IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

BRADLEY N. NUTTY,
Appellant,

v.

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

ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS

BRIEF OF APPELLEE SECRETARY OF VETERANS AFFAIRS

RICHARD J. HIPOLIT
Acting General Counsel

MARY ANN FLYNN
Chief Counsel

JAMES B. COWDEN
Deputy Chief Counsel

SHIR DAVIDOVICZ
Appellate Attorney
U.S. Department of Veterans Affairs
Office of General Counsel (027K)
810 Vermont Avenue, N.W.
Washington, D.C. 20420
(202) 632-6902

Attorneys for Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES

FEDERAL REGULATIONS

RECORD BEFORE THE AGENCY CITATIONS

IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

BRADLEY N. NUTTY,	)	
	)	
Appellant	)	
	)	
v.	)	Vet.App. No. 18-5810
	)	
ROBERT L. WILKIE, Secretary of Veterans Affairs	)	
	)	
Appellee	)	

ON APPEAL FROM THE BOARD OF VETERANS' APPEALS

BRIEF OF APPELLEE SECRETARY OF VETERANS AFFAIRS

I. ISSUE PRESENTED

Whether the Court should affirm that part of the June 21, 2018, decision of the Board of Veterans' Appeals (Board) that denied entitlement to an initial rating in excess of 10% for a left knee sprain.

II. STATEMENT OF THE CASE

Nature of the Case

Appellant, Bradley N. Nutty, appeals the June 21, 2018, decision of the Board that denied entitlement to an initial rating in excess of 10% for left knee sprain. [Record Before the Agency (R.) at 4 (4-15)].

The Board granted entitlement to a temporary total disability rating based on convalescence for surgery on service-connected left knee sprain from November 7, 2013 to February 1, 2014. [R. at 4 (4-13)]. This is a favorable finding by the Board that the Court may not disturb. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007) ("The Court is not permitted to reverse findings of fact favorable to a claimant made by the Board pursuant to its statutory authority.").

Statement of Facts and Procedural History

Appellant served on active duty from February 2006 to May 2007 and from August 2008 to October 2009. [R. at 2162]. Service treatment records indicate that Appellant reported left knee pain while running, however, x-rays did not indicate either fractures or degenerative changes. [R. at 4735 (4734-35)]; [R. at 4740 (4740-42)].

In June 2007, Appellant filed an application for compensation and/or pension claiming left knee pain beginning in May 2006. [R. at 4931 (4926-35)]. In March 2008, a rating decision denied service connection, as Appellant failed to report for a VA examination. [R. at 4709 (4706-12)]. Appellant did not submit a notice of

disagreement within one year. [R. at 4630]. Appellant filed a new claim in December 2009. [R. at 4630].

In February 2010, Appellant received a VA examination. [R. at 4326-33]. The examiner noted tenderness and guarding of movement, but there was no edema, instability, abnormal movement, effusion, weakness, redness, heat, deformity, malalignment or drainage. [R. at 4329 (4326-33)]. The range of motion (ROM) was flexion of 120 degrees and 118 after repetition. *Id*. Extension was noted at 0 degrees, inclusive of repetitive testing. *Id*. The examiner found that there was pain limitation after repetitive use, but that there no limitations related to fatigue, weakness, lack of endurance or incoordination. [R. at 4330 (4326-33)]. In April 2010, the Regional Office issued a decision granting a 10% rating for Appellant's left knee effective December 2009. [R. at 4270 (4269-74)]. Appellant filed a notice of disagreement in December 2010. [R. at 4229-31].

In November 2010, Appellant was afforded an additional VA examination. [R. at 4123-25]. The examiner noted that Appellant walked with a normal gait and that the left knee did not have any signs of "edema, instability, abnormal movement, effusion, weakness, redness, heat, deformity, malalignment and drainage. There is no subluxation." [R. at 4123 (4123-25)]. There was tenderness, guarding of movement, and left patella tenderness noted. *Id*. Appellant's flexion ROM was 117 inclusive of pain and the ROM remained the same after repetitive testing. [R. at 4124 (4123-25)]. Extension was at 0, inclusive of repetitive testing. *Id*. Both Appellant's x-ray results and stability tests were normal. *Id*. Appellant

was diagnosed with left knee sprain and left knee patella tendonitis which was a "result of a progression of the previous diagnosis." *Id*.

In March 2011, Appellant filed a Statement in Support of Claim stating that he was entitled to an earlier effective date. [R. at 3983]. The Regional Office issued a decision assigning October 2009 as the effective date in April 2011. [R. at 3962 (3952-64)]. A Statement of the Case was issued in July 2011. [R. at 3889-3912]. Appellant perfective his appeal in September 2011. [R. at 3845-47].

In January 2013, Appellant had a VA examination. [R. at 3574-80]. He reported painful flare-ups and "difficulty supporting his body weight and remaining stable during exercise and supporting additional weight." [R. at 3574 (3574-80)]. The degree of extension was 0 and there was no objective evidence of painful motion on extension. [R. at 3575 (3574-80)]. Appellant had limitation on ROM with repetitive use and had functional loss/impairment as well as pain on movement. *Id*. There was no anterior or posterior instability and no evidence of patellar subluxation/dislocation. [R. at 3577 (3574-80)]. The examiner noted that Appellant had a current meniscus condition with frequent episodes of joint pain and joint effusion. [R. at 3578 (3574-80)]. X-rays revealed that there was no evidence of patellar subluxation and diagnostic tests indicate normal radiographic series of the left knee. [R. at 3580 (3574-80)]. The examiner noted the following," [t]he impact of the knee/lower leg condition(s) on [Appellant's] ability to work is that he cannot stand for long periods and cannot walk far. His knees wants [sic] to 'go

out from under him' during the day. He has difficulty walking up and down ladders." *Id*. Appellant's diagnosis progressed to instability of the left ACL/PCL. *Id*.

On April 1, 2013, a decision review officer (DRO) granted a 10% evaluation for instability, left knee as secondary to the service-connected disability of sprain, left knee. [R. at 3193 (3192-93)]. A Supplemental Statement of the Case continued his 10% rating for his left knee sprain. [R. at 3197 (3194-3201)]. Appellant had a VA examination in August 2013, during which the examiner noted tenderness, guarding of movement, and crepitus. [R. at 2970 (2968-75)]. There was no edema, abnormal movement, weakness, heat, deformity, malalignment, or drainage. *Id*. Appellant's ROM was 110 degrees, inclusive of repetitive testing. [R. at 2970-71 (2968-75)]. There was 0 degrees extension. *Id*. Appellant's anterior and posterior instability tests were within normal limits. [R. at 2971 (2968-75)].

In October 2013, Appellant complained of pain, swelling, popping, and instability. [R. at 293 (293-98)]. In January 2014, the Regional Office issued a decision continuing his 10% rating. [R. at 2638 (2630-41)]. The Board issued a remand in October 2017, finding that the VA examinations from February 2010, November 2010, and January 2013 did not comply with *Correia v. McDonald*. [R. at 903 (891-905)]. The Regional Office attempted to contact Appellant via phone call twice in October 2017 and letter in November 2017 in order to schedule a new examination. [R. at 86]. However, Appellant did not respond to schedule an appointment and the examination was cancelled. *Id*.

A Supplemental Statement of the Case was issued in May 2018. [R. at 32-40]. The May 2018 supplemental statement of the case stated that "the evidence shows that Cheyenne VA called and left a message with you on the 26th and 27th of October 2017 concerning your VA exam. Current evidence shows we received aa Failure to Report for Examination Notification from VA Cheyenne dated November 7, 2017. Evidence expected from this examination, which might have been material to the outcome of your claim, could not be considered." [R. at 39 (32-40)]. Appellant submitted a May 2018 "POST-REMAND" brief to the Board that acknowledged the missed notifications and the cancelled examination but did not provide any argument regarding that circumstance and did not assert good cause for missing those examinations. [R. at 22 -25]. The Board denied entitlement to an initial rating in excess of 10% for left knee sprain in June 2018. [R. at 4-13]. The Board also found that a higher rating for instability was not warranted. [R. at 10 (4-13)]. This appeal followed.

III.SUMMARY OF ARGUMENT

The Board is not required to address procedural arguments that are not raised by a claimant. Therefore, the Board was not required to address whether proper VA procedures were followed when Appellant failed to respond to requests to make appointments for her examinations. Additionally, the Board was not required to address the presumption of regularity absent a complaint of non-receipt.

The Board properly relied on the evidence of record, given that Appellant did respond to requests for additional examination. Therefore, the Board did not fail to ensure that the duty to assist was satisfied by relying on inadequate examinations.

The Board provided adequate reasons or bases for its determination, as it addressed functional loss and pain within the decision.

IV.ARGUMENT

A. Standard of Review

In all cases, the burden is on the appellant to demonstrate error in the Board decision. *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (clarifying that the appellant bears the burden of demonstrating error). Moreover, to warrant judicial interference with the Board decision, the appellant must show that such demonstrated error was prejudicial to the adjudication of his claim. *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) (holding that the appellant bears the burden of demonstrating prejudicial error). It is the responsibility of the appellant, and the appellant alone, to articulate the basis of his or her arguments and develop those arguments sufficient to permit an informed consideration of the same. *See Locklear v. Nicholson*, 20 Vet.App. 410, 416 (2006) (holding that Court will not entertain underdeveloped arguments). Appellant fails to meet his burden in this case.

A Board determination of the degree of disability under the rating code is a finding of fact subject to the "clearly erroneous" standard of review by the Court. *See Pierce v. Principi*, 18 Vet.App. 440, 443 (2004); *see also* 38 U.S.C.

§ 7261(a)(4). A finding of fact is clearly erroneous when "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)). Under the clearly erroneous standard of review, "this Court is not permitted to substitute its judgment for that of the [Board] on issues of material fact; if there is a 'plausible' basis in the record for the factual determinations of the [Board], even if this Court might not have reached the same factual determinations, [the Court] cannot overturn them." *Gilbert*, 1 Vet.App. at 53.

B. The Board properly found that Appellant failed to respond to the VA medical center's invitations to schedule an appointment for VA examinations without good cause.

Appellant argues that the Board improperly found that Appellant failed to cooperate in the scheduling of his exams without good cause. [Appellant's Brief (App. Br.) at 10-14)]. This argument is without merit.

The record indicates that Appellant's knee and lower leg examination was cancelled because Appellant "FAILED TO RSVP." [R. at 86]. The comments for the entry explained that Appellant was called on October 26, 2017, and a voicemail was left, that he was called on October 27, 2017, and a voicemail was left, and a letter was sent to Appellant and he failed to RSVP for an examination by November 6, 2017. [R. at 86]. The

The May 2018 supplemental statement of the case stated that "the evidence shows that Cheyenne VA called and left a message with you on the 26th and 27th of October 2017 concerning your VA exam. Current evidence shows we received aa Failure to Report for Examination Notification from VA Cheyenne dated November 7, 2017. Evidence expected from this examination, which might have been material to the outcome of your claim, could not be considered." [R. at 39 (32-40)]. Appellant submitted a May 2018 "POST-REMAND" brief to the Board that acknowledged the missed notifications and the cancelled examination but did not provide any argument regarding that circumstance and did not assert good cause for missing those examinations. [R. at 22 -25]. The Board's May 2018 decision noted that "attempts were made by the RO to schedule [Appellant] for an examination, including phone calls made in October 2017 and a letter sent in November 2017. However, [Appellant] never responded." [R. at 9 (4-13)].

Appellant now, for the first time, argues to this Court that VA "did not follow its regular procedures" and Appellant attempts to bolster this argument by attaching information regarding VA procedures as exhibits to her brief. [App. Br. at 11-12, Exhibits 1 & 2]. Such argument is improper because "it is appropriate for the Board and the Veterans Court to address only those procedural arguments specifically raised by the veteran." *See Scott v. McDonald*, 789 F.3d 1375, 1381 (Fed. Cir. 2015). Appellant did not present any procedural argument to the Board, notwithstanding his acknowledgement of his failure to reply to telephone calls and a letter regarding the scheduling of the examination. [R. at 23]. "[O]rderly

procedure and good administration require that objections to the proceedings of an administrative agency be made while [the agency] has opportunity for correction in order to raise issues reviewable by the courts." *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952). "[C]ourts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the appropriate time under its practice." *Id.*

Appellant argues that, pursuant to *Kyhn v. Shinseki*, 26 Vet.App. 371 (2013), the Board was required to discuss the documents that the Board relied upon in finding that Appellant received proper notification. [App. Br. at 10-11]. Appellant's reliance on *Kyhn* is misplaced because *Kyhn* is factually different. In *Kyhn*, "the Board specifically made a factual finding about proper notification of the scheduled examination" and "[h]aving made such a finding, the Board was obliged to provide an adequate statement of the reasons or bases for the finding." *Kyhn*, 26 Vet.App. at 373. The Board made no such finding in Appellant's case. [R. at 9 (4-13)]. Therefore, the Board was not obliged to provide a statement of reasons or bases to support a finding that was never made. Additionally, *Kyhn* was decided before *Scott* established the rule that "it is appropriate for the Board and the Veterans Court to address only those procedural arguments specifically raised by the veteran." *See Scott*, 789 F.3d at 1381.

Moreover, Appellant has never asserted that he was not properly notified of the scheduling of the VA examinations; on the contrary, he acknowledged his failure to reply to telephone calls and a letter but made no assertion of non-receipt.

[R. at 23]. In *Baxter v. Principi*, 17 Vet.App. 407, 410 (2004), this Court held that the Board was not required to explain compliance when compliance was not disputed: "We reject any argument by Mr. Baxter that would require the Board to engage in an illogical exercise of explaining away evidence regarding VA's compliance with the duty to provide notice when *no one* has questioned its compliance." Thus, pursuant to *Baxter*, the Board was not required to examine the presumption of regularity unless there was an allegation of non-receipt. *Id.* at 411 ("the Board need not examine whether the presumption of regularity has been rebutted unless and until an appellant, at a minimum, alleges that he did not receive the document in question"). Therefore, this Court should reject Appellant's attempt on appeal to contest the procedures followed and the applicability of the presumption of regularity as this Court did in *Baxter*. *See id.* at 410-11. As this Court characterized the argument in *Baxter*, Appellant is inviting this Court "to engage in an illogical exercise." *See id.* at 410.

Appellant's attempt to argue that the Board should have addressed whether his psychological disability constituted good cause for his failure to respond should also be rejected. [App. Br. at 12-14]. The Board was not required to discuss hypothetical reasons that might have constituted good cause for Appellant's failure to respond to the invitation to schedule the examinations. *See Brokowski v. Shinseki*, 23 Vet.App. 79, 85 (2009) ("Although the Board must interpret a claimant's submissions broadly, 'the Board is not required to conjure up issues that were not raised by the claimant.'"); *Robinson v. Mansfield*, 21 Vet. App. 545, 553

(2008) (stating that the Board is not required "to assume the impossible task of inventing and rejecting every conceivable argument in order to produce a valid decision").

Moreover, it is Appellant's burden to show that he had good cause for any failure to appear for an examination. *See Kowalski v. Nicholson*, 19 Vet.App. 171, 177 (2005). VA's duty to assist is not "a one-way street." *See Wood v. Derwinski*, 1 Vet.App. 190, 193 (1991). A claimant has an obligation to cooperate in the development of evidence pertaining to his claim, and his failure to do so could subject him to the risk of an adverse adjudication based on an incomplete and underdeveloped record. *See Kowalski*, 19 Vet.App. at 178; s*ee Dusek v. Derwinski*, 2 Vet.App. 519, 522 (1992) ("'If a veteran wishes help, he cannot passively wait for it in those circumstances where he may or should have information that is essential in obtaining the putative evidence.'" (quoting *Wood*, 1 Vet.App. at 193)). Appellant acknowledged below his failure reply to telephone calls and a letter attempting to schedule an examination [R. at 23], however he failed to present any cause, let alone good cause, for that failure, to include the theory he is now asserting that the Board should have sua sponte considered. This argument impermissibly shifts the burden of demonstrating good cause to the Board and should be rejected by the Court.

C. The Board's Reliance on Previous Examinations Does Not Necessitate a Remand

Appellant argues that the Board relied on inadequate examinations and that, therefore, remand is necessary. Here, the Board relied on examinations from February 2010, November 2010, and January 2013 though the October 2017 Board decision found that these examinations were not compliant with *Correia v. McDonald*. [R. at 903 (891-905)]. Appellant's argument must fail because the Board acknowledges that it relies on previous examinations, and only does so due to the Appellant's failure to report to a new VA examination. *See* 38 C.F.R. § 3.655; *see also Kowalski*, 19 Vet.App. at 178; s*ee Dusek*, 2 Vet.App. at 522.

Appellant argues that the previous examinations were not adequate because they were not compliant with the requirements per *Correia v. McDonald*. [App. Br. at 15-17]. That these examinations are not complaint with those requirements is not dispute; here, the issue is that the duty to assist is not a one-way street, and Appellant cannot be a passive participant in seeking assistance to develop a claim. *Wood*, 1 Vet. App.at 193.

Here, the Board specifically acknowledged the October 2017 remand seeking additional examinations to conduct joint testing on both active and passive motion with weight-bearing and non-weightbearing, per *Correia*. [R. at 9 (4-13)]. The Board also notes that the Regional Office attempted to schedule an examination, but that Appellant failed to respond to the attempts. *Id*. The Board makes clear that the duty to assist, which includes a duty to provide adequate

examinations, does not operate solely in one direction; Appellants have to actively participate in garnering the evidence necessary for a claim rather than "passively wait for [help] in circumstances where he may or should have evidence that is essential in obtaining the putative evidence." [R. at 9 (4-13)]; *see Kowalski*, 19 Vet.App. at 178; *Wood*, 1 Vet. App at 193. Given that Appellant did not report for the examination and asserted no good cause for his failure to do so despite acknowledging that failure in his brief to the Board [R. at 23], the Board utilized the evidence that was in the record, in accordance with 38 C.F.R. § 3.655.

Here, Appellant's argument that the duty to assist was not satisfied because the examinations were inadequate is irrelevant; the Board properly utilized the evidence of record as Appellant failed to report for VA examinations.

D. The Board Adequately Addressed the Denial of A Rating in Excess of 10% for Left Knee Sprain

Lastly, Appellant argues that a remand is necessary because the Board failed to provide adequate reasons or bases for denying an initial rating in excess of 10% for left knee sprain. [App. Br. at 18-20].

A Board decision must include "a written statement of the Board's 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. § 7105(d)(1). This Court has interpreted that requirement to impose on the Board the obligation to analyze the probative value of the evidence, account for that which it finds persuasive or unpersuasive, and explain the basis of its rejection of evidence

materially favorable to the claimant. *Caluza v. Brown,* 7 Vet.App. 498, 506 (1995). *See also Johnson v. Shinseki*, 26 Vet.App. 237, 264 (2013) (Kasold, C.J. dissenting) ("The legal requirements with regard to the Board's statement are that the Board (1) address the material issues raised by the appellant or reasonably raised by the evidence, (2) explain its rejection of materially favorable evidence, (3) discuss potentially applicable laws, and (4) otherwise provide an explanation for its decision that is understandable and facilitative of judicial review."), reversed on other grounds by *Johnson v. McDonald*, 762 F.3d 1362 (Fed. Cir. 2014).

This obligation, however, is not unbounded. *See, e.g., Newhouse v. Nicholson*, 497 F.3d 1298, 1302 (Fed. Cir. 2007) (recognizing that the Board need not comment on every piece of evidence contained in the record). To the contrary, the demand placed upon the Board is quite simple: the Board must provide an explanation of its material findings and conclusions sufficient to enable the claimant and the Court to understand the basis of its decision and permit judicial review. *Gilbert*, 1 Vet.App. at 57. If the basis of the Board decision can be ascertained, its statement of reasons or bases is adequate. *Johnson,* 26 Vet.App. at 247 ("A Board statement should generally be read as a whole, and if that statement permits an understanding and facilitates judicial review of the material issues of fact and law presented on the record, then it is adequate.") (citation omitted); *see also Mayfield v. Nicholson,* 19 Vet.App. 103, 129 (2005) (observing that where judicial review is not hindered by deficiency of reasons or bases, a

remand for reasons or bases error would be of no benefit to the appellant and would therefore serve no useful purpose).

Here, Appellant asserts that the reasons or bases provided by the Board were inadequate because the Board failed to address "functional factors, such as difficulty sitting, standing, and weight-bearing." [App. Br. at 18]. The Board stated that there is a requirement of flexion being limited to 45 degrees for a 10% rating that Appellant does not meet, but that Appellant's additional pain on movement, occasional additional loss upon repetitive testing due to pain, weakness, and fatigue were previous considered when Appellant was granted a 10% rating. [R. at 10 (4-13)]. The Board found that, given that loss had been considered, the elements of *DeLuca* had been met. *Id*. Per *DeLuca v. Brown*, when a disability of the joints is evaluated based on limitation of motion, the Board must consider additional limitations due to pain, weakness, or fatigue. 8 Vet.App. 202, 205-206 (1995). Here, the Board clearly acknowledges Appellant's pain, weakness, and fatigue had been considered when providing a rating decision. [R. at 10 (4-13)]. Additionally, in its discussion of past examinations, the Board clearly denotes what examiners reported as functional loss, respectively. [R. at 7-9 (4-13)]. Here, it is clear that the applicable regulations and evidence of records has been considered. Appellant's arguments regarding the correct application of 38 C.F.R § 4.40 and 38 C.F.R § 4.45 lack supporting evidence, and given the prior consideration to functional loss, Appellant's argument is seeking an impermissible reweighing of the evidence. *See Gilbert*, 1 Vet.App. at 53. Moreover, Appellant's argument

ignores that the Board does, indeed, acknowledge Appellant's pain on movement and loss due to pain. [R. at 10 (4-13)].

Appellant asserts that the Board erred because it did not address Appellant's flare ups and the relation to Appellant's pain. [App. Br. at 19-20]. However, the Board does acknowledge that in November 2010 Appellant stated that he experienced flare-ups and the Board also acknowledged that Appellant stated he experienced flare-ups during his January 2013 VA examination. [R. at 8 (4-13)]. Moreover, the Board acknowledged Appellant's pain and the functional loss it created. [R. at 9 (4-13)]. Read as a whole, it is clear that the Board did address Appellant's reported flare ups and the limitations that the pain from the flare-ups cause Appellant; Appellant's argument is simply seeking that the evidence be weighed in a differing manner – which would impermissibly disrupt the Board's plausible findings. *See Gilbert*, 1 Vet.App. at 53.

The reasons or bases are clear and adequate, and, therefore, the Board's decision must be affirmed.

V.CONCLUSION

For the foregoing reasons, the Court should affirm that part of the Board's June 21, 2018, decision which denied an initial rating in excess of 10% for left knee sprain.

Respectfully submitted,

JAMES M. BYRNE
General Counsel

MARY ANN FLYNN
Chief Counsel

/s/ James B. Cowden
JAMES B. COWDEN
Deputy Chief Counsel

/s/ Shir Davidovicz
SHIR DAVIDOVICZ
Appellate Attorney
Office of General Counsel (027K)
U.S. Department of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, D.C. 20420
(202) 632-6902

Attorneys for Appellee
Secretary of Veterans Affairs