Vet. App. No. 19-0664

IN THE UNITED STATES COURT
OF APPEALS FOR VETERANS CLAIMS

EMIL G. HAGEMAN,
Appellant,

v.

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

ON APPEAL FROM THE BOARD OF VETERANS' APPEALS

BRIEF OF APPELLEE SECRETARY OF VETERANS AFFAIRS

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ISSUES PRESENTED

Whether the Court should affirm the Board of Veterans' Appeals' (Board's) December 4, 2018, decision that denied service connection for residuals of a right ankle injury, when the Board did not clearly err in any of its factual findings, and it supported the decision with an adequate statement of reasons or bases.

STATEMENT OF THE CASE

A. JURISDICTIONAL STATEMENT

The Court has exclusive jurisdiction to review the final decisions of the Board under 38 U.S.C. § 7252(a).

B. NATURE OF THE CASE

On December 4, 2018, the Board issued a decision denying service

connection for a right ankle injury.[1] (Record (R.) at 4 (4-11)). Appellant appealed to this Court in January 2019.

C. STATEMENT OF RELEVANT FACTS

Appellant sought service connection for a right ankle condition in July 2009. (R. at 6114). A VA regional office (RO) denied the claim in July 2010. (R. at 5392 (5388-96)). Appellant filed a notice of disagreement (NOD) in September 2010. (R. at 5383-84). The RO again denied service connection for a right ankle condition in a July 2011 statement of the case (SOC). (R. at 5374 (5356-75)). Appellant appealed to the Board two months later. (R. at 5348-50). VA treatment records from June 2014 note that Appellant rolled his ankle frequently. (R. at 2850). At an August 2017 Board hearing, Appellant described twisting his ankle in service. (R. at 1180 (1177-98)). Some three months later, in December 2017, the Board remanded Appellant's claim for further development. (R. at 1172 (1167-73)). To that end, the Board instructed the RO to procure a VA medical opinion that addressed the nature and etiology of his claimed right ankle condition. (R. at 1172 (1167-73)).

In April 2018, Appellant attended a VA examination of the ankle. (R. at 45-47). The examiner conducted an in-person interview and examined Appellant's medical records and concluded that Appellant did not have any current diagnosis of a right ankle condition. (R. at 46). In that regard, the examiner recorded

[1] The Board remanded claims for service connection for low back and right knee conditions. These are not final decisions, so the Court does not have jurisdiction over those claims. *See Breeden v. Principi*, 17 Vet.App. 475, 478 (2004).

Appellant's reports that he had had some past incidences of twisting his right ankle and pain after overuse but that these symptoms resolved. (*Id.*). The examiner further noted that Appellant expressed the wish to withdraw his claim for service connection for a right ankle condition and so indicated that the physical examination would not be performed. (R. at 47). The examiner concluded by repeating that there was no evidence of any chronic or pathologic condition of the right ankle either during or since Appellant's military service. (*Id.*).

The Board issued the decision on appeal on December 4, 2018. (R. at 4-9). Appellant appealed to this Court the following month.

SUMMARY OF THE ARGUMENT

The Court should affirm the Board's December 4, 2018, decision that denied service connection for a right ankle condition. The Board did not clearly err in any of its factual findings, and it supported the decision with an adequate statement of reasons or bases.

ARGUMENT

The Board Did Not Clearly Err in any of Its Factual Findings, and It Supported the Decision with an Adequate Statement of Reasons or Bases

In general, service connection will be granted if there is evidence of (1) a current disability, that is, a current diagnosis, (2) an in-service incurrence or aggravation of a disease or injury, and (3) a nexus between the claimed in-service disease or injury and the current disability. *See Washington v. Nicholson*, 19 Vet.App. 362, 367 (2005); *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd*, 78

F.3d 604 (Fed. Cir. 1996) (table). The Court of Appeals for the Federal Circuit (Federal Circuit) has held that pain, even in the absence of a current medical diagnosis, can meet the "current disability" requirement for service connection where such pain causes an impairment in the veteran's earning capacity. *Saunders v. Wilkie*, 886 F.3d 1356, 1367 (Fed. Cir. 2018). The Board's findings about whether the elements of service connection are met are subject to the "clearly erroneous" standard of review. *Gilbert v. Derwinski*, 1 Vet.App. 49, 53 (1990). Under this standard, if there is a plausible basis in the record for the Board's factual determinations, the Court cannot upset them. *Gilbert*, 1 Vet.App. at 53. And, like all factual findings, these findings must be supported by an adequate statement of reasons or bases. *Allday v. Brown*, 7 Vet.App. 517, 527 (1995).

Pursuant to duty to assist, VA must sometimes provide a medical examination or obtain a medical opinion, where such an opinion is necessary to decide a claim. 38 U.S.C. § 5103A(d)(1). Such a medical examination report or opinion must be adequate for adjudication purposes. *See* 38 C.F.R. § 4.2. To that end, a medical examination report or opinion is adequate when the examiner's opinion is based upon consideration of the veteran's prior medical history and describes the disability in sufficient detail so that the Board's "'evaluation of the claimed disability will be a fully informed one.'" *Ardison v. Brown*, 6 Vet.App. 405, 407 (1994) (quoting *Green v. Derwinski*, 1 Vet.App. 121, 124 (1991)). The Board's factual findings about whether the duty to assist has been satisfied are, just as with

the elements of service connection, subject to the "clearly erroneous" standard of review. 38 U.S.C. § 7261(a)(4); *Nolen v. Gober,* 14 Vet.App. 183, 184 (2000).

When the Board remands a claim, that remand "confers on the veteran or other claimant, as a matter of law, the right to compliance with the remand orders," and the Board errs when it fails to ensure compliance with the terms of such a remand. *Stegall v. West*, 11 Vet.App. 268, 271 (1998). Although the Secretary is required to comply with remand orders, substantial compliance, not absolute compliance, is required. *See Dyment v. West*, 13 Vet.App. 141, 146-47 (1999) (holding that there was no *Stegall* violation when an examiner made the ultimate determination required by the Board's remand, because such determination "more than substantially complied with the Board's remand order"). VA's actions are substantially compliant with a remand order when they resolve the issue that required the remand order. *See D'Aries v. Peake*, 22 Vet.App. 97, 105 (2008).

Here, the Board did not clearly err in finding that Appellant does not have a current disability. (R. at 5-7). In that regard, the Board noted that the April 2018 VA examiner found that there was no current medical diagnosis of any condition of the ankle. (R. at 6 (citing R. at 46-47)). This report provides a plausible basis for the Board's finding that the first avenue of establishing the "current disability" requirement for service connection – the presence of a current medical diagnosis – was not met, so this finding is not clearly erroneous. *See Gilbert*, 1 Vet.App. at 53. The Board also considered the second avenue for establishing the "current disability" requirement – the presence of symptoms that impair the veteran's

earnings, *Saunders*, 886 F.3d at 1367 – and found that no symptom of the ankle impaired Appellant's earnings. (R. at 6-7). The Board's finding here is not clearly erroneous. *Gilbert*, 1 Vet.App. at 53. And, by considering both the evidence of record and the potentially applicable provisions, the Board provided an adequate statement of reasons or bases for its finding that Appellant does not have a current disability. *See Allday*, 7 Vet.App. at 527.

Appellant's argument that the Board failed to provide an adequate statement of reasons or bases because it did not discuss VA treatment records showing the presence of limitations of dorsiflexion reflections a misunderstanding of the law. (Appellant's Brief at 8). The records to which he cites do not indicate the presence of a diagnosis of a condition of the ankle. (*See* R. at 3118 (August 2010 VA treatment record), 3171 (3171-72) (December 2009 VA treatment record), 3195 (3195-96) (October 2009 VA treatment record)). Nor do these records indicate that any ankle symptom affected Appellant's earning capacity. In short, these records are in no way inconsistent with the Board's findings that neither of the two avenues for establishing the presence of a current disability of the ankle was met. (*See* R. at 3118, 3171, 3195). And the assertion that the Board did not consider whether any symptom of the ankle impaired Appellant's earning capacity is simply false. (Appellant's Brief at 9); (*see* R. at 6-7 (observing that Appellant's ankle symptoms caused no compensable impairment of his earning capacity)). Quite tellingly, Appellant has pointed to no evidence showing that his periodic ankle symptoms impaired his earnings in any way.

The Board also did not clearly err in its implicit finding that the April 2018 VA examination report was adequate for adjudication purposes and that there was substantial compliance with the December 2017 remand instructions. (*See* R. at 5-7). In that regard, the VA examiner interviewed Appellant and reviewed his medical record. (R. at 46). On that basis, she concluded that Appellant had no current diagnosis of any ankle condition. (R. at 47). This report provides a plausible basis for the Board's implicit findings that the duty to assist was satisfied and that there was substantial compliance with the earlier remand, so these findings are not clearly erroneous. *See Gilbert*, 1 Vet.App. at 53. Appellant's allegation that the Board violated *Stegall* because the 2018 examiner did not conduct testing is entirely baseless. (Appellant's Brief at 10-12). The 2017 Board instructed the RO to procure an examination report that addressed the nature and etiology of any ankle condition. (R. at 1172). The examiner determined that there was no ankle diagnosis. (R. at 46-47). Thus, the examiner answered the question for which the examination was sought, so the report is substantially compliant with the Board's remand instructions. *See D'Aries*, 22 Vet.App. at 105; *Dyment*, 13 Vet.App. at 146-47.

Appellant's argument that the examiner erred by not conducting testing again misunderstands the law. (Appellant's Brief at 10-12). Even if the examiner had noted the presence of symptomatology, the record would still need to show the presence of a current disability, either by demonstrating a current diagnosis, *Washington*, 19 Vet.App. at 367, or by demonstrating an impairment in Appellant's

earning capacity. *Saunders*, 886 F.3d at 1367. As noted above, the record shows neither. Appellant's argument here is unpersuasive in another respect. The 2018 VA examiner noted that Appellant informed her that he wished to withdraw his claim for service connection for an ankle condition. (R. at 47). This led directly to the examiner's decision not to conduct physical testing. (*Id.*). This Court has long held that the "duty to assist is not always a one-way street. If a veteran wishes help, he cannot passively wait for it in those circumstances where he may or should have information that is essential in obtaining the putative evidence." *Wood v. Derwinski*, 1 Vet.App. 190, 193 (1991); *see Tyrues v. Shinseki*, 23 Vet.App. 166, 181 (2009) (recognizing that "an appellant has an obligation to cooperate in the development of evidence pertaining to his claim"). Appellant cannot inform the examiner that he no longer wished to pursue the claim, and so induce the examiner not to conduct testing, and then reasonably complain that no testing was conducted. *See Wood*, 1 Vet.App. at 193.

Appellant bears the burden of demonstrating prejudicial error on appeal, but, in this case, he has not established that the Board committed any error whatsoever, let alone error warranting remand. *See* 38 U.S.C. § 7261(b)(2) (requiring the Court to "take due account of the rule of prejudicial error"); *Shinseki v. Sanders*, 556 U.S. 396, 406 (2009); *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (same), *aff'd*, 232 F.3d 908 (Fed. Cir. 2000); *Marciniak v. Brown*, 10 Vet.App. 198, 201 (1997) (same). Insofar as Appellant has limited his arguments to those identified above, it is axiomatic that issues or arguments not raised on

appeal are abandoned. *See Disabled Am. Veterans v. Gober*, 234 F.3d 682, 688 n.3 (Fed. Cir. 2000); *Pederson v. McDonald*, 27 Vet.App. 276, 284 (2015). Appellant has thus abandoned any issue thus not addressed in brief. Because Appellant has not established Board error or any prejudice flowing therefrom, the Court should affirm the Board's decision.

CONCLUSION

In light of the foregoing, the Court should affirm the Board's December 4, 2018, decision.

Respectfully submitted,

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