

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

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**ANDREW MORRISON,**

Appellant,

v.

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

Appellee.

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

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

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Vet.App. No. 19-5066

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

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

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**I. ISSUE PRESENTED**

Whether the Court should affirm the May 2, 2019, Board of Veterans' Appeals (Board or BVA) decision, which denied entitlement to service connection for (1) a left shoulder disability, (2) a right shoulder disability, (3) a left elbow disability, (4) a right elbow disability, (5) a right hand disability, (6) a neck disability, (7) a left knee disability, (8) a right knee disability, (9) hypertension, (10) headaches, (11) bronchial cancer, (12) a heart disability, (13) a blood disorder, and (14) a traumatic brain injury (TBI), and which denied the applications to reopen the previously denied claims of entitlement to service connection for a dental condition and an acquired psychiatric disability, to include posttraumatic stress disorder (PTSD).

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

### **A. Jurisdictional Statement**

The Court has jurisdiction over this 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, Andrew Morrison, appeals a May 2, 2019, Board decision which denied entitlement to service connection for a right hand disability, left and right knee disabilities, bronchial cancer, and TBI, and which denied a reopening of the claim of entitlement to service connection for a dental condition. [Appellant's Informal Brief [AB] at 1 (1-3)].

In the decision on appeal, the Board also denied entitlement to service connection for (1) a left shoulder disability, (2) a right shoulder disability, (3) a left elbow disability, (4) a right elbow disability, (5) a neck disability, (6) hypertension, (7) headaches, (8) a heart disability, and (9) a blood disorder, and which denied the application to reopen the previously denied claim of entitlement to service connection for an acquired psychiatric disability, to include PTSD. *See generally* [Record Before the Agency [R.] at 4-24]. Appellant has neither identified these issues as part of his appeal nor has he provided any argument challenging the Board's decision as to these issues. *See generally* [AB at 1-3]. Therefore, the Court should dismiss the appeal as to these issues. *See Pederson v. McDonald*, 27 Vet.App. 276, 285 (2015) (en banc) (recognizing that where a veteran appeals a

Board decision but makes no assertion of error regarding the claims within that decision, the Court may properly decline to review the merits of the abandoned issues and dismiss the appeal as to the abandoned issues).

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

Appellant had active duty service from September 1973 to March 1975. [R. at 2473 (DD 214)], [R. at 2332 (Enlistment Contract)], [R. at 1854 (DD 215, Correction to DD 214)].

He applied for benefits in February 1989, December 2002, and June 2009, seeking service connection for a tooth condition and a psychiatric disability. [R. at 2250 (2245-51) (June 2009 Claim)], [R. at 2440 (2435-48) (December 2002 Claim)], [R. at 2468 (2467-70) (February 1989 Claim)]. In May 2010, the regional office (RO) denied entitlement to service connection for a dental condition and a psychiatric condition (claimed as TBI with residuals of headaches, forgetfulness, inability to concentrate, and dizziness). [R. at 1903 (1903-1905)]. Appellant did not file a timely appeal, and the decision became final.

In November 2013, Appellant requested to reopen the previously denied claims of entitlement to service connection for a dental condition and a psychiatric disability. See [R. at 1852 (Report of General Information)], [R. at 1842-43 (Personal Statement)]; see *also* [R. at 1827-40 (December 2013 Notice Letter)]. In December 2013, Appellant filed another claim seeking entitlement to service connection for PTSD, heart disease, osteoarthritis of the bilateral knees, shoulders, and elbows, hypertension, a neck condition, dental (mercury

poisoning), bilateral hand condition, bronchial cancer residuals, brain damage, a blood disorder as due to radiation exposure, anxiety, and paranoid schizophrenia. See [R. at 1606]; see *a/so* [R. at 1534-40 (September 2014 Notice Letter)].

The RO denied service connection for (1) a blood disorder, (2) a right elbow condition, (3) a left elbow condition, (4) heart disease, (5) hypertension, (6) a neck condition, (7) a right hand condition, (8) a left hand condition, (9) a right shoulder condition, (10) a left shoulder condition, (11) osteoarthritis of the right knee, (12) osteoarthritis of the left knee, (13) paranoid schizophrenia, (14) residuals of bronchial cancer due to exposure to asbestos, (15) TBI with forgetfulness and inability to concentrate, and (16) headaches. [R. at 1213-1214 (1213-24) (December 2014 Rating Decision)]. Additionally, the RO reopened the previously denied claim of service connection for PTSD but denied entitlement to service connection. [R. at 1223]. The RO also declined to reopen the previously denied claim of entitlement to service connection for a dental condition finding that new and material evidence had not been submitted. [R. at 1223-24].

Appellant filed a timely notice of disagreement (NOD), and in October 2017, the RO issued a statement of the case (SOC) continuing the denials. [R. at 265-313 (SOC)], [R. at 1185-86 (NOD)]. He filed a timely substantive appeal to the Board. [R. at 257-58].

On May 2, 2019, the Board issued the decision currently on appeal which denied all of the appealed claims. [R. at 4-24]. This appeal followed.

### III. SUMMARY OF ARGUMENT

The Court should affirm the May 2, 2019, Board decision because Appellant has failed to carry his burden of demonstrating prejudicial error in the Board's decision, and the argument raised and relief sought by Appellant in his brief is not within the jurisdiction of this Court.

### IV. ARGUMENT

#### **Appellant Fails To Demonstrate Error In The Board's Decision On Appeal And This Court Does Not Have Jurisdiction To Grant the Requested Relief.**

Appellant's brief to the Court is devoid of any arguments with regards to the claims denied in the Board's May 2, 2019, decision. See [AB at 1-3]. Moreover, the evidence of record fully supports the Board's findings. [R. at 4-24]. Initially, Appellant has neither challenged any of the Board's factual findings, nor alleged that it failed to apply or misapplied any laws and regulations. [AB at 1-2].

Although Appellant in this matter is proceeding *pro se* and the Court must liberally construe the arguments made by Appellant, he is still required to bear the burden of persuasion. See *Perez v. Derwinski*, 2 Vet.App. 85, 86 (1992); *Berger v. Brown*, 10 Vet.App. 166, 169 (1997); see also *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000). Therefore, any argument not advanced by Appellant in his informal brief has been abandoned. See, e.g., *Bucklinger v. Brown*, 5 Vet.App. 435, 436 (1993); *Coker v. Nicholson*, 19 Vet.App. 439, 442 (2006); *Williams v. Principi*, 15 Vet.App. 189, 199 (2001).

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 the decision and to permit judicial review of the same. *Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990). Factual determinations made by the Board are reviewed under the clearly erroneous standard. 38 U.S.C. § 7261(a)(4). Under this deferential standard of review, the Court cannot substitute its judgment for that of the Board and must affirm the Board's factual findings so long as they are supported by a plausible basis in the record. *Gilbert*, 1 Vet.App. at 52.

Service connection may be granted for a disability resulting from personal injury suffered or disease contracted in the line of duty, or for the aggravation of a pre-existing injury or disease in the line of duty. 38 U.S.C. § 1110; 38 C.F.R. § 3.303(a). Establishing service connection generally requires competent evidence of a current disability, an in-service incurrence or aggravation of an injury or disease, and a nexus between the claimed in-service injury or disease and the current disability. See *Hickson v. West*, 12 Vet.App. 247, 253 (1999). The Board's determination of service connection is a question of fact subject to review under the deferential clearly erroneous standard. See *Gilbert*, 1 Vet.App. at 52-53 (a

finding of fact is not clearly erroneous if there is a plausible basis for it in the record).

A claim that has been finally decided and disallowed will be reopened only if new and material evidence is presented or secured. 38 U.S.C. § 5108. Evidence is new if it was not previously submitted. 38 C.F.R. § 3.156(a). Evidence is material if “either by itself, or when considered with previous evidence of record, relates to an unestablished fact necessary to substantiate the claim.” *Id.*; *see also King v. Shinseki*, 23 Vet.App. 464, 467 (2010). New and material evidence can neither be cumulative nor redundant of the evidence of record at the time of the last prior final denial of the claim sought to be reopened, and must raise a reasonable possibility of substantiating the claim. *Woehlaert v. Nicholson*, 21 Vet.App. 456, 461 (2007). Whether evidence is new and material “depends on the basis on which the prior claim was denied.” *Kent v. Nicholson*, 20 Vet.App. 1, 10 (2006); *see Evans v. Brown*, 9 Vet.App. 273, 283 (1996) (holding that evidence is material if it is relevant to and probative of an issue that was a specified basis for the last final disallowance of a claim), *overruled, in part, on other grounds by Hodge v. West*, 155 F.3d 1356 (Fed. Cir. 1998). The Board’s determination that a claimant has not submitted new and material evidence is reviewed under the clearly erroneous standard. 38 U.S.C. § 7261(a)(4); *see Sauviso v. Nicholson*, 19 Vet.App. 532, 533 (2006); *see also Gilbert*, 1 Vet.App. at 53 (under this deferential standard of review, the Court cannot “substitute its judgment for that of the B[oard] on issues of material fact”

and cannot reverse a factual determination if there is a plausible basis in the record for them).

In his brief to the Court, Appellant lists several claims of which he seeks judicial review. See [AB at 1]. These issues include entitlement to service connection for (1) a right hand disability, (2) a left knee disability, (3) a right knee disability, (4) bronchial cancer, and (5) TBI, and which denied a reopening of the previously denied claim of entitlement to service connection for a dental condition. *Id.* Considering the substance of his brief, even under the relaxed standards by which *pro se* submissions are reviewed, Appellant appears to advance only one argument. See *generally* [AB at 1-3]. Specifically, he contends that his DD 214 is incomplete and requests that the Court “fill out my DD 214 or DD 215 completely.” [AB at 3]. He also alleges that he has not been discharged from active duty service. See [AB at 3]. However, this Court is without the authority to grant the requested relief.

The jurisdiction of this Court is limited to claims that have been appealed to and adjudicated by the Board. See 38 U.S.C. § 7252. Here, while Appellant, in his substantive appeal to the Board argued that his DD 214 is incomplete and requested the Court correct his DD 214 and DD 215, the Court does not have jurisdiction over issues related to changing a veteran’s military records; rather, Appellant must address the issue with the service board for correction of military records. See *Lauginiger v. Brown*, 4 Vet.App. 214, 216 (1993) (to extent that service record may be incomplete, it is the Secretary of the military department,

not VA, to whom veteran must look for relief for correction of military records); *DeSousa v. Gober*, 10 Vet.App. 461, 463-64 (1997) (concluding that issues related to a veteran's discharge much be presented to the service board for correction of military records); *Harvey v. Brown*, 6 Vet.App. 416, 424 (1994) ("any disagreement the veteran may have regarding the assigned discharge classification must be raised with the [service department], not VA").<sup>1</sup>

With regard to the claims of entitlement to service connection for (1) a right hand disability, (2) a left knee disability, and (3) a right knee disability, the Board found that the record failed to support a finding of service connection because there was no evidence of an in-service injury or disease, of a chronic condition which manifested within one year of discharge, or any indication that the these disabilities are causally related to Appellant's military service. [R. at 10]. In his brief to this Court, Appellant merely lists page numbers from the RBA. See [AB at 2-3]. To the extent that he points to these pages as evidence to challenge the Board's determination, the records he cites to do not demonstrate error in the decision. See *Hilkert*, 12 Vet.App. at 151 (holding that the appellant bears the burden of demonstrating error on appeal). It simply is not enough for Appellant to allude to an allegation of error, nor is it the responsibility of the Court, or even within its

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<sup>1</sup> It is important to note that the record contains Appellant's DD 214 and a DD 215, Correction to the DD 214, issued in August 2013, which demonstrates that his date of discharge was March 26, 1975. [R. at 2473 (DD 214)], [R. at 1854 (DD 215, Correction to DD 214)]. Moreover, Appellant previously sought a discharge upgrade from the Department of the Navy Board for Correction of Naval Records, which the Board denied. See [R. at 330].

purview, to construct arguments on the behalf of Appellant. See *Henderson v. Shinseki*, 131 S.Ct. 1197, 1203 (2011) (with the exception of issue of subject matter jurisdiction, “[c]ourts do not usually raise claims or arguments on their own . . . and are generally limited to addressing the claims and arguments advanced by the parties”). Importantly, a review of the record shows sufficient evidence to support the Board’s decision as to these claims.

The Board found that (1) there was insufficient evidence relating Appellant’s claimed right hand, left knee, and right knee disabilities to his military service, (2) that the evidence failed to demonstrate that Appellant has current diagnoses of bronchial cancer and TBI, and (3) that no new and material evidence had been submitted sufficient to reopen the claim for a dental condition. [R. at 11-14], [R. at 16-20].

With regard to Appellant’s claimed right hand disability, the evidence of record supports the Board’s finding that his right hand disability is unrelated to his military service. [R. at 11-14]. As the Board explained, his service treatment records (STR) are devoid of any complaints of and treatment for any right hand condition, and that his separation examination found no abnormalities in his upper extremities. See [R. at 12]; see *also* [R. at 1566-67 (August 1973 Report of Medical Examination)], [R. at 1578-81 (STRs)], [R. at 1588-89 (March 1975 Report of Medical Examination)], [R. at 1590-92 (STRs)]. Indeed, while his STRs show treatment for a left wrist sprain, the record fails to demonstrate any complaint for or treatment of a right hand condition. See [R. at 1578-81]. Private treatment

records show an onset of osteoarthritis in the right hand in 2003, decades after Appellant's separation from service. See [R. at 12]; see also [R. at 2399 (2394-400) (March 31, 2003, Medical Record)]. The record also indicates that Appellant experienced numbness in the right hand with an onset of 1977, approximately two years post-separation, when he suffered a fractured bone in the right hand. [R. at 2397]. While Appellant, in 2009, reported that he had been treated for a swollen right hand in service, there simply is no evidence showing in-service treatment for this condition. See [R. at 13]. Therefore, the Board's findings were not clearly erroneous. *Gilbert*, 1 Vet.App. at 52.

As to his left and right knee claims, the Board currently found that the evidence of record failed to demonstrate that these conditions are due to his military service. [R. at 12-14]. Notably, while the record contains a notation that Appellant suffered a laceration on the lower anterior of his left leg, the record is completely devoid of any complaints of or treatment for any knee conditions. See [R. at 1590-92 (STRs)]. Importantly, the records show that the injury to the lower anterior of his left leg healed without any residual condition, and that at the time of his separation, Appellant's lower extremities were found to be normal. See [R. at 1588 (March 1975 Report of Medical Examination)], [R. at 1591 (March 1975 STR)]. In his brief to this Court, Appellant cites to post-service treatment records which show he currently suffers from bilateral knee pain, but he has failed to point to any evidence relating these conditions to his service. See *generally* [AB at 2];

see also *Hilkert*, 12 Vet.App. at 151. Thus, the Board's findings have a plausible basis in the record. *Gilbert*, 1 Vet.App. at 52.

Regarding the claims of entitlement to service connection for bronchial cancer and TBI, the Board did not err in finding that the record failed to demonstrate that Appellant has current diagnoses of either condition. [R. at 16-17]. The record shows neither a diagnosis of nor treatment for bronchial cancer. See [R. at 892-94], [R. at 892-94 (October 2015 Primary Care Note)]. Indeed, a March 2013 medical record, which contains a list of Appellant's active health problems, does not include bronchial cancer. [R. at 1262 (1261-65)]. Most recently, an April 2018 medical note was silent as to any diagnosis of bronchial cancer. [R. at 41 (40-42)]. Moreover, the record shows no intracranial abnormality indicating TBI determined through CT scans. [R. at 220-21 (218-21) (December 2015 Neuropsychology Consult)]. Without a diagnosis for either condition, Appellant's claims for service connection must fail. See *McGinty v. Brown*, 4 Vet.App. 428, 432 (1993) (a determination of service connection requires a finding of the existence of a current disability and a determination of a relationship between that disability and an injury or disease incurred in service).

Lastly, the Board's finding that no new and material evidence has been submitted sufficient to reopen the claim for a dental condition is supported by the record. [R. at 18-20]. This claim was last denied in a May 2010 rating decision which became final as Appellant did not file a timely appeal. See [R. at 20]; see also [R. at 1903-05 (May 2010 Rating Decision)]. In that decision, the RO denied

the claim finding that Appellant did not have any disabling dental conditions which qualified for compensation. [R. at 1904]. The Board properly found that since the May 2010 decision, new evidence submitted still does not contain findings of a current disabling dental disability, or dental treatment. [R. at 19]. Indeed, treatment records show no problems with Appellant's teeth and even noted that he had "[g]ood dental hygiene." [R. at 161 (160-62) (October 2017 treatment record)], [R. at 199 (198-99) (April 2016 treatment record)], [R. at 458 (457-58) (December 2014 treatment record)], [R. at 894 (892-94) (January 2001 treatment record indicating Appellant had good dental hygiene)]. Thus, without evidence of a current qualifying dental disability, the Board did not err in finding that no new and material evidence has been submitted sufficient to reopen the claim. *See Gilbert*, 1 Vet.App. at 53.

Thus, because Appellant has failed to demonstrate error in the Board decision on appeal and provides arguments only for claims which are not properly on appeal before this Court, and because the Board's decision as to the select claims identified by Appellant in his brief have plausible bases in the record, the Court should affirm the Board's May 2, 2019, decision.

## **V. CONCLUSION**

Based upon the foregoing, the Secretary respectfully submits that the Court affirm the May 2, 2019, decision of the Board which denied entitlement to service connection for (1) a left shoulder disability, (2) a right shoulder disability, (3) a left elbow disability, (4) a right elbow disability, (5) a right hand disability, (6) a neck

disability, (7) a left knee disability, (8) a right knee disability, (9) hypertension, (10) headaches, (11) bronchial cancer, (12) a heart disability, (13) a blood disorder, and (14) a TBI, and which denied the applications to reopen the previously denied claims of entitlement to service connection for a dental condition and an acquired psychiatric disability, to include PTSD.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

On the 20<sup>th</sup> day of February, 2020, a copy of the foregoing was mailed,  
postage prepaid, to:

Andrew Morrison  
1501 Country Club Road  
Rocky Mount, NC 27804

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

/s/ Anna M. Castillo  
**ANNA M. CASTILLO**  
Counsel for Appellee