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

Vet. App. No. 19-1975

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**LENZY LOFTON**,

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 THE APPELLEE SECRETARY OF VETERANS AFFAIRS

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**ON APPEAL FROM THE**
**BOARD OF VETERANS' APPEALS**

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# BRIEF OF THE APPELLEE SECRETARY OF VETERANS AFFAIRS

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## ISSUE PRESENTED

Whether the Board of Appeals for Veterans' Claims (Board) provided adequate reasons or bases for its decision dated March 11, 2019, that denied entitlement to service connection for sleep apnea, to include as secondary to service-connected persistent insomnia disorder.

## STATEMENT OF THE CASE

### A. Jurisdictional Statement

The U.S. Court of Veterans Appeals for Veterans Claims has jurisdiction over the instant appeal pursuant to 38 U.S.C. § 7252.

## B. Nature of the Case

Appellant, Lenzy Lofton, appeals the March 11, 2019, Board decision that denied entitlement to service connection for sleep apnea, to include as secondary to service-connected persistent insomnia disorder. [Record Before the Agency (R.) at 3-9].

## C. Statement of Facts

Appellant served in the U.S. Air Force from February 1954 to February 1980. [R. at 3443].

Appellant was service connected for scalp eruption, which was later referred to as dermatitis of the scalp, in a March 1980 rating decision. [R. at 3585-88]; *see* [R. at 3539-40]. In September 2015, Appellant was granted entitlement for service connection for persistent insomnia disorder, claimed as major depressive disorder (MDD), associated with dermatitis of the scalp. [R. at 2169-78] (rating decision); [R. at 2135-45] (letter).

In connection with an increased rating claim for his persistent insomnia disorder in November 2016, Appellant submitted a Mental Residual Functional Capacity Assessment by his medical provider, Dr. Edwin W. Hoeper. [R. at 777-81] (assessment); *see* [R. at 775] (VA Form 9 regarding, inter alia, persistent insomnia increased rating claim); [R. at 776] (envelope noting from Appellant). Dr. Hoeper diagnosed insomnia due to sleep apnea, [R. at 777], and stated that "obstructive sleep apnea worsen[s] [i]nsomnia, depression, and the opposite is

also present," [R. at 778]; see also [R. at 780] (stating insomnia/MDD exaggerates his sleep apnea).

In January 2017, Appellant submitted a claim for entitlement to service connection for sleep apnea secondary to insomnia/MDD. [R. at 770-71]; *see* [R. at 772]. With his claim, he also submitted a journal article. [R. at 764-68].

Appellant underwent a Compensation and Pension (C&P) examination for his sleep apnea in February 2017. [R. at 549-54]. As part of the examination, the examiner reviewed Appellant's claims file and his Department of Veterans Affairs (VA) treatment records. [R. at 552]. When discussing the condition's medical history, Appellant stated his condition began in 2016, and the examiner noted that Appellant was diagnosed with obstructive sleep apnea in 2016. [R. at 549]. The examiner noted that Appellant's "MI" was 32 in the obese to morbidly obese range at the time of Appellant's June 2016 sleep study. [R. at 553]. Based on his examination of Appellant, and his review of the claims file and Veterans Health Administration medical records, the examiner found that his sleep apnea was less likely or not proximately due to or the result of his service-connected insomnia disorder. [R. at 553]. The examiner explained that Appellant's "morbid obesity is the strongest link to his sleep apnea." *Id.*

In March 2017, the regional office (RO) denied entitlement to service connection for sleep apnea. [R. at 528-37]. Appellant submitted a notice of disagreement (NOD) a couple months later. [R. at 487-88].

Along with his NOD, Appellant submitted argument in an associated statement, [R. at 489-93]; a physician's statement, [R. at 483]; and two journal articles, [R. at 467-73] (article titled *Association of Psychiatric Disorders and Sleep Apnea in a Large Cohort*), [R. at 474-82] (article titled *Comorbid Insomnia and Obstructive Sleep Apnea: Challenges for Clinical Practice and Research*). The physician's statement said "[o]ne cannot say exactly how long this condition existed prior to the date of diagnosis or definitively state its cause. However, it is as likely as not that Lofton's service connected insomnia/MDD exacerbates his [o]bstructive [s]leep [a]pnea condition." [R. at 483]. Appellant argued in his statement that "[t]he VA decision dated March 20, 2017[,] did not give appropriate consideration to this medical opinion and supporting research." [R. at 489]. Appellant also argued that the case had been decided in bad faith, that he provided credible supporting evidence as required by 38 C.F.R. § 3.304(f), and that he was entitled to the benefit of the doubt. [R. 489-93].

In November 2017, the RO issued a Statement of the Case (SOC) that denied entitlement to service connection for sleep apnea as secondary to service-connected persistent insomnia disorder, [R. at 326-47], and, later that month, Appellant submitted a substantive appeal, [R. at 307].

In March 2018, the Board issued a decision remanding the issue of entitlement to service connection for sleep apnea secondary to service-connected persistent insomnia disorder. [R. at 86-89 (71-89)]. The Board found that the February 2017 C&P examination as well as the physician statement and earlier

assessment submitted by Appellant were all "conclusory and not supported by sufficient rationale." [R. at 87]. The Board accordingly remanded for a new examination. [R. at 87-89].

In September 2018, another C&P examination was conducted. [R. at 42-47]; [R. at 51-53]. The examiner reviewed Appellant's e-folder as well as conducted an in-person examination. [R. at 42]; [R. at 51]. Based on this, the examiner found that Appellant's sleep apnea did not correlate with and was not controlled by his insomnia, and the examiner concluded that his sleep apnea was not at least as likely as not aggravated beyond its natural progression by his service-connected condition. [R. at 52-53].

A clarifying opinion was subsequently requested from the March 2018 examiner. [R. at 39-40].

The examiner provided an addendum opinion in January 2019. [R. at 35-36]. The examiner explained:

> Obstructive sleep apnea [(OSA)] is an anatomical condition in which the structures of the upper airway relax/prolapse during sleep. This results in the temporary occlusion of the airway. While some studies have shown that OSA and a diagnosis of chronic insomnia may co-exist (co-morbid) as noted in Association of Psychiatric Disorders and Sleep Apnea in a Large Cohort, Dr. A. Sharafkhaneh, et al; and Comorbid Insomnia and Obstructive Sleep Apnea: Challenges for Clinical Practice and Research, Dr. F. S. Luyster, et al, however, there is no credible medical evidence of a causative link. OSA is not caused by or aggravated by chronic/persistent insomnia.

[R. at 35].

Later that month, the RO issued a Supplemental Statement of the Case (SSOC). [R. at 19-31].

On March 11, 2019, the Board issued a decision denying entitlement to service connection for sleep apnea, to include as secondary to service-connected persistent insomnia disorder. [R. at 3-9]. The Board found that the preponderance of the evidence was against finding Appellant's current sleep apnea had its onset during active duty service, was otherwise etiologically related to service, or was proximately due to, the result of, or aggravated by, his service-connected persistent insomnia disorder. [R. at 4-8].

## SUMMARY OF THE ARGUMENT

Appellant fails to demonstrate either error or prejudice in the Board's decision so neither remand nor reversal is warranted. The Board provided adequate reasons or bases for finding service connection not warranted for sleep apnea as secondary to service-connected persistent insomnia disorder. Appellant fails to demonstrate any evidence the Board did not consider, any findings inadequately explained, or any law improperly applied. His arguments amount to a disagreement with the Board's decision. The Board's findings are not clearly erroneous and should be upheld.

## ARGUMENT

### I. The Board provided adequate reasons or bases for finding service connection not warranted for sleep apnea as secondary to persistent insomnia disorder

The Board provided adequate reasons or bases for finding service connection not warranted for sleep apnea as secondary to service-connected persistent insomnia disorder. When deciding an appellant's claim, the Board is obligated to provide a written statement of the reasons or bases for its findings and conclusions. *Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1990). "To comply with this requirement, the Board must analyze the credibility and probative value of the evidence, account for the evidence that it finds persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the claimant." *McDowell v. Shinseki*, 23 Vet.App. 207, 215-16 (2009). To do this, the Board must simply provide sufficient discussion to enable both the claimant and this Court to understand the basis of its decision and permit judicial review of the same. *Gilbert*, 1 Vet.App. at 57. The Board's statement of reasons or bases "generally should be read as a whole, and if that statement permits an understanding and facilitates judicial review of the material issues of fact and law presented on the record, then it is adequate." *Johnson v. Shinseki*, 26 Vet.App. 237 (2013) (en banc) (citations omitted), *rev'd on other grounds sub nom. Johnson v. McDonald*, 762 F.3d 1362 (Fed. Cir. 2014).

Factual determinations made by the Board are reviewed under the clearly erroneous standard. 38 U.S.C. § 7261(a)(4). Under this deferential standard of

review, the Court cannot substitute its judgment for that of the Board and 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 52-53. Additionally, the Court must duly consider the prejudicial error rule before it concludes vacatur of the decision of the Board is necessary as "an unquestioning, blind adherence" to 38 U.S.C. § 7104(d)(1) would run afoul of 38 U.S.C. § 7261(b)(2) and "result in this Court's unnecessarily imposing additional burdens on the [Board] . . . with no benefit flowing to the veteran." *Soyini v. Derwinski*, 1 Vet.App. 540, 546 (1991).

The Board here found that the most probative evidence of record did not demonstrate that Appellant's insomnia caused or aggravated his sleep apnea. [R. at 6-8]. The Board acknowledged that there were conflicting medical opinions of record but found that the two opinions from Appellant's psychiatrist had no underlying rationale and, therefore, provided little probative value. [R. at 6] (referencing [R. at 777-81] (Mental Residual Functional Capacity Assessment by Dr. Hoeper); [R. at 483] (Physician's Statement by Dr. Hoeper)). The Board found that the C&P examinations of the record, collectively, by contrast were based on objective findings, a review of Appellant's medical records, and a consideration of his history of sleep symptoms as well as Appellants lay contentions. [R. at 6-7]. The Board further found that the C&P examinations, considered together, were supported by fully reasoned analyses, which included references to medical literature. *Id.* The Board concluded that "these opinions, collectively, provide more persuasive evidence concerning the etiology of [Appellant]'s obstructive sleep

apnea." [R. at 7]. The Board also considered Appellant's lay statements as to etiology but found him not competent to provide such a medically complex etiological opinion. [R. at 7-8] (citing *Davidson v. Shinseki*, 581 F.3d 1313, 1316 (Fed. Cir. 2009) (recognizing that lay evidence can provide evidence of medical etiology or diagnoses if the lay person is competent to make such a determination)); *see also Jandreau v. Nicholson*, 492 F3d. 1372, 1376-77 and n.4 (Fed. Cir. 2007) (recognizing that the competence of a layperson to offer evidence on a medical issue is limited to where doing so does not require reliance on specialized medical knowledge or expertise); *Brewer v. West*, 11 Vet.App. 228, 234 (1998) (finding lay persons not competent to offer medical opinions on issues of medical expertise or that require specialized knowledge). The Board, further, considered the medical articles Appellant submitted suggesting an association between insomnia and obstructive sleep apnea but found these articles not based on Appellant's specific history and circumstances. [R. at 8]. The Board, accordingly, found the medical articles general and inconclusive and noted that speculative, general, or inconclusive evidence are of little probative value. *Id.* (citing *Obert v.Brown*, 5 Vet. App. 30, 33 (1993) (finding the Board correct in denying a claim based on speculative evidence)). The Board further noted that the January 2019 C&P examiner concluded that those articles did not actually present a direct causal connection between insomnia and sleep apnea and the Board deferred to his medical expertise as to the interpretation of medical issues. *Id.* The Board concluded that a preponderance of the evidence weighed against

finding entitlement to service connection and accordingly found the benefit of the doubt rule not for application. *Id.* The Board's findings are plausible, adequately explained, and should be affirmed. *See Gilbert*, 1 Vet.App. at 52-53.

Appellant fails to demonstrate error or prejudice in the Board's weighing of the evidence. Appellant argues that the Board disregarded medical evidence, specifically a December 2016 physician's statement. Appellant's Brief (App. Br.) at 4 (citing [R. at 483]). However, the Board explicitly discussed this statement and assigned it little probative weight given the absence of a supporting rationale. [R. at 6]. The Board is given wide latitude in deciding matters of fact. Factual findings may be derived from credibility determinations, physical or documentary evidence, or inferences drawn from other facts. *See 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." *Id.* Dr. Hoeper stated that "[o]ne cannot say exactly how long this condition existed prior to the date of diagnosis or definitively state its cause. However, it is as likely as not that Lofton's service connected insomnia/MDD exacerbates his Obstructive Sleep Apnea condition." [R. at 483]. The Board's finding that this statement did not include an adequate rationale was at the very least plausible and is entitled to deference. *See Gilbert*, 1 Vet.App. at 52-53.

Further, the Board's determination that a medical opinion without an adequate rationale is entitled to low probative value is appropriate. *See Horn v. Shinseki*, 25 Vet.App. 231, 240-42 (2012) (stating that under caselaw "an

unexplained conclusory opinion is entitled to no weight in a service-connection context"). While Appellant argues that the Board cannot give greater weight to a VA examiner's opinion than a private treating provider, that is inconsistent with relevant law. *See* App. Br. at 5. The Board may favor one medical opinion over another as long as it provides an adequate explanation for why it did so. *Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 300 (2008) (citing *Owens v. Brown*, 7 Vet.App. 429, 433 (1995)). As the Board explained, the private opinions offered no rationale, while the C&P examinations of the record, collectively, by contrast were based on objective findings, a review of Appellant's medical records, a consideration of his history of sleep symptoms as well as his lay contentions, and were supported by fully reasoned analyses, which included reference to medical literature. [R. at 6-7]. These findings were adequately supported and entitled to deference. *See Rodriguez*, 22 Vet.App. at 300.

Appellant also argues he is entitled to the benefit of the doubt. App. Br. at 2. "When there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant." 38 U.S.C. § 5107(b); *see also* 38 C.F.R. § 3.102 ("When, after careful consideration of all procurable and assembled data, a reasonable doubt arises regarding service origin, the degree of disability, or any other point, such doubt will be resolved in favor of the claimant."). The benefit of the doubt is only relevant if the evidence is in equipoise and does not apply if the preponderance of the evidence is against the claim. *See*

*Schoolman v. West*, 12 Vet.App. 307, 311 (1999) (explaining that the benefit of the doubt doctrine does not "come into play unless the evidence of record is in equipoise" and "has no application in those cases where the preponderance of the evidence is against the appellant's claim"); *see also Hayes v. Brown*, 5 Vet. App. 60, 70 (1993) ("If a fair preponderance of the evidence is against a veteran's claim, the claim will be denied, and the rule has no application."). Here, the Board found that the preponderance of the evidence weighed against the claim. [R. at 8]. As the Board explained, the benefit of the doubt rule, accordingly, did not apply. *Id.* (citing 38 U.S.C. § 5107(b); 38 C.F.R. § 3.102; *Gilbert*, 1 Vet.App. at 56[1] ("[I]f a fair preponderance of the evidence is against a veteran's claim, it will be denied and the 'benefit of the doubt' rule has no application")). The Board's finding that the preponderance of the evidence was based on its assignment of low probative value to the private psychiatrist opinions, medical articles, and Appellant's lay statements as to nexus, and its assignment of high probative value to the C&P examinations of record. *See* [R. at 6-9]. The Board adequately explained that the benefit of the doubt doctrine was not for application in this case, and this determination was in line with relevant law. *See* [R. at 8]; *see also Schoolman*, 12 Vet.App. at 311; *Hayes*, 5 Vet. App. at 70.

[1] The Secretary notes that the Board cites this case more generally but the Secretary has added a pincite that goes to the heart of the matter to assist with review.

Appellant cites to other Board decisions in support of his argument. App. Br. at 4-5. As an initial matter, the Board decisions cited in his brief were not submitted to the Board, so the Court should not consider them. *See Hillyard v. Derwinski*, 1 Vet.App. 349, 352 (holding the Court could not consider prior Board decisions related to five separate claimants because the decisions were not submitted to the Board for consideration). To the extent Appellant argues that the Board should have discussed the Board decision cited in his statement accompanying his NOD, he fails to demonstrate prejudice or error. *See Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) (holding that the appellant bears the burden of demonstrating prejudicial error); *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) ("An appellant bears the burden of persuasion on appeals to this Court."), *aff'd* 232 F.3d 908 (Fed. Cir. 2000); *see Overton v. Nicholson*, 20 Vet.App. 427, 435 (2006) (stating the appellant bears the burden of demonstrating error on appeal). Board decisions are nonprecidential. *See id.* (quoting 38 C.F.R. § 20.1303 ("[P]reviously issued Board decisions will be considered binding only with regard to the specific case decided.")). The Board instead is tasked with deciding the case before it "on the basis of the individual facts of the case in light of applicable procedure and substantive law." 38 C.F.R. § 20.1303. As explained above, that is exactly what the Board did here. Appellant cited to "BVA Citation Nr: 1648003 - Docket No. 13-16 522" in his letter accompanying his NOD and argued that entitlement to service connection was granted in that case even though the clamant there presented less evidence than he submitted here. [R. at 489-90].

However, in the Board decision as cited by Appellant, the claimant provided a private opinion that was more thorough than the VA medical opinions of record. [R. at 489-90]. The Board in that case also found that the private medical opinion was "based on knowledge and consideration of the [claimant]'s pertinent medical history as well as treatment of the [claimant] for sleep apnea and PTSD and w[as] adequately supported by sufficient rationale." [R. at 489]. The Board in that case found the evidence in equipoise and found that the benefit of the doubt doctrine applied. [R. at 490]. In the case at hand, the Board found that the private opinions submitted by Appellant were not adequately supported and, in fact, offered no rationale. [R. at 6]. As previously explained in more detail, the Board here found the most probative evidence to be the C&P examinations of record, [R. at 6-7], and that the preponderance of the evidence was against finding entitlement to service connection warranted, [R. at 8]. Thus, unlike the Board decision cited by Appellant, there was no opinion offering a positive nexus that "was adequately supported by sufficient rationale" as to warrant any significant probative weight. *Compare* [R. at 6], *with* [R. at 489-90]. Further, the Board decision cited by Appellant referenced a particularly powerful positive nexus opinion, one that was "based on knowledge and consideration of the [claimant]'s pertinent medical history" and was "more thorough than the VA medical opinions of record." *See* [R. at 489-90]. This distinguishes the Board decision cited by Appellant, which involved a particularly strong private opinion, and the Board's opinion here, which involved private opinions with bare conclusions and no supporting rationale, even more starkly.

*Compare* [R. at 6]; [R. at 483]; [R. at 777] (baldly stating "insomnia [is] due to [s]leep [a]pnea")*;* [R. at 778] (baldly stating "obstructive sleep apnea worsen[s] [i]nsomnia, depression, and the opposite is also present"); [R. at 780] (baldly stating "[i]t is likely as not that [s]ervice [c]onnected [i]nsomnia/MD[D] exaggerates his [s]leep [a]pnea"), *with* [R. at 489-90]. The Board is presumed to have considered all of the evidence of record "absent specific evidence indicating otherwise," *Gonzales v. West*, 218 F.3d 1378, 1380-81 (Fed. Cir. 2000), and, where it is silent as to a specific piece of evidence, the Court "must presume that the Board considered this evidence and found it too scant to warrant comment," *Robinson v. Peake*, 21 Vet.App. 545, 555 (2008). There is no reason to believe that the Board did not consider the cited previous Board decision when deciding the claim. *See* [R. at 3-9]. Even if the Board had failed to consider this opinion, Appellant fails to demonstrate how this would be prejudicial, given the large factual differences between the cited Board decision and the case at hand. *See Lamb v. Peake*, 22 Vet.App. 227, 235 (2008) (holding that there is no prejudicial error when a remand for a decision on the merits would serve no useful purpose); *see also Bryant v. Shinseki*, 23 Vet.App. 488, 498 (2010) (explaining that "the assessment of prejudice generally is case specific, demonstrated by the appellant and based on the record").

Appellant also directly cites to his argument offered in conjunction with his NOD. App. Br. at 3. In addition to the arguments he advances in his brief that are addressed above, Appellant argued in his statement below that the case had been

decided in bad faith, [R. at 490]; that the RO had not considered the medical research he submitted, [R. at 489]; and that he provided credible supporting evidence, in part, because of the research he submitted, [R. 491]. To the extent Appellant argues that the Board did not address these arguments, this argument is unpersuasive.

Appellant's argues that VA decided his case in bad faith because "[t]here are no VA laws or regulations that permit the valid, credible, applicable medical opinions to be ignored." [R. at 490]. Appellants argues that his claim was decided in bad faith because VA incorrectly considered the evidence, specifically the private medical opinions. *Id.* As explained previously, the Board adequately explained its weighing of the private medical opinions and, thus, addressed this argument. To the extent Appellant argues that VA should have reached out to the private examiner for clarification before rejecting the opinion, this is similarly unpersuasive. *See* [R. at 490-41]. While the duty to seek clarification from a private physician exists in some cases, it is limited to instances "when the private medical report is the *only* evidence on a material issue, and material medical evidence can no longer be obtained as to that issue, yet clarification of a relevant, objective fact would render the private medical report competent for the assignment of weight." *Carter v. Shinseki*, 26 Vet. App. 534, 545 (2014) (citing *Savage v. Shinseki*, 24 Vet. App. 259, 267 (2011)) (emphasis in original). That is not the case here, as there are three other examinations of record that collectively adequately explain that Appellant's sleep apnea was less likely than not

proximately due to, a result of or aggravated beyond its normal progression by his insomnia. *See* [R. at 6-7]. Further, even if there were no C&P examinations of record, offering an adequate rationale is not an objective fact so as to require clarification. See *Carter*, 26 Vet. App. at 545. Appellant's citation to *Cohen v. Brown*, 10 Vet. App. 128, 140 (1997), is also misguided, as that case pertained to requirements unique to post traumatic stress disorder (PTSD). *See generally Cohen v. Brown*, 10 Vet. App. 128 (1997). The Court in *Cohen* discussed how to handle VA examinations that are not in line with the Diagnostic and Statistical Manual of Mental Disorders (DSM) in light of 38 C.F.R. § 3.304(f) and associated regulations. *Id.* at 139-140 (discussing the interplay of 38 C.F.R. § 4.125; 38 C.F.R. § 4.126 (1996); 38 C.F.R. § 3.304(f) with the DSM). However, each of these regulations, as well as the DSM, are specific to mental disorders. *See* 38 C.F.R. § 4.125; 38 C.F.R. § 4.126 (1996); and 38 C.F.R. § 3.304(f). Thus, *Cohen* has no applicability here. Contrary to Appellant's argument, the Board only needed to adequately explain its weighing of the evidence and did not need to request clarification before assigning low probative value to private opinions. *See Rodriguez*, 22 Vet.App. at 300; see also *Carter*, 26 Vet. App. at 545. The Board adequately explained its weighing of the evidence here. *See* [R. at 6-7]. Further, the Board explained the relevant law on the issue:

> With regard to the medical opinions obtained, as with all types of evidence, it is the Board's responsibility to weigh the conflicting medical evidence to reach a conclusion as to the ultimate grant of service connection. *Wood v. Derwinski*, 1 Vet. App. 190, 193 (1991). The Board may

> favor the opinion of one competent medical expert over another if its statement of reasons and bases is adequate to support that decision. *Owens v. Brown*, 7 Vet. App. 429, 433 (1995). Stated another way, the Board decides, in the first instance, which of the competing medical opinions or examination reports is more probative of the medical question at issue. *Nieves-Rodriguez v. Peake*, 22 Vet. App. 295, 300 (2008).

Thus, the Board addressed Appellant's argument on this point because it explained the relevant law and explained its weighing of the private opinions. Even if the Board had not adequately addressed this argument, there is no prejudice, as Appellant cites to law not applicable to the case at hand. *See Lamb*, 22 Vet.App. at 235 (holding that there is no prejudicial error when a remand for a decision on the merits would serve no useful purpose); *see also Bryant*, 23 Vet.App. at 498 (2010) (explaining that "the assessment of prejudice generally is case specific, demonstrated by the appellant and based on the record").

Similarly, Appellant's argument that VA did not appropriately consider the research he submitted is not persuasive. [R. at 489]; [R. at 491]. Appellant argued that the research that he was submitted was credible supporting evidence and cites to 38 C.F.R. § 3.304(f) in support. [R. at 491]. As discussed previously, 38 C.F.R. § 3.304(f) is not applicable to Appellant's claim. *See* 38 C.F.R. § 3.304(f) (pertaining to PTSD). Thus, Appellant fails to show error or prejudice in the Board not discussing it. *Hilkert*, 12 Vet.App. at 151; *Overton*, 20 Vet.App. at 435. To the extent Appellant argues that the Board's weighing of the medical articles was clearly erroneous, this is also unpersuasive. As discussed earlier in

this brief, the Board found the medical articles not based on Appellant's specific history and circumstances and accordingly too general, speculative and inconclusive to have probative weight. [R. at 8]. The Board also found the C&P examinations of record highly probative, and 2019 C&P examiner addressed these medical articles and noted that they did not offer evidence of causative link. *See* [R. at 6-8]; [R. at 35]. Given the C&P examiner's medical expertise, the Board deferred to the medical examiner's evaluation of medical evidence. *See* [R. at 6-8]*; see Nieves-Rodriguez*, 22 Vet.App at 302 (2008) (stating that VA examiners are "nothing more or less than expert witnesses" who provide opinions on medical matters); *see also Colvin v. Derwinski*, 1 Vet.App. 171, 175 (1991) (finding that the Board may not rely on its own unsubstantiated medical opinions). The Board's analysis is in line with relevant law and its findings and conclusions are adequately supported and plausible based on the record. *See Gilbert*, 1 Vet.App. at 57; *Anderson*, 470 U.S. at 574; *see also Colvin*, 1 Vet.App. at 175. Thus, the Board decision should be upheld.

## II. Appellant fails to demonstrate reversal is warranted

Appellant requests that the Court grant entitlement to service connection for sleep apnea secondary to a mental disorder, which would amount to a reversal of the Board's decision. *See* App. Br. at 3; [R. at 3-9]. As previously explained in this brief, remand is not warranted. Reversal is also inappropriate. Reversal is the appropriate remedy "when the only permissible view of the evidence is contrary to the Board's decision." *Gutierrez v. Principi*, 19 Vet.App. 1, 10 (2004) (citing

*Johnson v. Brown*, 9 Vet.App. 7, 10 (1996)). As demonstrated throughout this brief, Appellant has not shown that the only permissible view of the evidence is contrary to the Board's findings. Thus, Appellant has not carried his burden of demonstrating that the only permissible view of the evidence is against the Board's finding as to warrant reversal by this Court. *See Gutierrez*, 19 Vet.App. at 10.

**III. Appellant has abandoned all issues not argued in his brief**

The Secretary has limited his response to only those arguments reasonably construed to have been raised by Appellant in his opening brief and submits that any other arguments or issues should be deemed abandoned. *See Pieczenik v. Dyax Corp.*, 265 F.3d 1329, 1332-33 (Fed. Cir. 2001); *Norvell v. Peake*, 22 Vet.App. 194, 201 (2008). For example, Appellant has not argued that he is entitled to service connection for sleep apnea on a direct basis, so that issue should be deemed abandoned. *See* App. Br. at 1 (stating that he is appealing issue of service connection for sleep apnea secondary to insomnia/depression); App. Br. at 3 (requesting grant of entitlement to service connection for sleep apnea secondary to a mental disorder); *see also Pederson v. McDonald*, 27 Vet.App. 276, 283 (2015) ("[T]his Court, like other courts, will generally decline to exercise its authority to address an issue not raised by an appellant in his or her opening brief.").

**CONCLUSION**

WHEREFORE, in light of the foregoing reasons, the Court should affirm the March 11, 2019, Board decision that denied entitlement to service connection for

sleep apnea, to include as secondary to service-connected persistent insomnia disorder.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

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

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

/s/ Jacqueline Kerin
JACQUELINE KERIN
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