IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

JOHN I. RUTCHICK,

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

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	)	
Appellant,	)	
	)	
v.	)	Vet.App. No. 19-3155
	)	
ROBERT L. WILKIE,	)	
Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS

BRIEF OF THE APPELLEE SECRETARY OF VETERANS AFFAIRS

ISSUE PRESENTED

Should the Court affirm the March 7, 2019, decision of the Board of Veterans' Appeals (Board) that denied entitlement to compensation under 38 U.S.C. § 1151 for residuals of an extended spinal epidural abscess (SEA)?

STATEMENT OF CASE

I. Nature of the Case

Appellant, John I. Rutchick, appeals the March 7, 2019, decision of the Board that denied entitlement to compensation under section 1151 for residuals of an extended SEA, including bilateral upper and lower extremity weakness, fatigue, neurogenic bladder and bowel, loss of motion of the neck, low back

disability, depression, and erectile dysfunction. [Record Before the Agency [R.]. at 5 (1-21)].

The Board reopened this claim because it found that new and material evidence was submitted. *Id*. This is a favorable finding that should not be disturbed. *Medrano v. Nicholson*, 21 Vet.App. 165 (2007).

II. Statement of Facts and Procedural History

Appellant served on active duty from 1964 to 1967. [R. at 2528].

A March 4, 2010, Department of Veterans Affairs (VA) dentistry note shows that Appellant had an "upper cast [removable partial denture] [inserted], with no adjustments needed at this time." [R. at 1011 (1011-12)]; *see* [R. at 348; 980-81]. The note added that "[a] periodic oral exam was done. There is still concern about condition of tooth #31, but our original plan to extract is on hold---the tooth does not appear to be jeopardizing adjacent area, and [Appellant] wants to keep the toot as long as possible---will monitor." [R. at 1011-12]; *see* [R. at 348; 981].

On March 26, 2010, Appellant presented at a private emergency department with complaints of left leg and hip pain. [R. at 358 (358-71)]. Following testing, Appellant was diagnosed with an extensive epidural abscess involving the cervical, thoracic, and lumbar spine that required surgery to evacuate. [R. at 364]. Appellant was also noted to have a history of polymyalgia rheumatica with chronic low dose prednisone therapy and a history of an October 2009 fall involving the lower back. *Id.* Testing of initial epidural abscess

fluid showed streptococcus viridans. *Id*. Treatment records noted that, "[g]iven the extensive lesion, likely partially due to the polymyalgia rheumatica and possibly related to the remote fall or, more likely, the dental cleaning approximately one month ago." [R. at 362]; *see also* [R. at 359; 361; 364]. Treatment records also noted that Appellant "was quadriplegic on admission, but has improved [with occupational therapy and physical therapy], and has gained strength in both his upper and lower extremities." [R. at 369].

On April 28 and 30, 2010, Appellant returned to VA complaining of tooth discomfort and had a fractured tooth in the lower right (#18) extracted. [R. at 478]. Because of Appellant's recent history of infection, the VA dentist consulted with an infection disease doctor before the performing the extraction. *Id*. No antibiotics were noted for the extraction. *Id*.

In June 2010, Appellant filed a claim for compensation under 38 U.S.C. § 1151 related to his March 4, 2010, dental treatment alleging negligence by the dentist because he was not prescribed prophylactic antibiotics given his use of prednisone. [R. at 1316-18]. The following month, the regional office (RO) denied the claim. [R. at 717-18; 722-26]. Appellant filed a timely notice of disagreement requesting decision review officer (DRO) review. [R. at 1308 (1302-08)].

Appellant submitted a July 2011 private medical statement from the private doctor that treated his spinal epidural abscess. [R. at 668-69]; *see also* [R. at 704]. The private doctor noted that "[f]luid samples revealed that [Appellant] was

suffering from a spinal epidural abscess. The organism identified was Streptococcus viridans, which is an organism consistent with oral flora." [R. at 668]. The private doctor concluded that he could "state within a reasonable degree of medical certainty that the dental provided performed on March 4, 2010[,] led to the introduction of the Streptococcus viridans, which caused the life & function threatening holospinal abscess. This is further substantiated by the timeline and severity of the infection." *Id*.

VA obtained a December 2011 medical opinion from a VA dental department chief. [R. at 579]; *see also* [R. at 518; 580]. He reviewed Appellant's claims file and relevant medical treatises and noted that the March 4, 2010, dental treatment consisted of the delivery of an upper partial denture and a possible occlusal adjustment. *Id*. at 578. He explained that, unlike the invasive April 2010 extraction of tooth #18, the March 4, 2010, procedure was not invasive. *Id*. He also noted that a medical treatise provided premedication is generally not recommended. *Id.* Because of that, he explained that consideration of prophylactic antibiotics would not be the same for the March 4, 2010, procedure as it was for the April 2010 extraction. *Id*. He concluded that, because the March 4, 2010, procedure was not invasive, it was "no more likely to cause systemic infection than normal daily routine including brushing, flossing, and eating." *Id*.

The RO issued a May 2013 statement of the case (SOC) continuing to deny the claim, [R. at 1319-38], and Appellant perfected his appeal later that

month, [R. at 504 (471-510)]. Appellant subsequently submitted medical references in support of his claim. [R. at 414-58].

VA sought another medical opinion because the record presented "conflicting medical evidence from different providers as to whether the dental treatment on March 4, 2010, is the direct cause of [Appellant's] subsequent spinal epidural abscess and associated symptoms and disabilities." [R. at 340 (337-340)]. The examination request also asked the examiner to address general questions related to proximate causation.[1] *Id*.

In July 2014, a VA dental chief opined that, even though the bacteria species cultured from the spinal abscess can be found in the oral cavity, it would be "mere speculation" to say that the "extraction of the molar tooth #19 or cleaning caused the spinal abscess." [R. at 331-32]. He explained that, based on information in Appellant's claims file, there would have been no reason to give Appellant antibiotics before or after the extraction. [R. at 332]. He concluded that there was no evidence of malpractice, reasonable care was taken, and "[r]arely a confounding and serious sequela can occur following a dental procedure, but this is not evidence of malpractice." *Id*.

[1] These questions included, "Was the additional disability an outcome of [Appellant's] surgery that was not reasonably foreseeable?" [R. at 340]. Because the only "surgery" Appellant underwent was for the spinal epidural abscess, it is unclear whether this question resulted from an oversight by the RO or if the RO sought information about whether the spinal surgery may have caused the additional disabilities.

In August 2014, the RO again denied the claim. [R. at 301-10]. In December 2014, Appellant had a personal hearing at the RO. [R. at 256-89]. Following the hearing, VA sought another medical opinion to address whether Appellant's claimed residuals were events not reasonably foreseeable from the March 4, 2010, dental procedure. [R. at 251 (250-252)]. The request noted that the question of negligence had previously been addressed. [R. at 251].

In response, in April 2015, the VA dental chief forwarded his prior July 2014 opinion. [R. at 242-44 (240-44)]. In an exchange of emails, the RO explained that it needed to know whether Appellant's claimed residuals were events not reasonably foreseeable from the March 4, 2010, dental procedure. [R. at 241-42]. The VA dental chief responded that the residuals were "an event not reasonably foreseeable." [R. at 241]. Because this response appeared to conflict with the July 2014 opinion, the RO sought clarification from the VA dental chief. [R. at 240]. He replied that "I do not think that the case can be made that the tooth extraction lead to the spinal abscess" such that it was less likely than not that there was any relationship between the extraction or dental cleaning and Appellant's spinal abscess. [R. at 240]. He added that "[t]he development of the abscess was an unforeseeable event that may or may not have any ties to the tooth extraction, in fact one could say that the spinal abscess could have developed from the mere brushing of the teeth by [Appellant] at home." *Id*. He also reemphasized that he "did not find evidence of negligence on the part of the dentist who extracted the tooth." *Id*.

The RO continued to deny Appellant's claim in an October 2015 SOC. [R. at 116-42].

On March 7, 2019, the Board denied entitlement to compensation under 38 U.S.C. § 1151 for residuals of an extended spinal epidural abscess, including bilateral upper and lower extremity weakness, fatigue, neurogenic bladder and bowel, loss of motion of the neck, low back disability, depression, and erectile dysfunction. [R. at 5]. The Board concluded that these residuals were not actually or proximately caused by VA treatment. [R. at 15]. The Board found that the December 2011 VA medical opinion persuasive on the question of actual causation because it opined that the "treatment provided was non-invasive and did not likely cause the infection that led to spinal abscess." [R. at 16]. The Board found that this opinion was consistent with the absence of an actual causation nexus in the March and April 2015 VA medical opinions. *Id*. The Board acknowledged that the March and April 2015 VA medical opinions incorrectly identified the specific March 4, 2010, dental treatment, but it concluded that "the information provided as to the medical literature review and as to an actual or proximate causal relationship is valid and not inconsistent with the other medical and scientific study evidence of record." *Id*.

The Board found that the December 2011, March 2013, March 2015, and April 2015 VA opinions were persuasive evidence that the March 4, 2010, dental care provider exercised the degree of care that would be expected of a reasonable health care provider. [R. at 16]. The Board found no contrary

medical opinions on the question of negligence and reasonable care. *Id*. The Board added that, because it found "no actual or proximate causation," Appellant's "claims that he had not given informed consent for that treatment and that his SEA was an event not reasonabl[y] foreseeable are moot." [R. at 17].

The Board also found that the December 2010 and July 2011 private medical opinions were less probative because "no explanation was provided as to how the oral flora attributed to SEA might be related to non-invasive dental treatment." [R. at 17]. Regarding the July 2011 statement about the timeline and severity of the infection substantiated a causal connection, the Board found that "no rational was provided to how it determined that timeline and severity substantiated the opinion." [R. at 18].

This appeal followed.

ARGUMENT

The Court should affirm that Board's decision because Appellant has not shown error, much less reversable error, in the Board's evaluation of the evidence and finding that there was no actual causation between the March 4, 2010, dental treatment and Appellant's SEA. *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) (holding that the appellant bears the burden of showing prejudicial error); *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (holding that appellant bears the burden of showing error).

A veteran may receive compensation for an additional disability that results from VA medical care. 38 U.S.C. § 1151(a); *Ollis v. Shulkin*, 857 F.3d 1338,

1341 (Fed. Cir. 2017). The veteran must first show that the medical care is the but-for cause of any additional disability, i.e. the actual cause of the additional disability. *Ollis*, 857 F.3d at 1343. "To establish [actual] causation, the evidence must show that the hospital care, medical or surgical treatment, or examination resulted in the veteran's additional disability or death." 38 C.F.R. § 3.361(c)(1). "Merely showing that a veteran received care, treatment, or examination and that the veteran has an additional disability or died does not establish cause." *Id*.

The additional disability must also have been proximately caused by (A) carelessness, negligence, lack of proper skill, error in judgment, or similar instance of VA fault in furnishing treatment or (B) an event not reasonably foreseeable. 38 U.S.C. § 1151(a)(1)(A)-(B); *Ollis*, 857 F.3d at 1343-46. Proximate cause "is the action or event that directly caused the disability or death, as distinguished from a remote or contributing cause." 38 C.F.R. § 3.361(d). Congress required that there be proximate cause "to restrict the statute's reach to situations in which a veteran's injury resulted from 'fault' on the part of VA or an unforeseeable 'event.'" *Viegas v. Shinseki*, 705 F.3d 1374, 1382 (Fed. Cir. 2013).

Entitlement to compensation under section 1151 is a finding of fact that the Court reviews for clear error. *Roberson v. Shinseki*, 22 Vet.App. 358, 365 (2009). So is whether a medical opinion is adequate. *Sharp v. Shulkin*, 29 Vet.App. 26, 31 (2017). A finding is clearly erroneous only when the Court has a firm and definite conviction that the Board made a mistake. *Id.* In making factual

findings, it is the province of the Board to weigh and assess the evidence of record. *Spellers v. Wilkie*, 30 Vet.App. 211, 221 (2018).

Initially, the Secretary agrees that the dispositive issue in this appeal is whether there was actual causation between the March 4, 2010, dental treatment and Appellant's SEA. *See* Appellant's Brief (App. Brf.) at 15. After showing evidence of an additional disability, which the Board appears to have found here, *see* [R. at 15-16], the threshold factor in continuing the section 1151 analysis is whether the March 4, 2010, dental treatment actually caused Appellant's SEA. *See Ollis*, 857 F.3d at 1343. But, unlike Appellant, the Secretary submits that the evidence fails to show that the March 4, 2010, dental treatment actually caused his SEA, consistent with the Board's decision.

To the extent Appellant, alternatively, argues that neither 38 U.S.C. § 1151 or 38 C.F.R. § 3.361 explicitly provide a standard of proof to show actual causation, the Secretary agrees that these provisions do not explicitly define such a standard of proof. *See* App. Brf. at 24-29. But, as Appellant highlights, VA has recognized that the "benefit-of-the-doubt doctrine" may apply in the context of establishing causation in section 1151 claims. *Id*. at 28-29 (citing VAOPGCPREC 7-97, at 11). However, the benefit-of-the-doubt doctrine only applies when the evidence is in equipoise and a preponderance of the evidence has not been established. *See Ortiz v. Principi*, 274 F.3d 1361, 1365 (Fed. Cir. 2001) (applying the benefit of the doubt rule only when the decision on the merits is "too close to call"); *Schoolman v. West*, 12 Vet.App. 307, 311 (1999) (finding

that when the preponderance of the evidence is against an appellant's claims, "the benefit of the doubt doctrine does not apply"). It follows then that, if the benefit-of-the-doubt doctrine may apply to the actual causation element of section 1151 claims, then the standard of proof for Appellant to establish actual causation is by a preponderance of the evidence. Additionally, whether an additional disability was actually caused by VA medical treatment is akin to a nexus needed to establish service-connected benefits such that competent evidence is necessary. *See Hickson v. West*, 12 Vet.App. 247, 253 (1999). And, as in all cases, the burden of proof is on the claimant to show entitlement to a benefit. *Skoczen v. Shinseki*, 564 F.3d 1319, 1324 (Fed. Cir. 2009) (recognizing that the burden is on the claimant to show entitlement to benefits). Thus, Appellant bears the burden of proof to establish entitlement to section 1151 benefits by establishing actual causation by a preponderance of the competent evidence.

Appellant relies the VA General Counsel Precedential Opinion (GC Opinion) because he believes that it provides for a finding of actual causation in his favor if the actual cause of his SEA cannot be identified. App. Brf. at 29. However, the factual scenario in the GC Opinion is distinguishable from the facts here. The relevant portion of the GC Opinion provides that, "when the cause of a fall during VA hospitalization cannot be determined, the benefit-of-the-doubt doctrine [] may militate in favor of a conclusion that the fall was attributed to the circumstances and conditions of hospitalization."

VAOPGCPREC 7-97, at 11. In other words, the GC Opinion contemplates a scenario where a fall occurs during VA hospitalization, presumably at a VA facility, such that there is some reasonable possibility that the fall related to VA care warranting application of the benefit-of-the-doubt doctrine when the cause of the fall cannot be identified. Unlike, the confined nature of that hypothetical, the record in this case presents possible alternative avenues for SEA infections, such as Appellant's polymyalgia rheumatica, the October 2009 fall, or other infections of the soft tissue or skin, which likely occurred outside the scope of VA dental treatment. *See, e.g.,* [R. at 331; 362]. Thus, Appellant's reliance on the GC Opinion in this regard is distinguishable from the situation presented here and militate in favor of the need for a preponderance of the evidence to establish actual causation absent a clear showing that the evidence is in equipoise.

In the decision on appeal, the Board found that a preponderance of the evidence was against Appellant's claim. [R. at 19]. The Board found the evidence of record failed to show that the March 4, 2010, dental treatment caused Appellant's SEA. [R. at 15-16]. The Board found that the December 2011 VA medical opinion persuasive on the question of actual causation because it opined that the "treatment provided was non-invasive and did not likely cause the infection that led to spinal abscess." [R. at 16]; *see* [R. at 579]. The Board also found that this opinion was consistent with the lack of an actual causation nexus in the March 2015 and April 2015 VA medical opinions. *Id*. In contrast, the Board found the July 2011 private medical opinion less

probative because "no explanation was provided as to how the oral flora attributed to SEA might be related to non-invasive dental treatment." [R. at 17]. The Board also found that the July 2011 private medical opinion provided "no rational was provided as to how it determined that timeline and severity substantiated the opinion." [R. at 18].

Appellant contests the Board's reliance on the December 2011 VA medical opinion because (1) the non-invasive nature of the March 4, 2010, dental treatment is not relevant to actual causation; (2) the likelihood of infection based on the March 4, 2010, dental treatment was not relevant to actual causation; and (3) the Board mischaracterized the December 2011 VA medical opinion. *See* App. Brf. at 14-16. However, reading the December 2011 VA medical opinion as a whole, it provided sufficient information to support the Board's finding that the March 4, 2010, "treatment provided was non-invasive and did not likely cause the infection that led to spinal abscess," [R. at 16], such that actual causation was not established, *see Monzingo v. Shinseki,* 26 Vet.App. 97, 106 (2012) (holding that a medical examination report must be read as a whole).

While it is true that the December 2011 VA medical opinion was provided in the context of Appellant's allegations that the March 4, 2010, dental care provider acted negligently, *see* App. Brf. at 14-15, that does not deprive the medical opinion of its probative value on the question of actual causation. A plain reading of the December 2011 VA medical opinion yields two critical findings relevant to actual causation: (1) the March 4, 2010, dental treatment

was non-invasive and (2) the risk of infection from a non-invasive dental procedure is no more likely than routine brushing, flossing, and eating. *See* [R. at 579]. The takeaway from these findings is that invasive dental procedures are more likely to cause infections than non-invasive dental procedures, and that non-invasive procedures are as harmless as everyday routine activities. It follows that because the March 4, 2010, dental treatment was non-invasive that it was less likely than not to have caused the significant systemic infection that Appellant later presented with. *See Monzingo*, 26 Vet.App. at 106. Contrary to Appellant's assertions, *see* App. Brf. at 14-15, the January 2011 medical opinion answers whether the March 4, 2010, dental treatment actually caused Appellant's SEA, *see* [R. at 579], and supports the Board's finding that March 4, 2010, dental "treatment provided was non-invasive and did not likely cause the infection that led to spinal abscess," [R. at 16]. The Board's analysis and reliance on the January 2011 VA medical opinion was not clearly erroneous.

To the extent Appellant believes that the January 2011 VA medical opinions statement that "[the non-invasive March 4, 2010, dental treatment] is no more likely to cause systemic infection than normal daily routine including brushing, flossing, and eating," places the dental procedure and brushing teeth in equipoise, App. Brf. at 16, that represents misunderstanding of the medical opinion. The dental chief was not saying that these are two, equally likely, alternative causes of a systemic infection, but that the likelihood of a systemic infection from a non-invasive procedure is equivalent to activities that the

average person engages in daily. In other words, the dental chief was opining by analogy that it is unlikely, or less likely than not, that the non-invasive March 4, 2010, dental treatment caused Appellant's SEA.

Appellant also disputes the Board's rejection of the July 2011 private medical opinion. App. Brf. at 16-18. The relevant portion of the July 2011 private medical opinion provides that "I can state within a reasonable degree of medical certainty that the dental procedure performed on March 4, 2010[,] led to the introduction of the Streptococcus viridans, which caused the life & function threatening holospinal abscess. This is further substantiated by the timeline and the severity of the infection." [R. at 668]. The July 2011 private opinion does not show an understanding of the nature of the March 4, 2010, dental treatment, unlike the December 2011 VA medical opinion, nor does the private opinion elaborate on the timeline or severity of the infection before spending most of the opinion discussing treatment and outcomes. *See id*. The Board found the July 2011 private medical opinion less probative because "no explanation was provided as to how the oral flora attributed to SEA might be related to non-invasive dental treatment." [R. at 17]. The Board also found that the July 2011 private medical opinion provided "no rational was provided as to how it determined that timeline and severity substantiated the opinion." [R. at 18]. The Board explained that "VA regulations specifically provide that merely showing that a [v]eteran received treatment and has an additional disability does not establish cause." *Id*. (citing 38 C.F.R. § 3.361(c)). In contrast, and as discussed

above, the December 2011 VA medical opinion showed an understanding of the March 4, 2010, dental procedure and explained that the non-invasive procedure was unlikely to cause a systemic infection. Thus, the Board's weighing of these competing medical opinions on the question of actual causation was not clearly erroneous. *Spellers*, 30 Vet.App. at 221.

To the extent that Appellant's arguments could be read as including that the VA examiners needed to explain what caused the oral flora, App. Brf. at 13, pinpointing the exact cause for a veteran's additional disability is one possible way for a medical examiner to explain a negative linkage, but it is not required. *See Jones v. Shinseki*, 23 Vet.App. 382, 388 (2010) (requiring, for medical opinions, "some assessment of probability, as opposed to a definitive statement of the cause of the disabilities"); *Stefl v. Nicholson*, 21 Vet.App. 120, 124 (2007) ("Relevant points that can be discussed in an examination report include, but are not limited to, why the examiner finds cited studies persuasive or unpersuasive, whether the veteran has the other risk factors for developing the claimed condition, and whether the claimed condition has manifested itself in an unusual manner." (emphasis added)). Moreover, the Board's requirements do not include determining the exact cause of a disability but do include determining whether there exists "competent and credible evidence of linkage between the in-service disease or injury and the present disability." *Shedden v. Principi*, 381 F.3d 1163, 1167 (Fed. Cir. 2004). Where, as here, the examiner determined whether the veteran's additional disability was not actually caused by the VA

treatment, the Court should find that the examiner provided the requisite rationale for an adequate medical opinion that supported the Board's finding that the January 2011 VA medical opinion was more probative.

Appellant also contests the April 2015 VA medical opinion because (1) it was ordered to gather evidence against the claim; (2) it was based on a false foundation; and (3) it was biased. App. Brf. at 18-22. Initially, the Secretary notes that this medical opinion, among others, was primarily used to support the Board's finding that the March 4, 2010, dental care provider exercised the degree of care that would be expected of a reasonable health care provider. *See* [R. at 16]. Appellant does not contest the Board's findings or the evidence of record showing that the March 4, 2010, VA dental provider did not act with reasonable care, *see* App. Brf. at 1-30, and any such arguments should be deemed abandoned, *Pederson v. McDonald*, 27 Vet.App. 276 (2015) (holding that claims and issues not challenged on appeal are abandoned). But, as noted above, a preponderance of the evidence is against a finding of actual causation here, such that the question of proximate causation—including reasonable and events not reasonably foreseeable—is moot. *Ollis*, 857 F.3d at 1343.

To the extent that the Board relied on the March and April 2015 VA medical opinions on the question of actual causation, such reliance was limited to a finding that these medical opinions were consistent with the December 2011 VA medical opinion on actual causation. *See* [R. at 16]. Therefore, any error in the Board's reliance on the March and April 2015 VA medical opinions is at best

harmless error because they merely support the findings of the December 2011 VA medical opinion. 38 U.S.C. § 7261(b)(2) (requiring the Court to "take due account of the rule of prejudicial error").

Nevertheless, Appellant's concerns about the April 2015 VA medical opinions are not persuasive and divorce the opinion from its context. First, the RO's emails with the dental chief do not reflect a hunt for negative evidence. *See* [R. at 240-45]. Instead, they show an adjudicator, familiar with the relevant law, seeking clarification from a medical expert, likely with no familiarity of the relevant law, about the nature of his medical opinion in the context of the relevant law. [R. at 240-42]. They also show that quality review identified a possible conflict between his March and April 2015 opinions, allowing the RO to seek clarification and avoid future delay in the adjudication of Appellant's case. [R. at 240]. The VA dental chief's response that "I think I see what you mean" does not show an attempt to appease the adjudicator but an acknowledgement of the conflict highlighted by the quality reviewer in his opinions. *Id*. The subsequent opinion largely shows an understanding of the inherent conflict highlight by the RO. *See id*. Thus, unlike *Mariano*, the RO was not providing the VA dental chief with an answer, but merely trying to clarify his answers. *See* [R. at 240-41]; *Mariano v. Principi*, 17 Vet.App. 305 (2003). Appellant's argument assumes malicious intent on the part of the RO, but the RO should be presumed to be properly exercising their duties absent clear evidence otherwise. *Miley v. Principi,* 366 F.3d 1343, 1347 (Fed.Cir.2004) ("The presumption of regularity

provides that, in the absence of clear evidence to the contrary, the court will presume that public officers have properly discharged their official duties."). The April 2015 email exchange is not such clear evidence.

Next, to the extent Appellant argues that the March and April 2015 VA medical opinions were based on a false premise because they misidentified the specific dental treatment provided on March 4, 2010, App. Brf. at 21, the Board acknowledged that these VA medical opinions incorrectly identified the specific March 4, 2010, dental treatment but concluded that "the information provided as to the medical literature review and as to an actual or proximate causal relationship is valid and not inconsistent with the other medical and scientific study evidence of record," [R. at 16]. As discussed above, that was the limited basis the Board relied on these opinions—to confirm the opinion of the December 2011 VA dental chief. *Id*. Indeed, the March 2015 VA medical opinion that "[e]ven though the bacteria species cultured from the spinal abscess can be readily found in the oral cavity, to say that the extraction of the molar tooth #19 or cleaning caused the spinal abscess is mere speculation," [R. at 243], is consistent with the December 2011 VA opinion also providing that it was unlikely that the dental treatment actually caused Appellant's SEA.

To the extent Appellant appears to believe that the RO made an implicit finding of actual causation because it sought medical opinions about his allegations of negligence and that his SEA was not reasonably foreseeable, *see* App. Brf. at 19-20, any such finding would have no bearing on the Board here

because the Board is not bound by favorable findings of the RO when conducting a de novo review of the appeal, *see McBurney v. Shinseki*, 23 Vet.App. 136, 139 (2009) ("The Board, as the final trier of fact, is not constrained by favorable determinations below."), *aff'd per curium*, 407 F. App'x 480 (Fed. Cir. 2011).

To the extent Appellant also argues that the Board misunderstood the role of proximate causation in section 1151 claims, App. Brf. at 23-24, any such error was harmless here because the threshold question of actual causation between the March 4, 2010, VA dental treatment and Appellant's SEA was not established by a preponderance of the evidence. 38 U.S.C. § 7261(b)(2). Appellant must first show that the March 4, 2010, VA dental treatment was the actual cause of his SEA before proceeding to the proximate cause analysis. *Ollis*, 857 F.3d at 1343. As the Board found, the evidence fails to show actual causation, so there was no need for the Board to engage in proximate causation. *See* [R. at 15]. Now, the Secretary acknowledges that the Board stated that Appellant's residuals "were not actually or proximately caused by VA treatment." *See, e.g.,* [R. at 15]. But the Board's finding that actual causation was not established within those statement's renders any reference to proximate causation harmless. Thus, to the extent the Board found that Appellant's claims about informed consent and that his SEA was an event not reasonably foreseeable were moot, this was appropriate given the finding of no actual causation. This case starts and stops with the Board's plausible finding that the March 4, 2010, VA dental treatment did not actually cause Appellant's SEA. *Ollis*, 857 F.3d at 1343.

To the extent Appellant argues for reversal on nearly every factual determination made by the Board, *see* App. Brf. at 13-23, reversal only is warranted when the only permissible view of the evidence is contrary to the Board's decision. *Gutierrez v. Principi*, 19 Vet.App. 1, 10 (2004). As argued above, the Board's findings related to the threshold question of actual causation were plausibly supported by the record such that reversal is inappropriate here, much less warranting the outright grant of section 1151 benefits. *See* App. Brf. at 29. If the Court disagrees that the Board has correctly applied the law or provided an adequate statement of reasons or bases for its determinations, or that the record is adequate, a remand is generally the appropriate remedy. *Id*.

In sum, the Board properly denied entitlement to section 1151 compensation because the preponderance of the evidence failed to show that the March 4, 2010, VA dental treatment actually caused Appellant's SEA. This finding was plausibly supported by the December 2011 VA medical opinion and consistent with other VA medical opinions and cited treatise evidence. The Board properly rejected the July 2011 private medical opinion because it failed to provide a sufficient rationale for its finding about actual causation. Thus, a preponderance of the evidence is against the claim. The Court should affirm the Board's decision.

The Secretary has limited his response to only those arguments reasonably construed to have been raised by Appellant in his opening brief and submits that any other arguments or issues should be deemed abandoned. *See*

Pieczenik v. Dyax Corp., 265 F.3d 1329, 1332-33 (Fed. Cir. 2001); *Norvell v. Peake*, 22 Vet.App. 194, 201 (2008).

CONCLUSION

Wherefore, for the foregoing reasons, Appellee, Robert L. Wilkie, Secretary of Veterans Affairs, respectfully urges the Court to affirm the Board's March 7, 2019, decision.

Respectfully submitted,

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