

**Vet. App. No. 19-1079**

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

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**STEVEN L. LANKFORD,**  
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 THE APPELLEE,  
SECRETARY OF VETERANS AFFAIRS**

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	iii
I. ISSUES PRESENTED .....	1
II. STATEMENT OF THE CASE.....	2
A. Jurisdictional Statement.....	2
B. Nature of the Case .....	2
C. Statement of Relevant Facts.....	2
III. SUMMARY OF THE ARGUMENT .....	4
IV. ARGUMENT .....	5
A. Standard of review .....	5
B. The Board correctly denied Appellant's claim because the record does not show that he has a compensable dental disability .....	5
C. Because Appellant does not have a compensable dental disability, Appellant fails to show either that an examination was required or that the Board was required to address why no examination was necessary .....	8
D. Appellant fails to show that the Board erred by relying in part on a June 2016 VA treatment record containing an ENT examination.....	12
V. CONCLUSION .....	13

## TABLE OF AUTHORITIES

### Cases

<i>Allday v. Brown</i> , 7 Vet. App. 517 (1995) .....	5
<i>Breeden v. Principi</i> , 17 Vet. App. 475 (2004) .....	2
<i>Byrd v. Nicholson</i> , 19 Vet. App. 388 (2005) .....	6
<i>Carbino v. West</i> , 168 F.3d 32 (Fed. Cir. 1999) .....	13
<i>Colvin v. Derwinski</i> , 1 Vet. App. 171 (1991) .....	10
<i>Gilbert v. Derwinski</i> , 1 Vet. App. 49 (1990) .....	5
<i>Golz v. Shinseki</i> , 590 F.3d 1317 (Fed. Cir. 2010) .....	8
<i>Hickson v. West</i> , 12 Vet. App. 247 (1999) .....	6, 8
<i>Hilkert v. West</i> , 12 Vet. App. 145 (1999) .....	11
<i>Hyatt v. Nicholson</i> , 21 Vet. App. 390 (2007) .....	9, 11
<i>Hyder v. Derwinski</i> , 1 Vet. App. 221 (1991) .....	10
<i>Kern v. Brown</i> , 4 Vet. App. 350 (1993) .....	10
<i>McLendon v. Nicholson</i> , 20 Vet. App. 79 (2006) .....	9
<i>Robinson v. Mansfield</i> , 21 Vet. App. 545 (2008) .....	9-10
<i>Smith v. Shinseki</i> , 24 Vet. App. 40 (2010) .....	6
<i>Washington v. Nicholson</i> , 19 Vet. App. 362 (2005) .....	6
<i>Waters v. Shinseki</i> , 601 F.3d 1274 (Fed. Cir. 2010) .....	11

### Statutes

38 U.S.C. § 5103A .....	8, 9, 12
38 U.S.C. § 5107 .....	8, 11
38 U.S.C. § 7104(d)(1) .....	5
38 U.S.C. § 7252(a) .....	2
38 U.S.C. § 7261(a)(4) .....	5

### Regulations

38 C.F.R. § 3.159(c)(4) .....	9
38 C.F.R. § 4.150 .....	6, 7

## Other

<i>Dorland's Illustrated Medical Dictionary</i> (32d ed. 2012).....	4
---	---

## RECORD CITATIONS

R. at 3-9 (December 2018 Board decision).....	<i>passim</i>
R. at 10-11 (October 2018 brief to the Board).....	4, 11
R. at 55-56 (June 2016 VA treatment record) .....	4, 12, 13
R. at 212 (November 2014 VA Form 9) .....	4
R. at 213-31 (October 2014 SOC).....	4
R. at 240-41 (February 2014 letter to congressman) .....	3
R. at 242-43 (May 2014 NOD) .....	3
R. at 252-57 (April 2014 rating decision).....	3
R. at 277 (DD 214) .....	2
R. at 407-08 (June 2013 request to reopen) .....	3
R. at 419-22 (STRs) .....	2, 3
R. at 432-33 (November 2006 rating decision) .....	3
R. at 461-73 (February 2006 claim) .....	3
R. at 528 (July 1976 STR).....	2
R. at 535-36 (April 1977 report of medical examination).....	3
R. at 537-38 (April 1977 report of medical history) .....	3

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Appellant,	)	
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v.	)	Vet. App. No. 19-1079
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<b>ROBERT L. WILKIE,</b>	)	
Secretary of Veterans Affairs,	)	
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Appellee.	)	

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**ON APPEAL FROM THE  
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**BRIEF OF THE APPELLEE,  
SECRETARY OF VETERANS AFFAIRS**

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**I. ISSUES PRESENTED**

Did the Board of Veterans' Appeals (Board) correctly deny service connection for a dental condition that is not eligible for disability compensation?

Where Appellant has no compensable dental disability, does he fail to show that VA was required to provide a VA examination or that the Board was required to address entitlement to a VA examination?

Did the Board adequately explain that the evidence does not support Appellant's claim?

## **II. STATEMENT OF THE CASE**

### **A. Jurisdictional Statement**

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

The Court does not have jurisdiction over the part of the Board decision remanding the issue of entitlement to service connection for a dental disorder, claimed as a residual injury due to fractured teeth, for treatment purposes. See *Breeden v. Principi*, 17 Vet.App. 475 (2004) (per curiam order).

### **B. Nature of the Case**

Appellant, Steven L. Lankford, appeals the Board's December 4, 2018, decision denying entitlement to service connection for a dental condition, claimed as a residual injury due to fractured teeth, for compensation purposes. [Record Before the Agency (R.) at 3-9].

### **C. Statement of Relevant Facts**

Appellant served in the United States Air Force from November 1975 to February 1980. [R. at 277]. During service, he was involved in a motorcycle accident that resulted in a chin laceration and broken teeth. [R. at 528]; see [R. at 419-22]. Contemporaneous imaging of the right and left lateral jaw showed no signs of fracture. [R. at 420]. His service treatment records (STRs) show that copalite was placed over his fractured teeth 7 through 9, and an arch bar was placed between teeth 6 and 11 for stabilization. *Id.* The arch bar was later removed,

and his teeth 7 through 10 were refilled and filled. [R. at 420, 422]. At an April 1977 medical examination, the examiner noted that Appellant sustained “laceration [and] teeth loss” due to trauma in July 1976 and was currently undergoing dental treatment. [R. at 536 (535-36)]; see [R. at 537-38].

After service, Appellant filed a February 2006 claim for benefits for a dental injury, including damaged teeth and a broken jaw. [R. at 469 (461-73)]. The Department of Veterans Affairs (VA) Regional Office (RO) denied the claims in a November 2006 rating decision. [R. at 432-33]. The RO explained that service connection was not warranted for a broken jaw because “evidence does not show the claimed condition exists” and in-service records show that jaw x-rays were negative for a fracture, and it denied service connection for fractured teeth because “it is not considered an actually disabling condition.” [R. at 433]. Appellant did not appeal this decision.

In June 2013, Appellant filed a request to reopen his claim for a tooth injury. [R. at 407-08]. The RO denied the request to reopen in an April 2014 rating decision because Appellant had not submitted new and material evidence. [R. at 254 (252-57)] (noting that reopening required evidence of loss of teeth “with their underlying structures that cannot be aided by dentures”).

Appellant submitted a notice of disagreement (NOD) asserting that an injury occurred in service and “therefore I feel the injury should be rated service connected.” [R. at 243 (242-43)]; see *also* [R. at 240-41] (Appellant’s February 2014 letter to his congressman, in which he states that he injured his teeth in

service and had “rebroke[n] those same teeth since”). And, after the RO issued a statement of the case (SOC) continuing the denial, he filed a substantive appeal again asserting that an injury to his teeth occurred in service. [R. at 212]; see [R. at 213-31].

A subsequent June 2016 VA treatment record shows that an ear, nose, and throat (ENT) examination revealed a dental condition described as “edentulous<sup>1</sup> (may have full dentures).” [R. at 56 (55-56)]. Thereafter, Appellant’s former representative submitted an October 2018 brief to the Board, which stated that Appellant “seems to be seeking only Service Connection so he can have his teeth fixed by the VA Dental Service.” [R. at 10 (10-11)]. In his brief, Appellant also stated that “[i]f necessary, please remand this case for . . . a current dental examination to determine the current condition of his teeth.” [R. at 11].

In December 2018, the Board issued a decision that denied entitlement to service connection for a dental condition for compensation and remanded the issue of service connection for a dental disorder for treatment purposes. [R. at 3-9]. This appeal followed.

### **III. SUMMARY OF THE ARGUMENT**

The Court should affirm the Board’s decision denying service connection because Appellant does not have a dental condition that is considered a disability for compensation purposes. As the Board explained, loss of teeth is only

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<sup>1</sup> “Edentulous” is defined as “without teeth; having lost some or all natural teeth.” *Dorland’s Illustrated Medical Dictionary* 594 (32d ed. 2012).



compensable if it is due to loss of substance of the body of either the maxilla or the mandible, and the record here contains no evidence showing such loss. Additionally, because Appellant does not have a compensable dental disability, he fails to show that a VA examination was required or that the Board erred when it did not address whether an etiological examination was necessary. Appellant also fails to show that the Board erred in relying in part on the June 2016 treatment note, which does not evidence a compensable dental condition, to deny his claim.

#### **IV. ARGUMENT**

##### **A. Standard of review**

The Court reviews the Board's service connection determination under the "clearly erroneous" standard of review. 38 U.S.C. § 7261(a)(4). Under this deferential standard, the Court must uphold the Board's factual determination if it is supported by a plausible basis in the record. *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990). The Board's decision must include a statement of reasons or bases for its factual findings and conclusions of law that is understandable by the claimant and facilitates review by this Court. 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995).

##### **B. The Board correctly denied Appellant's claim because the record does not show that he has a compensable dental disability**

The Board correctly denied Appellant's claim because he does not have a compensable dental condition. Establishing service connection generally requires medical, or in certain circumstances, lay evidence of (1) a current disability; (2) the

in-service incurrence or aggravation of a disease or injury; and (3) a nexus between the current disability and the claimed in-service disease or injury. *Hickson v. West*, 12 Vet.App. 247, 252 (1999). In determining whether these elements are met, the Board is responsible for assessing the credibility and probative weight of evidence, *Washington v. Nicholson*, 19 Vet.App. 362, 368 (2005), and 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).

Not all dental conditions are considered disabilities for compensation purposes. Service-connected disability compensation is only available for those dental conditions listed under 38 C.F.R. § 4.150. That regulation permits disability compensation for loss of teeth only when “due to loss of substance of body of maxilla or mandible.” § 4.150, Diagnostic Code (DC) 9913. This Court has recognized that the Secretary prohibited “periodontal disease, among other common conditions such as ‘carious teeth’ and ‘missing teeth’ from diseases generally eligible for VA compensation,” and has held that the Secretary’s “decision as reflected in the rating schedule . . . is not reviewable by this Court.” *Byrd v. Nicholson*, 19 Vet.App. 388, 393-34 (2005).

The Board here thoroughly explained that dental conditions are “treated differently from other medical disabilities in the VA benefits system” and correctly found that Appellant “does not have a dental disorder . . . for compensation purposes.” [R. at 4] (citing 38 C.F.R. § 4.150). The Board noted that VA treatment records show that Appellant is edentulous, but it explained that service connection

for loss of teeth is only compensable “if it is due to a loss of substance of the body of either the maxilla or the mandible provided that the bone loss is due to either trauma or disease.” [R. at 5]. The Board then noted that Appellant’s STRs and dental records did not show evidence of bone trauma or “loss of substance of either the maxilla or the mandible body.” *Id.* The Board also found that competent VA and private treatment records did not show that Appellant is edentulous as a result of service or contain any evidence of anatomical loss or mandibular injury subject to compensation. [R. at 5-6].

Appellant contends that the Board “recognize[d] the presence of [a] current disability” because it noted that Appellant is “edentulous.” Appellant’s Brief (Br.) at 8 (citing [R. at 5]). But this argument entirely disregards the Board’s findings that there is no evidence of any anatomical loss or mandibular injury, as well as the Board’s correct statement that loss of teeth is only compensable “if it is due to a loss of substance of the body of either the maxilla or the mandible” due to trauma or disease. [R. at 5-6]. In other words, although the Board recognized that Appellant is “edentulous,” it found that this is not the type of dental condition that is considered a disability for VA compensation purposes. See [R. at 4] (“The Veteran does not have a dental disorder, claimed as residual injury due to fractured teeth, for compensation purposes.”); see 38 C.F.R. § 4.150. Notably, Appellant does not contend that the record contains evidence showing the requisite loss of substance of the body of the maxilla or mandible, and instead appears to concede that the medical and lay evidence of record shows only that he has broken and

missing teeth. See Appellant's Br. at 9-10. Absent a current compensable dental disability, the Board did not clearly err in denying the claim. See *Hickson*, 12 Vet.App. at 252 (noting that service connection requires, inter alia, a current disability); see also 38 U.S.C. § 5107 (stating that a claimant has the burden of substantiating a claim).

**C. Because Appellant does not have a compensable dental disability, Appellant fails to show either that an examination was required or that the Board was required to address why no examination was necessary**

Absent a current condition, Appellant fails to show that a VA examination was required or that the Board erred when it did not explain why no examination was necessary.

The Secretary's duty to assist veterans in developing claims includes a duty to "make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate the claimant's claim for a benefit." 38 U.S.C. § 5103A(a) ("The Secretary is not required to provide assistance . . . if no reasonable possibility exists that such assistance would aid in substantiating the claim."); see *Golz v. Shinseki*, 590 F.3d 1317, 1320 (Fed. Cir. 2010) (stating that the duty to assist "is not boundless in its scope"). The Secretary does not have an absolute duty to provide a claimant with a medical examination or medical opinion. See 38 U.S.C. § 5103A(a)(2), (d)(1). The duty to assist requires the Secretary to provide an examination when there is (1) evidence of a current disability, or recurrent symptoms of a disability, (2) evidence establishing an in-service event or injury occurred that would support incurrence or aggravation, (3) an indication that the

current disability may be related to the in-service event, and (4) insufficient evidence to decide the case. *McLendon v. Nicholson*, 20 Vet.App. 79, 81 (2006); 38 C.F.R. § 3.159(c)(4). The Court reviews the Board's determination that VA fulfilled its duty to assist under the "clearly erroneous" standard of review. See *Hyatt v. Nicholson*, 21 Vet.App. 390, 395 (2007).

As explained above, Appellant does not have a current compensable dental disability, and thus no VA examination was required. See 38 U.S.C. § 5103A(a) (stating that no assistance is required where there is no reasonable possibility that assistance would aid in substantiating the claim). Although Appellant argues that a medical opinion is necessary to determine the etiology of his dental condition, he fails to explain why an etiological opinion is required where his dental condition cannot be service connected for compensation pursuant to law.

Instead, Appellant presents a new lay theory that is unsupported by citations to the record. Specifically, he muses that an examination is necessary because the in-service injury to his teeth may have resulted in trauma to his jaw and teeth, "which may have resulted in bone loss, which in turn may have resulted in the loss of teeth." *Id.* at 10. Contrary to Appellant's contention, however, this theory was not presented merely because Appellant submitted a statement that he broke his teeth in service and then "the same teeth [] rebroke later." *Id.* at 9-10. And any implicit assertion that the Board should have raised and addressed the theory that he "may have" bone loss that "may have" resulted in his tooth loss must also fail, as the Board is not required to invent theories and respond to them. See *Robinson*

*v. Mansfield*, 21 Vet.App. 545, 552-53 (2008), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009) (noting that “there is no reason for the Board to address or consider [] theory” with no evidentiary support and stating that the Board is not required to “assume the impossible task of inventing and rejecting every conceivable argument”). Further, absent any evidentiary support for Appellant’s new hypothesis, his argument is not constructive and cannot be considered on appeal. See *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.”); see also *Kern v. Brown*, 4 Vet.App. 350, 353 (1993) (rejecting an unsupported medical hypothesis as neither appellant nor his attorney were “qualified to provide an explanation of the significant of the clinical evidence”).

Appellant also fails to show that the Board erred or rendered an improper medical determination when it found no evidence of loss of substance of the maxilla or mandible. See Appellant’s Br. at 10 (citing *Colvin v. Derwinski*, 1 Vet.App. 171 (1991)). The Board did not make a medical finding as to the nature of Appellant’s dental condition; instead, it correctly explained that “dental records do not show a loss of substance of either the maxilla or the mandible body” and that there “is no evidence of any anatomical loss or mandibular injury” warranting compensation. [R. at 5-6]. Importantly, Appellant does not dispute the Board’s finding that the record contains no evidence of loss of substance of the maxilla or mandible, which is necessary to support his claim. Thus, he fails to show that the

Board clearly erred by finding its duty to assist satisfied or by denying his claim. See *Hyatt*, 21 Vet.App. at 395; *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (“An appellant bears the burden of persuasion on appeals to this Court.”); see also 38 U.S.C. § 5107 (“[A] claimant has the responsibility to present and support a claim for benefits.”).

Finally, Appellant fails to show that the Board erred when it did not address whether a VA examination was required based on his lay statements that he broke some teeth in service and then rebroke the same teeth later. See Appellant’s Br. at 9, 12-14 (asserting that his lay statements satisfy the third *McLendon* element). Even assuming arguendo that Appellant had a current compensable dental disability, a conclusory and generalized lay statement regarding nexus does not trigger VA’s duty to provide an etiological examination. See *Waters v. Shinseki*, 601 F.3d 1274, 1278-79 (2010). Moreover, the Board here explained that “as a lay person untrained in the fields of either dentistry or medicine [Appellant] is not competent to offer an opinion linking his current condition to service.” [R. at 6].

In sum, because it is undisputed that the record contains no evidence of a current compensable disability, Appellant fails to show that a VA examination was required or that the Board erred when it did not address whether a medical examination was necessary, to include addressing Appellant’s October 2018 brief requesting any necessary dental examination. See Appellant’s Br. at 15-16 (asserting that the Board did not respond to the October 2018 written brief that “requested a current dental examination”); see [R. at 10-11] (October 2018 brief to

the Board noting that “[i]f necessary” VA should remand for a dental examination, and noting that Appellant “seems to be seeking only Service Connection so he can have his teeth fixed by the VA Dental Service”).

**D. Appellant fails to show that the Board erred by relying in part on a June 2016 VA treatment record containing an ENT examination**

In its decision, the Board relied in part on a June 2016 VA gastroenterology pre-procedure note showing that an ENT examination was performed, which revealed “Dental Condition: edentulous (may have full dentures).” [R. at 56 (55-56)]; see [R. at 6]. Appellant contends that the Board erred in relying on it to deny his claim, because the record “does not provide an opinion into *why* Appellant’s dental condition exists.” Appellant’s Br. at 15.

Appellant’s argument is somewhat confusing because VA did not obtain the June 2016 ENT examination for purposes of adjudicating his claim, and it did not find that the record contained a VA examination that was adequate under 38 U.S.C. § 5103A. *But see id.* at 14. Rather, as noted earlier in Appellant’s brief, the Board did not obtain a VA examination in this matter. *See id.* at 11-12. Perhaps the Board was inartful in referring to the ENT examination as a “VA examination,” [R. at 6], but it is clear that the Board did not rely on the ENT examination to deny the claim based on a lack of etiology between service and Appellant’s missing teeth. The Board stated only that the examiner “determined that appellant was edentulous, and that he may need full dentures.” [R. at 6]. This is a correct recitation of the 2016 ENT examination contained in the June 2016 VA treatment



record. See [R. at 56]. This record, along with the other evidence of record, supports the Board's finding that there is no evidence of a current compensable dental condition. [R. at 6]. And because Appellant points to no evidence undermining the Board's finding of no current disability, his argument must fail.

The Secretary has limited his response to only those arguments raised by Appellant in his opening brief and submits that any other arguments or issues should be deemed abandoned. See *Carbino v. West*, 168 F.3d 32, 34 (Fed. Cir. 1999).

## **V. CONCLUSION**

WHEREFORE, for the foregoing reasons, the Secretary respectfully submits that the Board's December 4, 2018, decision should be affirmed.

Respectfully submitted,

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