Vet.App. No. 19-1741

IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

KENNEDY K. DECREE,
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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	)	
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ON APPEAL FROM THE BOARD OF VETERANS' APPEALS

BRIEF OF THE APPELLEE SECRETARY OF VETERANS AFFAIRS

ISSUE PRESENTED

Whether the Court should affirm the December 11, 2018, Board of Veterans' Appeals (Board or BVA) decision that denied a claim of entitlement to service connection for a left ankle disability.

STATEMENT OF THE CASE

A. JURISDICTIONAL STATEMENT

Jurisdiction is based upon 38 U.S.C. § 7252(a), which grants the U.S. Court of Appeals for Veterans Claims exclusive jurisdiction to review final decisions of the Board.

B. NATURE OF THE CASE

Appellant, Kennedy K. Decree, appeals the December 11, 2018, Board of Veterans' Appeals (Board or BVA) decision that denied his claim of entitlement to service connection for a left ankle disability. (R. at 1-10).

C. STATEMENT OF PERTINENT FACTS

Because Appellant has limited his allegations to the arguments identified herein, the Secretary will limit the statement of facts accordingly. (See Appellant's Brief (AB) at 1-10).

Appellant served on active duty in the United States Army from June 1982 to June 2002. (R. at 380).

An August 1998 medical examination and report of medical history reflect that Appellant had left ankle degenerative joint disease (DJD) secondary to a sprain in service (there is no diagnostic testing during service to confirm that diagnosis) (R. at 220-221) and an undated service treatment record (STR) reflected a complaint of a swollen ankle in 1996 that currently hurt, but it was not evaluated at the time. (R. at 368). Upon his discharge from service in 2002, Appellant reported numerous injuries or disabilities incurred in service, to include a head injury, left shoulder pain, and hemorrhoids, but he did not report left ankle pain. (R. at 356-357, 360 (356-360)). Additionally, although he noted arthritis, the location of the arthritis was not identified. (R. at 360).

In August 2010, Appellant filed a claim for entitlement to service connection for left ankle DJD with the Department of Veterans Affairs (VA). (R. at 690-693).

In November 2010, Appellant stated that he injured his left ankle at "recruiter['s] school in Indianapolis. This injury is documented in my Service Medical Records." (R. at 641 (641-642)).

In March 2011, a rating decision was issued that denied service connection for the left ankle DJD claim. (R. at 611-613) (R. at 615-622).

In September 2011, Appellant filed his notice of disagreement with the March 2011 decision. (R. at 605).

In November 2014, Appellant under a VA examination in which the examiner reviewed the claims file, lay statements, x-rays and CPRS and also examined Appellant in person. (R. at 417 (417-428)). Appellant reported "that he was a tanker and he injured his left ankle several times jumping off the tank, although no medical visit or x-ray was done at that time. During physical fitness training, he stepped in a hole and injured his left ankle at Fort Carson for which he went to medical. After the Fort Carson injury, the left ankle pain would occur intermittently for the last four years of his military service." (R. at 418-419). The examiner opined it was less likely than not that the current ankle sprain and pain was caused by or a result of any ankle sprains incurred during service and, *inter alia*, stated that the ankle sprains had resolved because Appellant did not

complain of left ankle pain again in the STRs after the August 1998 report of an ankle sprain. (R. at 427).

In December 2014, a statement of the case (SOC) was issued that continued to deny the claim (R. at 385-416) and Appellant then appealed to the Board. (R. at 381-382).

On December 11, 2018, the Board issued the decision on appeal that denied his claim of entitlement to service connection for a left ankle disability. (R. at 1-10). The Board also granted a claim of entitlement to service connection for hypertension. (R. at 4-6).

SUMMARY OF THE ARGUMENT

The Secretary respectfully contends that the Court should affirm the Board decision on appeal that denied the claim of entitlement to service connection for a left ankle disability. (R. at 1-10). The Board correctly analyzed the applicable law, set forth the relevant evidence, and provided an adequate statement of reasons or bases for its determinations. Therefore, the decision should be affirmed.

LAW

The Board's determination of whether a claimant is entitled to service connection is a factual finding that this Court reviews under the "clearly erroneous" standard. 38 U.S.C. § 7261(a)(4); *See Wensch v. Principi*, 15 Vet.App. 362, 366 (2001). In determining whether a finding is "clearly erroneous," this Court cannot "substitute its judgment for that of the

BVA on issues of material fact." *Gilbert v. Derwinski*, 1 Vet.App. 49, 53 (1990). If there is a plausible basis in the record for the Board's factual determinations, this Court cannot overturn them. *Id*.

The Board's decision must be based on all the evidence of record, and the Board must provide a "written statement of [its] findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented on the record." 38 U.S.C. § 7104(d)(1); *Gilbert*, 1 Vet.App. at 56-57. "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." *Allday v. Brown*, 7 Vet.App. 517, 527 (1995).

A Veteran is entitled to the assistance of VA in developing the facts pertinent to his or her claim. 38 U.S.C. § 5103A(a)(1). VA's duty to assist a veteran requires VA, *inter alia*, to obtain a medical opinion "when such an . . . opinion is necessary to make a decision on the claim." 38 U.S.C. § 5103A(d)(1); *see Charles v. Principi,* 16 Vet.App. 370, 375 (2002) (Board erred in failing to obtain medical nexus opinion necessary to make decision on claim). VA's duty to assist a veteran in developing a claim is not necessarily discharged simply by conducting a medical examination; the examination must be adequate for adjudication purposes. *See, e.g*, 38 C.F.R. § 4.2 ("[I]t is incumbent upon the rating board to return [a] report as

inadequate for evaluation purposes [if it does not contain sufficient detail]."); *Bowling v. Principi*, 15 Vet.App. 1, 12 (2001).

In this Court, the appellant bears the burden of first demonstrating the existence of an error, and, generally, resulting prejudice. *Shinseki v. Sanders*, 129 S. Ct. 1696 (2009); *Barrett v. Shinseki*, 22 Vet.App. 457, 461 (2009); 38 U.S.C. § 7261(b)(2). This means that Appellant has the burden of demonstrating that the Board's factual findings are clearly erroneous, and that its application of law to its factual findings was arbitrary and capricious.

ARGUMENTS

A. The Court Should Affirm The BVA Decision On Appeal

In the decision on appeal, the Board denied the claim of entitlement to service connection for a left ankle disability. (R. at 4-8). That decision is plausible based on the record and the Board did provide an adequate statement of reasons or bases for its determinations. As a result, the decision should be affirmed.

First, the Board reviewed the evidence of record (R. at 6-7), to include: (1) Appellant served on active duty in the United States Army from June 1982 to June 2002 (R. at 380), that an August 1998 medical examination and report of medical history reflected that Appellant had left ankle DJD secondary to a sprain in service (R. at 220-221) and an undated service treatment record (STR) reflected a complaint of a swollen ankle in

1996 that hurt, but it was not evaluated at the time. (R. at 368); (2) in 2002, upon his discharge from service, Appellant reported numerous injuries or disabilities incurred in service, but he did not report left ankle pain. (R. at 356-357, 360). Additionally, although he noted arthritis, the location of the arthritis was not identified. (R. at 360); (3) in November 2011, Appellant stated that he injured his left ankle in service and that the injury is documented in his STRs. (R. at 641-642); and (4) in November 2014, Appellant under a VA examination in which the examiner after reviewing the record and noting Appellant's contention that he hurt his left ankle jumping off tanks, opined, with a proper rationale, that it was less likely than not that the current ankle sprain and pain was caused by or a result of any ankle sprains incurred during service. (R. at 417-428).

The Board then weighed the evidence and, *inter alia*, found that the November 2014, VA examination report was most probative because it "considered the Veteran's in-service complaints of ankle pain, but found that the in-service injuries had resolved and were not related to his current left ankle pain." (R. at 7). As a result, the Board plausibly found that the "preponderance of the evidence reflects the Veteran's left ankle disability was not incurred in or related to his military service, [and that] service connection is not warranted. *Id*.

Based on the foregoing, the Board provided an adequate statement of reasons and bases for its findings and there is a plausible basis in the

record for its decision. The Secretary respectfully submits that the Board properly considered the law and evidence, and thereafter determined, based on its weighing, that Appellant was not entitled to service connection for a left ankle disability. (R. at 4-7). As a result, the Board's decision should be affirmed. *See Gilbert*, 1 Vet.App. at 53.

B. Appellant's Contentions And Appellee's Responses

In Appellant's brief, he first argues that the November 2014 VA examination was inadequate. Appellant argues that while the examiner mentioned his lay statements, the examiner "did not discuss them in his rationale supporting his opinion." (AB at 6). However, that argument is not persuasive as the medical examiner is not required to do so. While Appellant wanted the examiner to further discuss his lay statements in the rationale, the examiner was not required to do so, as there is no reasons or bases requirement imposed on a medical examiner. *Stefl v. Nicholson*, 21 Vet.App. 120, 123 (2007); *Green v. Derwinski*, 1 Vet.App. 121, 124 (1991).

Here the examiner, by Appellant's own admission (AB at 6), did in fact consider the lay statements (R. at 418-419), and as a result his argument should fail. Additionally, he argues that the VA examination is inadequate because Appellant argues that the examination report has "internal contradictions" because he "provided a diagnosis of 'chronic/recurrent' deltoid ligament sprain of the left ankle since August

1998, *see* **R. at 418 (417-28)**, but then opined that this 'chronic/recurrent' condition that began in service is not related to service. **R. at 427 (417-28)**." (AB at 7) (bold in original).

However, that argument is misguided, as Appellant neglects to give the opinion a full and fair reading, as the opinion was adequate, based on the entire record (to include lay statements), addressed all relevant issues, and had a clear opinion, that was supported by adequate rationale. *See Acevedo v Shinseki*, 25 Vet.App 286, 293 (2012) ("[A]n adequate medical report must rest on correct facts and reasoned medical judgment so as [to] inform the Board on a medical question...."); *Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 301 (2009). Specifically, the November 2014 VA examiner, in contrast to Appellant's argument, did opine that "it is less likely as not (less than 50/50 probability) that the current ankle sprain/pain was caused by or a result of any ankle sprains incurred during or caused by the military service since these ankle sprains he had resolved." (R. at 427).

Thus, Appellant's argument is not persuasive because the November 12014 VA examination report is adequate. Further, it should be noted that to the extent that Appellant is arguing that the examiner's opinion is wrong based on his assessment of the record, it should be noted that Appellant, nor his counsel, is competent to make such a medical

determination. *Grottveit v. Brown*, 5 Vet. App. 91, 93 (1993); *Espiritu v. Derwinski*, 2 Vet. App. 492, 494 (1992).

Next, Appellant argues that the Board erred by finding that VA satisfied its duty to assist because his 2014 x-ray report of his left ankle, that was relied upon by the November 2014 VA examiner, is not of record. He further argues that he was prejudiced by this error because "[w]hile the examiner characterized the impression as 'essentially' normal, the Board could not verify this statement or rule-out that the report contained additional commentary that the examiner did not reference." (AB at 8; See AB at 7-9). However, that argument is not persuasive because Appellant only suggests prejudice and does not show actual prejudice. See *Shinseki v. Sanders,* 129 S.Ct. 1696, 1706 (2009) (noting that the burden of demonstrating prejudice on appeal "normally falls upon the party attacking the agency's determination").

Here, it appears that there was a November 2014 x-ray report of the ankle (*See* R. at 425, 427) and that it is not in the record. However, Appellant was not prejudiced because the November 2014 VA medical examiner did clearly review and consider it. Here, as acknowledged by Appellant (AB at 8), the x-ray was specifically reviewed and considered by the medical professional in this case, namely the November 2014 VA examiner, when he issued his opinion. (R. at 417, 418). Here, the examiner apparently refers to a left ankle x-ray of November 2014 that was

obtained for his examination of Appellant and notes that the impression was "[e]ssentially normal left ankle" (R. at 425) and, later in his report, stated that the "[t]he current x-ray [does] not support degenerative joint disease." (R. at 427). Thus, of record in this case is the November 2014 VA examination report that specifically reviewed and considered the x-ray report of November 2014, in which the medical professional reviewed the x-ray and, in his medical opinion, found the impression of the left ankle was an essentially normal and that it did not support degenerative joint disease. (R. at 425, 427). As such, while the x-ray is not of record, Appellant was not prejudiced because the November 2014 VA examiner, did fully review and consider it when he opined that the left ankle disability was not related to service. As a result, Appellant has failed to demonstrate prejudicial error.

Moreover, it should be noted that neither the Board, Appellant, nor his counsel, is competent to interpret the x-ray, as they do not have the medical expertise needed to do so. *Espiritu v. Derwinski*, 2 Vet. App. 492, 494 (1992). Again, the Secretary respectfully asserts that any error that may have been committed was nonprejudicial and harmless error in this case. *See* 38 U.S.C. § 7261(b)(2) (Court is required to "take due account of the rule of prejudicial error"); *Conway v. Principi*, 353 F.3d 1369, 1374-75 (Fed. Cir. 2004); *See Shinseki v. Sanders,* 129 S.Ct. 1696, 1706 (2009).

Lastly, Appellant argues that the Board did not adequately explain why it found the in-service DJD diagnosis did not support a finding of an in-service injury related to his current ankle pain. (AB at 9-10). He argues that the Board's (and the November 2014 examiner) finding that the in-service diagnosis of DJD was not probative because of the lack of in-service x-rays (*See* R. at 7, 427) was incorrect as there was no foundation for that inference. *See Fountain v. McDonald*, 27 Vet. App. 258, 272 (2015). However, that argument is not persuasive because the Board's determination is plausible, as an x-ray of the ankle, if one had been taken, would have been contained in, or at last noted, in the record.

Further, Appellant argued that "[a]lthough there is no x-ray report in the service treatment records, that could simply mean the service treatment records are incomplete, or that the report was never associated with Mr. Decree's STRs. Indeed, the 2014 VA examiner relies on an x-ray report that itself is not of record." (AB at 425). However, that argument is not persuasive because unlike the November 2014 x-ray report, that was in fact referenced in the record, there was no reference or notation of any kind to an x-ray of the ankle in service, while there was to other x-rays taken during service, such as a chest x-ray of March 1991. *See* (R. at 242). As such, the Board considered the relevant facts and the applicable law, and then fully described the bases for its decision, while relying on, *inter alia*, adequate November 2014 VA examination. *Supra*. Thus, the

Secretary submits that the BVA did provide an adequate explanation of its reasons and bases for its determination. As a result, the Board's decision should be affirmed. *See Gilbert*, 1 Vet.App. at 53.

C. Appellant Has Abandoned Any Argument Or Issue Not Argued In His Opening Brief And Rule Of Prejudicial Error

It is axiomatic that issues not raised on appeal are abandoned. *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"); *Winters v. West*, 12 Vet.App. 203, 205 (1999); *Williams v. Gober*, 10 Vet.App. 447, 448 (1997) (BVA determinations unchallenged on appeal deemed abandoned); *Bucklinger v. Brown*, 5 Vet.App. 435, 436 (1993). Therefore, any and all other issues that have not been addressed in Appellant's Brief should be deemed abandoned on appeal.

It should also be noted that the Secretary does not concede any material issue that the Court may deem Appellant adequately raised, argued and properly preserved, but which the Secretary may not have addressed through inadvertence, and reserves the right to address same if the Court deems it necessary or advisable for its decision. *But cf. McWhorter v. Derwinski*, 2 Vet. App. 133, 136 (1992).

Lastly, the Secretary requests that the Court take due account of the rule of prejudicial error and/or the doctrine of issue exhaustion wherever applicable in this case. *See* 38 U.S.C. § 7261(b)(2); *Shinseki v. Sanders,*

129 S.Ct. 1696, 1706 (2009) (noting that the burden of demonstrating prejudice on appeal "normally falls upon the party attacking the agency's determination"); *Scott v. McDonald*, 789 F.3d 1375, 1381 (Fed. Cir. 2015); *see also Maggitt v. West*, 202 F.3d 1370 (Fed. Cir. 2000) (holding that the Court has the discretion to hear or remand a legal issue raised for the first time on appeal).

CONCLUSION

WHEREFORE, Appellee respectfully requests that the Court affirm the Board's decision of December 11, 2018.

Respectfully submitted,

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