Vet.App. No. 19-3419

IN THE UNITED STATES COURT
OF APPEALS FOR VETERANS CLAIMS

MARGARET RATHKA,
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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	)	
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	)	
Appellee.	)	

ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS

BRIEF OF THE APPELLEE
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I. ISSUE PRESENTED

In its April 2, 2019, decision, the Board of Veterans' Appeals (Board) denied (1) entitlement to Dependency and Indemnity compensation (DIC) under statutory section 1318, and (2) entitlement to service connection for the cause of the Veteran's death. The Board found that (1) the claim does not satisfy the statutory criteria for DIC, and (2) the evidence does not show that the Veteran's service-connected disabilities contributed to his death, or that the underlying causes for his death are related to service. Should the Court affirm the Board's decision where Appellant fails to show that the Board erred in relying on an expert medical opinion explaining that the Veteran's death, including ambulatory difficulties and problems moving about shortly before his death, were more likely due to nonservice-connected conditions?

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

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

B. Nature of the Case

Appellant, Margaret Rathka, the surviving spouse of Veteran Jack A. Rathka, appeals the Board's decision denying (1) entitlement to DIC under statutory section 1318, and (2) entitlement to service connection for the Veteran's cause of death. [Record Before the Agency (R.) at 3-12].

C. Statement of Facts

The Veteran served on active duty in the United States Army from December 1964 to December 1967. [R. at 473]. At the time of separation, the Veteran was not service connected for any disabilities. [R. at 4].

In December 2015, the Department of Veterans Affairs (VA) Regional Office (RO) issued a rating decision awarding entitlement to service connection for (1) a traumatic brain injury (TBI), with a zero percent rating, and (2) a seizure disorder, with a 10% rating. [R. at 270 (250-75)]. The RO denied entitlement to service connection for (1) a right leg condition, (2) a left leg condition, and (3) varicose veins of the bilateral lower extremities. [R. at 270].

In January 2016, the Veteran underwent a bilateral leg claudication. [R. at 160-67]. Prior to surgery, the Veteran reported being a very active individual,

who enjoyed hunting, fishing, and chores (e.g., lawn mowing and snow removal). [R. at 160]. The Veteran reported, however, that the pain in his legs continued to interrupt his active lifestyle. [R. at 160].

In March 2016, the Veteran filed a Notice of Disagreement with the December 2015 Rating Decision. [R. at 221-23]. The Veteran died eight days later. [R. at 102]. The immediate cause of death was found to be an acute pulmonary embolism, with underlying causes of death found to be chronic atrial fibrillation and coronary artery disease. [R. at 102]. Hepatocellular carcinoma and portal vein thrombosis were noted to be conditions that contributed to death but did not result in the underlying causes of death. [R. at 102]. At the time of death, the Veteran was service connected for a TBI (zero percent) and a seizure disorder (10%). [R. at 6; 268].

Appellant, the Veteran's surviving spouse, applied for DIC benefits in April 2016. [R. at 96-100]. In August 2016, she submitted a private medical opinion in which a physician opined that the Veteran's pulmonary emboli (the immediate cause of death) arose from his lower extremities, which the physician opined was caused by the Veteran's very sedentary lifestyle, which in turn was the result of the Veteran's service-connected TBI. [R. at 82]. Appellant argued the same in her accompanying statement, contending that venous thromboembolism is common after major trauma, which she argued was caused by the Veteran's TBI, and further argued that the Veteran's decreased mobility was due to his venous

thromboembolism, which she believed was one of the main causes of the Veteran's pulmonary complications. [R. at 81].

In September 2016, the RO issued a rating decision denying, *inter alia*, (1) entitlement to DIC benefits under statutory section 1318, and (2) entitlement to service connection for the cause of the Veteran's death. [R. at 77 (68-80)]. The RO found that Appellant's claim for substitution was not valid. [R. at 75]. VA received a timely Notice of Disagreement in March 2017. [R. at 62-65]. Appellant reiterated her contention that the Veteran's service-connected conditions led to his sedentary lifestyle, which in turn led to the conditions contributing to his death. [R. at 64].

In October 2017, VA provided Appellant with a medical opinion addressing the issue. [R. at 52-53]. The VA physician opined that the Veteran's service-connected TBI and seizure disorder did not render him debilitated or generally impaired to resist the effects of nonservice-connected liver cancer and congestive heart failure. [R. at 52-53]. The examiner explained, after noting the Veteran's most recent medical history prior to passing (e.g., the bilateral leg claudication), that it is more likely that any hypercoagulable blood condition leading to the Veteran's pulmonary embolism was to due his cancer and heart failure, which the examiner noted are common complications of the latter conditions. [R. at 52]. The physician also opined that the Veteran's service-connected TBI and seizure disorder were less likely than not related to service. [R. at 53].

Shortly after this medical opinion, the RO issued a Statement of the Case affirming its previous denials. [R. at 47 (21-51)]. Appellant then filed a timely substantive appeal. [R. at 17-18]. Appellant reiterated her previous argument about the nature of the Veteran's death, and now contends that the VA physician did not consider the Veteran's in-service traumatic injury. [R. at 17-18].

In April 2019, the Board issued the decision currently on appeal. [R. at 3-12]. The Board found that Appellant is not entitled to DIC benefits under statutory section 1318 because the Veteran was not service connected at the time of his discharge, he was not rated as totally disabled prior to his death, and he was never a prisoner of war. [R. at 4]. The Board found that service connection is not warranted for the cause of the Veteran's death, finding the October 2017 VA opinion to hold significant probative weight. [R. at 7-8]. The Board found that the VA opinion is more probative than the August 2016 private opinion, which was based on an inaccurate factual premise for not considering the fact that the Veteran himself reported having an active lifestyle. [R. at 8]. This appeal followed.

III. SUMMARY OF THE ARGUMENT

The Court should affirm the Board's decision denying both claims on appeal. As to entitlement to DIC benefits under statutory section 1318, the Board correctly found that Appellant does not satisfy the eligibility criteria outlined in the statute. Appellant does not dispute this conclusion and there is no evidence of

clear error in the conclusion. The Court should therefore dismiss an appeal of that claim.

The Board also correctly found that service connection is not warranted for the cause of the Veteran's death. The Board relied on the October 2017 VA examination that attributed the cause of death to nonservice-connected conditions. Appellant fails to show that the Board's discussion is insufficient or that the examination report is inadequate. The Court should affirm this conclusion as well.

IV. ARGUMENT

A. Standard of Review.

The Court reviews the Board's findings about a veteran's cause of death and entitlement to DIC benefits under the "clearly erroneous" standard of review. *See* 38 U.S.C. § 7261(a)(4); *Bonner v. Nicholson*, 19 Vet.App. 188, 195 (2005). The Supreme Court has held that a finding is clearly erroneous "when although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985) (explaining how an appellate court reviews factual findings under the "clearly erroneous" standard); *see Padgett v. Nicholson*, 19 Vet.App. 133, 146 (2005) (quoting same). In addition, the Supreme Court has held that under the clearly erroneous standard of review, "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson*, 470 U.S. at 574.

The Court also reviews whether the Board supported its decision with 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). Section 7104(d)(1) does not, however, require the Board to use any particular statutory language or "terms of art." *Jennings v. Mansfield*, 509 F.3d 1362, 1366 (Fed. Cir. 2007). Additionally, the Board is presumed to have considered all the evidence of record, even if the Board does not specifically address each item of evidence. *Newhouse v. Nicholson*, 497 F.3d 1298, 1302 (Fed. Cir. 2007).

It is relevant to the Court's standard of review that an appellant generally bears the burden of demonstrating error in a Board decision. *Hilkert v. West*, 12 Vet.App. 145, 151 (1999), *aff'd* 232 F.3d 908 (Fed. Cir. 2000). An appellant's burden also includes the burden of demonstrating that any Board error is harmful. *Waters v. Shinseki*, 601 F.3d 1274, 1278 (Fed. Cir. 2010). Furthermore, arguments not raised in the initial brief are generally deemed abandoned, and the Court should find that Appellant has abandoned any argument not presented in his initial brief. *See Carbino v. West*, 168 F.3d 32, 34 (Fed. Cir. 1999) ("[C]ourts have consistently concluded that the failure of an appellant to include an . . . argument in the opening brief will be deemed a waiver of the . . . argument.").

B. Appellant does not dispute the Board's finding that she is not entitled to DIC benefits under statutory section 1318

The Board correctly denied Appellant's claim for DIC benefits under statutory section 1318. Generally, the surviving spouse of a deceased veteran may be eligible to receive DIC benefits under § 1318 in the same manner as if the veteran's death were service connected. 38 U.S.C. § 1318(a). In order to establish entitlement to DIC benefits under § 1318, the evidence must show that the Veteran died, not as a result of his own willful misconduct, and was in receipt of or entitled to receive compensation at the time of death for a service-connected disability rated totally disabling if: (1) the disability was continuously rated as totally disabling for a period of 10 or more years immediately preceding death; (2) the disability was continuously rated as totally disabling for a period of at least five years from the date of the Veteran's discharge or other release from active duty; or (3) the Veteran was a former prisoner of war, and the disability was continuously rated as totally disabling for a period of not less than one year immediately preceding death. 38 U.S.C. § 1318(b). The Board correctly found that Appellant's claim does not satisfy these requirements.

In particular, the Board identified three reasons why DIC benefits under § 1318 are not warranted. [R. at 4]. First, the evidence shows that the Veteran was discharged from active duty in December 1967 and had no service-connected disabilities at that time. [R. at 4]. Second, at the time of his death, the Veteran had not been rated as totally disabled. [R. at 4]. And third, the Veteran

was never a prisoner of war. [R. at 4]. Consequently, Appellant's claim does not satisfy the statutory requirements and the Board correctly denied entitlement to DIC under § 1318.

Appellant does not dispute this conclusion or otherwise make an argument alleging error. An appeal of that claim should therefore be considered abandoned, and the Court should dismiss an appeal of that claim. *See Pederson v. McDonald*, 27 Vet.App. 276, 279 (2015) (en banc).

C. As to the Veteran's cause of death, the Board correctly found that the evidence does not support a finding that the Veteran's service-connected disabilities caused or contributed to his death and that the competent medical evidence actually shows that the Veteran's nonservice-connected disabilities contributed to his death

The Board correctly found that service connection is not warranted for the cause of the Veteran's death. Generally, benefits may be awarded to the surviving spouse of a veteran if the veteran's death was due to a service-connected disability or compensable disability. *See* 38 U.S.C. § 1310; 38 C.F.R. § 3.312. The evidence must show that the service-connected disability was either the principal or contributory cause of death. *See* 38 C.F.R. § 3.312(a). A determination of whether the disability that caused the veteran's death was related to service is dictated by the same laws and regulations that generally apply to claims for service connection: evidence of (1) a current disability, (2) an in-service incurrence or aggravation of a disease or injury, and (3) a nexus between the claimed in-service disease or injury and the current disability. *See*

38 U.S.C. § 1310; *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996). As the Board found, Appellant fails to satisfy these requirements.

In this case, the Board properly found that service connection is not warranted for the conditions that caused or contributed to the Veteran's death (acute pulmonary embolism, chronic atrial fibrillation, coronary artery disease, hepatocellular carcinoma, or portal vein thrombosis). [R. at 6; 102]. The Board found that there is no evidence that any of these conditions is related to service. [R. at 6]. The Board noted that there are no complaints, treatments, or manifestations of these conditions in service. [R. at 6]. Accordingly, the Board focused on any possible connection between the Veteran's service-connected disabilities (TBI and a seizure disorder) and his death. [R. at 6].

The Board noted Appellant's argument that the Veteran's service-connected disabilities caused or contributed to his portal vein thrombosis because the Veteran's TBI and restricted his ambulatory ability and ability to sit for long periods of time, which Appellant contends increased the Veteran's risk of pulmonary embolism and blood clots. [R. at 6; 18]. The Board further noted Appellant's contention that the Veteran's in-service injury that caused the TBI disability contributed to the Veteran's thromboembolism. [R. at 6; 81]. The Board correctly found, however, that the Veteran's service-connected TBI and seizure disorder disabilities were not principal or contributory causes of the Veteran's death. [R. at 9]. In this regard, the Board relied on the October 2017

VA examiner's negative nexus opinion, in which the examiner found that it was more likely that any hypercoagulable blood condition leading to pulmonary embolism was the result of nonservice-connected liver cancer and congestive heart failure, explaining that pulmonary embolism was a common complication of both of those conditions, with the Veteran's cancer leaving him weak and minimally ambulatory. [R. at 7; 52-53]. The Board found that this opinion holds significant probative value because the factual predicate that the examiner relied on, regarding the Veteran's being active, is consistent with the Veteran's own statements about being "very active" and only limited by bilateral leg pain, even after the TBI and seizure disorders. [R. at 8; 52-53; 160]. More specifically, the Board found that the evidence shows that the Veteran remained active and did not experience the loss of mobility until well after the service-connected TBI and seizure disorders, with his ambulatory difficulties corresponding instead to his nonservice-connected liver cancer and congestive heart failure shortly before his death. [R. at 8]. Appellant fails to show clear error in this decision.

1. Appellant fails to show that the Board provided an inadequate statement of reasons or bases

Appellant argues that the Board did not adequately consider her argument that the Veteran's in-service injury (resulting in service-connected TBI) caused the Veteran's venous thromboembolism. *See* Appellant's Brief (App. Br.) at 8-10. The Board's decision must generally be based on all the evidence of record, and the Board must 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." *Allday v. Brown*, 7 Vet.App. 517, 527 (1995). To comply with this requirement, the Board must analyze the credibility and probative value of the evidence, account for the evidence that it finds persuasive or unpersuasive, provide the reasons for its rejection of any material evidence favorable to the claimant, and consider and discuss all "potentially applicable" provisions of law and regulation. *Schafrath v. Derwinski*, 1 Vet.App. 589, 593 (1991); *see Caluza*, 7 Vet.App. at 506 (1995). Appellant fails to show that the Board fell short of these requirements.

Appellant disputes the Board's finding that there is no evidence or argument presented to show that the condition is related to service or otherwise manifested in service, pointing to evidence of lay statements alleging such a theory and treatment, and a service treatment showing the possibility of a foreign body in right leg tissue. App. Br. at 8-9. She then contends that the Board did not address the argument in any meaningful manner, omitting the word "parachute" or "hard landings." App. Br. at 9. This argument is unavailing because Appellant does not show error.

As Appellant acknowledges, the Board acknowledged Appellant's contention, [R. at 6]. App. Br. at 9. Appellant simply disagrees with the Board's decision. The Board explained that there is no competent evidence to support

such a theory. [R. at 6, 8]. Indeed, the only evidence that Appellant identifies are lay statements and her own hypotheses, but the evidence does not show that either Appellant or the Veteran were qualified to opine on the nature of the condition or the resulting complications from the in-service injury. *See Jandreau v. Nicholson,* 492 F.3d 1372, 1376-77 (Fed. Cir. 2007) (lay person generally not qualified to offer competent testimony on matters that require medical expertise); *Hyder v. Derwinski,* 1 Vet.App. 221, 225 (1991) ("Lay hypothesizing, particularly in the absence of any supporting medical authority, serves no constructive purpose . . . ."). Indeed, the Board found that the October 2017 VA medical opinion is entitled to significant probative weight. [R. at 8]. Moreover, the fact that the Board did not specifically mention "parachutes" or "hard landings" does not detract from the value of its conclusion, especially when the Board acknowledged Appellant's argument (showing that it was aware of the argument) and adequately explained the reasons for its decision. *See Jennings v. Mansfield,* 509 F.3d 1362, 1366 (Fed. Cir. 2007) (explaining that § 7104(d)(1) does not require the use of particular statutory language or "terms of art."). Appellant fails to show error on this ground.

Appellant also incorrectly accuses the Board of mischaracterizing the Veteran's description of his lifestyle as "active." App. Br. at 10-11. As noted above, the Board found that the Veteran had reported in January 2016 that he lived an active lifestyle, even after the TBI and seizure disabilities, until he experienced further complications from bilateral leg claudication, and that the

medical evidence after January 2016 showed that the Veteran was left weak and minimally ambulatory because of liver cancer and congestive heart failure. [R. at 8-9; 160; 52]. The Board noted that the Veteran and Appellant may have been describing the Veteran's lifestyle after January 2016 but found that neither one of them were competent to medically ascertain the reasons for debility, especially when the evidence suggests that ambulatory problems corresponded with the bilateral leg claudication and the nonservice-connected liver cancer and congestive heart failure. [R. at 8-9]. Appellant argues that the Board omitted the remaining portion of the Veteran's January 2016 statement in which the Veteran reported that the pain continues to interrupt the Veteran's lifestyle, which Appellant contends shows that the active lifestyle was interrupted by the pain. App. Br. at 10; [R. at 160]. But this is unpersuasive because the Veteran reported that he was "very active," enjoying a number of activities, with the pain interrupting "his active lifestyle"; he did not report that the pain inhibits or prevents his "active lifestyle." In this sense, interrupting an active lifestyle is not the same as precluding one.

Appellant also takes issue with the Board's consideration of the identified activities as being active. App. Br. at 9-10. This is unavailing. Sedentary is defined as "doing or requiring much sitting," or "not physically active." MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/sedentary (last visited Feb. 6, 2020). The Veteran's reported activities (hunting, fishing, lawn mowing, snow removal), contrary to Appellant's disagreement, cannot be

considered sedentary, such that they require much sitting and not being physically active, especially activities like hunting and snow removal, which require a high level of movement and physical activity. App. Br. at 9-10; [R. at 160]. This is especially true given the fact that the Veteran himself identified these activities to highlight his own reported "very active" lifestyle. [R. at 160]. Appellant's argument that these are not sedentary activities fails.

Lastly, Appellant argues that the Board did not address the Veteran's explanation and description of seizures as constricting him to bedrest for periods of time and their effects on his body. App. Br. at 11. Again, Appellant ignores that the Board acknowledged the argument that seizures caused the Veteran to be minimally ambulatory and that the Veteran could not avoid sitting for long periods of time. [R. at 6]. But as explained above, the Board found that the evidence does not support a relationship between the service-connected seizures disability and the Veteran's death, with the October 2017 VA examiner attributing any hypercoagulable blood condition, weakness, and ambulatory inabilities to nonservice-connected liver cancer and congestive heart failure. [R. at 6-7; 52-53]. Again, Appellant does not show that the Board's statement of reasons or bases is inadequate. The Court should reject Appellant's arguments alleging that the Board's statement of reasons or bases is inadequate.

2. The October 2017 VA opinion is adequate, and Appellant's arguments are unpersuasive because the examiner was presumed to have considered the evidence of record and was not required to specifically identify each piece of evidence that he reviewed

The Court should reject Appellant's argument that the October 2017 VA examination is inadequate because she fails to support her argument with evidence in the record. Generally, a medical examination or opinion is adequate where the examiner's opinion is based upon consideration of the Veteran's prior medical history and describes the disability in sufficient detail so that the Board's "'evaluation of the claimed disability will be a fully informed one.'" *Ardison v. Brown*, 6 Vet.App. 405, 407 (1994) (quoting *Green v. Derwinski*, 1 Vet.App. 121, 124 (1991)); *see Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 304 (2008) (holding that a probative medical opinion will be "factually accurate, fully articulated, [with] sound reasoning for the conclusion"); *Stefl v. Nicholson*, 21 Vet.App. 120, 124 (2007) (holding that a VA medical opinion "must support its conclusion with an analysis that the Board can consider and weigh against contrary opinions"). "The Board must be able to conclude that a medical expert has applied valid medical analysis to the significant facts of the particular case in order to reach the conclusion submitted in the medical opinion." *Nieves-Rodriquez*, 22 Vet.App. at 304; *see Parrish v. Shinseki*, 24 Vet.App. 391, 401 (2011) (holding that "the foundation and rationale of a medical opinion are crucial when the Board compares medical opinions and assesses the weight to be provided thereto"). Appellant fails to show that the October 2017 VA examination

falls short of these requirements and all three of her arguments should be rejected.

Generally, Appellant makes three main arguments that collectively accuse the examiner of not addressing specific evidence or arguments. *See* App. Br. at 11-15. This is unavailing because VA examiners, upon reviewing the claims file, are presumed to have considered the evidence in question. *See Sickels v. Shinseki*, 643 F.3d 1362, 1366 (Fed. Cir. 2011) (noting that under the presumption of regularity, in the absence of clear evidence to the contrary, public offers are presumed to have properly discharged their official duties). Moreover, there is no reasons or bases requirement imposed on VA examiners, and they are not required to comment on every piece of evidence. *Acevedo v. Shinseki*, 25 Vet.App. 286, 293 (2012) ("[T]here is no reasons or bases requirement imposed on examiners."); *Monzingo v. Shinseki*, 26 Vet.App. 97, 105 (2012) ("There is no requirement that a medical examiner comment on every favorable piece of evidence in a claims file."); *Roberson v. Shinseki,* 22 Vet.App. 358, 366 (2009) ("A medical examiner need not discuss all evidence favorable to an appellant's claim when rendering an opinion."). Collectively, the Court should reject Appellant's arguments on these grounds.

First, Appellant argues that the October 2017 VA examiner did not provide a rationale for his opinion that any hypercoagulable blood condition was the result of nonservice-connected liver cancer and congestive heart failure, stating that the examiner failed to mention treatment for venous thromboembolism in

2016. *See* App. Br. at 12. This is unavailing because after concluding that "[i]t is more likely any hypercoaguable blood condition leading to 'pulmo[n]ary embolism' would be the result of his liver cancer and congestive heart failure," the examiner noted that these were "common complications," and he explained that the Veteran's "seizure and TBI disorders and their medications did not render him debilitated or generally impaired to resist his cancer and heart failure and their side effects." [R. at 52-53]. As a medical expert, the examiner understood the nature of these conditions and possibly associated complications, and he was not required to explain this in further detail, given that he provided the medical reasoning for his condition (i.e., a hyperocoagulable blood condition and a pulmonary embolism are common complications of liver cancer and congestive heart failure). *See Espiritu v. Derwinski*, 2 Vet.App. 492, 495 (1992) (stating that, as medical experts in their fields, VA medical examiners are entitled to form judgments based upon their training and the facts before them); *Acevedo*, 25 Vet.App. at 293. Furthermore, the examiner affirmed that he had reviewed the entire record, so he is presumed to have considered the records related to the Veteran's treatment and surgery for his venous thromboembolism in 2016, which the examiner was not required to specifically identify. *See Monzingo*, 26 Vet.App. at 105; *Roberson,* 22 Vet.App. at 366; *see also Sickels*, 643 F.3d at 1366.

Second, Appellant argues that the examiner did not address whether a sedentary lifestyle contributed to the Veteran's death, including a discussion of

the private August 2016 opinion or any treatment records prior to January 2017. App. Br. at 12-13. The Court should reject this argument because, as explained above, the examiner is presumed to have considered the evidence and was not required to specifically list the August 2016 opinion (or other treatment records). *See Monzingo*, 26 Vet.App. at 105 (2012); *Roberson,* 22 Vet.App. at 366; *see also Sickels v. Shinseki*, 643 F.3d 1362, 1366. Moreover, the Board explained that the August 2016 opinion is not probative because the physician relied on the inaccurate factual premise that a TBI led to the Veteran living a sedentary lifestyle, thereby not considering the Veteran's January 2016 statements. [R. at 8]. Appellant acknowledges that the Board identified this opinion and tries to use this to support her argument. App. Br. at 13. But this is unavailing because the Board explained why the private August 2016 opinion is not probative. *See Owens v. Brown*, 7 Vet.App. 429, 435 (1995) (explaining that the Board may favor one opinion over another when it provides an adequate statement of reasons or bases for doing so). Moreover, the examiner considered the effects of the Veteran's conditions on his lifestyle when he considered how it affected his ambulatory abilities. *See* [R. at 52-53]. The Court should also reject Appellant's associated contention that the examiner did not provide medical literature to support his findings because the examiner is not required to do so; he is already presumed competent to render medical conclusions. *See Espiritu*, 2 Vet.App. at 495; *see also Monzingo*, 26 Vet.App. at 107 (stating that physicians are

"presumed to "remain up-to-date on medical knowledge and current medical studies"). Appellant's argument is therefore unavailing.

Third, Appellant argues that the examiner did not address the Veteran's lay statements or Appellant's arguments about his in-service injury being responsible for the conditions that eventually caused his death. App. Br. at 14-15. This is unpersuasive for two reasons. First, as explained above, the examiner is presumed to have considered this. *See Monzingo*, 26 Vet.App. at 105; *Roberson,* 22 Vet.App. at 366; *see also Sickels v. Shinseki*, 643 F.3d 1362, 1366. And second, the examiner provided an etiological reason for his opinion, notwithstanding the lay hypotheses that the in-service injury was responsible. [R. at 52-53] (explaining that nonservice-connected disabilities were more likely responsible for leading to the Veteran's death). Appellant may disagree with that opinion, but that is not sufficient to show that the opinion is inadequate. *See Espiritu*, 2 Vet.App. at 495 (1992) (stating that mere disagreement with a medical expert's opinion does not warrant a finding of inadequacy). And because the Board relied on this expert medical opinion, it did not offer its own medical opinion, as Appellant contends. *See* App. Br. at 15.

Indeed, Appellant's arguments about the October 2017 VA examination are unpersuasive and should be rejected by the Court.

Accordingly, the Secretary respectfully submits that the Court should dismiss an appeal of that part of the Board's decision denying entitlement to DIC under statutory section 1318 and affirm the part of the Board's decision denying

entitlement to service connection for the Veteran's cause of death. The Secretary submits that the Board has provided an adequate statement of its reasons and bases for its conclusion. Furthermore, as discussed above, the Court should find that Appellant has abandoned any argument not presented in his initial brief. *See Carbino*, 168 F.3d at 34 (holding that the failure of an appellant to include an argument in the opening brief will generally be deemed a waiver of that argument).

CONCLUSION

For the foregoing reasons, the Court should affirm the Board's decision.

Respectfully submitted,

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