

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

LINDA K. BUTLER,
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**

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the Board, which denied entitlement to service connection for surgical residuals and scar residuals¹.

C. Statement of Relevant Facts

Appellant served in the United States Army from April 1977 until January 1983. (Record Before the Agency (R.) at 2522). Appellant had a postpartum bilateral tubal ligation in August 1982. (R. at 2470), (R. at 2519).

In August 1991, Appellant filed an informal claim for abdominal pain. (R. at 2102). In a January 1992 rating decision, VA denied her claim, finding her service medical records showed she was treated for abdominal pain in service, but it was not chronic, and no disability was shown at the time of her discharge examination. (R. at 2046-2047). Appellant filed a notice of disagreement in August 1992. (R. at 2040-2041). The following month, VA issued a statement of

¹ Appellant is not challenging the Board's denial of service connection for gastroesophageal reflux disease (GERD), to include as secondary to an unspecified stomach disability and/or secondary to a total hysterectomy or scar residuals of intestinal surgery as secondary to unspecified stomach disability status post-surgery for block intestines. She raises no arguments regarding this claim, and thus, the Court should consider it abandoned. See *Grivois v. Brown*, 6 Vet.App. 136, 138 (1994) (issues or claims not argued on appeal are considered abandoned). The Board remanded the issues of entitlement to service connection for residuals, right knee injury and a disability manifested by stomach and abdominal pain (claimed as a stomach disability). The Court does not have jurisdiction over these claims. See *Breeden v. Principi*, 17 Vet.App. 475, 478 (2004) (per curiam order) ("[T]he Board's remand does not represent a final decision over which this Court has jurisdiction.").

the case (SOC), which continued to deny Appellant's claim finding her in-service abdominal pain was "acute, transitory and self-limiting without residual disability." (R. at 2036 (2033-2037)). Shortly thereafter, Appellant perfected her appeal. (R. at 2028-2030). Appellant testified before the Board in March 1993; she indicated that her abdominal pain began after the birth of her daughter in August 1982. (R. at 2023 (2007-2024)). A June 1993 Board decision recharacterized Appellant's claim as entitlement to service connection for a disorder manifested by abdominal pain; it remanded her claim for further development, to include obtaining outstanding medical records and a medical opinion. (R. at 2000-2001 (1997-2003)). VA provided Appellant a compensation and pension (C&P) examination in October 1993; the examiner found "[n]o medical explanation for the right-sided pain, given the findings of this examination." (R. at 1961 (1956-1961)). A March 1998 Board decision denied Appellant's claim. (R. at 1641-1667). Appellant did not appeal that decision and it became final.

In July 2008, Appellant file a claim for service connection for surgical residuals and scar residuals. (R. at 1398). In a June 2009 rating decision, VA denied her claims finding neither condition occurred in, was caused by, or was aggravated by military service. (R. at 1016-1026). Appellant did not appeal that decision and it became final.

In January 2011, Appellant petitioned to reopen her claims; a September 2011 rating decision found that new and material evidence was not submitted and did not reopen her claims. (R. at 992), (R. at 842-850). Appellant filed her

notice of disagreement in October 2011; she submitted a statement in support of her claims two months later. (R. at 787), (R. at 760-767). VA issued a SOC in March 2012, which reopened Appellant's claims but denied them on the merits. (R. at 734-759). Appellant perfected her appeal to the Board in May 2012. (R. at 714-728). In September 2014, Appellant's representative submitted a brief asserting she had "early signs of endometriosis and fibroids while on active duty" and requesting an examination to "determine if the signs and symptoms noted on active duty caused her claimed condition and residuals." (R. at 650 (649-653)). A February 2015 Board decision remanded Appellant's claim for further development, to include an examination "for the purpose of determining the nature and etiology of [Appellant's] gastrointestinal and/or gynecological symptoms of abdominal pain, GERD, and any other reported symptoms." (R. at 645 (629-647)).

VA provided Appellant a C&P examination for gynecological conditions in April 2015. (R. at 431-437). The examiner opined that Appellant's diagnosis of fibroids that resulted in hysterectomy "is not causally related to service or to the tubal ligation done 08/16/1986. The veteran was never diagnose[d] with endometriosis nor was this the reason for her hysterectomy. There was no evidence of fibroids during [the V]eteran[']s service." (R. at 437). An April 2015 deferred rating decision found that the examiner failed to opine whether it is at least as likely as not (a 50 percent or greater probability) that the Veteran's enlarged uterus (which resulted in a hysterectomy) is causally related to service

to include her 1982 tubal ligation. (R. at 409). A May 2015 addendum indicated that a routine gynecological examination in 1989 was unremarkable and the first mention of fibroids was not until 1992; the examiner opined that Appellant's enlarged uterus was not a result of service. (R. at 405-406), (R. at 2059) [December 1989 gynecological examination, finding no gynecologic cause for right lower quadrant pain], (R. at 1691) [January 1992 medical record-diagnosis of right inguinal hernia, vulvar papilloma, small fibroids, and Tietze syndrome].

In June 2017, the Board remanded Appellant's claims for additional development, to include obtaining an opinion "as to the nature and etiology of any gynecological symptoms present during the period of the claims, as well as the enlarged uterus that resulted in the Veteran's hysterectomy." (R. at 372 (369-376)). VA obtained an addendum C&P opinion in July 2017. (R. at 53-55). The examiner opined, "[Appellant] requested an Elective Sterilization for prevention of future pregnancy. This surgical procedure is not related with the development of Leiomyomas (fibroids) or uterine enlargement that resulted in the post service Hysterectomy." (R. at 55). She also opined that it was less likely than not that "the enlarged uterus that led to the Veterans Hysterectomy originated during active service or is otherwise etiologically related to active service, to include related activities described in the Veteran's written statements." (R. at 55).

In September 2018, the Board issued the decision on appeal, which denied entitlement to service connection for surgical residuals and scar residuals. (R. at 4-13). The present appeal followed.

III. SUMMARY OF ARGUMENT

This Court should affirm the September 11, 2018, decision which denied entitlement to service connection for surgical residuals and scar residuals. Specifically, the record illustrates that VA substantially complied with the terms of the remand. Additionally, the Board did not err in its statement of reasons or bases for the denial of Appellant's claims. It properly considered all relevant evidence of record and adequately explained why it found her lay statements were outweighed by other evidence of record as required by law. Accordingly, the Court should affirm the Board's decision.

IV. ARGUMENT

A. VA COMPLIED WITH THE DIRECTIVES OF THE JUNE 2017 BOARD REMAND

A February 2015 Board decision remanded Appellant's claim for an opinion to determine "the nature and etiology of the Veteran's gastrointestinal and/or gynecological symptoms of abdominal pain, GERD and any other reported symptoms." (R. at 645-646). An April 2015 C&P examiner opined that Appellant's diagnosis of fibroids that resulted in hysterectomy is "not causally related to service or to the tubal ligation done 08/16/1986. The veteran was never diagnosed with endometriosis nor was this the reason for her hysterectomy. There was not evidence of fibroids during [the V]eteran[']s service." (R. at 437). VA obtained a May 2015 addendum wherein the examiner opined, "[Appellant's] enlarged uterus is not a result of the military." (R. at 406). A June 2017 Board decision remanded Appellant's claim for a medical opinion to determine:

[W]ith respect to any gynecological symptoms present during the period of the claim, as well as the enlarged uterus that led to the Veteran's hysterectomy, as to whether it is *at least as likely as not* (i.e., whether there is a 50 percent or better probability) that the disorder originated during active service or is otherwise etiologically related to active service, to include related to the in-service activities described in the Veteran's written statements.

(R. at 372 (emphasis original)). A July 2017 C&P examiner opined Appellant's tubal ligation was not related to the later development of fibroids or uterine enlargement that resulted in her hysterectomy. (R. at 55). The examiner further opined it was less likely than not that Appellant's enlarged uterus "originated during active service or is otherwise etiologically related to active service, to include related activities described in the Veteran's written statements." (R. at 55).

In the present decision, the Board found:

Taken together, the VA examination and addendum opinions establish that the Veteran's post-service hysterectomy is not at least as likely as not related to an inservice injury, event, or disease, including tubal ligation. The examiners' combined opinion, particularly the information from July 2017, is probative, because it is based on an accurate medical history and provides an explanation that contains clear conclusions and supporting data.

(R. at 9). Appellant asserts the Board "failed to ensure that VA substantially complied with its prior remand order and fulfilled its duty to assist [her] by relying on the medical opinions of record to deny service connection." (Appellant Brief (App. Br.) at 12). This assertion is without merit.

Appellant's argument focuses on the February 2015 remand and ignores the June 2017 remand. (App. Br. at 12-20). The February 2015 remand was

much broader in nature and requested an examination to address Appellant's gastrointestinal and/or gynecological issues. (R. at 645). The June 2017 remand narrowed the scope of the examiner's inquiry and requested an opinion "as to the nature and etiology of any gynecological symptoms present during the period of the claims, as well as the enlarged uterus that resulted in the Veteran's hysterectomy." (R. at 372). This question was answered by the July 2017 addendum, wherein the examiner opined Appellant's in-service tubal ligation was not related to the development of her fibroids or enlarged uterus. (R. at 55). The examiner also considered Appellant's lay statements about her in-service complaints but determined that it was less likely than not that her enlarged uterus originated in or was otherwise etiologically related to active service. It is well settled that the Board is required to decide a claim based on a de novo review of the record. *McBurney v. Shinseki*, 23 Vet.App. 136, 139 (2009) ("The Board is permitted to review the entirety of the proceedings below."), *aff'd per curiam*, 407 F. App'x 480 (Fed. Cir. 2011). Appellant provides no argument, and cites to no statute or regulation, that would bind the Board to the February 2015 remand, ignoring the existence of the June 2017 remand.

Appellant argues that the April 2015 examination was based on an inaccurate factual premise as the examiner stated Appellant denied gynecological problems in service; she cites to various service treatment records (STR) to support her claim. (App. Br. at 14). The bulk of the evidence Appellant cites to discusses abdominal pain of unknown origin. (R. at 482) [August 1977

STR], (R. at 489) [August 1977 STR], (R. at 588-589) [February 1979 STR], (R. at 592) [February 1979 STR], (R. at 2240) [November 1978 STR], (R. at 2266) [November 1981 STR]. Those records are relevant to Appellant's remanded claim for entitlement to service connection for a disability manifested by stomach and abdominal pain; they are not relevant to her surgical residuals claim. While the examiner did not explicitly discuss the records of vaginal discharge and spotting, she did indicate that she reviewed all of Appellant's records, and she is presumed competent to comment on those records that she finds relevant to the medical questions posed to her. (R. at 431); *see Cox v. Nicholson*, 20 Vet.App. 563, 569 (2007); *see also Monzingo v. Shinseki*, 26 Vet.App. 97, 106-107 (2012). Her notation that Appellant denied gynecological problems in service is likely due to the normal report of medical examination of record. (R at 578-579) [November 1980 report of medical examination noting a "normal" pelvic and vaginal examination]. To the extent that her statement was overbroad, it does not discount the results of the examiner's thorough examination and interview of Appellant. (R. at 433-434); *cf. Monzingo*, 26 Vet.App. at 107("Furthermore, even if a medical opinion is inadequate to decide a claim, it does not necessarily follow that the opinion is entitled to absolutely no probative weight.").

Appellant asserts that the May 2015 examination did not comply with the February 2015 remand order and does not address whether she may have had fibroids that "potentially went undiscovered until 1992." (App. Br. at 15). As discussed above, the Board is not bound to the February 2015 remand.

Additionally, Appellant ignores the examiner's finding that a December 1989 gynecological exam, which included an abdominal and pelvic examination, was normal. (R. at 406), (R. at 2059). Fibroids were not present in 1989, and there is no indication that they were present during service.

Appellant asserts that the July 2017 addendum did not address whether her in-service symptoms were indicative of undiagnosed fibroids. (App. Br. at 16), (App. Br. at 18). Again, the Board was not bound by the inquiries of the February 2015 remand. Appellant also contends that "the examiner's reference to 'the period of the claim' calls into question whether she considered [her] in-service symptoms as opposed to only evidence post-dating her service." (App. Br. at 16). However, the July 2017 examiner also conducted the April 2015 examination; she also stated that she "reviewed the entire record including but not limited to all lay statements." (R. at 54). There is no basis for suspecting that the examiner did not adhere to the protocols and standards of a medical professional and elicit all the relevant and necessary information before rendering her decision. See *Cox*, 20 Vet.App. at 569 (the Board is entitled to assume the competence of a VA medical examiner); see also *Miley v. Principi*, 366 F.3d 1343, 1347 (Fed. Cir. 2004) ("The presumption of regularity provides that, in the absence of clear evidence to the contrary, the court will presume that public officers have properly discharged their official duties."). Overall, Appellant asserts that her in-service symptoms may have been attributable to an undiagnosed fibroid during service. However, the evidence of the record, to include the December 1989

gynecological examination and C&P opinions, contradicts that assertion. See *Kern v. Brown*, 4 Vet.App. 350, 353 (1993) (noting that “appellant's attorney is not qualified to provide an explanation of the significance of the clinical evidence”); see also, *Hyder v. Derwinski*, 1 Vet.App. 221, 225 (1991) (“Lay hypothesizing, particularly in the absence of any supporting medical authority, serves no constructive purpose and cannot be considered by this Court.”).

It is well established that “a remand by this Court or the Board confers on the veteran or other claimant, as a matter of law, the right to compliance with the remand orders.” *Stegall v. West*, 11 Vet.App. 268, 271 (1998). Furthermore, “a remand by this Court . . . imposes upon the Secretary . . . a concomitant duty to ensure compliance with the terms of the remand,” and where “the remand orders of the Board . . . are not complied with, the Board itself errs in failing to ensure compliance.” *Id.* However, it is substantial compliance, not absolute compliance, that is required, and VA’s actions will be deemed to have been in substantial compliance with a remand order when such actions resolve the issue that required the remand order. *D’Aires v. Peake*, 22 Vet.App. 97, 105 (2008); *Evans v. West*, 12 Vet.App. 22, 31 (1998); see also *Mo. Veterans Comm’n v. Peake*, 22 Vet.App. 123, 127 (2008) (recognizing “the general legal concept that substantial compliance means actual compliance with the essential objectives of a statute or regulation, so as to carry out its intent”). Here, the Board found that the combined medical opinions of record provided it with the information needed for it to make its determination regarding service connection. (R. at 9). It is the

responsibility of the Board to consider and assign probative value to the evidence. See *Washington v. Nicholson*, 19 Vet.App. 362, 368 (2005) (it is the responsibility of the Board to assess the probative weight of the evidence). Appellant's mere disagreement with the weighing of the evidence does not constitute error. See *Deloach v. Shinseki*, 704 F.3d 1370, 1380 (Fed. Cir. 2013); *D'Aries*, 22 Vet.App. at 108. Therefore, Appellant's arguments fail to demonstrate the Board did not ensure substantial compliance with the remand in accordance with *Stegall*. Furthermore, the Board's decision is supported by the evidence of record. Thus, Appellant has not shown that the Board's statement of reasons or bases was prejudicially inadequate. Also, as remand is not warranted for Appellant's surgical residuals claim there is no basis for remand for her scar residuals claim.

Moreover, the Secretary does not concede any material issue that the Court may deem Appellant adequately raised, argued and properly preserved, but which the Secretary may not have addressed through inadvertence, and reserves the right to address same if the Court deems it necessary or advisable for its decision. The Secretary also requests that the Court take due account of the rule of prejudicial error wherever applicable in this case. 38 U.S.C. § 7261(b)(2).

V. CONCLUSION

Upon review of all the evidence, as well as consideration of the arguments

advanced, Appellant has not demonstrated the Board committed clear error in its findings of fact or its conclusions of law. Because Appellant failed to satisfy his burden of demonstrating the existence of a prejudicial error, the Court should affirm the decision on appeal.

Respectfully submitted,

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