IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

ROBERT I. ATKINSON,
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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IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

ROBERT I. ATKINSON,	)	
	)	
Appellant,	)	
	)	
v.	)	Vet.App. No. 19-3228
	)	
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

_____

I. ISSUE PRESENTED

Whether the Court of Appeals for Veterans Claims (Court) should affirm the March 2019, Board of Veterans' Appeals (Board) decision that denied entitlement to service connection for sleep apnea, to include as secondary to Appellant's service-connected anxiety disorder.

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

The Court has jurisdiction over the instant appeal pursuant to 38 U.S.C. § 7252(a).

B. Nature of the Case

Appellant, Robert I. Atkinson, appeals the March 2019, Board decision that denied entitlement to service connection for sleep apnea, to include as secondary to Appellant's service-connected anxiety disorder. (Record (R.) at 3-8).

C. Statement of Facts

Appellant had active duty service from December 1977 to April 1982. (R. at 67). He was granted service connection for Anxiety Disorder, not otherwise specified (NOS) from August 8, 2010, at 10% disabling and from April 11, 2012, at 70% disabling. (R. at 394 (394-402)).

In April 2015, Appellant filed a claim for sleep apnea secondary to major depressive disorder. (R. at 460-61). He submitted records from Dr. Hassan Jabbour, a psychiatrist, which included a March 2015 letter where Dr. Jabbour "describe[d] the connection between sleep apnea and posttraumatic stress disorder [PTSD] as a diagnosis." (R. at 434 (431-55)). He indicated that he had been treating Appellant for PTSD and opined that it was as least as likely as not that Appellant's sleep apnea was aggravated by this PTSD. *Id*. Dr. Jabbour explained that "[PTSD] might not cause sleep apnea, but might exacerbate symptoms of sleep apnea because there is more REM [rapid eye movement] sleep in [PTSD]," and because apnea episodes happens during REM due to the decrease in the muscle tone and airways. *Id*.

Appellant was afforded a VA sleep apnea examination in September 2015 where the examiner diagnosed him with severe obstructive sleep apnea (OSA)

that was shown in 2011 and 2015 sleep study findings. (R. at 415 (404-18)). The examiner opined that Appellant's OSA had not been permanently aggravated by his service-connected anxiety. *Id*. at 417. She noted that Appellant's Continuous Positive Airway Pressure (CPAP) treatment decreased from 22 centimeters (cm) of water in 2011 to 12 cm in 2015. *Id*. The examiner explained that higher numbers of water settings for CPAP machines indicated a higher intensity of treatment and found that Appellant's levels indicated improved treatment response and not aggravation. *Id*. She opined, "There are many known contributors to sleep apnea improvements but the above history and current sleep study results are consistent with improved status, not worsening." *Id*.

The Regional Office (RO) issued a rating decision denying entitlement to service connection for sleep apnea. (R. at 396 (394-402)). Appellant filed a notice of disagreement (NOD) in September 2016 with attachments. (R. at 345-47, 371-72 (345-72)).

Another VA examiner submitted a supplemental examination report in June 2017, noting that the prior examination "only asked aggravation." (R. at 312-13). She addressed the issue of whether Appellant's sleep apnea was proximately due to or as the result of Appellant's anxiety disorder. (R. at 312-13). She opined that Appellant's OSA was less likely than not proximately due to or the result of his service-connected condition. *Id*. at 313. The examiner explained that OSA is caused by complete or partial obstructions of the upper airway and that, while anxiety can have sleep disturbance, "it does not cause the physiological

anatomical change that occur with sleep apnea." *Id*. at 311. Further, research did not support anxiety being a cause of OSA. *Id*.

The RO issued a June 2017 Statement of the Case (SOC) (R. at 294-309), and Appellant filed a VA Form 9 in August 2017 (R. at 291).

III. SUMMARY OF ARGUMENTS

The Board provided a plausible basis for its finding that Appellant's OSA was not caused or aggravated by his service-connected anxiety based on the well-developed medical evidence of record. Appellant fails to meet his burden to show that the Board's decision was in error. As such, the Board's March 2019 decision should be affirmed.

IV. ARGUMENT

Establishing entitlement to service connection 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 Davidson v. Shinseki*, 581 F.3d 1313, 1316 (Fed. Cir. 2009); *Hickson v. West*, 12 Vet.App. 247, 252 (1999); *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table); 38 C.F.R. § 3.303(b). A finding of service connection, or no service connection, is a finding of fact that the Court reviews under the "clearly erroneous" standard. *See Swann v. Brown*, 5 Vet.App. 229, 232 (1993). When applying the "clearly erroneous" standard, if, after reviewing the record in its entirety, the Board's finding of fact is supported by a plausible

basis, “the [Court] may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently.” *Gilbert v. Derwinski,* 1 Vet.App. 49, 52-53 (1990).

The Board's decision must include 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 an appellant to understand the precise basis for the Board's decision, and to facilitate informed review in this Court. *See* 38 U.S.C. § 7104(d)(1); *Allday v. Brown,* 7 Vet.App. 517, 527 (1995); *Gilbert,* 1 Vet.App. at 57. To comply with this requirement, the Board must analyze the credibility and probative value of the evidence, account for the evidence it finds persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the claimant. *Caluza,* 7 Vet.App. at 506.

Here, the Board provided a plausible basis for its determination, which was supported by the well-developed evidence of record. *Gilbert,* 1 Vet.App. at 52-53.

The Board found that the preponderance of evidence was against a finding that OSA was related to service or was caused or aggravated by his anxiety disorder. (R. at 3 (3-8)). While it acknowledged that Appellant had a current diagnosis of sleep apnea, it found that the most probative evidence of record did not support secondary service connection, finding no probative evidence of record showed OSA was caused by anxiety. *Id.* at 6. Citing the September 2015 VA

examiner's findings that Appellant's OSA improved, the Board determined that Appellant's OSA was not aggravated by anxiety. *Id.* Further, it accorded less probative weight to Dr. Jabbour's March 2015 opinion, finding that he was equivocal in his opinion, the medical evidence showed that Appellant's sleep apnea improved over the years, and Dr. Jabbour only reviewed the 2011 sleep study and not the 2015 sleep study. *Id*. at 7.

The Board's determination is supported by the record. The probative medical evidence of record – the September 2015 and the June 2017 VA examination reports – addressed the questions of nexus and aggravation and provided sufficient rationale after consideration of Appellant's entire medical history. *See* (R. at 310-13, 404-18); *Stefl v. Nicholson*, 21 Vet.App. 120, 123 (2007) (a VA medical examination or opinion is adequate "where it is based upon consideration of the veteran's prior medical history and examinations"). For the issue of aggravation, the September 2015 VA examiner considered Appellant's medical history and compared his sleep study results from 2011 and 2015, finding that Appellant's OSA had improved and not worsened and that the current severity was not greater than the baseline; thus, no permanent aggravation. (R. at 410 (404-18)); *see also* 38 C.F.R. § 3.310(b) (principles relating to aggravation of a non-service connected condition). Regarding secondary service connection, the June 2017 VA examiner, provided clear rationale after consideration of Appellant's medical history, explaining that physiological changes that occur with sleep apnea were not caused by anxiety and that research did not support causality. (R. at

312-13); *Stefl*, 21 Vet.App. at 124. Thus, the Board has a plausible basis supported by the record, and its determination should not be disturbed. *See Gilbert,* 1 Vet.App. 52-53 (quoting *Anderson v. City of Bessemer City,* 470 U.S. 564, 573-74 (1985)).

Appellant argues that he was entitled to have his claim decided on all the evidence of record and that the Board failed to apply the benefit of the doubt doctrine pursuant to 38 U.S.C. § 5107(b) and 38 C.F.R. § 3.303. (Appellant's Informal Br. (App. Inf. Br. at 2).[1] Appellant also cites to several Board decisions to argue that his claim may have been granted service connection had he received a different Veterans Law Judge (VLJ). *Id*. at Attachment (Attch.) 2.

Appellant's arguments are either unsupported by the record or law or do not allege error or prejudice. *Hilkert v. West,* 12 Vet.App. 145, 151 (1999) (en banc) (holding that the appellant has the burden of demonstrating error), *aff'd per curiam,* 232 F.3d 908 (Fed. Cir. 2000) (table); *see also* 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, 409 (2009) (explaining that "the burden of showing that an error is harmful normally falls upon the party attacking the agency's determination").

[1] Appellant also cites to previous arguments made in his September 2016 NOD. (App. Inf. Br. at 3). However, the only arguments in this document relate to Appellant's citation to a Board decision in an unrelated case; an argument that there is credible supporting evidence in the record; and an argument that he was entitled to the benefit of the doubt doctrine. *See* (R. at 345-47). Because these arguments will be addressed in this brief, the Secretary will not readdress them further.

While Appellant alleges the Board did not consider all the evidence of record (App. Inf. Br. at 2), there is nothing in the decision to indicate that the Board did not consider the entire record. *See* (R. at 3-8); *Gonzales v. West,* 218 F.3d 1378, 1381 (Fed. Cir. 2000) (holding that "absent specific evidence indicating otherwise, all evidence contained in the record . . . must be presumed to have been reviewed"). Additionally, contrary to Appellant's argument (App. Inf. Br. at 2), the Board directly considered the benefit of the doubt doctrine but determined that the preponderance of evidence weighed against Appellant's claim. (R. at 3-4 (3-8)). Because the Board properly weighed the evidence of record as noted above, the evidence was not in relative equipoise, and, therefore, the benefit of the doubt standard is not for application. *Ferguson v. Principi*, 273 F.3d 1072, 1076 (Fed. Cir. 2001) (the benefit of doubt doctrine is only applicable when there is an "approximate balance of positive and negative evidence").

Lastly, Appellant's citation to other Board decisions to argue that another VLJ may have made a different finding is not a cognizable legal argument (App. Inf. Br., Attch. 2), and therefore, is not sufficiently developed for this Court's review. *See McCarroll v. McDonald*, 28 Vet.App. 267, 272 (2016) (en banc) (the Court cannot properly review underdeveloped arguments). Furthermore, Board decisions have no precedential value and "issued Board decisions [are] considered binding only with regard to the specific case decided . . . [and] each case presented to the Board [is] decided on the basis of the individual facts of the case in light of applicable procedure and substantive law." 38 C.F.R. § 20.1303. Finally, by way

of argument, Appellant offers only what appears to be language from a different Veteran's favorable Board decision. *Id.* Although the Secretary is mindful that Appellant is *pro se*, he hasn't presented any legal basis for this argument and so it warrants no further consideration. (App. Inf. Br., Attch. 2); *see Abbott v. O'Rourke*, 30 Vet.App. 42, 50 n.3 (2018) (rejecting the Veteran's arguments for "failing to satisfy even the liberal standard for pro se pleadings at the Court."). As such, Appellant's citation to other unrelated Board decisions should have no effect on the decision on appeal and are not binding on this Court. *Hilkert,* 12 Vet.App. at 151; *Sanders,* 556 U.S. at 409.

The Secretary has limited his response to only those arguments reasonably construed to have been raised by Appellant in his opening informal brief. It is axiomatic that any issues or arguments not raised on appeal are abandoned. *Pieczenik v. Dyax Corp.*, 265 F.3d 1329, 1332-33 (Fed. Cir. 2001); *Norvell v. Peake*, 22 Vet.App. 194, 201 (2008).

V. CONCLUSION

In light of the foregoing, Appellee, the Secretary of Veterans Affairs, requests that the Court affirm the March 2019, Board decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the United States of America that on January 22, 2020, a copy of the foregoing was mailed postage prepaid to:

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