

IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

WILLIE M. RICHARDSON, JR.,
Appellant,

v.

ROBERT L. WILKIE
Secretary of Veterans Affairs,
Appellee.

ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS

BRIEF OF APPELLEE
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ROBERT L. WILKIE,
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Vet.App. No. 19-5567

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

APPELLEE'S BRIEF

I. ISSUES PRESENTED

Whether the Court should affirm the May 28, 2019, decision of the Board of Veterans' Appeals (Board) that denied entitlement to 1) service connection for a bilateral knee disability other than gout, to include as secondary to service-connected disabilities and exposure to contaminated water at Camp Lejeune; 2) service connection for a back disability, to include as secondary to service-connected disabilities and exposure to contaminated water at Camp Lejeune; 3) service connection for an eye disability, to include as secondary to service-connected disabilities and exposure to contaminated water at Camp Lejeune; and 4) service connection for gout, to include as secondary to service-connected disabilities and exposure to contaminated water at Camp Lejeune.

II. STATEMENT OF THE CASE

Jurisdictional Statement

The Court has proper jurisdiction pursuant to 38 U.S.C. § 7252(a).

Nature of the Case

Willie M. Richardson, Jr., (Appellant), appeals the May 28, 2019, Board decision that denied entitlement to service connection for a bilateral knee disability other than gout, a back disability, an eye disability, and gout, all to include as secondary to service-connected disabilities and exposure to contaminated water at Camp Lejeune.

Statement of Relevant Facts

Appellant served on active military duty from October 1977 to October 1981. His service treatment records are negative for complaints of gout, or a chronic knee condition. [Record (R.) at 8741-8772]. In November 1980, Appellant complained of back pain of one-month duration. [R. at 8757]. Appellant also complained of dry eye and photophobia during service. [R. at 8751, 8754, 8762]

In October 2007, Appellant's representative submitted a statement indicating he would file claims for entitlement to service connection for his back and eyes, among other claims. [R. at 8934]. That same month, Appellant filed a Department of Veterans Affairs (VA) application for entitlement to service connection for a back and eye disability, among other claims. [R. at 8912, (8908-8922)].

An October 2008 rating decision denied entitlement to service connection for a back and eye disability. [R. at 8656-8667]. In November 2008, Appellant filed a Notice of Disagreement (NOD). [R. at 8647].

In June 2009, Appellant was provided a VA back examination. [R. at 8539-8540]. The examiner reviewed the claims file and noted the November 1980 service

treatment for back pain of one-month duration. [R. at 8539]. The examiner also reviewed Appellant's VA records and noted a December 2004 diagnosis of gouty arthritis. *Id.* X-rays revealed lumbar spine degenerative disc disease (DDD) without radiculopathy spondylosis. [R. at 8540]. The examiner opined that Appellant's DDD was less likely related to service because although he complained of back pain of one-month duration in service, there was no finding of a chronic condition or evidence of a permanent condition until the present examination. [R. at 8539-8540].

A Statement of the Case (SOC) was issued in June 2009. [R. at 8481-8506]. In July 2009, Appellant perfected his appeal. [R. at 8470-8475].

Appellant was provided a VA eye examination in May 2010. [R. at 8088-8090]. The examiner diagnosed right eye corneal scarring, dry eye syndrome, allergic conjunctivitis, hyperopia, and presbyopia. [R. at 8090]. The examiner stated he was unable to render an opinion as to whether the conditions were related to Appellant's military service because his claims file was not available. *Id.* In a June 2010 addendum opinion, the examiner reviewed the claims file and opined against a link between his in-service eye complaints and his to service. [R. at 8065]. The examiner explained that blepharitis conjunctivitis is a common condition and can be related to age. *Id.*

In July 2010, Appellant was awarded entitlement to service connection for pes planus with plantar fasciitis. [R. at 7993-7999]. A Supplemental SOC (SSOC) was issued in July 2010. [R. at 7983-7991].

In September 2011, Appellant filed a claim for service connection for gout in his feet and knees. [R at 7474-7475].

In December 2012, Appellant was provided a VA foot examination. [R. at 7258-7283]. The examiner diagnosed bilateral gout of the knees/lower legs. [R. at 7268]. The examiner also diagnosed left knee lateral meniscus tear and tendonitis. [R. at 7269]. Appellant reported that he did not have a specific injury to his knees. *Id.* Instead, Appellant reported he started experiencing knee pain over 20 years ago and believed it related to his flat feet because he did not walk normally. *Id.* The examiner explained that gout is not caused by pes planus or plantar fasciitis. [R. at 7282]. He opined that it was at least as likely as not that Appellant's left knee tendonitis was due to abnormal gait caused by plantar fasciitis and/or pes planus. *Id.*

In February 2013, a VA examiner opined that Appellant's left knee tendonitis was not the result of his flat feet. [R. at 7244, (7213-7246)]. The examiner explained that Appellant sustained a left meniscal tear to his left knee two years prior and his left knee pain resulted from that injury. *Id.* The examiner further explained that Appellant's knee pain was related to his nonservice connected gout. *Id.*

In March 2013, VA obtained a medical opinion to address the conflicting opinions in relation to the etiology of Appellant's bilateral knee disabilities. [R. at 7182-7196]. The examiner opined that it was less likely as not that Appellant's bilateral knee condition was related to his service-connected pes planus or plantar fasciitis. [R. at 7193]. The examiner explained that Appellant does not have osteoarthritis of the left knee and that osteoarthritis would be expected if a gait

change from pes planus caused knee pain, that gout is not caused by pes planus or plantar fasciitis and is not related to his service connected disabilities, that his left knee pain and tendonitis was the result of his left meniscal tear, and his meniscal tear was not related to his pes planus or plantar fasciitis. [R. at 7193-7194].

A June 2013 rating decision denied entitlement to service connection for gout of the feet and knees and left and right knee tendonitis. [R. at 4710-4715; 6178-6186]. Appellant filed a NOD in July 2013. [R. at 4694-4699]. A SOC was issued in November 2013 regarding his knees. [R. at 4602-4629]. Appellant perfected his appeal in December 2013. [R. at 4597-4601].

In November 2015, Appellant was provided a Board hearing. [R. at 3327-3371]. He testified that all of his claims were due to exposure to contaminated water at Camp Lejeune, North Carolina. [R. at 3336]. Appellant's representative stated his back disability resulted from carrying 15 - 20 pound radios on his back at camp Lejeune. [R. at 3343, 3346]. Appellant testified that while at the rifle range, he was hit in the eye with a hot round. [R. at 3348-3349]. He said his knee disabilities were caused by his service-connected foot disability. [R. at 3359].

In February 2016, the Board remanded the claims for additional development, specifically for VA examinations to address his claimed disabilities. [R. at 3282-8379, (3256-3286)].

In May 2017, a VA examiner reviewed Appellant's claims file in relation to his claimed disabilities and exposure to contaminated water at Camp Lejeune and opined it was less likely as not that Appellant's gout was related to exposure to

contaminants at Camp Lejeune. [R. at 2180, (2180-2206)]. The examiner explained that the risk factors for developing gout were age, gender, obesity, hypertension, noted Appellant was morbidly obese, and that his father had gout. *Id.* The examiner noted there was no evidence Appellant had gout in military or within first year of separation, and that the known contaminants in the water at Camp Lejeune were not considered the etiology for gout. *Id.*

Regarding Appellant's his back condition, the examiner opined it was less likely as not that his back condition was the result of exposure to contaminants at Camp Lejeune. [R. at 2199]. The examiner noted Appellant was morbidly obese and that there was no evidence of DDD while he was in service or within one year of his separation from service. *Id.* The examiner explained that the known contaminants in the water at Camp Lejeune were not an etiology cause of degenerative arthritis and that the etiology of his condition is more often unknown but associated factors were smoking, obesity, age, female gender, physically strenuous work, sedentary work, psychologically strenuous work, low educational attainment, Workers' Compensation insurance, job dissatisfaction, and psychologic factors such as somatization disorder, anxiety, and depression. *Id.*

Regarding the knees, the examiner opined it was less likely as not that Appellant's bilateral knee condition was the result of exposure to contaminants at Camp Lejeune. [R. at 2201]. The examiner again noted Appellant was morbidly obese and that there was no evidence of a chronic knee condition in service or within the first year after his separation from service. [R. at 2202].

In relation to Appellant's eye claim, the examiner explained that at a February 2017 eye examination a refractive error was noted but no diagnosis for an eye disability. [R. at 2206].

Appellant was provided another VA eye examination in May 2017. [R. at 2151-2156]. The examiner noted a current diagnosis of cataracts, and previous diagnoses of corneal scars and infiltrative keratitis. [R. at 2151]. Appellant reported he was hit in the eye with a round casing in 1980 as well as tearing and itching of both eyes. *Id.* The examiner noted he did not find an examination relating to an injury of being hit in the eye or its treatment in Appellant's service treatment records but did find records dated in 1980 for diagnosed blepharitis, allergic conjunctivitis and conjunctival abrasions left eye worse than right. [R. at 2155]. Trauma and foreign bodies to the eyes was denied at the time and these issues resolved without sequelae. *Id.* The examiner noted Appellant's vision was 20/20 throughout all his service treatment records and there was no trauma or corneal scarring of the right eye documented. *Id.* The examiner explained Appellant's age-related cataracts were not related to service. *Id.* He further acknowledged Appellant suffered floppy eyelid syndrome which results in eye irritation and exposure and is related to sleep apnea, which Appellant had. *Id.* The examiner noted Appellant had dry eyes which was not related to his service, and three small scars of the right cornea that were likely to be due to small foreign bodies or previous infections. *Id.* The examiner explained that this was not noted in Appellant's service treatment records or even a 2008 eye examination. *Id.* He acknowledged Appellant's history of infiltrative

keratitis in 2013/2014 which was treated with steroid drops and resolved. *Id.* The examiner opined that Appellant did not have any current eye condition that would be secondary any incident or disease in service and that his eye conditions are not related to his service-connected disabilities. [R. at 2156].

Appellant was provided a VA knee examination in June 2017. [R. at 2100-2111]. The examiner diagnosed left knee joint osteoarthritis, left knee gout, and mild bilateral patellar bursitis. [R. at 2100]. Appellant reported multiple strains during service and said he self-medicated. [R. at 2101]. The examiner opined it was less likely as not that Appellant's gout was related to his military service. [R. at 2117, (2117-2120)]. The examiner explained that the risk factors for developing gout were age, gender, race and ethnicity as well as modifiable factors such as hyperuricemia, obesity, hypertension, hyperlipidemia, ischemic heart disease, diabetes mellitus, chronic kidney disease, dietary factors, alcohol and certain medication affecting urate balance. [R. at 2118]. The examiner noted Appellant was extremely obese and review of his medical records were silent for the condition for over the 22 years following his separation from service. *Id.*

Regarding Appellant's back, the examiner diagnosed degenerative arthritis of the spine. [R. at 2121, (2121-2127)]. Appellant reported he did not have a specific injury to his back but suffered multiple sprains over time. [R. at 2122]. The examiner opined that Appellant's back condition was less likely as not related to his military service. [R. at 2118]. The examiner noted the one instance of treatment for back complaints in service but that there were no further evidence of complaints or

treatment during service, that after service when he was treated for other conditions, Appellant did not complain of back pain, and there was 28 years after service without continuous back care. [R. at 2119].

The examiner also opined it was less likely as not that Appellant's bilateral knee condition was related to service. [R. at 2119]. The examiner found no medical evidence of injury or trauma to the knees in service or within one year of separation from service. *Id.* A SSOC was issued in March 2019. [R. at 463-499].

In the decision on appeal, the Board denied the claim. It conceded Appellant's records revealed he was exposed to contaminated water at Camp Lejeune, and that he has a diagnosis for each of the claimed conditions. [R. at 5, (1-11)]. The Board found that preponderance of the evidence was against a link between Appellant's disabilities and his military service. [R. at 8]. The Board noted that none of Appellant's claimed disabilities are listed as a presumptive disease that would qualify for service connection, and because the medical evidence did not link these conditions to exposure to contaminated water, presumptive service connection was not warranted. [R. at 10]. This appeal followed.

III. SUMMARY OF ARGUMENT

This Court should affirm the May 28, 2019, Board decision that denied Appellant's claims of entitlement to service connection for a bilateral knee disability other than gout, a back disability, an eye disability, and gout, all to include as secondary to service-connected disabilities and exposure to contaminated water at

Camp Lejeune because the Board provided adequate reasons or bases for its determinations, and Appellant has not demonstrated the Board's decision is clearly erroneous or the result of prejudicial error.

IV. ARGUMENT

The Board Provided an Adequate Statement of Reasons or Bases for Denying Appellant's Claims.

The Court should affirm the Board's decision that denied Appellant's claims for entitlement to entitlement to service connection for a bilateral knee disability other than gout, a back disability, an eye disability, and gout, all to include as secondary to service-connected disabilities and exposure to contaminated water at Camp Lejeune because there is a plausible basis for the Board's determinations and Appellant has not demonstrated the Board's decision is clearly erroneous or the result of prejudicial error. *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (noting that the appellant bears the burden of persuasion on appeals to this Court); *see also Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) (Appellant bears the burden of demonstrating prejudicial error).

The Board must provide a statement of the reasons or bases for its determinations that are adequate to enable an appellant to understand the precise basis for the Board's decision as well as to facilitate review in this Court. 38 U.S.C. § 7104(d)(1); *Moody v. Wilkie*, 30 Vet.App. 329, 339 (2018). To accomplish this, the Board is required to assess the credibility, probative value, and persuasiveness of the evidence and to provide reasons for rejecting material

evidence that is favorable to the claimant. *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F. 3d 604 (Fed. Cir. 1996) (table).

To the extent Appellant asserts error in RO decisions, the Court should not entertain this argument. [App. Br. at 2-3]. The Court's jurisdiction is limited to final Board decisions, and Appellant fails to make any allegation of error in the merits of the Board decision on appeal. 38 C.F.R. § 7252(a) ("The Court of Appeals for Veterans Claims shall have exclusive jurisdiction to review decisions of the Board of Veterans' Appeals").

To the extent Appellant alleges his complete service records were not considered by the RO or examiners, [App. Br. at 2-3], there is no evidence that there are any missing service medical records. Appellant refers to service medical records regarding complaints of eyes and back. [App. Br. at 3]. However, these records are contained in the claims file and were specifically considered by the examiners. In November 1980, Appellant complained of back pain of one-month duration. [R. at 8757]. He complained of dry and burning eyes and photophobia in September and October 1980. [R. at 8750, 8751, 8754, 8762]. The June 2010 VA examiner considered these records in rendering his opinion. [R. at 8088, 8065]. While the examiner initially did not render an opinion in May 2010 because the records were not available, [R. at 8090], they were subsequently provided, and in June 2010, the examiner provided an addendum report where he was able to render an opinion, opining that Appellant's eye conditions were not related to his military service. [R. at 8065].

In addition, the May 2017 VA examiner also reviewed Appellant's claims file, [R. at 2151], and acknowledged his 1980 eye diagnoses. [R. at 2155]. Moreover, the Board acknowledged Appellant's service medical records, which documented his in-service eye complaints. [R. at 5-6]. It is clear the medical examiners and the Board considered Appellant's service medical records in relation to his eyes. Therefore, Appellant fails to demonstrate error.

In addition, Appellant's one-time in-service back complaint was also considered by the medical examiners and the Board. [App. Br. at 3]. The June 2009 VA examiner reviewed the claims file and noted the November 1980 service treatment for back pain of one-month duration. [R. at 8539]. The June 2017 VA examiner also acknowledged Appellant's one instance of treatment for back complaints in service. [R. at 2119]. The Board acknowledged his 1980 complaints of back pain but explained that the service records did not show a chronic back condition. [R. at 6]. Contrary to his assertions, the Board did not overlook his back complaints, but instead found that the preponderance of the evidence weighed against a finding of a link between Appellant's back disability and his military service. [R. at 8]. Moreover, the Board is presumed to have considered all evidence presented in the record. *Newhouse v. Nicholson*, 497 F.3d 1298, 1302 (Fed. Cir. 2007).

Appellant also appears to contend that the statement of the case points out that service treatment records were not viewed. [App. Br. at 4]. It is unclear which statement of the case he refers to. *Coker v. Nicholson*, 19 Vet.App. 439,

442 (2006) (Appellant is required to plead the allegation of error with some particularity), *rev'd on other grounds sub nom Coker v. Peake*, 310 F.App'x 371 (Fed. Cir. 2008). And as discussed above, the examinations of record and the Board all considered his service treatment records documenting treatment for his back and eyes. Therefore, there is no error warranting remand.

To the extent Appellant contends the Board relied upon an inadequate medical examination, it is not clear as to which examination he was referring, or whether he was merely reciting the holding from the case of *Stegall v. West*, 11 Vet.App. 268 (1998), to which he referenced. [App. Br. at 4]. In any case, the Secretary maintains that each of the VA medical examinations are adequate. An adequate medical examination is based on consideration of the veteran's prior medical history and examinations and describes the disability in sufficient detail so that the Board can provide a fully informed evaluation of the claimed disability. *Stefl v. Nicholson*, 21 Vet. App. 120, 123 (2007). Each of the examinations considered Appellant's medical history and examinations and sufficiently described his disabilities. The Board's finding that the duty to assist had been satisfied and that the medical examinations of record are adequate is not clearly erroneous. [R. at 8]; *D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008) (whether an examination report is adequate is a finding of fact reviewed under the "clearly erroneous" standard of review). Thus, there is no error.

And, finally, Appellant asserts the Board placed more probative value on the medical evidence of record, but again notes that the RO did not look at his

STRs. [App. Br. at 4]. Appellant then argues that *Jandreau v. Nicholson*, 492 F.3d 1372, 1377, 1377 n.4 (Fed. Cir. 2007), would not apply to his case because his STRs were in VA's possession. [App. Br. at 4-5]. The Secretary has attempted to interpret how these arguments could demonstrate error in the Board's decision. However, again, Appellant raises no error with regards to the Board decision on appeal, and for reasons discussion above – including that both the Board and the medical examiners considered his service treatment records – these statements do not represent any error warranting remand. Similarly, the Board addressed Appellant's lay statements and found that he is not competent to opine on etiology and that the medical evidence is more probative. [R. at 10]. Appellant's contentions fail to demonstrate any clear error with the Board's weighing of the evidence, and therefore, remand is not warranted.

Appellant disagrees with how the Board weighed the evidence, but this is not error. See *Washington v. Nicholson*, 19 Vet.App. 362, 369 (2005) (It is the Board's responsibility to determine the credibility and weight to be given to the evidence). He fails to demonstrate any error warranting remand. *Locklear v. Nicholson*, 20 Vet.App. 410, 416-17 (2006) (terse or undeveloped arguments do not warrant detailed analysis by the Court and are considered waived); *Coker*, 19 Vet.App. at 442.

The Secretary is cognizant of the duty to give a liberal and sympathetic reading to the informal briefs of *pro se* Appellants and has done so in this case. See *Szemraj v. Principi*, 357 F.3d 1370, 1373 (Fed. Cir. 2004) (stating that with

respect to all *pro se* pleadings, VA must give a sympathetic reading by “determining all potential claims raised by the evidence, applying all relevant laws and regulations”) (quoting *Roberson v. Principi*, 251 F.3d 1378, 1384 (Fed. Cir. 2001)); *Calma v. Brown*, 9 Vet.App. 11, 15 (1996); *De Perez v. Derwinski*, 2 Vet.App. 85, 86 (1992); *see also* U.S. VET.APP. R. 28(e) (providing that a *pro se* appellant need not conform to the strictures regarding the content of his brief). Nonetheless, even a liberal and sympathetic reading of Appellant’s informal brief fails to identify prejudicial error in the Board decision on appeal. It is not the duty of this Court, or the Secretary, to search the record to uncover any errors not identified by Appellant. *See Breeden v. West*, 13 Vet.App. 250, 250 (2000) (*per curiam* order).

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. at 406; *Hilkert*, 12 Vet.App. at 151; *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”). The Secretary has limited his response to only those arguments reasonably construed to have been raised by Appellant’s opening brief and any issues or arguments not raised on appeal should be deemed abandoned. *Pieczenik v. Dyax Corp.*, 265 F.3d 1329, 1332-1333 (Fed. Cir. 2001) (“It is well settled that an appellant is not permitted to make new arguments that it did

not make in its opening brief."); *Norvell v. Shinseki*, 27 Vet.App. 194, 201 (2008) ("This Court and the U.S. Court of Appeals for the Federal Circuit have repeatedly discouraged parties from raising arguments that were not presented in an initial brief to the Court.").

V. CONCLUSION

For the reasons provided above, this Court should affirm the decision on appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify under possible penalty of perjury under the laws of the United States of America, that on March 2, 2020, a copy of the foregoing was mailed, postage prepaid, to:

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419 Vining Street
Sumter, SC 29150

/s/ Monique A. S. Allen
Appellate Attorney