

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

ANGELA M. MITCHELL,  
Appellant,

v.

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

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Vet. App. No. 19-2657

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

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

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WILLIAM A. HUDSON, JR.  
Acting General Counsel

MARY ANN FLYNN  
Chief Counsel

SARAH W. FUSINA  
Deputy Chief Counsel

NATASHA D. REED  
Appellate Attorney  
Office of General Counsel (027H)  
U.S. Department of Veterans Affairs  
810 Vermont Avenue, N.W.  
Washington, DC 20420  
(202) 632-6115  
Attorneys for Appellee

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## **B. Nature of the Case**

Appellant, Angela M. Mitchell, appeals the December 20, 2018, Board decision denying entitlement to service connection for headaches. [Record Before the Agency (R.) at 8-9 (1-21)]. The Board also remanded the issues of service connection for (1) chronic fatigue syndrome (CFS), (2) hypertension, (3) ulcers, (4) pulmonary embolism (claimed as blood clots), (5) an acquired psychiatric disorder, to include insomnia, anxiety, and posttraumatic stress disorder (PTSD), (6) uterine cysts, (7) hysterectomy, (8) endometriosis (claimed as abnormal female exams), (9) pes planus, and (10) sinusitis/rhinitis. [R. at 5-6]. The Court is without jurisdiction over these issues. 38 U.S.C. §§ 7252(a), 7266(a); see *Breeden v. Principi*, 17 Vet.App. 475, 478 (2004).

## **C. Statement of Facts and Procedural History**

Appellant served honorably in the U.S. Navy from February 1988 to February 1993. [R. at 1720]. In April 2005, Appellant sought treatment for migraine headaches. [R. at 1828-1830]. Ten years later, in October 2015, Appellant filed a claim for entitlement to service connection for headaches. [R. at 1496-1497]. A rating decision denied this claim in November 2015. [R. at 1423-1425]. The following month, Appellant filed a Notice of Disagreement. [R. at 1388-1396]. A December 2016 Statement of the Case again denied Appellant's claim. [R. at 975-1003]. Appellant timely appealed this decision. [R. at 954]. In December 2018, the Board denied Appellant's claim, finding that there is no evidence that Appellant's migraine headache disorder is related to treatment of

any of her other claimed medical conditions or to service. [R. at 8-9 (1-21)]. This appeal followed.

### **III. SUMMARY OF THE ARGUMENT**

The Court should affirm the Board's December 20, 2018, decision because Appellant fails to demonstrate that the Board misapplied the law in relation to her claim, overlooked any evidence, or otherwise did not provide a plausible analysis of the evidence in support of its ultimate conclusion that Appellant's headaches were not incurred in or aggravated by service, or related to treatment of any of her claimed medical condition. As such, Appellant is not entitled to remand on any of her theories of error.

### **IV. ARGUMENT**

#### **A. The Board Provided Adequate Reasons or Bases In Denying Appellant Service Connection for Headaches**

A Board decision must include "a written statement of the Board's 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. § 7105(d)(1). Specifically, the Board must analyze the probative value of the evidence, account for that which it finds persuasive or unpersuasive, and explain the basis of its rejection of evidence materially favorable to the claimant. *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995). The purpose of the requirement for adequate reasons or bases is to enable both Appellant and the Court to understand the basis for the Board's decision. *See Mayfield v. Nicholson*, 19 Vet.App. 103, 129 (2005). The

Board is presumed to have considered all of the evidence in the record in coming to its decision, even if some pieces of evidence are not specifically mentioned within its analysis. *Gonzales v. West*, 218 F.3d 1378, 1380-81 (2000). As such, the requirement of adequate reasons or bases is satisfied if the Board's explanation, when read as a whole, is clear enough to permit effective judicial review. *Johnson v. Shinseki*, 26 Vet.App. 237, 247 (2013).

Here, the Board met the requirements laid out by 38 U.S.C. § 7105(d)(1). First, in making its decision, the Board thoroughly explained how it came to its decision, including because the evidence of record does not suggest that Appellant's migraine headache disorder is related to the treatment of any of her other claimed medical conditions or to service. [R. at 8]. Specifically, as the Board correctly noted, Appellant's service treatment records do not indicate complaints, diagnoses, or treatment for headaches during service, her clinical separation exam was normal, and Appellant denied frequent or severe headaches on a February 1993 separation report of medical history. [R. at 8]; [R. at 2802 (2798-2803)]. Further, the Board noted Appellant's April 2005 report of migraine headaches, but correctly found no evidence to suggested that her migraine headache disorder is related to the treatment of any of her other claimed medical conditions. [R. at 8]; [R. at 1828-1830].



Appellant now raises two arguments<sup>1</sup> for the first time on appeal, despite being represented by the same counsel since the original filing of her claim in October 2015. *See Appellant's Brief* at 4-7; [R. at 1496-1497].

Appellant first unpersuasively argues that the Board failed to address favorable evidence of record which should have resulted in her claim for headaches being remanded as inextricably intertwined with other claimed conditions. *See Appellant's Brief* at 3-7. Specifically, Appellant alleges that the record raised the theory that Appellant's headaches were caused or aggravated by the conditions remanded by the Board, due to the medications prescribed in treatment of those remanded conditions. *See Appellant's Brief* at 7; *see* [R. at 5-6]. However, the Board did note that the evidence does not suggest that Appellant's migraine headache disorder is related to the treatment of any of her other claimed medical conditions, [R. at 8], thereby demonstrating that they did consider this theory and found there to be no evidentiary support.

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<sup>1</sup> The Secretary notes that Appellant's sole assertion on appeal is that her headaches are secondary to her other claims, to include medication taken for those disabilities. Appellant makes no argument pertaining to the Board's finding that her current migraine headache disorder was not incurred in service. [R. at 9]. Thus, she has abandoned any such argument regarding direct service connection. *See Pederson v. McDonald*, 27 Vet.App. 276, 283 (2015) (en banc) (stating that "this Court, like other courts, will generally decline to exercise its authority to address an issue not raised by an appellant in his or her opening brief."); *Cacciola v. Gibson*, 27 Vet.App. 45, 47 (2014) (holding that when Appellant expressly abandons an appealed issue or declines to present arguments as to that issue, Appellant relinquishes the right to judicial review of that issue and the Court will not decide it); *Grivois v. Brown*, 6 Vet.App. 136, 138 (1994) (holding that issues or claims not argued on appeal are considered abandoned).

Moreover, to the extent Appellant suggests that the Board did not discuss specific medications, that argument is also unpersuasive. Appellant points to a March 2013 mental health note, which lists headaches as a potential side effect of Lunesta (among other side effects such as GI effects and orthostasis), the only medication taken by Appellant included in both Appellant's brief and the March 2013 note. [R. at 550 (547-551)]. However, Appellant fails to demonstrate that Appellant's headaches, which were first noted 8 years prior in April 2005, were actually caused by any medication, including Lunesta, taken for any medical condition. [R. at 1828-1830]. Further, Appellant fails to demonstrate that anything within the record reasonably raised the theory that Appellant's noted headaches were caused by medication, potentially requiring additional discussion by the Board.

Instead, without providing any evidence that actually demonstrates that headaches were indeed caused by medications rather than just one of a myriad of *potential* side effects, Appellant relies on a general citation of caselaw to argue that the Board was obligated to discuss every theory reasonably raised by the record to sympathetically award the greatest benefit available to Appellant. See *Appellant's Brief* at 5-6; *Robinson v. Mansfield*, 21 Vet. App. 545 (2007), *aff'd sub nom*, 557 F.3d 1355 (Fed. Cir. 2009); *Schroeder v. West*, 212 F.3d 1265 (Fed. Cir. 2000). Moreover, as stated above, the Board noted that the evidence does not suggest that Appellant's migraine headache disorder is related to treatment of any of her other claimed medical conditions. [R. at 8]. Appellant fails to acknowledge

that the Board is not required to discuss all pieces of evidence of record or list every medicine prescribed and potential side effects when not relevant to the issue at hand. See *Newhouse v. Nicholson*, 497 F.3d 1298, 1302 (Fed. Cir. 2007). Further, although an appellant's filings must be liberally construed, the use of general language without accompanying specific medical records does not require the Board "to conduct an unguided safari through the record to determine all possible conditions for which the veteran may possibly be able to assert entitlement to a claim for disability compensation." *Brokowski v. Shinseki*, 23 Vet.App. at 89, 88 (2009). Finally, and most especially in the instant case where Appellant has been represented by the same counsel throughout the entire period on appeal, the Board is not required to raise theories of entitlement in order to render an adequate opinion. See *Robinson v. Peake*, 21 Vet.App. 545, 553 (2008) (stating that Board is "not required sua sponte to raise and reject 'all possible' theories of entitlement in order to render a valid opinion"); see also *Sondel v. Brown*, 6 Vet.App. 218, 220 (1994) (when an issue is not reasonably raised, the Board is not required to "conduct an exercise in prognostication").

Finally, to the extent that Appellant points to additional medications allegedly linked to her headaches based on a singular citation to the record from a mental health visit in March 2013, of the medications referenced by Appellant, including atenolol, clonidine, and chlorthalidone used to treat hypertension, along with bupropion/Wellbutrin used to treat an acquired psychiatric disorder, none of those medications are listed on the treatment record by the attending physician in

reference to the possibility of potential headaches. [R. at 550]. Further, even if those medications were listed or meant to be included, Appellant has failed to demonstrate that they caused her headaches as she cites only to records significantly post-dating the March 2013 examination and significantly post-dating the onset of her headaches in 2005. [R. at 32 (31-35)]; [R. at 257 (257-259)]; [R. at 322 (321-323)]; [R. at 330 (330-343)].

In a last attempt to link Appellant's headaches to her medication, Appellant states that her "treating physicians appear to have linked Appellant's headaches to hot flashes suffered as residuals of hysterectomy, endometriosis, and ovarian cysts, in that they have prescribed a singular medication to treat both conditions." *See Appellant's Brief* at 8-9. But this represents nothing more than Appellant's attempt to provide an incompetent medical opinion. *See Hyder v. Derwinski*, 1 Vet.App. 221, 225 (1991) (holding that "[l]ay hypothesizing, particularly in the absence of any supporting medical authority, serves no constructive purpose, and cannot be considered"); *Kern v. Brown*, 4 Vet.App. 350, 353 (1993) (holding that the "[a]ppellant's attorney is not qualified to provide an explanation of the significance of clinical evidence"). Despite Appellant's assertion, nothing in the record suggests that the treatment for Appellant's hot flashes and headaches are in any way linked, either to one another or to any other condition on appeal. [R. at 2171]. Specifically, the September 2010 note cited to by Appellant noted that propranolol-inderal-LA helped with both headaches and hot flashes, but this medication was not listed by Appellant anywhere in her brief as potentially causing

her headaches, and even a generous reading of this record gives absolutely no indication that Appellant was prescribed this medication due to residuals of hysterectomy, endometriosis, or ovarian cysts, as now claimed by Appellant. See *Appellant's Brief* at 8-9. Therefore, Appellant's contention that the Board provided inadequate reasons or bases pertaining to her belief that there was a reasonably raised theory that her medications caused her headaches, is unpersuasive for the reasons discussed above.

Second, Appellant next argues, again for the first time, that an article submitted by Appellant allegedly demonstrates a connection between headaches and PTSD. [R. at 1679-1683]. However, this mischaracterizes the article, which actually states that symptoms such as headaches are common in people with PTSD and stem from an anxiety disorder. [R. at 1679]. This does not demonstrate that Appellant's headache condition is directly connected to or caused by Appellant's remanded condition, and again, per the aforementioned case law, fails to demonstrate that the Board should have addressed this theory of causation, including because the article does not directly link Appellant's migraine headaches to any of her conditions that have yet to be service connected. Therefore, she fails to demonstrate that the Board needed to consider this article. She also fails to demonstrate that her headaches are inextricably intertwined with any of her remanded claims as a decision on any of those issues would not have a significant impact of her headache claim. See *Harris v. Derwinski*, 1 Vet.App. 180, 183 (1991).

As such, for the aforementioned reasons, both of Appellant's newly raised arguments must be dismissed, as they fail to demonstrate that Appellant's headaches are linked in any way to service or to the conditions remanded by the Board. Rather, Appellant has failed to establish clear error by the Board or to demonstrate that the Board provided inadequate reasons or bases. As such, the only arguments presented by Appellant amount to a mere disagreement with how the Board weighed the evidence and constitute a misreading of case law. *Owens v. Brown*, 7 Vet.App. 429, 433 (1995) (holding that it is the responsibility of the Board, not the Court, to assess the credibility and weight to be given to the evidence). Therefore, the Court should affirm the Board's decision.

Ultimately, Appellant bears the burden of demonstrating error on appeal, but in this case, she has not established that the Board committed error warranting remand. See 38 U.S.C. § 7261(b)(2) (Court is required to "take due account of the rule of prejudicial error"); *Shinseki v. Sanders*, 556 U.S. 396, 406, 129 S. Ct. 1696, 1704 (2009); *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (Appellant bears the burden of persuasion on appeal), *aff'd per curiam* 232 F. 3d 908 (Fed. Cir. 2000); *Marciniak v. Brown*, 10 Vet.App. 198, 201 (1997) (holding that the appellant bears the burden of demonstrating prejudice on appeal and that remand is unnecessary "[i]n the absence of demonstrated prejudice").

## **V. CONCLUSION**

WHEREFORE, in light of the foregoing, the Court should affirm the December 20, 2018, decision of the Board, which denied entitlement to service connection for headaches.

Respectfully submitted,

WILLIAM A. HUDSON, JR.  
Acting General Counsel

MARY ANN FLYNN  
Chief Counsel

/s/ Sarah W. Fusina  
SARAH W. FUSINA  
Deputy Chief Counsel

/s/ Natasha D. Reed  
NATASHA D. REED  
Appellate Attorney  
Office of General Counsel (027H)  
U.S. Department of Veterans Affairs  
810 Vermont Avenue, N.W.  
Washington, D.C. 20420  
(202) 632-6115

Attorneys for Appellee  
Secretary of Veterans Affairs