United States Court of Appeals for Veterans Claims

Vet.App. No. 18-5399

WILLIE HAIRSTON, JR.,

Appellant,

v.

ROBERT L. WILKIE
Secretary of Veterans Affairs,

Appellee.

BRIEF FOR APPELLANT

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TABLE OF CONTENTS

TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES

Cases

Statutes and Regulations

Other Authorities

Record Citations

R. 43 (34-57) (Jan. 2017 C&P Exam)	26
R. 44 (34-57) (Jan. 2017 C&P Exam)	9, 10, 26
R. 44-45 (34-57) (Jan. 2017 C&P Exam)	18
R. 62-66 (Mar. 29, 2017 Nurse Practitioner Note)	7
R. 63 (62-66) (Mar. 29, 2017 Nurse Practitioner Note)	30
R. 80 (80-81) (Apr. 13, 2017 Baptist Health Info Management Department)	22
R. 83 (Apr. 21, 2017 Statement in Support of Claim)	16, 22
R. 92 (91-94) (Nov. 15, 2010 Office of Disability Determination Services)	3
R. 123 (Feb. 4, 2008 Imaging Center of Columbus)	2, 6, 27
R. 182 (178-184) (Disability Determination)	3, 22, 26
R. 255 (255-258) (Aug. 14, 2013 William Gary, MD Exam)	4, 22, 23, 26
R. 255-258 (Aug. 14, 2013 William Gary, MD Exam)	7
R. 258 (255-258) (Aug. 14, 2013 William Gary, MD Exam)	3
R. 750 (743-753) (Prior BVA remand)	9, 19, 30
R. 761 (761-762) (Jun. 13, 1986 Report of Medical Examination for Extension)	4
R. 770 (Aug. 29, 1983 STR)	3
R. 774-777 (Entrance Medical Examination)	18
R. 782 (May 31, 1983 STR)	4n1
R. 802 (Aug. 29, 1983 STR)	3
R. 806 (Jul. 21, 1983 STR)	4n1
R. 812 (Sep. 2, 1983 STR noting trauma to face)	3
R. 814 (Aug. 28, 1983 Emergency Care Note for fight)	3, 19
R. 825 (824-825) (Feb. 18, 1988 Exit Medical Examination)	4, 5, 19, 29
R. 852 (Aug. 12, 1987 STR noting direct trauma)	4, 19
R. 856 (May 8, 1984 STR)	4n1
R. 861 (Aug. 29, 1983 Radiographic Report)	3
R. 866 (Feb. 26, 1988 STR)	*passim*
R. 869 (869-870) (Feb. 26, 1988 STR)	4n1
R. 870 (Mar. 2, 1988 STR noting completion of therapy)	5
R. 871 (Mar. 22, 1988 STR)	5
R. 877 (DD 214)	2
R. 911 (Jun. 13, 1986 Report of Medical History)	4
R. 931-934 (Nov. 21, 2014 Nurse Practioner Follow-Up Note)	7
R. 932 (931-934) (Nov. 21, 2014 Nurse Practioner Follow-Up Note)	3, 30
R. 1353 (1353-1364) (Sep. 11, 2012 C&P Exam)	4, 8, 19, 23
R. 1353-1364 (Sep. 11, 2012 C&P Exam)	8
R. 1362-1363 (1353-1364) (Sep. 11, 2012 C&P Exam)	8

R. 1363 (1353-1364) (Sep. 11, 2012 C&P Exam)	29, 30
R. 1369 (Jun. 7, 2012 VAMC Addendum)	7, 30
R. 1390-1393 (Aug. 26, 2011 Provider Follow-Up Note)	6
R. 1404 (1403-1406) (Aug. 25, 2010 Columbus Nurse Note)	7
R. 1409 (1409-1411) (May 12, 2010 Columbus VAMC Follow-Up Note)	7
R. 1414 (Apr. 9, 2010 Physical Therapy Consult)	7
R. 1416 (1415-1417) (Apr. 9, 2010, Neurosurgery Consult Note)	7
R. 1418 (1418-1420) (Feb. 3, 2010, Chiropractic Consult Note)	7
R. 1418-1420 (Feb. 3, 2010, Chiropractic Consult Note)	6
R. 1419 (1418-1420) (Feb. 3, 2010, Chiropractic Consult Note)	6, 27
R. 1419-1420 (1418-1420) (Feb. 3, 2010, Chiropractic Consult Note)	3
R. 1431 (1427-1432) (Sep. 4, 2009 Columbus Follow-Up Note)	6
R. 1513 (1512-1514) (Apr. 4, 2006 Columbus Follow up Note)	6
R. 1524 (1523-1526) (Nov. 17, 2005 Columbus follow up note)	6
R. 1617 (May 4, 2006 Physical Therapy Consult)	6
R. 1627 (Feb. 4, 2010 Spine Lumbosacral Imaging Addendum)	3, 6
R. 1628 (Imaging Report Noting Long-Standing Process)	3, 23
R. 1661 (1661-1662) (Jul. 30, 2004 VAMC Addendum Note)	6
R. 1667 (1667-1668) (Apr. 14, 2003 VAMC Addendum)	6
R. 1670 (Mar. 25, 2003 Telephone Advice)	6
R. 1690 (Jun. 20, 2002 VAMC Note)	5
R. 1690-1691 (Jun. 6, 2002 Telephone Advice)	5
R. 1693 (May 24, 2002 Addendum)	5
R. 1697 (1696-1697) (Apr. 18, 2002 Physician Note)	5
R. 1697-1699 (Mar. 26, 2002 VAMC Consult)	5
R. 1704 (Mar. 12, 2002 VAMC Addendum)	5
R. 1720-1721 (Mar. 19, 1999 VAMC Addendum)	5
R. 1722 (1722-1723) (Dec. 1, 1997 H&P Note)	5
R. 1723 (1722-1723)] (Dec. 1, 1997 H&P Note)	5
R. 1726 (1726-1727) (Mar. 23, 1999 XRay Notes)	5, 27
R. 2157-2158 (Aug. 16, 2013 Cert. to Board Letter)	9
R. 2161 (Aug. 23, 2013 Docketing Letter)	9
R. 2174 (Apr. 23, 2012 Personal Hearing)	7
R. 2180 (2179-2180) (Aug. 13, 2013 Statement of Acr. Rep.)	2, 3
R. 2181 (2181-2182) (Nov. 15, 2012 Form 9)	6
R. 2181-2182 (Nov. 15, 2012 Form 9)	9
R. 2186-2208 (Sep. 24, 2012 SOC)	9

R. 2233-2234 (Aug. 17, 2012 C&P Exam Request)	8
R. 2235 (Jun 21, 2012 Notice of Hearing Transcript Issues)	7
R. 2237 (2237-2238) (Jul. 19, 2012 Statement in Support of Claim)	3, 4, 8, 23
R. 2239-2240 (Jun. 21, 2012 VA Hearing Issue Notice Letter)	13, 14
R. 2241-2242 (Jun. 18, 2012 Note to File regarding tape)	7, 13
R. 2287-2289 (NOD Acknowledgment Letter)	7
R. 2297 (Sep. 9, 2010 NOD)	7
R. 2299-2304 (Apr. 27 Rating Decision Letter)	7
R. 2309-2315 (Apr. 15, 2010 Rating Decision Narrative)	7
R. 2698 (Aug. 20, 2009 VA Note to File)	7
R. 2717 (2711-2721) (Jul. 30, 2009 Apl. for Benefits)	7

JURISDICTION OF THIS COURT

This Court has jurisdiction to review decisions of the Board of Veterans Appeals ("Board") and decide all relevant questions of law pertaining to a claim. 38 U.S.C. §§7252 & 7261(a)(1).

ISSUES PRESENTED

1. Whether the Board should have remanded to correct a process defect, when the VA did not provide a transcript of a hearing and did not provide proper notice to the Veteran that he was waiving his right to a hearing in submitting an additional statement;
2. Whether the Board's reasons and bases were adequate, when it failed to issue credibility findings on multiple material items of evidence, did not address inadequacies in each C&P examination, and when some of its factual conclusions are contradicted by the record;
3. Whether the 2017 C&P examination was adequate, when it was based on several inaccurate factual predicates, did not adequately explain some of its findings, and engaged in speculative fact finding;
4. Whether the 2012 C&P examination was adequate, when it was based on inaccurate factual predicates and engaged in unwarranted fact-finding.

STANDARD OF REVIEW

The Court reviews questions of fact using the "clearly erroneous" standard of review. 38 U.S.C. §7261(a)(4). A factual finding is clearly erroneous when either (1) the record lacks "sufficient competent evidence" to support the finding, *see McLendon v. Nicholson*, 20 Vet.App. 79, 85 (2006), or (2) although there is evidence to support the finding, the reviewing court is nonetheless left with a definite and firm conviction that a mistake was made. *See Hersey v. Derwinski*, 2 Vet.App. 91, 94 (1992). When reviewing the agency's factual determinations, the

Court must evaluate "whether the agency took a hard look at information relevant to the decision." *See New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683, 704 (10th Cir. 2009).

The Court reviews claimed legal errors by the Board under the *de novo* standard, by which the Board's decision is not entitled to any deference. 38 U.S.C. §7261(a)(1); *Butts v. Brown*, 5 Vet.App. 532, 538 (1993) (*en banc*); *see also Hensley v. West,* 212 F.3d 1255 (Fed. Cir. 2000).

Finally, by statute, the Board must 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; *see also Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1990). To comply with this requirement, the Board must analyze the credibility and probative value of the evidence, account for the evidence that it finds to be persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the claimant. *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995); *Mingo v. Derwinski*, 2 Vet.App. 51, 54 (1992). But, where grounds are given, whether required or not, they cannot be arbitrary. *See* 38 U.S.C. §7261(a)(3)(A); *Kandik v. Brown*, 9 Vet.App. 434, 440 (1996).

STATEMENT OF THE CASE AND COURSE OF PROCEEDINGS

Mr. Hairston served honorably on active duty in the Army as a Chaparral/Redeye Repairer from August 26, 1980, to May 4, 1988. [R. 877] (DD 214). The issue on appeal is entitlement to service connection for a back disorder. [R. 2180 (2179-2180)] (Aug. 13, 2013 Statement of Acr. Rep.). His disorders include "severe degenerative disc disease" in the "lumbar type vertebral bodies[,] probable spondlyolysis[,]" "prominent anterior and posterior spurring[,]" [R. 123] (Feb. 4, 2008 Imaging Center of Columbus), lumbar segmental dsyfunction, lumbar disc syndrome without myelopathy, arthralgia of the lumbar spine, stiffness of the lumbar spine, and degenerative joint

disease. [R. 1419-1420]. The Veteran maintains that while he had in service onset of back pain, it "started worsening in 1996." [R. 258 (255-258)] (Aug. 14, 2013 William Gary, MD Exam); *see also* [R. 2237] (Jul. 19, 2012 Statement in Support of Claim noting he "had occasional back pain throughout [his] military career"); [R. 2180 (2179-2180)] (Aug. 13, 2013 Statement of Acr. Rep. noting conditions have continued to worsen since onset during service); [R. 182 (178-184)] (Disability Determination noting low back pain diagnosed in 1996); *but see* [R. 92 (91-94)] (Nov. 15, 2010 Office of Disability Determination Services Med Note recording pain starting in mid-90's). The pain occurs with walking or standing for long periods. [R. 932 (931-934)] (Nov. 21, 2014 Nurse Practioner Follow-Up Note). His Chiropractor told him that an issue with his lumbar vertebrae "had to have happened a long time ago." [R. 2237] (Jul. 19, 2012 Statement in Support of Claim). The Chiropractor "did not give a time frame." *Id.* Imaging noted that "[e]xtensive bony changes are consistent with long-standing process." [R. 1628]; *see also* [R. 1627] (Feb. 4, 2010 Spine Lumbosacral Imaging Addendum).

In-Service Injuries

In 1983, Mr. Hairston treated at emergency care because of an assault, where he was "beaten [with] fists about [the] head." [R. 814] (Aug. 28, 1983 Emergency Care Note for fight). The record notes abrasions to the face, neck and knees. *Id.* While the emergency care note recorded "no back tenderness" at the time, *id.,* the following day it was noted that he had pain in his "throat, back and jaw" and that he had been "vommitting blood[.]" [R. 802] (Aug. 29, 1983 STR). On examinations it was noted that a fracture was displaced, but not enough to warrant surgical intervention. [R. 770] (Aug. 29, 1983 STR); *see also* [R. 861] (Aug. 29, 1983 Radiographic Report); [R. 812] (Sep. 2, 1983 STR noting trauma to face).

At some point in 1984, he injured his lower back while in Germany lifting a "Redeye missile system test station." [R. 825 (824-825)] (Feb. 18, 1988 Exit Medical Examination) ("sometime have lower back pain after bending then […] straightening up, injured back in Germany 1984"); [R. 2237]; [R. 1353 (1353-1364]) (Sep. 11, 2012 C&P Exam by Willam M. Stanton) ("the first incident was while lifting a test station in 1984"). Following the injury, he was placed on limited lifting. [R. 1353]; [R. 2237].

In mid-1986, he had a medical examination, for an extension of service, that noted in a check box that his spine was normal. [R. 761 (761-762)] (Jun. 13, 1986 Report of Medical Examination for Extension). There is no indication that imaging studies were performed at the time. On the examination, he checked a box noting that he did not have recurrent back pain. [R. 911] (Jun. 13, 1986 Report of Medical History). The Veteran provided statements that he sustained a fall "about 1985[,]" [R. 1353], or in 1986, [R. 255 (255-258)] (Aug. 14, 2013 William Gary, MD Exam) (implying onset in 1986 and worsening in 1996), and that he believed he may have injured his back at that time. [R. 1353].[1] It is unclear from the record whether the possible 1986 fall was before or after the extension examination.

In 1987, he received acute medical care from "direct trauma" where another service member "grabbed [him] by the waist [...] shov[ing] him against the wall […]." [R. 852] (Aug. 12, 1987 STR noting direct trauma). The diagnosis was shoulder sprain. *Id.* The following year, on his

[1] There are two STRs from 1983 that note a fall and an injury to his knee. [R. 806] (Jul. 21, 1983 STR without noting how he fell); [R. 782] (May 31, 1983 STR noting fall on cobblestone road). And, in 1984 there is another STR noting a fall. [R. 856] (May 8, 1984 STR). It is unclear from the record if any of these are the fall the Veteran spoke about. However, there is an STR from 1988 noting that the 1984 injury was from a trip and fall, and thus appears not related to falling from a fence. [R. 869 (869-870)] (Feb. 26, 1988 STR).

exit medical examination, although the clinical evaluation had a conclusory check-mark for a normal spine, it was noted that the Veteran would sometimes have lower back pain after bending. [R. 825]. There is no indication that imaging studies were performed. Following the exit medical examination, the Veteran had an in-service physical therapy consultation. This consultation, in addition to noting left knee pain, appears to note, "low back pain." [R. 866] (Feb. 26, 1988 STR for physical therapy noting left knee pain and, on third line, low back pain). The actual physical therapy records do not appear in the RBA. *Cf*. [R. 870] (Mar. 2, 1988 STR noting completion of therapy). Approximately two months prior to his discharge, as a result of knee pain, he was placed on profile until discharge. [R. 871] (Mar. 22, 1988 STR).

Post-Service Treatment

On December 1, 1997, Mr. Hairston treated at the Tuscaloosa VAMC for right hip pain that began roughly three years prior after a strain. [R. 1722 (1722-1723)] (Dec. 1, 1997 H&P Note). While diagnosing "chronic muscle strain" the doctor also prescribed motrin and "low back stretching exercises[.]" [R. 1723]. In March 1999 he would again see the VAMC for hip pain, [R. 1720-1721] (Mar. 19, 1999 VAMC Addendum), a few days thereafter followed by xrays showing "[m]ild degenerative change in the lower lumbar spine[.]" [R. 1726 (1726-1727)] (Mar. 23, 1999 XRay Notes).

In 2002, it was noted that he had borderline spinal canal stenosis and significant foramenal stenosis; a surgical consult was recommended. [R. 1697 (1696-1697)] (Apr. 18, 2002 Physician Note); *see also* [R. 1704] (Mar. 12, 2002 VAMC Addendum); [R. 1697-1699] (Mar. 26, 2002 VAMC Consult); [R. 1693] (May 24, 2002 Addendum); [R. 1690-1691] (Jun. 6, 2002 Telephone Advice). He began physical therapy. [R. 1690] (Jun. 20, 2002 VAMC Note). Six months later, he was still

having pain in his left side. [R. 98 (98-103)] (Dec. 10, 2002 Baptist Memorial ER Record). Because Mr. Hairston believed that physical therapy was insufficient, he requested consult with a chiropractor. [R. 1670] (Mar. 25, 2003 Telephone Advice).

By April 2003, another referral to a surgeon was discussed. [R. 1667 (1667-1668)] (Apr. 14, 2003 VAMC Addendum). More than a year later the back issues were "essentially unchanged." [R. 1661 (1661-1662)] (Jul. 30, 2004 VAMC Addendum Note). Xrays showed degenerative disc disease at C4 and L4-5. *Id*. The following year, complaints of "some back pain" were noted, as was that he was taking pain medication. [R. 1524 (1523-1526)] (Nov. 17, 2005 Columbus follow up note). And, the year after that, "chronic back pains" were noted. [R. 1513 (1512-1514)] (Apr. 4, 2006 Columbus Follow up Note). On the examination report it was noted that the "[l]ower back pains started about 10 years ago." *Id*. The following physical therapy consult inexplicably pegged onset at four years prior. [R. 1617] (May 4, 2006 Physical Therapy Consult).

In 2008, spondylosis changes were noted on imaging. [R. 123] (Feb. 4, 2008 Imaging Center of Columbus). He would continue to treat, with complaints of chronic lower back pain. [R. 1431 (1427-1432)] (Sep. 4, 2009 Columbus Follow-Up Note); [R. 1390-1393] (Aug. 26, 2011 Provider Follow-Up Note).

In 2010, he would see a chiropractor who pegged onset in 1995 "while running." [R. 1418-1420] (Feb. 3, 2010, Chiropractic Consult Note); [R. 1627] (Feb. 3, 2010 Spine Lumbosacral Imaging). It is unclear why the chiropractor made this finding. *See e.g.,* [R. 2181 (2181-2182)] (Nov. 15, 2012 Form 9 "I never reported that I injured my back while running as stated in the SOC. This is a false statement."). Regardless, the examiner found "[c]hronic low back complicated by spondylolisthesis[.]" [R. 1419]. It was noted "that he feels like he needs to stretch the area."[R.

1418]. A surgery consult two months later noted a 15 year history of low back pain, with several chiropractic treatments over the years. [R. 1416 (1415-1417)] (Apr. 9, 2010, Neurosurgery Consult Note). The same day he had a physical therapy consult, which noted that his pain when walking or standing increases from a 2/10 to a 10/10. [R. 1414] (Apr. 9, 2010 Physical Therapy Consult). The following month a VAMC record notes right hip pain for 15 years. [R. 1409 (1409-1411)] (May 12, 2010 Columbus VAMC Follow-Up Note). Roughly three months later he inquired about more chiropractic treatment. [R. 1404 (1403-1406)] (Aug. 25, 2010 Columbus Nurse Note). He would continue to treat periodically thereafter. [R. 1369] (Jun. 7, 2012 VAMC Addendum); [R. 255-258]; [R. 931-934]; [R. 62-66] (Mar. 29, 2017 Nurse Practitioner Note).

2009 Application for Benefits

In 2009, Mr. Hairston first filed for service connection for lower back pain stemming from an injury "picking up missile tests." [R. 2717 (2711-2721)] (Jul. 30, 2009 Apl. for Benefits). The following month the VA placed a notation in his file that without dates of treatment for his back since service the back condition was "too moot [*sic*] due timeframe from discharge to date of claim." [R. 2698] (Aug. 20, 2009 VA Note to File). The following year the VA denied his claim. [R. 2299-2304] (Apr. 27 Rating Decision Letter); [R. 2309-2315] (Apr. 15, 2010 Rating Decision Narrative). A timely NOD followed. [R. 2297] (Sep. 9, 2010 NOD); [R. 2287-2289] (NOD Acknowledgment Letter). As part of the appeal, Mr. Hairston attended an informal hearing at his local RO, however, the transcript was not properly recorded. [R. 2241-2242] (Jun. 18, 2012 Note to File regarding tape); [R. 2174] (Apr. 23, 2012 Personal Hearing). The VA sent the Veteran a letter giving him three options, without explaining the ramifications of each option. [R. 2235] (Jun 21, 2012 Notice of Hearing Transcript Issues). After the letter, the Veteran submitted a statement in

support of claim briefly discussing the back disorder. [R. 2237-2238] (Jul. 19, 2012 Statement). Thereafter, the VA requested a C&P examination to evaluate the back disorder. [R. 2233-2234] (Aug. 17, 2012 C&P Exam Request). He was not afforded another hearing.

September 2012 C&P Examination

The first C&P examination was conducted in September of 2012. [R. 1353-1364]. The examiner listed diagnosis of degeneration of lumbar intervertebral disc, diagnosis 2010, spondylolisthesis, diagnosis 2010, and spinal stenosis lumbar region, diagnosis in 2002. [R. 1353]. He did not record the 1999 date for degenerative disc disease, nor did he record the disorders diagnosed by the chiropractor in 2010. The examiner found that the condition was less likely than not related to service because Mr. Hairston: 1) "had transient muscle spasm of the right lumbar area in 08/1984 when he lifted heavy equipment the day before," 2) "he responded to muscle relaxant and 1 week limited lifting," 3) "at subsequent 06/1986 periodic history and physical he had absolutely no complaints related to his back and had a normal examination," 4) "at his exit examination he stated that he had injured lower back in germany [*sic*] in 1984 and stated he sometimes had low back pain after bending and then straightening [but] physical examination was negative [and] no diagnosis was provided," and 5) "he is very clear at all visits before 2009 where the back pain origin was brought up that it began about 1995, which was well after he left the military." [R. 1362-1363]. Despite the treatment since 2010, the examiner also inexplicably found that, "no new information is apparently provided since 2010." [R. 1363]. In particular, the examiner alleged that the "claims file is thoroughly reviewed with particular attention paid to all pages since denial in 2010." *Id.* The examiner did not discuss either of the in-service assaults, nor did he discuss the physical therapy consultation following the exit medical examination.

Following the examination, the Statement of the Case was issued, continuing to deny the claim. [R. 2186-2208] (Sep. 24, 2012 SOC). A timely form 9 followed and the appeal was certified to the Board. [R. 2181-2182]; [R. 2157-2158] (Aug. 16, 2013 Cert. to Board Letter); [R. 2161] (Aug. 23, 2013 Docketing Letter).

January 2017 Board Remand

In 2017 the Board remanded the appeal for a low back disability to obtain additional records, including records from SSA, and for a C&P examination to discuss the in-service assault in 1983 and any records obtained on remand. [R. 750 (743-753)] (Prior BVA remand).

July 2017 C&P Examination

The C&P addendum was provided in July 2017, continuing to provide a negative linkage. [R. 34-57]. This time the examiner noted the 1999 diagnosis of degenerative changes. [R. 36]. And, despite this notation being years prior to the chiropractic treatment, and surgery being discussed concurrently with the chiropractic treatment in 2002, the examiner inexplicably concluded that "symptoms began 'several days ago' so this is acute and new back pain." [R. 36]. The examiner did not explain how multiple recommendations for surgery signified that the condition was merely acute. And, despite the clearly documented diagnosis predating 2002, the examiner found it significant that back pain was not recorded in medical records in 2002. [R. 42]. The examiner did not explain the significance, if any, of back pain needing to be recorded in medical records, even though he later recorded that arthritis can be asymptomatic. [R. 44]. The examiner incorrectly alleged a gap between treatment in 2002 and 2004, where none in fact existed. [R. 37] ("30th 07/2004 primary care tuscaloosa vamc: not seen since 19th 12/2002.").

As to the back pain that was noted following the in-service assault in 1983, the examiner speculated that this was merely the result of sleeping. [R. 42]. His support for this conclusion was that the day prior the Veteran did not complain of back pain and that the examiner speculated the back examination must have been normal. [R. 42]. The examiner did not opine whether the trauma from this assault or the other one later in-service could cause arthritis later in life. Nor did the examiner discuss the physical therapy consultation that followed the exit medical examination. As to the degenerative changes, the examiner found that it was "age appropriate" someone in their 30s would be experiencing arthritic changes because 76% of those in his age group DID NOT experience arthritic changes. [R. 44]. The examiner did not explain whether his finding that arthritic change is an "age-related phenomena" meant that arthritis only results from old age, or whether it meant that arthritis, regardless of cause, manifests itself in later years. The SSOC followed this addendum. [R. 20-32].

June 2018 Board Decision on Appeal

In the decision on appeal, the Board concluded that the STRs "specifically" only show "a complaint" of back pain and that the only in-service injury was incurred "while lifting heavy equipment." [R. 6]; *see also* [R. 5] ("The Veteran contends that he served as a missile systems technician in the Army and that he injured his back while picking up a missile test system while on active duty in 1984, more than 30 years ago."); [R. 10] ("While the Veteran believes that his low back disability is related to an in-service injury, event, or disease, including picking up a missile test system while on active duty in 1984, he is not competent to provide a nexus opinion in this case."). As to this possible injury from lifting heavy equipment, the Board adopted the C&P examiner's finding that this injury was self-limited and transitory. [R. 7]. The Board made this finding without

issuing credibility determinations on the other in-service events raised in the record. For example, the Board did not discuss the in-service physical therapy consultation, noting low back pain, that followed the exit medical examination.

As part of its findings, the Board found that the Veteran's low back disability "was not diagnosed […] until January 2002, nearly fourteen years after his separation from service." [R. 6]. Indeed, the Board found that the "evidence of record demonstrates that the Veteran did not have a diagnosed low back disability until January 2002." [R. 9-10]. The Board did not discuss the diagnosis of degenerative changes in 1999, nor explain what its medical basis was for concluding that the delay in diagnosis was relevant. The Board found the C&P examination and its addendum highly probative "because both opinions are based on an accurate medical history and provide explanations that contains clear conclusions and supporting data." *See* [R. 9]. While the Board noted that the addendum opinion discussed the in-service assault in 1983, it did not discuss that the examiner speculated that the back pain noted at the time was from sleep, nor did the Board render a credibility finding on the assault. [R. 7-8]. Without discussing service connection under 38 C.F.R. §3.303(b), the Board found that, "[e]ven if the Veteran did have a low back disability in the mid-1990s, the evidence of record does not demonstrate a positive relationship between that claimed disability and his military service." [R. 10]. Instead, the Board's finding concerning presumptive service connection was: "Finally, the Board observes that the Veteran's January 2002 chiropractic treatment was for low back pain and that he was not diagnosed with any form of arthritis until July 2004 when x-rays showed evidence of degenerative disc disease at L4-L5. Thus, the Board finds that service connection cannot be awarded for the manifestation of arthritis on a presumptive basis." [R. 10]. This timely appeal followed.

Summary of the Argument

Although the Veteran requested a hearing, the VA did not ensure that the informal hearing process presented under 38 C.F.R. §3.104(c) was followed here because the VA has an obligation to preserve the hearing transcript, and the record shows that it did not follow this requirement in this case. Further, the VA improperly shifted the burden to the Veteran to ensure that the hearing transcript was preserved and it did not give proper notice explaining that, in submitting an additional statement in support of the claim, the Veteran would be waiving his right to a hearing, which included waiving the ability to have him or his representative submit additional argument at the hearing and for the VA to fully explain the issues and suggest submission of additional evidence.

Next, remand is required because the Board's reasons and bases are inadequate. First, the Board did not issue credibility findings on multiple material items of favorable evidence. Second, the Board failed to adequately address service connection for arthritis under 38 C.F.R. §3.303(b).

Finally, neither of the two C&P examinations the VA provided are adequate for ratings purposes. The 2017 C&P is predicated on an inaccurate factual predicate and engaged in speculative fact-finding. Similarly, the 2012 C&P examination is inadequate because it contains factual errors.

Argument

I. Because the missing tape was a procedural defect, the Board was required to remand in order to correct this procedural defect

Although the Veteran requested a hearing, the VA did not ensure that the hearing process presented under 38 C.F.R. §3.104(c) was followed because the VA has an obligation to preserve

the hearing transcript and the record shows that it did not follow this requirement in this case. [R. 2241-2242]; [R. 2239-2240]. Under the regulation in effect at the time, a veteran had a "right to a hearing […] [u]pon request […] at any time on any issue [...]" 38 C.F.R. §3.104(c). "The purpose of the hearing is to permit the claimant [not only] to introduce into the record, in person, any available evidence [but also] any argument or contentions with respect to the facts and applicable law [...]" *Id.* The VA, in turn, had a "responsibility […] 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." *Id.* The hearing officer was directed to frame questions "to explore fully the basis for claimed entitlement" to "assure clarity and completeness of the hearing record [...]" *Id.* The regulation made it clear that the VA is "responsible for establishment and preservation of the hearing record." *Id.* A federal agency must scrupulously observe rules, regulations, or procedures that it establishes. *See Morton v. Ruiz*, 415 U.S. 199, 235 (1974); *Hammond v. Lenfest*, 398 F.2d 705, 715 (2d Cir. Conn. 1968) (extending this doctrine to agency policy); *United States ex rel. Brooks v. Clifford*, 409 F.2d 700, 709 (4th Cir. S.C. 1969) (extending this doctrine to agency directives); *United States v. Heffner*, 420 F.2d 809, 811 (4th Cir. Md. 1969) (clarifying that this doctrine applies to rules, regulations or procedures). "This is so even where the internal procedures are possibly more rigorous than otherwise would be required." *Morton*, 415 U.S. at 235. Under the *Accardi* doctrine, when an agency fails to follow its own procedures, and that process was an agency wide directive designed to set uniform standards as part of an adjudicative proceeding, its action cannot stand. *See e.g., Heffner*, 420 F.2d at 811; *United States v. Leahey*, 434 F.2d 7, 11 (1st Cir. Mass. 1970); *see also Yellin v. United States*, 374 U.S. 109, 121 (1963) (stating that "[petitioner] might not prevail […] [b]ut he is at least entitled to have the Committee follow its rules

[…]"); *but see Quinn v. Wilkie*, U.S. Vet. App. No. 17-4555 at 8-9 (Jul. 11, 2019) (noting harmless error analysis). The purpose of this doctrine is to prevent the arbitrariness inherent in an agency's violation of its own procedures. *Heffner*, 420 F.2d at 812. The Board must ensure that it provides a veteran fair process in the adjudication of a claim. *See Austin v. Brown*, 6 Vet.App. 547 (1994); *Thurber v. Brown*, 5 Vet.App. 119 (1993). Whether the VA applied the correct legal standard as set forth in §3.104(c) is a question of law reviewed *de novo*. *See* 38 U.S.C. §7261(a)(1); *Butts*, 5 Vet.App. at 539. While this Court's recent decision in *Quinn v. Wilkie* concerned the right to a second Board hearing, *Quinn* at 1-2, the issue here is whether the right to a hearing includes the right to a transcript evidencing what transpired during that hearing, and whether the VA is obligated to ensure that the hearing transcript is preserved or whether it may shift that burden to a veteran by, in effect, asking the veteran to request another hearing or to select two other options that have the effect of the veteran waiving his right to the hearing, and its accompanying transcript, and doing so without adequate notice.

The VA, in effect, improperly shifted the burden on the Veteran to ensure that the hearing transcript was preserved and it did not give proper notice explaining that, in submitting an additional statement in support of the claim, the VA would, in effect, consider that the Veteran waived his right to a hearing, which includes waiving the ability to have him or his representative submit additional argument at the hearing and for the VA to fully explain the issues and suggest submission of additional evidence. [R. 2239]. A reasonably veteran would not know this was a waiver given this notice letter, which merely presented three options with a warning that if VA did not "receive the information within 30 days [it] will make a decision based upon the evidence of record." *Id*.; *cf. Munro v. Shinseki*, 616 F.3d 1293, 1299 (Fed. Cir. 2010); *see also Wood v. Office*

*of Personnel Managemen*t, 241 F.3d 1364, 1366-67 (Fed. Cir. 2001) (considering adequate notice in the context of the reasonable person standard); *Henderson v. Shinseki,* 562 U.S. 428, 431 (2011) ("The VA's adjudicatory 'process is designed to function throughout with a high degree of informality and solicitude for the claimant.'"). And, in shifting the burden to the Veteran to, in effect, ensure that the hearing transcript issue was resolved, the VA has also, in effect, added additional restrictions to a regulation where they do not exist. *See Ortiz-Valles v. McDonald*, 28 Vet.App. 65, 71 (2016) ("The Secretary cannot simply add restrictions to a regulation where they do not exist."). By its own text, the regulation places the burden on the VA to ensure that the hearing transcript is preserved. The Veteran has a right to a hearing, which he exercised, that right does not place on him the burden to ensure the VA satisfies the other requirements of this regulation. Since the VA arbitrarily ignored its own process in the adjudication of this claim, the Board's entire decision must be vacated and remanded. *See e.g*., *Heffner*, 420 F.2d at 811;[2] 38 C.F.R. §19.9 (Board shall remand to correct a procedural defect). If a tree falls in a forest and no one is around to hear it, does it make a sound? Since the outcome of any hearing before the VA in this context is a transcript that serves an evidentiary purpose, with far reaching implications including the adequacy of VA provided medical examinations, because the VA did not satisfy its obligation to preserve the transcript, it is tantamount to the Veteran not being provided a hearing in the first place.

While it is true that the Veteran was provided a hearing, because there is no transcript of this hearing, we cannot know whether the VA satisfied its obligation to discuss the issues and

[2] This is not an instance where the Appellant asks this Court to impose additional or substitute procedural requirements on the Secretary - a request which would trigger a Mathews analysis - rather merely for the Secretary to be held to follow the process he set. *See Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976) (Court weighed Appellant's argument that the existing procedures were not constitutionally valid, against Respondent's argument that they were).

possible submission of additional evidence that would help him prove his claim. Further, subsequent to the hearing, the VA scheduled a C&P examination for the back disorder. Because of the missing transcript we cannot know if there was something significant that was established at the hearing prompting the VA to determine that the duty to assist was triggered. This is relevant because it also potentially raises questions as to the adequacy of each C&P examination because a C&P examiner must base his opinion on a consideration of a veteran's prior medical history, including that provided in testimony. *See* 38 C.F.R. §4.1; *Floyd v. Brown*, 9 Vet.App. 88, 93 (1996); *cf. Buchanan v. Nicholson*, 451 F.3d 1331, 1336 (Fed. Cir. 2006) (noting C&P exam, which relied on absence of evidence, "failed to consider whether the lay statements presented sufficient evidence of the etiology of [the veteran's] disability such that his claim of service connection could be proven"). Neither VA examiner could have done so as to this testimony without the transcript. Further, after the hearing, the Veteran also attempted to submit evidence from a private medical provider he apparently began seeing in 1995, but these records were no longer available. [R. 83]. We do not know if the Veteran clarified the importance of these records as to the back disorder claim at the hearing. This is relevant because the Board found it significant that the Veteran was not diagnosed with a back disability until 2002. And, specifically to a point raised in *Quinn v. Wilkie* that "a hearing would have provided the appellant the ability to address and respond to any specific [...] questions relating to the new evidence and testimony [he] was submitting [...]", *Quinn,* U.S. Vet. App. No. 17-4555 at 9, without a transcript a veteran's subsequent representative would have no way of knowing what issues the VA believed were material or needed further clarification. It is unclear if a representative attended the hearing. Accordingly, even if the harmless error analysis applies here, the error here prejudiced the Veteran's claim because of these aforementioned

issues. *See Wagner v. U.S.*, 365 F.3d 1358, 1365 (Fed. Cir. 2004) ("Where the effect of an error on the outcome of a proceeding is unquantifiable, however, we will not speculate as to what the outcome might have been had the error not occurred."); *Arneson v. Shinseki*, 24 Vet.App. 379, 389 (2011) (finding prejudice when error "could have altered the Board's determination[s]"); *see also Mayfield v. Nicholson*, 19 Vet.App. 103, 116 (2005) (stating that the key to determining whether an error is prejudicial is the effect of the error on the essential fairness of the adjudication); *Parker v. Brown*, 9 Vet. App. 476, 481 (1996) (stating that "'[p]rejudice…means injury to an interest that the statute, regulation, or rule in question was designed to protect'" (*quoting Intercargo Ins. Co. v. United States*, 83 F.3d 391, 396 (Fed. Cir. 1996))). Remand is required for the Board to ensure that a Regional Office hearing is held and its transcript associated with the record, or to explain why one is not required. *See* 38 C.F.R. §19.9 (Board shall remand to correct a procedural defect).

II. Remand is required because the Board's R&B were inadequate

A. The Board did not issue credibility findings on multiple material items of favorable evidence.

While the Board issued a credibility finding on some of the possible in-service causes, it did not do so for all possible causes raised by the record. The Board must weigh and assess the credibility of the evidence in the first instance. *See Deloach v. Shinseki*, 704 F.3d 1370, 1380 (Fed. Cir. 2013) (Court prohibited from making factual findings in first instance); *Madden v. Gober*, 125 F.3d 1477, 1481 (Fed. Cir. 1997). The Board cannot abdicate this responsibility to a medical examiner. *See Owens v. Brown*, 7 Vet.App. 429, 433 (1995). As the record contradicts the Board's implicit finding as to the number of in-service events, that finding is clearly erroneous. *See Hersey*, 2 Vet.App. at 94 (finding clearly erroneous when court left with definite and firm conviction a mistake committed). And, as there is favorable evidence contradicting the Board's finding as to an injury in-service that

was unaddressed, remand is required for the Board to address these in the first instance. *See Caluza*, 7 Vet.App. at 506 (the Board must account for and provide the reasons for its rejection of any material evidence favorable to the claimant). When the Board fails to explore the legal theories reasonably raised by the record, its statement of reasons or bases is inadequate. *See Dennis v. Nicholson*, 21 Vet.App. 18, 22 (2007) ("merely listing the evidence before stating a conclusion does not constitute an adequate statement of reasons or bases").

Here, to begin with, the Board did not issue a credibility finding on which of the current back disorders, or even if any of the current back-disorders, the Veteran is diagnosed with are congenital. *See* [R. 44-45] (2017 C&P examiner concluding "it is significantly more likely than not that his bilateral pars interarticularis defects are congenital"). While the 2017 C&P examiner reached this conclusion as to at least one of the disorders, multiple other medical providers included in the record did not reach this same conclusion. Here, the benefit of the doubt would favor the Veteran as to the question of whether this is a congenital defect. *See Combee v. Brown*, 34 F.3d 1039, 1043 (Fed. Cir. 1994) ("benefit of the doubt is given to veterans on all issues material to their claims"). While the examiner opines that it is "significantly more likely than not that his bilateral pars interarticularis defects are congenital[,]" the examiner does not find that this condition is always congenital, which implies that this disorder is not solely from a genetic defect. [R. 44-45]. Here, the Veteran's entrance medical examination does not display any such defect with the spine. [R. 774-777].Thus, the presumption of soundness applies. *See Wagner v. Princip*i, 370 F.3d 1089, 1096 (Fed. Cir. 2004). And, while the examiner made a finding of fact that there was no worsening during service, the Board did not make a finding on whether the presumption of soundness had been rebutted through clear and unmistakable evidence. *See Holton v. Shinseki*,

557 F.3d 1362, 1367 (Fed. Cir. 2009).This is critical because, in not addressing the examiner's finding here, in which he inherently assumes the presumption of soundness had been rebutted, the Board has in effect incorporated evidence into its decision that is based on the presumption of soundness being rebutted. *Cf. Adams v. Principi*, 256 F.3d 1318, 1321-22 (Fed. Cir. 2001) (affirming this Court's remand of a presumption of soundness case when the medical evidence required clarification). In relying on this evidence, without first addressing this issue, this means, effectively, that the Board's own reasoning is implicitly assuming that this presumption was rebutted, because otherwise the Board would have returned the examination as inadequate. Next, the Board concluded that the STRs "specifically" only show "a complaint" of back pain and that the in-service injury was incurred "while lifting heavy equipment." [R. 6]; *see also* [R. 5] ("The Veteran contends that he served as a missile systems technician in the Army and that he injured his back while picking up a missile test system while on active duty in 1984, more than 30 years ago."); [R. 10] ("While the Veteran believes that his low back disability is related to an in-service injury, event, or disease, including picking up a missile test system while on active duty in 1984, he is not competent to provide a nexus opinion in this case."). As to this possible injury from lifting heavy equipment, the Board adopted the C&P examiner's finding that this injury was self-limited and transitory. [R. 7]. Yet, the record showed that possible in-services causes of the disorder or manifestations of back pain also include: 1) an in-service fall, [R. 1353 (1353-1364)] ("about 1985 states he was scaling a fence and came down on the knee and injured the knee. thinks [*sic*] that the back was injured as well"), 2) two different in-service assaults, [R. 750 (743-753)]; [R. 814]; [R. 852], 3) intermittent pain since an injury in Germany in 1984, [R. 825], or 4) an in-service physical therapy consultation noting back pain, which was noted after the exit medical examination. [R.

866]. The issue here is that the Board in reaching its conclusion on service connection failed to render credibility findings on these possible in-service causes. *See Smith v. Derwinski*, 1 Vet.App. 267, 272 (1991) (Board must consider entire record). The Board's failure to weigh the credibility of this evidence was highly prejudicial because if the Board were to find these in-service events credible it must ensure that any C&P examination it relies on adequately considers these possible in-service causes. *See Coburn v. Nicholson*, 19 Vet.App. 427, 434 (2006) (Lance, J., dissenting) (when a medical opinion ignores the facts accepted by the Board it is not competent evidence). For example, if the Board finds the notation on the exit medical examination of intermittent pain since 1984 credible, then it must reject both C&P examinations because the findings in those C&P examinations are predicated and an acute disorder in-service. Similarly, without weighing the physical therapy note of back pain, which came after the exit medical examination, the Veteran cannot know the precise basis for why the Board relied on C&P examinations that found there were no issues with the Veteran's back at exit from service. At the very least this may place this question of whether his back was healthy upon exit from service in relative equipoise, in which case the Veteran would prevail on this issue that is material to the resolution of his claim. *See Combee*, 34 F.3d at 1043. To be sure, this does not get him direct service connection outright, but it is applicable for presumptive service connection and, at any rate, would indicate that the C&P examinations are not adequate because they would then be based on an inaccurate factual predicate. Additionally, these possible in-service causes contradict the Board's findings that there was only one injury in-service, or may contradict the Board's finding that the injury that it did discuss was self-limited and transitory, which raises whether that finding is clearly erroneous. See *Hersey*, 2 Vet.App. at 94. This is also why this error was not harmless. Importantly, this is not a

request to reweigh evidence, because the Board has not explicitly weighed these disorders despite its duty to so do. Remand is required for the Board to adequately address this evidence in the first instance. *See Hensley*, 212 F.3d at 1263-64 (when a court of appeals reviews a lower court's decision, it may remand it if the previous adjudicator failed to make findings of fact essential to the decision).

B. Remand is required because the Board did not adequately address service connection for arthritis under 38 C.F.R. §3.303(b).

Even though the Board conceded arthritis, it did not adequately address presumptive service connection under §3.303(b). [R. 6] ("The question for the Board is whether the Veteran has a current disability that began during service or is at least as likely as not related to an in-service injury, event, or disease."). It is well-settled that the VA has a duty to give a sympathetic reading to a veteran's filings and adjudicate all potential claims reasonably raised by the evidence. *See Roberson v. Principi,* 251 F. 3d 1378, 1384 (Fed. Cir. 2001). This duty requires the VA to consider all legal theories raised by the record that may lead to a grant of the benefits requested, regardless of whether they are specifically raised by the veteran. *See Douglas v. Derwinski,* 2 Vet.App. 435, 438 (1992) (*en banc*). Under §3.303(b), there are two alternative methods of establishing service connection - chronicity and continuity of symptomatology. *See* 38 C.F.R. §3.303(b); *Walker v. Shinseki*, 708 F.3d 1331, 1337 (Fed.Cir. 2013). A chronic disease is one listed at 38 C.F.R. §3.309(a). *See Walker* at 1331. Arthritis qualifies for service connection under §3.303(b). *Id.* Importantly, §3.303(b) does not require medical evidence of an etiological link between service and a current disability. *Id.* Nor is continuous medical treatment, or continuous pain, required; instead, the regulation specifies continuous symptomatology. *See Wilson v. Derwinski*, 2 Vet.App. 16, 19

(1991) ("regulation requires continuity of symptomatology, not continuity of treatment"). "Lay testimony is competent […] to establish the presence of observable symptomatology." *Barr v. Nicholson,* 21 Vet.App. 303, 307 (2007). This section eliminates the requirement to show a nexus between a present condition and service that is required for direct service connection. *See Walker* at 1339. The Board's failure to truly analyze the claim under all legal theories reasonably raised by the record renders its reasons or bases inadequate, which frustrates judicial review and fails to inform the Veteran of the precise basis for the decision here. *See Schafrath v. Derwinski*, 1 Vet.App. 589, 593 (1991). As the Board's failure to adequately discuss this provision of law speaks directly to service connection on a presumptive basis, this was not harmless error. It is possible that were the Board to adequately discuss this theory of entitlement it would either grant service connection or remand for further development.

Here, the Board inexplicably concluded that presumptive service connection could not be granted because, "the Veteran's January 2002 chiropractic treatment was for low back pain and [...] he was not diagnosed with any form of arthritis until July 2004 when x-rays showed evidence of degenerative disc disease at L4-L5." [R. 10]. This is neither an accurate restatement of the evidence of record, nor of presumptive service connection under §3.303(b).

As to the record evidence, first, the Veteran notified the VA that he treated at Baptist Memorial from 1995, until at least 2002, but that by 2017 the facility no longer had records available of treatment prior to 2005. [R. 80 (80-81)] (Apr. 13, 2017 Baptist Health Info Management Department) [R. 83] (Apr. 13, 2017 Statement in Support of Claim) ("Veteran states that the treatment records that is [sic] being requested from Baptist Memorial Hospital […] are no longer available for […] anything before 2005 […] They no longer have in file."). It is unclear from the

record why he treated specifically here, but multiple other items of evidence corroborate the assertion that he began treating for his back disorder in the mid 1990s. *See* [R. 182 (178-184)] (noting diagnosis of back pain in 1996); [R. 255 (255-258)] (noting onset in 1986 and worsening in 1996). Although the Veteran need not show continuity of treatment, beginning treatment approximately seven years after service may corroborate the Veteran's statement that the condition worsened in the mid-90s. Second, the Board did not issue a credibility finding on the statement that while the back pain began in the mid-80s, it worsened in the mid-90s. [R. 255]; *see also* [R. 1353] (statement of intermittent pain since service). This speaks directly to continuity of symptomatology and may also contradict findings in the C&P examination. Third, although the Board briefly discussed treatment with a chiropractor in 2002, [R. 10], the Board failed to discuss or issue a credibility finding on the lay statement that the Chiropractor informed the Veteran that the disability "had to have happened a long time ago." [R. 2237]. A veteran is competent to relay what a medical provider told him. *See Jandreau v. Nicholson*, 492 F.3d 1372, 1376-77 (Fed. Cir. 2007), and n. 4 (lay people competent to describe experiences). This relates to the C&P examination's adequacy and its finding that the 2002 record only showed a recent issue. Fourth, closely related, the Board also failed to discuss that the imaging study from 2010 noted that the "[e]xtensive bony changes are consistent with long-standing process." [R. 1628]. That notation may corroborate the Veteran's assertion of what the chiropractor told him, and indicates that the condition pre-existed the 2010 study. Neither of the C&P examination reports opined on this notation or what the Chiropractor informed the Veteran; accordingly, the Board had no medical basis to consider this evidence. Fifth, the Board failed to discuss the medical record from 1999 diagnosing degenerative changes, which contradicts its finding as to when arthritis was shown on imaging studies, rendering

that finding clearly erroneous. See *Hanson v. Derwinski*, 1 Vet.App. 512, 518-19 (1991); *Traut v. Brown*, 6 Vet.App. 495, 498 (1994). To the extent the Board relied on speculation in the 2017 C&P examination as to the findings in the 1999 imaging study, that speculation is addressed below in section III. For the aforementioned reasons this Court should remand.

To the extent that the Board's statement that "[w]hile the Veteran is competent to report having experienced symptoms of back pain since service, he is not competent to provide a diagnosis in this case or determine that these symptoms were manifestations of a low back disability caused by the 1984 injury," was its analysis for §3.303(b) and took into account these items if evidence, [R. 6], it is well-settled that a veteran is competent to report that which comes to his senses, including pain, the location of that pain, and what a doctor conveyed to him. *See Jandreau*, 492 F.3d at 1377 (lay persons are generally competent to provide evidence on observable symptoms); *Falzone v. Brown*, 8 Vet.App. 398, 403 (1995) (veteran is competent to testify as to observable medical conditions). Doing so is not providing a layman's medical nexus. To ignore competent and credible lay statements effectively means that the VA is substituting its own opinions for that of the record, which is always harmful error. *See Colvin v. Derwinski*, 1 Vet.App. 171, 175 (1990). When the Board fails to explore the legal theories reasonably raised by the record, its statement of reasons or bases is inadequate. *See Dennis*, 21 Vet.App. at 22.

III. Neither the 2012 nor the 2017 C&P examinations are adequate

Neither of the C&P examinations the VA provided are adequate for ratings purposes. The Board failed to ensure for an adequate C&P examination or explain why one did not need to be provided. *See Charles v. Principi*, 16 Vet.App. 370, 375 (2002). The Secretary must obtain a medical opinion when necessary to decide the claim. *McLendon*, 20 Vet.App. at 81. Once an

opinion is obtained, the VA must ensure that the opinion is adequate or explain why one cannot be provided. *See Daves v. Nicholson,* 21 Vet.App. 46, 52 (2007); *Barr*, 21 Vet.App. at 311. "[A]ny and all scientific testimony or evidence admitted must not only be relevant, but also reliable." *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993). To be adequate, a medical opinion must be "accurate and fully descriptive" and based on a consideration of a veteran's prior medical history, 38 C.F.R. §4.1; *Floyd*, 9 Vet.App. at 93, and "sufficiently inform the Board of a medical expert's judgment on a medical question and the essential rationale for that opinion," *Monzingo v. Shinseki*, 26 Vet.App. 97, 105 (2012). A medical opinion based upon incorrect facts lacks probative value, *Reonal v. Brown*, 5 Vet.App. 458, 461 (1993), as does an opinion based only on data and conclusions. *See Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 304 (2004). Whether a medical examination report is adequate is a finding of fact, reviewed under the "clearly erroneous" standard. *See* 38 U.S.C. §7261(a)(4); *Nolan v. Gober*, 14 Vet.App. 183, 184 (2000). The Board's determination of the adequacy of a medical examination must be supported by adequate reasons or bases. *See* 38 U.S.C. §7104(d)(1). Reliance on an inadequate medical examination frustrates judicial review. *See Hicks v. Brown*, 8 Vet.App. 417, 422 (1995) (concluding that an inadequate medical evaluation frustrates judicial review); *Ardison v. Brown,* 6 Vet.App. 405, 407 (1994); *see also Bowling v. Principi,* 15 Vet.App. 1, 12 (2001) (emphasizing Board duty to return inadequate examination report). The errors here were not harmless because the Board relied on these inadequate medical examinations to deny this claim. Had the Board adequately considered these issues, it may have remanded for a subsequent addendum. The Board's failure to do so deprived the Veteran of potentially favorable medical evidence. This necessitates remand.

A. The 2017 C&P is Based on a Misunderstanding of the Facts and Engaged in Fact-Finding

1. The 2017 has no probative weight because it is based on inaccurate factual predicates.

The 2017 C&P examination contains factual errors. Despite these errors, the Board found it entitled to full probative weight, without first addressing why these errors did not render the examination inadequate. Yet, a medical opinion based on an inaccurate factual premise is not competent evidence. *Reonal,* 5 Vet.App. at 461. Here, the examiner concluded that the first indication of back pain after service was in 2002. [R. 42]; [R. 43]. But, this is contradicted by multiple items of evidence that the Board needed to issue credibility findings on before it accorded this examination full probative weight. [R. 182 (178-184)] (noting diagnosis of back pain in 1996); [R. 255 (255-258)] (noting onset in 1986 and worsening in 1996). And, as discussed above, there is the question of the private treatment records no longer available for 1995. Next, the last item of evidence in-service that the examiner discussed was the separation examination, for which he concluded that there was a "fully normal orthopaedic and neurological examination at his exit examination." [R. 43]. The obvious problem with this finding is that it is contradicted by the subsequent in-service physical therapy note which appears to record back pain. [R. 866]. If the Veteran's back was fully normal upon exit from service, as the examiner alleged, then why would back pain have been recorded near in time to exit from service? The Board must address this question in the first instance through properly issuing a credibility finding on this evidence. It is possible that the examiner would revise his analysis if he were made aware of the notation on the STR here, or if he were required to adopt a Board finding that the back was not normal on separation. Further, the examiner's claim that it is "age appropriate" for a 37 year old to suffer degenerative changes is contradicted by the study he himself cites, which notes that the overwhelming majority of those in the 20-39 age group do not have this disorder. [R. 44]

("spondylosis is documented in 24 percent of those 20-39 years old"). If most in that age group do not have this disorder, how is it age appropriate for someone so young to have degenerative changes? The Board did not seek clarification. Closely related, his conclusion that "degenerative disorders in the spine are normal, age-related phenomena and largely asymptomatic in most cases[,]" [R. 44], is impermissibly ambiguous because it can be taken to mean that arthritis occurs as people age, or it could mean that arthritis occurs because of aging. *See* 38 C.F.R. §4.2 ("[I]f [a] report does not contain sufficient detail, it is incumbent upon the rating board to return the report as inadequate"). If it occurs as people get older, *vis-a-vis* because of old age, then the finding is entirely irrelevant to whether the Veteran can obtain service connection for this disorder. See *Daubert*, 509 U.S. at 591 ("Expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful"). As a matter of logic, merely because something first occurs after a delay of time does not mean that it occurred because of that delay of time. And, if arthritis always occurred merely because of aging, then it begs the question why the VA has ratings for arthritis to begin with, which are designed to compensate veterans for injuries sustained in-service. Obviously the Secretary has, in general, already conceded through promulgating the ratings tables that arthritis can result from events or injuries in-service, and not merely because of age. *Cf.* 38 C.F.R. §3.309(a); *Walker* at 1331. Clarification is critical because he did not address if arthritis can be caused by trauma from an assault, which was the purpose of the remand. Additionally, he speculated that the diagnosis in 1999 was actually spondylosis, despite the record in question not making this diagnosis, [R. 1726], and despite other records appearing to make a distinction between the two disorders. *See e.g.,* [R. 1419-1420]; [R. 123]. While the Board found this finding particularly significant, as evidenced by the amount of space it allocated to it, the Board did not

consider this finding against the contradictory evidence. [R. 8-9]. Finally, the examiner's conclusion is based entirely on "muscle spasms" and not whether an assault can result in arthritis, which was the point of the remand. The Board did not address these discrepancies before according full probative weight. Remand is required for the Board to address these issues in the first instance.

2. The speculation in the 2017 examination was impermissible fact-finding.

The 2017 C&P cannot be used to decide this claim because it engaged in speculative fact-finding. *Colayong v. West*, 12 Vet. App. 524, 534–35 (1999). Here, the examiner speculated that the back pain noted after the in-service assault "is more likely than not related to his sleep rather than to the trauma." [R. 42]. His only non-speculative support for this speculation is that the examination the day prior did not record back pain. *Id.* Importantly, there is no indication in the contemporaneous STRs that this back pain was merely from sleep. The Board did not issue a credibility finding or resolve this impermissible speculative fact finding. *See Owens*, 7 Vet.App. at 433. Theoretical speculation lacking a basis in the record does not create a genuine issue of fact. *Cf. Penn. Dental Ass'n. v. Med. Serv. Ass'n.,* 745 F.2d 248, 262 (3d Cir.1984); *Novartis Corp. v. Ben Venue Labs., Inc.*, 271 F.3d 1043, 1051 (Fed. Cir. 2001); *see also Gabrielson v. Brown,* 7 Vet.App. 36, 40 (1994) (medical opinion is only that, an opinion providing medical evidence). When an examiner makes factual findings instead of medical opinions, a new medical examination may be necessary to "remove whatever taint there may be from [the examiner's] overreaching in his report." *Sizemore v. Principi*, 18 Vet. App. 264, 275 (2004). When "the Board fail[s] to acknowledge or discuss the fact that the [examiner] overstepped when he opined on purely factual matters that are the purview of VA or Board decisionmakers alone," this Court is "unable to assess whether the Board was aware of this problem with the […] opinion on which it relied and whether its findings

and conclusions may have been influenced thereby." *Rogers v. McDonald*, No. 13–3039, 2015 WL 1939366, at *9 (CAVC Apr. 30, 2015) (non-precedential)[3]. "This renders inadequate the Board's reasons or bases for finding the opinion adequate and relying on it to decide the claim," and "remand is required to correct the Board's errors." *Id.* The Board has to render a credibility determination on these findings in the first instance. *Washington v. Nicholson*, 19 Vet.App. 362, 368 (2005). Further, this report should have been returned because it is not even clear what the examiner's medical basis was for this speculation. *See* 38 C.F.R. §4.2; *see also Nieves-Rodriguez*, 22 Vet.App. at 301 ("medical examination report must contain not only clear conclusions with supporting data, but also a reasoned medical explanation connecting the two"). Where a physician's opinion "sits by itself, unsupported and unexplained […] his opinion is purely speculative," and cannot provide the "degree of certainty" required for medical evidence. *Bloom v. West*, 12 Vet.App. 185, 187 (1999). "The Board's reliance on an unsupported conclusion also hampers meaningful review by the Court." *See Stefl v. Nicholson,* 21 Vet.App. 120, 124 (2007). In finding this examination fully probative, the Board adopted this speculation as its own, without explanation. But, the Board may not abdicate its responsibility to a medical examiner. *Owens*, 7 Vet.App. at 433.

B. The 2012 C&P examination is inadequate because it contains factual errors.

The September 11, 2012 C&P examination 1) incorrectly found that there was no history of recurrence of the back disorder while in-service, *compare* [R. 1363] *and* [R. 866] *and* [R. 825] (exit medical examination noting "sometime have lower back pain after bending then […] straightening

[3]Under U.S. VET. APP. R. 30(a), this case is referenced not as precedential authority, but instead only for the persuasive value of its logic and reasoning to show how this Court has treated this issue.

up"), 2) did not consider the physical therapy note after the exit medical examination, [R. 866], 3) did not consider the in-service assault, [R. 750], and 4) incorrectly concluded that there were no complaints of back pain after 2010. *Compare* [R. 1363] ("no new information is apparently provided since 2010. claims file is thoroughly reviewed with particular attention paid to all pages since denial in 2010") *and* [R. 1369] (2012 VAMC record noting back pain) *and* [R. 932] (2012 VAMC record noting back pain) *and* [R. 63] (2017 VAMC record noting back pain)[4]. The latter itself is an impermissible credibility determination cloaked as a medical finding because the examiner is implying that the Veteran did not continue to seek treatment after he filed his claim. These errors mean that the 2012 C&P examination also has no probative weight. *See Reonal,* 5 Vet.App. at 461; 38 C.F.R. §4.1. Being defective itself, the subsequent C&P examination did not cure these defects. *See Horn v. Shinseki*, 25 Vet.App. 231, 241 (2012) ("an accretion of medical opinions, each of which is entitled to no weight in its own right, cannot add probative value to the ultimate medical conclusion"). Finally, neither C&P examination opined on all of the disorders diagnosed.

Conclusion and Relief Sought

Because of the foregoing, this Court should vacate the Board's decision and remand for additional development as discussed above.

Respectfully submitted,

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[4] Although the latter two VAMC records were created after the 2012 exam, this still does not absolve the Board from determining whether the 2012 C&P examination is based on a materially inaccurate factual predicate. Regardless, even at the time of the November 2012 C&P examination the medical evidence showed continued treatment for the back after the 2010 date alleged by the C&P examiner.