
IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

BOBBY E. BENSON,
Appellant,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,

Appellee.

ON APPEAL FROM THE BOARD OF VETERANS' APPEALS

BRIEF OF THE APPELLEE SECRETARY OF VETERANS AFFAIRS

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IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

BOBBY E. BENSON,	)	
	)	
Appellant,	)	
	)	
v.	)	Vet. App. No. 19-2303
	)	
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

1. Whether the Court should remand that part of the January 31, 2019, Board of Veterans' Appeals (Board) decision that denied entitlement to service connection for right ankle arthritis, a back disability, pain and swelling of bilateral lower extremities, left foot drop, a right foot disability associated with left foot drop, right ear hearing loss, and dermatitis also claimed as swelling of the groin area.

2. Whether the Court should affirm that part of the Board decision that denied entitlement to service connection for a cervical spine disability, residuals of a left tibia fracture, an allergic condition, asthma, and an acquired psychiatric condition to include posttraumatic stress disorder (PTSD).

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

The Court has jurisdiction over the instant appeal pursuant to 38 U.S.C. § 7252, which grants the Court of Appeals for Veterans Claims exclusive jurisdiction to review final decisions of the Board.

B. Nature of the Case

Appellant, Bobby E. Benson, appeals that part of the January 31, 2019, Board decision that denied entitlement to service connection for right ankle arthritis, a back disability, pain and swelling of bilateral lower extremities, left foot drop, a right foot disability associated with left foot drop, right ear hearing loss, dermatitis also claimed as swelling of the groin area, a cervical spine disability, residuals of a left tibia fracture, an allergic condition, asthma, and an acquired psychiatric condition to include PTSD. (Record (R.) at 5-38).

C. Statement of Facts

Appellant served from February 1966 to February 1968. (R. at 956).

On a report of medical history at entrance, Appellant reported hay fever and shortness of breath, noting that he was allergic to dust, and the physician's summary showed an acknowledgement of hay fever, moderate. (R. at 3140-41). His entrance examination showed normal hearing. (R. at 3142-43). Service treatment records (STRs) indicate that Appellant sustained a left ankle sprain as

the result of an incident where he hit his ankle on a storeroom shelf. (R. at 3154,[1] 3144-47). His exit examination showed normal extremities, with notation of a healed fracture of the left tibia. (R. at 3136-37).

Appellant filed a claim for service connection for an injured left leg in August 1970. (R. at 3185 (3184-87)). A November 1970 radiographic report showed a normal left leg. (R. at 3126). At a December 1970 VA examination, Appellant complained of a fractured left leg, ankle, and foot bone. (R. at 3122 (3122-25)). The examiner noted that his left lower leg was not swollen, and that his left ankle had normal, pain free motions. *Id*. at 3124. In January 1971, the Regional Office (RO) granted service connection for history of an injury to the left lower leg at a noncompensable rating. (R. at 3119-20).

In May 2001, Appellant requested an increased evaluation for his ankles, indicating that both were "causing [him] problems." (R. at 2846-47). The RO granted a rating of 20% for traumatic arthritis of the left ankle, residuals of a sprain, effective May 10, 2001, and denied service connection for swelling of the lower extremities and a right ankle condition. (R. at 2829-31 (2828-35)).

Appellant filed a claim for an increased rating for a bilateral ankle condition and service connection for a back condition secondary to his service-connected conditions in an April 2004 claim. (R. at 2826). In a September 2004 rating

[1] While the record on this page notes right ankle sprain, the Board found that subsequent treatment records clarified that the injury was to Appellant's left ankle. (R. at 14 (5-38)).

decision, the RO proposed a reduction to 10% for the rating for traumatic arthritis of the left ankle, denied service connection for a back condition, and denied reopening a claim for entitlement to service connection for a right ankle condition because the evidence submitted was not new and material. (R. at 2792-93 (2788-93)). The RO effectuated the reduction to 10% for a rating for traumatic arthritis in a November 2004 rating decision. (R. at 2785 (2779-85)).

A November 2006 rating decision, responding to a September 2006 claim (R. at 2724), increased the evaluation of residuals of a left ankle sprain to 20%, effective September 28, 2006, denied service connection for left foot drop, confirmed and continued the denial of service connection for swelling of the lower extremities and a right ankle condition, and denied reopening a claim for entitlement to service connection for a back condition as secondary to traumatic arthritis because the evidence submitted was not new and material. (R. at 2694-97 (2687-99)).

Appellant filed claims for service connection for swelling of both lower extremities, back and neck conditions, dermatitis, swelling of the groin area, bilateral hearing loss, and tinnitus, (R. at 2671 (2671-73)); an April 2015 rating decision granted service connection for left ear hearing loss, but denied service connection for right ear hearing loss, cervical spondylosis claimed as a neck condition, dermatitis also claimed as swelling of the groin area, and tinnitus, and denied reopening claims for entitlement to service connection for swelling of the lower extremities and a back condition because the evidence was not new and

material. (R. at 2007-2010 (1988-2012)). Appellant filed a Notice of Disagreement (NOD) regarding his claims of entitlement to service connection for dermatitis, cervical spondylosis, right ear hearing loss, tinnitus, and a back condition in August 2015. (R. at 1986-87).

Appellant filed claims in April 2016, requesting service connection for swollen joints, an allergic condition, a skin disease, asthma secondary to hay fever allergies, shortness of breath, boils, fracture of the left tibia, a right foot condition secondary to the left foot condition, a right ankle condition claimed as arthritis, right ear hearing loss, left foot drop to include abnormal gait. (R. at 1965 (1964-67), 1973 (1972-75)). He was informed that claims for right ear hearing loss, left foot drop, and abnormal gait were ongoing, and therefore would not be addressed in this appeal. (R. at 1030-35). A claim for entitlement to service connection for PTSD was filed in June 2016. (R. at 1009 (1008-11)). In an October 2016 rating decision, the RO denied entitlement to service connection for PTSD; a right foot condition; an allergic condition; asthma also claimed as hay fever, allergies, and shortness of breath; and fracture of the left tibia, and declined to reopen claims for service connection for left foot drop to include abnormal gait and arthritis because there was no new and material evidence. (R. at 772-75 (750-75)).

At a February 2017 hearing before a Decision Review Officer (DRO), appellant reported that he believed he injured his back and neck in the same incident where he injured his ankle, involving falling shelving. (R. at 721-22 (719-40)). He also testified that he had a hearing problem in the right ear, *id*. at 729,

and a rash on his body or skin irritation for a "long time . . . in the military." *Id*. at 732-33.

At a March 2017 VA hearing loss examination, the examiner opined that Appellant's right ear hearing loss is less likely than not the result of in-service noise exposure because Appellant's hearing was normal on entry without "significant shift/decrease outside of normal test/reested [sic] variance." (R. at 710 (707-12)). He opined that post-military noise exposure was reported and was likely related to the etiology of his right ear hearing loss. *Id*.

Appellant filed an NOD to the October 2016 rating decision in July 2017. (R. at 700-02).

A February 2018 Statement of the Case (SOC) denied entitlement to right ear hearing loss, cervical spondylosis, dermatitis, swelling of the lower extremities, a back condition, PTSD, a right foot condition, an allergic condition, asthma also claimed as hay fever allergies and shortness of breath, fracture of the left tibia, left foot drop, and arthritis of the right ankle. (R. at 124-31 (89-131)). Appellant filed a substantive appeal in February 2018. (R. at 87).

At an October 2018 hearing before the Board, Appellant testified that he injured his legs, foot, ankle, neck, and back in an accident involving collapsed shelving. (R. at 43-50 (41-69)). He reported that he had not been diagnosed with a psychiatric disorder, *id*. at 57, but had 26 diagnosed allergies that he also had during service. *Id*. at 57-58. He also reported that he was not diagnosed with asthma in service. *Id*. at 59-60. The Veterans Law Judge (VLJ) conducting the

hearing stated that Appellant's right ear did not meet the minimum threshold for hearing loss to be eligible for VA benefits. *Id*. at 65-66.

III. SUMMARY OF THE ARGUMENT

The Secretary concedes that remand is warranted for several of Appellant's claimed conditions—entitlement to service connection for for right ankle arthritis, a back disability, pain and swelling of bilateral lower extremities, and left foot drop—for the Board to provide credibility analysis of Appellant's lay statements regarding injuries sustained in an accident in service and to provide an adequate hearing for the issue of entitlement to service connection for right ear hearing loss. Appellant's claims for entitlement to service connection for a right foot disability and dermatitis are inextricably intertwined with other remanded claims.

Appellant's other arguments relating to the administration of a proper hearing, the need to obtain records, and the provision of an adequate examination are not grounds for remand. Additionally, Appellant's arguments relating to the Board's statement of reasons or bases are unconvincing, and he has failed to carry his burden of demonstrating that the Board's decision contained prejudicial error. The Court should therefore affirm those portions of the Board's decision.

IV. ARGUMENT

A. The Secretary concedes that some, but not all, of Appellant's arguments relating to the Secretary's duty to assist constitute grounds for remand.

The Board's duty to assist incorporates several different and distinct duties. First, the Secretary is required to assist a claimant in obtaining evidence necessary

to substantiate his claim for benefits. 38 U.S.C. § 5103A(b)(1); 38 C.F.R. § 3.159. This requires that the Secretary make reasonable efforts to obtain all federal and private records adequately identified by the claimant and relevant to his claim. *See Golz v. Shinseki*, 590 F.3d 1317, 1322 (Fed. Cir. 2010). Where such records are in the custody of the federal government, reasonable efforts include "as many requests as are necessary" unless it "concludes that the records sought do not exist or that further efforts to obtain those records would be futile." 38 C.F.R. § 3.159(c)(2).

Second, the duty to assist requires the Secretary to provide a medical examination if there is (1) competent evidence of a current disability or persistent or recurrent symptoms of a disability; (2) evidence that the an event, injury or disease occurred in service; (3) an indication that the disability or persistent or recurrent symptoms of a disability may be associated with the established in-service event, injury or disease or with another service-connected disability; and (4) there is insufficient competent medical evidence on which to decide the claim. *See* 38 C.F.R. § 3.159(c)(4), *see also McLendon v. Nicholson*, 20 Vet.App. 79, 85-86 (2006). Whether an examination is necessary requires the Board to take into consideration "all information and lay or medical evidence." 38 U.S.C. § 5103A(d)(2). The Court reviews the Board's determinations as to each of the factual prerequisites under the clearly erroneous standard and reviews *de novo* the ultimate legal question of whether, based on those factual determinations, a

medical examination is required. *See* 38 U.S.C. § 7261(a)(3)(A); *McLendon*, 20 Vet.App. at 79-81.

Once the Secretary undertakes the effort to provide an examination, he must provide an adequate one. *Barr v. Nicholson*, 21 Vet.App. 303, 311 (2007). An adequate medical opinion 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) (finding that an 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). This requires the examiner to not only render a clear conclusion on the relevant medical question but to support that conclusion "with an analysis that the Board can consider and weigh against contrary opinions." *Stefl v. Nicholson*, 21 Vet.App. 120, 124 (2007) (holding that "a mere conclusion by a medical doctor is insufficient to allow the Board to make an informed decision as to what weight to assign to the doctor's opinion").

Finally, if VA provides a hearing over the course of Appellant's appeal, the hearing officer is required to "explain fully the issues" and "suggest the submission of evidence which the claimant may have overlooked and which would be of advantage to the claimant's position." 38 C.F.R. § 3.103(c)(2). The first requirement compels a hearing officer to identify any issues that remain outstanding. For example, if a service connection claim is denied because of a

lack of evidence of a current disability and a nexus to service, the hearing officer "should explain that the claim can be substantiated only when the claimed disability is shown to exist and shown to be caused by an injury or disease in service." *Bryant v. Shinseki*, 23 Vet.App. 488, 496 (2010). The second requirement compels a hearing officer to "suggest that a claimant submit evidence on an issue material to substantiating the claim when the record is missing any evidence on that issue or when the testimony at the hearing raises an issue for which there is no evidence in the record." *Id.*

1. The Secretary concedes error in fulfilling the duty to assist on the following bases.

The Secretary agrees that remand is warranted for several of the claimed conditions.

a. Right ankle arthritis, a back disability, pain and swelling of bilateral lower extremities, left foot drop

Appellant argues that examinations are warranted for the claims of service connection for right ankle arthritis, a back disability, bilateral leg pain and swelling, and left foot drop. Appellant's Brief (App. Br.) at 15-16. He asserts that the low threshold to obtain an examination under *McLendon* is met; he argues that for all conditions, the Board found that there were current diagnoses, he experienced an in-service accident relevant to all of the diagnoses, and that there is "submitted evidence which etiologically related those diagnoses to service." *Id.* at 15.

The Secretary agrees that there are current diagnoses of all the conditions, and that the Board found that Appellant experienced an in-service accident. (R. at

14, 16, 18-19, 21 (5-38)). However, the evidence that Appellant asserts "etiologically related [the] diagnoses to service" are merely lay statements that he injured those body parts in the same accident for which there is medical evidence of injury to his left ankle. *See, e.g.*, (R. at 43-50 (41-69) (October 2018 hearing transcript wherein Appellant testified that he injured his legs, foot, ankle, and back in an accident involving collapsed shelving)). The probative value of these statements to determine whether an examination is warranted rests on whether the Board finds these statements to be credible; obviously, if the Board finds that they are not credible, the statements do not fulfill the necessary third prong of the *McLendon* analysis. The Board makes no credibility findings with regard to Appellant's lay evidence. *See* (R. at 14, 17, 19, 22 (5-38)). Thus, the Secretary concedes that the Board erred by failing to provide the necessary credibility analysis for Appellant's lay testimony, in order to determine whether he is entitled to examinations for these conditions under *McLendon*.

b. Right ear hearing loss

The Secretary also concedes that remand is warranted for the issue of entitlement to service connection for right ear hearing loss because the VLJ improperly reported that Appellant did not meet the threshold for a current condition for right ear hearing loss. *See* App. Br. at 17-19, *see also* App. Br. at 22-23. Here, the VLJ erred when he stated that Appellant did not meet the minimal threshold for a current condition. (R. at 65-66 (41-69)). In fact, three previous hearing loss VA examinations showed right ear hearing loss that met the threshold

under 38 C.F.R. § 3.385, (R. at 193 (192-98) (August 2017 VA examination), 707 (707-12) (March 2017 VA examination), 2650 (2650-54) (April 2015 VA examination)), and the Board even finds that he has a qualifying disability in its decision. (R. at 30 (5-38)). The Secretary concedes that the VLJ's failure to recognize that Appellant's right ear hearing loss qualifies as a disability under 38 C.F.R. § 3.385 constitutes error because as a result, he failed to explain what was outstanding in Appellant's claim for right ear hearing loss and failed to suggest evidence material to substantiating the claim. *See Bryant*, 2 Vet.App. at 496. Thus, remand is warranted.

2. Appellant's remaining arguments relating to the fulfillment of the Secretary's duty to assist are unavailing.

Appellant raises other arguments with respect to the duty to assist; however, these other arguments do not constitute grounds for remand.

a. Records

Briefly, Appellant argues that the Board erred by failing to obtain treatment records from Brook Army Medical Center on Fort Sam Houston for two reasons: first, because it considered the records to be records outside the custody of the federal government (by citing to 38 C.F.R. § 3.159(c)(1)) when the records are federal records and the duty to assist for federal records—as outlined under 38 C.F.R. § 3.159(c)(2)—requires that VA make as many requests as necessary. App. Br. at 10-12. Appellant also argues that the Board erred because it found that he reported that the records were unavailable, when he actually testified that

the records were sent to St. Louis after five years; Appellant argues that the reference to St. Louis is a reference to the records being in the National Personnel Records Center (NPRC).[2] App. Br. at 10-14, *see also* App Br. at 21-22. Any error relating to obtaining these records is harmless. *See Soyini v. Derwinski*, 1 Vet.App. 540, 546 (1991) (finding that remand is not required where such action would result solely in the imposition of additional burdens on VA without providing any benefit to the claimant).

First, VA requested complete medical and dental records and Appellant's entire personnel file from NPRC in September 2016, and NPRC responded with "all available requested records." (R. at 941). Thus, to the extent that Appellant argues that the records were in the custody of the NPRC, VA attempted to obtain them and received all responsive records. Second, it is not clear that the records in question are not in Appellant's claims file (c-file); as Appellant concedes, STRs from Brooke General Hospital are contained within the record, including treatment for an ankle sprain as due to an accident with a storeroom shelf. App. Br. at 12, *see also* (R. at 3144-47, 3154). Finally, throughout its decision, the Board repeatedly found that even if these hospitalization records existed, they would not affect the outcome of Appellant's claims. (R. at 14, 17, 19, 22, 24, 27 (5-38)).

[2] Appellant also argues that the Board conceded that attempting to obtain the records would "not be futile," App. Br. at 11, (R. at 10-11 (5-38)); however, from context, it is clear that this is a typographical error and the Board intended to conclude that searching for the records would be futile. *Id*.

Appellant does not challenge the Board's finding. App. Br. at 10-14. For all of the above reasons, remand is not warranted to attempt to obtain these records.

b. Adequacy of Board hearing

Appellant argues that the VLJ misled him by stating that VA had already obtained all records related to his in-service accident and failed to instruct him to submit nexus evidence relating to any of his disabilities and military service which is contrary to the holding in *Bryant*. App. Br. at 19-20, *see also* App. Br. at 22-23, (R. at 52-53 (41-69)). Neither of these arguments raise sufficient grounds for remand. First, a hearing officer has no duty to preadjudicate a claim. *See Bryant*, 23 Vet.App. at 496. Because of this, the VLJ's equivocal statement that he was "pretty sure" that VA had obtained all records about Appellant's in-service incident is not a *Bryant* error. Indeed, the VLJ suggested evidence to substantiate the claim, as required by *Bryant*, when he recommended obtaining family or buddy statements. *See Bryant*, 23 Vet.App. at 496.

Second, *Bryant* only requires suggestion of evidence "when the record is missing any evidence on that issue or when the testimony at the hearing raises an issue for which there is no evidence in the record." *Bryant*, 23 Vet.App. at 496. Contrary to Appellant's assertions, the Board did not deny most of the claims for lack of nexus; rather, it denied the claims due to an inability to establish that the injuries occurred as part of the alleged in-service incident involving shelving. (R. at 14, 16, 19, 21, 24, 26 (5-38)). While this is a narrow distinction, it is dispositive here; the missing element for service connection for the right ankle, back, leg pain,

left foot drop, and right foot disability is an in-service incident. Because there was no evidence of an in-service injury to these body parts, the VLJ was not required to suggest evidence of a nexus.

c. Adequacy of VA hearing loss examinations

Finally, Appellant argues that the April 2015 and March 2017 VA examinations were based on the inaccurate factual premise that he did not experience a threshold shift in the hearing in his right ear and provide inadequate rationale. App. Br. at 16-17. Specifically, he argues that both opinions stated that there was no permanent positive threshold shift greater than normal measurement variability at any frequency between 500 and 6000 hertz, (R. at 716 (713-18) (March 2017 VA examination), 2657 (2655-58) (April 2015 VA examination)), but Appellant's service treatment records show a 15 decibel threshold shift in the right ear at 500 hertz, (R. at 3143 (3142-43) (pre-induction examination), 3137 (3136-37) (separation examination)), which Appellant asserts is a significant threshold shift as defined in *Hensley v. Brown*, 5 Vet.App. 155, 164 (1993). *Hensley* establishes that a 15- to 30-decibel shift in threshold hearing levels in service, coupled with other evidence, can serve as evidence requiring the Board to address whether a claimant's current hearing loss condition was related to service. *Hensley*, 5 Vet.App. at 164. However, Appellant's arguments do not warrant remand.

First, the examiners' opinions do not constitute an inaccurate factual premise, and therefore, the medical examinations should not be rejected as non-

probative. *See Reonal v. Brown*, 5 Vet.App. 458, 460-61 (1993) (medical opinion based on inaccurate factual premise may properly be rejected as non-probative). The "inaccurate factual premise" described in *Reonal* involves an examiner's reliance on a claimant's recitation of his medical history, 5 Vet.App. at 460; here, the underlying facts reviewed and addressed by the examiners are accurate; the alleged error relates not to the facts themselves but to inferences drawn from those facts. (R. at 716 (713-18) (March 2017 VA examination), 2657 (2655-58) (April 2015 VA examination)). Because the examiner's inferences are not, of themselves, facts, the opinions are not *de facto* non-probative.

Second, contrary to Appellant's assertion, the March 2017 VA examiner did not find that there was no threshold shift in service; instead, he found that there was no "significant shift . . . outside of normal test . . . variance." (R. at 716 (713-18)). This is a different finding than a failure to acknowledge a threshold shift; here, the examiner was not misapplying the standard articulated by *Hensley*, but was instead acknowledging that such a shift was not significant in the context of the other evidence of record. *Id*.

Third, any errors in calculation of a threshold shift in the examiners' opinions are harmless. *See Soyini*, 1 Vet.App. at 546. The 2017 VA examination also relies on the occurrence of post-service noise exposure as likely etiology to deny service connection. (R. at 716-17 (713-18)). Appellant does not challenge the examiner's finding. App. Br. at 16-17. Therefore, remand on the grounds that the

examinations did not calculate the appropriate threshold shift would only create additional burdens on VA without any additional benefit to Appellant.

B. The Board provided an adequate statement of reasons or bases addressing the other claimed conditions.

A Board decision must be supported by an adequate statement of reasons or bases which explains the basis of all material findings and conclusions. 38 U.S.C. § 7104(d)(1). This requires the Board 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. *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995). The Board's statement of reasons or bases must simply be sufficient to enable the claimant to understand the basis of its decision and to permit judicial review of the same. *Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990). Appellant fails to demonstrate that the Board committed any error in providing an adequate statement of reasons or bases.

1. The Board did not err in its analysis for service connection for an acquired psychiatric disorder when it to address a July 2015 treatment record.

Appellant argues that the Board erred when it found that there was no medical evidence demonstrating a current psychiatric condition because it failed to address a single treatment record from July 2015 showing that Appellant had anxiety over healthcare and multiple problems. App. Br. at 23-24, (R. at 1134 (1134-36)). First, it is unclear whether this record is relevant to Appellant's claim. *See Newhouse v. Nicholson*, 497 F.3d 1298, 1302 (Fed. Cir. 2007) (finding that

the Board must only discuss that evidence which is relevant to the issues on appeal). Though it uses the word "anxious" to describe Appellant's condition, it qualifies such anxiousness as related to "healthcare." (R. at 1134 (1134-36)). The word "anxious" has both clinical and colloquial uses, and it is likely that the treatment provider uses the term "anxious" in the colloquial fashion, especially because in the very next sentence, the treatment provider notes that Appellant denied having the clinical condition of anxiety. *Id.* The treatment record in question does not offer even a provisional diagnosis of a psychiatric condition, and explicitly states that Appellant denied not only anxiety, but depression, suicidal [or] homicidal ideations, visual or auditory hallucinations, or insomnia. *Id.* Thus, the record is questionably relevant to Appellant's claim.

Regardless of the relevance of the July 2015 VA treatment record, Appellant has failed to demonstrate that the Board's failure to discuss this record is prejudicial. *See Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) (holding that the appellant bears the burden of demonstrating prejudicial error). At his October 2018 hearing, Appellant denied having been diagnosed with a psychiatric disorder. (R. at 57 (41-69)). Appellant points to no treatment record that demonstrates a diagnosis of a current condition. App. Br. at 23-24. Because he fails to provide any evidence of a current diagnosis for a psychiatric condition,[3] he has failed to

[3] The Secretary rests on the arguments made at the oral argument of *Webb v. Wilkie*, 18-0996, for the proposition that a diagnosis of a psychiatric condition is necessary to demonstrate a current condition for the purposes of service connection. *See also* 38 C.F.R. §§ 3.304(f), 4.125(a), and 4.130.

demonstrate how the Board's failure to address the July 2015 treatment record is prejudicial. *Sanders*, 556 U.S. at 409.

2. The Board properly weighed the evidence of record when addressing entitlement to service connection for a left tibia fracture.

Appellant argues that the Board erred when it found that he did not have an in-service left tibia fracture because his separation examination noted such a fracture. App. Br. at 24-26, (R. at 3136 (3136-37)). His arguments are insufficient to demonstrate error. *See Sanders*, 556 U.S. at 409.

First, Appellant appears to argue that the Board noted that the separation report of medical history included reports of a left tibia fracture, implying that the Board overlooked the separation examination. App. Br.at 24. However, the Board explicitly states that the "separation *examination* noted [Appellant]'s reports of a left tibia fracture." (R. at 29 (5-38)) (emphasis added). Thus, it is clear that the Board reviewed the separation examination. (R. at 3136-37).

Second, the Board provided an adequate statement of reasons or bases to address why it chose to disregard the findings contained in the separation examination. (R. at 29 (5-38)). It noted that no VA treatment record or examination had diagnosed a disability related to an in-service left tibia fracture. *Id*., *see also* (R. at 3126 (November 1970 radiographic report showing a normal left leg)). It also found that Appellant's STRs did not show clinical evidence of such a fracture, a conclusion which is supported by the STRs. *Id*., *see also* (R. at 3134-76). It therefore concluded that the preponderance of the evidence was against a claim

for service connection for a left tibia fracture. (R. at 29 (5-38)). The Board's decision involved weighing the evidence of record, a duty left exclusively in the purview of the factfinder. *See 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). As the Board's conclusion is not clearly erroneous and supported by the evidence of record, the Court should decline to reweigh the evidence here.

Third, Appellant has not demonstrated prejudicial error. *See Sanders*, 556 U.S. at 409. He does not dispute the Board's finding that there is no residual disability related to an in-service tibia fracture. App. Br. at 24-26. A current disability is a required element for entitlement to service connection. *See Hickson v. West*, 12 Vet.App. 247, 253 (1999). Because Appellant does not challenge the Board's finding that there is no current disability, he fails to demonstrate that any error is prejudicial. *See Sanders*, 556 U.S. at 409.

3. The Board properly addressed entitlement to service connection for an allergic condition.

A claimant who is not noted to have a preexisting condition upon entrance into service is presumed to have entered service in sound condition. 38 U.S.C. § 1111. If the presumption of soundness applies, an injury or disease first noted in service is presumed to have occurred in service unless clear and unmistakable evidence demonstrates that it existed before acceptance and enrollment and was not aggravated by service. *See Wagner v. Principi*, 370 F.3d 1089, 1096 (Fed.

Cir. 2004); *see also Vanerson v. West*, 12 Vet.App. 254, 258 (1999) (explaining that clear and unmistakable evidence means evidence that "cannot be misinterpreted and misunderstood"). If, on the other hand, a veteran is noted to have a preexisting condition upon entrance into service to have had a preexisting condition, he or she must show that the condition was aggravated by service. *Wagner*, 370 F.3d at 1096.

Appellant argues that the Board erred when it found that hay fever and occasional shortness of breath were noted on his pre-induction examination, because the listed conditions actually appeared on his report of medical *history*, but not his entrance examination. (R. at 3140-41 (report of medical history), 3142-43 (report of medical examination)). He relies on 38 C.F.R. § 3.304(b) for the proposition that the presumption of soundness only applies to such conditions that are recorded in examination reports, and because hay fever was not listed on his entrance examination, it is not subject to the presumption of soundness. App. Br. at 26-28.

First, Appellant's reliance on 38 C.F.R. § 3.304(b) for its assertion that a condition must be noted on an entrance examination to be subject to the presumption of soundness may be misplaced. While it is true that 38 C.F.R. § 3.304(b) explicitly states that "[o]nly such conditions as are recorded in examination reports are to be considered as noted," it does not specify what constitutes an "examination report." *Id*. Moderate hay fever is acknowledged in the section of Appellant's report of medical history labeled "physician's summary;"

this portion of the report of medical history is completed by a physician, and therefore may be considered an examination report. (R. at 3141 (3140-41)).

Second, even if the presumption of soundness applies, any error is harmless. *See Soyini*, 1 Vet.App. at 546. The Board also found that Appellant's STRs were negative for any complaints, symptoms, or treatment of any allergic condition at any time during service, and that Appellant reported that he did not receive treatment for his allergic condition during service. (R. at 33 (5-38)). This conclusion is supported by the record. (R. at 3134-76 (STRs), 58-59 (41-69) (October 2018 hearing transcript wherein Appellant testified that he was not treated for allergies in service)). The Board also found that the first evidence of an allergy-related condition was more than three decades post-service. (R. at 33 (5-38)). Finally, it concluded that there was no competent and credible medical evidence that suggested a link between his current disability and service. *Id.* at 34. Because hay fever is another form of allergic condition, the Board's reasoning regarding the lack of relationship between an allergic condition and service would apply to hay fever even if it was subject to the presumption of soundness. Because Appellant does not challenge the portion of the Board decision that found no relationship between an allergic condition and service, he fails to demonstrate that the Board prejudicially erred when it found that hay fever was not subject to the presumption of soundness. *See Sanders*, 556 U.S. at 409.

C. Remand is warranted on the basis of some, but not all, of Appellant's allegations that several of his conditions are inextricably intertwined with remanded claims.

Finally, where facts underlying separate claims are "intimately connected," interests of judicial economy and avoidance of piecemeal litigation require that the claims be adjudicated together. *See Smith v. Gober*, 236 F.3d 1370, 1373 (Fed. Cir. 2001), *see also Tyrues v. Shinseki*, 23 Vet.App. 166, 178 (2009).

The Secretary concedes that remand is warranted for the conditions of dermatitis and a right foot disability. App. Br. at 28-29. A March 2000 treatment record for chronic history of dermatitis noted that Appellant had edema and varicosities with a history of stasis dermatitis, (R. at 2636 (2635-36)), which suggests a relationship between dermatitis and bilateral leg pain and swelling. Additionally, the Board recognized that Appellant's claim for a right foot disability is associated with his claim for left foot drop. (R. at 23-25 (5-38)). Thus, there is evidence linking dermatitis and a right foot disability to claims that the Secretary concedes should be remanded. In the interest of judicial economy, these claims should also be remanded.

The conditions of asthma and an acquired psychiatric condition should not be remanded as inextricably intertwined. App. Br. at 29. Appellant asserts that his asthma is related to his allergy disorder, *see, e.g.*, (R. at 61 (41-69)). For the reasons stated in Part B.3 of the Secretary's brief, however, the portion of the Board decision denying entitlement to service connection for an allergic condition should be affirmed. *See supra*. Thus, because the claim with which Appellant

argues that asthma is intertwined was properly denied, the Court should also affirm the denial of service connection for asthma.

Additionally, Appellant has failed to demonstrate that an acquired psychiatric condition is intimately connected to any of his other conditions on appeal. App. Br. at 29. He relies on the same July 2015 treatment record to argue that his anxiousness related to medical issues "potentially include[es] some or all of the other issues on appeal;" however, his assertion that his anxiousness may be related to some or all of the other issues on appeal is tenuous at best; he does not even allege a specific condition with which the claim is inextricably intertwined. *See Sanders*, 556 U.S. at 409. He also fails to provide any support for the proposition besides a single medical emergency department record where Appellant was admitted after dropping a glass on his foot. (R. at 1134 (1134-36)). Because Appellant fails to provide a clear and intimate connection between his claim for an acquired psychiatric condition and his other claims on appeal, it should not be remanded as inextricably intertwined. *See Smith*, 236 F.3d at 1373, *Tyrues*, 23 Vet.App. at 178.

D. 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. It is axiomatic that any issues or arguments not raised on appeal are abandoned. *Pieczenik v. Dyax Corp.*, 265 F.3d 1329, 1332-33 (Fed. Cir. 2001); *Norvell v. Peake*, 22 Vet.App. 194, 201 (2008).

V. CONCLUSION

WHEREFORE, for the foregoing reasons, the Court should remand that part of the January 31, 2019, decision of the Board denying entitlement to service connection for right ankle arthritis, a back disability, pain and swelling of bilateral lower extremities, left foot drop, a right foot disability associated with left foot drop, right ear hearing loss, and dermatitis also claimed as swelling of the groin area, and affirm that part of the decision denying entitlement to service connection for a cervical spine disability, residuals of a left tibia fracture, an allergic condition, asthma, and an acquired psychiatric condition to include PTSD.

Respectfully submitted,

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