Vet.App. No. 19-3502

IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

RICHARD F. CARTNEY,
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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Appellee.	)	

ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS

BRIEF OF THE APPELLEE
SECRETARY OF VETERANS AFFAIRS

ISSUES PRESENTED

1. Whether there is a plausible basis in the record for the Board of Veterans' Appeals (Board or BVA) conclusion that Appellant's gastroesophageal reflux disease (GERD) is not related to his military service where there is no competent medical opinion that relates Appellant's GERD to service.
2. Whether the Court should affirm the Board's decision where this Court's decision in *Atencio v. O'Rourke* expressly prohibits the grant of service

connection for GERD as a medically unexplained chronic multisymptom illness (MUCMI).

3. Whether the Court should decline to consider arguments raised for the first time on appeal to the Court where the arguments were not reasonably raised by the record and Appellant's counsel failed to raise the arguments below.

STATEMENT OF THE CASE

A. Jurisdictional Statement

The Court has proper jurisdiction pursuant to 38 U.S.C. § 7252(a), which grants the United States Court of Appeals for Veterans Claims exclusive jurisdiction to review final decisions of the Board.

B. Nature of the Case

Richard F. Cartney (Appellant) appeals the February 1, 2019, decision of the Board that denied entitlement to service connection for gastroesophageal reflux disease (GERD), to include due to an undiagnosed illness. [Record (R.) at 2-11)]. In his brief, he argues that the Board's statement of reasons or bases is inadequate, the July 2017 VA examination is inadequate, and the Board failed to consider reasonably raised theories of entitlement to service connection. [Appellant's Brief (Br.) at 1].

The Secretary asks the Court to affirm the February 1, 2019, decision that denied entitlement to service connection for GERD because the medical evidence

provides a plausible basis for the Board's decision, and Appellant fails to meet his burden of persuasion as to his allegations of error.

C. Statement of Relevant Facts and Procedural History

The Veteran had active service from April 1987 to April 1991. [R. at 1379-80]. Appellant's DD Form 215 reflects that he served in Southwest Asia in Operation Desert Shield/Storm from September 1990 to March 1991. [R. at 1583].

VA obtained Appellant's service treatment records (STRs). [R. at 19-181]; [R. at 1502-1622]. A July 1987 STR notes that Appellant complained of a sore throat, fever, chills, cough, pain and diarrhea. [R. at 1540]. In May 1989, Appellant complained of nausea, vomiting and abdominal pain. [R. at 1542]. Appellant was diagnosed with acute gastroenteritis. *Id*. A March 1988 record shows that Appellant complained that his left ear hurt, and his symptoms were negative for cough, cold or sore throat. [R. at 1560]. The diagnosis was external otitis. *Id*. On September 29, 1987 Appellant complained of stomach cramps and diarrhea and was diagnosed with acute gastroenteritis ("AGE"). [R. at 56-57]; [R. at 1568]. Appellant was seen in a follow-up appointment on October 1, 1987, where it was noted his symptoms were "much better." [R. at 1566]. An August 1988 periodic examination was negative for any gastrointestinal complaints or symptoms. [R. at 1523, 1577]. In March 1990, Appellant complained of cough and post-nasal drainage and was diagnosed with rhinitis. [R. at 1612]. In February 1990, Appellant complained of a sore throat and post-nasal drainage was noted. [R. at

1615]. He was found to have tonsillitis. *Id*. In April 1991, Appellant complained of persistent cough and nasal drainage, and was diagnosed with an upper respiratory infection. [R. at 1600].

A treatment record from October 2002, states that the Appellant presented to the clinic for enrollment in the VA Health Care System. [R. at 1277-81]. It was noted, under "Toxic Exposure," that his history was positive to oil field smoke while in Desert Storm. [R. at 1278 (1277-81)]. On examination, he admitted to some intolerance to spicy foods that could result in irregular bowel movements, but he did not mention GERD, and he denied symptoms such as difficulty swallowing, heartburn, and vomiting. [R. at 1279 (1277-81)]. The examiner's final assessments of ongoing problems did not include GERD. [R. at 1281 (1277-81)].

October 2006 VA records indicate that the Veteran was seen to establish primary care. [R. at 1346-49]. His chronic problems were reviewed, but Appellant specifically denied having GERD. [R. at 1347 (1346-49)].

VA treatment records from September 2010 state that the Veteran was on over-the-counter medication for GERD. [R. at 501-04]. He denied heartburn, pains in the abdomen, constipation, diarrhea, melena, or weight loss. *Id*. After the examination and interview, the assessment was GERD, and a different medication was ordered. [R. at 502 (501-04)]. A September 2013 record reflects that Appellant's GERD was asymptomatic. [R. at 582-83]. A September 2016 VA

treatment record notes that Appellant has chronic GERD that is controlled with over-the-counter medications. [R. at 489 (487-89)].

Appellant filed his claim for service connection for "GERD Gulf War Syndrome" in July 2016. [R. at 1362-65]. Appellant underwent a Gulf War Medical Examination in July 2016. [R. at 1227-32]. He reported having been exposed to environmental hazards, such as smoke from oil well fires. [R. at 1229 (1227-32)]. He reported that he was diagnosed with GERD/acid reflux 20 years ago. *Id*. Appellant reported breakthrough symptoms of gagging and coughing after eating. *Id*. He stated that sometimes his coughing was uncontrollable and would lead to dry heaves. [R. at 1229-30 (1227-32)]. He denied any nausea when this occurs. *Id*. The examiner opined that Appellant's GERD is less likely than not incurred in or caused by service. [R. at 1230 (1227-32)]. The examiner explained that Appellant's service treatment records were "silent for GERD, GERD symptoms such as heartburn, regurgitation, dysphagia, GERD related chest pain, that are among the most common symptoms" and that Appellant had reported his GERD started after service. [R. at 1231 (1227-32)]. She noted that obesity is a common risk factor for GERD and Appellant's current body mass index was 45. *Id*. She further explained that while Appellant stated that chief complaint is a "cough," she noted that Appellant had been treated for allergic rhinitis and that his cough was related to post-nasal drip which is a symptom of allergic rhinitis. *Id*. She concluded

that Appellant's GERD and his cough, which was related to allergies, "have a clear and specific etiology." *Id*.

A November 2016 rating decision denied service connection for GERD because "this disability is determined to result from a known clinical diagnosis, which neither occurred in nor was caused or aggravated by service." [R. at 548 (543-49)]. The Berry Law Firm began its representation of the Appellant in February 2017 and requested electronic access of Appellant's file at that time. *See* [R. at 429-30 (429-35)]. Appellant, through counsel, submitted a notice of disagreement in March 2017 in which he contended that his GERD was caused by exposure to thick smoke from burning oil fields during service. [R. at 359-72].

A Statement of the Case continued the denial of service connection for GERD. [R. at 299-327]. Appellant, through counsel, appealed to the Board in August 2017, but raised no argument. [R. at 298 (297-98)]. VA provided Appellant's counsel a copy of Appellant's VA file in November 2017, pursuant to his request. [R. at 294-96].

The Board, in the decision on appeal, found that the record does not reflect evidence of GERD during service or until several years after service. [R. at 9 (4-11)]. The Board noted that Appellant never stated that his symptoms began during service in any of his contentions or in any statements to any of his examiners or care providers, and the evidence shows that the initial complaints and diagnosis of GERD were several years after discharge. *Id*. The Board also noted there is

also no competent medical opinion that relates the current diagnosis of GERD to active service. *Id*.

The Board found that entitlement to service connection for GERD as part of an undiagnosed or multi-symptom illness was not warranted. [R. at 10 (4-11)]. The Board observed that GERD is a known diagnosis, and not an undiagnosed illness. *Id*. The Board relied on the findings of the VA examiner who "found that the Veteran does not have an undiagnosed illness or a medically unexplained chronic multi-symptom illness of unknown or partially explained etiology." *Id*. Indeed, the Board noted the examiner stated that Appellant's "GERD has a very clear and specific etiology." *Id*. The Board then concluded that "service connection for GERD may not be granted on this basis." [R. at 10 (4-11)] (citing 38 C.F.R. § 3.317).

SUMMARY OF THE ARGUMENT

The Court should affirm the February 1, 2019, Board decision that denied entitlement to service connection for GERD. As the Board found, the medical evidence of record shows that the Appellant did not develop GERD until several years after service and that his GERD is not otherwise linked to service. Additionally, the Board's statement of reasons or bases adequately explained the basis for its determination. Accordingly, the Secretary asserts the Court should affirm the Board's decision.

Appellant's arguments are unsupported and undeveloped. Additionally, Appellant raises new arguments in his brief for the first time. The Secretary respectfully requests this Court to decline to entertain arguments that were not reasonably raised by the record and that were not previously raised by Appellant's counsel.

ARGUMENT

A. THERE IS A PLAUSIBLE BASIS IN THE RECORD FOR THE BOARD'S DENIAL OF SERVICE CONNECTION FOR GERD BECAUSE THERE IS NO MEDICAL OPINION THAT RELATES THE CURRENT DIAGNOSIS OF GERD TO APPELLANT'S SERVICE.

"'If the [factfinder]'s account of the evidence is plausible in light of the record viewed in its entirety, the [reviewing court] may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently.'" *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990) (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74, (1985)). *See* 38 USC § 7261 (a)(4) (this Court shall "hold unlawful and set aside or reverse such finding if the finding is clearly erroneous"). In addition, in every decision, the Board must provide a statement of the reasons or bases for its determination, adequate to enable an appellant to understand the precise basis for the Board's decision as well as to facilitate review in this Court. 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Gilbert*, 1 Vet.App. at 56-57.

7.

1. The July 2016 VA medical examination is adequate.

"[E]examination reports are adequate when they sufficiently inform the Board of a medical expert's judgment on a medical question and the essential rationale for that opinion." *Monzingo v. Shinseki*, 26 Vet. App. 97, 105-06 (2012) (citing *D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008) ("An opinion is adequate where it is based upon consideration of the veteran's prior medical history and examinations and also describes the disability in sufficient detail so that the Board's 'evaluation will be a fully informed one.'" (quoting *Ardison v. Brown*, 6 Vet.App. 405, 407 (1994))). An adequate medical examination report "must contain not only clear conclusions with supporting data, but also a reasoned medical explanation connecting the two." *Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 301 (2009) (citing *Stefl v. Nicholson*, 21 Vet.App. 120, 124 (2007)).

Here, the July 2016 VA medical opinion provides the Board with a plausible basis for its determination that Appellant's GERD is not related to active service. During the July 2016 VA examination, Appellant reported that he was diagnosed with GERD 20 years prior. [R. at 1231 (1227-32)]. The examiner noted that the onset of Appellant's GERD would have been 5 years after service. *Id*. The examiner opined that Appellant's GERD was not related to service. [R. at 1230 (1227-32)]. The examiner also explained that Appellant was negative for any undiagnosed illnesses or disability patterns, nor any chronic multi-symptoms illness of unknown or partially explained etiology. *Id*. The examiner stated that

GERD was not temporally related to any exposure event in South West Asia. [R. at 1231 (1227-32)]. The July 2016 VA examination provided the Board with the plausible basis for its determination that Appellant's GERD is not related to active service.

Appellant argues that the July 2016 VA examination is inadequate, but Appellant's arguments are perfunctory, undeveloped, and unsupported. This Court has "'made clear that perfunctory and undeveloped arguments . . . are waived.'" *Locklear v. Nicholson*, 20 Vet. App. 410, 416 (2006) (quoting *United States v. Berkowitz*, 927 F.2d 1376, 1384 (7th Cir. 1991)).

Appellant argues that the examiner did not determine the cause of Appellant's GERD, ignores evidence that Appellant was obese in service, ignores Appellant's lay statements, and ignores the fact that the record contains no post-service exposures that would have caused GERD. [Br. at 1-4]. These arguments are completely unsupported. Appellant does not state a basis for arguing that GERD is caused by an "exposure." [Br. at 2]. *See* U.S. VET. APP. R. 28(a)(5) (providing that an appellant's brief must contain "an argument . . . and the reasons for [it], with citations to the authorities . . . relied on"). Moreover, Appellant contends that his lay statements establish "continuity of symptomatology." [Br. at 4]. First, he fails to explain how exposure to smoke in service and an alleged "onset of GERD that occurred very shortly after service" demonstrates continuous "symptoms." [Br. at 4]. Moreover, he fails to establish that this method of

establishing service connection is available for GERD. *Walker v. Shinseki*, 708 F.3d 1331, 1339-40 (Fed.Cir. 2013). The U.S. Court of Appeals for the Federal Circuit in *Walker* clarified that continuity of symptomatology may be used to establish linkage to service only for the list of chronic conditions in 38 C.F.R. § 3.309(a). *Walker*, 708 F.3d at 1340. GERD is not listed in section 3.309(b). In making these arguments, Appellant cites to no authority to support his assertions. This is the very definition of an unsupported argument. This is precisely the practice that this Court has chastised. *Locklear*, 20 Vet. App. at 416 (citing U.S. VET. APP. R. 28(a)(5)).

Next, Appellant argues that the examiner "inexplicably ignored the fact that the veteran was obese in service." [Br. at 2]. However, the Appellant undercuts his own argument by agreeing that the examiner noted Appellant's body mass index (BMI) was 30 in service. [Br. at 3]. The examiner did not ignore this information, but instead used this information to note that Appellant's BMI has risen gradually post separation. [R. at 1231 (1227-32)]. The examiner noted that Appellant's GERD had its onset post separation. *Id*. The examiner's opinion is supported by an adequate rationale because the examiner used data to support her conclusions. *See Nieves-Rodriguez*, 22 Vet.App. at 301 ("[An adequate] medical examination report must contain not only clear conclusions with supporting data, but also a reasoned medical explanation connecting the two.").

Appellant then argues that obesity can be an intermediate step between a service-connected disability and a current disability. [Br. at 3-4]. However, Appellant does not explain which service-connected disability caused obesity, nor does Appellant explain how obesity is an intermediate step. Indeed, Appellant, without support, argues that "a showing that the veteran's obesity caused his GERD, when the veteran was obese in service, is similar to a showing that a service[-]connected disability caused obesity which caused a secondary disability." [Br. at 4]. This argument is unclear and undeveloped. *Locklear*, 20 Vet. App. at 416. Moreover, it ignores the fact that VA has determined that obesity is not a disease eligible for service connection under the rating schedule and the Court has found it lacks jurisdiction to review the rating schedule in this regard. *Marcelino v. Shulkin*, 29 Vet.App. 155, 158-59 (2018). Thus, to the extent Appellant is arguing that because he was obese in service, service connection for obesity should be awarded, such argument lacks legal merit. Accordingly, the Court should find Appellant's argument to be wholly unsupported. Appellant argues that the examiner overlooked Appellant's claim that his GERD started two years after discharge. [Br. at 4]. However, Appellant failed to demonstrate how the July 2016 VA medical examiner could possibly address the assertions made in a March 2017 notice of disagreement. *See Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (*en banc*) (holding that the appellant bears the burden of demonstrating error on appeal). Appellant's counsel forwarded that information to VA approximately eight months

after the July 2016 VA examination. Appellant also argues that the examiner failed to opine about the cause of the Appellant's rhinitis, [Br. at 5], but Appellant's rhinitis is not at issue here. Appellant's perfunctory arguments should be rejected. *Locklear*, 20 Vet. App. at 416.

Appellant argues that the examiner ignored STRs noting symptoms of GERD. [Br. at 5]. Appellant has not shown he possesses the competence to rebut the examiner's specific finding that the service treatment records do not reflect symptoms of GERD. *See* [R. at 1231 (1227-32)]. The examiner specifically found that the treatment records do not reflect symptoms of GERD those symptoms are "symptoms such as heartburn, regurgitation, dysphagia, [and] GERD related chest pain." *Id*. Moreover, Appellant simultaneously argues that his GERD symptoms started two years after discharge from service, [Br. at 4], and that the STRs contains symptoms of GERD. [Br. at 5-6]. Appellant fails to explain how his STRs could possibly contain evidence of GERD symptoms in service, while simultaneously admitting that his symptoms started after service. *Hilkert*, 12 Vet.App. at 151.

Appellant asserts that the VA examiner found that a symptom of GERD was coughing. [Br. at 5]. Appellant has misread the examination report. As noted above, the examiner listed common symptoms of GERD, but those do not include coughing. [R. at 1231 (1227-32)]. Indeed, she attributed the symptom of coughing to Appellant's post-nasal drip due to allergic rhinitis. *Id*. Thus, Appellant's

argument is based on an erroneous reading of the examiner's opinion and thus lacks support.

Additionally, a review of the STRs Appellant proffers to make his argument reveals that these STRs bolster the examiner's opinion as none contain any findings related to GERD. [Br. at 5-6]. A July 1987 STR notes that Appellant complained of a sore throat, fever, chills, cough, pain and diarrhea. [R. at 1540]. In May 1989, Appellant complained of nausea, vomiting and abdominal pain. [R. at 1542]. Appellant was diagnosed with gastroenteritis. *Id*. A March 1988 record shows that Appellant complained of pain in the left ear, his symptoms were negative for cough, cold and sore throat, and external otitis was diagnosed. [R. at 1560]. In September 1987 Appellant complained of stomach cramps and diarrhea and was diagnosed with acute gastroenteritis ("AGE"). [R. at 1568]; [R. at 56-57]. An August 1988 periodic examination was negative for any gastrointestinal complaints or symptoms. [R. at 1523, 1577]. In April 1991 Appellant complained of persistent cough and nasal drainage. [R. at 1600]. In March 1990, Appellant complained of cough and post-nasal drainage. [R. at 1612]. In February 1990 Appellant complained of a sore throat and post-nasal drainage was noted. [R. at 1615]. In May 1989, Appellant complained of nausea, vomiting and abdominal pain. [R. at 1542]. Appellant complained of painful lesion on the tongue. [R. at 1604]. Appellant complained tonsillitis in February and In June of 1990. [R. at 1607], [R. at 1615]. Appellant has failed to demonstrate how these records

establish relevant symptomatology. Accordingly, the Court should reject this argument. *Locklear*, 20 Vet. App. at 416.

2. The Board provided an adequate statement of reasons or bases for its determination.

The Board's statement of reasons or bases adequately explained the precise basis for the Board's decision. The Board found that the record does not reflect evidence of GERD during service or until several years after service. [R. at 9 (4-11)]. Appellant concedes this point by arguing that his GERD symptoms started two years after discharge. [Br. at 4]. The Board pointed out that "[t]here is also no competent medical opinion that relates the current diagnosis of GERD to active service." [R. at 9 (4-11)]. The Board also pointed out that service connection for GERD may not be granted as an undiagnosed illness. [R. at 10 (4-11)] (citing 38 C.F.R. § 3.317).

Appellant argues that the Board ignored Appellant's BMI in service. [Br. at 3]. However, this argument is refuted by a reading of the Board decision. *See* [R. at 9 (4-11)]. The Board discussed the examiner's finding that Appellant's BMI "had risen gradually since service from 30 to 45." *Id*. Appellant argues that the Board ignored evidence that Appellant was exposed to this smoke from burning oil fires. [Br. at 4]. However, this is also refuted by a reading of the Board's decision. *See* [R. at 8 (4-11)] (Appellant "reported being exposed to environmental hazards, such as smoke from oil well fires"). Appellant argues that the Board failed to give an

adequate statement of reasons or bases for relying on an inadequate examination report. [Br. at 6]. However, as noted above, Appellant has failed to demonstrate that the examination opinion is inadequate. Appellant's arguments that the Board's decision is not adequately supported by its statement of reasons or bases are unsupported and undeveloped. *Locklear*, 20 Vet. App. at 416.

Appellant argues that the Board and the examiner erred in not considering whether service connection should be established for allergic rhinitis as "the examiner found in part that the veteran's non-service connected allergic rhinitis may be a cause of his GERD." [Br. at 6]. Appellant cites to no specific finding of the examiner. And with good cause, as the examiner made no such finding. Rather, she addressed Appellant's symptom of a cough, which *Appellant* has attributed to GERD, and found that his cough was not due to GERD, but rather to post nasal drip which was caused by allergic rhinitis. [R. at 1231 (1227-32)]. Accordingly, the record did not raise a new theory of service connection and Appellant's arguments are without factual support in the record. As such, the Court should find they lack merit.

B. APPELLANT'S CLAIM HERE IS BARRED BY THIS COURT'S DECISION IN *ATENCIO V. O'ROURKE*.

To the extent that Appellant seeks service connection for GERD as an undiagnosed illness, that claim is barred by this Court's precedent. 38 C.F.R. § 3.317 provides "[c]ompensation for disability due to undiagnosed illness and

medically unexplained chronic multisymptom illnesses." This Court, in *Atencio v. O'Rourke,* held that "the plain language of § 3.317 specifically bars GERD from being considered as a MUCMI." 30 Vet. App. 74, 77 (2018). *See Stankevich v. Nicholson*, 19 Vet. App. 470, 472 (2006) ("The very essence of an undiagnosed illness is that there is no diagnosis."); *Gutierrez v. Principi*, 19 Vet. App. 1, 10 (2004) (explaining that "claimed symptoms by history, physical examination, and laboratory tests cannot be related to any known clinical diagnosis for compensation to be awarded under section 1117").

Here, the Board found that "GERD a known diagnosis, and not an undiagnosed illness." [R. at 10 (4-11)]. Appellant's arguments that presumptive service connection could be granted pursuant to § 3.317 are not meritorious. *See* [Br. at 8-10].

Appellant's argument's here are difficult to decipher. Appellant claims that the examiner used the "wrong test in order to determine whether the veteran's disability is a" MUCMI. [Br. at 9]. Appellant argues that "nowhere in the veteran's case file does the VA make a determination that the veteran's GERD is a structural gastrointestinal disease." *Id*. Appellant attempts to distinguish the present matter from *Atencio* by arguing that "there is no evidence in the record that the veteran's GERD is a structural disease rather than a functional disease." [Br. at 10]. Appellant's arguments here all fail because they are underdeveloped and unsupported. *Locklear*, 20 Vet. App. at 416. Moreover, to the extent that Appellant

attempts to distinguish the present matter from *Atencio*, Appellant misses the mark. As the Court held, the "plain language of § 3.317 bars GERD from being considered as a MUCMI" because GERD is "a structural gastrointestinal disease." *Atencio*, 30 Vet.App. at 82. Appellant baldly argues that VA has not shown that *his* GERD is a structural gastrointestinal disease. [Br. at 9]. However, Appellant has failed to show how his diagnosis of GERD would be different than any other diagnosis of GERD.

Accordingly, Appellant's attempt to obtain service connection for GERD on the basis of 38 C.F.R. § 3.317 must fail because this type of claim is expressly barred by this Court's holding in *Atencio v. O'Rourke.*

C. THE COURT SHOULD DECLINE TO CONSIDER APPELLANT'S ARGUMENTS RAISED FOR THE FIRST TIME ON APPEAL.

The Court has jurisdiction over this appeal and, as such, has discretion to consider arguments raised for the first time on appeal. *Maggitt v. West*, 202 F.3d 1370, 1377 (Fed. Cir. 2000). Key to exercising this discretion is a "a case-by-case analysis of the competing individual and institutional interests." *Id*. at 1378. "Those institutional interests are, in the main, to protect agency administrative authority and to promote judicial efficiency." *Id.* at 1377. "An improper or late presentation of an issue or argument under the court's rules need not be considered and, in fact, ordinarily should not be considered." *Carbino v. West*, 168 F.3d 32, 34 (Fed. Cir. 1999).

Here, the Appellant has been represented by his current counsel since February 2017. *See* [R. at 429 (429-35)]. Now, in his brief, Appellant argues that the Board failed to adjudicate a reasonably raised theory of entitlement to service connection for GERD based on Appellant's rhinitis. [Br. at 6]. There is nothing that raises this theory of entitlement. In fact, in order to make this baseless argument, the Appellant misconstrues the July 2016 examiner's findings. Appellant claims that the examiner found that the Appellant's non-service-connected allergic rhinitis may be the cause of his GERD. [Br. at 6]. However, the examination report states: "Veteran was seen on numerous occasions for allergic rhinitis. His enlistment note indicates hay fever/allergies." [R. at 1230]. The examiner states that upper airway cough syndrome is related to allergic rhinitis. [R. at 1231]. The examiner never stated that rhinitis can cause GERD.

Appellant argues that "the VA has made no determination [] on whether the [Appellant's] GERD and cough should be connected through his allergic rhinitis." [Br, at 6]. This should come as no surprise to anyone since the "record does not show that the [Appellant] has ever filed a claim for allergic rhinitis." [Br. at 6]. Appellant now argues that this theory of service connection was reasonably raised by the record. However, if that was true, then this theory of entitlement should have been explicitly raised by the Appellant, who has been represented by counsel since February 2017. *See Janssen v. Principi*, 15 Vet.App. 370, 374 (2001) (Court presumes a claimant's counsel to know and understand the law as it relates to the

facts of the claimant's case). Not only is there no factual basis for Appellant's argument that rhinitis causes GERD, the fact that his counsel did not raise this argument below speaks to baseless nature of this argument. *See Massie v. Shinseki*, 25 Vet.App. 123, 131 (2011) (noting that the Board is "entitled to assume that the arguments presented [by Appellant] were limited for whatever reason under the advice of counsel and that those were the theories upon which [the claimant] intended to rely."), *aff'd*, 724 F.3d 1325 (Fed. Cir. 2013).

Considering Appellant's new arguments would expend precious judicial resources investigating arguments that have not been developed. Raising arguments for the first time on appeal "hinders the decision-making process and raises the undesirable specter of piecemeal litigation." *Fugere v. Derwinski*, 1 Vet.App. 103, 105 (1990) ("Advancing different arguments at successive stages of the appellate process does not serve the interests of the parties or the Court. Such a practice hinders the decision-making process and raises the undesirable specter of piecemeal litigation."). Accordingly, the Court should decline to entertain Appellant's arguments that were raised for the first time in his brief.

CONCLUSION

WHEREFORE, for the foregoing reasons, Appellee, Robert L. Wilkie, respectfully urges the Court to affirm the Board's February 1, 2019, decision, denying service connection for GERD to include due to an undiagnosed illness.

Respectfully submitted,

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