

Vet.App. No. 19-7151

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

BRIAN W. CALMON,
Appellant,

v.

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

ON APPEAL FROM THE BOARD OF VETERANS' APPEALS

**BRIEF OF APPELLEE
SECRETARY OF VETERANS AFFAIRS**

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Vet. App. No. 19-7151

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

**BRIEF OF APPELLEE
SECRETARY OF VETERANS AFFAIRS**

I. ISSUE PRESENTED

Whether the Court should vacate, in part, and remand the July 9, 2019, decision of the Board of Veterans' Appeals (the Board), that denied a claim of entitlement to service connection for sleep apnea and for hypertension.

In this decision, the Board also granted service connection for a deviated septum with residuals, and the Court should not disturb this favorable finding. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007) ("The Court is not permitted to reverse findings of fact favorable to a claimant made by the Board pursuant to its statutory authority").

Likewise, the Court should not disturb the part of the Board's decision that remanded the issue of entitlement to service connection for bilateral hearing loss, as it is not final. See *Kirkpatrick v. Nicholson*, 417 F.3d 1361 (Fed.Cir. 2005) (holding that a Board remand is not a final decision within the meaning of 38 U.S.C. § 7252(a)).

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

This Court has jurisdiction over the instant appeal pursuant to 38 U.S.C. § 7252(a).

B. Nature of the Case

Appellant, Brian W. Calmon, appeals *pro se* from a July 9, 2019, decision of the Board that denied entitlement to service connection for sleep apnea and for hypertension. (Record (R.) at 5-16).

Appellant asserts entitlement to service connection for sleep apnea and for hypertension was established, arguing that the Board incorrectly afforded little probative value to the letters from Appellant's physicians dated May 2012 and April 2019. (Appellant's Informal Brief (App.) at 1 (1-3)). Appellant also argues that the Board erred by failing to apply the benefit of the doubt doctrine and misevaluated the evidence. The Secretary disputes these contentions.

C. Statement of Relevant Facts

Appellant served honorably on active duty in the U.S. Marine Corps from September 1977 to September 1981. (R. at 575).

While in the U.S. Marine Corps, Appellant had his blood pressure taken multiple times. Between September 20, 1977, and September 23, 1977, Appellant had his blood pressure taken eight separate times. (R. at 326). For two of these times, Appellant had high blood pressure readings (both from the same day). *Id.* However, the readings from the following two days did not indicate high blood pressure. *Id.* Likewise, in the following years of service, Appellant's blood pressure remained normal. See (R. at 297, 299, 301, 319).

In January 1979, Appellant was diagnosed with a deviated nasal septum which required a septoplasty. See (R. at 307-312).

Thirty-one years later, in April 2010, Appellant was diagnosed with sleep apnea. (R. at 460-464).

In August 2012, Appellant submitted claims of entitlement to service connection for bilateral hearing loss, tinnitus, residuals of deviated septum, sleep apnea secondary to deviated septum, sinusitis secondary to deviated septum, and hypertension. (R. at 562-567).

In September 2012, Appellant submitted a note from Dr. Michael Joyce, which stated, "My patient has a deviated septum which may be connected to his sleep apnea." (R. at 482).

Appellant was provided with VA examinations for his claimed issues in March 2013. (R. at 410-418, 420-431, 433-436). Each of these VA examiners found Appellant to have current diagnoses of the claimed disabilities, but only Appellant's sinusitis was determined to be related to service. *Id.*; see (R. at 431).

On May 23, 2013, the Newark Regional Office (RO) issued a rating decision denying Appellant's claims of entitlement to bilateral hearing loss, residuals of deviated septum, sleep apnea secondary to deviated septum, and hypertension. (R. at 258-263, 345-350). The RO granted Appellant entitlement to service connection for tinnitus and for sinusitis, secondary to deviated septum. (R. at 348).

Appellant submitted a timely notice of disagreement in July 2013. (R. at 254).

On December 17, 2015, VA provided an addendum opinion regarding Appellant's hypertension claim. (R. at 227-228). The examiner again found that Appellant's hypertension was not related to service, reasoning that

subsequent readings did not show any sbps > 160 or dbp > 90 as per above criteria. he had several more readings from sept 20 - 23 and was normal. therefore, as there are no 3 separate days of having systolic bp > 160 or diastolic bp > 90, a diagnosis of hypertension cannot be made during military service. therefore, to answer question asked, it LESS likely that the high readings in service were first manifestations of subsequent diagnosed hypertension[.]

(R. at 228).

On December 21, 2015, the RO issued a statement of the case, continuing its previous decision to deny entitlement to service connection for bilateral hearing loss, residuals of deviated septum, sleep apnea secondary to deviated septum, and hypertension. (R. at 116-140).

Appellant submitted a VA Form 9 in January 2019, appealing the RO's decision to the Board. (R. at 113). The appeal was certified in March 2016 and added to the Board's docket in February 2019. (R. at 102-103, 79).

In March 2019, Appellant participated in a hearing before the Board. (R. at 41-74).

On April 12, 2019, Appellant submitted a letter from Dr. Allen Blaivas, which stated “[Appellant] is undergoing further testing to document his sleep apnea. His nasal issues (septal deviation) may be contributing to his sleep apnea but further testing is still needed.” (R. at 40).

In July 2019, the Board issued a decision denying Appellant’s claims of entitlement to service connection for sleep apnea and for hypertension, while granting his claim of entitlement to service connection for a deviated septum with residuals. (R. at 7-13). The Board also remanded his claim of entitlement to service connection for bilateral hearing loss. (R. at 13-16). Appellant now challenges this decision.

III. SUMMARY OF THE ARGUMENT

As a threshold matter, because Appellant has submitted an informal brief, the Secretary has attempted to discern, to the extent possible, Appellant’s arguments on appeal. (App. at 1-3); see *De Perez v. Derwinski*, 2 Vet.App. 85, 86 (1992) (noting that when reviewing the Board’s decision, the Court liberally construes arguments made by *pro se* appellants). However, like other parties, *pro se* appellants “bear the burden of persuasion on appeals to this Court.” *Berger v. Brown*, 10 Vet.App. 166, 169 (1997); see also *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (holding that the appellant bears the burden of demonstrating error on appeal), *aff’d per curiam*, 232 F.3d 908 (Fed.Cir. 2000) (table); *Shinseki*

v. Sanders, 556 U.S. 396, 409 (2009) (holding that the appellant bears the burden of demonstrating prejudicial error).

The Secretary recognizes that the Board's decision to deny Appellant entitlement to service connection for sleep apnea and for hypertension should be vacated and remanded, because in both instances, VA provided an inadequate medical examination. Regarding Appellant's claim for sleep apnea (claimed as secondary to his deviated septum residuals), the medical examiner failed to provide an opinion regarding aggravation. Likewise, regarding the claim for hypertension, the medical examiner provided an inadequate rationale for her medical determinations.

Accordingly, the Secretary respectfully requests that the Court vacate, in part, and remand the Board's decision to deny Appellant's claim of entitlement to service connection for sleep apnea and for hypertension, and direct the Board to provide Appellant with new examinations.

IV. ARGUMENT

A. VA Violated its Duty to Assist by Providing Inadequate Medical Examinations in March 2013 and December 2015.

The Secretary's duty to assist includes "providing a medical examination or obtaining a medical opinion when such an examination or opinion is necessary to make a decision on the claim." 38 U.S.C. § 5103A(d)(1) (2019). Once the Secretary undertakes the effort to provide an examination, even if not statutorily

obligated to do so, he must provide an adequate one. *Barr v. Nicholson*, 21 Vet.App. 303, 311 (2007).

The Court has held that a medical opinion is adequate “where it is based on consideration of the veteran’s prior medical history and examinations and also describes the disability, if any, 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). This requires the examiner to not only render a clear conclusion on the relevant medical question but to support that conclusion “with an analysis that the Board can consider and weigh against contrary opinions.” *Steffl v. Nicholson*, 21 Vet.App. 120, 124 (2007). Likewise, VA-provided medical opinions “must contain not only clear conclusions with supporting data, but also a reasoned medical explanation connecting the two.” *Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 301 (2008).

i. Entitlement to Service Connection for Sleep Apnea

Entitlement to service connection may be established when the evidence demonstrates that the claimed disability is proximately due to, or the result of, a veteran’s service-connected disability, or when a nonservice-connected disability is aggravated by a service-connected disability. 38 C.F.R. § 3.310(a)-(b) (2019); *see also Allen v. Brown*, 7 Vet.App. 439, 448 (1995).

In *El-Amin v. Shinseki*, the Court held that when deciding a claim for secondary service connection, VA must determine whether the claimed disability is caused or aggravated by the intertwined service-connected disability. 26

Vet.App. 136, 140-141 (2013). Likewise, in *Atencio v. O'Rourke*, the Court held that VA examiners must provide separate, distinct analyses on the issues of causation and aggravation. 30 Vet.App 74, 90-91 (2018).

Pursuant to 38 C.F.R. § 3.310, aggravation is shown by an “increase in severity of a nonservice-connected disease or injury that is proximately due to or the result of a service-connected disease or injury, and not due to the natural progress of the nonservice-connected disease.” See *Allen*, 7 Vet.App. at 448. Moreover, when causation and aggravation are at issue, as they are when considering entitlement under § 3.310, the Board must ensure that the medical opinion addresses each factor. *El-Amin*, 26 Vet.App. at 141.

Here, remand is warranted because VA did not fulfill its duty to assist, specifically, by providing an inadequate medical examination. In her report, the March 2013 VA examiner provided no analysis on the issue of whether Appellant’s deviated septum aggravated his sleep apnea. (R. at 9-10, 433-436). In fact, neither the Board nor the examiner even mentioned the possibility of aggravation, despite Appellant’s claim being one for secondary service connection. *Id.* This directly violates the Court’s ruling in *El-Amin*, and warrants remand and a new examination. 26 Vet.App. at 141.

Accordingly, the Secretary respectfully requests this Court to vacate and remand the Board’s decision to deny entitlement to service connection for sleep apnea, and to instruct the Board to provide Appellant with a new examination that considers both causation *and* aggravation.

ii. *Entitlement to Service Connection for Hypertension*

Remand of the Board's decision to deny Appellant's claim of entitlement to service connection for hypertension is also warranted, because VA, again, did not fulfill its duty to assist by providing inadequate examinations. Both the March 2013 and December 2015 VA medical examinations are inadequate, as they both provide insufficient rationales. *Nieves-Rodriguez*, 22 Vet.App. at 301. In the March 2013 medical examination report, the physician found that Appellant's hypertension was not related to his service, reasoning that "septoplasty does not cause or aggravate hypertension the veteran's hypertension is essential hypertension and its etiology is idiopathic." (R. at 416). In the December 2015 medical examination report, the same physician again found that Appellant's hypertension was not related to his service, and explained that

subsequent readings did not show any sbps > 160 or dbp > 90 as per above criteria. he had several more readings from sept 20 - 23 and was normal. therefore, as there are no 3 separate days of having systolic bp > 160 or diastolic bp > 90, a diagnosis of hypertension cannot be made during military service. therefore, to answer question asked, it LESS likely that the high readings in service were first manifestations of subsequent diagnosed hypertension[.]

(R. at 228). Neither of these rationales provide clear conclusions with supporting data and a reasoned medical explanation connecting the two. *Nieves-Rodriguez*, 22 Vet.App. at 301. Indeed, both reports offer mere conclusions, with the December 2015 rationale providing only terse citations to data. (R. at 416, 228).

Accordingly, the Secretary respectfully requests this Court to vacate and remand the Board's decision to deny entitlement to service connection for

hypertension, and to instruct the Board to provide Appellant with a new examination.

B. Appellant's Remaining Arguments are Moot.

As indicated by the foregoing, the Board's decision to deny entitlement to service connection for sleep apnea and for hypertension warrants remand. Therefore, Appellant's arguments regarding the benefit of the doubt doctrine and the Board's evaluation of the evidence are moot. Consequently, the Secretary respectfully notes that he does not concede any material issue that the Court may deem Appellant adequately raised, argued and properly preserved, but which the Secretary may not have addressed through inadvertence, and reserves the right to address same, if the Court deems it necessary or advisable before its decision. *But cf. McWhorter v. Derwinski*, 2 Vet. App. 133, 136 (1992).

C. Appellant Has Abandoned All Issues Not Argued in His Brief.

It is axiomatic that issues or arguments not raised on appeal are abandoned. *See Disabled Am. Veterans v. Gober*, 234 F.3d 682, 688 n.3 (Fed.Cir. 2000) (stating that the Court would "only address those challenges that were briefed"); *Pederson v. McDonald*, 27 Vet.App. 276, 284 (2015); *Williams v. Gober*, 10 Vet.App. 447, 448 (1997) (deeming abandoned Board determinations unchallenged on appeal); *Bucklinger v. Brown*, 5 Vet.App. 435, 436 (1993). Therefore, any and all issues that have not been addressed in Appellant's informal brief have been abandoned.

V. CONCLUSION

Wherefore, Appellee respectfully submits that the July 9, 2019, Board decision should be vacated, in part, and remanded in accordance with the preceding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On the 3rd day of March, 2020, a copy of the foregoing was mailed, postage prepaid, to:

Brian W. Calmon
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I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

/s/ Colin E. Tansits
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