

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

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**ROBERT L. CARTER, SR.,**  
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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Vet. App. No. 19-5321

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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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**I. ISSUE PRESENTED**

Whether the Court should affirm a June 19, 2019, decision of the Board of Veterans' Appeals (the Board), that denied entitlement to a rating in excess of the granted 10% disability evaluation for a service-connected left inguinal hernia from March 24, 2006, and denied entitlement in excess of the granted separate 10% disability rating for a left inguinal hernia scar from July 21, 1981, and denied entitlement to a rating in excess of the granted 10% evaluation for left inguinal hernia scar.

In this decision, the Board also remanded the issues of entitlement to an initial compensable rating for service-connected left inguinal hernia from March

8, 1976, and entitlement to a rating higher than 10% for bilateral plantar calluses. The Court should not disturb this part of the Board's decision, as it is not final. See *Kirkpatrick v. Nicholson*, 417 F.3d 1361 (Fed.Cir. 2005) (holding that a Board remand is not a final decision within the meaning of 38 U.S.C. § 7252(a)).

## **II. STATEMENT OF THE CASE**

### **A. Jurisdictional Statement**

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

### **B. Nature of the Case**

Appellant, Robert L. Carter, Sr., appeals *pro se* from a June 19, 2019, decision of the Board that granted entitlement to a 10% disability rating for a service-connected left inguinal hernia from March 24, 2006, and entitlement to a separate 10% disability rating for a left inguinal hernia scar from July 21, 1981, denied entitlement to a rating higher than 10% for left inguinal hernia scar, and remanded this issues of entitlement to an initial compensable rating for service-connected left inguinal hernia from March 8, 1976, and entitlement to a rating higher than 10% for bilateral plantar calluses. (Record (R.) at 5-11).

Appellant asserts entitlement to an increased rating for his left inguinal hernia scar and entitlement to an earlier effective date for his 10% disability rating for a service-connected left inguinal hernia, arguing that the Board should have considered evidence from a vocational rehabilitation training that he participated

in between 1991 and 1992. (Appellant's Informal Brief (App.) at 1 (1-3)). The Secretary disputes this contention.

### **C. Statement of Relevant Facts**

Appellant served honorably on active duty in the U.S. Army from August 1974 through December 1975. (R. at 6248).

On December 11, 1975, Appellant submitted a claim of entitlement to service connection for a hernia. (R. at 6244-6247). This claim was denied in a March 1976 rating decision. (R. at 6137, 6158).

In July 1981, Appellant underwent surgery on a left inguinal hernia at Barnes Hospital. (R. at 4068-4071, 3508).

In September 2010, the Board issued a decision that found clear and unmistakable error in the March 1976 rating decision, and granted entitlement to service connection for a left inguinal hernia. (R. at 3623-3631). A December 2010 rating decision implemented the Board's September 2010 decision, and granted Appellant a noncompensable rating, effective March 8, 1976. (R. at 3580-3587).

Appellant submitted a notice of disagreement on December 28, 2010. (R. at 3571-3576).

In July 2012, Appellant underwent a VA examination regarding his hernia. (R. at 3320-3328). During this examination, the physician noted the presence of a scar from the July 1981 surgery on Appellant's hernia. (R. at 3323).

In an August 2012 rating decision, the St. Louis, Missouri Regional Office (RO) granted Appellant entitlement to service connection for the residual scar from

surgery on his left inguinal hernia. (R. at 3307-3312). The RO noted that its decision constituted a “partial grant of benefits” for Appellant’s service-connected hernia condition. (R. at 3307). The scar was evaluated at 10% disabling, effective July 19, 2012. *Id.*

The RO issued a statement of the case in September 2012, continuing its December 2010 decision of a noncompensable left inguinal hernia evaluation and denying Appellant’s claim for an increased evaluation. (R. at 3295-3303).

Appellant submitted a VA Form 9, appealing the RO’s December 2010 decision. (R. at 3266-3272).

In January 2015 and November 2017, the Board remanded Appellant’s claim. (R. at 2717-2720, 1137-1142). In January 2015, the Board found that Appellant was entitled to a contemporaneous examination. (R. at 2718-2720).

In the November 2017 remand, the Board recharacterized Appellant’s initial claim as being claims for an increased initial rating for Appellant’s left inguinal hernia, a separate compensable rating for a scar associated with his left inguinal hernia, and an increased rating for a scar associated with his left inguinal hernia. (R. at 1137-1142). Based on this recharacterization, the Board remanded Appellant’s claims for new, separate examinations. (R. at 1138-1141).

Appellant underwent VA examinations on his left inguinal hernia and his scar in December 2017, in accordance with the Board’s remand instructions. (R. at 1089-1099).



In March 2019, the RO issued a supplemental statement of the case denying Appellant entitlement to, *inter alia*, an initial compensable disability rating for a left inguinal hernia since March 8, 1976, to include on an extraschedular basis, and a separate compensable disability rating for a scar associated with a left inguinal hernia prior to July 19, 2012, and in excess of a 10 percent disability rating since July 19, 2012. (R. at 38-52).

The appeal was returned to the Board's docket in April 2019. (R. at 22).

In June 2019, the issued a decision granting Appellant entitlement to a 10% disability rating for a service-connected left inguinal hernia from March 24, 2006, and entitlement to a separate 10% disability rating for a left inguinal hernia scar from July 21, 1981, while denying Appellant entitlement to a rating higher than 10% for left inguinal hernia scar. (R. at 7-9). The Board also remanded his claims of entitlement to an initial compensable rating for service-connected left inguinal hernia from March 8, 1976, and entitlement to a rating higher than 10% for bilateral plantar calluses. (R. at 9-11). Appellant now challenges this decision.

### **III. SUMMARY OF THE ARGUMENT**

As a threshold matter, because Appellant has submitted an informal brief, the Secretary has attempted to discern, to the extent possible, Appellant's arguments on appeal. (App. at 1-3); see *De Perez v. Derwinski*, 2 Vet.App. 85, 86 (1992) (noting that when reviewing the Board's decision, the Court liberally construes arguments made by *pro se* appellants). However, like other parties, *pro se* appellants "bear the burden of persuasion on appeals to this Court." *Berger v.*

*Brown*, 10 Vet.App. 166, 169 (1997); see also *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (holding that the appellant bears the burden of demonstrating error on appeal), *aff'd per curiam*, 232 F.3d 908 (Fed.Cir. 2000) (table); *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) (holding that the appellant bears the burden of demonstrating prejudicial error).

Appellant's argument for an increased rating of his service-connected hernia scar amounts to little more than an unsupported disagreement with how the Board weighed and applied the evidence. Because he asserts no legal or factual evidence to support his argument, Appellant has failed to meet his burden of persuasion.

Additionally, Appellant's argument for an earlier effective date for his service-connected left inguinal hernia is moot, as the Board remanded the issue of entitlement to an initial compensable rating beginning March 8, 1976.

Accordingly, this Court should affirm the Board's decision in all respects.

#### **IV. ARGUMENT**

##### **A. The Board Provided an Adequate Statement of Reasons or Bases Regarding Why Appellant Was Not Entitled to an Increased Rating.**

In his informal brief, Appellant asserts that he is entitled to an increased rating for his service-connected hernia scar. (App. at 3). Appellant's argument, however, amounts to little more than a disagreement with how the Board weighed and applied the evidence, as well as a disagreement with the ultimate outcome.

Moreover, the Board provided an adequate statement of reasons or bases explaining its decision to deny Appellant's claim for a higher initial rating.

The assignment of a disability rating is a factual finding that the Court reviews under the "clearly erroneous" standard of review. *Johnston v. Brown*, 10 Vet.App. 80, 84 (1997). A finding of fact is clearly erroneous when the Court, after reviewing all the evidence, "is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948); *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990). Indeed, under the "clearly erroneous" standard of review, the Court cannot substitute its judgment for that of the Board, and it *must* affirm the Board's factual findings so long as they are supported by a plausible basis in the record. *Gilbert*, 1 Vet.App. at 52 (emphasis added); see also *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 574 (1985) ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.").

As with any finding on an issue of material fact or law, the Board must support its assignment of a disability evaluation with a statement of reasons or bases that enables a claimant to understand the precise basis for its decision and facilitates review in this Court. 38 U.S.C. § 7104(d)(1) (2019); see *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Gilbert*, 1 Vet.App. at 56-57. 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 v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed.Cir. 1996) (table).

Under 38 C.F.R. § 4.118, Diagnostic Code (DC) 7805, other scars may be evaluated by any disabling effects not considered in a rating provided under DCs 7800 through 7804, under an “appropriate diagnostic code.” 38 C.F.R. § 4.118 (2019). Scars that are evaluated under DCs 7800, 7801, 7802, or 7805 may also receive an evaluation under DC 7804, when applicable. *Id.* Diagnostic Code 7804 provides a 10% rating for “one or two scars that are unstable or painful,” a 20% rating for “three or four scars that are unstable or painful,” and 30% rating—the maximum rating—for “five or more scars that are unstable or painful.” *Id.*

Section 4.118, DC 7804 also explains that “[a]n unstable scar is one where, for any reason, there is frequent loss of covering of skin over the scar. 38 C.F.R. § 4.118 (2019). Diagnostic Code 7804 also instructs raters that “[i]f one or more scars are both unstable and painful, add 10 percent to the evaluation that is based on the total number of unstable or painful scars.” *Id.*

Here, the Board provided an adequate statement of reasons or bases by describing the applicable rating formula and DCs, and explaining why Appellant’s current 10% rating was proper. (R. at 7-8). Specifically, the Board noted that because DCs 7800-7802 were inapplicable, the proper formula to rate Appellant’s scar was DC 7804. (R. at 7). The Board subsequently explained the rating parameters under DC 7804 by stating the requirements for each individual rating (i.e. 10% rating requires one or two scars; 20% rating requires three or four scars).

*Id.*; 38 C.F.R. § 4.118 (2019). After describing the applicable DC, the Board discussed the medical evidence, citing to various examinations and Appellant's July 1981 hernia surgery. (R. at 7-8). The Board noted that Appellant's scar was a residual of his July 1981 hernia surgery, but concluded that "[a] higher rating is not warranted as the Veteran has a *single hernia scar* and higher ratings under DC 7804 require *multiple scars*. (R. at 7-8) (emphasis added).

Altogether, this represents an adequate statement of reasons or bases, and a proper application of the rating formula. As noted above, DC 7804 requires multiple scars for a rating higher than 10%. 38 C.F.R. § 4.118 (2019). The Board explained, and the evidence shows, that Appellant has a single scar—a residual from his July 1981 hernia surgery. Thus, a higher rating is not warranted.

In his brief, Appellant offers no factual or legal evidence to support his argument for a higher rating, aside from a blanket request for a higher rating. (App. at 1-3). The Secretary is unable to discern any argument other than simple disagreement with the Board's decision. Success with such an argument requires a showing that the Board's decision was clearly erroneous. *Johnston*, 10 Vet.App. at 84. Appellant has proffered no evidence and provided no argument to show that the Board's decision was not supported by a plausible basis in the record. Thus, Appellant has failed to meet his burden.

Accordingly, the Secretary respectfully requests the Court to affirm the Board's decision, finding that it provided an adequate statement of reasons or bases and properly applied the rating formula, and more importantly, that Appellant

has not met this burden of persuasion. *Berger*, 10 Vet.App. at 169; see also *Hilkert*, 12 Vet.App. at 151 (holding that the appellant bears the burden of demonstrating error on appeal); *Sanders*, 556 U.S. at 409.

**B. Appellant's Argument for an Earlier Effective Date is Moot.**

The Board's decision to remand the issue of entitlement to an initial compensable rating for service-connected left inguinal hernia from March 8, 1976, renders Appellant's request to move "back [the effective] date of hernia from March 2006 to 1991-1992" moot. Compare (R. at 9-11) with (App. at 1-3). Because the Board remand instructed VA to determine whether a compensable rating is warranted for the period between March 1976 and March 2006, it is necessarily required to consider whether Appellant is entitled to an earlier effective date. (R. at 9-10). In fact, the Board's decision instructs the Secretary to "have a VA examiner review the file to provide a retrospective opinion regarding the extent of the hernia disability from March 8, 1976 through March 26, 2006." (R. at 10). Therefore, Appellant's argument for an effective date of 1991-1992 is moot, as this issue was remanded. Moreover, the Court should not disturb this part of the Board's decision, because a remand is not a "final" decision. See *Kirkpatrick*, 417 F.3d at 1361.

**C. Appellant Has Abandoned All Issues Not Argued in His Brief.**

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) (stating that the Court would "only address those challenges that were briefed");

*Pederson v. McDonald*, 27 Vet.App. 276, 284 (2015); *Williams v. Gober*, 10 Vet.App. 447, 448 (1997) (deeming abandoned Board determinations unchallenged on appeal); *Bucklinger v. Brown*, 5 Vet.App. 435, 436 (1993). Therefore, any and all issues that have not been addressed in Appellant's informal brief have been abandoned.

## **V. CONCLUSION**

For the foregoing reasons, Appellee respectfully submits that the June 19, 2019, Board decision should be affirmed in all respects.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

On the 23rd day of January, 2020, a copy of the foregoing was mailed,  
postage prepaid, to:

Robert L. Carter, Sr.  
3010 Washington Avenue  
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St. Louis, MO 63103

I certify under penalty of perjury under the laws of the United States of  
America that the foregoing is true and correct.

/s/ Colin E. Tansits

**COLIN E. TANSITS**

Counsel for Appellee