

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

TRAVIS MAY,
Appellant,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,
Appellee.

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

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

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v.)	Vet. App. No. 18-0437
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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. ISSUES PRESENTED

- A.** Whether the Court should affirm the parts of the October 10, 2017, Board of Veterans' Appeals (Board) Decision, which denied the claims of entitlement to service connection for degenerative disc disease of the lumbar spine and for right and left hip musculoligamentous strain, all to include as secondary to the service-connected left knee strain.
- B.** Whether the Court should remand that portion of the October 10, 2017, Board Decision, which denied the claim of entitlement to service connection for a right knee condition, to include as secondary to the service-connected left knee strain.

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

The Court of Appeals for Veterans Claims (“the Court”) has jurisdiction over the instant appeal pursuant to 38 U.S.C. § 7252(a), which grants the Court exclusive jurisdiction to review final decisions of the Board.

B. Nature of the Case

Travis May (Appellant) seeks the Court’s review of the October 10, 2017, Board decision only to the extent that it denied the claims of entitlement to service connection for a right knee condition, degenerative disc disease of the lumbar spine, and right and left hip musculoligamentous strain, all to include as secondary to the service-connected left knee strain. R. at 1-30. The Board found that none of those disabilities were the result of Appellant’s active service, to include as secondary to the service-connected left knee strain. R. at 5 (1-30). The Board also found that the preponderance of the evidence failed to establish that Appellant presently suffered from a right knee disability. *Id.* As such, the Board concluded that the criteria for service connection for each of these disabilities had not been met. R. at 6-7 (1-30).

In response, Appellant alleges that the Board erred by relying upon an inadequate medical record and by not providing an adequate statement of reasons or bases for its determinations. In turn, Appellant requests that the Board’s decision be vacated and remanded. (Appellant’s Brief (A.B.)) at 1-11.

The Secretary also notes that the Court does not have jurisdiction over the parts of the Board's decision remanding the issues of entitlement to 1) service connection for erectile dysfunction as secondary to PTSD; 2) an initial evaluation in excess of 50% for PTSD; 3) an initial evaluation in excess of 10% for left knee strain with laxity; 4) an initial evaluation in excess of 10% for left knee strain with limitation of motion; and 5) an initial evaluation in excess of 10% for right shoulder tendonitis. *See Breeden v. Principi*, 17 Vet.App. 475, 478 (2004) (per curiam order) (a Board remand "does not represent a final decision over which this Court has jurisdiction").

Similarly, the Secretary notes that the portions of the Board's decision granting Appellant entitlement to 1) an effective date of March 6, 2012, and no earlier, for the grant of service connection for PTSD; 2) an initial 10% disability evaluation for right shin splints; and 3) an initial 10% disability evaluation for left shin splints represent favorable findings for Appellant that cannot be disturbed. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007).

Finally, the Secretary notes that the Board denied Appellant's claims of entitlement to 1) an effective date earlier than March 6, 2012, for the grant of service connection for PTSD; 2) an effective date earlier than March 6, 2012, for the grant of service connection for left knee strain with laxity; 3) an effective date earlier than March 6, 2012, for the grant of service connection for left knee strain with limitation of flexion; 4) an effective date earlier than June 18, 2014, for the grant of service connection for right and left shin splints; and 5) initial disability

evaluations in excess of 10% for right and left shin splints. R. at 21-22 (1-30). However, Appellant, in his opening brief to the Court, does not raise any argument or allegation of error with those parts of the Board's decision. As such, the Court should find that Appellant has abandoned those claims, decline to review the merits of those claims, and dismiss the appeal as to the Board's decision regarding those issues. *See Pederson v. McDonald*, 27 Vet.App. 276, 285 (2015).

C. Statement of Relevant Facts

Travis May (Veteran) had active duty service from February 1992 to February 1996. R. at 2539. Copies of his Service Medical Records (SMRs) were obtained and associated with his VA file. R. at 2425-2502; 2533-64.

In August 2013, he submitted an informal claim for entitlement to service connection for a right knee condition "as a direct service-connected disability, or possibly secondary to [his] service-connected left knee" to the Regional Office (RO). R. at 3491-93. Thereafter, the RO issued the April 2014 rating decision in which it denied Appellant entitlement to service connection for a right knee condition. R. at 2921-46. The RO explained that his "service treatment records show no evidence of treatment for, or a diagnosis of, any right knee condition" and that he had not "submitted [any] medical or other evidence showing that [he] had a current chronic right knee disability that began during or was caused by military service or is related to [his] service connected left knee condition." R. at 2930 (2921-46).

Thereafter, in June 2014, Appellant submitted informal claims for entitlement to service connection for degenerative disc disease of the lumbar spine and for bilateral hip strain, both to include as being secondary to his service-connected left knee disability. R. at 2866-68. Appellant also submitted a Notice of Disagreement (NOD) with the RO's August 2013 decision denying his right knee claim. R. at 2171-79. Following, in October 2014, the RO issued a Statement of the Case (SOC) continuing its denial of Appellant's right knee claim. R. at 1743-67. In response, Appellant submitted a formal appeal to the Board. R. at 1562-64.

Thereafter, Appellant was provided with and underwent a VA examination for each of his claimed disabilities in October 2014. R. at 1690-1717. As it pertains to Appellant's right knee, the VA examiner did not record a history of or current diagnosis of a right knee condition in the medical report. R. at 1707 (1690-1717). Nonetheless, the examiner did note that Appellant had functional loss and/or function impairment of both knees with less movement than normal and pain on movement being contributing factors to the functional impairment. R. at 1710 (1690-1717).

With respect to Appellant's bilateral hips, the examiner diagnosed Appellant with bilateral hip musculoligamentous strain. R. at 1699 (1690-1717). The doctor opined that Appellant's bilateral hip condition was less likely than not proximately due to or the result of the Veteran's service-connected left knee condition. R. at 1716 (1690-1717). In so doing, the examiner explained that "[t]he xrays of the hips today are normal without degenerative findings suggestive of increase stress on

the joints.” *Id.* The physician further noted that there was “no evidence that the left knee condition would have caused increased stress on the hips causing a condition” and that there was “[n]o evidence of aggravation.”

In regard to Appellant’s lumbar spine, the examiner diagnosed degenerative arthritis of the spine. R. at 1691 (1690-1717). The doctor determined that Appellant’s lumbar condition was less likely than not proximately due to or the result of his service-connected left knee condition. R. at 1715 (1690-1717). The examiner found “no evidence of aggravation.” *Id.* The examiner explained that Appellant “doesn’t report any direct correlation to his knee condition” and he “walks with a steady gait which isn’t altered therefore no reason for increase stress on the low back.” *Id.* The physician also explained that degenerative changes reflected on the MRI were normal or “expected at 42 years old” and not reflective of an increase or aggravation of his lumbar spine condition. *Id.*

In consideration of the aforementioned medical reports, the RO, in November 2014, issued a rating decision in which it denied Appellant’s lumbar spine and right and left hip claims. R. at 1547-61. Following, Appellant submitted a NOD with the RO’s decision. R. at 1456-65. In response, the RO issued the September 2015 SOC in which it continued its denial of Appellant’s claims. R. at 1186-1214. Thereafter, Appellant submitted a formal appeal to the Board. R. at 1180-82.

Following, the Board issued the decision on appeal in October 2017. R. at 1-30. On January 24, 2018, the Veteran filed his Notice of Appeal with the Court.

III. SUMMARY OF ARGUMENT

The Court should affirm the portions of the October 10, 2017, decision of the Board, which denied the claims of entitlement to service connection for degenerative disc disease of the lumbar spine and for bilateral hip disorders, all to include as secondary to the service-connected left knee strain as the Board's conclusions are permissible views of the evidence of record and its statement of reasons or bases explaining its findings are plausibly supported by the evidence of record. Additionally, Appellant has failed to present any arguments sufficient to meet his burden of demonstrating prejudicial error committed by the Board.

The Court should vacate and remand the portion of the Board's October 10, 2017, decision, that denied the claim of entitlement to service connection for a right knee condition, to include as secondary to the service-connected left knee strain. Particularly, the Board erred by not providing an adequate statement of reasons or bases for its determination where it did not account for notations in the October 2014 VA examination report that appear to conflict with the Board's finding.

IV. ARGUMENT

A. Standard of Review

The Court reviews the Board's findings of fact under the clearly erroneous standard. 38 U.S.C. § 7261(a)(4). The Supreme Court has held that a finding is

clearly erroneous “when although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been committed.” *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985) (explaining how an appellate court reviews factual findings under the “clearly erroneous” standard), *quoting United States v. United States Gypsum Co.*, 333 U.S. 564, 595 (1948); *see Padgett v. Nicholson*, 19 Vet.App. 133, 146 (2005) (quoting same). In addition, the Supreme Court has held that under the clearly erroneous standard of review, “[w]here there are two permissible views of the evidence, the factfinder’s choice between them cannot be clearly erroneous.” *Id.* at 574.

Moreover, in rendering its decision, the Board is required to provide a written statement of its “findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented on the record.” 38 U.S.C. § 7104(d)(1). The statement must be adequate to enable a claimant to understand the precise basis for the Board’s decision, as well as to facilitate review in this Court. *See Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990).

Finally, the Secretary further asserts that it is relevant to the Court’s standard of review that the appellant generally bears the burden of demonstrating error in a Board decision. *Hilkert v. West*, 12 Vet.App. 145, 151 (1999), *aff’d* 232 F.3d 908 (Fed. Cir. 2000). The appellant’s burden also includes the burden of demonstrating that any Board error is harmful. *Waters v. Shinseki*, 601 F.3d 1274, 1278 (Fed. Cir. 2010).

Furthermore, arguments not raised in the initial brief are generally deemed abandoned, and the Court should find that Appellant has abandoned any argument not presented in his initial brief. See *Carbino v. West*, 168 F.3d 32, 34 (Fed. Cir. 1999) (“courts have consistently concluded that the failure of an appellant to include an . . . argument in the opening brief will be deemed a waiver of the . . . argument”).

B. The Court should affirm the parts of the Board’s decision denying the claims of entitlement to service connection for degenerative disc disease of the lumbar spine and for right and left hip musculoligamentus strain, all to include as secondary to the service-connected left knee strain.

The Board’s determinations are supported by a plausible basis in the record and Appellant fails to present any arguments sufficient to meet his burden of demonstrating prejudicial error.

Bilateral Hip Disorder Claims

Appellant first contends that the Board erred by relying on the October 2014 VA examination. See A.B. at 6-8 (1-11). More specifically, Appellant asserts that the examiner “offered no rationale for his conclusion May’s two separate service-connected left knee disabilities did not aggravate [his] bilateral hips in light of the shin splints and right knee. . . .” A.B. at 7-8 (1-11). Appellant also states that “the relied-on October 2014 medical opinion is incomplete and the examiner failed to consider alternate theories of recovery reasonably raised by the record, including secondary causation and/or aggravation by May’s service-connected bilateral

shins (and his wrongly-decided right knee) disabilities.” R. at 7 (1-11). His contention, however, should be rejected.

Mainly, the record explicitly contradicts Appellant’s argument that the October 2014 VA examiner did not provide any rationale for the conclusion of no aggravation. Beyond explicitly stating that there was “no evidence of aggravation”, the examiner further explained that this was so because x-rays of the hips, which would have reflected any worsening of Appellant’s bilateral hip condition, were “normal without degenerative findings suggestive of increase stress on the joints.” R. at 1716 (1690-1717). The examiner also informed “[t]he veteran walks with a steady gait without a limp and therefore no evidence that the left knee condition would have caused increased stress on the hips causing a condition.” *Id.* Therefore, and when read as a whole as required by law, it is clear that the October 2014 VA examiner provided a clear rationale for his opinion. See *Monzingo v. Shinseki*, 26 Vet.App. 97, 106 (2012) (holding that a medical examination report must be read as a whole and does not require that it “explicitly lay out the examiner’s journey from the facts to a conclusion”).

Furthermore, Appellant concedes and notes in his argument that the examiner provided a rationale for his opinion as he states that “[t]he examiner provided negative secondary basis opinions when he opined, because May’s service-connected left knee did not cause an altered gait, or caused May to limp, May’s hips were not affected by his left knee disabilities. . . .” A.B. at 7 (1-11). Appellant goes on to fault the examiner for not offering “**additional** rationale for

this negative aggravation opinion. . . .” *Id.* (emphasis added). As such, Appellant’s argument cannot be viewed as anything more than a mere disagreement with the October 2014 VA examiner’s stated rationale, which is insufficient to demonstrate prejudicial error.

Because the record shows that the October 2014 VA examiner provided a rationale for his opinion and because Appellant’s contention amounts to nothing more than a disagreement with the examiner’s professional judgment, the Court should find Appellant’s assertion unpersuasive.

With respect to the part of Appellant’s assertion that “the examiner failed to consider alternate theories of recovery reasonably raised by the record, including secondary causation and/or aggravation by [his] service-connected bilateral shins (and his wrongly-decided right knee) disabilities”, the Secretary submits that Appellant’s argument is underdeveloped and insufficiently pled as it fails to reference any evidence of record that demonstrates that the VA examiner was requested to provide opinions as to whether Appellant’s bilateral hip disorder was caused by or aggravated by Appellant’s bilateral shin or right knee conditions. See A.B. at 6-8 (1-11). Furthermore, he fails to explain why the October 2014 VA examiner would have been required to provide any such opinions when he is not service-connected for a right knee disability and when he was first service-connected for his bilateral shin disability in November 2014, which post-dates the October 2014 examination. See R. at 1547-61 (November 2014 Rating Decision).

Because Appellant was not service-connected for a bilateral shin condition or a right knee condition at the time of the relevant VA examination and because the October 2014 VA examiner was not requested to provide the opinions that Appellant now proffers, the Court should reject his argument.

Similarly, the Court should also reject Appellant's contention that "the Board failed to consider if [his] service-connected bilateral shin disabilities [] caused or aggravated [his] diagnosed bilateral hips (and/or by his wrongly decided right knee disability), with this alternate theory of recovery reasonably raised by the record." A.B. at 8 (1-11). Mainly, the Board is only required to consider theories of entitlement that are either raised by the claimant or reasonably raised by the record. See *Robinson v. Peake*, 21 Vet.App. 545, 554 (2008) ("The Board commits error only in failing to discuss a theory of entitlement that was raised either by the appellant or by the evidence of record."), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009). To this end, as with the argument regarding the October 2014 VA examination, his assertion in this regard is underdeveloped and insufficiently pled as it fails to reference any evidence of record demonstrating that he explicitly raised the issue or any evidence suggesting a relationship between his bilateral hip disorder and his bilateral shin and right knee disabilities such that the issues were reasonably raised by the record. See A.B. at 6-8 (1-11); see also *Coker v. Nicholson*, 19 Vet.App. 439, 442 (2006) ("The Court requires that an appellant plead with some particularity the allegation of error so that the Court is able to review and assess the validity of the appellant's arguments"); *Woehlaert v.*

Nicholson, 21 Vet.App. 456, 463 (2007) (“The Court has consistently held that it will not address issues or arguments that counsel fails to adequately develop in his or her opening brief.”).

Because it is Appellant’s burden to demonstrate any alleged error committed by the Board and because he has failed to present any evidence to do so on this issue, the Court should reject his contention and affirm the Board’s decision. See *Overton v. Nicholson*, 20 Vet.App. 427, 435 (2006) (the appellant bears the burden of demonstrating error on appeal).

Lumbar Spine Claim

Appellant next contends that “the relied-on October 2014 medical opinion is incomplete.” A.B. at 9 (1-11). He states that “[t]he examiner failed to consider alternate theories of recovery reasonably raised by the record, including [his] service-connected bilateral shins (and his wrongly-decided right knee) disabilities.” *Id.* Appellant also asserts that “[t]he examiner additionally offered no rationale for his conclusion [his] two separate service-connected left knee disabilities did not aggravate [his] lumbar spine. . . .” *Id.* His arguments should be rejected for several reasons.

First, and similar to the bilateral hip claims, Appellant’s contentions that the October 2014 VA examiner and the Board erred by not considering “alternate theories of recovery reasonably raised by the record” are underdeveloped and insufficiently pled as he fails to reference any evidence of record that demonstrates the VA examiner was requested to provide opinions as to whether Appellant’s

lumbar spine condition was caused by or aggravated by Appellant's bilateral shin or right knee conditions. See A.B. at 8-10 (1-11). Furthermore, he fails to explain why the October 2014 VA examiner would have been required to provide any such opinions when he is not service-connected for a right knee disability and when he was first service-connected for his bilateral shin disability in November 2014, which post-dates the October 2014 examination. See R. at 1547-61 (November 2014 Rating Decision).

Additionally, he fails to reference any evidence of record demonstrating that he explicitly raised the issue or any evidence suggesting a relationship between his bilateral hip disorder and his bilateral shin and right knee disabilities such that the issues were reasonably raised by the record. See A.B. at 8-10 (1-11). As such, the Board had no obligation to discuss the proffered theories of entitlement.

Second, and regarding Appellant's assertion that the October 2014 VA examiner did not provide a rationale on the issue of aggravation, Appellant's contention is again explicitly contradicted by the text of the examination report when read as a whole. See *Monzingo*, 26 Vet.App. at 106. Specifically, and beyond his explicit statement of "no evidence of aggravation", the October 2014 VA examiner explained that Appellant did not report any direct correlation between his back pain and his knee condition, which address both the issue of causation and aggravation. R. at 1715 (1690-1717). Additionally, the examiner informed that an altered gait, which would cause increased stress or worsening of the low back, was not present in this case because "[t]he veteran walks with a steady gait." *Id.*

Finally, the examiner stated that Appellant's lumbar spine MRI, which would reflect any increase/worsening of his condition, only showed minimal arthritis which was normal or "expected at 42 years old" and not reflective of an increase or worsening of the condition. *Id.*

Because it is clear that the October 2014 VA examiner provided a rationale for his opinion, when read as a whole, and because Appellant has failed to demonstrate that there were any other alternative theories of entitlement that should have been considered by the Board or the October 2014 VA examiner, the Court should find Appellant's arguments unpersuasive and affirm the Board's decision.

C. The Court should remand the portion of the Board's decision denying the claim of entitlement to service connection for a right knee condition, to include as secondary to the service-connected left knee strain.

The Secretary agrees with Appellant that the Court should vacate and remand the part of the Board's decision denying the claim of entitlement to service connection for a right knee condition, to include as secondary to the service-connected left knee strain as the Board erred by not providing an adequate statement of reasons or bases for its determination.

Specifically, and in denying Appellant's claim, the Board relied on the medical report provided by the October 2014 VA examiner. See R. at 13-14 (1-30). In so doing, the Board noted that "[t]he Veteran underwent a VA knee examination in October 2014 which revealed **no findings relating to the right**

knee and no diagnosis of a right knee disability.” R. at 14 (1-30) (emphasis added). The Board’s statement, however, appears to conflict with a plain reading of the findings contained in the October 2014 medical report. Particularly, while it is fact that the examiner did not diagnosis Appellant with a current right knee disability, the examiner did note that Appellant had functional loss and/or functional impairment of both knees with less movement than normal and pain on movement being contributing factors to the functional impairment. R. at 1710 (1690-1717). The Board did not account for this evidence in finding that the October 2014 VA medical examination did not reveal any findings related to the right knee.

Because the Board’s finding appears to conflict with the notation contained in the October 2014 VA medical report, the Secretary submits that remand is warranted for the Board to provide an adequate statement of reasons or bases that reconciles its finding with the aforementioned evidence contained in the October 2014 VA medical report.

V. CONCLUSION

For the foregoing reasons, Appellee Robert L. Wilkie, Secretary of Veterans Affairs, respectfully submits that the Court should affirm the parts of the Board’s October 10, 2017, decision, that denied the claims of entitlement to service connection for degenerative disc disease of the lumbar spine and for bilateral hip disorders, all to include as secondary to the service-connected left knee strain. The Secretary also submits that the Court should vacate and remand the portion of the Board’s October 10, 2017, decision, that denied the claim of entitlement to service

connection for a right knee condition, to include as secondary to the service-connected left knee strain.

Respectfully submitted,

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