IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

ROCCO J. DELAURI,

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

WILLIAM A. HUDSON, JR.
Acting General Counsel

MARY ANN FLYNN
Chief Counsel

CHRISTOPHER W. WALLACE
Deputy Chief Counsel

COLIN M. RETTAMMEL
Appellate Attorney
U.S. Department of Veterans Affairs
Office of the General Counsel (027G)
810 Vermont Avenue, N.W.
Washington, D.C. 20420
(202) 632-6130
Colin.Rettammel@va.gov

Attorneys for Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other

RECORD CITATIONS

IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

ROCCO J. DELAURI,	)	
	)	
Appellant,	)	
	)	
v.	)	Vet.App. No. 19-0461
	)	
ROBERT L. WILKIE,	)	
Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

_____

ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS

_____

_____

BRIEF OF THE APPELLEE
SECRETARY OF VETERANS AFFAIRS

_____

I. ISSUE PRESENTED

Whether the Court should affirm the Board of Veterans' Appeals (Board or BVA) September 25, 2018, decision that denied Appellant's claim for benefits for entitlement to service connection for right ear hearing loss.

II. STATEMENT OF THE CASE

A. Nature of the Case

Appellant appeals the September 25, 2018, Board decision to the extent that it denied his claim for benefits based on entitlement to service connection for right

ear hearing loss. [Record Before the Agency (R.) at 3-10]; (Appellant's Brief (App. Br.) at 1-7).

B. Statement of Relevant Facts

Rocco J. Delauri (hereinafter Appellant, or the Veteran) served on active duty in the United States Army from 1977 to 1981. [R. at 854.] Appellant filed his original claim for benefits based on entitlement to service connection for bilateral hearing loss and tinnitus in December 2013. [R. at 297-300.] Appellant was afforded a VA medical examination in June 2014, at which time the examiner diagnosed left ear hearing loss and tinnitus, but found that the VA criteria were not met for a diagnosis of right ear hearing loss. [R. at 151-158]; *see also* 38 C.F.R. § 3.385. The Regional Office (RO) denied Appellant's claims for service connection for bilateral hearing loss and tinnitus in an August 2014 Rating Decision. [R. at 141-145.] Appellant timely filed a Notice of Disagreement (NOD) in August 2015, and requested that the decision be reviewed by a Decision Review Officer (DRO). [R. at 122-123.] In September 2017, the DRO issued a Statement of the Case (SOC) which continued the denial of Appellant's claims. [R. at 60-88.] Appellant appealed to the Board, which issued a September 2018 decision that granted Appellant's claims of entitlement to service connection for left ear hearing loss and

tinnitus, but denied the claim for right ear hearing loss citing the lack of a diagnosed disability under VA regulations[1]. [R. at 3-10.] This appeal followed.

III. SUMMARY OF ARGUMENT

Appellant has not presented any persuasive argument showing prejudicial error that would warrant vacatur and remand of the Board's decision. Appellant's argument amounts to no more than an attempt to alter both the content and meaning of his prior statements *post hoc* to suit his current needs, while simultaneously advocating for an untenable expansion to VA's duty to provide medical examinations which is squarely contrary to VA regulation and this Court's law. Thus, neither reversal nor remand is warranted, and the Court should affirm the Board's decision.

IV. ARGUMENT

A. Appellant Fails to Identify Any Error in the Board's Decision, as he Never Claimed That his Condition Worsened Since his Last VA Medical Exam

At no point during the pendency of the present claim has Appellant ever presented any statement, argument, or assertion to VA that his right ear hearing loss has worsened since the time of his June 2014 VA medical exam. Appellant currently argues that the Board failed to adequately consider his lay testimony, by way of his Informal Hearing Presentation (IHP) to the Board, that his hearing loss

[1] The portions of the Board's decision that granted entitlement to service connection for left ear hearing loss and tinnitus, are favorable to Appellant and should not be disturbed on appeal. *Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007).

was "progressively getting worse." (App. Br. at 2-4.) However, Appellant quite simply did not say this nor in any way indicate it. Appellant's IHP to the Board asserted, at best, that hearing loss generally *can be* a progressive condition, without *ever* discussing his own claimed disability. [R. at 11-13, stating that "the ACOEM Task Force on Occupation Hearing Loss January 2012 Guidance Statement does not conclude that noise induced hearing loss is not progressive," and "[i]t is established that even with apparent recovery of normal hearing after acoustic trauma there can be widespread and ongoing damage to the cochlear hairs and their nerves becoming manifested only over time."] At no point during his IHP did Appellant ever assert that *his* hearing loss was in any way progressively worsening, nor did he even so much as discuss his own claimed hearing loss. *Id.* The Secretary further notes that even Appellant's current brief cites to no evidence in the record which indicates a worsening, or which would in any way tend to corroborate his current interpretation of his IHP that he is experiencing progressive worsening. In fact, absent Appellant's attempt to refashion his IHP into an entirely different statement, the record is totally devoid of even the slightest hint that his right ear hearing loss has worsened since his June 2014 VA exam.

Finally, although the evidence here demonstrates no assertion that Appellant's right ear hearing loss has worsened save for his current *post hoc* presentation of his IHP to the Board, the Secretary responds to the contention that a VA medical exam is necessary where a Veteran alleges that his or her disability is generally "progressively worsening." Even if the Court finds itself willing to

accept Appellant's entirely re-characterized statement that his hearing loss is generally "progressively worsening," the Secretary contends that this still fails to meet the standard necessary for a new VA medical exam and that such argument necessarily leads to an absurd and untenable result.

As an exercise of its rulemaking authority, VA has enacted regulations concerning when reexaminations of claimants are to be required. 38 U.S.C. § 501, 38 C.F.R. § 3.327. In doing so, VA has decided that reexaminations are to generally be required "if evidence indicates there has been a material change in a disability or that the current rating may be incorrect." 38 C.F.R. § 3.327. This may be satisfied by the claimant's own assertion that his or her disability has undergone an increase in severity since the date of the last examination. *See Snuffer v. Gober*, 10 Vet. App. 400, 403 (1997). The *Snuffer* Court specifically limited its holding to the facts of the case, however, and noted that the Appellant "had expressly complained of worsening ear problems." *Id.* The argument that a generally "progressive worsening" condition, where there has been no express complaint or otherwise any showing of a material change in the disability, is not

sufficient to require a new examination under VA regulations or law[2]. *See also Caffrey v. Brown*, 6 Vet.App. 377, 381 (1994) (finding that a new examination was required where Appellant "presented evidence … that there had been a material change in his condition …); *Weggenmann v. Brown*, 5 Vet.App. 281, 284 (1993) (holding that where an Appellant "claims his condition is worse than when originally rated" and the evidence is "too old for an adequate evaluation of Appellant's current condition," the duty to assist then requires a new examination.)

Additionally, the practical consequences of Appellant's argument necessarily lead to an untenable and absurd result. Taken to its logical conclusion, the argument that an assertion of having a "progressively worsening" condition is sufficient to require a new VA medical examination would functionally prevent VA from ever providing an adequate exam in cases where a progressive disability is claimed. Where a new exam would be necessary simply by virtue of the progressive nature of disability over time, as opposed to an assertion of actual worsening, VA would be unable to ever provide a sufficiently current examination simply due to the delay inherent in the adjudicative process. Such an outcome

[2] Although this Court has not issued a precedential decision on this issue, it has addressed a similar argument and the Court's logic and reasoning in that instance is highly applicable. Where an Appellant claimed that he should be afforded a new examination because he testified at a Board hearing that his doctor told him that his service-connected ringworm was "going to spread" and "going to get worse" over time, the Court found that this was not an express assertion of worsening as contemplated in *Snuffer*, and merely "evidence that his condition could *one day* worsen, not that it *had* worsened." *Thompson v. Skinseki*, 2012 U.S. App. Vet. Claims LEXIS 393, at *9-10 (emphasis in original).

would not only be entirely untenable, but would also be inconsistent with this Court's prior decisions concerning VA's duty to provide a contemporaneous medical examination. *See, e.g. Chotta v. Peake*, 22 Vet.App. 80, 86 (2008) (holding that a retrospective examination is may, in some circumstances, be necessary, but that the Board is not obligated to provide one unless a disability rating "cannot be awarded based on the available evidence" and a retrospective evaluation or opinion is deemed necessary.)

As Appellant has failed to identify any prejudicial error in the Board's decision, vacatur and remand are not appropriate, and the Secretary asks the Court to affirm the Board's decision.

In offering this response, the Secretary has limited himself to only those arguments raised by Appellant in her opening brief. Appellant bears the burden of demonstrating error. *Shinseki*, 556 U.S. at 409. As such, it is for Appellant to present argument as to the specific errors involved in the adjudication of her claim. *Id.*; *see also Hilkert v. West*, 12 Vet.App. 145, 151 (1999); ***aff'd***, 232 F.3d 908 (Fed. Cir. 2000). Such arguments must be presented and adequately developed in Appellant's opening brief in order to be properly considered by the Court. *Locklear*, 20 Vet.App. at 416; *see also Woehlaert v. Nicholson*, 21 Vet.App. 456, 463 (2007) ("The Court has consistently held that it will not address issues or arguments that counsel fails to adequately develop in his or her opening brief."); *Henderson v. Shinseki*, 562 U.S. 428, 434 (2011) ("Courts do not usually raise claims or arguments on their own . . . and are generally limited to addressing the claims and

arguments advanced by the parties."). As such, the Secretary urges this Court to find that Appellant has abandoned all other arguments not specifically raised in her opening brief. *See Norvell v. Peake*, 22 Vet.App. 194, 201 (2008). The Secretary, however, does not concede any material issue that the Court may deem Appellant to have adequately raised and properly preserved, but which the Secretary did not address herein, and he requests the opportunity to address the same if the Court deems it to be necessary.

V. CONCLUSION

In view of the foregoing arguments, the Secretary respectfully requests that the Court affirm the Board's September 25, 2018, decision.

Respectfully submitted,

WILLIAM A. HUDSON, JR.
Acting General Counsel

MARY ANN FLYNN
Chief Counsel

/s/ Christopher W. Wallace
CHRISTOPHER W. WALLACE
Deputy Chief Counsel

/s/ Colin M. Rettammel
COLIN M. RETTAMMEL
Appellate Attorney
Office of the General Counsel (027G)
U.S. Department of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, D.C. 20420
(202) 632-6310

Attorneys for Appellee,
Secretary of Veterans Affairs