Vet.App. No. 18-5399

IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

WILLIE HAIRSTON, JR.,
Appellant,

v.

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

ON APPEAL FROM THE BOARD OF VETERANS' APPEALS

BRIEF OF THE APPELLEE SECRETARY OF VETERANS AFFAIRS

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Appellant,	)	
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Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS

BRIEF OF THE APPELLEE
SECRETARY OF VETERANS AFFAIRS

I. ISSUES PRESENTED

1. Whether Appellant was prejudicially harmed by a malfunctioning audio recording that rendered his testimony before a Decision Review Office inaudible, given that he was properly notified of this malfunction and given the opportunity to appear for a second hearing or to provide written testimony.

2. Whether the Board of Veterans' Appeals (Board) properly denied service connection for a low back disability, when the evidence did not establish that Appellant had a chronic disability in service or continuous symptoms thereafter, and where the Board relied on two detailed medical opinions that discussed the relevant facts of Appellant's claim in sufficient detail.

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

The United States Court of Appeals for Veterans Claims (Court) has jurisdiction under 38 U.S.C. § 7252(a), which grants the Court exclusive jurisdiction to review Board decisions.

B. Nature of the Case

Appellant Willie Hairston, Jr., appeals the June 11, 2018, Board decision that denied service connection for a back disability. [Record Before the Agency (R.) at 4-11]; [Appellant's Brief (App. Br.) at 1].

C. Statement of Relevant Facts

Appellant served on active duty with the United States Army from August 1980 to May 1988. [R. at 877 (DD 214)]. While serving with the Army, Appellant was assigned a military occupational specialty (MOS) of "chaparral/redeye repairer." *Id*. Appellant's service medical records (SMRs) indicate that he sought treatment for a low back injury on August 30, 1984. [R. at 827-28 (August 30, 1984, Report of Medical Treatment)]. At that time, Appellant reported that he "may have strained [his] back while lifting heavy equipment last [evening.]" [R. at 828]. The examining physician noted that Appellant reported that his pain was concentrated in the right lower back area and also noted the presence of muscle spasms. [R. at 828]. Appellant was diagnosed with "muscle spasms" and placed on limited duty which included no lifting for one week. *Id*. During a subsequent Report of Medical History, Appellant affirmatively denied any symptoms of

"recurrent back pain." [R. at 772-73 (June 13, 1986, Report of Medical History)]. No spinal abnormalities were noted on the contemporaneous physical examination. [R. at 761-62 (June 13, 1986, Report of Medical Examination)].

Prior to his honorable discharge from service, Appellant was administered a physical examination on February 18, 1988. [R. at 824-25 (February 18, 1988, Report of Medical Examination)]. Examination of the spine was normal, and the only notation of injury were the Appellant's reports of injuring his back in Germany in 1984. [R. at 825]. In describing this injury, Appellant reported that he would "sometime[s] have lower back pain after bending down [and] then straightening up." *Id*. Additionally, reports of in-service injuries were documented at this time, including left knee pain. *Id*. Based on these reports, the examining physician recommended that Appellant be seen for a follow-up evaluation by a physical therapist. *Id*.

On February 26, 1988, an initial physical therapy consultation was documented in Appellant's SMRs. [R. at 866 (February 26, 1988, Consultation Sheet)]. In the "Reason for Request" section of this consultation sheet, the examining physician recorded Appellant's reports of left knee pain, and also included an ambiguous reference to "[l]ow back pain." *Id*. But, in the more detailed contemporaneous clinical assessment associated with this February 26, 1988 initial consultation, the examining physician documented only Appellant's reports of left knee pain and did not elaborate on any symptoms of low back pain. [R. at 869 (February 26, 1988, Physical Therapy Initial Note)]. Similarly, there is no

mention of any intermittent or chronic low back pain in Appellant's later physical therapy treatment reports. [R. at 869-71 (Records of Physical Therapy, dated February 26, 1988 through March 22, 1988)]. During the final record of physical therapy, dated March 22, 1988, it was noted that Appellant reported an improvement of his knee symptoms. [R. at 871]. But, because Appellant reported left knee pain during three-mile marches, the examining clinician noted that he would remain on profile until his "ETS" date, or separation, in May 1988. *Id*. Again, no reports of low back pain were noted during any of these physical therapy assessments. *See, e.g.,* [R. at 869-71].

In July 2009, Appellant applied for service connection of, among other things, "lower back pain." [R. at 2711-21 (July 2009 Application for Disability Compensation)]. In this application, Appellant reported that he injured his back while "picking up missile tests" in 1984, during his service in Nurnberg, Germany. [R. at 2717]. In support of his claim, Appellant submitted records of private medical treatment and also requested that the Department of Veterans Affairs (VA) Regional Office (RO) obtain his VA treatment records. *See, e.g.,* [R. at 2358-92 (Treatment records from Ralph Johnson, D.C.), 2394 (October 2009 Statement from Appellant)].

In April 2010, the RO declined to award service connection for Appellant's low back disability. [R. at 2309-14 (April 2010 Rating Decision)]. The RO explained that although Appellant's reports of an in-service back injury in 1984 are consistent with his SMRs, a review of his post-service treatment records shows

that when he first sought treatment for low back symptoms, he related that his pain was caused by a running injury in 1995, several years following his separation. [R. at 2312]. The RO additionally explained that these post-service records show that Appellant "den[ied] any other injuries prior to 1995." *Id*. Given this evidence, the RO explained that service connection for a low back disability was not warranted because there was no evidence linking his current disability to his reports of an in-service injury. *Id*.

Appellant submitted a timely Notice of Disagreement in September 2010. [R. at 2297 (September 2010 Notice of Disagreement)]. Then, in October 2010, Appellant requested that he be scheduled for a Decision Review Officer (DRO) Hearing. [R. at 2281 (October 2010 Statement in Support of Claim)]. On March 23, 2012, the RO mailed Appellant a notice letter informing him of the scheduled date and time for his DRO Hearing. [R. at 2243-45 (March 2012 Notice Letter)]. The DRO Hearing took place on April 23, 2012, but in a subsequent report, the RO noted that the transcript of Appellant's testimony had been damaged and therefore the testimony was inaudible. [R. at 2242 (June 5, 2012, Transcript Status Report), 2241 (June 2012 Deferred Rating Decision)]. Due to this error, the RO contacted both Appellant and his appointed representative, the American Legion (AL), to inform him of the unavailability of his transcript and to offer him the opportunity to appear for a second DRO Hearing. [R. at 2239-40, (June 22, 2012, Notice Letter)]. As an alternative to appearing for a second hearing, the RO advised both Appellant and AL that he could provide a written summary of his testimony or opt to have the

RO process his appeal based on the written notes of the officer who conducted the hearing. [R. at 2239]. In response, Appellant submitted a written statement wherein he described the onset of his current low back disability and responded to questions he was asked during the DRO Hearing in April 2012. [R. at 2237-38 (July 2012 Statement in Support of Claim)].

Based upon the written testimony provided by Appellant, the RO requested a VA examination and medical opinion to assess the etiology of his current low back disability. [R. at 2233-34 (August 17, 2012, Examination Request, where the RO discusses Appellant's reports of being "put on quarters" and injuring his back while lifting a "Redeye missile system")]; *cf.* [R. at 2237 (July 2012 Statement discussing same)]. A VA medical examination was conducted in September 2012. [R. at 2209-30 (September 2012 VA Medical Examination)]. At that time, Appellant was noted to have current diagnoses of "degeneration of the lumbar spine," "spondylolisthesis," and "spinal stenosis [in] lumbar region without neurogenic claudication." [R. at 2209-11]. Following the notation of symptom onset and the history from Appellant, and a physical examination, the examining physician opined that it was less likely as not that the current low back disabilities were etiologically related to Appellant's active duty service. [R. at 2226-30]. The physician explained that Appellant was treated for a transient muscle spasm during active service, which per objective testing and Appellant's subjective statements, resolved prior to his separation from service in May 1988. [R. at 2227-28]. The physician further explained that in all post-service treatment records, Appellant

was “very clear” that his back pain began in 1995, which the physician noted was well after he left the military. [R. at 2228].

Thereafter, a Statement of the Case (SOC) was issued in September 2012, which continued the denial of service connection for a low back disability. [R. at 2186-2208 (September 2012 Statement of the Case)]. This September 2012 SOC was authored by a DRO who noted that Appellant’s April 23, 2012, testimony was unavailable due to a faulty audio tape. [R. at 2207]. The DRO discussed Appellant’s written testimony, submitted in July 2012, as well as the medical evidence and 2012 VA examination. [R. at 2207-08]. The DRO explained that service connection was not warranted because the medical evidence failed to establish a nexus. [R. at 2208]. Appellant submitted a timely VA Form 9, where he declined another opportunity to appear and to testify on the facts of his claim. [R. at 2181-82 (November 2012 VA Form 9)]. The appeal was certified to the Board in August 2013. [R. at 2171 (VA Form 8)].

In January 2017, the Board remanded the service connection claim for further development. [R. at 743-55 (January 2017 Board Decision and Remand)]. The Board explained a remand was required to obtain additional evidence, including Appellant’s application for disability benefits from the Social Security Administration (SSA), private records of chiropractic treatment, and any available records associated with Appellant’s application for a Commercial Drivers’ License (CDL). [R. at 749-50]. Additionally, the Board observed that Appellant was involved in an in-service fight, after which he reported symptoms of back, throat,

and neck pain. [R. at 750, 814 (August 28, 1983, Emergency Care Note), 802 (August 29, 1983, Screening Note of Acute Medical Care), 861 (August 29, 1983, Facial and Mandibular X-ray Report)]. Given this evidence, the Board requested that an addendum medical opinion be obtained on remand to discuss the relevance of these in-service reports of back pain. [R. at 751-52].

Following the Board's January 2017 Remand Order, the RO obtained Appellant's records from SSA as well as updated records from his designated VAMCs. [R. at 125 (March 22, 2017, Transmission of Records from SSA)]. The RO also mailed Appellant a development letter and requested that he provide signed waivers for the outstanding private medical records identified by the Board's remand order. [R. at 315-24 (March 21, 2017, Development Letter)]. But, in an April 2017 written statement, Appellant reported that these private medical records were no longer available. [R. at 88 (April 2017 Statement in Support of Claim)]. After processing these requests for additional medical records, the RO requested an addendum medical opinion. [R. at 85-86 (April 2017 Request for Medical Opinion)].

In July 2017, the same physician who authored the initial September 2012 VA examination and opinion, provided the requested addendum medical opinion. [R. at 34-45 (July 2017 VA Addendum Medical Opinion)]. After reviewing the evidence identified in the Board's January 2017 Remand Order, the physician opined that Appellant's current low back disability was not caused by this August 1983 in-service altercation. [R. at 42]. The physician explained that although

Appellant reported back pain the day following this altercation, the emergency room records did not document any bruises or lacerations to the back and did not contain any contemporaneous reports of back pain associated with his initial symptoms. *Id*. Afterwards, the RO issued a Supplemental Statement of the Case (SSOC) which continued to deny service connection for a low back disability. [R. at 20-32 (August 2017, Supplemental Statement of the Case)].

In June 2018, the Board issued its decision denying service connection for a low back disability. [R. at 3-13]. This appeal followed.

III. SUMMARY OF THE ARGUMENT

Appellant fails to advance a persuasive argument demonstrating that he was prejudiced by the unavailability of his April 2012 DRO transcript. Because he was properly notified of the malfunction of a recording device and was provided with an opportunity to have a second hearing, he cannot establish that VA failed its duty to help him develop his claim. Also, at no point was Appellant prevented from requesting the opportunity to have another hearing, before the RO or the Board.

In denying service connection for a low back disability, the Board provided an adequate statement of reasons or bases, which directly addressed Appellant's contentions and theories of entitlement. The Board's analysis is sufficient to facilitate review and to enable Appellant to have a clear understanding for why his claim was denied. Furthermore, the medical opinions of record are adequate as they are based on a thorough review of Appellant's medical history and provide

detailed rationales for their findings. Appellant's arguments to the contrary are unpersuasive and fail to show any clear error.

IV. ARGUMENT

A. Standard of review.

The Court reviews the Board's findings of fact, such as the determination of whether to award service connection and whether a medical examination is adequate, under the "clearly erroneous" standard of review. 38 U.S.C. § 7261(a)(4); *see Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990) (a finding of fact is not clearly erroneous if there is a plausible basis for it in the record). The Supreme Court has held that a finding is clearly erroneous "when although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985) (explaining how an appellate court reviews factual findings under the "clearly erroneous" standard).

The Court also reviews whether the Board has supported its decision with a written statement of reasons or bases for its factual findings and conclusions of law. 38 U.S.C. § 7104(d)(1). To comply with this requirement, the Board must analyze the probative value of evidence, account for evidence it finds persuasive or unpersuasive, and explain why it rejected evidence materially favorable to the claimant. *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995). The Board is not required to address each item of evidence, as it is presumed to have considered all evidence of record. *Newhouse v. Nicholson*, 497 F.3d 1298, 1302 (Fed. Cir. 2007).

Further, because the Board is responsible for assessing the credibility and probative weight of evidence, *Washington v. Nicholson*, 19 Vet.App. 362, 368 (2005), the Court may only overturn the Board's probative value determinations if they are clearly erroneous, *Smith v. Shinseki*, 24 Vet.App. 40, 48 (2010). *See Deloach v. Shinseki*, 704 F.3d 1370, 1380 (Fed. Cir. 2013) (explaining that the Court "may not weigh any evidence itself").

It is relevant to the Court's standard of review that an appellant generally bears the burden of demonstrating that any error in a Board decision is prejudicial. *Hilkert v. West*, 12 Vet.App. 145, 151 (1999), *aff'd* 232 F.3d 908 (Fed. Cir. 2000); *Shinseki v. Sanders,* 556 U.S. 396, 409, 129 S.Ct. 1696, 1706 (2009). Furthermore, arguments not raised in the initial brief are generally deemed abandoned, and the Court should find that Appellant has abandoned any argument not presented in his initial brief. *See Carbino v. West,* 168 F.3d 32, 34 (Fed. Cir. 1999).

B. Appellant fails to show that he was prejudiced by an inaudible recording of his testimony before a Decision Review Officer

While Appellant advances a number of arguments about how he was harmed, none of these are persuasive because they are vague and unsupported allegations of how he may have been prejudiced. App. Br. at 12-17. Contrary to Appellant's assertions, he was properly notified of the unavailability of the transcript of his April 2012 DRO testimony and was also provided with an opportunity to appear for a second hearing. Despite Appellant's protestations, just

because he affirmatively elected not to appear for a second DRO hearing in 2012, he did not waive his right to request another hearing at a later date. *See* 38 C.F.R. 3.103(c).

In October 2010, Appellant submitted a written request to appear and to give testimony to a DRO. [R. at 2281]. The RO properly granted Appellant's request and scheduled him for an in-person hearing in April 2012. [R. at 2243-45]. After this hearing, in June 2012, the RO alerted Appellant that the audio recording of his April 2012 testimony was inaudible due to a malfunction with the recording device. [R. at 2239-40, 2241]. This letter also advised Appellant that he had the option to request another DRO hearing, that he could provide a written summary of his testimony, or that he could elect to have his appeal continue based on the notes taken by the DRO who participated in the April 2012 hearing. [R. at 2239]. In response to this letter, Appellant submitted a written summary of his testimony. [R. at 2237-38]. Thus, contrary to Appellant's assertions, the factual record clearly demonstrates that Appellant was notified of the unavailability of his April 2012 hearing transcript and that he was provided the opportunity to appear for a second hearing.

The mere fact that Appellant submitted written testimony in response to the RO's June 2012 letter does not mean that he waived his right to a second hearing. App. Br. at 13. To the contrary, under regulations in effect at that time, Appellant could have at any point prior to his appeal being certified to the Board, submitted a written request for another hearing. *See* 38 C.F.R. § 3.103(c) (2012) (which

states, in relevant part, that "a claimant is entitled to a hearing at any time on any issue involved in a claim . . . subject to the limitations described in § 20.1304 of this chapter with respect to hearings in claims which have been certified to the Board of Veterans' Appeals for appellate review.").[1] Thus, not only was Appellant alerted by the RO that he could request a second hearing, he also had the ability to submit a written request for a hearing at anytime thereafter. But Appellant did not request a second hearing. Also, when provided the opportunity to testify before a Veterans' Law Judge, Appellant declined. [R. at 2181].

Appellant is also unable to show that he was prejudiced by the unavailability of his April 2012 DRO transcript, and he instead advances a number of vague and unsupported contentions that he was possibly harmed. App. Br. at 15-17. For example, Appellant suggests that because there was no transcript of his April 2012 testimony, the Court is unable to determine whether the DRO complied with his duties to "discuss the issues and possible submission of additional evidence." App. Br. at 15-16. But in making this argument, Appellant fails to acknowledge that VA took steps to ensure that due process was available when it offered him the opportunity for a second hearing. [R. at 2239]. Moreover, Appellant is unable to show that he was harmed in any way. To the contrary, the record shows that following Appellant's submission of written testimony in July 2012, the RO

[1] While Appellant refers to this regulation as § 3.104(c), there was no such regulation at that time. *See, e.g.,* App. Br. at 13. While there was a § 3.104 that was in effect at that time, it is not applicable here because it discusses the finality of decisions.

concluded that he had provided sufficient evidence to trigger its duty to provide him with a medical opinion. [R. at 2233-34]. Based on the statements Appellant provided, the RO initiated a request for a VA medical opinion, and, in the body of this request, the RO quoted directly from Appellant's July 2012 written testimony. *Id*; *Cf.* [R. at 2237-38].

In sum, because Appellant is unable to show how he was harmed by the unavailability of his April 2012 DRO testimony, this Court should decline to address his arguments. *Evans v. West*, 12 Vet.App. 22, 31 (1998) (the Court will not consider a "vague assertion" or an "unsupported contention" of error).

C. The Board provided an adequate statement of reasons or bases when it denied service connection for a low back disability, and its factual findings, to include about the adequacy of the evidence, are not clearly erroneous

The Board adequately supported its decision to deny Appellant's service connection claim with a discussion of the relevant facts and a concise statement of reasons and bases. In adjudicating a claim for benefits, the Board is statutorily required to provide Appellant with a written decision of all material issues presented by the record, supported by a statement of the Board's reasons or bases. 38 U.S.C. § 7104(d)(1). This Court has held that such a statement from the Board must be adequate, such that it must facilitate understanding and informed review of the Board's decision by thoroughly discussing relevant evidence considered by the Board and the rationale it utilized. *See Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Gilbert*, 1 Vet.App. at 57. To comply with this

requirement, the Board must analyze the probative value of evidence, account for evidence it finds persuasive or unpersuasive, and explain why it rejects 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).

Here, the Board explained that service connection was not warranted because the preponderance of the evidence weighed against a finding that Appellant's current low back disability was related to his active duty service, to include any in-service injury therein. [R. at 6]. In reaching this determination, the Board relied on two adequate medical opinions which thoroughly reviewed and fully discussed Appellant's medical history, and which provided the Board with a sufficient explanation to make a fully informed decision. As explained in more detail below, Appellant fails to demonstrate error in the Board's statement of reasons or bases. *Shinseki v. Sanders*, 556 U.S. at 409; *Hilkert*, 12 Vet.App. at 151.

i. The Board's discussion of the evidence enabled Appellant to fully understand how it weighed the relevant evidence of record

Appellant advances a number of allegations of error with the Board's statement of reasons or bases, but ultimately, all are unpersuasive and amount to an impermissible request for this Court to reweigh the evidence. The court should therefore reject appellant's argument. *See Deloach*, 704 F.3d at 1380 ("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.").

In reviewing Appellant's medical history, the Board properly discussed the relevant evidence and explained what weight it assigned to such records. For example, the Board began its decision by acknowledging Appellant's contention that his current low back disability was caused by an injury he sustained in service, when he lifted heavy equipment. [R. at 5]; *Cf.* [R. at 2717 (July 2009 Application for Service Connection)]. While the Board discussed Appellant's contentions, it ultimately found that the remaining evidence weighed against such a nexus. [R. at 6]. Also, contrary to Appellant's assertions, in directly addressing Appellant's theory of entitlement, the Board did not make an implicit finding that the August 1984 reported injury was the only in-service injury he sustained. App. Br. at 17. Rather, and as shown by the Board's review of his SMRs, the Board clearly reviewed the totality of his records, but it determined that the August 1984 report of injury was the only record which directly addressed the low back.

Although Appellant argues the Board erred in not discussing his other in-service reports of injuries to the low back, he is unable to identify any relevant record of a low back injury that the Board did not discuss. Instead, Appellant cites to numerous post-service assertions where he states that he "may have" injured his back in service. App. Br. at 19. For example, Appellant cites to his report during the September 2012 VA examination that, while in service, he fell while scaling a fence and landed on his left knee which caused an injury. [R. at 2211]. At that time, Appellant also stated that he "thinks" he injured his back as well. *Id.* But the board clearly reviewed appellant's SMRs and discussed the relevant

portions of those records. [R. at 6]; *Newhouse*, 497 F.3d at 1302 (recognizing that the Board need not comment on every piece of evidence contained in the record); *see also Dela Cruz v. Principi,* 15 Vet.App. 143, 149 (2001) (the Board is only required to discuss the relevant evidence). The board also relied on a detailed summary and discussion of appellant's SMRs, as contained in both the 2012 and 2017 VA medical opinions, which found no reports of a back injury associated with a fall that injured a knee. *See, e.g.,* [R. at 806 (July 21, 1983, Report of Injury to Right Knee), 34-45 (July 2017 VA Medical Opinion)]. Simply demanding that the board provide further discussion does not satisfy appellant's burden of demonstrating error on appeal.

Next, Appellant asserts that the Board erred when it did not discuss SMRs showing that he was recommended for physical therapy following his February 1988 separation physical examination. App. Br. at 19. But this argument is not persuasive because it is based on a misunderstanding of the evidence. Contrary to Appellant's assertions, there are no records of physical therapy for his low back injury. At his February 1988 separation physical examination, in Box 73 titled "NOTES," Appellants reports of left knee pain and occasional low back pain were documented by the physician who performed the physical examination. [R. at 825 (where it was noted that Appellant "sometime[s] has low back pain after bending")]. Although no diagnoses were provided in Box 74, the physician advised that a referral for physical therapy was recommended to evaluate the reports of left knee and low back pain. *Id*.; *see also* [R. at 866 (February 26, 1988, referral for physical

therapy)]. While the referral was recommended for both the left knee and the low back, the detailed physical therapy intake note documented only reports of left knee complaints and did not note that Appellant reported any symptoms of low back pain. [R. at 869 (February 26, 1988, Physical Therapy Initial Note)]. Furthermore, in all subsequent physical therapy sessions, there is no mention of any low back symptoms. [R. at 869-71]. Thus, Appellant's argument that the Board overlooked relevant evidence is without merit because it is not supported by the factual record.

Also, given that the Board discussed the February 1988 separation examination, and its notation of intermittent back pain, the Board was not obligated to discuss subsequent records which did not document any reports by Appellant of back pain. Although this referral mentions "back pain," the referral was a summary of the February 1988 separation examination, and in particular, the reports noted in Box 73, and it did not constitute a separate finding of back pain as alleged by Appellant. Moreover, even if it were error for the Board not to discuss these records, it would be non-prejudicial because these records do not pertain to Appellant's low back disability. *See* 38 U.S.C. § 7261(b)(2) (requiring the Court to "take due account of the rule of prejudicial error").

Finally, Appellant's allegation that the Board erred in not explaining which of his diagnosed disabilities was congenital is at best a red herring. App. Br. at 18. To be clear, the Board did not deny service connection because Appellant had a preexisting disability. Appellant was not noted to have any preexisting disabilities

at his entrance to service, and therefore the issue of what disability may or may not be congenital in nature is not relevant to the Board's reasons for denying service connection.

In sum, Appellant fails to present a persuasive argument as to how he was prejudiced by the Board's statement of reasons or bases. The Board's statement of reasons or bases clearly conveyed to Appellant that service connection could not be awarded because the preponderance of the evidence weighed against his claim. *See* 38 U.S.C. § 7104(d)(1); *Gilbert*, 1 Vet.App. at 52 (explaining Court must affirm Board's factual findings if they are "plausible in light of the record"). Because Appellant fails to show otherwise, the Court should affirm the Board's decision to deny service connection for a low back disability.

ii. Appellant's arguments as to the continuity of symptomatology for his low back disability are predicated on a misunderstanding of the law

The Board correctly determined that service connection under 38 C.F.R. § 3.303(b) for a low disability was not warranted because there is no evidence that Appellant had a low back disability "noted" during his active duty service and no evidence of a diagnosed disability within one year following his separation from service. Because Appellant did not have a condition noted in service, the Board was not required to discuss whether service connection was warranted based on continuity of symptomatology. Appellant's arguments to the contrary amount to a misunderstanding of the law and are therefore unconvincing.

Service connection may be awarded on a presumptive basis for certain chronic diseases listed in 38 C.F.R. § 3.309(a) that manifest during service and then again at a later date. 38 C.F.R. § 3.303(b); *see Walker v. Shinseki*, 708 F.3d 1331, 1337 (Fed. Cir. 2013). Evidence of continuity of symptomatology may be sufficient to invoke this presumption if a claimant demonstrates (1) that a condition was "noted" during service; (2) evidence of post-service continuity of the same symptomatology; and (3) medical or, in certain circumstances, lay evidence of a nexus between the present disability and the post-service symptoms. *Barr v. Nicholson*, 21 Vet.App. 303, 307 (2007) (citing *Savage v. Gober*, 10 Vet.App. 488, 496-97 (1997)); 38 C.F.R. § 3.303(b). Arthritis is a chronic condition under 38 C.F.R. § 3.309(a) and "the term osteoarthritis is a synonym of the terms degenerative arthritis and degenerative joint disease." *Greyzck v. West*, 12 Vet.App. 288, 291 (1999) (citing STEDMAN'S MEDICAL DICTIONARY 1267 (26th ed. 1995)).

Contrary to Appellant's contention, the Board did discuss whether a finding of service connection was warranted under § 3.303(b) for a chronic disability noted during service. [R. at 10 (finding that presumptive service connection cannot be awarded for Appellant's post-service manifestations of arthritis)]; App. Br. at 21. The Board explained that diagnostic evidence demonstrating arthritis was not available until July 2004. *Id*. Appellant asserts that the Board's finding here is error because the record contains a report of a March 1999 x-ray which he argues documents an earlier finding of arthritis. [R. at 1726 (March 23, 1999, X-ray Report

of the Right Hip)]. But Appellant's assertions fail to demonstrate prejudicial error because, as this x-ray is dated in 1999, it is insufficient to establish a diagnosis of arthritis during the one-year presumptive period following his separation from service in May 1988. *See* 38 C.F.R. §§ 3.307(a)(3); 3.309(a).

As to evidence of an in-service condition, the Board acknowledged Appellant's reports of injuring his back while on active duty. Specifically, the Board discussed Appellant's theory that his current disability was due to his August 1983 injury, where he reported back pain after lifting missile equipment, and also the reports of an in-service altercation. [R. at 6-7]. The Board first explained that the August 1983 report of back pain was insufficient to "note" a chronic disability because the SMRs documented only this isolated report of an injury, and do not suggest that he experienced continuous symptoms. To the contrary, the Board noted that Appellant affirmatively denied any symptoms of low back pain during a June 1986 physical examination. [R. at 7, 772-73]. The Board also acknowledged the notation of a back injury on Appellant's February 1988 separation physical examination but emphasized that this report documented that he experienced low back pain "sometimes." [R. at 6, 825]. Thus, given the lack of a "noted" condition during Appellant's active duty service, the Board was correct when it found that presumptive service connection under § 3.303(b) was not warranted.

Appellant disagrees with the Board's factual determination but fails to provide any evidence showing that he had a chronic low back disability noted during his service. Instead, Appellant cites to numerous post-service treatment

records where he sought intermittent treatment for complaints of low back pain. App. BR. at 22-23. But Appellant overlooks the fact that the presumption in § 3.303(b) cannot attach where arthritis is not "noted" in service or within the one-year presumptive period following service. *See Walker*, 708 F.3d at 1340. Absent this factual foundation, for which he presents no evidence, his argument is without merit.

In sum, Appellant has failed to present a sufficient argument to warrant remand of the Board's determination that service connection under § 3.303(b) for a low back disability. *See Coker v. Nicholson*, 19 Vet.App. 439, 442 (2006) (Appellant bears the burden of demonstrating error and the precise relief sought). The Board's statement of reasons or bases clearly conveyed to Appellant that service connection could not be awarded on a presumptive basis under § 3.303(b) because there was no indication from the record that Appellant had a low back disability to a compensable degree within one year of his separation from active duty service. [R. at 10]. Therefore, the Board's analysis concerning § 3.303(b) is understandable and facilitates review, and Appellant has not demonstrated that the Board erred in its finding that his current low back disability was not "noted" in service or within one year following discharge. *See* 38 U.S.C. § 7104(d)(1); *Gilbert*, 1 Vet.App. at 52 (explaining Court must affirm Board's factual findings if they are "plausible in light of the record"). As such, the Court should affirm the Board's decision to deny service connection for a low back disability.

D. The Record contained adequate expert medical opinion evidence that thoroughly evaluated the etiology of the low back disabilities and allowed the Board to render a fully informed decision on Appellant's service connection claim

Both the September 2012 and the July 2017 medical opinions are adequate as they are based on an accurate account of Appellant's medical history, including his in-service low back injury and post-service treatment for back pain following a 1995 running injury. The physician who authored these medical opinions provided an explanation for why Appellant's current low back disability was less likely as not related to his active duty service. Appellant alleges numerous deficiencies with the 2012 and 2017 medical opinions, but all are misguided.

A medical opinion is adequate "where it is based upon consideration of the veteran's prior medical history and examinations and also describes the disability, if any, in sufficient detail so that the Board's 'evaluation of the claimed disability will be a fully informed one.'" *Stefl v. Nicholson*, 21 Vet.App. 120, 123 (2007) (quoting *Ardison v. Brown*, 6 Vet.App. 405, 407 (1994)) (internal quotation marks omitted). Put differently, an adequate medical examination report allows the Board to "conclude that a medical expert has applied valid medical analysis to the significant facts of the particular case . . . ." *Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 304 (2008). Whether a medical opinion is adequate is a finding of fact subject to review under the deferential "clearly erroneous" standard. *D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008).

i. The September 2012 VA medical opinion was based on an accurate factual history

Appellant's assertions that the September 2012 medical opinion was premised on an inaccurate factual history is not supported by the record. App. Br. at 29-30. Instead, the September 2012 VA medical opinion is based on a detailed review of Appellant's medical history, including a review of the SMRs and post-service treatment records. [R. at 2211-13]. The VA examiner, Dr. Stanton, also documented Appellant's own recitation of his medical history, including his assertion that he sustained "several [ ] injuries on active duty" but that not all were documented in the SMRs. [R. at 2211]. Based on a review of the SMRs, Dr. Stanton observed that Appellant sought treatment for symptoms of low back pain in August 1984, after he reported sustaining an injury while lifting heavy equipment. [R. at 2227]. Dr. Stanton noted that the SMRs indicated Appellant was diagnosed with "muscle spasms" at that time, and that these spasms appeared to resolve with treatment, which included muscle relaxants and one week of limited lifting. *Id*; *see also* [R. at 827-28 (August 30, 2984, Chronological Record of Medical Care)]. Dr. Stanton explained that these muscle spasms were "transient" in nature, because during a subsequent physical examination, in June 1986, Appellant affirmatively denied any continuous symptoms of low back pain. [R. at 2228]. While Dr. Stanton discussed Appellant's reports of an injury on his February 1988 separation examination, he explained that this was documented as intermittent, or non-continuous, symptoms of low back pain. *Id*.

Dr. Stanton explained that the post-service treatment records supported his impression that the August 1984 injury was transient, or non-continuous. Here, Dr. Stanton summarized numerous reports from Appellant to his then-treating physicians that his current low back pain did not begin until the mid-1990s, which was several years following his separation from service. [R. at 2228 (explaining that Appellant "is very clear at all visits before 2009 where the back-pain origin was brought up that it began about 1995)]. Based on this review of the SMRs and post-service treatment records, Dr. Stanton concluded that it was less likely as not that Appellant's current low back disability was etiologically related to his active duty service. [R. at 2228-29]. Dr. Stanton explained that his medical opinion was based on the lack of continuous reports of symptoms following the August 1984 reported injury, the affirmative denials of continuous symptoms at the June 1987 in-service physical examination, and Appellant's denials of back pain following service until 1995, where Appellant then related his symptoms to events that post-date his military service. *Id*.

Appellant first attacks the September 2012 medical opinion as being premised on an inaccurate factual premise because Dr. Stanton did not discuss SMRs showing he was recommended for physical therapy following his February 1988 separation physical examination. App. Br. at 29-30. But, as discussed, *supra*, this argument is not persuasive because it is based on a misunderstanding of the evidence. There are no records of physical therapy for his low back injury. *See, e.g.,* [R. at 866, 869-71]. Thus, Appellant's argument, that the examiner

overlooked relevant evidence, is without merit because it is not supported by the factual record. Even if it were error for the examiner not to mention these records, it would be non-prejudicial because these records do not pertain to Appellant's low back disability. S*ee* 38 U.S.C. § 7261(b)(2) (requiring the Court to "take due account of the rule of prejudicial error").

Next, Appellant unpersuasively argues that the September 2012 VA medical opinion is inadequate because Dr. Stanton did not review evidence which did not, at that time, exist. App. Br. at 30, Fn. 4 (where Appellant acknowledges that the evidence, he cites to in support of his argument was created AFTER the September 2012 VA examination) (emphasis added). Appellant also contends that the 2012 examination is inadequate because the examiner did not discuss the in-service reports of his physical assault. App. Br. at 30. But these assertions of error are misplaced because the Board obtained a second VA medical opinion, dated in April 2017, which does discuss the evidence that Appellant argues is missing from the 2012 opinion. [R. at 34-75]. As such, Appellant's allegations of error are unsupported.

ii. The July 2017 addendum VA medical opinion is adequate because it is supported by a reasoned explanation and contains sufficient detail for the Board to render a fully informed decision

Unable to show any clear error with the July 2017 medical opinion, Appellant, again, asserts that it is inadequate because Dr. Stanton failed to discuss relevant evidence showing continued reports of back pain during his active duty service. But Appellant's assertions are, again, without support from the factual

record. As discussed, *supra,* Dr. Stanton's alleged failure to discuss Appellant's physical therapy records is unpersuasive. App. Br. at 34. Although the February 1988 referral to physical therapy did note an allegation of "low back pain," the initial treatment note, as well as all subsequent records of treatment, fail to document any allegation of low back pain. *See* [R. at 866, 869-71]. Because these records contain no mention of any ongoing low back symptoms, Dr. Stanton was not obligated to discuss them. Furthermore, Appellant's assertions that if the VA examiner were to consider such evidence, he may "revise his analysis," are undermined by the fact that Dr. Stanton did consider and discuss the February 1988 notation of intermittent back pain on the February 1988 Separation examination. [R. at 36].

Next, Appellant argues that Dr. Stanton misstated the evidence when he found that the first post-service instance of treatment for the low back was not until 2002. App. Br. at 26. But Appellant is unable to support his argument with any evidence from the record. Instead, Appellant cites to evidence dated in 2013 where he is noted as reporting that his back pain began in the 1990s. App. Br. at 26, citing [R. at 178-84 (September 2013 SSA Denial of Disability Claim), 255-58 (August 2013 Examination conducted for purposes of SSA Disability Application)]. To the extent that Appellant argues Dr. Stanton did not consider the medical records associated with his SSA application, this is clearly contradicted by Dr. Stanton's thorough review and discussion of the post-service medical history. *See, e.g.,* [R. at 40 (where Dr. Stanton specifically addresses the August 2013 SSA

medical examination)]. Appellant's argument is further undermined by Dr. Stanton's thorough review of the post-service medical records. Significantly, Dr. Stanton reviews all available records of post-service treatment and documents that at every visit, up until 2002, Appellant does not allege any current, chronic, or intermittent symptoms of low back pain or a low back injury. *See, e.g.,* [R. at (36-41)]. As Appellant is unable to provide evidence that directly contradicts Dr. Stanton's findings, the Court should decline to address this argument. See *Locklear,* 20 Vet.App. at 416.

Appellant's final arguments amount to an attempt to undermine Dr. Stanton's opinion by providing his own interpretation of the medical evidence. App. Br. at 26-29. But Appellant is not a doctor, and he has not shown that he otherwise has the competence or expertise to ascertain the pertinent facts of medical studies, or to question the interpretations offered by others who actually do possess that expertise, such as Dr. Stanton. *See Kern v. Brown*, 4 Vet.App. 350, 352 (1993) (noting that "appellant's attorney is not qualified to explain the significance of the clinical evidence"); *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.").

Here, Dr. Stanton is competent to have concluded that "mild degenerative changes in [the] lower lumbar spine" is appropriate for someone of Appellant's age. [R. at 44]. While Appellant may disagree with this assessment, his argument that the medical study cited in the July 2017 medical opinion contradicts Dr. Stanton's

conclusion is not persuasive. Notably, Dr. Stanton explained that "mild degenerative changes" are age appropriate, especially for an individual, such as Appellant, who is shown to have "congenital sacralization of L5." *Id*. Thus, Dr. Stanton's own explanation recognized that an individual such as Appellant would be more likely than an average person to have mild degenerative changes given the structure of his lower lumbar spine.

Finally, contrary to Appellant's suggestion, Dr. Stanton did not engage in impermissible speculation when he opined that the in-service physical assault was less likely as not to have caused Appellant's current low back disability. App. Br. at 28. Rather, Dr. Stanton provided a reasoned explanation that this in-service assault did not result in any injury to the back because the contemporaneous medical records did not document any reports or bruises, lacerations, or cuts to Appellant's back. [R. at 42]. This finding is consistent with the SMRs which do not show any reports of visible injuries to Appellant's back. [R. at 814]. Furthermore, while Dr. Stanton may have made a finding as to why Appellant reported back pain the day after this altercation, this is insufficient to establish that his opinion was premised on speculation. *Espiritu v. Derwinski*, 2 Vet.App. 492, 495 (1992) (stating that, as medical experts in their field, VA medical examiners are entitled to form judgments based upon their training and the facts before them). To the contrary, Dr. Stanton's medical opinion is well reasoned and contained a detailed and thorough review of the SMRs.

In light of the above, Appellant has failed to meet his burden of demonstrating that either the September 2012 or the July 2017 VA medical opinions are inadequate. *See Hilkert*, 12 Vet.App. at 151; *Shinseki v. Sanders*, 556 U.S. at 409. The Court should therefore find that these medical opinions are adequate. *D'Aries*, 22 Vet.App. at 104.

V. CONCLUSION

In light of the foregoing, Appellee, the Secretary of Veterans Affairs, respectfully submits that the Court should affirm the June 11, 2018, decision of the Board of Veterans' Appeals.

Respectfully submitted,

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