSION

Willie Threatt says he fell from an obstacle in Basic Combat Training in 1968, injuring his right hip and leading, eventually, to disabilities in both of his hips and his lower back. Through a complex up-and-down process of appeals and attempted claim renewals, the Board rendered its 2014 Decision with regard to Mr. Threatt's hip and back claims relying on the apparent finality of the 2003 Board Decision. Because the 2003 Board Decision was not final, the 2014 Board Decision's determination regarding Mr. Threatt's hip and back claims are deprived of any logical force and are, accordingly, void.

In the 2003 Board Decision, the Board determined that because Mr. Threatt disclosed in his pre-induction physical that he had experienced some pain in his right hip due to a recent injury, Mr. Threatt's in-service injury doesn't matter. But, as a matter of law, Mr. Threatt's history of right hip pain was insufficient to disentitle him from the presumption of soundness. Because that presumption should have been applied to his claim from its October 1996 inception, and because most of the evidence in the record indicates that his injury did occur, Mr. Threatt's claim should be remanded with instructions to assist him in developing the likely nexus between that fall and his current disabilities. And, even if the Secretary was right to treat Mr. Threatt's claim as one for aggravation, the Board's inadequately explained its medical conclusion that Mr. Threatt's alleged episodic pain disorder was not aggravated by service.

WHEREFORE, Appellant Willie J. Threatt, Jr., respectfully asks the Court to modify the 2014 Board Decision, reverse the 2003 Board Decision's determination that

his right hip disability was a pre-existing condition, modify the 2003 Board Decision to find as a fact that he fell from an obstacle during training in July 1968, and remand the remainder of the 2003 Board Decision for further development and reevaluation consistent with these rulings.

/s/ Aniela K. Szymanski
Aniela K. Szymanski, Esq.
Lewis B. Puller, Jr. Veterans Benefits Clinic
William & Mary Law School
P.O. Box 8795, Patrick Galt House
Williamsburg, VA 23187-8795
(757) 221-7443

/s/ William A. M. Burke
William A. M. Burke
Willcox & Savage, P.C.
440 Monticello Ave.
Norfolk, VA 23507
(757) 628-5554

Counsel for Appellant