

Vet.App. No. 18-6827

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

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**THOMAS C. GRAHAM,**  
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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**THOMAS C. GRAHAM,** )  
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Appellant, )  
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v. ) Vet. App. No. 18-6827  
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**ROBERT L. WILKIE,** )  
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Secretary of Veterans Affairs, )  
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Appellee. )

**BRIEF OF THE APPELLEE  
SECRETARY OF VETERANS AFFAIRS**

1. Whether the Court should affirm the Board of Veterans' Appeals' (Board) August 16, 2018, decision that denied entitlement to service connection for a lumbar spine disability as due to radiation exposure.
2. Whether the Court should affirm the Board's August 16, 2018, decision that denied entitlement to service connection for cataracts as due to radiation exposure.
3. Whether the Court should affirm the Board's August 16, 2018, decision that denied entitlement to service connection for a cardiovascular disability as due to radiation exposure.

4. Whether the Court should affirm the Board's August 16, 2018, decision that denied entitlement to service connection for prostate gland hypertrophy as due to radiation exposure.

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

### **A. Jurisdictional Statement**

This Court has jurisdiction under 38 U.S.C. § 7252(a) to consider the Board's decision.

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

Appellant, Thomas C. Graham, appeals the Board's August 16, 2018, decision that denied Appellant's claims of entitlement to service connection for a lumbar spine disability, cataracts, a cardiovascular disability, and prostate gland hypertrophy, all claimed as due to radiation exposure. [Record (R.) at 1-18].

The Board also denied Appellant's claims of entitlement to service connection for a lumbar spine disability, cataracts, a cardiovascular disability, and prostate gland hypertrophy, as secondary to his service-connected bilateral lower extremity peripheral neuropathy and as related to service on a direct basis. [R. at 14-15]. As Appellant makes no argument regarding those theories of entitlement, this Court should find that Appellant has abandoned his appeal of entitlement to service connection for those claims based on those theories. See *Disabled American 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, 285 (2015) (declining to review abandoned issues);

*Degmetich v. Brown*, 8 Vet.App. 208, 209 (1995), *aff'd*, 104 F.3d 1328 (Fed. Cir. 1997) (issues or claims not argued on appeal are deemed to be abandoned).

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

Appellant served on active duty from November 1956 to November 1959. [R. at 2136].

In August 2002, the National Personnel Records Center (NPRC) informed the Regional Office (RO) that it could not provide Appellant's service records, including any potential records showing exposure to radiation, because they were destroyed in a fire. [R. at 1772]. In February 2003, Appellant filed claims of entitlement to service connection for a heart condition, cataracts, prostate gland hypertrophy, and a back condition and argued that these conditions were related to his handling of radioactive material in service. [R. at 1749-50]. In a July 2003 Rating Decision, the RO denied Appellant's claims of entitlement to service connection for a heart condition, cataracts, prostate gland hypertrophy, and a back condition, all claimed as a result of radiation exposure. [R. at 1693-1700]. Appellant appealed. [R. at 1671-74]. The RO issued a Statement of the Case in September 2004. [R. at 1608-37].

In April 2006, the Veteran completed a Radiation Risk Activity Information Sheet and indicated that he witnessed or participated in tests of nuclear devices during active service in 1957, 1958, and 1959, but did not know the names or numbers of tests he witnessed. [R. at 2097 (2095-2100)]. He stated that he was exposed to ionizing and microwave radiation when he was a radar technician and



operator. [R. at 2099]. He stated that he placed, serviced, broke down, and tested equipment from 1957 to 1959. *Id.* The RO issued a Supplemental Statement of the Case (SSOC) in July 2006 continuing the denial of Appellant's claims. [R. at 1377-1407].

Appellant testified in a January 2007 Board hearing and reiterated his contention that his disabilities, including a heart condition, cataracts, prostate hypertrophy, and back condition, were secondary to in-service occupational radiation exposure. [R. at 1257-1305]. In April 2007, the Board denied Appellant's claims. [R. at 1172-84]. Appellant appealed in May 2007. [R. at 1061 (1060-65)]. In March 2010, the Court remanded Appellant's claims because it concluded that the Board provided inadequate reasons or bases for its decision. [R. at 1066-69]. In September 2010, the Board remanded Appellant's claims for further development. [R. at 1030-44].

A January 2011 VA eye examiner found that Appellant had pseudophakia in both eyes and stated that he could not opine as to whether the condition was caused by service without resorting to speculation. [R. at 669 (665-70)]. A VA heart examiner found that Appellant's sick sinus syndrome, a heart condition, was not likely caused by microwave radiation in the military. [R. at 677 (673-84)]. He noted that medical literature reflected that microwave radiation from radars causes injury only to the surface body structures, which have low blood flow such as lenses of the eyes and the testicles, but not the heart. *Id.* The examiner also indicated that Appellant's benign prostatic hypertrophy and lumbar spine conditions were not

caused by microwave radiation in the military, as microwave radiation only affected superficial structure with low blood flow. [R. at 681].

In an April 2012 VA addendum opinion, a VA examiner indicated that he could not resolve the issue of whether the Veteran's pseudophakia and dry eye syndrome were caused by service without resorting to speculation, as there were no records from service in the file. [R. at 641 (640-42)]. He also indicated that it would be speculation to opine as to whether the Veteran's lumbar spine disability was the result of incidents or injuries during service as there were no service records to review. [R. at 649 (646-53)]. The examiner noted that microwave radiation can raise the temperature of surface body structures but not the core body temperature, which would affect the heart, prostate, or lumbar spine. [R. at 648].

In a February 2013 Board hearing, Appellant reiterated that his conditions were caused by radiation exposure in service. [R. at 471-89]. In the hearing, the Veterans Law Judge noted that Appellant claimed both ionizing and non-ionizing radiation. [R. at 481]. Appellant stated that he worked with radar systems and other equipment in missile defense that emitted microwave radiation as well as alpha particle, beta particle, and gamma ray radiation. [R. at 474-76]. In April 2013, the Board remanded Appellant's claims for further development. [R. at 449-63].

In October 2015, the U.S. Army Radiation Dosimetry Branch reported that they were unable to locate any records pertaining to Appellant's exposure to

ionizing radiation. [R. at 187]. In a March 2016 letter from the Department of the Army, the Portfolio Director for Occupational Health Sciences stated that the Veterans' Radiation Exposure Investigating Program reviewed Appellant's records and statements and concluded that it was unlikely that he received a radiation dose greater than 1.5 rem from his three years of work with radar systems (hereinafter, "VREIP Report"). [R. at 144 (143-45)]. The Director also stated that Appellant gave no indication that he was exposed to a level of radiofrequency radiation (RFR) that would exceed the exposure limits. *Id.*

Appellant's claims file was sent to the VA Under Secretary for Health for a radiation dose estimate in April 2016. [R. at 133-37]. In November 2016, the Director, Post-9/11 Era Environmental Health Program reviewed Appellant's record and provided an opinion for the Under Secretary (hereinafter, "EHP opinion"). [R. at 131]. The Director noted that based on Appellant's work as a missile crewman, Appellant's estimated total ionizing radiation dose was 1.5 rem<sup>1</sup> (3 years x 0.5 rem/year). *Id.* The Director noted that Appellant had a diagnosis of rheumatic heart disease with atrial fibrillation and sick sinus syndrome status post pacemaker in 2000 (43 years after exposure); cataracts since 2004 (47 years after exposure); prostate gland hypertrophy since 2001 (44 years after exposure); and

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<sup>1</sup> The rem (Roentgen equivalent man) is one of the standard units for measuring the effective dose of radiation and is calculated by combining the amount of radiation energy with the medical effects of the type of radiation. See U.S. Nuclear Regulatory Commission Glossary, <https://www.nrc.gov/reading-rm/basic-ref/glossary/rem-roentgen-equivalent-man.html> (last accessed November 26, 2019).

degenerative osteo spondylosis since 1998 (41 years after exposure). *Id.* The Director also noted that these conditions were not diseases listed at 38 C.F.R. § 3.309(d), and that Appellant's military service did not include participation in a "radiation-risk activity" as defined in that section. *Id.* The Director concluded that based on current medical literature, as Appellant's lifetime total radiation dose did not exceed 10 rem above natural background radiation, it was unlikely that rheumatic heart disease with atrial fibrillation, sick sinus syndrome status post pacemaker, cataracts, prostate gland hypertrophy, and degenerative osteo spondylosis were caused by exposure to ionizing radiation during military service. *Id.* The Director stated that such exposure was not statistically different from zero. *Id.*

In December 2016, the Under Secretary for Benefits (USB) provided an advisory opinion pursuant to 38 CFR § 3.311 (hereinafter, "USB opinion"). [R. at 132]. She opined that there was no reasonable possibility that Appellant's rheumatic heart disease with atrial fibrillation, sick sinus syndrome status post pacemaker, cataracts, prostate gland hypertrophy, and degenerative osteo spondylosis resulted from ionizing radiation exposure in service. *Id.* The Under Secretary discussed Appellant's in-service radiation exposure history, including dose rem data; the time-lapse between Appellant's radiation exposure and the onset of each disease; the opinion of the Director, Post 9-11 Environmental Health Program; Appellant's family history; and the extent to which an average person was exposed to natural background radiation. *Id.*

In May 2017, Appellant participated in another Board hearing. [R. at 44-57]. In a November 2017 Veterans Health Administration (VHA) advisory medical opinion, a VHA expert, a clinical neurologist, opined that peripheral neuropathy was not a cause of any of the claimed disabilities. [R. at 25-26]. The Board issued the decision on appeal in August 2018. [R. at 1-18].

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

The Board properly provided adequate reasons or bases for its finding that VA satisfied its duty to assist under 38 C.F.R. § 3.311 and for its finding that Appellant was not entitled to service connection for a lumbar spine disability, cataracts, a cardiovascular disability, and prostate gland hypertrophy, all claimed as due to radiation exposure.

### **IV. ARGUMENT**

#### **A. Applicable Law**

Establishing that a disability is service connected for purposes of entitlement to VA disability compensation generally requires medical or, in certain circumstances, lay evidence of (1) a current disability, (2) incurrence or aggravation of a disease or injury in service, and (3) a nexus between the claimed in-service injury or disease and the current disability. See 38 U.S.C. § 1110; *Shedden v. Principi*, 381 F.3d 1163, 1166-67 (Fed. Cir. 2004); see also *Davidson v. Shinseki*, 581 F.3d 1313, 1316 (Fed. Cir. 2009); 38 C.F.R. § 3.303 (2018).

Additionally, service connection for a disability that is claimed to be attributable to exposure to ionizing radiation during service can be demonstrated

by three different methods. *Davis v. Brown*, 10 Vet. App. 209, 211 (1997). First, there are certain types of cancer that are presumptively service-connected specific to radiation-exposed Veterans. 38 U.S.C. § 1112(c); 38 C.F.R. § 3.309(d). Second, “radiogenic diseases” may be service-connected pursuant to 38 C.F.R. § 3.311. Third, service connection may be granted under 38 C.F.R. § 3.303(d) when it is established that the disease diagnosed after discharge was incurred in service.

As relevant to Appellant’s claim, VA has established a special adjudication process for claims based on exposure to ionizing radiation. See 38 C.F.R. § 3.311. The adjudication process begins by the referral of a radiation exposure claim to the Under Secretary for Benefits (USB). 38 C.F.R. § 3.311(b)(1)(iii). Once the claim is forwarded, § 3.311(c) dictates the process, which requires the Under Secretary for Benefits to evaluate the claim with reference to specific factors laid out in § 3.311(e). These factors are:

- (1) The probable dose in terms of dose type, rate and duration as a factor in inducing the disease, taking into account any known limitations in the dosimetry devices employed in its measurement or the methodologies employed in its estimation;
- (2) The relative sensitivity of the involved tissue to induction, by ionizing radiation, of the specific pathology;
- (3) The veteran's gender and pertinent family history;
- (4) The veteran's age at the time of exposure;
- (5) The time-lapse between exposure and onset of the disease; and
- (6) The extent to which exposure to radiation, or other carcinogens, outside of service may have contributed to development of the disease.

38 C.F.R. § 3.311(e). As noted in *Hilkert v. West*, 12 Vet.App. 145, 149 (1999) (en banc), because the USB's consideration of the claim relies heavily on medical and scientific findings and analysis, the USB may request an advisory opinion from the Under Secretary for Health. The USB then forwards his/her decision, with supporting rationale, to the RO for adjudication of the claim. 38 C.F.R. § 3.311(c) and (d).

In all decisions, the Board is required to provide a written statement of the reasons or bases for its findings and conclusions on all material issues of fact and law presented on the record; the statement must be adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court. 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990). To comply with this requirement, the Board must analyze the credibility and probative value of the evidence, account for the evidence that it finds to be persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence 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); *Gabrielson v. Brown*, 7 Vet.App. 36, 39-40 (1994).

**B. The December 2016 USB Opinion Complied With 38 C.F.R. § 3.311 and the Court's Holding in *Hilkert*.**

The Board properly based its opinion on the December 2016 USB opinion as contemplated by the special procedure set forth in 38 C.F.R. § 3.311. [R. at 10-12]. Before discussing 38 C.F.R. § 3.311, the Secretary notes that Appellant relies

on the November 2016 EHP opinion and not the December 2016 USB opinion, which is the record relevant to the procedure set forth in 38 C.F.R. § 3.311. See Appellant's Brief (App. Br.) at 4-7, 9; [R. at 131-32]. The Secretary's analysis will focus on the relevant December 2016 USB opinion.

In December 2016, the USB found that there was no reasonable possibility that Appellant's rheumatic heart disease with atrial fibrillation, sick sinus syndrome status post pacemaker, cataracts, prostate gland hypertrophy, and degenerative osteo spondylosis resulted from ionizing radiation exposure in service. [R. at 132]. Within her opinion, the USB discussed Appellant's dose estimate, the lapse in time between exposure and onset of each condition, and family history, as directed by 38 C.F.R. § 3.311, as well as the 2016 EHP opinion, and medical literature. *Id.*; see [R. at 131-32]. Contrary to Appellant's assertion, the USB did not need to specifically refer to every factor in 38 C.F.R. § 3.311(e) and the Board did not err in relying on the December 2016 USB opinion. App. Br. at 5-6; *Hilkert*, 12 Vet.App. at 149-50.

As the Court found in *Hilkert*, if the USB ultimately recommends that there "is no reasonable possibility that the veteran's disease resulted from radiation exposure in service," see 38 C.F.R. § 3.311(c)(1)(ii), the USB is not required to discuss in his decision each of the subsection (e) factors. *Hilkert*, 12 Vet.App. at 149. Rather, the factors should be considered and consulted as a point of reference and any failure to discuss factors is "by no means a failure to *consider* these factors." *Id.* at 149-50. As the Court explained, 38 C.F.R. § 3.311 requires



the USB to make the determination based on "sound scientific evidence." 38

C.F.R. § 3.311(c)(1). "[S]ound scientific evidence" is defined as:

observations, findings, or conclusions which are statistically and epidemiologically valid, are statistically significant, are capable of replication, and withstand peer review, and . . . which are consistent with current medical knowledge and are so reasonable and logical as to serve as the basis of management of a medical condition.

38 C.F.R. § 3.311(c)(3).

Here, as in *Hilkert*, the USB found that there was, "no reasonable possibility" that Appellant's rheumatic heart disease with atrial fibrillation, sick sinus syndrome status post pacemaker, cataracts, prostate gland hypertrophy, and degenerative osteo spondylosis resulted from ionizing radiation exposure in service. [R. at 132]. She based her opinion on sound scientific evidence, including the 2016 EHP opinion, which found that radiation exposure did not exceed 5 millisievert per year (.5 remy-1). *Id.* Appellant's argument that the USB was required to "specifically" consider every factor is contradicted by binding caselaw. *Hilkert*, 12 Vet.App. at 149-50. The USB provided an adequate explanation as to why there was no reasonable possibility that Appellant's conditions resulted from service, including specific discussion of some of the § 3.311(e) factors. [R. at 131]. The Board did not err in finding that "based upon the competent medical evidence [obtained in developing Appellant's claim pursuant to] 38 C.F.R. § 3.311 . . . a preponderance of the evidence [was] against a finding that [Appellant's] cardiovascular disability, cataracts, prostate gland hypertrophy, and lumbar spine disability were due to his exposure to ionizing radiation." [R. at 12]. The Secretary also notes that Appellant

fails point to any evidence that the USB's decision failed to substantively comply with § 3.311(c)(1) or the Court's holding in *Hilkert*. See *Overton v. Nicholson*, 20 Vet.App. 427, 435 (2006) (the appellant bears the burden of demonstrating error on appeal); *Hilkert*, 12 Vet.App. at 151 (finding that the "appellant always bears the burden of persuasion.").

**C. The Board Met Its "Heightened Duty" to Explain the Reasons and Bases For Its Decision.**

Appellant next argues that neither the Director nor the Board provided adequate reasons or bases as to how the Appellant's estimated total ionizing radiation dose was estimated. App. Br. at 6-7. The Secretary first notes that there is no reasons or bases requirement placed on a Director, much less any heightened duty, and Appellant fails to point to any heightened duty placed on anyone but the Board. *Hilkert*, 12 Vet.App. at 151. Instead, in cases such as Appellant's where his records were likely destroyed in the 1973 NPRC fire, it is the Board that has a "heightened" duty to explain the reasons and bases for its decision. See *Pruitt v. Derwinski*, 2 Vet.App. 83, 85 (1992). Here, the Board met this heightened duty as it clearly explained that the November 2016 dose estimate provided in the EHP opinion took into account Appellant's military personnel history and was based upon studies of radiation health risks related to the doses of radiation to which Appellant could have been exposed in service, due to his work near radar systems. [R. at 12]; see [R. at 131].

Appellant argues that the statements and findings within a January 2011 VA examination were not considered by the Director. App. Br. at 6-7. As stated, the Director had no duty to specifically discuss evidence. Moreover, a reading of the EHP opinion reveals that the Director did review the record as well as the May 2016 VREIP Report. [R. at 131]. In the May 2016 VREIP report, Appellant's records and statements were reviewed, as well as his responses from a radiation risk activity information sheet wherein Appellant stated that he was exposed to radiation on a daily basis and specifically discussed how he was exposed. [R. at 145]; see [R. at 2095-2100].

Contrary to Appellant's assertion, the Director had no duty to "explain[] what impact [Appellant's] exposure would have on a dose estimate." App. Br. at 7. Instead, she was asked to provide a dose estimate which she did and Appellant points to no evidence that she was not competent or qualified to provide such an estimate. App. Br. at 6-7; see [R. at 144]; *Hilkert*, 12 Vet.App. at 151. The dose estimate provided by the EHP opinion was consistent with that provided by the VREIP Report by the Department of Army. [R. at 143-45]. It was then properly relied upon by the VA Under Secretary for Health and the USB who both opined that Appellant's conditions were not related to the radiation he claimed he was exposed to in service. [R. at 132-37]. The Board clearly met its heightened duty to provide adequate reasons or bases for its decision, which included a thorough review of the evidence relied upon, as well as a thorough rationale for its findings. [R. at 6-14].

#### **D. The Board Considered All Reasonably Raised Theories of Entitlement.**

It is not disputed that the Board has an obligation to consider and address all issues raised by either the claimant or the evidence. See *Robinson v. Peake*, 21 Vet.App. 545, 552-56 (2008), (“The Board commits error only in failing to discuss a theory of entitlement that was raised either by the appellant or by the evidence of record.”), *aff’d sub nom. Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009). However, the Court has made clear that this obligation “does not require the Board to assume the impossible task of inventing and rejecting every conceivable argument in order to produce a valid decision.” *Robinson*, 21 Vet.App. at 554.

Appellant argues that he raised an alternate theory of entitlement at his January 2007 Board hearing that the Board erred in not considering. App. Br. at 7-8. Appellant’s argument consistent of two sentences where he generally references 5 pages of the transcript of the 2007 hearing but fails to point to any statement that reasonably raised the argument that his disabilities were caused by exposure to toxic fuel chemicals while in service. App. Br. at 8, citing [R. at 1274-78]; see *Locklear v. Nicholson*, 20 Vet.App. 410, 416-17 (2006) (terse or undeveloped arguments do not warrant detailed analysis by the Court and are considered waived); *Evans v. West*, 12 Vet.App. 22, 31 (1998) (the Court will not consider a “vague assertion” or an “unsupported contention” of error). Additionally, a review of the transcript reflects that Appellant referenced that he fueled missiles

and was exposed to chemicals, but nothing to suggest that he was arguing that his conditions were caused by exposure to fuel chemicals in service. [R. at 1257-1305]; see *Robinson*, 21 Vet.App. at 554. Additionally, within the 2007 hearing, Appellant affirmatively stated that his claim of entitlement to service connection for these conditions was claimed as secondary to radiation exposure and he repeatedly argues that radiation is the cause of his conditions within his testimony. [R. at 1260]; see [1257-1305]. The Secretary notes that in the twelve years since the 2007 Board hearing, VA has adjudicated Appellant's claims as secondary to radiation exposure and Appellant has not raised any issue with the characterization of his claims despite the fact he was provided two subsequent Board hearings, [R. at 471-89, 44-57]. As the Board addressed all claims and issues reasonably raised by the record, the Court should affirm the Board's decision.

The Secretary has limited his response to only those arguments raised by Appellant in his opening brief, and, as such, urges this Court to find that Appellant has abandoned all other arguments. See *Pieczenik v. Dyax Corp.*, 265 F.3d 1329, 1332-33 (Fed. Cir. 2001); *Norvell v. Peake*, 22 Vet.App. 194, 201 (2008); *Woehlaert v. Nicholson*, 21 Vet.App. 456, 463 (2007) ("This Court has consistently held that it will not address issues or arguments that counsel for the appellant fails to adequately develop in his or her opening brief."). The Secretary, however, does not concede any material issue that the Court may deem Appellant adequately raised and properly preserved, but which the Secretary did not address, and requests the opportunity to address the same if the Court deems it necessary.

## **V. CONCLUSION**

For the foregoing reasons, the Secretary respectfully asserts that the Court should affirm the Board's August 16, 2018, decision.

Respectfully submitted,

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