IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

LEROY D. ANDERSON,
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

LEROY D. ANDERSON Appellant, v. **ROBERT L. WILKIE**, Secretary of Veterans Affairs, Appellee.	))))))))))	Vet App. No. 19-0673

ON APPEAL FROM THE BOARD OF VETERANS' APPEALS

BRIEF OF THE APPELLEE SECRETARY OF VETERANS AFFAIRS

I. ISSUE PRESENTED

Whether the Court should affirm the Board of Veterans Appeals' (Board or BVA) October 3, 2018, decision which denied Appellant's claim of entitlement to service connection for sleep apnea (OSA).

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

The Court's jurisdiction in this matter is predicated on 38 U.S.C. § 7252(a), which grants the Court of Appeals for Veterans Claims exclusive jurisdiction to review final decisions of the Board.

B. Nature of the Case

Appellant, Leroy D. Anderson, appeals the Board's October 2018 decision which denied entitlement to service connection for OSA. (Record Before the Agency (R.)) (R. at 4-8).

C. Relevant Factual and Procedural History

Appellant served on active duty from September 1966 to September 1968. (R. at 2789). Appellant underwent a sleep study in August 2009 and was diagnosed with OSA. (R. at 990-91). Appellant filed a claim for service connection for OSA in July 2017. (R. at 184-86).

The Regional Office (RO) issued a rating decision denying Appellant's claim in September 2017 (R. at 122-39), and Appellant filed a timely Notice of Disagreement. (R. at 112-21). The RO issued a Statement of the Case (SOC) in October 2017 continuing the denial. (R. at 53-71). Appellant subsequently filed a substantive appeal in November 2017. (R. at 34-35).

III. SUMMARY OF THE ARGUMENT

The Secretary maintains the Court should affirm the Board's October 2018, decision denying Appellant entitlement to service connection for OSA. The Board properly determined that the duty to assist was satisfied and a VA examination was not warranted, and otherwise provided an adequate statement of reasons or bases for decision.

IV. ARGUMENT

A. Applicable Law

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 Court reviews the Board's findings of fact under the clearly erroneous standard of review. *See Swann v. Brown*, 5 Vet.App. 229, 232 (1993); *see also Gilbert v. Derwinski*, 1 Vet. App. 49, 52-53 (1990). Under this standard of review, the Court cannot substitute its judgment for that of the Board and must affirm the Board's factual determinations so long as they are supported by a plausible basis in the record. *Id.* at 52; *see also Deloach v. Shinseki*, 704 F.3d 1370, 1380 (Fed. Cir. 2013) ("The Court of Appeals for Veterans Claims, as part of its clear error review, must review the Board's weighing of the evidence; it may not weigh any evidence itself.").

In rendering its decision, the Board is required to provide a written statement of its "findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented on the record." 38 U.S.C. § 7104(d)(1). The statement must be adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court. *See Gilbert* at 57.

The Board has wide latitude when it comes to deciding matters of fact and its factual determinations may be derived from any number of sources, to include credibility determinations, physical or documentary evidence, or inferences drawn from other facts. *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985). The mere fact that the evidence could be viewed differently does not render the Board's interpretation of the evidence clearly erroneous. *Id.* ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.").

B. The Board provided an adequate statement of reasons or bases for its decision

Appellant contends that the Board erred when it failed to provide an adequate statement of reasons or bases for finding that a VA examination was not warranted. Appellant's Brief (App. Br. at 3-8).

The Secretary does not have an absolute duty to provide a claimant with a medical examination or medical opinion. *See* 38 C.F.R. § 3.159(c)(4). Its obligation to provide such services extends only insofar as, based upon its review of the evidence of record, it determines such service to be "necessary to decide the claim." *Id*. A medical examination or opinion is necessary only if (1) the evidence contains competent evidence of a current diagnosed disability or persistent or recurrent symptoms of disease; (2) the evidence establishes that the veteran suffered an in-service event, injury or disease; (3) the evidence indicates that the claimed disability or symptoms may be associated with the established in-

service event, injury or disease or with another service-connected disability; and (4) the information and evidence of record does not contain sufficient competent medical evidence to decide the claim. *McLendon v. Nicholson,* 20 Vet.App. 79, 85-86 (2006).

Here, as Appellant concedes, the Board acknowledged that he was not afforded a VA examination for OSA. (R. at 7 (4-10)); *see also* (App. Br. at 4-5). Upon consideration of the evidence, the Board properly considered whether an examination was warranted under *McClendon*. (R. at 7). The Board found that Appellant satisfies the first prong of *McLendon*, as he does have a current diagnosis of OSA. *Id*. However, it also properly found that there is no evidence that Appellant suffered an in-service event, injury or disease and no competent that his OSA may be associated with service or with a current service-connected disability. *Id*. The Board's finding is consistent with the evidence of record.

Appellant does not point to any evidence of an in-service injury or event or association with a service-connected condition. (App. Br. at 1-9). Instead he now argues that the Board should have addressed the theory that his in-service weight gain caused or aggravated his sleep apnea. (App. Br. at 6). However, Appellant fails to support this assertion or cite to any authority that indicates that in-service weight gain constitutes a bases for service connection. *Locklear v. Nicholson,* 20 Vet.App. 410, 416 (2006) (holding that Court will not entertain underdeveloped arguments). Therefore, the Court should reject this argument as it is tenuous at best and predicated on Appellant's own creative interpretation of the evidence.

Further, Appellant is raising his current argument for the first time before the Court. *Maggitt v. West,* 202 F.3d 1370, 1377 (Fed. Cir. 2002) (holding that where an appellant raises an issue before the Court that was not raised below, the Court has discretion to determine whether the hear the argument in the first instance). Notably, Appellant has been represented by the same counsel from the inception of his OSA claim, yet the current theory of entitlement was not explicitly raised at any point before the agency. (R. at 184-85); *see Fugere v. Derwinski*, 1 Vet.App. 103, 105 (1990) (recognizing that piecemeal litigation does not serve the interests of the parties or the court). The Court should now decline to hear this argument in the first instance.

Moreover, and despite Appellant's assertions to the contrary, Appellant's current theory of in-service weight gain was not reasonably raised by the record such the Board was required to address it. *See Robinson v. Peake,* 21 Vet.App. 545, 552-56 (2008), aff'd sub nom. *Robinson v. Shinseki,* 557 F.3d 1355 (Fed. Cir. 2009) (The Board is required to address only those issues either expressly raised by the claimant or reasonably raised by the record.) A theory of entitlement that is not raised by either the claimant or the evidence of record need not be considered. Indeed, the Court has made clear that the Board does not "assume the impossible task of inventing and rejecting every conceivable argument in order to produce a valid decision." *Robinson,* 21 Vet.App. at 553.

Here, Appellant's service records note that Appellant weighed 203 pounds at his pre-induction examination in September 1966 (R. at 2713 (2711-13)), and

212 pounds in September 1968 when he separated from service. (R. at 2742 (2739-42)). On his separation examination, Appellant also denied having "frequent trouble sleeping". (R. at 2739). Appellant gained 9 pounds during two years of service. However, he was not diagnosed with sleep apnea until 41 years later, in August 2009. (R. at 990-91). Moreover, in July 2009 when he was referred for a sleep study, Appellant reported that he has unintentionally gained weight because he cannot exercise due to knee pain and his primary care physician noted that he weighed 244.6 pounds (R. at 1002(1000-03)). He was advised at that time to reduce his weight. (R. at 1003). It is clear from this record that Appellant's weight gain is associated with his non service-connected knee condition, rather than an in-service occurrence. (R. at 1002). Therefore, the mere fact that Appellant gained weight in service does not reasonably raise his current theory of entitlement.

To the extent that Appellant suggests that the Board failed to consider favorable evidence, that link his 9-pound weight gain 41 years ago in service, to his current OSA, his argument is based on his own consideration and weighing of the evidence. (App. Br. at 6-7). However, it is the province of the Board, not Appellant, to weigh and assign probative value to the evidence of record. *See D'Aries v. Peake*, 22 Vet.App. 97, 107 (2008) (it is the responsibility of the Board to assess the credibility and weight to be given to evidence). The Board is presumed to have considered all of the evidence of record and there is nothing in this Board decision that suggest otherwise. *Newhouse v. Nicholson*, 497 F.3d 1298, 1302 (Fed. Cir. 2007). The medical record that Appellant relies on

demonstrates that he was overweight in August 2009, but there is nothing to indicate that he was overweight or obese during service. (R. at 2064-65). Likewise, there is no evidence that Appellant "continued to gain weight steadily" as Appellant suggests. (App. Br. at 6). He gained approximately 30 pounds over the span of 40 years, and per his own statement some if not all of his weight gain was attributable to his inability to exercise as a result of his knee problems. (R. at 1002).

To this end, Appellant has failed to demonstrate that his current contention that in-service weight gain caused or aggravated his OSA was reasonably raised by the record. *See Mayfield v. Nicholson*, 19 Vet.App. 103, 111 (2005) (noting that "every appellant must carry the general burden of persuasion regarding contentions of error"), *rev'd on other grounds*, 444 F.3d 1328 (2006). Likewise, he has failed to demonstrate that the Board erred in its finding that a VA examination was not warranted or that the reasons or bases for its decision are otherwise inadequate. Because there was a plausible basis for the Board's decision, to include its weighing of the evidence of record, Appellant's arguments must fail. *See Shinseki v. Sanders*, 129 S. Ct. 1696, 1706 (2009); *Mayfield,* 19 Vet.App. at 111. Accordingly, the Board's decision is plausibly based should be affirmed.

V. CONCLUSION

WHEREFORE, for the foregoing reasons, the Secretary respectfully submits that the Board's October 2018, decision should be affirmed.

Respectfully submitted,

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