

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

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**LARRY O. PENDLETON,**

Appellant,

v.

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

Appellee.

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

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

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

<b>LARRY O. PENDLETON,</b>	)	
	)	
Appellant,	)	
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v.	)	Vet.App. No. 18-3700
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<b>ROBERT L. WILKIE,</b>	)	
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Appellee.	)	

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

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

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**I. ISSUE PRESENTED**

Whether the Court should remand the March 30, 2018, decision of the Board of Veterans' Appeals, which denied Appellant entitlement to service connection of a low back disability?

**II. STATEMENT OF THE CASE**

**A. Nature of the Case**

Appellant, Larry O. Pendleton, appeals the March 30, 2018, decision of the Board of Veterans' Appeals (Board), which denied him entitlement to service connection of a low back disability. [Record Before the Agency (R.) at 1-14.] Appellant asks that this Court vacate the Board's decision and reverse the Board's decision to deny him service connection of such disability. (Appellant's Brief (App.

Br.) at 25-26.) In the alternative, Appellant asks that the Court vacate the Board's decision and remand his claim for additional development. (App. Br. at 26-30.) The Secretary agrees that vacatur of the Board's decision and remand of Appellant's claim for service connection are appropriate in this case, but the Secretary asserts that reversal of the Board's decision is not warranted.

### **B. Statement of Relevant Facts**

Appellant served on active duty in the United States Army from March 1968 through February 1970, at which time he was honorably discharged from service. [R. at 462.] Appellant's service records indicate that during his service, he worked as a light vehicle driver, and his service records indicate that while serving in this capacity, Appellant was involved in three motor vehicle accidents. [R. at 347, 368.] However, Appellant's service records do not record that Appellant was injured in any of these accidents. [R. at 347, 368.]

On September 29, 2003, Appellant filed a claim for service connection of a back disorder. [R. at 2361-2388.] Accordingly, Appellant was provided with a VA medical examination of his spine on March 1, 2004. [R. at 2139-2141.] During this examination, Appellant reported that he experienced back pain in service after driving a truck "over rough roads". [R. at 2139.]

Following this examination, the Regional Office in Columbia, South Carolina issued a Rating Decision on May 12, 2004, denying Appellant's claim for service connection. [R. at 2129-2134.] Appellant provided written notice of disagreement with this decision on December 8, 2004. [R. at 2106-2107.] In response to this

disagreement, Appellant was provided with a Statement of the Case on March 23, 2005. [R. at 2021-2032.] Appellant then perfected his appeal of this claim on April 25, 2005. [R. at 1938-1939.] Supplemental Statements of the Case were then provided on June 6, 2007, and January 2, 2008. [R. at 1619-1629, 1517-1525.]

Appellant testified before the Board on May 20, 2009. [R. at 1382-1403.] During this hearing, Appellant testified that he injured in his back during his time in the Army. [R. at 1387.] Specifically, Appellant reported that he injured his back in one specific instance of driving while in service, and that he had continued to experience back pain due to the conditions of his driving. [R. at 1388.]

The Board first took up Appellant's claim on June 23, 2009. [R. at 1369-1380.] At this time, the Board remanded Appellant's claim to the agency of original jurisdiction, ordering that additional evidentiary development of the record be completed. [R. at 1376-1377.] Following this remand, Appellant submitted a statement from a private treatment provider, Dr. Carter Smith. [R. at 330-332.] In this statement, Dr. Smith recorded Appellant's statements regarding his symptomatology, service, and the conditions of his driving in service, noting that Appellant was forced into a cramped position during his driving in service, due to his height. [R. at 330.] Dr. Smith then opined that Appellant's back disorder originated from active duty service, as "[t]he force of riding over a rough terrain and the jarring of the truck caused his disc to bulge leading to displacement of the nucleus with inner annular fiber disruption." [R. at 331.]

Upon completion of the development ordered by the Board, Appellant was provided with a Supplemental Statement of the Case on February 24, 2011. [R. at 828-837.] The Board then again remanded Appellant's claim on April 14, 2011. [R. at 814-821.] At this time, the Board found that remand was necessary in order to obtain a medical opinion as to the etiology of Appellant's current back disability, noting that the 2004 medical examination did not include any such opinion. [R. at 817.] In explaining the necessity of this remand, the Board noted that while Appellant's service treatment records were "silent concerning the Veteran's back disability...evidence received since the Board's June 2009 remand strengthens the credibility of his assertions". [R. at 817.] The Board then ordered that Appellant be provided with a medical examination of his spine, and the Board asked that the examiner "specifically consider and address (1) the Veteran's assertion that he experienced low back pain in connection with his military occupation as a vehicle driver..." [R. at 818.]

Such an examination was conducted on May 18, 2011. [R. at 796-800.] In this examination, the medical examiner recorded Appellant's statement that he did "not recall a specific injury" during service, but that his back started hurting because of his job assignment as a truck driver. [R. at 797.] The examiner also noted that Appellant's medical history included complaints of back pain while doing yard work in 1999 and after lifting in 2000. [R. at 797.] The examiner also noted that Appellant had been involved in a motor vehicle accident in 2001 and filed a worker's compensation claim in 2002. [R. at 797.] Finally, the examiner opined



that Appellant's current back disability was less likely than not caused by or related to his service, explaining that Appellant's disability was diagnosed after service and after the worker's compensation claim in 2001. [R. at 800.] A Supplemental Statement of the Case was then prepared and provided to Appellant on September 9, 2011. [R. at 762-784.]

The Board decided Appellant's claim on December 8, 2011, denying Appellant entitlement to service connection. [R. at 734-746.] This decision was then appealed to this Court on January 4, 2012. [R. at 723 (721-724).] That appeal was resolved through a Joint Motion for Remand the parties entered into on June 4, 2012, which was granted by the Court on June 11, 2012. [R. at 706-711, 705.] In this joint motion, the parties agreed that vacatur of the Board's decision and remand of the claim was appropriate, as the Board had failed to provide an adequate statement of reasons or bases with its decision. [R. at 706.]

Appellant's claim was then returned to the Board on July 11, 2012. [R. at 702-703.] The Board reconsidered Appellant's claim on November 14, 2012. [R. at 686-689.] At this time, the Board remanded Appellant's claim with instructions that the agency of original jurisdiction was to request certain information from Appellant, as well as from the National Personnel Records Center (NPRC). [R. at 688.] Following this development, Appellant was provided with another hearing before the Board on July 16, 2014. [R. at 641-658.] In this hearing, Appellant again asserted that his back pain arose as a consequence of his height and his

duties driving a truck in service. [R. at 644-646, 648-649.] Appellant also reported that he had received treatment for his back in service. [R. at 646, 651.]

The Board again remanded Appellant's claim for service connection on September 8, 2014. [R. at 629-640.] In this remand, the Board instructed that the agency of original jurisdiction was again to contact the NPRC and any other appropriate agency to request service personnel records, as well as any treatment records for his low back disability at any of the facilities Appellant identified in his testimony. [R. at 634.] Pertinent to Appellant's claim for service connection of a low back disorder, the Board also ordered that development of other treatment records be completed. [R. at 635.]

The necessary requests to the NPRC were made on April 6, 2015. [R. at 471.] On April 17, 2015, the NPRC responded that all personnel and treatment records had been uploaded to the electronic claims file. [R. at 472.] After completing the remaining development required by the Board, Appellant was provided with a Supplemental Statement of the Case on July 28, 2015. [R. at 269-271.] The Board then again reviewed Appellant's claim on January 12, 2016. [R. at 227-231.] At this time, the Board again remanded Appellant's claim for service connection, ordering that the agency of original jurisdiction prepare a memorandum of unavailability with respect to any service treatment records from facilities in Wiesbaden, Mainz, Heidelberg, or Stuttgart Germany from 1968 to 1970. [R. at 230.] The Board also ordered that any additional treatment records be identified and authorized by Appellant. [R. at 230.]

A Supplemental Statement of the Case was again prepared and provided to Appellant on October 11, 2016. [R. at 128-137.] Appellant's appeal was then certified to the Board on March 7, 2017. [R. at 119.] However, a memorandum of unavailability had not been completed as the Board directed, and so on April 19, 2017, the Board again remanded Appellant's claim in order for such action to be completed. [R. at 84-89.] This memorandum was completed on August 28, 2017, and Appellant received a Supplemental Statement of the Case on October 21, 2017. [R. at 61, 29-38.] Appellant's appeal was returned to the Board on December 21, 2017, and the Board issued the decision now on appeal on March 30, 2018. [R. at 22-23, 2-12.]

In this decision the Board denied Appellant entitlement to service connection for a low back disability on two grounds. [R. at 2-12.] First, the Board found that service connection was not warranted because "the evidence does not substantiate that the Veteran sustained a low back injury in service." [R. at 10.] In support of this finding, the Board stated that while Appellant is generally competent to report an injury sustained in service, his statements regarding an injury in service were not credible. [R. at 10, 11.] The Board reasoned that Appellant's service records documented no such injury or treatment, he specifically denied any back problems at separation, and his statements regarding the type of injury he sustained in service have been inconsistent. [R. at 11.] As support for this finding, the Board noted that at various times of record Appellant has stated that he was injured in a trucking accident and that he could not recall any specific injury. [R. at

11.] Still at other times Appellant reported that his back injury was due to the cumulative effects of his driving in service. [R. at 11.]

However, in addition to finding that Appellant did not have an in-service event, injury, or disease to which his current disability may related, the Board also found that “the evidence of record does not support a finding that any alleged back injury sustained in service is etiologically related to [his] current low back disability.” [R. at 11.] In support of this finding, the Board found that while Appellant had submitted a positive nexus opinion from a private doctor, that opinion was of less probative weight as it “was primarily based on the Veteran’s self-reported medical history and was wholly conclusory in nature.” [R. at 11.] The Board found that in addition to the conclusory nature of this doctor’s opinion, it was of less probative weight because Appellant’s lay statements were not considered credible. [R. at 11.] As such, the Board placed greater probative weight on the opinion of the May 2011 VA medical examiner, who opined that Appellant’s current low back disability was less likely than not related to his service. [R. at 11, 800.]

Based on the lack of an in-service event, injury, or disease and the lack of probative medical evidence to support a nexus between Appellant’s current back disability and any alleged back injury in service, the Board denied Appellant’s claim for service connection. [R. at 12.] This appeal timely followed the Board’s decision.

### **III. SUMMARY OF ARGUMENT**

Vacatur of the Board's decision and remand of Appellant's claim for service connection is warranted in this case, as the Board failed to ensure satisfaction of the duty to assist prior to its decision in this case. Specifically, the Board failed to ensure that Appellant was provided with an adequate medical examination when it relied on an inadequate May 2011 Department of Veterans Affairs (VA) medical examination to render its decision. This examination is inadequate because the medical examiner failed to provide sufficient rationale connecting the examiner's conclusion to the supporting evidence of record, so as to allow the Board to render a fully informed decision on the claim and weigh the examiner's opinion against other evidence of record. Accordingly, the Secretary asks that the Court vacate the Board's March 30, 2018, decision to deny Appellant service connection of a low back disability, and he asks that the Court remand Appellant's claim to the Board in order for the Board to ensure satisfaction of the duty to assist.

The Secretary does not concede any other inadequacy asserted by Appellant, but his concession as to the adequacy of the medical examination evidence of record constitutes the narrowest possible grounds upon which the Court may decide the case, and so the Secretary asks the Court to remand the claim on only that basis. To the extent that Appellant requests that the Court reverse the findings of the Board, either as to the specific factual findings made by the Board or as to the Board's ultimate decision to deny entitlement to service connection, Appellant has failed to demonstrate the propriety of such findings.

Rather, the law is clear that when additional evidentiary development is needed in a given case, remand, not reversal, is the appropriate remedy. Appellant has also failed to demonstrate that the factual findings identified in his brief are the result of clear error on the part of the Board and lack any plausible basis in the record. Remand is, therefore, the appropriate remedy in this case.

#### **IV. ARGUMENT**

In his brief, Appellant argues for either reversal of the Board's decision or remand of his claim for service connection on several bases. (App. Br. at 11-29.) Among these, Appellant argues that vacatur of the Board's decision and remand of the claim is warranted because the Board relied on an inadequate VA medical examination, which failed to satisfy the duty to assist. (App. Br. at 26-29.) Specifically, Appellant argues that the May 2011 VA medical examination which the Board found to be of greater probative weight was inadequate because the Board directed the medical examiner to consider Appellant's statements of pain during and following service, and the examiner failed to account for this evidence in her opinion statement. (App. Br. at 27.) Appellant also argues that the examination is inadequate because the examiner failed to consider evidence of back pain complaints prior to his post-service accident and worker's compensation claim. (App. Br. at 27-28.) Finally, Appellant argues that the May 2011 examination is inadequate because the examiner relied on the absence of medical records which were found to be unavailable. (App. Br. at 28.) The Secretary agrees that vacatur of the Board's decision and remand of Appellant's claim is

appropriate in this case, as the May 2011 VA medical examination is inadequate to satisfy the duty to assist under 38 U.S.C. § 5103A(d).

This Court has held that when VA undertakes to provide a claimant with a medical examination of a claimed condition in connection with a claim for benefits, that examination must be adequate. *Barr v. Nicholson*, 21 Vet.App. 303, 311 (2007). In order to be adequate, a medical examination must be premised on an accurate understanding the veteran's relevant medical history. See *Ardison v. Brown*, 6 Vet.App. 405, 407 (1994); *Reonal v. Brown*, 5 Vet.App. 458, 460-61 (1993). The medical examination must also provide the Board with sufficient information to render a fully informed decision on the questions presented. *Ardison*, 6 Vet.App. at 407. Accordingly, the medical examiner must reach clear conclusions and to provide sufficient rationale for the Board to weigh that opinion against the other evidence of record. *Steffl v. Nicholson*, 21 Vet.App. 120, 124 (2007). This requires the medical examiner to provide clear conclusions, supporting data, and a "reasoned medical explanation connecting the two". *Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 301 (2008).

In this case, the Secretary agrees that the May 2011 VA medical examination of record is inadequate to satisfy the duty to assist. As was laid out above, the May 2011 medical examiner acknowledged in the medical examination report that Appellant experienced back pain at least as early as 1999, as well as Appellant's reports that his back began to hurt in service. [R. at 797-798.] Despite this, the medical examiner offered a negative nexus opinion regarding Appellant's

current back disability, reasoning only that his current disability was diagnosed after service and after a worker's compensation claim in 2001. [R. at 800.] However, the Secretary agrees that this statement from the medical examiner does not provide sufficient rationale for the Board to understand the medical reasoning connecting the evidence of record, including the evidence of Appellant's back pain prior to 2001, to the examiner's conclusion. *Nieves-Rodriguez*, 22 Vet.App. at 301. As such, the May 2011 medical examination does not provide sufficient information for the Board to render a fully informed decision and to weigh the opinion against other evidence of record, particularly given the Board clear instruction that the examiner was to "specifically consider" Appellant's assertions of low back pain in service. [R. at 818.] *Ardison*, 6 Vet.App. at 407; *Stegall v. West*, 11 Vet.App. 268, 271 (1998). The Secretary, therefore, agrees that vacatur of the Board's decision and remand of Appellant's claim is appropriate in order for the Board to ensure satisfaction of the duty to assist by obtaining adequate medical examination evidence.

Given the parties agreement as to the inadequacy of the medical examination evidence of record in this case, the Secretary asks that the Court vacate the Board's decision and remand Appellant's claim on only that basis. It is the stated practice of this Court to decide appeals on the narrowest possible grounds. *Best v. Principi*, 15 Vet.App. 18, 20 (2001). Such practice is consistent with the Court's statutory instruction to decide cases only "to the extent necessary to its decision" under 38 U.S.C. § 7261(a). The parties' agreement as to the



inadequacy of the medical examination evidence of record is the narrowest possible basis for vacatur and remand, and the parties' agreement renders either cumulative or moot much of Appellant's remaining arguments.

That said, the Secretary does note Appellant's request that the Court reverse both specific factual findings of the Board and the Board's overall decision to deny him entitlement to service connection. (App. Br. at 17, 26.) However, reversal of either finding is not the appropriate remedy. This Court has been clear that reversal of a finding of the Board is an extraordinary remedy to be granted only in the narrow circumstances where the sole permissible view of the evidence is contrary to the Board's decision. *Gutierrez v. Principi*, 19 Vet.App. 1, 10 (2004). However, the Board is entitled to deference with respect to its findings of fact, and so reversal of such findings is only appropriate when the record lacks any plausible basis for the Board's finding. *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990). With respect to the Board's decision itself, this Court has held that reversal is only the appropriate remedy when the Board has performed all necessary fact-finding and explicitly weighed the evidence, but when the Board has incorrectly applied the law, failed to provide an adequate statement of reasons or bases, or where the record is "otherwise inadequate", reversal is not appropriate. See *Delouch v. Shinseki*, 704 F.3d 1370, 1380 (Fed. Cir. 2013); *Tucker v. West*, 11 Vet.App. 369, 374 (1998); see also *Cook v. Principi*, 318 F.3d 1334, 1346 (Fed. Cir. 2002) (holding that a breach of the duty to assist results in the record being incomplete).

As to Appellant's first request, that the Court reverse the Board's specific factual finding that Appellant did not experience an in-service event, injury, or disease, to which his current disability could relate, Appellant has not shown that this finding of fact is clearly erroneous and lacks any plausible basis in the record. As was reported above, this finding of fact from the Board is premised on the lack of any documentation of any back pain or injury in service, Appellant's denial of any back pain upon separation, and Appellant's conflicting accounts of the injury to his back. [R. at 10-11.] Specifically, the Board noted in its decision that at various times Appellant had stated that he did acutely injury his back, that he had no acute injury to his back, and that his back pain was the result of the cumulative effect of his driving. [R. at 11.] The Board found these statements to be inconsistent, and therefore supportive of the Board's finding that his statements of an in-service injury were not credible. [R. at 11.] Appellant asserts in his brief that the Board offered inadequate reasons or bases for this decision.

As an initial matter, an inadequate statement of reasons or bases from the Board does not support reversal of a finding of the Board. *Tucker*, 11 Vet.App. at 374. However, Appellant asserts that the Board's statement of reasons or bases with respect to this finding is inadequate because the Board violated the holding of the United States Court of Appeals for the Federal Circuit in *Buchanan v. Nicholson*, by requiring that Appellant's service medical records "confirmatory medical evidence". (App. Br. at 18-19.) 451 F.3d 1331, 1336-1337 (Fed. Cir. 2006). Appellant's argument overlooks the fact that the lack of corroborating

service medical records was only one of many factors supporting the Board's finding that Appellant's statements of an in-service injury were not credible. [R. at 10-11.] Such an analysis is entirely compliant with the Federal Circuit's holding in *Buchanan*. See *Buchanan*, 451 F.3d at 1336 (noting that "the lack of contemporaneous medical records **may be a fact** that the Board can consider and weigh against a veteran's lay evidence" but that "the lack of such records does not, in and of itself, render lay evidence not credible". (emphasis added).)

Appellant also asserts that reversal of the Board's finding of fact is warranted because the Board's finding that his statements of an in-service injury were inconsistent "creates a dichotomous situation where none exists." (App. Br. At 20.) Put in other words, Appellant attempts to present a cohesive picture of the lay evidence of an in-service injury through his May 2009 testimony before the Board, in which he reported that he hurt his back "one time" and then it "just kept hurting". [R. at 1388.] (App. Br. at 20.) Appellant argues that this statement indicates that he had an acute injury and that the conditions of his driving in service continued to "re-injure[] his back". (App. Br. at 20.)

However, Appellant's attempt to rehabilitate his conflicting statements of record does not account for the various statements of record regarding his back. While Appellant appears to have testified at his 2009 hearing that he did acutely injure his back, and while this statement may be read as consistent with his statement that he was injured in a trucking accident, this statement is plainly not consistent with his statement to the 2011 medical examiner that he could not recall

any specific injury in service. [R. at 1388, 1938, 797.] His 2009 testimony is also not consistent with other evidence of record, including his 2014 testimony to the Board that his pain developed as a result of his driving conditions or his 2010 statements to the private medical provider. [R. at 644, 330-332.] The totality of the lay statements of record regarding the causes of Appellant's in-service injury are clearly in conflict and provide a more than plausible basis for the Board's finding that his statements were not credible. Accordingly, Appellant has not shown that reversal of this specific finding of fact from the Board is warranted.

Similarly, Appellant has not shown that reversal of the Board's decision to deny him entitlement to service connection is appropriate in this case. Initially, the Secretary reiterates that the Board's denial of entitlement to service connection was made on two alternate bases. First, the Board found that Appellant did not have an in-service event, injury, or disease so as to warrant service connection. *See Shedden v. Principi*, 381 F.3d 1163, 1166-67 (Fed. Cir. 2004). [R. at 10.] Alternatively, the Board found that there was no nexus between Appellant's current disability and any in-service injury Appellant may have sustained. [R. at 11.] Given the Board's alternate findings that the evidence does not support either the second or third elements of service connection, the Court would be required to find that reversal of both findings of fact is appropriate in order to reverse the Board's ultimate decision to deny service connection. *Shedden*, 381 F.3d at 1166-1167. 38 C.F.R. § 3.303. As the Secretary has already demonstrated, reversal of the

Board's finding as to the second element of service connection is not warranted in this case.

That said, Appellant has also failed to demonstrate that reversal of the Board's finding of fact as to the nexus requirement of service connection is appropriate. In his brief, Appellant argues that the Board's consideration of the 2010 private medical opinion of record "Lacks Sound Reasoning". (App. Br. at 24.) Specifically, Appellant argues that the Board's finding that the 2010 private opinion was entitled to lower probative weight "makes no sense". (App. Br. at 24.) In its decision, the Board found that this opinion was entitled to lower probative weight because it was "primarily based on the Veteran's self-reported medical history and was wholly conclusory in nature." [R. at 11.] Appellant argues that this reasoning to support the Board's finding is not true. (App. Br. at 24.)

Appellant argues that the private medical examiner "did not rely on [Appellant's] "self-reported medical history", but "rather based his opinion on [Appellant's] description of his driving experiences". (App. Br. at 25.) Appellant then argues that "[a]s the Board did not find this information lacked credibility, it cannot fault the examiner for relying on it." (App. Br. at 25.) On a superficial review, Appellant's argument appears to seek a difference where none exists. Appellant argues that the 2010 private medical examiner did not rely on Appellant's self-reported history, but then states that the examiner relied on Appellant's self-reported history. (App. Br. at 25.) There appears to be no substantive difference between the Board's conception of the medical opinion and Appellant's. [R. at 11.]

(App. Br. at 25.) Moreover, Appellant's statement that the Board did not find his statements on this point to lack credibility is simply inconsistent with the Board's decision. The Board specifically stated that Appellant's lay reports regarding his history of injury, including his statements that his current disability was the result of the cumulative effect of his driving conditions, were not credible. [R. at 11.] The Board even reasoned that the 2010 private medical opinion was entitled to less probative weight because "the Veteran's lay statements concerning his injury have not been found credible." [R. at 11.] As such, Appellant's arguments for the Court's acceptance of the 2010 private medical opinion are not supported by the record, whatsoever, particularly given that Appellant presents no argument of any error in the Board's reasoning that the 2010 private medical opinion was "wholly conclusory" in nature. [R. at 11.]

Because Appellant fails to demonstrate any error in the Board's consideration of the 2010 private medical opinion, his argument for reversal of the Board's finding regarding a nexus between his current disability and his military service necessarily fails. In his brief, Appellant specifically argues that "if the Court agrees that the [2010 private] medical opinion is probative, and that [Appellant] has provided credible evidence of an in-service injury, the Court should reverse the Board's holding and grant [Appellant] service connection." (App. Br. at 25-26.) As Appellant cannot demonstrate any error in the Board's consideration of his lay statements or the 2010 private medical opinion, reversal is unwarranted in this case, and the Secretary asks that the Court vacate the Board's decision and

remand the claim on the agreed upon inadequacy of the 2011 VA medical examination.

Finally, the Secretary also notes his in ardent disagreement with Appellant's argument that his due process rights have been violated in this case and with Appellant's assertion that his statements were previously found credible. (App. Br. at 11-13.) As an initial matter, the Secretary notes that constitutional questions are to be avoided wherever possible. *Bucklinger v. Brown*, 5 Vet.App. 435, 441 (1993) ("It is '[a] fundamental and long-standing principle of judicial restraint...that courts avoid reaching constitutional questions in advance of the necessity of deciding them.'" (quoting *Lyng v. Nw. Indian Cemetery Pro. Ass'n*, 485 U.S. 439, 445 (1988))). Given the agreement between the parties that vacatur of the Board's decision is necessary in this case, the Court should therefore refuse to entertain Appellant's constitutional argument.

However, to the extent that the Court sees fit to address Appellant's argument, he asserts that the Board's decision should be vacated because the Board violated his due process right when it found his statements to be incredible. (App. Br. at 13.) [R. at 11.] In support of this argument, Appellant asserts that his statements "regarding how he initially injured his back and his ongoing pain since that time" were previously found to be credible by the Board. To substantiate this assertion, Appellant directs the Court to the Board's April 2011 remand instructions wherein the Board explained that a VA medical examination was needed, in part because Appellant had "consistently reported that he has experienced back

problems since service” and “evidence received since the Board’s June 2009 remand strengthens the credibility of his assertions.” [R. at 817.]

Appellant argues that the Board’s finding in the decision now on appeal constitutes a reversal of the Board’s prior finding of credibility. (App. Br. at 12.) However, the Secretary notes that at no point in the April 2011 remand did the Board find Appellant’s statements to be credible. [R. at 817.] Rather, the Board noted that evidence of record strengthened the credibility of his assertions that he has experienced back pain since service. [R. at 817.] This is not a finding of credibility, but rather an explanation of the reasoning behind the Board’s finding that a medical examination was necessary and a notation that certain evidence has merely strengthened the credibility of Appellant’s statements, without that issue being determinative. As such, the premise for Appellant’s due process argument is not supported by the record in this case, and the Court should vacate the Board’s decision and remand the claim in order for the Board to obtain adequate medical examination evidence to satisfy the duty to assist.

## **V. CONCLUSION**

The parties in this case are in clear agreement as to the adequacy of the medical examination evidence of record to satisfy the duty to assist, and the parties further agree that vacatur and remand are warranted on this basis. As such, the Court should exercise its usual practice and decide this appeal on the agreed upon inadequacy, as such constitutes the narrowest possible grounds upon which to decide the claim. Consideration of Appellant’s remaining arguments is not



necessary in this case, as they are rendered cumulative or moot by the agreement between the parties. Additionally, consideration of Appellant's constitutional argument is not necessary for a decision in this case, and so the Court should avoid reaching the issue unless a decision on this point is found to be necessary.

In providing this response, 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 to have adequately raised and properly preserved, but which the Secretary did not address, and he requests the opportunity to address the same if the Court deems it to be necessary. In light of the foregoing, Appellee, the Secretary of Veterans Affairs, asks the Court to vacate the March 30, 2018, decision of the Board of Veterans' Appeals and to remand Appellant's claim for service connection in order for the Board to ensure satisfaction of the duty to assist by obtaining adequate medical examination evidence.

Respectfully submitted,

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