Vet.App. No. 18-7419

IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

BENJAMIN J. SELTZER, IV,
Appellant,

v.

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

ON APPEAL FROM THE BOARD OF VETERANS' APPEALS

BRIEF OF THE APPELLEE SECRETARY OF VETERANS AFFAIRS

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ON APPEAL FROM THE
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BRIEF OF THE APPELLEE
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I. ISSUES PRESENTED

1. Did the Board of Veterans' Appeals (Board) properly find that it did not have jurisdiction over claims currently pending before the Agency?

2. Did the Board correctly deny service connection for a low back disability and a bilateral knee disability where the probative evidence of record does not demonstrate that these conditions are etiologically related to Appellant's active duty service?

3. Is there a plausible basis in the record for the Board's finding that a rating in excess of 30% is not warranted for Appellant's bilateral plantar fasciitis?

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

The United States Court of Appeals for Veterans Claims (Court) has jurisdiction under 38 U.S.C. § 7252(a), which grants the Court exclusive jurisdiction to review Board decisions. The Court, however, lacks jurisdiction to hear the issues that were remanded, withdrawn, or not appealed. *See Breeden v. Principi,* 17 Vet.App. 475, 477 (2004). Here, the Board remanded the issues of entitlement to service connection for (1) a right ankle disability, (2) an eye disability, to include iritis with vision loss, (3) hypertension, to include as secondary to service-connected other specified trauma and stressor related disorder, (4) a bilateral wrist disability, to include carpal tunnel syndrome and (5) entitlement to a rating above 10% for degenerative changes of the left big toe.

B. Nature of the Case

Appellant Benjamin J. Seltzer, IV, appeals the August 31, 2018, Board decision that denied service connection for (1) a low back disability, (2) a bilateral knee disability, and (3) entitlement to a rating above 30% for plantar fasciitis with degenerative arthritis of both feet. [Record Before the Agency (R.) at 4-24].

C. Statement of Relevant Facts

Appellant served on active duty in the United States Navy from June 1978 to December 1999. [R. at 5340 (DD 214)].

In June 2013, Appellant submitted a claim seeking service connection for bilateral knee and low back pain. [R. at 5184-85 (June 2013 Statement in Support

of Claim)]. Appellant reported that since his separation from service he has "been experiencing lower back pain" which he related to "the physical rigo[]rous activities of being in the military." [R. at 5184]. Appellant similarly reported that he experiences bilateral knee pain "[d]ue to the physical rigo[]rous activities of being in the military." [R. at 5185]. Appellant further asserted that he believed "the cartilage in [his] knees may have deteriorated due to the physical requirements and exercise [he] did to maintain his weight and health while in the service." *Id*.

In light of his application for disability benefits, Appellant was afforded a December 2013 Department of Veterans Affairs (VA) examination for his bilateral knee condition. [R. at 4597-603 (November 2013 Examination Request), 4391-98 (December 2013 VA Examination)]. During this VA examination, Appellant was noted to have normal flexion and extension for both the right and left knee, without any evidence of pain on motion. [R. at 4392-94]. The VA examiner further reported that Appellant did not experience any additional limitation in range of motion following repetitive use testing and noted that there was no functional loss of either the right or left knee. [R. at 4394-95]. The only abnormal finding reported by the VA examiner was that anterior instability testing of both the right and left knee was significant for "1+" or "0-5 millimeters." [R. at 4395]. Otherwise, the VA examiner reported there was no evidence or reported history of recurrent patellar subluxation or dislocation bilaterally. [R. at 4396].

The December 2013 VA examiner diagnosed Appellant with patellofemoral pain syndrome for both the right and left knee. [R. at 4392]. The examiner

observed that x-ray images of both knees were normal and showed no signs of degenerative changes. [R. at 4397-98]. Following this physical examination, and a review of Appellant's service treatment records (STRs) and post-service medical records, the examiner opined that Appellant's current bilateral patellofemoral pain syndrome is less likely as not etiologically related to his active duty service. [R. at 4407-8]. The examiner explained that Appellant's STRs did not contain any references or treatment to "a specific injury or sustained pattern of knee problems" that would be related to his current reports of bilateral knee pain. [R. at 4408].

In May 2014, the VA Regional Office (RO) denied service connection for left knee pain, right knee pain, and low back pain. [R. at 4249-58 (May 2014 Rating Decision)]. Appellant timely filed a notice of disagreement (NOD) and requested "de novo review" of his claims by a Decision Review Officer (DRO). [R. at 4190-207 (June 2014 NOD with attached excerpts from Appellant's STRs)]. Additionally, Appellant submitted a statement wherein he reiterated his contentions that his bilateral knee and low back pain were caused by the physical nature of his active duty service. [R. at 4184-85 (June 2014 Statement in Support of Claim)].

In September 2014, Appellant submitted an additional statement wherein he requested that VA provide him with new examinations to assess his bilateral knee condition and his low back disability. [R. at 4123 (September 2014 Statement in Support of Claim)]. Coincident with his statement, Appellant submitted private treatment records and a positive medical opinion from his VA treating physician. [R. at 4124-33 (September 2014 submission of private medical records), 4134

(September 2014 Medical Opinion from Anna Quan, M.D.)]. After receipt of this additional evidence, the RO issued a Deferred Rating Decision in October 2014, which requested that Appellant be afforded VA examinations for his lumbar spine and right knee. [R. at 3881 (October 2014 Deferred Rating Decision)].

Appellant underwent a second VA examination in November 2014 for his complaints of right knee pain. [R. at 3856-74 (November 2014 Knee and Lower Leg Disability Benefits Questionnaire (DBQ))]. Although the RO did not request Appellant's left knee be evaluated, the November 2014 examiner performed range of motion testing for both the right and left knee and reported that Appellant did not experience any reduced range of motion, either during initial testing or following three repetitions. [R. at 3859-60]. The examiner reported that Appellant experienced functional loss of the right knee only, which was described as pain on movement. [R. at 3862]. Joint stability testing was performed, but the examiner indicated that there was no right or left knee instability. [R. at 3866]. Based on this physical examination, Appellant was diagnosed with a right knee strain. [R. at 3857].

Appellant was additionally afforded a VA examination for his low back disability in November 2014. [R. at 3838-55 (November 2014 Back DBQ)]. At the beginning of this examination, Appellant provided a summary of symptoms, which he described as beginning in 1990 and caused by "lifting heavy equipment during service." [R. at 3840]. Appellant reported that he experienced back pain daily, but that "there are no specific functional limitations" from his back pain other than

noting "that running can be difficult at times." *Id*. The examiner performed range of motion testing and reported that Appellant exhibited normal ranges across all tested planes. [R. at 3840-41]. The examiner further noted that there was no additional limitation following repetitive range of motion testing and that no pain was reported or observed during testing. [R. at 3841-42]. Based on this normal physical examination, the examiner diagnosed Appellant with intervertebral disc syndrome. [R. at 3839].

In February 2015, the RO issued another Deferred Rating Decision which stated that new VA examinations were needed for both the right knee and low back claims. [R. at 3399 (February 2015 Deferred Rating Decision)]. The RO stated that additional medical opinions were requested because, after the November 2014 VA examinations, additional medical evidence had been added to Appellant's claims file. *Id*. Thereafter, a new VA medical opinion was obtained for the low back claim, [R. at 3376-77 (March 2015 VA Medical Opinion)], and for the right knee disability, [R. at 3365-66 (March 2015 VA Medical Opinion)]. Another VA medical opinion was subsequently requested for Appellant's right knee disability because the March 2015 medical opinion had relied on an incorrect date for when Appellant separated from active duty service. [R. at 3347 (July 2015 Deferred rating Decision), 3323-24 (July 2015 VA Medical Opinion Clarification Opinion for Right Knee), 3315-16 (July 2015 VA Medical Opinion for Left Knee)].

A Statement of the Case (SOC) was issued to Appellant in July 2015. [R. at 3278-314 (July 2015 SOC)]. At that time, the DRO explained that Appellant's

service connection claims were denied because the medical opinion evidence of record did not demonstrate any relationship between Appellant's active duty service and his current bilateral knee or low back disabilities. [R. at 3305-7, 3312-14]. Appellant timely appealed to the Board and requested that he be provided with a hearing before a Veterans Law Judge (VLJ) in Washington, D.C. [R. at 3277 (August 2015 VA Form 9), 3251 (September 2015 Report of General Information)].

In addition to these service connection claims, Appellant requested an increased evaluation for his service-connected right plantar fasciitis. [R. at 4217-18 (June 2014 Application for Disability Compensation)]; *see* [R. at 5212-15 (June 2006 Rating Decision granting service connection for plantar fasciitis of the right leg)]. At that time, Appellant additionally indicated that he wished to reopen the previously denied claim for service connection for left plantar fasciitis. [R. at 4217-18, 5295-309 (April 2001 Rating Decision denying service connection for left plantar fasciitis because Appellant did not have a current diagnosis for such a disability)].

After receiving Appellant's claim, the RO afforded him a VA examination and medical opinion in September 2014. [R. at 3940-47 (September 2014 VA Examination)]. The September 2014 VA examiner noted that Appellant had bilateral plantar fasciitis and indicated that it was diagnosed in 2014. [R. at 3941]. Subsequently, the RO explained that an addendum medical opinion was necessary because a review of Appellant's STRs and post-service medical records indicated that he had been diagnosed with left plantar fasciitis as far back as 2003.

[R. at 3459 (December 2014 Deferred Rating Decision)]. A second examination was also requested to evaluate Appellant's bilateral plantar fasciitis. [R. at 3910-15 (October 2014 DBQ)].

In a December 2014 addendum medical opinion, a VA physician opined that it was at least as likely as not that Appellant's left plantar fasciitis was etiologically related to his active duty service. [R. at 3455-56 (December 2014 medical opinion)]. Based on this positive nexus opinion, the RO issued a Rating Decision that awarded Appellant service connection for left plantar fasciitis and assigned a 10% rating. [R. at 3425-31 (January 2015 Rating Decision)]. The January 2015 Rating Decision continued Appellant's 10% evaluation for the right plantar fasciitis. *Id*. Appellant timely filed a NOD with this Rating Decision and requested that he be assigned an increased evaluation for his bilateral plantar fasciitis. [R. at 3369-70 (March 2015 NOD)].

Following a de novo review by the DRO, Appellant was awarded an increased evaluation of 30% for bilateral plantar fasciitis. [R. at 1717-20 (July 2016 Rating Decision)]. The DRO explained that a rating above 30% was not warranted because the evidence did not show "pronounced symptoms" such as marked pronation or extreme tenderness of the plantar surfaces of the feet. [R. at 1721-41 (July 2016 SOC)]. Appellant timely appealed to the Board, and again stated his desire to have an in-person hearing before a VLJ in Washington, D.C. [R. at 1644 (September 2016 VA Form 9)].

On June 5, 2017, Appellant appeared and testified before a VLJ in Washington, D.C. [R. at 96-129 (June 2017 Board Testimony)]. At the outset of this hearing, the VLJ noted the claims on appeal included, in relevant part, (1) service connection for a right knee disability, (2) service connection for a left knee disability, (3) service connection for a low back disability, and (4) entitlement to a rating above 30% for bilateral plantar fasciitis. [R. at 97]. At the conclusion of Appellant's testimony, the VLJ acknowledged Appellant's concern that he had additional evidence in his possession that he believed my not be associated with his claims folder. [R. at 127]. The VLJ informed Appellant that while he was in Washington, D.C., he could speak with an on-site VA employee who would help him determine if such records had been associated with his electronic claims file. *Id*. Appellant was additionally informed that he could submit additional records following his Board hearing. [R. at 127-29].

Following this June 2017 Board hearing, Appellant submitted multiple requests to delay any decision so that he could submit additional evidence into the record. [R. at 94 (September 2017 Request for an Extension), 87 (January 2018 Request for an Extension), 84 (April 2018 Request for an Extension)]. The VLJ granted two of these requests, [R. at 92 (November 2017 Board Correspondence), 85 (February 2018 Board Correspondence)], but denied Appellant's final request for an extension of time because Appellant had failed to show good cause for the continued delay, [R. at 63 (May 2018 Board Correspondence)].

On August 31, 2018, the Board issued the decision on appeal. [R. at 4-24]. This appeal followed.

III. SUMMARY OF THE ARGUMENT

The Court should affirm the Board's August 2018 decision. First, the Board did not err when it explained that it did not have jurisdiction over claims that the RO was still developing. Second, the Board properly denied service connection for a low back disability, a left knee disability, and a right knee disability, because the probative evidence of record does not establish a nexus to Appellant's active duty service. Third, the Board adequately explained that the evidence of record does not support a finding that Appellant's bilateral plantar fasciitis is consistent with an increased 50% disability rating. Appellant fails to demonstrate that the Board committed any prejudicial error.

IV. ARGUMENT

A. Standard of review

The Board's determinations of whether to award service connection, whether a medical examination is adequate, and the degree of disability assigned to a condition under a rating code are findings of fact subject to review under the clearly erroneous standard. *See Nolen v. Gober*, 14 Vet.App. 183, 184 (2000); *Robertson v. Shinseki*, 22 Vet.App. 358, 365 (2009); *Smallwood v. Brown*, 10 Vet.App. 93, 97 (1997); *Gilbert v. Derwinski*, 1 Vet.App. 49, 52-57 (1990) (a finding of fact is not clearly erroneous if there is a plausible basis for it in the record). The Supreme Court has held that a finding is clearly erroneous "when although there

is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985) (explaining how an appellate court reviews factual findings under the "clearly erroneous" standard). Further, under this standard, the Court may not reverse a finding of fact just because it "would have decided the [matter] differently." *Cooper v. Harris*, 137 S. Ct. 1455, 1465 (2017) (citing *Anderson*, 470 U.S. at 575). "A finding that is 'plausible' in light of the full record—even if another is equally or more so—must govern." *Cooper*, 137 S. Ct. at 1465.

The Court also reviews the Board's decision to determine whether the Board supported its decision with a "written statement of [its] findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented on the record." 38 U.S.C. § 7104(d)(1). "The statement must be adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court." *Allday v. Brown*, 7 Vet.App. 517, 527 (1995). However, § 7104(d)(1) does not require the Board to use any particular statutory language or "terms of art," and it does not require "perfection in draftsmanship." *Jennings v. Mansfield*, 509 F.3d 1362, 1366 (Fed. Cir. 2007); *McClain v. Nicholson*, 21 Vet.App. 319, 321 (2007). Additionally, the Board is presumed to have considered all the evidence of record, even if the Board does not specifically address each item of evidence. *Newhouse v. Nicholson*, 497 F.3d 1298, 1302 (Fed. Cir. 2007).

It is relevant to the Court's standard of review that an appellant generally bears the burden of demonstrating error in a Board decision. *Hilkert v. West*, 12 Vet.App. 145, 151 (1999), *aff'd* 232 F.3d 908 (Fed. Cir. 2000); *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) (holding that the Appellant bears the burden of demonstrating prejudicial error). An appellant's burden also includes the burden of demonstrating that any Board error is harmful. *Waters v. Shinseki*, 601 F.3d 1274, 1278 (Fed. Cir. 2010). Furthermore, arguments not raised in the initial brief are generally deemed abandoned, and the Court should find that Appellant has abandoned any argument not presented in his initial brief. *See Carbino v. West,* 168 F.3d 32, 34 (Fed. Cir. 1999) ("[C]ourts have consistently concluded that the failure of an appellant to include an . . . argument in the opening brief will be deemed a waiver of the . . . argument").

B. The Board properly determined that it did not have jurisdiction over the pending claims addressed in a May 2017 Rating Decision because Appellant filed a timely NOD and the RO was taking action on those claims

This Court does not have jurisdiction over claims that are currently pending before the agency, and thus it should reject Appellant's request that this Court "retain jurisdiction" over claims that remain before the RO and are not currently on appeal. *See* Appellant's Notice of Appeal (NoA) at 2; *see also* Appellant's Informal Brief (App. Br.) at 4-5, 14 (requesting that his NoA be reviewed and addressed). Specifically, Appellant requests that this Court take jurisdiction over his claims for service connection for characteristic callosities of the right and left feet, for right

big toe arthritis, and the claims for entitlement to a rating above 10% for the left ankle and to a compensable rating for tinea versicolor, tinea pedis, and tinea unguium. App. Br. at 12; *see* [R. at 151-59 (May 2017 Rating Decision)]. The Court should decline this request because, as the Board correctly explained, the RO "is still taking action on these issues." [R. at 7].

In the May 2017 Rating Decision, the RO denied Appellant's claims for entitlement to service connection for characteristic callosities of the right and left feet, and for right big toe arthritis. [R. at 151-59]. The RO additionally denied Appellant's claims for a compensable rating for tinea versicolor, tinea pedis, and tinea unguium (also claimed as black toe nails and thickening). *Id*. Further, the May 2017 Rating Decision awarded Appellant an increased 10% rating for his left ankle lateral collateral ligament sprain but explained that a rating above 10% was not warranted based on the evidence of record. *Id*. The RO notified Appellant of these findings and informed him that he had one year to file a NOD. [R. at 130-46 (May 25, 2017 Correspondence)]. Thereafter, on May 25, 2018, Appellant submitted his NOD to the RO's May 2017 Rating Decision. [R. at 80-81]. In addition to his formal NOD, Appellant attached additional records in support of his claims. [R. at 64-82]. The Secretary notes that these documents are the same documents that Appellant attached to his NoA and the same documents that Appellant argues are missing from the Record Before the Agency (RBA). *Compare* [R. at 64-82], *with* NoA at 3-17.

In the decision on appeal, the Board acknowledged that Appellant had timely filed a NOD to the RO's May 2017 Rating Decision. [R. at 7]. The Board then explained that, because the RO was actively working on Appellant's claims, it did not have jurisdiction over these claims and it was not necessary to issue a remand for the RO to provide Appellant with a SOC. *Id.* (citing *Manlincon v. West*, 12 Vet.App. 238 (1999)). The Board did not err in declining to exercise jurisdiction. Moreover, Appellant is not without recourse. As this Court held in *DiCarlo v. Nicholson*, if a claimant desires a decision on a claim pending before VA, the appropriate course of action is to request that VA render such a decision, and once VA renders that decision, pursue his appellate rights by filing an appeal to the Board. 20 Vet.App. 52, 57 (2006). Once a decision on that claim has been rendered by the Board, the claimant may seek review of that decision by the Court, properly subjecting it to the Court's jurisdiction. 38 U.S.C. § 7252(a); *DiCarlo*, 20 Vet.App. at 57-58.

In sum, because the Board lacks jurisdiction over Appellant's claims for service connection for characteristic callosities of the right and left feet, and for right big toe arthritis, and over the claim for a compensable rating for black toe nails and thickening, the Court also lacks jurisdiction of these claims. The Secretary also notes that, because the RO is still developing the claims addressed in the May 2018 NOD, Appellant will be provided with another opportunity, if he so desires, to provide testimony before a VLJ. *See* App. Br. at 12-14 (arguing that

the Board erred when it did not allow him to present testimony concerning the claims addressed in the May 217 Rating Decision).

C. The Board's service connection determinations are supported by a plausible basis in the record and an adequate statement of reasons or bases

The Board adequately supported its decision to deny Appellant's service connection claims with a discussion of the relevant facts and a concise statement of its reasons and bases. In his informal brief, Appellant asserts that the Board provided an inadequate statement of reasons or bases for denying his claims for right and left knee disabilities and for his low back disability. App. Br. at 5-9; *See Calma v. Brown*, 9 Vet.App. 11, 15 (1996) (noting that the Court liberally interprets pleadings from pro se appellants); *see also Coker v. Nicholson*, 19 Vet.App. 439, 442 (2006), *rev'd on other grounds sub nom. Coker v. Peake*, 310 F. App'x 371 (Fed. Cir. 2008) (per curiam order) (stating that an appellant must "plead with some particularity the allegation of error so that the Court is able to review and assess" the arguments). More specifically, Appellant contents that the Board erred in not explaining why it found the September 2014 positive medical opinion less probative than the VA medical opinions of record. App. Br. at 5. He also contends that the Board erred when it did not consider the full scope of his bilateral knee disability, including the notations for diagnoses other than osteoarthritis. App. Br. at 8. The Secretary respectfully refutes these arguments.

Establishing service connection generally requires medical, or in certain circumstances, lay evidence of (1) a current disability; (2) the in-service incurrence

or aggravation of a disease or injury; and (3) a nexus between the current disability and the claimed in-service disease or injury. *Hickson v. West*, 12 Vet.App. 247, 252 (1999). Lay evidence may provide sufficient support for a finding of service connection, but lay evidence generally is not competent to establish facts that require medical knowledge or expertise. *Clemons v. Shinseki*, 23 Vet.App. 1, 4-5 (2009); *Barr v. Nicholson*, 21 Vet.App. 303, 307 (2007). "Whether lay evidence is competent and sufficient in a particular case is a fact issue to be addressed by the Board." *Jandreau v. Nicholson*, 492 F.3d 1372, 1377 & n.4 (Fed. Cir. 2007); *see Washington v. Nicholson*, 19 Vet.App. 362, 368 (2005) (explaining that it is the Board's responsibility to assess the credibility and probative weight of evidence).

Service connection may also be awarded on a presumptive basis for certain chronic diseases listed in 38 C.F.R. § 3.309(a) that manifest during service and then again at a later date. 38 C.F.R. § 3.303(b); *see Walker v. Shinseki*, 708 F.3d 1331, 1337 (Fed. Cir. 2013). Evidence of continuity of symptomatology may be sufficient to invoke this presumption if a claimant demonstrates (1) that a condition was "noted" during service; (2) evidence of post-service continuity of the same symptomatology; and (3) medical or, in certain circumstances, lay evidence of a nexus between the present disability and the post-service symptoms. *Barr*, 21 Vet.App. at 307 (citing *Savage v. Gober*, 10 Vet.App. 488, 496-97 (1997)); 38 C.F.R. § 3.303(b).

i. Low Back Disability

In its decision here, the Board began by acknowledging Appellant's contention that his current low back disability developed as a result of his having to "carry heavy boxes of paper and other supplies up and down ladders of six decks" during his active duty service. [R. at 8]. The Board additionally acknowledged Appellant's contention that his back deteriorated as a result of his "physically rigorous activities, including running and exercising on metal or steel decks" while on active duty. *Id*. Next, the Board noted that Appellant testified that he "first noticed his back symptoms in 2000." [R. at 8, 120 (June 2017 Board Testimony)]. The Board then noted that the post-service medical records established that Appellant had a current diagnosis for lumbar spine degenerative disc disease. [R. at 9].

After reviewing this evidence, the Board explained that the question on appeal is "whether [Appellant's] currently diagnosed lumbar spine disease is etiologically related to his active duty service." *Id*. In this regard, the Board noted that the record contained conflicting medical opinions concerning the cause of Appellant's current low back disability. The Board first discussed the positive September 2014 medical opinion, authored by Appellant's VA treating physician, which found that Appellant "sustained an injury to his back during service, which at least as likely as not led to the current arthritic changes in his back." [R. at 10, 4134]. The Board explained that it found this medical opinion was entitled to little probative value because it lacked a rationale and failed to acknowledge that Appellant's STRs do not document any reports of injuries to the lower back or any

low back symptoms. [R. at 10]; *See Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 304 (2008) (explaining that an adequate medical examination report allows the Board to conclude that a medical expert has applied valid medical analysis to the significant facts of a claimant's case). The Board also explained that it found the September 2014 medical opinion of little probative value because the author did not consider Appellant's contentions of how his in-service duties, such as lifting and carrying heavy boxes, caused his current low back disability.

Next, the Board explained that it found the March 2015 VA medical opinion more probative on the question of the etiology of Appellant's low back disability. [R. at 10, 3376-77]. Here, the Board explained that the March 2015 VA examiner considered Appellant's STRs, which contained no evidence of any low back symptoms, and Appellant's lay reports that he did not notice symptoms of a low back disability until a year after his discharge from active duty service. *Id*. The Board noted that the examiner considered Appellant's reports of weightbearing activities during his active duty service, but that the examiner found this contention was unsupported by medical literature. [R. at 10, 3377]. Rather, the examiner explained that "[p]hysical fitness is felt to . . . improve muscle strength" which provides "protective benefits" against injuries. [R. at 3377]. The examiner explained that the degenerative changes demonstrated by Appellant's medical records and MRI reports indicate that his condition is more consistent with general wear and tear associated with aging. [R. at 3376-77 (explaining that Appellant's August 2014 MRI documented spondylitic changes that are "very common in

[Appellant's] age demographic and by themselves do not provide injury from service," and that medical literature "demonstrates that spondylosis and disc bulging and herniation can occur in up to 50% or greater in asymptomatic individuals age 50 and [older]")]. After summarizing the March 2015 VA examiner's opinion, the Board explained that it found this medical opinion more probative because the examiner's opinion was based on a review of the evidence, including Appellant's lay contentions, and because the opinion was supported by an adequate rationale which included references to medical literature. [R. at 10-11].

The Board's explanation for finding the March 2015 VA medical opinion more probative than the September 2014 opinion is not clearly erroneous. *D'Aries v. Peake*, 22 Vet.App. 97, 107 (2008) (explaining that the Board is permitted to favor one medical opinion over another, provided that it gives an adequate statement of its reasons or bases for doing so). Here, the Board explained that the September 2014 medical opinion was less probative because it did not consider Appellant's reports regarding how his in-service activities caused wear and tear on his low back. [R. at 10, 4134 (September 2014 medical opinion, discussing only the impact of such in-service activities on Appellant's knees)]. The Board also explained that it found the September 2014 medical opinion less probative because it lacked a supporting rationale. [R. at 10]. The Board explained that, in contrast to the 2014 opinion, the March 2015 VA medical opinion was more probative because of the examiner's detailed review and discussion of the evidence and because he supported his findings with a clear rationale. [R. at 10-

11]; *see Deloach v. Shinseki*, 704 F.3d 1370, 1380 (Fed. Cir. 2013) (holding "that the evaluation and weighing of the evidence are factual determinations committed to the factfinder-in this case, the Board"); *see also Washington*, 19 Vet.App. at 367-68 (noting that it is the Board's duty, as factfinder, to assess the credibility and probative weight of all relevant evidence). As such, the Board did not err in finding the March 2015 VA medical opinion more probative and clearly explained why it favored that opinion over the September 2014 medical opinion.

After discussing the medical opinion evidence, the Board next explained that the evidence did not warrant a finding that Appellant's low back disability is presumptively related to his active duty service under 38 C.F.R. § 3.303(b). [R. at 11]. The Board reasoned that Appellant's STRs did not "reflect any treatment or diagnosis for any back problem" during his active duty service. *Id*. As no back disability was noted during Appellant's active duty service, the Board correctly determined that presumptive service connection was not warranted. *See Walker*, 708 F.3d at 1340. Thus, because Appellant's STRs do not reflect any evidence of treatment of complaints for a low back condition, the Board's determination was not clearly erroneous.

Finally, the Board explained that Appellant's lay contentions of an etiology between his low back disability and his active duty service were not sufficient to establish a nexus. [R. at 11]. The Board explained that the determinative issue of causation is a medical question requiring competent medical evidence, and it reasoned that Appellant has not demonstrated that he has the requisite specialized

training to render a competent medical assessment on the etiology of his current disability. *Id*. This determination is not clearly erroneous. *See Jandreau*, 492 F.3d at 1377 (stating that the competency of lay evidence is a fact issue to be addressed by the Board); *Gilbert*, 1 Vet.App. at 53.

In sum, the Board considered the evidence of record and provided an adequate statement of reasons or bases for why the preponderance of the evidence weighs against Appellant's claim. As the Board's findings are not clearly erroneous, the Court should affirm the Board's denial of service connection for a low back disability.

ii. Left and right knee disabilities

In discussing the claims for service connection for the bilateral knee disabilities, the Board again began by acknowledging Appellant's contentions that his current disabilities were caused by his active duty service. [R. at 8]. Then, the Board noted that Appellant's post-service medical records show that he has been diagnosed with bilateral knee osteoarthritis. [R. at 12]. Appellant contends that the Board erred in limiting its analysis to "osteoarthritis," but the Board did not do so. "Osteoarthritis" is a general term encompassing "noninflammatory degenerative joint disease . . . characterized by degeneration of the articular cartilage, hypertrophy of bone at the margins, and changes in the synovial membrane." *See Dorland's Illustrated Medical Dictionary*, 1344 (32d ed. 2012). Thus, although Appellant correctly points out that medical evidence contains findings of knee "joint effusions," "tri-compartmental osteoarthritic changes," and

"chondromalacia of the patella," these are all encompassed within the generalized diagnosis for "osteoarthritis."[1] As such, the Board considered the entirety of Appellant's diagnosed right and left knee disabilities and reported symptoms of pain. *See Clemons,* 23 Vet.App. at 5.

The Board next explained that the question on appeal was whether Appellant's "current bilateral knee disability is etiologically related to his active duty service." [R. at 12]. Here, the Board once again noted that there were conflicting medical opinions of record. The Board explained that the September 2014 medical opinion from Appellant's VA physician provided a positive nexus between Appellant's active duty service and his current knee disability. [R. at 12, 4134 (September 2014 medical opinion where Appellant's physician opined that "rigorous/repetitive . . . running/working on ships with steel decks and ladders [have] worn down his knees due to impact.")]. The Board explained that it found the September 2014 medical opinion less probative because the examiner did not indicate whether Appellant's STRs were reviewed and also did not explain what evidence supported a nexus between the current disabilities and Appellant' active duty service. [R. at 12]; *See Nieves-Rodriguez*, 22 Vet.App. at 304 (explaining that an adequate medical examination report allows the Board to conclude that a

[1] Chrondromalacia of the patella is defined as pain and crepitus over the anterior aspect of the knee, particularly in flexion, with softening of the cartilage on the articular surface of the patella." *See Dorland's* at 352.

medical expert has applied valid medical analysis to the significant facts of a claimant's case).

The Board then explained that it found the July 2015 VA medical opinions more probative because each opinion was supported by a detailed rationale. Specific to the right knee, the Board explained that the examiner found it significant that Appellant was noted to have a normal right knee at his separation examination and that the first report of early arthritic changes did not occur until 2008, which was nearly 10 years after his separation from service. [R. at 12-13, 3323-24]. The examiner explained that the radiographic evidence showing the development of early arthritic changes nearly 10 years following the Appellant's separation from service suggested that the current right knee disability is unrelated to his active duty service. [R. at 3323]; *see Maxson v. Gober*, 230 F.3d 1330, 1333 (Fed. Cir. 2000) (explaining that evidence of a prolonged period without medical complaint or treatment is one factor for consideration in determining whether a nexus exists). The Board also noted that the examiner additionally explained that recent x-rays of Appellant's right knee "show only minimal signs of [degenerative joint disease] with mild narrowing of the joint space," which the examiner explained "is consistent with more recent disease rather than an onset of disease during active service." [R. at 13, 3324]. Based on this evidence, the examiner concluded that Appellant's right knee "degenerative condition is more than likely incurred after service and is likely due to advancing age and activities of daily living." *Id*.

With regard to the left knee disability, the Board explained that in a separate July 2015 VA medical opinion the examiner opined that the left knee disability was less likely than not related to Appellant's active duty service. [R. at 13, 3315-16]. The Board noted that the July 2015 VA examiner reviewed Appellant's STRs, which documented treatment for a left knee strain in June 1985. [R. at 13, 5041 (June 27, 1986 Record of Medical Care)]. But the examiner explained that Appellant's STRs indicate that he sustained a mild strain because there were no reports of ongoing symptoms or limitations. [R. at 3315]. The examiner further explained that mild strains are the result of overuse and are not expected to aggravate or cause any underlying condition. *Id*. Given that the STRs did not reflect any continuous symptoms and that the post-service medical records did not document any reports of left knee symptoms for many years following Appellant's separation from service, the July 2015 VA examiner opined that the current disability was less likely than not related to his active duty service. *Id.*; *See Maxson,* 230 F.3d at 1333.

The Board's explanation for finding the July 2015 VA medical opinions more probative than the September 2014 opinion is not clearly erroneous. *D'Aries,* 22 Vet.App. at 107. The Board clearly explained that the July 2015 VA medical opinions were more probative given that the examiner reviewed Appellant's STRs and post-service medical records, and provided a detailed rationale for each conclusion which enabled to the Board to make a fully informed decision. *See Nieves-Rodriguez*, 22 Vet.App. 304; *see also Deloach*, 704 F.3d at 1380. The

Board explained that, in contrast, the September 2014 medical opinion was less probative because the examiner did not explain what evidence supported a positive nexus and because the VA physician did not explain what evidence was considered, including whether or not Appellant's STRs were reviewed. [R. at 12]; *see Washington*, 19 Vet.App. at 367-68 (noting that it is the Board's duty, as factfinder, to assess the credibility and probative weight of all relevant evidence). As such, the Board did not err in finding the July 2015 VA medical opinions more probative.

After discussing the medical opinion evidence, the Board next explained that the evidence did not warrant a finding that Appellant's bilateral knee disabilities cannot be presumptively related to his active duty service under 38 C.F.R. § 3.303(b). [R. at 14]. Here, the Board explained that the post-service medical records did not document evidence of arthritis until 2008 for the right knee and not until 2014 for the left knee. *Id*. The Board also found probative that Appellant denied any knee problems in his July 1988 and October 1999 Reports of Medical History. [R. at 14, 4924-25 (July 15, 1988, Report of Medical Examination), 4926-27 (July 8, 1998, Report of Medical History), 5166-67 (October 19, 1999, Report of Medical Examination), 5168-69 (October 19, 1999, Report of Medical History)].

Finally, the Board explained that Appellant's lay contentions of an etiology between his current bilateral knee conditions and his active duty service were not sufficient to establish a nexus. [R. at 15 (explaining that Appellant does not have the medical training required to render an opinion as to etiology of a disability)].

This determination is not clearly erroneous. *See Jandreau*, 492 F.3d at 1377 (stating that the competency of lay evidence is a fact issue to be addressed by the Board); *Gilbert*, 1 Vet.App. at 53.

In sum, the Board considered the evidence of record and provided an adequate statement of reasons or bases for why the preponderance of the evidence weighs against Appellant's claims. As the Board's findings are not clearly erroneous, the Court should affirm the Board's denial of service connection for a bilateral knee disability.

D. The Board did not err in denying a rating above 30% for Appellant's service-connected bilateral plantar fasciitis

Appellant's bilateral plantar fasciitis is rated by analogy under 38 C.F.R. § 4.71a, Diagnostic Code (DC) 5276, for pes planus (flatfoot) and is assigned a 30% disability rating. [R. at 15-16, 1717-20]. A 30% rating is assigned where there is "objective evidence of marked deformity (pronation, abduction, etc.), pain on manipulation and use accentuated indication of swelling on use, characteristic callosities." 38 C.F.R. § 4.71a, DC 5276. An increased rating of 50% is warranted for bilateral flatfoot where there is a severe condition, as exhibited by "marked deformity (pronation, abduction, etc.), pain on manipulation and use accentuated, indication of swelling on use, [and] characteristic callosities." *Id*.

The Board explained that a rating above 30% for Appellant's bilateral plantar fasciitis was not warranted because the evidence did not show that his condition was "severe" as contemplated by DC 5276. In this regard, the Board noted that

Appellant testified that his symptoms included an inability to walk on bare feet, that his right foot was more painful than the left, prolonged standing and walking worsened his pain, and that he did not receive any active treatment for his condition other than the use of insoles. [R. at 15-16]. The Board next noted that the objective findings on three separate VA examinations did not document signs or symptoms which would suggest Appellant's disability is "severe." [R. at 16]. For example, during the December 2013 VA examination, Appellant was not found to experience swelling of his feet with use, there was no evidence of characteristic calluses, there was no evidence of extreme tenderness of the plantar surfaces, and there was no objective evidence of a marked deformity of the foot. [R. at 16, 4400 (4398-4403)]. And during the September 2014 VA examination, Appellant was noted to have pain on both feet but the examiner noted that this pain did not result in any functional loss. [R. at 16, 3943 (3940-46)]. Further, in a subsequent October 2014 DBQ, Appellant was again not found to have swelling on use, to experience extreme tenderness, or to have characteristic calluses. [R. at 16, 3911-12]. Based on this objective evidence, the Board plausibly concluded that Appellant's bilateral plantar fasciitis disability was consistent with a continued 30% disability rating. [R. at 16].

Appellant argues that the Board overlooked favorable evidence which he believes demonstrates that he is entitled a 50% disability evaluation. App. Br. at 10-11. For example, Appellant argues that the evidence he submitted in May 2017 shows that he has "'deep rooted' characteristic callosities," and that this evidence

undermines the Board's denial for an increased evaluation. App. Br. at 10. But the evidence Appellant references does not support such a finding or undermine the Board's decision. These records show only that a December 2005 VA medical note found that Appellant experienced "callosity on the lateral [left] forefoot." [R. at 76]. The Secretary notes that this December 2005 VA medical note predates the period on appeal, as Appellant filed for an increased rating in 2014, and therefore this evidence cannot possibly show the state of the disability during the current rating period. [R. at 4217]. Also, to the extent Appellant references this December 2005 VA medical note for purposes establishing that he has "characteristic callosities," the Secretary emphasizes that the Board does not have jurisdiction over Appellant's claim for service connection for "characteristic callosities."

Appellant's remaining arguments amount to nothing more than a disagreement with how the Board weighed the evidence. For example, he argues the Board erred when it failed to discuss an in-service treatment record showing he was diagnosed with a "callus" on his right foot. App. Br. at 11; [R. at 75]. But Appellant's argument is not persuasive because again it appears that this evidence is related to Appellant's claim for service connection for "characteristic callosities," which the Board did not have jurisdiction to consider. Appellant also alleges that the Board failed to obtain evidence showing that he has calluses on his feet, but his argument is undermined by his own citations to evidence in the RBA. *See, e.g.,* [R. at 75 (April 7, 1981, Report of Medical Care), 76 (December 5, 2005, VA Treatment Note), 3919-20 (September 27, 2014, MRI of the right ankle)]. The

Secretary also notes that both the April 1981 and the December 2005 records pre-date the period on appeal for Appellant's increased rating claim. [R. at 4217]. Additionally, the 2014 MRI report showed that there was "no plantar fasciitis." [R. at 3919]. Thus, it is not clear why Appellant relies on this evidence to show that the Board erred in denying his claim for an increased rating.

In sum, the Court should affirm the Board's determination that a rating above 30% was not warranted for Appellant's bilateral plantar fasciitis, because the Board's findings are supported by an adequate statement of reasons or bases and fully considers the relevant evidence of record.

E. The Court should not consider any other argument, including those pertaining to matters over which the Court lacks jurisdiction

The Secretary has limited his response to only those arguments raised by Appellant in his opening brief and submits that any other arguments or issues should be deemed abandoned. *See Carbino v. West*, 168 F.3d 32, 34 (Fed. Cir. 1999). It is not the duty of the Secretary, or this Court, to uncover any errors that Appellant has not identified. *See Breeden v. West*, 13 Vet.App. 250 (2000) (per curiam order). Appellant bears the burden of demonstrating error on appeal, and he has not met that burden in this case. *See Shinseki v. Sanders*, 556 U.S. 396, 406 (2009); *Hilkert v. West*, 12 Vet.App. 145, 151 (1999).

V. CONCLUSION

In light of the foregoing, Appellee, the Secretary of Veterans Affairs, respectfully submits that the Court should affirm the August 31, 2018, decision of the Board of Veterans' Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify under possible penalty of perjury under the laws of the United States of America that, on September 4, 2019, a copy of the foregoing was mailed postage prepaid to:

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