IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

Vet. App. No. 19-2033

JOHN R. SHEFFIELD
Appellant,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,
Appellee.

ON APPEAL FROM THE BOARD OF VETERANS' APPEALS

BRIEF OF APPELLEE

WILLIAM A HUDSON, JR.
Acting General Counsel

MARY ANN FLYNN
Chief Counsel

CAROLYN F. WASHINGTON
Deputy Chief Counsel

JENNIFER MENSAH
Appellate Attorney
Office of General Counsel
(027D)
U.S. Department of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, D.C. 20420
(202) 632-6140

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

RECORD CITATIONS

IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

JOHN R. SHEFFIELD,	)	
	)	
Appellant,	)	
	)	
v.	)	Vet. App. No. 19-2033
	)	
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 of Appeals for Veterans Claims (Court) should vacate and remand the Board of Veterans' Appeals (Board) January 9, 2019, decision which denied entitlement to service connection for a back disability.

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

This Court's jurisdiction over the case at bar is predicated on 38 U.S.C. § 7252(a) which grants the Court of Veteran Appeals exclusive jurisdiction to review final decisions of the Board.

B. Nature of the Case

Appellant, John R. Sheffield, appeals the January 9, 2019, Board decision that denied entitlement to service connection for a back disability. (Appellant's Brief (App. Br.) at 2); (Record Before the Agency (R.) at 5-15).

C. Statement of Pertinent Facts and Proceedings Below

Appellant served in the US Air Force from June 1977 to June 1985. (R. at 325), *see also* (R. at 6 (5-15)). During service, in December 1977, Appellant was injured in a car accident and treated at Landstuhl Army Hospital in Germany. (R. at 543, 590). Beginning in December 1977 through March 1978, Appellant's service treatment records (STRs) reflect complaints of upper and lower back pain. (R. at 530-34, 537, 543). X-rays taken in December 1977 reveal a diagnosis of Scheurmann's disease. (R. at 534). Other STRs noted Appellant had scoliosis in 1984 (R. at 502, 559) and a mild 10-degree curvature to the left thoracolumbar area. (R. at 500, 502).

Appellant filed a claim for compensation for a back condition in June 2013. (R. at 423). He was afforded a VA back examination in December 2013, where the examiner diagnosed facet arthropathy in the lumbar spine, probable degenerative changes at the sacroiliac joints, and childhood scoliosis. (R. at 282 (274-82)). The examiner stated that she could not resolve the issue without resorting to speculation. *Id.* She opined that "[p]robable degenerative changes at the sacroiliac (SI) joints is less likely

as not caused by his military service because he was not diagnosed with these conditions in service." *Id.*

The Regional Office (RO) subsequently denied the claim for back disorder in a March 2014 Rating Decision. (R. at 235 (228-36)). Appellant submitted a notice of disagreement (NOD) with the decision in January 2015. (R. at 218-19).

In May 2015, the RO obtained another medical opinion where the examiner opined that it is less likely as not that Appellant's preexisting low back condition was chronically aggravated beyond normal progression. (R. at 196 (195-200)). She noted that Appellant had scoliosis from childhood, was not on chronic limitations, and was eligible to enter a second period of duty. *Id.* at 166. The examiner also concluded that "lumbar strain does not cause/chronically aggravate his current diagnoses including facet arthropathy, [degenerative joint disease sacroiliac] DJD SI joints, or scoliosis (which are preexisting)." *Id.*

The RO continued to deny the claim in a May 2015 statement of the case (SOC) (R. at 119-46) and Appellant appealed to the Board in June 2015. (R. at 109). In July 2018, Appellant attended a Board hearing and testified that records from Landstuhl hospital, where he received medical care after his December 1977 car accident, were missing from the record. (R. at 49 (47-58)). He stated that although he had a preexisting back

condition prior to service, it was asymptomatic, and his back issues arose during service. *Id.* at 50, 53.

In August 2018, Appellant submitted a private medical opinion from Dr. Jewison. (R. at 18-29). The physician opined that Appellant's lumbar disc disease is as likely as not related to a car accident in December 1977 because he had some visits with a physician in 1978 related to low back pain that was likely aggravated by the car accident. *Id.* at 19.

III. SUMMARY OF ARGUMENT

The Secretary agrees with Appellant that the Board erred in failing to ensure VA satisfied its duty to assist by failing to obtain all of his service records and providing inadequate reasons or bases for its reliance on the May 2015 VA examination. *See* 38 U.S.C. § 5103A; (App. Br. at 7-10). Accordingly, the Court should vacate and remand the Board's decision. However, reversal is not warranted.

IV. ARGUMENT

A. The Board Failed to Ensure VA Satisfied its Duty to Assist.

To the extent Appellant contends that the Board failed to ensure VA satisfied its duty to assist because it did not obtain his STRs, the Secretary agrees. App. Br. at 8-10*; See* 38 U.S.C. § 5103A(b)(1); 38 C.F.R. § 3.159. The Secretary is required to "make reasonable efforts" to assist a claimant in obtaining evidence necessary to substantiate his or her claim for benefits, including all federal and private records adequately identified by

the claimant. 38 U.S.C. § 5103A. Under 38 C.F.R. § 3.159, VA is required to make as many requests as necessary to obtain relevant records from a Federal department or agency. *See Sullivan v. McDonald*, 815 F.3d 786, 792 (Fed Cir. 2016). The duty to assist also includes a duty to provide a thorough and contemporaneous medical examination or obtain a medical opinion when either is "necessary to make a decision on the claim." 38 U.S.C. § 5103A(d)(1); 38 C.F.R. § 3.159(c); *see also Green v. Derwinski*, 1 Vet.App. 121, 124 (1991); 38 C.F.R. § 3.326. The Board's determination that the duty to assist has been satisfied is a finding of fact subject to review under the clearly erroneous standard. *See Nolen v. Gober,* 14 Vet.App. 183, 184 (2000); *Gilbert v. Derwinski*, 1 Vet.App. 49, 52-53 (1990) (a finding of fact is not clearly erroneous if there is a plausible basis for it in the record).

The Secretary agrees with Appellant's assertion that VA failed to obtain records of his treatment at Landstuhl Army Hospital in Germany. (App. Br. at 9-11). Appellant testified at the July 2018 Board hearing that after his accident in December 1977, he was given treatment at Landstuhl Army Hospital where he attended physical therapy for almost one year. (R. at 49 (47-58)). He also stated that none of this medical treatment was in the records. *Id*. Although Appellant adequately notified VA regarding these records by providing the name of the hospital, the location and an approximate time period, there is no indication that VA attempted to obtain

these records as required pursuant to its duty to assist. *See* 38 U.S.C. § 5103A(b)(1); 38 C.F.R. § 3.159(c). Accordingly, VA failed to satisfy its duty to assist by not obtaining these records.

B. The Board Failed to Provide an Adequate Statement of Reasons or Bases For its Determination that the Presumption of Soundness Was Rebutted.

The Secretary concedes that the Board failed to provide an adequate statement of reasons and bases for its decision regarding the presumption of soundness. The Board is required to provide a written statement of reasons or bases for its findings and conclusion. *See* 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995). The Board is required to analyze the probative value of the evidence, account for that which it finds persuasive or unpersuasive, and explain why it rejected evidence materially favorable to the claimant. *See Caluza v. Brown*, 7 Vet.App. 498, 506 (1995). The statement must be adequate to ensure a claimant understands the reason for the decision and facilitate review. *Simon v. Derwinski*, 2 Vet.App. 621, 622 (1992).

The Secretary agrees with Appellant that the Board erred by relying on the May 2015 VA examiner's opinion to conclude that there is clear and unmistakable evidence of no aggravation. (App Br. at 7-8); (R. at 11-12 (5-15)). When no preexisting medical condition is noted upon entry into service, a veteran is presumed to have been sound in every respect. *See Wagner v. Principi,* 370 F.3d 1089, 1096 (Fed. Cir. 2004). This statutory

provision is referred to as the "presumption of soundness." *Horn v. Shinseki,* 25 Vet.App. 231, 234 (2012). If the presumption of soundness applies, the burden then falls on VA to rebut the presumption with clear and unmistakable evidence that an injury or disease manifested in service was *both* preexisting *and* not aggravated by service. *See* 38 U.S.C. § 1111. The presumption can also be overcome by evidence that the increase was due to the natural progress of the disease. *Horn*, 25 Vet.App. at 235; 38 U.S.C § 1153.

The May 2015 VA medical examiner concluded that Appellant's "claimed condition, which clearly and unmistakably existed prior to service, was not aggravated beyond its natural progression by an in-service event, injury or illness." (R. 196 (195-200)). The Board relied on the May 2015 VA medical opinion to determine that Appellant's back condition "clearly and unmistakably did not undergo a permanent increase in severity beyond the natural progression of the disabilities during active service". (R. at 13 (3-15)). However, the Board did not discuss how it found that the May 2015 medical opinion to clearly and unmistakably attribute Appellant's back conditions to its natural progression, especially in light of that fact that the examiner opined that it is "less likely than not that veteran's preexisting low back condition, though painful, was chronically aggravated beyond normal progression." (R. at 196 (195-200)). This, is, on its face, an application of a standard less stringent than the clear and unmistakable standard and the

Board did not explain how, it found the examiner's opinion to constitute clear and unmistakable evidence sufficient to rebut the presumption of soundness. The Board's failure to include this discussion undercuts Appellant's ability to understand the Board's decision and frustrates judicial review. *See also Gilbert*, 1 Vet.App. at 57 (The Board's statement of reasons or bases must enable the claimant to understand the basis of its decision and permit judicial review). Accordingly, the Board provided an inadequate statement of reasons and bases for its determination that the presumption of soundness was rebutted.

C. Reversal is Not Warranted.

Appellant argues that this Court should reverse the Board's findings that the presumption of soundness was rebutted because he argues that the Board relied on evidence that "falls short of being clear and unmistakable," particularly concerning Appellant's lumbosacral spine. App Br. at 6-7. He alleges that the only medical opinion concerning his lumbosacral spine is the August 2018 private opinion and his statements that he never had any back pain "undermine a conclusion that it is clear and unmistakable that a pre-service condition was not aggravated by the accident." *Id.* at 7-8; (R. at 18-29). Reversal is not warranted in this case as Appellant's arguments ignore substantial portions of the record and the Board's decision.

Reversal is only appropriate when the only permissible view of the evidence is contrary to the Board's decision. *See Gutierrez v. Principi,* 19 Vet.App. 1, 10 (2004); *see also Deloach v. Shinseki*, 704 F.3d 1370, 1380 (Fed. Cir. 2013) ("But where the Board has performed the necessary fact-finding and explicitly weighed the evidence, the Court of Appeals for Veterans Claims should reverse when, on the entire evidence, it is left with a definite and firm conviction that a mistake has been committed."). Generally, where the Board has incorrectly applied the law, failed to provide an adequate statement of reasons or bases for its determinations, or where the record is otherwise inadequate, remand is the appropriate remedy. *See Coburn v. Nicholson,* 19 Vet.App. 427, 431 (2006); *Tucker v. West,* 11 Vet.App. 369, 374 (1998).

Reversal is not warranted here because the Board properly discussed Appellant's lumbosacral spine strain and explained that although there was a current diagnosis and evidence of an in-service event, there was no competent medical evidence supporting a finding that there was a nexus between his current condition and the strain that he suffered in service. (R. at 13 (5-15)); *See Hickson v. West*, 12 Vet.App. 247, 253 (1999). Appellant's allegation that the only medical opinion of record regarding his lumbosacral spine was the 2018 private opinion is incorrect as the May 2015 VA examiner also addressed that condition in his findings. (R. at 196 (195-200)). The Board relied on the May 2015 VA examiner's

conclusion that his current back diagnoses of facet arthropathy and DJD of the sacroiliac joints are not related to his lumbar spine strain in service. (R. at 196 (195-200)). It also explained that the May 2015 examination was the "most probative medical opinion on this claim" because the examiner provided a thorough review of the medical evidence and provided a detailed rationale. (R. at 12 (3-15)). Accordingly, the Board provided a plausible basis for its findings. *Gilbert*, 1 Vet.App. at 52 (This Court may only reverse a finding of the Board if there is no plausible basis in the record for the finding). To that extent, Appellant has not met his burden in demonstrating clear error in the Board decision and reversal is not for application.

Further, as argued *supra*, the record is inadequate as the Board failed to obtain all of Appellant's record of treatment at Landstuhl Army Hospital. The Board must initially obtain the missing STRs, and then discuss whether the newly obtained evidence is sufficient to establish whether service connection for a back disability is warranted. *See Gilbert*, 1 Vet.App. at 52-53 (holding that it is within the purview of the Board to make findings of fact), *cf. Owens v. Brown*, 7 Vet.App. 429, 433 (1995) (it is the responsibility of the Board, not the Court, to assess the credibility and weight to be given to evidence). Additionally, the Board, as discussed earlier, provided insufficient reasons or bases for its reliance upon the May 2015 VA examiner's opinion as the sole basis for its finding that clear and

unmistakable evidence existed to rebut the finding of no aggravation. Such a failure in the Board's reasons or bases analysis constitutes error warranting remand, not reversal. *See Gutierrez,* 19 Vet.App. at 10.

Appellant also argues that the Board cannot sustain a conclusion of clear and unmistakable evidence of no aggravation. App. Br. at 7-8. He alleges that because the Board did not find his statement's not credible, his lay statement that prior to the incident, he never had any back pain, and the July 2018 private medical opinion (R. at 18-29) undermine a conclusion that there was clear and unmistakable of a pre-service condition was not aggravated by the accident. App. Br. at 8. Appellant's argument has no merit because he is merely disagreeing with how the Board weighed the evidence. Weighing the evidence, is a responsibility only for Board. *See Owens*, 7 Vet.App. at 433. The Board properly weighed the evidence and as such, this could not result in clear error, making reversal not for application.

Also, the Board did not commit clear error in its determination that the July 2018 private medical opinion was entitled to "limited" probative value because it "contained merely conclusory statements without supporting rationale" and didn't utilize an appropriate standard of review. (R. at 8-9 (5-15)); *Deloach*, 704 F.3d at 380. The Board also appropriately determined that Appellant is not competent to testify regarding etiology or aggravation of a preexisting disability. *Id.* at 7; *Clemons v. Shinseki*, 23

Vet.App. 1, 4-5 (2009). Accordingly, Appellant has not met his burden of demonstrating that the only permissible view is contrary to the Board's decision.

D. Appellant's Other Contentions Are Not Grounds For Remand.

Appellant argues that the Board failed to provide an adequate statement of reasons and bases because it failed to address the July 2018 private examiner's opinion (including his conclusion that the degenerative changes in the lumbar and lumbosacral spine were as likely as not related to the car accident) and corresponding x-rays showing "degenerative changes in the lumbar and lumbosacral spine." App Br. at 14; (R. at 18-29). However, this argument is unavailing as it ignores substantial sections of the Board's decision, the Board explicitly considered the July 2018 private opinion, and assigned it "limited" probative value. *Caluza,* 7 Vet.App. at 506; (R. at 12 (3-15)).

This argument fails because as Appellant concedes, and as argued above, the Board analyzed the private opinion and assigned it lower probative value. (R. at 12 (3-15)); App Br. at 7; *See Washington,* 19 Vet.App. at 368 (it is the responsibility of the Board to assess the probative weight of the evidence). To the extent that Appellant argues that the Board did not specifically address his opinion and the x-rays, it distorts the reasons and bases standard. *Caluza,* 7 Vet.App. at 506. The reasons and bases standard states that the Board must consider favorable evidence, it

does not state that every aspect of the evidence must be included in the Board's analysis. *See Gonzalez v. West,* 218 F.3d 1378, 1380-81 (Fed. Cir. 2000) (the Board does not have to discuss each piece of evidence it considers when deciding a claim). Further, to the extent that he argues that the Board did not address the July 2018 x-rays that were attached to the medical private opinion, it did so as the x-rays were clearly part of the August 2018 private medical opinion. (R. at 12 (3-15)); (R. at 20-29 (18-29)). The Court should reject this argument.

The Secretary has limited his response to only those arguments raised by Appellant in his brief, and, as such, urges this Court to find that Appellant has abandoned all other arguments not specifically raised in his 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 adequately raised and properly preserved, but which the Secretary did not address, and requests the opportunity to address the same if the Court deems it to be necessary.

V. CONCLUSION

In view of the foregoing arguments, Appellee, the Secretary of Veterans Affairs, respectfully submits that the Board's, January 2019 decision should be remanded.

Respectfully submitted,

WILLIAM A HUDSON, JR.
Acting General Counsel

MARY ANN FLYNN
Chief Counsel

/s/ Carolyn F. Washington
CAROLYN F. WASHINGTON
Deputy Chief Counsel

/s/ Jennifer Mensah
JENNIFER MENSAH
Appellate Attorney
Office of the General Counsel (027D)
U.S. Department of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, D.C. 20420
(202) 632-6140

Attorneys for Appellee Secretary of Veterans Affairs