IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

Vet. App. No. 17-4053

ROY L. RUYLE
Appellant,

v.

ROBERT L. WILKIE
Secretary of Veterans Affairs,
Appellee.

ON APPEAL FROM THE BOARD OF VETERANS' APPEALS

BRIEF OF APPELLEE

JAMES M. BYRNE
General Counsel

MARY ANN FLYNN
Chief Counsel

CAROLYN F. WASHINGTON
Deputy Chief Counsel

ABHINAV GOEL
Appellate Attorney
Office of General Counsel (027D)
U.S. Department of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, D.C. 20420
(202) 632-6797
Abhinav.Goel@va.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

RECORD CITATIONS v

I. ISSUE PRESENTED 1

II. STATEMENT OF THE CASE 1

A. JURISDICTIONAL STATEMENT 1

B. NATURE OF THE CASE 2

C. STATEMENT OF FACTS AND PROCEEDINGS BELOW 2

III. SUMMARY OF ARGUMENT 7

IV. ARGUMENT 8

A. The Board's Credibility Determinations Were Plausible Because of Appellant's Inconsistent Declarations—even in his Brief, Appellant does not Present Any Assertions of Back Pain During, or Within One Year, of Discharge from Service. 10

B. The Board Adequately Explained Why Dr. Sucgang's Positive Nexus Opinions were less Probative 18

C. Appellant's Arguments as to the VLJ's Failure to Fulfill Her Responsibilities Under 38 C.F.R. 3.103(c)(2) are Unpersuasive—The VLJ Expressly Identified Evidence Needed to Substantiate Appellant's Claim, but Appellant Submitted No Such Evidence. 22

V. CONCLUSION 26

TABLE OF AUTHORITIES

CASES

Allday v. Brown, 7 Vet.App. 517 (1995) 9, 21
Allen v. Nicholson, 21 Vet.App. 54 (2007) 25
Anderson v. City of Bessemer City, N.C., 470 U.S. 564 (1985) 18
Barr v. Nicholson, 21 Vet.App. 303 (2007) 14
Bastien v. Shinseki, 599 F.3d 1301 (Fed. Cir. 2010) 21
Bryant v. Shinseki, 23 Vet.App. 488 (2010) 23, 25
Cacciola v. Gibson, 27 Vet.App. 45 (2014) 2
Caluza v. Brown, 7 Vet.App. 498 (1995) 12
Coker v. Nicholson, 19 Vet.App. 439 (2006) 25
Cox v. Nicholson, 20 Vet.App. 563 (2007) 17
D'Aires v. Peake, 22 Vet.App. 97 (2008) 18, 20, 21
Davidson v. Shinseki, 581 F.3d 1313 (Fed. Cir. 2009) 8
Deloach v. Shinseki, 704 F.3d 1370 (Fed. Cir. 2013) 18, 20, 21
Gilbert v. Derwinski, 1 Vet.App. 49 (1990) 10, 17, 18, 21
Greyzck v. West, 12 Vet.App. 288 (1991) 16, 21
Hickson v. West, 12 Vet.App. 247 (1999) 8
Hilkert v. West, 12 Vet.App. 145 (1999) 8, 13
Hilkert v. West, 232 F.3d 908 (Fed. Cir. 2000) 8
Hood v. Shinseki, 23 Vet.App. 295 (2009) 19
Hyder v. Derwinski, 1 Vet.App. 221 (1991) 20
Jandreau v. Nicholson, 492 F.3d 1372 (Fed. Cir. 2007) 14, 17, 20
Kern v. Brown, 4 Vet.App. 350 (1993) 20
Madden v. Gober, 125 F.3d 1477 (Fed. Cir. 1997) 21
Massie v. Shinseki, 25 Vet.App. 125 (2011) 25
Nieves-Rodriguez v. Peake, 22 Vet.App. 295 (2008) 23
NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969) 25
Norvell v. Peake, 22 Vet.App. 194 (2008) 25
Owens v. Brown, 7 Vet.App. 429 (1995) 12
Savage v. Gober, 10 Vet.App. 488 (1997) 9, 11, 14
Shinseki v. Sanders, 556 U.S. 396 (2009) 13
Stefl v. Nicholson, 21 Vet.App. 120 (2007) 15, 23
Walker v. Shinseki, 708 F.3d 1331 (Fed. Cir. 2013) 10, 11, 12

STATUTES

38 U.S.C. § 7104(d)(1) 9
38 U.S.C. § 7252(a) 1
38 U.S.C. § 7261(a)(4) 9

REGULATIONS

38 C.F.R. § 3.103(c)(2) 8, 22, 23, 25
38 C.F.R. § 3.159(a)(1) 17
38 C.F.R. § 3.303(b)..... 8
38 C.F.R. § 3.307(b)..... 14
38 C.F.R. § 3.309 ..... 7, 10

OTHER AUTHORITIES

STEDMAN'S MEDICAL DICTIONARY 149, 1267 (26th ed. 1995) 16

RECORD CITATIONS

R. at 2-13 (September 2017 Board Decision) ..... *passim*

R. at 41-67 (February 2017 Board Hearing) 6, 12, 22, 23, 24

R. at 78-83 (October 2016 Board Remand) 6

R. at 97-102 (June 2016 SSOC) 6

R. at 104-12 (May 2016 VA Medical Examination) ..... *passim*

R. at 208-09 (January 2014 VA Medical Examination) 4

R. at 290-92 (May 2009 Treatment Note) 3

R. at 296 (January 2009 Treatment Note) 3

R. at 543-44 (March 2000 Treatment Note) 11

R. at 556 (DD 214) 2

R. at 559-65 (August 2014 Board Remand) 5

R. at 578-606 (April 2015 Board Hearing) 5, 12, 23

R. at 610 (Dr. Sucgang's April 2015 Opinion) 5, 19, 20

R. at 656 (November 2010 Treatment Note) 3

R. at 711-13, 723-28 (Evidence of May 1955 In-service Accident) 2, 19

R. at 738 (February 2014 Appeal) 5

R. at 741-66 (January 2014 SOC) 5

R. at 850-64 (March 2012 VA Medical Examination) 4

R. at 879 (Dr. Sucgang's February 2012 Statement) 4, 19, 20

R. at 885 (Dr. Sucgang's October 2011 Opinion) 4, 20

R. at 962 (July 2011 NOD) 4

R. at 968-75 (April 2011 Rating Decision) 4

R. at 1158 (September 2010 Claim) 3

R. at 1333-34 (September 1954 Induction Examination) 2

R. at 1337-38 (August 1956 Separation Examination) 3, 12, 18

IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

ROY L. RUYLE,	)	
	)	
Appellant,	)	
	)	
v.	)	Vet. App. No. 17-4053
	)	
ROBERT L. WILKIE,	)	
Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

_____

ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS

_____

_____

BRIEF OF THE APPELLEE
SECRETARY OF VETERANS AFFAIRS

_____

I. ISSUE PRESENTED

Whether the Court of Appeals for Veterans Claims (Court) should affirm the September 30, 2017, Board of Veterans' Appeals (Board) decision which denied entitlement to service connection for a back injury.

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

This Court's jurisdiction over the case at bar is predicated on 38 U.S.C. § 7252(a).

B. Nature of the Case

Appellant, Roy L. Ruyle, appeals the September 20, 2017, Board decision that denied entitlement to service connection for a back injury. (Record Before the Agency (R.) at 13 (2-13)). Appellant does not appeal the Board's dismissal of entitlement to an increased rating for service-connected bilateral hearing loss. *See* (App. Br. at 1-2). Accordingly, the Board's decision as to that issue should remain undisturbed. *See Cacciola v. Gibson*, 27 Vet.App. 45, 48 (2014) (noting that "when an appellant . . . fails to present any challenge and argument regarding an issue, the abandoned issue generally is not reviewed by the Court").

C. Statement of Pertinent Facts and Proceedings Below

Appellant served in the U.S. Army[1] for two years, from September 1954 until August 1956. (R. at 556). Appellant's September 1954 induction report of medical examination noted no relevant abnormalities. (R. at 1333 (1333-34)).

During service, in May 1955, Appellant was a passenger in an aircraft which "succeeded in rising only about 20 feet from the runway before me[]chanical difficulties caused it to crash and slide several hundred yards along the ground before coming to a stop." (R. at 713 (711-13, 723-28)). Appellant was "not injured," and the only damage was to the aircraft. *Id.* at

[1] In his brief, Appellant mischaracterizes his service to be in Air Force. *Compare* (Appellant's Brief (App. Br.) at 2) *with* (R. at 556) (DD-214).

723; *see also id.* at 713 (noting that both, Appellant and the aircraft's pilot, "escaped injury" from this incident). An investigation was to follow, "to determine the cause of the crash." *Id.* at 723.

An August 1956 separation medical examination noted a scar and abnormalities of abdomen and viscera, but found that Appellant's spine and musculoskeletal system were normal. (R. at 1337 (1337-38)).

More than fifty (50) years after separation from service, in January 2009, Appellant complained of low back pain, (R. at 296), which was diagnosed in May 2009 as "moderate degenerative changes in upper lumbar spine" and "sclerosis of the left [sacroiliac (SI)] joint, possible sacroiliitis[2]." (R. at 292 (290-92)) (capitalization omitted).

The next year, in September 2010, Appellant claimed service connection for a back injury that he alleged he suffered from the May 1955 in-service aircraft accident. (R. at 1158). A few months later, he complained of chronic back pain, and his private physician, Dr. Paul Sucgang (Dr. Sucgang), noted his complaint that he had back pain since his in-service accident. (R. at 656).

[2] Sacroiliitis is inflammation or arthritis of the SI joint. *See* DORLAND'S ILLUSTRATED MEDICAL DICTIONARY (DORLAND'S) 1687 (31st ed. 2007).

In April 2011, the VA regional office (RO) denied Appellant's claim, (R. at 972 (968-75)), and Appellant filed a notice of disagreement (NOD) with this decision in July 2011. (R. at 962).

A written statement by Dr. Sucgang in October 2011, noted that Appellant had complained of low back pain for "several years." (R. at 885). The next year, in February 2012, Appellant submitted another statement from Dr. Sucgang, wherein the doctor stated that he had treated Appellant's back condition "since 2007," Appellant indicated he was involved in an aircraft crash during service and opined and that it "can be said that [Appellant's] aircraft crash during service could have in fact contributed to his current back conditions . . ." (R. at 879).

Appellant was afforded a VA medical examination in March 2012. (R. at 850-64)). The examiner diagnosed Appellant with chronic thoracolumbar strain with degenerative arthritis, and found that it was less likely than not incurred in or caused by his claimed in-service aircraft accident. *Id.* at 850, 862. Similarly, another VA medical examiner reported in January 2014 that Appellant's back condition was less likely than not related to his service because Appellant was not injured in the aircraft accident, Appellant's claims file (c-file) was negative for any medical evaluation following this crash, and his August 1956 separation medical exam indicated that he was fit for duty, with no reports of a back condition secondary to the in-service accident. (R. at 209 (208-09)).

The RO issued a statement of the case (SOC) in January 2014 which continued to deny service connection, (R. at 764-65 (741-66)), and Appellant appealed to the Board in February 2014. (R. at 738). In April 2015, Appellant testified before the Board. (R. at 578-606).

In the same month, Dr. Sucgang wrote another opinion, restating Appellant's reports that he had experienced upper back and neck pain since the in-service airplane accident, and noting that such pain was a result of the accident. (R. at 610).

In August 2015, the Board found that the March 2012 and January 2014 VA examinations were inadequate, and remanded Appellant's claim to obtain another medical examination. (R. at 562 (559-65)).

Appellant was afforded another VA examination in May 2016. (R. at 104-12). The examiner diagnosed him with "degenerative arthritis of the lumbar spine" that started in 2009. *Id.* at 104. The examiner reviewed Appellant's in-service aircraft accident, his reports of why he did not complain or seek medical attention for pain after this accident, his post-service complaints of pain, and Dr. Sucgang's positive nexus opinion. *Id.* at 112. After reviewing the evidence, the examiner opined that Appellant's condition, of degenerative arthritis of lumbar spine, was "overwhelmingly due to the age (degenerative) process." *Id.* He explained that Appellant was 73 years old at the time of the diagnosis of his current condition, and

that it is "medically expected and considered normal to have the presence of degenerative arthritic changes of the spine" at that age. *Id.*

The examiner also opined that "if [Appellant's] condition of degenerative arthritis of the spine were at least as likely as not due to previous remote trauma such as that which occurred in-service (airplane crash), premature early arthritis of the spine would have resulted at a significantly earlier time period." *Id.* He stated that there was no evidence that Appellant complained, was treated for, or diagnosed with, a chronic or recurrent neck, upper, or low back condition either during service, or within first year of service, or within even fifty years after service. *Id.* Therefore, the examiner concluded, Appellant's current condition was due to age rather than due to his military service, to include the in-service aircraft incident. *Id.*

A supplemental SOC (SSOC) issued in June 2016 continued to deny service connection, (R. at 101-02 (97-102)), and in October 2016, on Appellant's request, the Board remanded Appellant's claim for another hearing. (R. at 79 (78-83)).

In February 2017, Appellant appeared before the Board for a hearing. (R. at 41-67). During the hearing, Appellant testified that the first time he noticed back problems was "from the [19]70s. . ." *Id.* at 46. The Veteran Law Judge (VLJ) conducting the hearing explained that the May 2016 VA opinion was against Appellant's claim, so before she could grant the claim, she would need evidence that adequately weighed against the opinion. *Id.*

at 48-49. Appellant's representative asked Appellant if he could get an updated medical opinion from Dr. Sucgang, to which Appellant stated that he could. *Id.* at 50-51. Therefore, Appellant's representative requested, and the VLJ granted, 60 days for Appellant to obtain an adequate medical opinion from Dr. Sucgang. *Id.* at 54.

The VLJ explained that such an opinion must state whether Appellant's condition was at least as likely as not due to service, and explain the bases of such a conclusion. *Id.* at 54, 59. Appellant asked the VLJ if it would help to have Dr. Sucgang testify, to which Appellant's representative stated, "[n]o, not needed." *Id.* at 60. The VLJ clarified that "what makes a difference" is the "explanation that Dr. Sucgang gives," and the "important question is why" Dr. Sucgang believes that Appellant's current condition is related to service. *Id.* at 61; *see also id.* at 64.

III. SUMMARY OF ARGUMENT

The Court should affirm the Board's September 2017 decision denying service-connection for a back injury. First, Appellant argues that his post-service statements, that he had back pain during and since service, are sufficient to establish presumption of service connection under 38 C.F.R. § 3.309(b), and the Board erred in finding him not credible as to those assertions. (App. Br. at 9-19). Second, he argues, the Board erred in rejecting Dr. Sucgang's positive nexus opinions. (App. Br. at 20-26). Finally, he argues that the VLJ who conducted his February 2017 hearing did not

fulfil her responsibilities under 38 C.F.R. § 3.103(c)(2) because she "confused [him] as to the type of evidence that the VLJ would consider," and "denie[d] [his] request to produce Dr. Sucgang as a witness." (App. Br. at 26-28). However, Appellant misinterprets the law as to chronicity and continuity of symptomatology and ignores that the Board properly determined the credibility and probative value of evidence before it. Further, the VLJ who conducted Appellant's February 2017 hearing neither confused him, nor precluded him from producing any testimony as evidence. Appellant, therefore, has not met his burden of demonstrating prejudicial error, and the Board's decision should be affirmed. *See Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (holding that appellant has the burden of demonstrating error), *aff'd*, 232 F.3d 908 (Fed. Cir. 2000) (table).

IV. ARGUMENT

Generally, to establish service connection for a claimed disorder, there must be (1) a current disability; (2) an in-service incurrence or aggravation of a disease or injury; and (3) a nexus between the claimed in-service disease or injury and the current disability. *See Davidson v. Shinseki*, 581 F.3d 1313, 1316 (Fed. Cir. 2009); *Hickson v. West*, 12 Vet.App. 247, 253 (1999).

However, there are two alternative methods of establishing service connection under 38 C.F.R. § 3.303(b). First, a claimant may establish service connection by chronicity. Chronicity is established if the claimant

can demonstrate (1) the existence of a chronic disease in service and (2) present manifestations of the same disease. 38 C.F.R. § 3.303(b); *see Savage v. Gober*, 10 Vet.App. 488, 495-97 (1997). Second, a claimant may establish service connection by continuity of symptomatology. Continuity of symptomatology may be established if a claimant can demonstrate that (1) a condition was "noted" during service; (2) there is post-service evidence of the same symptomatology; and (3) there is medical or, in certain circumstances, lay evidence of a nexus between the present disability and the post-service symptomatology. *See Savage*, 10 Vet.App. at 495.

In deciding whether a claimant's condition is service connected, the Board is required to include in its decision a written statement of the reasons or bases for its findings and conclusions on all material issues of fact and law presented on the record; that statement must be adequate to enable an appellant to understand the precise basis for the Board's decision and facilitate an informed review by the Court. *See* 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995).

A determination of entitlement to service connection "is a question of fact that the Court reviews under the 'clearly erroneous' standard of review." *Washington v. Nicholson*, 19 Vet.App. 362, 366 (2005); *see* 38 U.S.C. § 7261(a)(4). Under the "clearly erroneous" standard, the Court cannot overturn the Board's factual finding if it is supported by a plausible basis in the record, even if the Court may not have reached the same factual

determination. *See Washington*, 19 Vet.App. at 366; *see also Gilbert v. Derwinski*, 1 Vet.App. 49, 53 (1990).

A. The Board's Credibility Determinations Were Plausible Because of Appellant's Inconsistent Declarations—even in his Brief, Appellant does not Present Any Assertions of Back Pain During, or Within One Year, of Discharge from Service.

Appellant argues that he is entitled to service connection for his chronic in-service back injury because he has consistently complained of pain during and since service, which warrants service connection under the theory of continuity of symptomatology. (App. Br. at 11-20). He contends that the Board's credibility findings were clearly erroneous, *id.* at 14-15, because the Board erroneously found that he reported back pain in 2009, "even though he had been receiving treatment at the VA since 2000." *Id.* at 14. He also argues that if his statements are credible, the Board's error is prejudicial because VA's May 2016 negative nexus opinion "provided no rationale" and is based upon inaccurate factual premise that he did not suffer from back problems after service until 2009. *Id.* at 16-19.

Initially, Appellant concedes that since there is no evidence of an in-service diagnosis of arthritis of lumbar spine, "the fact of chronicity in service is not 'adequately supported' . . ." (App. Br. at 11); *see* 38 C.F.R. § 3.309(a) (identifying chronic diseases subject to presumptive service connection); *see also Walker v. Shinseki*, 708 F.3d 1331 (Fed. Cir. 2013) (holding that service connection based on continuity of symptomatology is available only

for chronic diseases enumerated in § 3.309(a)). Indeed, even after Appellant's in-service aircraft incident, he concedes that the first time he sought any treatment for back pain was several years after service, in 2000. *See* (App. Br. at 11, 14) (noting his March 2000 treatment record and stating that he had been receiving treatment at the VA "since 2000."); (R. at 543-44) (March 2000 treatment record). Thus, because there was no in-service diagnosis of arthritis, a chronic disease listed under § 3.309(a), Appellant can establish service connection under § 3.303(b) *only* by showing continuity of symptomatology. *See Savage*, 10 Vet.App. at 495.

To establish service connection under continuity of symptomatology, Appellant needs to show that the symptoms of his chronic condition, here arthritis, were present during service and continued after discharge from service. *See Walker*, 708 F.3d at 1336 ("If evidence of a chronic condition is noted during service or during the presumptive period, but the chronic condition is not 'shown to be chronic, or where the diagnosis of chronicity may be legitimately questioned,' . . . then a showing of continuity of symptomatology *after discharge* is required . . . ." (quoting § 3.303(b))). Appellant attempts to establish these symptoms by noting several of his post-service assertions that he had back pain during and after service. *See* (App. Br. at 11-14) (noting such reports made from 2000 to 2017).

However, Appellant's arguments fail because the Board properly found that such assertions, made fifty years after service, were not credible.

See (R. at 11-12 (2-13)); *see Owens v. Brown*, 7 Vet.App. 429, 433 (1995) (holding that the Board is responsible for assessing the credibility and weight of evidence and that the Court may overturn the Board's decision only if it is clearly erroneous). The Board explained that Appellant's reports that he had pain during service, and pain during his discharge physical, were inconsistent with medical evidence as well as his other statements of record. *See* (R. at 11 (2-13)). Specifically, the Board noted his discharge physical examination, which noted "abdomen and viscera (include[ing] hernia)" as "abnormal," but a "normal" spine, with no concerns as to the back. *See id.*; (R. at 1337 (1337-38)) (capitalization omitted) (August 1956 separation medical examination). Further, the Board explained that Appellant testified during Board hearings that his back pain started not during service, or immediately after service, but in around 1989 or 1990. *See* (R. at 11-12 (2-13); 598 (578-606) (Appellant's testimony in his April 2015 hearing that his back problem started more than thirty years after service, around 1990)); *see also* (R. at 46 (41-67)) (Appellant's testimony in his February 2017 Board hearing that the first time he noticed back problems was fifteen years after service, in around 1970s). Thus, on the basis of such inconsistency in reporting, the Board found that Appellant's statements that he experienced pain during service, and immediately after service, were not credible. *See Walker*, 708 F.3d at 1336; *Owens*, 7 Vet.App. at 433; *Caluza v. Brown*, 7 Vet.App. 498, 510-11 (1995) (Board must evaluate credibility of all evidence;

lay statements may be evaluated based on, *inter alia*, inconsistent statements, facial plausibility, and consistency with other evidence of record).

Indeed, instead of presenting any evidence of complaints or treatments of back pain during, or immediately after service to rebut the Board's finding, Appellant only notes complaints of pain starting in 2000, close to fifty years after service. *See* (App. Br. at 11-14); *Hilkert*, 12 Vet.App. at 151. He argues that he has "consistently maintained that he has suffered back pain since the May 1955 in-service aircraft mishap," but then cites to R. at 543-44, a March 2000 treatment record reporting pain after "loading the truck." *See* (App. Br. at 11). Even assuming, as Appellant alleges, that contrary to the Board's finding, he "had been receiving treatment at the VA since 2000," *see* (App. Br. at 14), that does not establish any complaints of back pain either during, or immediately after service. To the extent Appellant argues that the Board insufficiently explained its adverse credibility assessment, remand is not warranted because he failed to show that the error is prejudicial. *See Shinseki v. Sanders*, 556 U.S. 396, 407-410 (2009) (under the harmless error rule, Appellant has the burden of showing that he suffered prejudice because of VA error).

Further, although a medical opinion linking a veteran's current disability to service is not necessary to obtain service connection pursuant to continuity of symptoms, unless the "relationship between any present

disability and the continuity of symptomatology" is "one as to which a lay person's observation is competent," medical evidence *is necessary* to demonstrate such a relationship. *Savage*, 10 Vet.App. at 497; *see* 38 C.F.R. § 3.307(b) ("The factual basis [regarding chronic diseases] may be established by medical evidence, *competent* lay evidence or both." (emphasis added)); *see also Jandreau v. Nicholson*, 492 F.3d 1372, 1377 (Fed. Cir. 2007) (whether lay evidence is competent and sufficient is a factual issue to be addressed by the Board); *Barr v. Nicholson*, 21 Vet.App. 303, 307 (2007) (service connection based on a theory of continuity of symptomatology requires competent evidence of a nexus between the present disability and the post-service symptomatology).

Here, as Appellant concedes, and the Board determined, Appellant is not competent to opine on the etiology of his condition. *See* (App. Br. at 15); (R. at 12 (2-13)). Therefore, a medical opinion was necessary to establish entitlement to service connection under the theory of continuity of symptomatology. Appellant argues that the May 2016 VA opinion obtained here was inadequate because it "provided no rationale" as to why his age, and not his in-service injury, caused his current disability. (App. Br. at 17).

But Appellant ignores that a medical examination is adequate "where it is based upon consideration of the veteran's prior medical history and examinations and describes the disability, if any, in sufficient detail so that the Board's 'evaluation of the claimed disability will be a fully informed one.'"

Stefl v. Nicholson, 21 Vet.App. 120, 123 (2007). Here, the May 2016 VA examiner performed an in-person examination, reviewed Appellant's medical history and c-file, and adequately informed the Board as to why Appellant's degenerative arthritis of spine was not related to his service. *See* (R. at 111-12 (104-12)). Despite Appellant's contention, the examiner thoroughly explained that, even after considering his May 1955 in-service accident, his current condition was "overwhelmingly due to the age (degenerative) process" because 1) Appellant was 73 years old when he was diagnosed with arthritis, and it was medically expected and normal to have such a condition at his age, and 2) if this condition had been due to the in-service aircraft accident, it would have resulted in premature arthritis at a significantly earlier time. (R. at 112 (104-12)). The examiner also relied on evidence during, within the first year, and within fifty years post-service, to explain that there were no such complaints to establish a diagnosis of premature or early arthritis. *Id.* Further, the examiner specifically reviewed Appellant's 1) May 1955 in-service aircraft accident, 2) his reports that he "did not complain of or seek medical attention for neck/upper or low back symptoms after this incident," 3) nexus opinions provided by Appellant's private physician, Dr. Sucgang, and 4) Appellant's post-service medical records. *Id.* at 112. Therefore, the examiner described Appellant's disability in sufficient detail so that the Board's evaluation was fully informed. *See Stefl*, 21 Vet.App. at 123.

Appellant further argues that the examiner's opinion is based upon an inaccurate factual premise because, although the examiner commented that he did not suffer from back problems after service until *2009*, he complained of such pain in *2000*. (App. Br. at 16-19). However, that does not take anything away from the opinion; whether Appellant was first treated for back pain in 2000, or in 2009, the examiner's explanation, that Appellant's current condition is overwhelmingly due to age and that records during, immediately after service, and close to fifty years after service, did not show premature arthritis, are still valid. *See* (R. at 112 (104-12)).

Appellant also argues that "if [his] statements regarding his back problems are credible, then the examiner's opinion is based on an inaccurate factual premise and is therefore entitled to no probative weight." (App. Br. at 19). However, the May 2016 VA examiner did not rely solely on an absence of Appellant's in-service or post service complaints of pain. *But see* (App. Br. at 25-26). Rather, the examiner also considered the nature of Appellant's current condition of degenerative arthritis, and opined that it was such that it was "overwhelmingly due to the age (*degenerative*) process." (R. at 112 (104-12)) (emphasis added); *see Greyzck v. West*, 12 Vet.App. 288, 291 (1991) ("the term *osteoarthritis* is a synonym of the terms *degenerative arthritis* and *degenerative joint disease* [(DJD)]." (emphasis in original) (citing STEDMAN'S MEDICAL DICTIONARY 149, 1267 (26th ed. 1995)). Since the examiner was competent to make such determinations, there is

no error as alleged. *See* 38 C.F.R. § 3.159(a)(1) (A medical examiner is competent to provide a medical opinion and "is qualified through education, training, or experience to offer medical diagnoses, statements, or opinions."); *see Cox v. Nicholson,* 20 Vet.App. 563, 569 (2007) (holding that the Board may assume the competence of a VA medical examiner).

Appellant also argues that the Board failed to explain the "change in [his] physical category of 'A' upon enlistment physical and 'C' upon discharge physical," or of the reference in his discharge physical to Form #89, which may support his claim that his back disability was reported on his discharge physical. *See* (App. Br. at 15). But he ignores that the Board is not competent to explain the *medical* relevance of such change in categories notated on Appellant's physical examinations. *See Jandreau*, 492 F.3d at 1377. Such issues were already addressed by the May 2016 VA examiner who specifically addressed Appellant's medical records, and his own reports that he did not complain of or seek medical attention for his back problems in service. *See* (R. at 112 (104-12)). To the extent Appellant seeks non-medical relevance of that change, the Board had plausible basis to find that Appellant's discharge physical examination was normal as to back concerns because it is also plausible that Appellant's discharge examiner marked him in physical category 'C' because of his bilateral defective hearing and bilateral high frequency deafness. *See* (R. at 11 (2-13)); (R. at 1338 (1337-38)); *Washington*, 19 Vet.App. at 366; *see also Gilbert*, 1 Vet.App. at 53.

B. The Board Adequately Explained Why Dr. Sucgang's Positive Nexus Opinions were less Probative.

Appellant's argument, that the Board erred in rejecting Dr. Sucgang's positive nexus opinions, *see* (App. Br. at 20-26), is also unavailing. The weighing of evidence is the duty of the Board, not of this Court nor Appellant. *Deloach v. Shinseki*, 704 F.3d 1370, 1380 (Fed. Cir. 2013) ("The Court of Appeals for Veterans Claims, as part of its clear error review, must review the Board's weighing of the evidence; it may not weigh any evidence itself."); *see D'Aires v. Peake*, 22 Vet.App. 97, 107 (2008) (it is within the purview of the Board to evaluate the medical evidence and favor one medical opinion over another). And the Board's factual findings after weighing the evidence cannot be clearly erroneous. *See Anderson v. City of Bessemer City, N.C.,* 470 U.S. 564, 574 (1985) ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous."); *Gilbert*, 1 Vet.App. at 52-53 (finding of fact is not clearly erroneous if there is a plausible basis for it in the record).

Here, in furtherance of that duty, the Board gave more probative weight to the May 2016 VA exam, which it found was supported by a review of 1) Appellant's medical history, 2) his medical record, and 3) a detailed discussion of Appellant's lay statements about the in-service accident and post-service complaints of pain, and 4) a rationale as to why his condition of degenerative arthritis was not related to his service. *See* (R. at 10-11 (2-

13)); *see also* (R. at 111-12 (104-12)). Contrarily, the Board found that Appellant's physician, Dr. Sucgang's, favorable opinions were less probative because he 1) did not explain his determinations that Appellant's in-service injury caused the current back condition, and 2) did not explore other possibilities for arthritis, including age-related degenerative changes. *Id.* The Board had plausible basis for these findings.

Dr. Sucgang, in his February 2012 opinion, speculated that "it *can* be said that [Appellant's] aircraft crash during service *could* have in fact contributed to his current back conditions affecting him since his release from service," but did not provide any explanation for that conclusion. *See* (R. at 879); *see also Hood v. Shinseki,* 23 Vet.App. 295, 298-99 (2009) (holding that the equivocal nature of an examiner's opinion "should have signaled to the Board that the medical opinion was speculative and of little probative value"). Likewise, his April 2015 opinion summarily commented, without offering any explanation, that Appellant's current condition was a direct result of his in-service plane crash. *See* (R. at 610). Further, it is evident that the opinion contradicted the record--although Dr. Sucgang opined that Appellant had not had relief from the injuries he suffered due to the accident, the record suggests that Appellant was "not injured" from the accident. (R. at 723 (711-13, 723-28)); *see also id.* at 713 (noting that both, Appellant and the aircraft's pilot, "escaped injury" from this incident.). Therefore, considering such inadequacies, the Board had a plausible basis

to assign more weight to the May 2016 VA opinion. *See Deloach*, 704 F.3d at 1380; *D'Aires*, 22 Vet.App. at 107.

Appellant argues that contrary to the Board's findings, Dr. Sucgang's opinions *did* provide a rationale because "by the time [Appellant] sought ongoing medical treatment and pain management, his symptoms had progressed to the point that current severity or manifestation was consistent with an in-service onset." (App. Br. at 23). However, none of Dr. Sucgang's opinions stated such; it is Appellant's attorney's rationale, which is unpersuasive for failure to demonstrate competency. *See* (R. at 610, 879, 885); *See Jandreau*, 492 F.3d at 1377; *Kern v. Brown*, 4 Vet.App. 350, 353 (1993) (noting that "appellant's attorney is not qualified to provide an explanation of the significance of the clinical evidence"). Appellant's reliance on his own testimony to suggest such a rationale is likewise unavailing. *See* (App. Br. at 23) (arguing that his testimony reflects such a reasoning); *Jandreau*, 492 F.3d at 1377; *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."). Indeed, merely because Appellant stated that he had not been involved in a car wreck, but in an airplane crash, in no way suggests that his arthritis "symptoms had progressed to the point that the current severity or manifestation was consistent with an in-service onset." (App. Br. at 23).

To the extent Appellant argues that the May 2016 VA examiner relied solely on an absence of in-service or post service complaints of pain, *see* (App. Br. at 25-26), he ignores that the examiner also considered the nature of Appellant's current condition of degenerative arthritis, and opined that it was such that it was "overwhelmingly due to the age (*degenerative*) process." (R. at 112 (104-12)) (emphasis added); *see Greyzck*, 12 Vet.App. at 291. Appellant's argument is therefore nothing more than a disagreement with the Board's weighing of the evidence, disguised as a "reasons and bases error." *See Bastien v. Shinseki*, 599 F.3d 1301, 1306 (Fed. Cir. 2010) ("The evaluation and weighing of evidence and the drawing of appropriate inferences from it are factual determinations committed to the discretion of the fact-finder."); *Madden v. Gober*, 125 F.3d 1477, 1481 (Fed. Cir. 1997) (it is the Board's duty "to analyze the credibility and probative value of evidence"). The Board's explanation of why it discounted Dr. Sucgang's opinion in favor of the May 2016 VA opinion was thorough, permitted judicial review, and had plausible basis in the record. *See* (R. at 10-11 (2-13)); *Gilbert*, 1 Vet.App. at 56-57; *Allday*, 7 Vet.App. at 527. Therefore, contrary to Appellant's assertion to remand to "resolve medical discrepancies" between Dr. Sucgang's opinions and the May 2016 VA opinion, (App. Br. at 24), no such remand is warranted. *See Deloach*, 704 F.3d at 1380; *D'Aires*, 22 Vet.App. at 107.

C. Appellant's Arguments as to the VLJ's Failure to Fulfill Her Responsibilities Under 38 C.F.R. 3.103(c)(2) are Unpersuasive—The VLJ Expressly Identified Evidence Needed to Substantiate Appellant's Claim, but Appellant Submitted No Such Evidence.

Appellant argues that the VLJ who conducted the February 2017 Board hearing violated 38 C.F.R. § 3.103(c)(2), his entitlement to produce witnesses, because when he asked "[w]ould it help, your Honor, if Dr. Sucgang showed up?" the VLJ "rejected [his] attempt to provide witness testimony of Dr. Sucgang." (App. Br. at 28). He argues that the VLJ "denied" his request to produce witness testimony by "invok[ing] an evidentiary standard" that he could only submit a written statement from the doctor "instead of providing in person witness testimony." *Id.* at 28-29. This is a misreading and misrepresentation of the law and the record.

During the February 2017 hearing, the VLJ advised Appellant several times that since there was evidence of negative nexus from the May 2016 VA examiner, it was important that the private examiner, Dr. Sucgang, provide a "well explained opinion" as to why he believed that Appellant's condition was related to his service. *See* (R. at 54, 59, 61 (41-67)). During the hearing Appellant indicated that Dr. Sucgang had made a nexus opinion, and Appellant's representative responded that he would submit that opinion within 60 days of the hearing. *Id.* at 57. Therefore, when Appellant asked, "[w]ould it help" to have Dr. Sucgang produced as a witness, his representative stated, "[no], not needed." *Id.* at 60. The VLJ clarified that

Dr. Sucgang presence wasn't needed; however, "what makes a difference" is the "explanation that Dr. Sucgang gives," and the "important question is why" Dr. Sucgang believes that Appellant's current condition is related to service. *Id.* at 61; *see also id.* at 64. The VLJ further elaborated that "a letter is exactly the same as an oral statement." *Id.* at 61. Therefore, it is evident that the issue here was not whether Appellant could produce Dr. Sucgang as a witness, or was only permitted to obtain a written testimony. *But see* (App. Br. at 28-29). Instead, it was that regardless of the form of Dr. Sucgang's testimony, his reasoning had to be adequate. (R. at 61 (41-67)); *see Nieves-Rodriguez v. Peake,* 22 Vet.App. 295, 301 (2008); *Stefl*, 21 Vet.App. at 123. In other words, contrary to Appellant's contention, the VLJ expressly "suggest[ed] the submission of evidence when testimony during the hearing indicates that it exists (or could be reduced to writing) but is not of record. *See* (App. Br. at 28); *Bryant v. Shinseki*, 23 Vet.App. 488, 492-95 (2010).

Moreover, in the April 2015 Board hearing, in addition to his representative, Appellant also had "Rafe Mafla-Proano, observer" as a witness. (R. at 578-79 (578-606)). Appellant therefore knew that he could produce a witness. Under 38 C.F.R. § 3.103(c)(2), a claimant is "entitled to produce witnesses, but the claimant and witnesses are expected to be present." But Appellant did not produce Dr. Sucgang as a witness during his February 2017 hearing. *See* (R. at 41-67); 38 C.F.R. § 3.103(c)(2)

(noting that the claimant and witnesses are expected to be present for the hearing). Therefore, there is no error as alleged.

To the extent Appellant argues that the VLJ "dismiss[ed]" his attempts to reference his medical records and statements from his private medical provider, or "inappropriately attempt[ed] to refute [his] evidence and discredit his testimony," (App. Br. at 27), that is simply not true. Contrary to Appellant's claim, the VLJ did not dismiss his attempts to produce statements by Dr. Sucgang, but expressly acknowledged such statements, explaining that they were inadequate because they did not provide a well explained opinion. *See* (R. at 54, 59, 61 (41-67)). Accordingly, the VLJ advised Appellant several times that since there was evidence of negative nexus from the May 2016 VA examiner, it was important that the private examiner, Dr. Sucgang, provide a "well explained opinion" as to why he believed that Appellant's condition was related to his service. *Id.* Similarly, there was no attempt to "refute [his] evidence and discredit his testimony." (App. Br. at 27). Instead, when Appellant's representative asked Appellant if he could get an updated medical opinion from Dr. Sucgang, Appellant clearly stated that he could. (R. at 50-51 (41-67)). Therefore, when Appellant's representative requested the VLJ for 60 days to obtain such an opinion, *id.* at 54, the VLJ expressly granted that request. *Id.* But Appellant did not submit any such opinion from Dr. Sucgang.

The VLJ thus fulfilled her duty to "explain fully the issues and suggest the submission of evidence which the claimant may have overlooked and which would be of advantage to the claimant's position." 38 C.F.R. § 3.103(c)(2); *see also Bryant*, 23 Vet.App. at 496 (duty to suggest the submission of evidence requires the hearing officer to "suggest that a claimant submit evidence on an issue material to substantiating the claim when the record is missing any evidence on that issue or when the testimony at the hearing raises an issue for which there is no evidence in the record.").

Given the foregoing, Appellant has failed to present any cogent argument to warrant a reversal or a remand, and the Court should affirm the Board's decision. *See Coker v. Nicholson*, 19 Vet.App. 439, 442 (2006). Vacating the Board's decision would serve no purpose, except to perpetuate the "hamster wheel" reputation of veterans' benefits law. *Massie v. Shinseki*, 25 Vet.App. 125, 128 (2011); *see Allen v. Nicholson*, 21 Vet.App. 54, 62 (2007) (holding that "judicial review of agency's action should not be converted into a 'ping-pong game' where remand is 'an idle and useless formality'" (quoting *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766 (1969))).

The Secretary has limited his response to only those arguments raised by Appellant in his brief, and, as such, urges this Court to find that Appellant has abandoned all other arguments not specifically raised in his opening brief. *See Norvell v. Peake,* 22 Vet.App. 194, 201 (2008). The

Secretary, however, does not concede any material issue that the Court may deem Appellant adequately raised and properly preserved, but which the Secretary did not address, and requests the opportunity to address the same if the Court deems it to be necessary.

V. CONCLUSION

In view of the foregoing arguments, Appellee, the Secretary of Veterans Affairs, respectfully requests that the Court affirm the September 30, 2017, Board decision.

Respectfully submitted,

JAMES M. BYRNE
General Counsel

MARY ANN FLYNN
Chief Counsel

/s/ Carolyn F. Washington
CAROLYN F. WASHINGTON
Deputy Chief Counsel

/s/ Abhinav Goel
ABHINAV GOEL
Appellate Attorney
Office of the General Counsel (027D)
U.S. Department of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, D.C. 20420
(202) 632-6797
Abhinav.Goel@va.gov

Attorneys for Appellee