Vet.App. No. 19-1871

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

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**DENNIS R. SENNE,**
Appellant,

**v.**

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

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**ON APPEAL FROM THE BOARD OF VETERANS' APPEALS**

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# BRIEF OF APPELLEE SECRETARY OF VETERANS AFFAIRS

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WILLIAM A. HUDSON, JR.
Acting General Counsel

MARY ANN FLYNN
Chief Counsel

EDWARD V. CASSIDY, JR.
Deputy Chief Counsel

COLIN E. TANSITS
Appellate Attorney
Office of General Counsel (027B)
U.S. Department of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, D.C. 20420
(202) 632-6139

Attorneys for Appellee

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## I. ISSUE PRESENTED

Whether the Court should affirm the February 21, 2019, Board of Veterans' Appeals (Board) decision, which denied a claim of entitlement to service connection for a right knee condition.

## II. STATEMENT OF THE CASE

### A. Jurisdictional Statement

This Court has jurisdiction over the instant appeal pursuant to 38 U.S.C. § 7252(a).

**B. Nature of the Case**

Appellant, Dennis R. Senne, appeals from a February 21, 2019, decision of the Board that denied entitlement to service connection for a right knee condition.

**C. Statement of Relevant Facts**

Appellant served honorably on active duty in the U.S. Navy from May 1958 through February 1961. (Record (R.) at 621).

During his May 1958 entrance examination, Appellant reported no knee or leg issues and stated that he was in good health. (R. at 560-566).

On March 7, 1959, Appellant was injured when he slipped and fell at an indoor swimming pool. (R. at 554). The examiner noted that Appellant had "multiple contusions and abrasions of right cheek, left hand and foot, knees, right scapula, and right elbow." *Id*. Appellant's lesions were cleaned, and a sterile dressing was applied before he was returned to regular duty. *Id*.

One year later, on January 12, 1960, Appellant received an x-ray after his right ankle "got pinned between a fork lift and a j bar." (R. at 555). The examiner noted "none" under the nature and extent of the injury, and Appellant was returned to regular duty. *Id*.

In February 1961, Appellant underwent a separation examination, and was found to have no injuries or defects. (R. at 544-545, 558).

Over forty years later, Appellant first began to complain of knee pain in 2003. *See* (R. at 409-410). These reports of pain were inconsistent, however, until 2015. *See* (R. at 409-410, 354-356, 122).

On February 24, 2015, Appellant submitted a claim of entitlement to service connection for a right knee condition. (R. at 631-632).

Appellant underwent a knee and lower leg conditions examination on March 10, 2015. (R. at 634-643). Following this examination, Appellant was diagnosed with right knee tendonitis/tendonosis. (R. at 634).

On April 17, 2015, Appellant underwent a VA examination. (R. at 519-522). Following this examination, the physician opined that Appellant's right knee condition was not related to his service. (R. at 519-521). The physician based this opinion on an absence of persistent knee issues while in service and, thereafter, an absence of residuals associated with Appellant's March 1959 slip and fall, Appellant's normal health on separation, and the medical nature of Appellant's injury—that tendonitis is most likely to stem from repetition of a particular movement over time. *Id*.

On April 22, 2015, the St. Petersburg, Florida Regional Office (RO) issued a decision denying Appellant's claim of entitlement to service connection for a right knee condition. (R. at 497-500, 509-514).

Appellant submitted a timely notice of disagreement in May 2015. (R. at 494-496).

In June 2017, the RO issued a statement of the case, continuing its decision to deny Appellant's claim of entitlement to service connection for a right knee condition. (R. at 41-57).

Appellant submitted a VA Form 9, appealing the RO's decision to the Board, in July 2017. (R. at 24-25, 34-35).

The appeal was added to the Board's docket in January 2019. (R. at 14).

On February 21, 2019, the Board issued a decision which denied Appellant's claim of entitlement to service connection for a right knee condition. (R. at 5-9). Appellant now challenges that decision.

## III. SUMMARY OF THE ARGUMENT

The Board provided an adequate statement of reasons or bases for finding the April 2015 VA examination to be highly probative and the March 2015 private examination to be minimally probative. The Board is the proper entity to provide evidentiary and factual determinations, as long as it adequately explains its decisions. In this case, the Board provided an adequate statement of reasons or bases, explaining that because the March 2015 private examiner offered only conclusions without rationale and did not view Appellant's file or medical record, his opinion was minimally probative. This demonstrates both an adequate explanation and a proper evidentiary finding.

Additionally, the April 2015 VA examination is adequate. The examiner provided a well-reasoned, descriptive opinion which was based on correct facts and a review of Appellant's record and medical history. Contrary to Appellant's

assertions, the April 2015 VA examiner did not need to provide a flare opinion, because flare opinions are not considered for service connection claims, and further, because he was not tasked with doing so.

Accordingly, the Court should find that the Board provided an adequate statement of reasons or bases, offered a proper explanation for its probative evaluation of the evidence, relied on an adequate April 2015 VA medical examination, and further, that Appellant has not shown that any of the Board's findings or determinations were clearly erroneous.

## IV. ARGUMENT

### A. The Board Provided an Adequate Statement of Reasons or Bases for Finding the Private Medical Opinion Less Probative Than the VA Medical Opinion.

The Board's statement of reasons or bases and its probative evaluation of the competing medical opinions is not problematic, because the Board acted within its powers as factfinder and provided an adequate explanation of its conclusions. The Court has long held that the Board is empowered and tasked with weighing the evidence, and despite Appellant's assertions, it did so properly in this case.

A Board decision must be supported by a statement of reasons or bases which adequately explains the basis of the its material findings and conclusions. 38 U.S.C. § 7104(d)(1) (2019); *Gilbert v. Derwinski,* 1 Vet.App. 49, 57 (1990). This generally requires the Board 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), *aff'd per curiam*, 78 F.3d 604 (Fed.Cir. 1996) (table).

As factfinder, the Board is responsible for interpreting and weighing the evidence. *See Deloach v. Shinseki*, 704 F.3d 1370, 1380 (Fed.Cir. 2013) ("The Court of Appeals for Veterans Claims, as part of its clear error review, must review the Board's weighing of the evidence; it may not weigh any evidence itself."). It follows that it is squarely within the purview of the Board to evaluate medical evidence and favor one medical opinion over another. *D'Aries v. Peake*, 22 Vet.App. 97, 107 (2008); *see also Owens v. Brown*, 7 Vet.App. 429, 433 (1995) (Board may properly favor one medical opinion over another).

Moreover, as the Court has explained, "most of the probative value of a medical opinion comes from its reasoning." *Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 304 (2008). In fact, neither a VA medical examination report nor a private medical opinion is entitled to any weight in a service-connection or rating context if it contains only data and conclusions. *See Stefl v. Nicholson*, 21 Vet.App. 120, 125 (2007) (holding that "a mere conclusion by a medical doctor is insufficient to allow the Board to make an informed decision as to what weight to assign to a doctor's opinion"); *Miller v. West*, 11 Vet.App. 345, 348 (1998) ("A bare conclusion, even one reached by a health care professional, is not probative without a factual predicate in the record."); *see also Dennis v. Nicholson*, 21 Vet.App. 18, 22 (2007) ("The Court has long held that merely listing evidence before stating a conclusion does not constitute an adequate statement of reasons and bases." (*citing*

*Abernathy v. Principi*, 3 Vet.App. 461, 465 (1992))); *but see McLendon v. Nicholson*, 20 Vet.App. 79 (2006) (holding that a conclusory opinion may furnish enough evidence of current disability or medical nexus so as to call for a VA medical examination).

The Board's interpretation and assignment of probative weight are entitled to deference and may not be disturbed unless clearly erroneous. 38 U.S.C. § 7261(a)(4) (2019); *Gilbert,* 1 Vet.App. at 52. Under the "clearly erroneous" standard of review, the Court cannot substitute its judgment for that of the Board, and it *must* affirm the Board's factual findings so long as they are supported by a plausible basis in the record. *Gilbert*, 1 Vet.App. at 52 (emphasis added); *see also Anderson v. City of Bessemer City, N.C.*, 105 S.Ct. 1504 (1985) ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.").

Here, the Board's statement of reasons or bases is not problematic, nor is its probative evaluation of the evidence, because it considered both the VA and private medical opinions and based its evidentiary valuations on the lack of rationale within the March 2015 private opinion. Specifically, the Board explained that the March 2015 private opinion was minimally probative because the physician failed to review Appellant's medical record and did not provide any rationale or opinion regarding the etiology of the right knee tendonitis diagnosis. (R. at 8). The Board further reasoned that the April 2015 VA medical opinion was highly probative because it was "based on an accurate medical history and provides an

explanation that contains clear conclusions and supporting data." *Id*. Such a finding is certainly proper and within the Board's duties as factfinder and evidence evaluator. In fact, this Court has repeatedly held that the Board is entitled to weigh and evaluate the medical evidence and favor one opinion over the other. *D'Aries*, 22 Vet.App. at 107.

Appellant offers several arguments against the Board's reasons or bases and its probative evaluations of the evidence. First, Appellant asserts that the Board erred in citing to *Nieves-Rodriguez v. Peake* to support its finding that the March 2015 private opinion was minimally probative. (Appellant's Brief (App.) at 2-4). Appellant argues that the Board cannot make a probative valuation based solely off whether an examiner reviewed a veteran's medical history. *Id*. However, Appellant ostensibly neglects consideration of the Board's entire explanation for its evidentiary decision, namely, that the March 2015 examiner failed to review Appellant's medical record *and* did not provide a rationale or opinion. (R. at 8) (emphasis added).

Moreover, the Board's reliance on *Nieves-Rodriguez* is entirely proper, because *Nieves-Rodriguez* stands for the proposition that a medical opinion must be based upon reasoning, rather than merely conclusions. 22 Vet. App. at 304. Because the March 2015 examiner provided no opinion regarding etiology and did not offer a nexus opinion, the Board—acting within its powers—found the opinion to offer conclusions without reasoning (in violation of *Nieves-Rodriguez*) and properly afforded little probative weight to his opinion. (R. at 634-643). Aside from

the logical considerations—that the Board cannot be fully informed without a medical nexus opinion—the Board's actions were not improper.[1]

Appellant next argues against the Board's finding that "[t]he Veteran did not require any further treatment for his knees while in service, nor was a condition noted on his February 1961 service separation physical examination," asserting that this is a "misstatement of the examiner's rationale and an illogical inference." (R. at 7); (App. at 4). Aside from being an ostensibly undeveloped argument, Appellant's reasoning is flawed. Contrary to Appellant's contentions, it makes logical sense for the Board to infer that no further treatment occurred, because it was presented with no evidence, notation, or any other documentation thereof.

Appellant also asserts that the Board and the VA examiner improperly relied upon the absence of evidence. (App. at 4). He argues that "no evidence, no further visits, and no condition noted upon separation do not tend to show that [he] had not been experiencing symptoms." (App. at 4). This argument is unpersuasive, as it fails to consider *Buczynski v. Shinseki* and the substantive negative evidence

[1] The Secretary notes that factual accuracy is another issue with reliance on the March 2015 private opinion. Because the March 2015 private examiner did not review Appellant's service treatment records, he incorrectly noted that Appellant suffered a knee injury in service when it was actually his ankle that was caught between a forklift and J-bar. *Compare* (R. at 634) *with* (R. at 555) (noting that Appellant's *ankle* was injured by the forklift) (emphasis added). Thus, the private examination is inadequate under *Acevedo v. Shinseki*. 25 Vet.App. 286, 293 (2012) (holding that an adequate examination "must rest on correct facts and reasoned medical judgment so as inform the Board on a medical question and facilitate the Board's consideration and weighing of the report against any contrary reports.")

of record. In *Buczynski v. Shinseki*, the Court explained that where there is a lack of notation of a medical condition or symptoms where such notation would normally be expected, the Board may consider this as evidence that the conditions or symptoms did not exist. 24 Vet.App. 221, 224 (2011). Here, a notation of knee treatments while in service would normally be expected, as service treatment records are specifically created to generate a record of treatment received during service. Thus, under *Buczynksi*, the Board's consideration and analysis of the evidence was proper. Moreover, Appellant's 1961 separation examination, which indicates *no* knee issues, stands as substantive negative evidence against assertions that Appellant suffered from recurrent knee issues or received regular treatment therefor during service. *See* (R. at 544-545).

Lastly, Appellant argues that the Board's decision should be remanded because it "did not bother to explain" the relevance of the fact that no knee condition was noted on his separation examination. (App. at 4-5). For legal support, Appellant cites to *Hensley v. Brown*, for the proposition that claimants may establish service connection for a current disability "many years" after separation. (App. at 4-5). As an initial matter, the *Hensley* precedent is inapplicable to this case, because in *Hensley*, the Court was specifically discussing delayed onset hearing loss. The Court explained that "when audiometric test results at a veteran's separation from service do not meet the regulatory requirements for establishing a 'disability' at that time, he or she may nevertheless establish service connection for a current hearing disability by submitting evidence that the current

disability is causally related to service." *Hensley v. Brown*, 5 Vet.App. 155, 160 (1993). Here, however, the issue is right knee tendonitis, *not* delayed onset hearing loss. The specific medical nature of the above-referenced law established in *Hensley* renders it inapplicable to the current facts.

Moreover, the presence of condition noted upon separation is extremely relevant to the second requirement for establishing service connection—an in-service incurrence or aggravation of a disease or injury. *See Shedden v. Principi*, 381 F.3d 1163, 1166-1167 (Fed.Cir. 2004). By noting this requirement in its decision and subsequently noting the absence of evidence to show that this requirement has been met (to include the absence of a condition during separation), the Board sufficiently explained the relevance of this information.

Accordingly, the Court should find that the Board provided an adequate statement of reasons or bases for its decision, and further, that Appellant has not demonstrated that the Board's credibility determinations were clearly erroneous. *See Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc), *aff'd per curiam*, 232 F.3d 908 (Fed.Cir. 2000) (table); *Berger v. Brown*, 10 Vet.App. 166, 169 (1997) (holding that, on appeal to this Court, the appellant "always bears the burden of persuasion.").

**B. The April 2015 VA Medical Examination was Adequate.**

The April 2015 VA examination was adequate, as it was based on Appellant's medical history and included a well-reasoned rationale for its conclusions. Appellant's arguments against this opinion are unpersuasive,

because flare opinions are not required to establish service connection and the examiner was not tasked with providing a flare opinion. Moreover, the apparent distinction Appellant makes between tendonitis and tendonosis is unsupported by facts, law, or medical reasoning.

An adequate medical examination is one that is based on a consideration of the veteran's prior medical history and describes the veteran's condition with a level of detail sufficient to allow the Board to make a fully informed decision. *Ardison v. Brown*, 6 Vet.App. 405, 407 (1994). This requires the examiner to not only render a clear conclusion on the relevant medical question, but also to support that conclusion "with an analysis that the Board can consider and weigh against contrary opinions." *Stefl*, 21 Vet.App. at 124 (holding that "a mere conclusion by a medical doctor is insufficient to allow the Board to make an informed decision as to what weight to assign to the doctor's opinion").

Generally, an adequate examination "must rest on correct facts and reasoned medical judgment so as to inform the Board on a medical question and facilitate the Board's consideration and weighing of the report against any contrary reports." *Acevedo v. Shinseki*, 25 Vet.App. 286, 293 (2012).

Whether a medical opinion is adequate is a finding of fact subject to review under the "clearly erroneous" standard. *Hood v. Shinseki*, 23 Vet.App. 295, 299 (2009); *D'Aries*, 22 Vet.App. at 104. Under the "clearly erroneous" standard of review, the Court cannot substitute its judgment for that of the Board, and it *must* affirm the Board's factual findings so long as they are supported by a plausible

basis in the record. *Gilbert*, 1 Vet.App. at 57 (emphasis added); *see also Anderson*, 105 S.Ct. at 1504 ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.").

Here, the April 2015 VA examination was adequate, as it offered a well-reasoned medical rationale based on correct facts (as opposed to the March 2015 private opinion), and sufficiently informed the Board on Appellant's right knee condition. *See* (R. at 519-521). In fact, the April 2015 VA opinion facilitated the Board's ability to consider and weigh it against the contrary March 2015 private opinion. *Id*. Appellant does not dispute the adequacy of the VA examiner's reasoning or rationale; rather, his dispute is based on the absence of a flare opinion (citing to 38 C.F.R. § 4.40), and the absence of an opinion on both tendonitis and tendonosis. (App. at 3-4).

Regarding the absence of a flare opinion, Appellant fails to consider the section of law in which § 4.40 fits. *See* 38 C.F.R. § 4.40 (2019). The requirement of a flare opinion and 38 C.F.R. § 4.40 are both within the *rating* section of the Code (as opposed to the regulations governing service connection). More importantly, a flare opinion is *not* a requirement for service connection and the examiner was not tasked with providing a flare opinion.

Appellant's other argument, that the examiner should have addressed both tendonitis and tendonosis, is similarly unpersuasive. The March 2015 diagnoses coupled tendonitis and tendonosis together ("tendonitis/tendonosis"). Thus, it may be logically assumed that the injuries are similar or potentially interchangeable.

*See* (R. at 631). Nonetheless, even if the Court were to find that this were error, it would be harmless, because as illustrated by the forgoing, there is no evidence of consistent knee treatment during or after service. *See Mayfield v. Nicholson*, 19 Vet.App. 103, 116 (2005) (focus is on the effect of the error on the essential fairness of the adjudication), *rev'd on other grounds by*, 444 F.3d 1328 (Fed.Cir. 2006).

Accordingly, the Court should find that the April 2015 VA examination is adequate, and further, that Appellant has not met his burden to show that the Board's decision to rely on the medical opinion was clearly erroneous. *See Hilkert*, 12 Vet.App. at 151; *Berger*, 10 Vet.App. at 169 (holding that, on appeal to this Court, the appellant "always bears the burden of persuasion.").

**C. Appellant Has Abandoned All Issues Not Argued in His Brief.**

It is axiomatic that issues or arguments not raised on appeal are abandoned. *Disabled Am. Veterans v. Gober*, 234 F.3d 682, 688 n.3 (Fed.Cir. 2000) (stating that the Court would "only address those challenges that were briefed"); *Pederson v. McDonald*, 27 Vet.App. 276, 284 (2015); *Williams v. Gober*, 10 Vet.App. 447, 448 (1997) (deeming abandoned Board determinations unchallenged on appeal); *Bucklinger v. Brown*, 5 Vet.App. 435, 436 (1993). Therefore, any and all issues that have not been addressed in Appellant's brief have therefore been abandoned.

## V. CONCLUSION

For the foregoing reasons, the Secretary respectfully submits that the February 21, 2019, Board decision be affirmed in all respects.

Respectfully submitted,

**WILLIAM A. HUDSON, JR.**
Acting General Counsel

**MARY ANN FLYNN**
Chief Counsel

/s/ Edward V. Cassidy, Jr.
**EDWARD V. CASSIDY, JR.**
Deputy Chief Counsel

/s/ Colin E. Tansits
**COLIN E. TANSITS**
Appellate Attorney
Office of General Counsel (027B)
U.S. Department of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, DC 20420
(202) 632-6139