Vet. App. No. 19-3610

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

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**JOHN HARO,**
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 APPELLEE SECRETARY OF VETERANS AFFAIRS

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# BRIEF OF THE APPELLEE SECRETARY OF VETERANS AFFAIRS

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## I. ISSUE PRESENTED

**Whether the Court should affirm the April 3, 2019, decision of the Board of Veterans' Appeals (Board) that denied Appellant's claim for service connection for a lumbar spine disability.**

## 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, John Haro, appeals the April 3, 2019, Board decision that denied entitlement to service connection for a lumbar spine disability. Record Before the Agency (R) [R. at 5-13]. Appellant's Informal Brief solely argues for a review of his case and that he be provided with an examination. Appellant's Informal Brief (App. Br.) at 3.

### C. Statement of Facts and Procedural History

Appellant served on active duty in United States Army from April 1947 to April 1952. [R. at 1095].

In October 2009, Appellant filed his claim for service connection for a lower back condition. [R. at 1097]; *see also* [R. at 1084-1094]. VA provided Appellant correspondence pursuant to the Veteran Claims Assistance Act (VCAA) in October 2009. [R. at 1070-1077]. Appellant's Service Treatment Records (STR) were obtained in November 2009. [R. at 1035-1068].

VA denied Appellant service connection for a lower back condition in a December 2009 rating decision. [R. at 953-959]; *see also* [R. at 950-951]. Appellant submitted additional evidence in January 2010; VA continued the denial of service connection for a lower back condition in a March 2010 rating decision. [R. at 943-945]; *see also* [R. at 936-939].

In April 2013, Appellant initiated a claim to reopen service connection for a back disability. [R. at 920-921]; *see also* [R. at 868]. In July 2013, VA provided Appellant with correspondence pursuant to the VCAA. [R. at 848-852].

Appellant submitted private medical evidence from October 2016 and November 2016 in support of his claim. [R. at 753-755]; *see also* [R. at 826]. Appellant in November 2016 also argued that his back disorder was due to his service as a paratrooper and his parachute jumps. [R. at 811-812].

VA provided Appellant with an examination to review the etiology of his back condition in January 2017. [R. at 673-681]. In a January 2017 rating decision, VA reopened Appellant's claim for a lumbar spine disability but continued the denial of service connection for a lumbar spine disability. [R. at 489-497]. In February 2017, Appellant initiated an appeal with the January 2017 rating decision and filed a Notice of Disagreement (NOD). [R. at 463-464]. In April 2017, a Statement of the Case (SOC) was issued which continued the denial of service connection for a lumbar spine disability. [R. at 196-219]. Appellant perfected his appeal via a VA Form 9 in April 2017. [R. at 195].

In July 2017, Appellant submitted a private medical opinion dated from September 2012 in support of his claim. [R. at 169-174]. Appellant testified at a Board videoconference hearing in July 2017. [R. at 154-168]. In October 2017, the Board reopened Appellant's claim for service connection for a lumbar spine disability and remanded for further development. [R. at 136-150]. An addendum medical opinion was obtained in November 2017 and a Supplemental Statement of the Case (SSOC) was issued in February 2018. [R. at 118-121]; [R. at 75-96]. In January 2018, Appellant again argued to the Board that service connection was warranted based on his in-service parachute jumps. [R. at 72, 71-73]. The Board

in July 2018 remanded Appellant's appeal so that another addendum opinion could be obtained. [R. at 67, 59-68]. Appellant in July 2018 submitted private medical evidence in support of his claim. [R. at 48-55]. VA obtained the ordered addendum opinion in September 2018. [R. at 40-43]. The addendum opinion concluded that it was less likely than not that Appellant's degenerative disc disease, spondylosis, and spondylolisthesis, was caused by or was otherwise related to his 1949 fall during a parachute jump in service and that his chronic low back pain was not related to his in-service parachute jumps. [R. at 40-43]. VA issued a SSOC in January 2019 and continued the denial of service connection for a lumbar spine disability. [R. at 18-33].

The Board in its April 2019 decision denied Appellant's appeal for service connection for a lumbar spine disability. [R. at 5-11]. The Board noted Appellant's STRs and that the first post service evidence of low back symptoms was in September 2001. [R. at 7]; *see also* [R. at 1032-34]. The Board determined that service connection for a low back disability was not warranted either based on continuity of symptomatology or on a direct basis. [R. at 5-11]. The Board denied service connection on the basis that it afforded higher probative weight to the September 2018 VA medical opinion than the September 2012 private opinion and Appellant's lay statements. [R. at 5-11].

## III. SUMMARY OF THE ARGUMENT

Initially, Appellant fails to allege an error with the Board's decision and merely requests that another examination be provided. Because this assertion is

insufficient to merit remand, the Court should affirm the Board's decision. Moreover, the Board's reliance on the September 2018 VA addendum opinion was proper because the opinion was adequate. Finally, although Appellant does not dispute the merits of the Board's decision, the Court should affirm the Board's decision because it had a plausible basis in the record–namely reliance on the negative nexus opinion from September 2018–and was supported by an adequate statement of reasons or bases.

## IV. ARGUMENT

### A. Standard of Review

Whether service connection is warranted and whether a medical examination is adequate is a question of fact, which the Court reviews under the "clearly erroneous" standard. *See Swann v. Brown*, 5 Vet.App. 229, 232 (1993); *see also D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008). "The Court reviews factual findings under the 'clearly erroneous' standard such that it will not disturb a Board finding unless, based on the record as a whole, the Court is convinced that the finding is incorrect." *Hood v. Shinseki*, 23 Vet.App. 295, 299 (2009). The Court cannot reverse a finding simply because it would have reached a different conclusion. *Elkins v. West*, 12 Vet.App. 209, 216 (1999) (citing *Gilbert v. Derwinski*, 1 Vet. App. 49, 53 (1990)).

The Court also reviews the Board's decision to determine whether the Board supported its decision with 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). "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). However, § 7104(d)(1) does not require the Board to use any particular statutory language or "terms of art," nor does it require "perfection in draftsmanship." *Jennings v. Mansfield*, 509 F.3d 1362, 1366 (Fed. Cir. 2007); *McClain v. Nicholson*, 21 Vet.App. 319, 321 (2007). Additionally, the Board is presumed to have considered all the evidence of record, even if the Board does not specifically address each item of evidence. *Newhouse v. Nicholson*, 497 F.3d 1298, 1302 (Fed. Cir. 2007).

Although Appellant is proceeding pro se, and the Secretary chooses to liberally read his informal opening brief, Appellant still carries the burden of demonstrating error on appeal. *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) (holding that the burden of establishing whether an error is harmful falls on the party attacking the agency's determination); *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (Appellant bears the burden of persuasion on appeal), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000).

**B. Appellant Fails To Fulfill His Burden Of Persuasion**

In this case, Appellant has not carried his burden of persuasion and fails to raise any cognizable Board error, thus, the Court should affirm the Board's decision. Although Appellant is proceeding *pro se*, Appellant still carries the burden of demonstrating error on appeal. *Shinseki v. Sanders*, 556 U.S. at 409

(holding that the burden of establishing whether an error is harmful falls on the party attacking the agency's determination); *Hilkert*, 12 Vet.App. at 151 (Appellant bears the burden of persuasion on appeal).

Even when liberally construing Appellant's opening Informal Brief, the Secretary respectfully submits that Appellant fails to offer any allegations of error with the Board's decision. In the absence of allegation of specific error by Appellant, he has failed to meet his burden. Furthermore, the Board did not clearly err in its determination that Appellant was not entitled to service connection for a lumbar spine disability.

Appellant's sole argument made in his Informal Brief is that he warrants a new examination in support of his claim for service connection for a lumbar spine disability. But this argument fails to allege error with either the Board's decision or its duty to ensure compliance with the duty to assist and therefore is insufficient to warrant remand. *Hilkert*, 12 Vet.App. at 151 (Appellant bears the burden of persuasion on appeal); *see also Breeden v. West,* 13 Vet.App. 250 (2000) (explaining that it is not the responsibility of the Court "to search the record to try to uncover errors not identified by the appellant"). A request for a new examination does not by itself establish an error with the Board's decision and the Court should therefore affirm the Board's decision. *See Mayfield v. Nicholson,* 19 Vet.App. 103, 111 (2005) (noting that "every appellant must carry the general burden of persuasion regarding contentions of error"), *rev'd on other grounds,* 444 F.3d 1328 (2006).

Though, if the Court does deem Appellant's argument a sufficient allegation of error, the Board's decision still warrants affirmance. The Board did not err when it relied on the September 2018 VA addendum opinion because the medical opinion provided was adequate. Generally, an adequate examination "must rest on correct facts and reasoned medical judgment so as inform the Board on a medical question and facilitate the Board's consideration and weighing of the report against any contrary reports." *Acevedo v. Shinseki*, 25 Vet.App. 286, 293 (2012). Here, the Board, in a July 2018 remand decision, requested that an examiner provide a medical opinion addressing: whether Appellant's lumbar spine disability was at least as likely as not caused by or otherwise related to his 1949 fall during a parachute jump, with specific consideration to the September 2001 VA treatment record documenting chronic back pain allegedly caused by his parachute jumps in service. [R. at 67, 59-68]. The September 2018 addendum opinion provided a clear conclusion to that inquiry and supported its determination with detailed rationale; the September 2018 addendum opinion should therefore be considered adequate. [R. at 40-43].

The September 2018 addendum opinion separately addressed Appellant's diagnosed degenerative disc disease, spondylosis, and spondylolisthesis and whether either of the three conditions were related to his 1949 parachute fall or his repeated parachute jumps in service. [R. at 40-43]. Thus, the September 2018 addendum opinion fulfilled its intended purpose and provided a more than adequate response to the specifically medical questions posed by the Board. *See*

*Ardison v. Brown*, 6 Vet.App. 405, 407 (1994) (adequate medical examination is one that is based on consideration of veteran's prior medical history and describes his or her condition with a level of detail sufficient to allow the Board to make a fully informed decision on the relevant medical question). Moreover, the September 2018 addendum opinion also explicitly noted that Appellant's degenerative disc disease, spondylolysis and associated spondylolisthesis was not caused by or otherwise related to his 1949 fall during a parachute jump in service. [R. at 41]. In addition, the examiner noted the September 2001 medical record revealing low back pain and also considered the allegation that multiple parachute jumps caused his lumbar spine disabilities. [R. at 41-42]. The opinion is replete with rationale and the examiner noted several factors which supported his conclusion. Notably the examiner reasoned that: (1) degenerative disc disease is typically due to aging, (2) the evidence did not support a severe or traumatic injury which would have support early onset degenerative disc disease, (3) Appellant had a normal physical examination on separation, (4) spondylolysis develops in childhood, and (5) his noted chronic back pain within his medical history was predicated on Appellant's own lay theorizing and speculation. [R. at 41-43]. Because the examiner supported his conclusion with well-reasoned analysis, the September 2018 VA addendum opinion should be deemed adequate. *See Monzingo v. Shinseki*, 26 Vet.App. 97, 107 (2012) ("examination reports are adequate when they sufficiently inform the Board of a medical expert's judgment on a medical question and the essential rationale for that opinion.").

Moreover, to trigger VA's duty to provide another examination, more than a bald request is necessary from Appellant. *See Palczewski v. Nicholson*, 21 Vet.App. 174, 180 (2007) (submission of new evidence or allegation that the disability has worsened may require new medical examination to be provided, but "mere passage of time" between the date of the regional office's decision and the Board's review of that decision does not). Because Appellant's argument to the Court is unsupported by any allegation of worsening or any material change to his disability, a new examination is not warranted and does not necessitate a remand by the Court.

Because Appellant fails to fulfill his required burden and substantiate an error committed by the Board, the Court should affirm the Board's decision. Even when interpreting Appellant's argument presented in his Informal Brief sympathetically–as an allegation of exam inadequacy or that the duty to assist was unfulfilled–it still does not demonstrate Board error because the September 2018 VA addendum opinion was adequate and further examination is unnecessary.

### C. The Board's Denial of Service Connection Was Not Clearly Erroneous

Although Appellant does not challenge the merits of the Board's denial of service connection for a lumbar spine disability, the Secretary avers that the Board's decision was not clearly erroneous and was supported by an adequate statement of reasons and bases.

Because there is a plausible basis in the record for the Board's determinations, the Court should defer to the Board's denial of service connection for a lumbar spine disability and not disturb the Board's decision. *See Gilbert v. Derwinski*, 1 Vet.App. 49, 52-53 (1990) ("the Court is not permitted to substitute its judgment for that of the [Board] on issues of material fact; if there is a 'plausible basis' in the record for the factual determinations of the [Board], even if this Court might not have reached the same factual determinations," the Court cannot overturn them). Crucially, the Board considered Appellant's overall contention that his back disability was due to his 1949 parachute fall or alternatively from the cumulative impact of his in-service parachute jumps. [R. at 6-11]. The Board reviewed Appellant's lay assertions and the private September 2012 medical opinion, but explained that, ultimately, because the September 2018 VA addendum opinion was the most probative evidence on the issue of nexus, that service connection was not warranted. [R. at 6-11]. The Board weighed the probative value of the September 2012 private opinion against the September 2018 VA opinion and explained that because the September 2012 private opinion failed to include rationale for its conclusion it therefore had lower probative value. This factual assessment and weighing of the evidence is squarely within the Board's purview. *See Washington v. Nicholson*, 19 Vet.App. 362, 368 (2005) (it is the responsibility of the Board to assess the probative weight of the evidence); *see also D'Aries v. Peake*, 22 Vet.App. 97, 107 (2008) (it is within the purview of the

Board to evaluate the medical evidence and favor one medical opinion over another).

This weighing was also not clearly erroneous as the private September 2012 opinion was conclusory and the September 2018 VA addendum was supported by a medically sound rationale premised on a full review of Appellant's medical complaints and history. *Compare* [R. at 169-174] *with* [R. at 40-43]; *see Owens v. Brown*, 7 Vet.App. 429, 433 (1995) (holding that the Board's assessment of the weight to be accorded evidence will be overturned only if it is clearly erroneous). The Board's specific determination that Appellant was not competent to provide a nexus opinion because the issue is medically complex was likewise not a clearly erroneous decision. Not only did the Board consider Appellant's claim on a direct basis but it too considered whether service connection was warranted based on a theory of continuity of symptomatology. *See Schafrath v. Derwinski,* 1 Vet.App. 589, 593 (1991).

Next, the Board's analysis and explanation was precise, clear-cut, and sufficiently enables judicial review; the Board's reasons or bases is therefore adequate. *Allday*, 7 Vet.App. at 527. The Board explained the procedural history, found compliance with the Board's prior remands instructions, reviewed the development provided to Appellant, thoroughly discussed the exams of record, addressed Appellant's main assertion and theory of entitlement, reviewed the favorable private evidence, and assessed the competency of Appellant's lay statements. [R. at 6-11]. In addition, the Board provided Appellant with a detailed

accounting of the evidence of record and most importantly, explained why the September 2018 VA addendum opinion was afforded the most evidentiary weight. The Board provided an adequate statement of reasons or bases in support of its determination that service connection for a lumbar spine disability was not warranted. *Allday*, 7 Vet.App. at 527.

The Board's decision to deny service connection for a lumbar spine disability is supported by the evidentiary record and was properly explained. The Court should therefore affirm the Board's decision because it was not clearly erroneous and supported by an adequate statement of reasons or bases.

**D. Appellant has Abandoned all Other Arguments**

Because Appellant has limited his arguments to the Court and has solely requested that he receive a new examination, the Court should deem all arguments not raised before the Court as abandoned. *Ford v. Gober*, 10 Vet.App. 531, 535 (1997) (noting that arguments not raised before the Court are considered abandoned on appeal).

## V. CONCLUSION

For the foregoing reasons, the Court should affirm the Board's decision.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify under possible penalty of perjury under the laws of the United States of America, that on January 21, 2020, a copy of the foregoing was mailed, postage prepaid, to:

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/s/ Joshua L. Wolinsky
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