IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

Vet. App. No. 19-0530

VERNON L. WINGERT,
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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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Regulations

Record Before the Agency (R.) Citations

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VERNON L. WINGERT,	)	
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	)	
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ON APPEAL FROM THE BOARD OF VETERANS' APPEALS

BRIEF OF THE APPELLEE SECRETARY OF VETERANS AFFAIRS

I. ISSUES PRESENTED

Whether the U.S. Court of Appeals for Veterans Claims (Court) should affirm the September 26, 2018, decision of the Board of Veterans' Appeals (Board) that denied entitlement to an effective date prior to May 18, 2015, for an increased rating for service-connected coronary artery disease, status post myocardial infarction (MI) and coronary artery bypass graft (CABG) (collectively, CAD).

Whether the Court should dismiss the appeal of the September 26, 2018, decision of the Board that new and material evidence sufficient to reopen the claim for entitlement to service connection for pleural effusion of the left lung had not been submitted.

II. STATEMENT OF THE CASE

A. Nature of the Case

Appellant, Vernon L. Wingert, appeals, through counsel, the September 26, 2018, Board decision that denied entitlement to an effective date prior to May 18, 2015, for an increased rating for service-connected CAD and found that new and material evidence sufficient to reopen the claim for service connection for pleural effusion of the left lung had not been submitted. (Record Before the Agency (R.) at 4-22); *see* Appellant's Brief (App. Br.). However, Appellant does not offer any argument or assertion of error with respect to the Board's finding that new and material evidence sufficient to reopen the claim for service connection for pleural effusion of the left lung had not been submitted. *See* App. Br.; *see also* (R. at 7-10). Because he has not challenged this portion of the Board decision, the appeal as to this issue should be dismissed. *See Pederson v. McDonald*, 27 Vet.App. 276, 281-86 (2015) (en banc) (declining to review the merits of an issue not argued and dismissing that portion of the appeal); *Cacciola v. Gibson*, 27 Vet.App. 45, 48 (2014) (same).

Similarly, Appellant does not offer any argument or assertion of error with respect to the Board's denial of entitlement to (1) an increased rating in excess of 20% for diabetes mellitus type II with erectile dysfunction and mild diabetic neuropathy and (2) special monthly compensation for aid and attendance allowance for Appellant's spouse. *See* App. Br.; *see also* (R. at 10-15, 18-19 (4-22)). Accordingly, as he has not challenged those portions of the Board decision,

the appeal as to these issues should be dismissed. *See Pederson*, 27 Vet.App. at 281-86; *Cacciola*, 27 Vet.App. at 48.

The Board remanded issues of entitlement to (1) service connection for hypertension, to include as secondary to service-connected disabilities, (2) service connection for gastroesophageal reflux disease, to include as secondary to service-connected disabilities, and (3) a total disability rating based on individual unemployability. (R. at 19-22 (4-22)). As remand orders are not final decisions within the meaning of the Court's jurisdictional statute, these issues are not currently before the Court and should remain undisturbed. *See* 38 U.S.C. §§ 7252(a), 7266(a); *Breeden v. Principi*, 17 Vet.App. 475, 477-78 (2004) (per curiam order) (Court lacks jurisdiction to review Board remands).

The Secretary requests that the Court affirm the Board's September 26, 2018, decision denying entitlement to an effective date prior to May 18, 2015, for an increased rating for service-connected CAD and dismiss the appeal of the Board's decision that new and material evidence sufficient to reopen the claim of entitlement to service connection for pleural effusion of the left lung had not been submitted.

B. Statement of Facts

Appellant served on active duty from September 1969 to August 1971, (R. at 909), June 1999 to September 1999, (R. at 910), and October 2001 to July 2002, (R. at 917). Service treatment records are silent as to any complaints, treatment, or diagnosis of a lung disability in service. *See* (R. at 1897-1927).

Appellant was a long-term smoker, smoking one pack of cigarettes per day for 48 years, until 2009. *See* (R. at 1418 (1416-31); 1016-19; 112 (112-13)).

In May 2009, Appellant reported to a private hospital that he was experiencing chest pain. *See* (R. at 104 (104-05); 106 (106-08); 109 (109-11); 112 (112-13); 114 (114-15); 101 (101-03)). He underwent a cardiac catheterization and was found to have CAD with inferior wall MI. (R. at 101; 120 (118-20)). He then underwent CABG for his CAD with inferior wall MI. (R. at 101-02; 114).

Post-op from his cardiac surgery, he developed left lung pleural effusion (fluid in the lung).[1] *See* (R. at 98 (July 2009 private medical record – diagnostic radiology x-ray report)). That pleural effusion was treated by a pleurodesis procedure, which adheres the lung to the chest wall.[2] (R. at 188-89 (July 2009 private treatment record); 167-68 (August 2009 private treatment record)).

In July 2012, Appellant filed a claim seeking service connection for, *inter alia*, a heart condition and a lung condition. (R. at 1954 (1947-48, 1954-66)). In November 2012, a Department of Veterans Affairs (VA) regional office (RO), *inter alia*, denied entitlement to service connection for a lung condition. (R. at 1509,

[1] Pleural effusion is the "the presence of fluid in the pleural space." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 596 (32d ed. 2012). Pleura is "the serous membrane investing the lungs and lining of the thoracic cavity, completely enclosing a potential space known as the pleural cavity. There are two pleurae, right and left, entirely distinct from each other, and they are moistened with a serous secretion that facilitates movements of the lungs in the chest." *Id.* at 1460.

[2] Pleurodesis "is a procedure that obliterates the pleural space to prevent recurrent pleural effusion or recurrent pneumothorax. It is most commonly performed by draining the effusion or intrapleural air and then inducing intrapleural inflammation and fibrosis by either instilling a chemical irritant or performing mechanical abrasion." UPTODATE (Sept. 2019).

1530-31 (1506-12, 1526-31)). In that decision, the RO also granted, *inter alia*, service connection for CAD, status post MI and CABG (claimed as heart condition), associated with herbicide exposure, with a 10% evaluation effective July 31, 2011. (R. at 1508, 1527-28). In November 2012, Appellant filed a Notice of Disagreement (NOD) with the RO's denial of service connection for a lung condition, in which he noted he was seeking service connection for lung condition as secondary to his service-connected heart condition. (R. at 1499-1500, 1503-04).

Appellant received a VA Compensation and Pension (C&P) respiratory examination and medical opinion in January 2013, (R. at 1416-31), with an addendum opinion provided in February 2013, (R. at 1414). Appellant reported that he had shortness of breath when picking up items. (R. at 1418). The VA examiner explained that Appellant had an acute lung condition that was proximately due to or the result of his CABG status post MI and CABG, i.e., his pleural effusion for which he had to have a thorascopy and chemical pleurodesis; however, the examiner explained, this resolved and Appellant did not have any pleural effusion at that time based on x-ray evidence. *Id.* at 1430. The examiner explained that Appellant's current pulmonary function tests (PFTs) were more indicative of his 48-year pack-per-day smoking history than any pleural effusion. *Id.* "Hence, [Appellant] did prior have an acute lung condition (pleural effusion) that was caused after his CABG, however as currently seen on evidence, this resolved and there is no current chronic lung residuals from the status post acute pleural effusion seen at this time." *Id.* In February 2013, the VA examiner

explained that Appellant's current lung condition was less likely as not aggravated by his CABG status post MI and CABG, reiterating that the pleural effusion had resolved and that Appellant had an extensive smoking tobacco history as seen with his PFT results. (R. at 1414).

In February 2013, the RO issued a Statement of the Case (SOC) continuing the denial of service connection for left lung pleural effusion, resolved, claimed as lung condition. (R. at 1411-12 (1393-1413)). Appellant did not timely perfect his appeal, and the denial of service connection became final.

In July 2014, Appellant appointed current counsel his representative before VA. *See* (R. at 1371-76). Also in July 2014, Appellant filed a petition to reopen his previously denied claim for service connection for left lung pleural effusion, resolved (claimed as lung condition). (R. at 1348-49 (1344-59)).

In November 2014, Appellant received several VA C&P examinations, including a respiratory conditions examination. (R. at 1016-19 (1010-19)). Following an in-person examination of Appellant and review of the claims file (c-file), the examiner noted three lung diagnoses: (1) chronic obstructive pulmonary disease (COPD), diagnosed in 2013, (2) restrictive lung disease, specified as "mild restrictive lung disease likely due to prior pleurodesis for pleural effusion," diagnosed in 2014, and (3) pleural effusion—resolved, diagnosed in 2009. *Id.* at 1017. The examiner documented Appellant's respiratory medical history, including Appellant's history of smoking cigarettes for most of his adult life (quitting when he developed heart disease in 2009) and his development of a persistent

pleural effusion as a complication of CABG in 2009, which medical records indicated had subsequently resolved following pleurodesis. *Id.* The examiner noted that Appellant's PFTs performed in 2013 revealed changes of airflow obstruction thought to be related to his history of smoking and that current PFTs were interpreted as showing severe airflow obstruction. *Id.* Chest x-rays performed in August 2012 and January 2013 revealed no evidence of pleural effusion. *Id.* Appellant reported that he could walk at his own pace and climb stairs without difficulty but became short of breath and has to stop with minimal exertion such as carrying something. *Id.* He reported that he had been through cardiac evaluation with his private physician and that "my heart is doing fine now." *Id.* The examiner explained that Appellant's COPD with airway obstruction was the predominant condition responsible for his limitation of pulmonary function and that while he also had lung restriction, this appeared to be a milder condition and not as responsible for limitation in pulmonary function. *Id.* at 1018. The examiner noted that Appellant's respiratory condition impacted his ability to work in that Appellant becomes dyspnea with any vigorous physical exertion and has to quickly stop and rest. *Id.*

The examiner opined that it was less likely than not that Appellant's lung condition is proximately due to or caused by his CAD. *Id.* Rather, his obstructive lung disease is much more likely than not related to his history of smoking. *Id.* The examiner noted that it was as likely as not that Appellant's pleural effusion (resolved after pleurodesis) and associated mild restriction of lung function was

due to his CAD and CABG, but noted that the pleural effusion has resolved and that the serial chest x-rays and PFTs suggested there was only mild restriction of lung volumes that would not lead to significant impairment. *Id.* at 1019. The examiner explained that CAD, pleural effusion, and prior pleurodesis would not be expected to cause the significant airway obstruction that was noted in Appellant's case. *Id.* at 1018-19.

In a December 2014 rating decision, the RO denied, *inter alia*, service connection for a lung condition. (R. at 1002 (984-88, 997-1002)). Appellant, via his current counsel, filed a timely NOD in March 2015. (R. at 975-83). In April 2015, VA received a statement in support of Appellant's various claims dated March 28, 2015, which was submitted by current counsel. (R. at 963-65).

On May 18, 2015, VA received Appellant's Intent to File a Claim for Compensation form. (R. at 953-55). VA acknowledged Appellant's intent to file had been received in a May 2015 letter. (R. at 950-52). Appellant submitted a claim seeking an increased evaluation for his service-connected "chest condition" in July 2015. (R. at 947-49). He received a VA C&P heart examination in July 2015, wherein the examiner noted he had difficulty lifting and found a metabolic equivalents of task (METs) level of between 3 and 5 METs. (R. at 856 (851-57)).

In an August 2015 rating decision, the RO granted an increased rating of 60% for Appellant's service-connected CAD, effective May 18, 2015, the date of receipt of the standardized "intent to file" form. (R. at 838 (812-20, 834-39)).

Appellant, via his current counsel, filed a timely NOD in August 2015 disagreeing with the effective date of the increased evaluation. (R. at 782-91).

In September 2015, the RO issued SOCs, *inter alia*, continuing the denial of service connection for a lung condition, (R. at 743-44 (746-74)), and denying entitlement to an earlier effective date for the increased 60% rating for service-connected CAD, (R. at 743-45 (710-45)). Appellant filed timely substantive appeals in September 2015 as to both issues. (R. at 688-90).

In September 2018, the Board issued a decision, *inter alia*, denying entitlement to an effective date prior to May 18, 2015, for an increased rating for service-connected CAD, (R. at 15-18 (4-22)), and declining to reopen a claim of entitlement to service connection for pleural effusion of the left lung, finding that new and material evidence had not been received, *id.* at 7-10. This appeal followed.

III. SUMMARY OF THE ARGUMENT

The Court should affirm the Board's September 2018 decision denying entitlement to an effective date earlier than May 18, 2015, for an increased 60% rating for service-connected CAD. The Board's denial is supported by a plausible basis in the record, applicable law, and an adequate statement of reasons or bases. Appellant fails to meet his burden of persuasively demonstrating remandable error with regard to that decision.

The Court should dismiss the appeal of the Board's decision that new and material evidence sufficient to reopen the claim of entitlement to service

connection for pleural effusion of the left lung had not been received because Appellant does not challenge that determination by the Board. Rather, he asserts that the Board provided an inadequate statement of reasons or bases for not addressing an alleged separate, freestanding claim for service connection for chest pain. His argument fails, however, as he fails to establish that such a claim was either expressly raised by him or reasonably raised by the record such that the Board was required to consider it.

IV. ARGUMENT

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); *see* 38 U.S.C. § 7261(b)(2) (mandating that the Court, in making determinations regarding Board decisions, "shall . . . take due account of the rule of 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. The Board correctly determined that Appellant was not entitled to an effective date earlier than May 18, 2015, for the increased 60% rating for CAD.

In the decision on appeal, the Board properly denied entitlement to an effective date earlier than May 18, 2015, for the increased 60% rating for CAD. (R. at 15-18 (4-22)). The Board's decision is supported by an adequate statement of reasons or bases, enabling Appellant to understand the basis for its determination and permitting judicial review. (R. at 15-18); *see* 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995). It is also supported by a plausible basis in the record and is consistent with applicable law. *See Gilbert v. Derwinski*, 1 Vet.App. 49, 53 (1990); 38 U.S.C. § 5110; 38 C.F.R. § 3.400(o); *see also Evans v. West*, 12 Vet.App. 396, 401 (1999) (explaining that a Board determination of the proper effective date is a finding of fact reviewed by the Court under the "clearly erroneous standard"); *Gilbert*, 1 Vet.App. at 53 (explaining that under the clearly erroneous standard of review, the Court may not substitute its judgment for the factual determinations of the Board; if there is a plausible basis in the record for the Board's determination, the Court must affirm).

In his brief, Appellant argues for the first time that he is entitled to an earlier effective date for the increased rating for his service-connected CAD of the date of the November 2014 VA respiratory examination under the old 38 C.F.R. § 3.157(b)(1) (2014) (permitting certain medical reports related to an already service-connected condition to be accepted as an "informal claim for increased benefits" for that already service-connected condition)—which was effective prior

to March 24, 2015, *see Standard Claims and Appeals Forms, Final Rule*, 79 Fed. Reg. 57,660, 57,660, 57,696 (Sept. 25, 2014)—because, he alleges, the 2014 VA respiratory examination showed a worsening of his heart condition. App. Br. at 3-4. For this alleged demonstration of worsening of his heart condition in the 2014 VA respiratory examination, during which his heart condition was not examined or treated, he relies on the functional impairment of his lung condition, which is dyspnea (difficulty or labored breathing) with any vigorous physical exertion and he has to quickly stop and rest, (R. at 1018 (1016-19)); *see also id.* at 1017 (Appellant's report of becoming easily fatigued and dyspneic with exertion, can walk at own pace and climb stairs with no difficulty but becomes short of breath and has to stop with minimal exertion such as carrying something). App. Br. at 3-4. He contends that the Board provided an inadequate statement of reasons or bases for not addressing that this November 2014 VA respiratory examination was an informal claim under the old 38 C.F.R. § 3.157(b)(1). *Id.*

As an initial matter, the Court should decline to address Appellant's newly raised informal claim argument because he failed to exhaust his administrative remedies prior to appealing to the Court. Appellant is currently represented by the same counsel who represented him before VA since 2014, during the entire administrative phase of his claim. *See* (R. at 1371-76 (July 2014 documents appointing current counsel Appellant's power of attorney (POA) before VA); 953 (May 2015 Intent to File a Claim for Compensation, signed and submitted by current counsel); 947-49 (June 2015 claim for increased rating for CAD, submitted by

current counsel)). The Court has the discretion to choose, based on the circumstances of the case, whether to reach this newly raised argument. *See Maggitt v. West*, 202 F.3d 1370, 1377 (Fed. Cir. 2000) (articulating case-by-case balancing test for issue exhaustion in the VA system: "whether the interests of the individual weigh heavily against the institutional interests the doctrine exists to serve"); *Massie v. Shinseki*, 25 Vet.App. 123, 127-28, 131 (2011), *aff'd*, 724 F.3d 1325 (Fed. Cir. 2013).

The circumstances here are such that the Court should exercise its discretion to invoke the exhaustion of remedies doctrine against Appellant and refuse to consider his newly raised argument. Importantly, Appellant has been represented by current counsel throughout the administrative appeals process as to this issue, "meaning that the . . . concerns regarding the potentially harsh result of applying the exhaustion of remedies doctrine against a party who was not represented by an attorney while before VA has no bearing upon this appeal." *Massie*, 25 Vet.App. at 127; *see also id.* at 128 ("Again, this is not a situation in which a veteran who was self-represented or represented by a veterans service organization filed a nondescript Notice of Disagreement and Substantive Appeal while before VA, expressing disagreement with a regional office determination in only the broadest terms. Rather, Mr. Massie was represented by an attorney and filed pleadings during his administrative appeal that set forth in detail the precise theory, statutes, and regulations upon which he intended to rely."). "Interests of judicial economy demand that a represented veteran present all theories and

assignments of error to VA before appealing to this Court." *Massie*, 25 Vet.App. at 128. Appellant was represented by current counsel before VA and, despite raising various arguments, *see, e.g.*, (R. at 782 (782-91) (August 2015 NOD, current counsel arguing that the increased rating for CAD should have an effective date back to August 2011 when he originally filed the claim for service connection because he was allegedly never given the opportunity to appeal the decision because he was, allegedly, never notified of the original decision)), which the agency and the Board addressed, (R. at 744 (710-45); 15-16 (4-22)), failed to raise any such argument regarding the 2014 VA respiratory examination and the former 38 C.F.R. § 3.157. As such, the Court should conclude that the interests of judicial economy and VA's institutional interests in addressing this issue earlier in the case outweigh Appellant's interest in this Court's adjudication of the issue. *See Maggitt*, 202 F.3d at 1377; *Massie*, 25 Vet.App. at 127-28.

Should the Court nevertheless choose to entertain Appellant's newly raised argument, it should find it unavailing. Appellant baldly asserts that the 2014 VA respiratory conditions examination report constitutes an informal claim for increased benefits for his service-connected CAD pursuant to the old § 3.157(b)(1). App. Br. at 4. He summarily concludes that the Board failed to provide an adequate statement of reasons or bases because it did not address his newly raised theory that the 2014 VA respiratory examination constitutes an informal claim for an increased evaluation for CAD. App. Br. at 4. His argument is unavailing for two reasons. First, he fails to establish that this theory was

reasonably raised by the record. Second, even if such a theory were reasonably raised by the record, he is unable to demonstrate (and, indeed, has not even alleged) prejudice as, even assuming that the 2014 VA examination constituted an informal claim for increase for CAD, Appellant still would not be entitled to an effective date prior to May 18, 2015.

First, Appellant fails to establish that his theory—that the 2014 VA respiratory examination report was an informal claim for an increased disability rating for his service-connected CAD pursuant to § 3.157(b)(1)—was reasonably raised by the record such that the Board erred in not considering and discussing it. *See* App. Br. at 3-4; *Hilkert*, 12 Vet.App. at 151. The Board is required to address only those issues that are expressly raised by the claimant or reasonably raised by the evidence of record. *Robinson v. Mansfield*, 21 Vet.App. 545, 552-56 (2008), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009). As discussed above, it is undisputed that Appellant and his current counsel who represented him below did not expressly raise this theory to the agency. As such, it was only error for the Board not to have considered it if it was raised by the record.

"The assignment of an effective date for disability compensation is governed by statute and regulation." *Dixon v. Gober*, 14 Vet.App. 168, 171 (2000). The general rule for effective dates is that it "shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application therefor." 38 U.S.C. § 5110(a). There are statutory and regulatory exceptions to this general

rule, including that the effective date of an award of increased compensation shall be the earliest date as of which it is factually ascertainable that an increase in disability had occurred, if application is received within one year from such date. 38 U.S.C. § 5110(b)(3); 38 C.F.R. § 3.400(o)(2). Otherwise, the general rule applies and the effective date of an award of increased compensation is the "date of receipt of claim or date entitlement arose, whichever is later." 38 C.F.R. § 3.400(o)(1); *see also Harper v. Brown*, 10 Vet.App. 125, 126-27 (1997) (explaining that if a showing of an increase in disability precedes, by one year or less, a claim, then 38 U.S.C. § 5110(b)(3)[3] and 38 C.F.R. § 3.400(o)(2) apply; otherwise, the general rule applies (the later of the date of receipt of claim and the date entitlement arose (i.e., an increase is shown))).

The prior § 3.157(b)—which was effective prior to March 24, 2015, *see Standard Claims and Appeals Forms, Final Rule*, 79 Fed. Reg. 57,660, 57,660, 57,696 (Sept. 25, 2014)—provided in pertinent part:

> Once a formal claim for . . . compensation has been allowed . . . receipt of one of the following will be accepted as an informal claim for increased benefits . . . . (1) Report of examination or hospitalization by Department of Veterans Affairs or uniformed services. The date of outpatient or hospital examination . . . will be accepted as the date of receipt of a claim. The provisions of this paragraph apply only when such reports relate to examination or treatment of a disability for which service-connection has previously

[3] The current subsection (b)(3) of § 5110 was previously subsection (b)(2). *See* Honoring Americas Veterans and Caring for Camp Lejeune Families Act of 2012, Pub. L. 112-154, Title V, § 506, 126 Stat. 1165, 1193 (Aug. 6, 2012) (amending § 5110(b) by redesignating paragraphs (2) and (3) as paragraphs (3) and (4), respectively, and inserting new paragraph (2)). Thus, the Court's discussion of § 5110(b)(2) in cases such as *Harper*, 10 Vet.App. 125, and *Hazan v. Gober*, 10 Vet.App. 511 (1997), regards the current § 5110(b)(3).

> been established or when a claim specifying the benefit sought is received within one year from the date of such examination, treatment or hospital admission.

38 C.F.R. § 3.157(b) (2014).

The provision makes clear that a "report of examination" may only constitute an informal claim for increase for an already service-connected condition when such report relates to examination or treatment of a disability for which service-connection has previously been established. 38 C.F.R. § 3.157(b)(1) (2014); *see also Massie*, 25 Vet.App. at 133-34. Here, that is not the case. The November 2014 VA *respiratory* examination related to Appellant's lung conditions, not his service-connected heart condition. *See* (R. at 1016-19). The 2014 VA examiner did not examine (or treat) Appellant's heart condition. *See id.* Accordingly, the November 2014 VA respiratory examination could not constitute an informal claim for increase for his heart condition. *See* 38 C.F.R. § 3.157(b)(1) (2014).

Further, in order to constitute an informal claim for increase for an already service-connected condition under § 3.157(b)(1), the report of examination related to the service-connected disability must demonstrate that the service-connected disability has worsened. *Massie*, 25 Vet.App. at 134; *see also Massie*, 724 F.3d at 1328-29 (holding that the Court "did not err in requiring that a report of examination offered as a basis for an informal claim for increased benefits must indicate that the disability at issue has increased"). As the Court explained in *Massie*, 38 C.F.R. § 3.157(b)(1) requires that a report of examination indicate that the veteran's service-connected worsened because "[w]ithout such a requirement,

every medical record generated by the Veterans Health Administration and received by VA that could possibly be construed as a report of examination would trigger the provisions of § 3.157(b)(1)," creating an unnecessary and unwarranted adjudicative burden on VA. 25 Vet.App. at 134. The November 2014 VA respiratory examination did not demonstrate that Appellant's service-connected disability had worsened. *See* (R. at 1016-19). Rather, during that examination, Appellant reported having been through cardiac evaluation with his private physicians and that "my heart is doing fine now." (R. at 1017). Further, the relied-on portion of the 2014 VA respiratory examination is the functional impairment of the respiratory condition. (R. at 1018). And the medical opinion provided in the November 2014 VA respiratory examination provides that the functional impairment of his respiratory condition is due to his current lung condition (COPD), which is less likely than not due to or caused by his service-connected heart condition (rather, it was due to his extensive 48-year pack-per-day smoking history). (R. at 1018-19). The November 2014 VA respiratory examination does not reflect worsening of Appellant's service-connected heart condition necessary to transform it into an informal claim for an increased evaluation under § 3.157(b)(1).

As the November 2014 VA respiratory examination was not a report of examination of his service-connected cardiac condition and did not demonstrate a worsening of his service-connected cardiac condition, it would not constitute an informal claim for increased evaluation for his service-connected cardiac condition

under § 3.157(b)(1). Thus, § 3.157(b)(1) was not implicated by the November 2014 VA respiratory examination. *See Massie*, 25 Vet.App. at 134. Accordingly, the Board did not err in failing to discuss the theory now expressly raised by Appellant in the first instance. *See Robinson*, 557 F.3d at 1361; *Robinson*, 21 Vet.App. at 553 ("The Board commits error only in failing to discuss a theory of entitlement that was raised either expressly by the appellant or by the evidence of record.").

Furthermore, even if the November 2014 VA respiratory examination constituted an informal claim for increase, Appellant's argument that he could be entitled to an earlier effective date still fails. His focus solely on the date of claim cannot demonstrate prejudicial error in this case because, under his argument, he still would not be entitled to an effective date earlier than May 18, 2015. Under the governing law, the effective date is the later of the date of claim and the date entitlement arose. Under his argument, the date of claim is the date of the November 2014 VA respiratory examination, which is earlier than the date entitlement arose (i.e., the date is was factually ascertainable that an increase occurred), which is, as the Board plausibly found—a finding that Appellant does not challenge (and, thus, any appeal of such finding has been abandoned, *see Seri v. Nicholson*, 21 Vet.App. 441, 445 (2007); *Cromer v. Nicholson*, 19 Vet.App. 215, 217 (2005) (issues not raised on appeal are abandoned))—the date of the July 2015 VA heart examination. (R. at 18 (4-22)); *see* (R. at 851-57). Thus, the 2014 VA respiratory examination would not entitle him to an earlier effective date.

In the decision on appeal, the Board correctly explained that, under the governing effective date rules the effective date for an increased rating for an already service-connected disability generally will be the date of receipt of the claim or the date entitlement arose, whichever is later. (R. at 15 (4-22)); 38 C.F.R. § 3.400(o) (2019); *see also* 38 U.S.C. § 5110(a) (providing that unless specifically provided otherwise, a claim for increase of compensation shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application therefor); 38 U.S.C. § 5110(b)(3) (providing that "[t]he effective date of an award of increased compensation shall be the earliest date as of which it is ascertainable that an increase in disability had occurred, if application is received within one year from such date"). Thus, as the Board explained, determining whether an effective date assigned for an increased rating is correct or proper under the law involves two inquiries: (1) a determination of the date of the receipt of the claim for the increased rating and (2) a review of all the evidence of record to determine when an increase in disability was factually "ascertainable." (R. at 15 (citing *Hazan v. Gober*, 10 Vet.App. 511 (1997))); *see* 38 U.S.C. § 5110(a), (b)(3); 38 C.F.R. § 3.400(o).

As to the first inquiry, the date of receipt of claim for an increase, the Board noted that "the first correspondence from [Appellant] indicating that he was seeking an increased rating for his 'heart disease' was received in May 2015." (R. at 15 (4-22)); *see* (R. at 953-55). The Board found that "[t]here was no earlier claim [and Appellant] does not argue the contrary." (R. at 15). The Board then went on to

address the argument that Appellant's counsel did make before VA and explained why it was unavailing. *See* (R. at 16).

The Board then turned to the second inquiry of when, based on all of the evidence of record, a 60% disability rating for CAD was factually ascertainable. (R. at 16 (4-22)); 38 U.S.C. § 5110(b)(3); 38 C.F.R. § 3.400(o); *see Hazan*, 10 Vet.App. at 519 (holding that "an increase" as used in the current § 5110(b)(3) means "an increase to the next disability level"). In making this determination, the Board is presumed to have considered all evidence of record, absent evidence to the contrary, which Appellant has not provided. *See Newhouse v. Nicholson*, 497 F.3d 1298, 1302 (Fed. Cir. 2007); *Gonzales v. West*, 218 F.3d 1378, 1381 (Fed. Cir. 2000); *see also* App. Br.

Prior to being awarded an increased rating of 60%, Appellant was in receipt of a 10% rating. *See* (R. at 15 (4-22)). His CAD is rated under Diagnostic Code (DC) 7005, which provides for a 30% evaluation for a workload of greater than 5 METs but not greater than 7 METs resulting in dyspnea, fatigue, angina, dizziness, or syncope; or evidence of cardiac hypertrophy or dilation on electrocardiogram, echocardiogram, or x-ray. 38 C.F.R. § 4.104, DC 7005. A 60% rating is warranted for more than one episode of acute congestive heart failure in the past year, or a workload of greater than 3 METs but not greater than 5 METS resulting in dyspnea, fatigue, angina, dizziness, or syncope, or; left ventricular dysfunction with an ejection fraction of 30 to 50%. *Id.* And a 100% rating is warranted for chronic congestive heart failure, or when a workload of 3 METs or less results in dyspnea,

fatigue, angina, dizziness, or syncope, or; left ventricular dysfunction with an ejection fraction of less than 30%. *Id.*

In the decision on appeal, the Board expressly addressed when a 60% rating for CAD was factually ascertainable. (R. at 16-18 (4-22)); *see also* 38 C.F.R. § 4.104, DC 7005; *Hazan*, 10 Vet.App. at 519. It plausibly found after "reviewing all the evidence of record" that the evidence did not show that Appellant's CAD more nearly approximated the criteria for a 60% rating prior to his July 2015 VA examination, at which time he was shown to have dyspnea and fatigue with activity between 3 and 5 METs. (R. at 18); *see* (R. at 856 (851-57)); 38 C.F.R. § 4.104, DC 7005. Thus, prior to the July 2015 VA heart examination, it was not factually ascertainable that Appellant's symptoms more nearly approximated the criteria for a 60% rating. (R. at 16-18); *see also* 38 C.F.R. § 4.7. Appellant does not present evidence demonstrating that his symptoms more nearly approximated the criteria for a 60% rating (i.e., evidence that he had a METs score of 5 or less) prior to the July 2015 VA heart examination. *See Hazan*, 10 Vet.App. at 519 (holding that "an increase" as used in the current § 5110(b)(3) means "an increase to the next disability level"); 38 C.F.R. § 4.104, DC 7005. Indeed, he does not challenge the Board's finding that it was not factually ascertainable prior to the July 2015 VA examination that an increase occurred. As such, any appeal of such finding has been abandoned. *See Seri*, 21 Vet.App. at 445; *Cromer*, 19 Vet.App. at 217.

Under the effective date rules, if the claim for increase is received before an increase in disability is shown to have occurred, the effective date is the date that

the increase is shown to have occurred (as it is the later of those two dates). 38 C.F.R. § 3.400(o)(1); *see* 38 U.S.C. § 5110(a)–(b). Because Appellant's claim for an increased rating for his service-connected CAD preceded the date that the increase was shown to have occurred—which, as the Board plausibly found, is the date of the July 2015 VA heart examination—then the date the increase was shown (the date of the July 2015 VA examination) would be the effective date. *See* 38 C.F.R. § 3.400(o)(1). This date is later than the current effective date of May 18, 2015, and, as such, the Board properly denied Appellant's appeal with respect to an effective date earlier than May 18, 2015. *See* (R. at 4, 16-18 (4-22)). This was plausibly based on the evidence of record and consistent with the applicable law regarding effective dates. *See Gilbert*, 1 Vet.App. at 53; 38 C.F.R. § 3.400(o).

Similarly, under Appellant's newly raised theory, the date of his purported claim for increase (November 2014) would precede the date that the increase was shown to have occurred (July 2015); thus, the date that the increase was shown to have occurred (July 2015) would be the effective date. *See* 38 C.F.R. § 3.400(o)(1). This date is later than the current effective date of May 18, 2015, *see* (R. at 4, 16-18 (4-22)), and, therefore, Appellant has failed to demonstrate prejudice, *see* 38 U.S.C. § 7261(b)(2) (requiring the Court to "take due account of prejudicial error"); *Sanders*, 556 U.S. at 409; *Soyini v. Derwinski*, 1 Vet.App. 540, 546 (1991) (holding that the Court need not order a remand based on a technical error of law where a remand would unnecessarily impose additional burdens on

the Board with no benefit flowing to the claimant). As noted, Appellant does not challenge the Board's plausible determination that it was not factually ascertainable prior to the July 2015 VA examination that an increase in his CAD, i.e., an increase to the next disability level, *see Hazan*, 10 Vet.App. at 519, had occurred. As such, any appeal of that finding should be deemed abandoned. *See Seri*, 21 Vet.App. at 445; *Cromer*, 19 Vet.App. at 217. Consequently, the Court should conclude that Appellant has not demonstrated that the Board's denial of an effective date earlier than May 18, 2015, was clearly erroneous.

B. Appellant fails to establish that there was a separate, freestanding claim for service connection for chest pain.

A claim that is disallowed by an RO or the Board and not appealed within the required period is considered final. 38 U.S.C. §§ 7104(b), 7105(c); 38 C.F.R. §§ 3.160(d), 20.302, 20.1100, 20.1103 (2018). Where a claim has been finally adjudicated, a claimant must present new and material evidence to reopen the previously denied claim. 38 U.S.C. § 5108; 38 C.F.R. § 3.156.

Appellant does not challenge the Board's finding that there was not new and material evidence received sufficient to reopen his claim for service connection for pleural effusion of the left lung. *See* App. Br.; *see also* (R. at 4-5, 7-10 (4-22)). Accordingly, the Court should dismiss this aspect of the appeal. *See Pederson*, 27 Vet.App. at 281-86 (declining to review the merits of an issue not argued and dismissing that portion of the appeal); *Cacciola*, 27 Vet.App. at 48 (same); *see also Cromer*, 19 Vet.App. at 217 (issues not raised on appeal are considered abandoned).

Appellant's sole argument, rather, is that his claim for a lung condition was improperly characterized as a claim to reopen—asserting that the claim to reopen also included a separate, freestanding claim for service connection for pain in his chest—and, thus, that the Board "failed to provide an adequate statement of reasons or bases for finding that Appellant's claim for chest pain is not a new, freestanding claim." App. Br. at 1-3. In making this argument, Appellant relies on the fact that the applicable DCs and rating criteria for Appellant's diagnosed lung conditions, *see* 38 C.F.R. § 4.97, do not mention chest pain. App. Br. at 2-3. His argument is unavailing.

As an initial matter, the Court should decline to address this newly raised "new, freestanding claim" argument because Appellant failed to exhaust his administrative remedies prior to appealing to the Court. *See Maggitt*, 202 F.3d at 1377; *Massie*, 25 Vet.App. at 127-28, 131. As discussed above, Appellant is currently represented by the same counsel who represented him before the agency since July 2014, during the entire administrative phase of his claim to reopen. *See* (R. at 1371-76 (July 2014 documents appointing current counsel Appellant's POA before VA); 1344-59 (July 2014 claim to reopen claim of entitlement to service connection for left lung pleural effusion, resolved, claimed as lung condition, filed by current counsel as an untimely VA Form 9 with addendum attempting to appeal denial of "service connection for left lung pleural effusion, resolved, claimed as lung condition")). Thus, the "concerns regarding the potentially harsh result of applying the exhaustion of remedies doctrine against a

party who was not represented by an attorney while before VA has no bearing upon this appeal." *Massie*, 25 Vet.App. at 127; *see also id.* at 128. "Interests of judicial economy demand that a represented veteran present all theories and assignments of error to VA before appealing to this Court." *Massie*, 25 Vet.App. at 128. Appellant was represented by current counsel before VA and, despite raising various arguments, *see, e.g.*, (R. at 975-77 (975-83) (March 2015 NOD, current counsel arguing that Appellant should receive service connection for his lung condition, noting that his pleural effusion has not been resolved and he "has pain in his chest, and shortness of breath")), failed to raise any such argument that there was a separate, freestanding claim for service connection for chest pain. As such, the Court should conclude that the interests of judicial economy and VA's institutional interests in addressing this issue earlier in the case outweigh Appellant's interest in this Court's adjudication of the issue. *See Maggitt*, 202 F.3d at 1377; *Massie*, 25 Vet.App. at 127-28.

Should the Court nevertheless address this newly raised argument, it should find it unavailing. Appellant fails to establish that there was a freestanding claim for service connection for chest pain such that the Board erred by failing to consider and address it. The Board is required to address only those issues that are expressly raised by the claimant or reasonably raised by the evidence of record. *Robinson*, 21 Vet.App. at 552-56. Appellant does not establish—or even argue—that this alleged freestanding claim was expressly raised by him. *See* App. Br. Thus, and although he fails to actually argue as much, *see Locklear*, 20 Vet.App. at

416 (holding that the Court will not entertain undeveloped arguments); *Coker v. Nicholson*, 19 Vet.App. 439, 442 (2006) ("The Court requires that an appellant plead with some particularity the allegation of error so that the Court is able to review and assess the validity of the appellant's arguments."), *vacated on other grounds sub nom. Coker v. Peake*, 310 F. App'x 371 (Fed. Cir. 2008) (per curiam order), his argument appears to be that the alleged freestanding claim for service connection for chest pain was reasonably raised by the record. *See* App. Br. at 1-3.

However, a freestanding claim for service connection for chest pain was not reasonably raised by the record. To the extent the Secretary can discern, Appellant appears to assert that a March 2015 statement, submitted by his current counsel as a statement in support of various already pending claims, in conjunction with the fact that applicable DCs and rating criteria do not mention pain, constitutes or reasonably raised a freestanding claim for service connection for chest pain. *See* App. Br. at 2-3 (citing (R. at 964 (963-65)) and 38 C.F.R. § 4.97, DCs 6604, 6845). In the cited statement, Appellant states "[m]y left lung is glued to my chest cavity [result of pleurodesis procedure to treat pleural effusion, which was due to CABG for CAD] so it is not a free floating normal lung which causes continues [sic] pain and breathing issues." (R. at 964).

In order for Appellant to have a freestanding claim for service connection for chest pain, he would have to demonstrate that his chest pain was not a symptom of, and thus not reasonably encompassed within his claims for, his heart and lung conditions. *See* 38 U.S.C. § 7104(b) (a claim based upon "the same factual basis"

as a prior claim disallowed by the Board may not thereafter be adjudicated and allowed except as provided in 38 U.S.C. § 5108 (new and material evidence)); *Boggs v. Peake*, 520 F.3d 1330, 1334 (Fed. Cir. 2008) (holding that the "factual basis" of a claim for purposes of 38 U.S.C. § 7104(b) is the veteran's disease or injury rather than the symptoms of the veteran's disease or injury). And Appellant fails to establish that his chest pain is not related to his service-connected heart condition, for which he has been treated for chest pain in the past, *see, e.g.*, (R. at 104 (104-05); 106 (106-08); 109 (109-11); 112 (112-13); 114 (114-15); 101 (101-03)), is not related to his non-service-connected COPD with airway obstruction which is responsible for his limitation in pulmonary function, (R. at 1018 (1016-19)), and is not related to his pleural effusion, for which he has claimed service connection and, in the course of the adjudication of that claim, he and his current counsel have alleged caused his chest pain and/or his chest pain was encompassed within that claim, *see, e.g.*, (R. at 964 (963-65); 976 (975-83)). As such, he fails to demonstrate that his chest pain is distinct from and not reasonably encompassed within his claims for service connection for coincidental conditions of the chest. *See Hilkert*, 12 Vet.App. at 151.

Further, to the extent that there exists any chest pain that is unattributable to Appellant's service-connected heart condition, non-service-connected current chronic lung condition (COPD), and non-service-connected left lung pleural effusion, there is no indication that Appellant's chest pain causes any functional impairment in earning capacity. *See Saunders v. Wilkie*, 886 F.3d 1356, 1361-63

(Fed. Cir. 2018) (explaining "that 'disability' in § 1110 [which limits entitlement for service-connected disease or injury to cases where such incidents have resulted in a disability] refers to the functional impairment of earning capacity, not the underlying cause of said disability"). "Congress specifically limits entitlement for service-connected disease or injury to cases where such incidents have resulted in a *disability*." *Brammer v. Derwinski*, 3 Vet.App. 223, 225 (1992) (citing 38 U.S.C. § 1110). "In the absence of proof of a present disability there can be no valid claim." *Brammer*, 3 Vet.App. at 225. Here, Appellant points to no evidence that there is any functional impairment in earning capacity due to chest pain that is unrelated to his heart and lung conditions. *See* App. Br.; *Hilkert*, 12 Vet.App. at 151; *see also Coker*, 19 Vet.App. at 442. And, notably, despite Appellant's report of "continue[d] pain and breathing issues" in the March 2015 statement, (R. at 964 (963-65)), he denied chest pain and his respiratory and cardiovascular systems were found normal on examination in June 2015, (R. at 223-24 (222-25)), January 2016, (R. at 220 (218-21)), and June 2016, (R. at 207, 211 (207-13)).

As Appellant has not established that the alleged freestanding claim was either expressly or reasonably raised by the record, the Board was not required to address the issue in its decision on appeal. *See Robinson*, 557 F.3d at 1361 ("Where a fully developed record is presented to the Board with no evidentiary support for a particular theory of recovery, there is no reason for the Board to address or consider such a theory."); *Robinson*, 21 Vet.App. at 553 ("The Board commits error only in failing to discuss a theory of entitlement that was raised either

expressly by the appellant or by the evidence of record."); *see also Parrish v. Shinseki*, 24 Vet.App. 391, 398 (2011) (finding no error where Board did not address issue not raised by appellant or reasonably raised by the record); *Sondel v. Brown*, 6 Vet.App. 218, 220 (1994) (when issue is not reasonably raised, Board is not required to "conduct an exercise in prognostication").

C. Appellant has abandoned all issues not argued in his brief.

The Secretary has limited his response to only those arguments reasonably construed to have been raised by Appellant in his opening brief and submits that any other arguments or issues should be deemed abandoned. *See Pieczenik v. Dyax Corp.*, 265 F.3d 1329, 1332-33 (Fed. Cir. 2001); *Norvell v. Peake*, 22 Vet.App. 194, 201 (2008).

V. CONCLUSION

WHEREFORE, in light of the foregoing reasons, the Court should affirm the September 26, 2018, Board decision that denied entitlement to an effective date prior to May 18, 2015, for an increased rating for service-connected CAD and dismiss the appeal of the Board's decision that new and material evidence sufficient to reopen the claim of entitlement to service connection for pleural effusion of the left lung had not been submitted.

Respectfully submitted,

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