

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

ALBERT B. ANDERSON,
Appellant,

v.

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

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

**BRIEF OF APPELLEE
SECRETARY OF VETERANS AFFAIRS**

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ALBERT B. ANDERSON,
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ROBERT L. WILKIE,
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Appellee.

Vet. App. No. 19-1045

**BRIEF OF THE APPELLEE
SECRETARY OF VETERANS AFFAIRS**

Did the Board of Veterans' Appeals (Board) provide an adequate statement of reasons or bases for relying upon the VA examinations in denying Appellant service connection for bilateral plantar fasciitis with right heel spur and for sleep apnea?

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, Albert B. Anderson, appeals the January 10, 2019, Board decision that denied Appellant's claim of entitlement to service connection for bilateral plantar fasciitis with right heel spur and for obstructive sleep apnea.

C. Statement of Relevant Facts

Appellant served in the United States Army from May 1970 through January 1972. [R. at 1738]. In November 1971, Appellant presented with and was treated for plantar warts. [R. at 2027]. In his December 1971 separation examination, Appellant reported trouble sleeping, and the examining physician noted that Appellant had sleeping difficulty for many years. [R. at 2050-52]. Appellant indicated that he had foot problems in service, but the examining physician clarified that it was in reference to his plantar warts from the prior month and found his feet to be normal. *Id.* at 2050-51. Appellant was granted service connection for a bilateral knee disability effective January 1972, immediately following his discharge from active duty. [R. at 1989-90]. Appellant was awarded service connection for a low back disability, effective January 2006. [R. at 1350-54].

In April 2008, Appellant presented to his primary care physician for "snoring and cessation of breathing during sleep" that he had experienced "for years." [R. at 217-23].

In September 2009, Appellant was afforded a Department of Veterans Affairs (VA) examination regarding his knees. [R. at 1223-28]. Upon examination, Appellant's gait was found to be within normal limits. *Id.* at 1224.

In June 2010, Appellant filed a claim for service connection for sleep apnea and plantar fasciitis. [R. at 1121]; [R. at 1124]. Appellant alleged that his plantar fasciitis was secondary to his service-connected knee disabilities. [R. at 1121].

In December 2010, Appellant received a VA examination regarding his plantar fasciitis. [R. at 1083-86]. Appellant stated that he believed his plantar fasciitis was caused by "an altered gait and stance caused by [his service connected] osteoarthritis of the knees." *Id.* at 1083. Appellant reported constant bilateral foot pain. *Id.* The examiner summarized Appellant's medical history and conducted a physical examination. *Id.* at 1083-85. The examiner noted that Appellant "had the foot symptoms for several years, but they became severe enough for him to seek medical treatment only in 2009." *Id.* at 1083. The examiner diagnosed Appellant with right foot plantar fasciitis with heel spur and left foot plantar fasciitis. *Id.* at 1085. Appellant's gait and stance were normal. *Id.* at 1083. The examiner opined that the Appellant's bilateral plantar fasciitis was not secondary to or permanently aggravated beyond its natural progression by his bilateral knee disability. *Id.* at 1086. The examiner's rationale was that Appellant's gait and stance were both normal, and that plantar fasciitis was a common condition not typically associated with knee osteoarthritis. *Id.* The examiner opined Appellant's plantar fasciitis was more likely due to tight heel cords. *Id.*

The Winston-Salem Regional Office (RO) issued a rating decision in June 2011 denying service connection for Appellant's plantar fasciitis and sleep apnea. [R. 1029-36]. Appellant filed a notice of disagreement (NOD) the following month. [R. at 1023-26]. The RO issued a statement of the case (SOC) in May 2013 continuing the denial of Appellant's claims. [R. at 936-49]. Appellant filed a substantive appeal the following month. [R. at 918-20].

Appellant testified at a Board hearing in April 2018. [R. at 404-23]. Regarding his claim for service connection for sleep apnea, Appellant testified that he started having sleep disturbances and snoring episodes, which "occasionally . . . would stop breathing," in 1971. *Id.* at 408. Appellant stated that his wife and kids noticed his sleeping issues. *Id.* at 410. Appellant's friend testified that he noticed Appellant taking frequent naps and "snoring very loudly." *Id.* at 411. Appellant testified he currently uses a CPAP machine. *Id.* at 420. Regarding his claim for service connected plantar fasciitis, Appellant continued to argue that his service connected knee disability caused his current plantar fasciitis. *Id.* at 422-23. Appellant's representative argued that his knees had a "mechanical impact on the heel cord where [Appellant], for a prolonged period, did not walk in a manner that stretched the heel cords resulting in a tightening of the cord and the associated problems of fasciitis, heel pain, and ultimately a heel spur." *Id.* at 423.

In June 2018, the Board issued a decision remanding Appellant's claims. [R. at 392-96]. Specifically, the Board instructed the RO to obtain another medical opinion to consider if Appellant's "tight heel cords were caused or aggravated by

service connected bilateral knee arthritis.” *Id.* at 396. Additionally, the Board instructed VA to obtain an examination “to determine the etiology of diagnosed sleep apnea” and to “discuss the complaints of sleep disturbance in service, lay statements regarding the observation of disturbed sleep from service to the present, and the private medical opinion relating sleep apnea to service.” *Id.* at 395.

In July 2018, pursuant to the Board’s remand instructions, Appellant received a VA examination regarding his plantar fasciitis. [R. at 137-39, 141-45]. The examiner reviewed the claims file and noted that Appellant had plantar warts removed during service. *Id.* at 142. Appellant reported experiencing bilateral foot pain and believing that his plantar fasciitis was caused by an altered gait due to his service-connected bilateral knee condition. *Id.* The examiner diagnosed Appellant with plantar fasciitis of both feet. *Id.* The examiner noted the possible risk factors for developing plantar fasciitis. *Id.* at 138. The examiner opined that Appellant’s plantar fasciitis was not directly related to his service because the diagnosis of plantar fasciitis was not made until many years after service and the medical evidence was silent of foot pain until his diagnosis. *Id.* at 138. The examiner also provided a negative nexus opinion regarding whether his plantar fasciitis was secondary to his service-connected conditions. *Id.* at 138. The examiner noted that Appellant was found to have abnormal gait in January 2007 but that it would be mere speculation for her to determine the cause of that abnormal gait as she was not present. *Id.* The examiner found that Appellant

presented with normal gait several times throughout the record, based on his summary of the pertinent medical treatment record notations earlier in the examination, so his gait was not chronically abnormal. *Id.* at 138; *see also id.* at 137. Never-the-less, the examiner explained that the weight of medical literature indicates that there is no relationship between altered gait and plantar fasciitis. *Id.* Additionally, the examiner found that the weight of the medical literature does not indicate Appellant's service-connected knee disability and lumbar spine disability as etiologies of, or aggravations to, plantar fasciitis. The examiner listed the medical literature she relied upon. *Id.* at 138-39.

Appellant also received a VA examination regarding sleep apnea in July 2018. [R. at 139-41, 145-46]. The VA examiner reviewed the claims file and noted Appellant's in-service complaint of sleeping difficulties. *Id.* at 139, 145. The examiner also acknowledged lay statements provided by Appellant and others that he had snored for many years. *Id.* at 139-40. The examiner also noted Appellant's primary care physician's opinion that his sleep apnea started in service. *Id.* at 140. The examiner provided a negative nexus opinion because Appellant's in-service complaint of sleeping difficulty was far too vague to assume the existence of any particular condition. *Id.* The examiner cited to the Appellant's medical record and cited excerpts from medical literature concerning sleep apnea. *Id.* at 140-41. The examiner explained that obesity was widely accepted as the most important prevalent factor of sleep apnea in addition to middle age and male gender, and that obesity was objectively noted in the Appellant's case. *Id.* at 140-41. The

examiner stated that, although it may be in the realm of possibility that there was a relationship between the Appellant's vague complaint of sleep difficulty to the formal diagnosis of sleep apnea nearly 40 years later, in the examiner's professional opinion, "it did not meet the standard of equipoise, and a nexus was not established." *Id.* at 141.

The RO issued a supplemental statement of the case (SSOC) in September 2018 that continued the denial of Appellant's claims. [R. at 44-69]. Appellant submitted a written statement the following month, arguing that he did not seek treatment for sleep apnea after service because he believed it could not be treated and that his plantar fasciitis was related to prolonged standing while in service. [R. at 37-38].

The Board issued its decision that is before the Court on appeal in January 2019. [R. at 6-15]. First, the Board found that Appellant was not entitled to service connection for plantar fasciitis. *Id.* at 7. The Board explained that, "taken together, the December 2010 and July 2018 VA examiners opined that it was less likely than not that the Veteran's bilateral plantar fasciitis was either caused by or aggravated by service or a service-connected disability, to include as a result of an altered gait." *Id.* at 11. The Board found the VA examinations to be highly probative because the "VA examiners specifically identified and discussed [Appellant]'s contentions and theory concerning service, his service-connected knees, and the plantar fasciitis"; "considered the [Appellant's] statements"; and "specifically cited to medical research to support the opinion." *Id.* The Board also

noted that Appellant “has not submitted any further medical evidence to support the contention that his bilateral plantar fasciitis is related to service or to a service-connected disability.” *Id.*

Second, the Board found that Appellant was not entitled to service connection for sleep apnea. *Id.* at 7. The Board found that the VA opinion to have more probative value than the private medical opinion. *Id.* at 13-14. The Board explained that the July 2018 VA examiner reviewed Appellant’s claims file, noted his in-service complaint of sleeping difficulties, cited the various lay statements of record, and noted Appellant primary care physician’s opinion that his sleep apnea began in service. *Id.* at 12-13. The Board explained that the “examiner opined that the Veteran’s in-service complaint of sleeping difficulty was far too vague to assume the existence of any particular condition” because “the differential of conditions to consider for a vague complaint of ‘sleeping difficulty’ was far too vast.” *Id.* at 13. The Board also acknowledged that the examiner explained that Appellant’s primary care physician’s opinion included no rationale. *Id.* The Board noted that the examiner explained that “obesity was widely accepted as the most important prevalent factor of obstructive sleep apnea in addition to middle age, and male gender, and obesity was objectively noted in the [Appellant’s] case.” *Id.* The Board found this opinion “highly probative” because it was “supported by detailed rationale and provided by a trained medical professional.” *Id.* at 14. The Board found, “The VA examiner specifically identified and discussed [Appellant]’s contentions and theory concerning service [connection], his service-connected

conditions, and his obstructive sleep apnea. The examiner considered the lay statements. In particular, the examiner acknowledged and discussed [Appellant]’s documented report of frequent trouble sleeping at the end of active duty.” *Id.*

This appeal followed.

SUMMARY OF THE ARGUMENT

The Board provided adequate reasons or bases for its reliance upon the VA examinations when denying Appellant’s claim for service connection for plantar fasciitis and for sleep apnea. Regarding Appellant’s claim for service connection for plantar fasciitis, the Board explained that it relied upon December 2010 and the July 2018 VA examinations “taken together” when denying Appellant’s claim. Both examiner’s opined that any altered gait stemming from Appellant’s service-connected knee disability had no etiological link to plantar fasciitis, and both examiners found that Appellant did not suffer from chronic altered gait anyway. The Board explained that these examinations, when taken together, specifically identified and discussed the Veteran’s contentions and theory concerning service connection, considered Appellant’s lay statement’s, and specifically cited to medical research to support the opinions. *Id.* Regarding Appellant’s claim for service connection for sleep apnea, the Board explained it relied upon July 2018 VA examination because it was supported by detailed rationale by a trained medical professional. The Board explained that the examiner found Appellant’s claims of sleep problems in service were too vague to attribute them to sleep apnea,

and that Appellant's current age and obesity were more likely the cause of his current disability because they are the highest risk factors for sleep apnea according to cited medical literature.

STANDARD OF REVIEW

The Board's determination of whether service connection is warranted and the Board's assessment of the adequacy of an examination involve findings of fact, and such findings are reviewed by the Court under the clearly erroneous standard of review. 38 U.S.C. § 7261(a)(4); see *D'Aries v. Peake*, 22 Vet.App. 97, 107 (2008); *Nolan v. Gober*, 14 Vet.App. 183, 184 (2000); *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990). Under this standard of review, the Court cannot substitute its judgment for that of the Board and must affirm the Board's factual determinations so long as they are supported by a plausible basis in the record. *Gilbert*, 1 Vet.App. at 52. See also *Deloach v. Shinseki*, 704 F.3d 1370, 1380 (Fed. Cir. 2013) ("The Court of Appeals for Veterans Claims, as part of its clear error review, must review the Board's weighing of the evidence; it may not weigh any evidence itself."). The Board has wide latitude when it comes to deciding matters of fact, and its factual determinations may be derived from any number of sources, to include 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 (1985). The mere fact that the evidence could be viewed differently does not render the Board's interpretation of the evidence clearly erroneous. *Id.* ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.").

ARGUMENT

I. The Board Provided an Adequate Statement of Reasons or Bases for its Reliance on the VA Examinations when Denying Appellant's Claims

The Board provided adequate reasons or bases for why it relied upon the VA examinations in denying Appellant's claims. A Board decision must be supported by statements of reasons or bases that adequately explains the basis of the its material findings and conclusions. 38 U.S.C. § 7104(d)(1); *Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990). This generally requires the Board to analyze the probative value of the evidence, account for that which it finds persuasive or unpersuasive, and explain the basis of its rejection of evidence materially favorable to the claimant. *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995). The Board, however, need not comment upon every piece of evidence contained in the record. *Newhouse v. Nicholson*, 497 F.3d 1298, 1302 (Fed. Cir. 2007).

In order for a medical opinion to be adequate, it must be based upon a consideration of the relevant evidence and must provide the Board with a foundation sufficient enough to evaluate the probative worth of that opinion. See *Ardison v. Brown*, 6 Vet.App. 405, 407 (1994) (adequate medical examination is one that is based on consideration of veteran's prior medical history and describes his or her condition with a level of detail sufficient to allow the Board to make a fully informed decision on the relevant medical question); see also *Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 301 (2008) (examiner must provide "not only clear conclusions with supporting data, but also a reasoned medical explanation

connecting the two”). But this obligation is not insurmountable, and an examination report need not “explicitly lay out the examiner’s journey from facts to a conclusion.” *Monzingo v. Shinseki*, 26 Vet.App. 97, 106 (2012) (holding that a medical examination report must be read as a whole and does not require that it “explicitly lay out the examiner’s journey from the facts to a conclusion”)

1. The Board Provided Adequate Reasons or Bases for Relying Upon the December 2010 and July 2018 VA Examinations When Denying Appellant’s Claim for Service Connection for Plantar Fasciitis

The Board adequately explained its reliance upon the December 2010 and July 2018 VA examinations when reaching its decision to deny service connection for plantar fasciitis. The Board found that Appellant was not entitled to service connection for plantar fasciitis and explicitly relied on the December 2010 and July 2018 VA examination that provided negative nexus opinions. The Board explained that taken together, the “December 2010 and July 2018 VA examiners opined that it was less likely than not that the Veteran’s bilateral plantar fasciitis was either caused by or aggravated by service or a service-connected disability, to include as a result of an altered gait.” [R. at 11]. The Board found that the “VA examiners specifically identified and discussed the Veteran’s contentions and theory concerning service, his service-connected knees, and the plantar fasciitis”; “considered the [Appellant’s] statements”; and “specifically cited to medical research to support the opinion.” *Id.*

The rationale provided by the VA examiners for their opinions is adequate. The December 2010 examiner explained that Appellant’s gait and stance were

normal at the time of the examination, and that plantar fasciitis is a fairly common condition that is not associated with knee osteoarthritis. [R. at 9]; [R. at 1086]. Additionally, the July 2018 VA examiner opined that Appellant presented with normal gait several times throughout the record, so his gait was not chronically abnormal, and, furthermore, there is no relationship between altered gait and plantar fasciitis. *Id.* at 138. The examiner explained the weight of the medical literature did not support that Appellant's service-connected knee disability and lumbar spine disability as etiologies of, or aggravations to, plantar fasciitis. *Id.* at 138-39 (citing 9 pieces of medical literature that do not support an etiological link between either of Appellant's service connected conditions and plantar fasciitis). Taken together, these examinations sufficiently allowed the Board to make a fully informed decision, and the Board adequately explained its reliance upon them. See *Ardison*, 6 Vet.App. at 407; see also *Gilbert*, 1 Vet.App. at 57.

Appellant makes several arguments that the Board's reasons or bases are inadequate to justify its reliance on these examinations, but none of these are persuasive. Appellant argues that the Board does not explain why it attributed probative weight to the December 2010 VA examination when the Board previously found the examination inadequate. Appellant's Brief (App. Br.) 9; see [R. at 393-95] (June 2018 Board decision finding the December 2010 VA examination inadequate to adjudicate the claim). The Secretary notes that the June 2018 Board decision found that the December 2010 examination was inadequate to fully adjudicate the claim, but just because a medical opinion is

inadequate to decide a claim does not mean that it is without any probative weight. See *Monzingo v. Shinseki*, 26 Vet.App. 97, 107 (2012) (“[E]ven if a medical opinion is inadequate to decide a claim, it does not necessarily follow that the opinion is entitled to absolutely no probative weight”). The Board previously found the December 2010 VA examination was inadequate because it did not indicate whether or not it considered instances where Appellant had abnormal gait and it did not consider whether Appellant’s “tight heel cords were caused or aggravated by service connected bilateral knee arthritis.” [R. at 393-94]. The December 2010 VA examiner found that Appellant had normal gait at the time of examination, that plantar fasciitis is not associated with knee arthritis nor altered gait, and that Appellant’s condition of tight heel cords was likely causing his plantar fasciitis. [R. at 1086]. Just because the December 2010 VA examination did not explicitly consider the instances of the record where Appellant presented with abnormal gait, does not mean the examination was based on an inaccurate factual premise, and the June 2018 Board decision did not make such a finding. [R. at 393-94]. Any inadequacies of the December 2010 VA examination were addressed in the July 2018 VA examination, including the explicit consideration of Appellant’s instances of abnormal gait, and the July 2018 VA examiner also found Appellant’s abnormal gait “wasn’t chronic.” [R. at 138]. This is precisely why the Board explicitly stated that the December 2010 and July 2018 examinations were considered together in adjudicating the claim. [R. at 11].

Appellant also argues that the December 2010 VA examination is inadequate because it did not correctly opine to aggravation, using a “permanently worsened” standard, but this argument ignores the fact that the July 2018 VA examination sufficiently opines to aggravation. App. Br. 11. Once again, the December 2010 VA examination was inadequate to adjudicate the claim by itself, but it is still entitled to probative weight, including its opinion that knee arthritis does not cause plantar fasciitis. *Monzingo*, 26 Vet.App. at 107. The July 2018 VA examiner explicitly finds that “[t]he weight of the medical literature does not support any of [Appellant’s service-connected disabilities] as etiologies of or aggravations to condition of plantar fasciitis” and that “the weight of medical literature lacks support for a relationship between altered gait and plantar fasciitis.” [R. at 138].

Appellant argues the July 2018 VA examination was inadequate, but Appellant, again, does not present a persuasive argument. First, Appellant argues that the July 2018 VA examination did not provide rationale for its direct service connection opinion. App. Br. 11. As a preliminary matter, Appellant has maintained throughout the appeal that his current plantar fasciitis is secondary to his service-connected knee disability. See [R. at 1121] (June 2010 claim where Appellant alleged that his plantar fasciitis was secondary to his service-connected knee disabilities); [R. at 1083] (December 2010 VA examination where Appellant stated he did not develop plantar fasciitis until 2009 and believed it was “because of an altered gait and stance caused by osteoarthritis of the knees”); see App.’s Br. 12 (Appellant’s “ultimate contention” is that he “the way he walked due to his

service-connected knee and back pain resulted in reduced range of motion in his ankle and a tightening of his heel cords, which caused his plantar fasciitis and heel spur”). Additionally, there are no documented in service complaints of foot problems (other than warts) in service, even though Appellant reported other orthopedic conditions such as bilateral knee pain and plantar warts while in service. [R. at 1989] (“During service the veteran was evaluated on numerous occasions for pain in the left and right knee.”); see also [R. at 2027] (November 1971 Service Treatment Record (STR)); [R. at 2029] (December 1971 STR); [R. at 2031] (August 1971 STR); [R. at 2050-52] (December 1971 Separation Examination). Therefore, Appellant shows no prejudice. See *Martinak v. Nicholson*, 21 Vet.App. 447, 451 (2007) (explaining “[t]he appellant bears the burden of demonstrating on appeal any prejudiced caused by a deficiency in an examination”); *Robinson v. Shinseki*, 557 F.3d 1355, 1357 (Fed. Cir. 2009) (“Where a fully developed record is presented to the Board with no evidentiary support for a particular theory of recovery, there is no reason for the Board to address or consider such a theory”). Moreover, Appellant has not contended that he has suffered from plantar fasciitis since service, so there has not been a credibility determination made that he has experienced foot pain since service. Appellant cites to only his substantive appeal as evidence that he reported the condition since service. App. Br. 10 (citing [R. at 1024]). But in his substantive appeal, he asserted only that he suffered from plantar fasciitis with heel spurs “as early as 1970,” not continuously since service. [R. at 1024]. Because Appellant

offers no theory of direct service connection, the July 2018 VA examiner's rationale that there are no complaints of foot pain, no in-service incident of foot problems (beyond warts), and no diagnosis until 40 years after service, is adequate.

Next, Appellant argues the July 2018 VA failed to address Appellant's "ultimate contention" that his service-connected conditions "reduced range of motion in his ankle" that caused his plantar fasciitis. App. Br. 12. The July 2018 VA examiner notes that reduced ankle dorsiflexion is one of the potential risk factors for the development of plantar fasciitis. [R. at 149]. However, Appellant cites to no evidence of record that indicates his limited range of motion in his ankle was due to any his service-connected disabilities. In fact, the only evidence Appellant cites to is his own lay testimony that, when he was in physical therapy for plantar fasciitis in 2009, he was taught to stretch out his ankles and his representative's statement that "it's our argument that that [the] tight cord resulted because you weren't fully stretching the ankles when you were walking." [R. at 415-16]. However, such lay statements are not competent evidence that his limited range of motion of his ankle was due to his service-connected conditions. See *Brewer v. West*, 11 Vet. App. 228, 234 (1998) (stating "lay persons are not competent to offer medical opinions" on issues of medical expertise or that require specialized knowledge). Furthermore, the July 2018 VA examiner found that Appellant's altered gait was not a chronic problem and has no relation or etiological link to his plantar fasciitis, [R. at 138], so the examiner addressed Appellant's theory that chronic altered gait caused tight heel cords and plantar fasciitis

because his gait was not chronically altered, [R. at 416-17]. As such, the July 2018 VA examination already addressed Appellant's theory for how his tight heel cords is related to his plantar fasciitis, through his gait, and Appellant fails to point to any competent evidence indicating that his tight heel cords are related to his service-connected conditions.

Next, Appellant argues that the July 2018 VA examiner's reliance on medical literature violate this Court's holding in *Bailey v. O'Rourke*, 30 Vet.App. 54 (2018); however, this matter is distinguishable. App. Br. 14. In *Bailey*, the Court held that a VA examiner's rationale was inadequate when the medical examiner, not the medical articles that the examiner relied upon, did not provide rationale specific to the claimant. 30 Vet.App. at 60 (stating an "examiner's opinion was inadequate as to the issue of direct service connection because the rationale was based solely on general articles and did not discuss any facts pertaining to [the claimant's] condition or individual circumstances, including any risk factors that may contribute to that particular type of [disability]"). In this matter, the July 2018 VA examiner explains that there is no medical evidence to support a relationship between altered gait and plantar fasciitis. [R. at 138]. The examiner cites to a list of articles about the causes of plantar fasciitis to show that altered gait is not one of those causes; but that things like obesity, prolonged standing, flat feet, and reduced ankle dorsiflexion are causes. *Id.* It was appropriate for the examiner to cite to medical literature as part of its rationale. See *Nieves-Rodriguez*, 22 Vet.App. at 301 (providing that an adequate examination report must contain a "reasoned

medical explanation” connecting its conclusions with supporting data). Here, the examiner relates the cited medical literature to Appellant’s specific facts and explains that Appellant was obese, which is a major risk factor for plantar fasciitis, and that the examiner could not find that Appellant’s plantar fasciitis was more likely than not caused by abnormal gait (and the literature did not indicate that abnormal gait was a major risk factor), rather than the major risk factor of obesity. [R. at 141]. Additionally, and unlike the facts presented in *Bailey*, Appellant has not presented any medical evidence showing a connection between altered gait and plantar fasciitis. [R. at 138]; 30 Vet.App. at 60.

Appellant also argues the Board, nor the examiner, considered Appellant’s reports of how often he had abnormal gait, which at times was improved with medication. App. Br. 14-15. The July 2018 VA examiner reviewed the entire claims file and acknowledged that Appellant demonstrated altered gait in 2004, 2007, and 2009. [R. at 137]. The examiner also explained that Appellant had normal gait in 2008, and two instances of normal gait in 2009 and in 2010. *Id.* With so many instances of normal gait, the examiner made a medical determination that it “wasn’t a chronic problem.” [R. at 138]; see *Guerrieri v. Brown*, 4 Vet. App. 467, 471 (1993) (holding the “[Board] is prohibited from asserting its own unsubstantiated medical opinion”). Also, Appellant merely stated that, at times pain medication helped him “ambulate a little better” during his Board hearing, but did not allege that he had normal gait when on pain medication. [R. at 414]. Appellant highlights that is a graduate of medical school, App. Br. 15, so

it is reasonable for the Board to have assumed that he meant only that he meant what he said that he ambulated a little better, not that he had normal gait, when on medication. Furthermore, Appellant did not have altered gait in February 2002. App. Br. 14 (citing [R. at 1784]). In February 2004, the physician found his gait was normal. [R. at 1784] ("The gait of [Appellant] appears normal with the exception of the left knee, maintained slightly in flexion with ambulation." (emphasis added)). Moreover, even if the examiner were wrong in this determination, there is no medical evidence that altered gait has any relationship to Appellant's plantar fasciitis, so Appellant fails to demonstrate prejudice. *Id.* 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); *Mayfield v. Nicholson*, 19 Vet.App. 103, 116 (2005) (explaining that focus is on the effect of the error on the essential fairness of the adjudication), *rev'd on other grounds by*, 444 F.3d 1328 (Fed. Cir. 2006).

Finally, Appellant argues that the July 2018 VA examiner provided inadequate rationale for concluding that it would be speculation to opine why Appellant presented with altered gait in January 2007. App. Br. 15-16. The 2018 examiner indicates that it would be mere speculation for him to determine the cause of Appellant's abnormal gait in 2007, not mere speculation to provide an opinion on whether Appellant's plantar fasciitis is related to his non-chronic abnormal gait. [R. at 138]. The issue in this case is whether abnormal gait is etiologically related to plantar fasciitis, not what caused Appellant's notation of

abnormal gait in 2007. Here, the July 2018 VA examiner explicitly opined that abnormal gait does not have a relationship with plantar fasciitis and that Appellant does not have chronic abnormal gait. *Id.*; *Sharp v. Shulkin*, 29 Vet.App. 26, 33 (2017).

The Board adequately explained its reliance upon the December 2010 and July 2018 VA examinations when denying Appellant's claim for service connected plantar fasciitis. Additionally, Appellant has failed to demonstrate any prejudice because both examiners definitively found there is no relationship between altered gait and plantar fasciitis and supported their findings with adequate rationale. See *Mayfield v. Nicholson*, 19 Vet.App. at 116. There is no remandable error in the Board's decision.

2. The Board Provided Adequate Reasons or Bases for Relying Upon the July 2018 VA Examination When Denying Appellant's Claim for Service Connection for Obstructive Sleep Apnea

The Board adequately explained its reliance upon the July 2018 VA examination when reaching its decision to deny service connection for sleep apnea. The July 2018 VA examiner opined that it was less likely than not that the Veteran's sleep apnea was either caused by or aggravated by service or a service-connected disability. [R. at 141]. The examiner explained that Appellant was unable to recall the nature of the "sleep problems" that he had in service, and that these complaints were "far to vague" to assume the relationship between that and his current diagnosis sleep apnea more than 40 years later. [R. at 140]. Additionally, the examiner explained that Appellant's current obesity is, which is

“widely accepted as the most prevalent factor of obstructive sleep apnea . . . in addition to middle age [and] male gender,” was more likely the cause of his sleep apnea. [R. at 141]. The Board explained that this examination was “more probative” because the opinions “were supported by detailed rationale and provided by a trained medical professional.” [R. at 14]. Additionally, the Board stated the examiner “specifically identified and discussed [Appellant’s] contentions and theory concerning service, his service-connected conditions, and his obstructive sleep apnea. The examiner considered the lay statements. In particular, the VA examiner acknowledged and discussed the Veteran’s documented report of frequent trouble sleeping at the end of active duty.” [R. at 14]. The Board explained why the July 2018 VA examination sufficiently allowed it to make a fully informed decision and its reliance upon the examination. See *Ardison*, 6 Vet.App. at 407; see also *Gilbert*, 1 Vet.App. at 57.

Appellant makes several arguments that the Board’s reasons or bases are inadequate to justify its reliance on the July 2018 VA examination, but none of which are persuasive. First Appellant argues the July 2018 VA examiner did not consider the lay statements provided by Appellant and others regarding observed sleeping issues. App. Br. 17. This is not accurate. The July 2018 VA examiner explicitly considered Appellant’s assertions of “sleeping difficulties” documented in-service and found them to be “far to vague to assume the existence of any particular condition.” [R. at 139, 145]; [R. at 140]; [R. at 13]. Additionally, the examiner explained that Appellant proffered 3 lay statements from witnesses that

included common symptoms associated with sleep apnea, i.e. snoring, apnea, daytime napping, but that Appellant was not actually diagnosed with sleep apnea until 40 years later, at which time he demonstrated risk factors such as his age and obesity. [R. at 141]; [R. at 13]. After the examiner considered all of these lay statements describing Appellant's symptoms, the examiner relied upon her medical expertise that these symptoms by themselves did not support the presence of sleep apnea while Appellant was in service. See 38 C.F.R. § 3.159(a)(1) (defining competent medical evidence as "evidence provided by a person who is qualified through education, training, or experience to offer medical diagnoses, statements, or opinions"); *Nieves-Rodriguez*, 22 Vet.App. at 302 (recognizing that VA examiners are "nothing more or less than expert witnesses" who provide opinions on medical matters); [R. at 146] (reflecting that the July 2018 VA examiner was a nurse practitioner). The examiner explained that Appellant had a body mass index (BMI) of 25 when while in service at the age of 24, and a BMI of greater than 32 at the time of his sleep apnea diagnosis at the age of 61. *Id.* This reflects a BMI from slightly above a healthy weight at age 24, to obesity at age 61,¹ and the VA examiner explained that obesity is "widely accepted as the most important prevalent factor of obstructive sleep apnea." *Id.* Appellant's argument ignores the July 2018 VA examiner's well-reasoned rationale that Appellant's obesity, not his service, is what likely caused

¹ See *About Adult BMI*, CENTER'S FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/healthyweight/assessing/bmi/adult_bmi/index.html.

his current diagnosis of sleep apnea. *Id.* This is also why the July 2018 VA examiner noted that Appellant's medical records were silent of a sleep apnea diagnosis or complaints with sleep trouble until 2008, because it was more likely caused by his age and weight gain. App. Br. 18; *Id.* at 140-41. Noting that there was no diagnosis of sleep apnea until 2008 is not an "innacurate factual premise" as described by Appellant. App. Br. 18. Furthermore, the Board explained that Appellant and the witnesses were competent and credible when describing Appellant's sleep difficulties, but "an opinion as to the etiology of the obstructive sleep apnea is a medical issue that requires medical training." [R. at 14]; see *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); see also *Brewer v. West*, 11 Vet. App. 228, 234 (1998) (lay persons are not competent to offer medical opinions on issues of medical expertise or that require specialized knowledge).

Next, Appellant argues that the July 2018 examiner "implicitly concluded that it would be speculative to attribute the Veteran's in-service sleep difficulties to obstructive sleep apnea" when the examiner found Appellant's noted sleeping difficulties were "far too vague to assume the existence of any particular condition." App. Br. 18; [R. at 140]. This is a mischaracterization of the examiner's opinion and ignores the examiner's rationale that Appellant's current age and obesity were more likely the reason for his current diagnosis, and not service. [R. at 141]. This

opinion is not speculative, and the examiner provided a definitive negative nexus opinion. [R. at 141] (“[T]he weight of the medical literature does not support the [service-connected] conditions . . . as etiologies in my professional opinion, a secondary nexus is not supported.”).

Finally, Appellant argues that the Board did not reconcile the July 2018 examiner’s conclusion that obesity and other risk factors caused Appellant’s sleep apnea with Appellant’s lay statements that he suffered from identical symptoms since service and prior to being obese. App. Br. 19. This argument ignores the logic behind the examiner’s opinion. Here, Appellant was diagnosed with sleep apnea in 2008, which is the same time Appellant demonstrated risk factors that are known to cause sleep apnea: age and obesity. [R. at 140-41]. The Board explains that, although Appellant reported he experienced symptomatology associated with sleep apnea, Appellant is not competent to opine to its etiology and the July 2018 VA examiner’s opinion is more probative because it explains that Appellant was diagnosed with sleep apnea when he exhibited the risk factors for it. [R. at 14]. Once again, the examiner, who has the medical expertise, determined that the earlier symptoms by themselves did not support a finding of sleep apnea. 38 C.F.R. § 3.159(a)(1); *Nieves-Rodriguez*, 22 Vet.App. at 302. This is adequate rationale.

The Board adequately explained its reliance upon the July 2018 VA examination when denying Appellant’s claim for service connection for sleep apnea and, therefore, committed no remandable error in its decision.

CONCLUSION

WHEREFORE, in light of the foregoing reasons, the Court should affirm the January 10, 2019, Board decision that denied Appellant's claims of entitlement to service connection for bilateral plantar fasciitis with right heel spur and for obstructive sleep apnea.

Respectfully submitted,

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