IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

CHARLES E. BROWN,

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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MISCELLANEOUS

IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

CHARLES E. BROWN, Appellant,	)	
v.	)	Vet. App. No. 19-4957
ROBERT L. WILKIE, Secretary of Veterans Affairs, Appellee.	)	

ON APPEAL FROM THE BOARD OF VETERANS' APPEALS

BRIEF OF THE APPELLEE SECRETARY OF VETERANS AFFAIRS

I. ISSUES PRESENTED

A. Whether the Court should affirm the March 28, 2019, Board of Veterans' Appeals' (Board) denial of reopening of Appellant's claim of entitlement to service connection for a lumbar spine disability; and

B. Whether the Court should affirm the March 28, 2019, Board's denial of Appellant's claims of entitlement to service connection for gastroesophageal reflux disease (GERD) and fibromyalgia.

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

The Court has exclusive jurisdiction to review the final decisions of the Board under 38 U.S.C. § 7252(a).

B. Nature of the Case

Appellant, Charles E. Brown, seeks the Court's review of a March 28, 2019, Board decision that denied his application to reopen a previously denied claim of entitlement to service connection for a lumbar spine disability. [Record Before the Agency (R.) at 9-10 (1-19). Appellant also seeks the Court's review of the March 28, 2019, Board's denials of entitlement to service connection for GERD and fibromyalgia. R. at 12-13 (1-19).

Appellant does not challenge the Board's decision to the extent that it denied his claim of entitlement to service connection for prostate cancer. R. at 11-12 (1-19); *see* Appellant's Brief (App. Br.) at 1-10; *see also Pederson v. McDonald*, 27 Vet.App. 276, 285 (2015) (en banc) (declining to review the merits of issues that were abandoned). Appellant also does not challenge the Board's dismissal of his claim of entitlement to special monthly compensation based on the need for aid and attendance or by reason of being housebound. R. at 13-14 (1-19); *see* App. Br. at 1-10; *see also Pederson*, 27 Vet.App. at 285.

The Board also remanded Appellant's claims of entitlement to a total disability evaluation based on individual unemployability, and service connection for: cellulitis; deep vein thrombosis; posttraumatic stress disorder (PTSD); major depressive disorder (MDD); and obstructive sleep apnea. R. at 14-17 (1-19). Therefore, the Court does not have jurisdiction over those issues. *See Breeden v.*

Principi, 17 Vet.App. 475, 478 (2004) (a Board remand "does not represent a final decision over which this Court has jurisdiction").

Finally, the Court may not disturb the Board's decision to the extent it reopened Appellant's claims of entitlement to service connection for cellulitis and MDD, because those findings are favorable to Appellant. *See* R. at 7-8 (1-19); *see also 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.").

C. Statement of Relevant Facts

Appellant served on active duty from March 1975 to March 1979. *See* R. at 5301-05.

In August 2005, Appellant filed his claim of entitlement to service connection for a back disability. R. at 5278 (5272-86). At that time, Appellant asserted that his disability began in July 1996. *Id*. In a January 2006 statement, Appellant noted that he injured his back during service when he fell from a cliff. R. at 5189. Previously, during treatment in October 2000, Appellant reported that he was employed as a construction worker and injured his back in 1999 while doing heavy lifting. R. at 5249 (5249-50). An August 2001 Department of Veterans Affairs (VA) treatment record also noted that Appellant injured his back in October 1999. R. at 5246.

A May 2006 Rating Decision denied Appellant's claim of entitlement to service connection for a low back disability because he failed to submit adequate

evidence that his disability was related to his period of military service as the evidence showed that the condition was related to a post-service work injury. R. at 5072-73 (5067-77). Specifically, the May 2006 Rating Decision notes "[s]ervice connection for low back pain is denied since this condition neither occurred in nor was caused by service." R. at 5073 (5067-77). Appellant did not appeal the rating decision and it became final.

Eight years later, Appellant sought to reopen his claim in February 2014. R. at 4993 (4992-93). In the same document, Appellant sought entitlement to service connection for fibromyalgia and acid reflux. R. at 4992 (4992-93). To support his claim, Appellant submitted buddy statements from his niece, which noted that Appellant had chronic low back pain that began during his period of military service. *See*, *e.g.*, R. at 4787, 4792 (4792-93).

An August 2015 Rating Decision denied reopening Appellant's claim of entitlement to a low back disability because the evidence failed to show that the disability was related to his period of military service. R. at 3975 (3964-76). The same rating decision also denied Appellant's claims of entitlement to service connection for fibromyalgia and GERD because the evidence failed to show diagnoses of the conditions. R. at 3970 (3964-76). Appellant filed his notice of disagreement (NOD) with the August 2015 Rating Decision. R. at 3909-10 (3897-3910). Appellant reiterated his assertion that he injured his back when he fell during service. *See* R. at 3894. VA continued the denials in an August 2017

Statement of the Case (SOC). R. at 900-01, 903-04 (871-905). That same month, Appellant appealed to the Board. R. at 849-51.

On March 28, 2019, the Board issued the decision on appeal. R. at 1-19. Appellant filed his Notice of Appeal with the U.S. Court of Appeals for Veterans Claims on July 24, 2019.

III. SUMMARY OF ARGUMENT

The Court should affirm the March 28, 2019, Board decision denying entitlement to service connection for fibromyalgia and GERD because there are plausible bases in the record for the Board's findings and those findings are supported by an adequate statement of reasons or bases. Moreover, the arguments presented by Appellant fail to provide a legally sufficient basis to find prejudicial error because he fails to show a diagnosis of either disability. The Court should also affirm the Board's decision to the extent that it denied reopening of Appellant's claim of entitlement to service connection for a lumbar spine disability, because the Board provided adequate reasons or bases for its determination. Appellant failed to submit any evidence that was not previously submitted to agency decision-makers.

IV. ARGUMENT

A. The Court Should Affirm the March 28, 2019, Board Determination that New and Material Evidence was Not Submitted to Reopen Appellant's Claim of Entitlement to Service Connection for a Lumbar Spine Disability Because the Board's Decision is Supported by an Adequate Statement of Reasons or Bases and Not Clearly Erroneous.

i. Legal Standard

The Secretary must reopen a previously and finally disallowed claim when "new and material evidence" is presented or secured. 38 U.S.C. §§ 5108, 7104(b), 7105(c); 38 C.F.R. § 3.156(a). To satisfy this requirement, evidence presented or secured "must be both new and material." *Woehlaert v. Nicholson,* 21 Vet.App. 456, 460 (2007); *Smith v. West*, 12 Vet.App. 312, 314 (1999). "New evidence" is evidence "not previously submitted to agency decision makers . . . [that] is neither cumulative nor redundant." 38 C.F.R. § 3.156(a); *see Woehlaert*, 21 Vet.App. at 461; *Smith*, 12 Vet.App. at 314 (if evidence was not in record at time of final disallowance of claim and is not cumulative of other evidence in record, it is new). New evidence is "material" if, "by itself, or when considered with previous evidence on record, relates to an unestablished fact necessary to substantiate the claim." 38 C.F.R. § 3.156(a). "New and material evidence can be neither cumulative nor redundant of the evidence of record at the time of the last prior final denial of the claim sought to be reopened, and must raise a reasonable possibility of substantiating the claim." *Id*.

The Board's determinations as to whether new and material evidence has been presented are generally reviewed under the "clearly erroneous" standard. 38 U.S.C. § 7261(a)(4); *see Woehlaert*, 21 Vet.App. at 461; *Fortuck v. Principi*, 17 Vet.App. 173, 178 (2003). In addition, the Board is required to provide a written statement of the reasons or bases for its "findings and conclusions [ ] on all material issues of fact and law presented on the record." 38 U.S.C. § 7104(d)(1); *see D'Aries*, 22 Vet.App. 97, 104 (2008) (citing *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995)).

ii. **Analysis**

The last final denial of Appellant's back disability claim was a May 2006 Rating Decision. R. at 5072-73 (5067-77). Previously, VA denied entitlement to service connection because Appellant failed to submit adequate evidence that his disability was incurred in or caused by his period of military service as the evidence showed that the condition was related to a post-service work injury. R. at 5073 (5067-77). Contrary to Appellant's assertion, service connection was not denied solely because he "complained of low back pain with radiculopathy from a job[-]related injury in 1999 or 2000[.]" App. Br. at 5.

In the decision on appeal, the Board determined that entitlement to reopening of Appellant's low back disability claim was not warranted because the evidence he submitted since the May 2006 final denial presented the same theory of entitlement; specifically, that Appellant injured his back during an in-service fall. R. at 9 (1-19); *see* R. at 5189 (January 2006 statement noting Appellant injured

his back when he "fell off a cliff during training" in Okinawa, Japan); R. at 4787 (June 2014 statement noting Appellant injured his back during training in Okinawa, Japan); *see also Kent v. Nicholson*, 10 Vet.App. 1, 10 (2006) (Whether evidence is material "depends on the basis on which the prior claim was denied."). Although Appellant asserts that the Board was required to find his buddy statements to be new and material evidence of in-service incurrence of a back disability because his service treatment records were unavailable, App. Br. at 4-7, such a finding was not required as the unavailability of service treatment records does not create a presumption that evidence in new and material, as defined in 38 C.F.R. § 3.156(a). *See O'Hare v. Derwinski*, 1 Vet. App. 365, 367 (1991) (holding the Board's "obligation to explain its findings and conclusions and to consider carefully the benefit-of-the-doubt rule is heightened" where service medical records are unavailable). While "the credibility of the evidence is to be presumed[,]" *Justus v. Principi*, 3 Vet.App. 510, 513 (1992), Appellant was still required to show that it "relate[d] to an unestablished fact necessary to substantiate the claim." 38 C.F.R. § 3.156(a).

Appellant acknowledges that – prior to the May 2006 Rating Decision – he attempted to establish that his low back disability was caused by an in-service fall. *See* App. Br. at 4 (citing R. at 5189); *see also* R. at 5072 (5067-77). However, that fact was rejected by VA in May 2006, and considered by the Board in the decision on appeal, because evidence of record showed that the disability was incurred after his period of military service. *See* R. at 9 (1-19), 5072 (5067-77); *see*, *e.g.*,

R. at 5246, 5249 (5249-50). While Appellant asserts that the rejection of the duplicative theory of entitlement renders it "obviously [ ] very difficult if not impossible for [him] to establish his in-service injury," App. Br. at 7, his assertion is inaccurate, and nevertheless, he is responsible for supporting his claim for benefits. *See* 38 U.S.C. § 5107(a) (a claimant has the responsibility to present and support a claim for benefits). For example, Appellant could have submitted competent evidence showing that his current back disability is consistent with a fall described in his prior statements. Contrary to Appellant's assertion, private treatment records "that never existed[,]" App. Br. at 9, are not required. Rather, Appellant was required to submit evidence was neither cumulative nor redundant of the evidence of record at the time of the last prior final denial of the claim sought to be reopened, and which raised a reasonable possibility of substantiating his claim. *See* 38 C.F.R. § 3.156(a). Appellant's buddy statements that present the same theory that was previously submitted to agency decision-makers are necessarily redundant. *See id*.; *see also* R. at 4787, 5189.

To the extent Appellant asserts that the Board was required to explain which evidence he could have submitted to substantiate his claim, *see* App. Br. at 7, his assertion is not supported by any authority. Instead, the Board is required to provide a written statement of the reasons or bases for its "findings and conclusions [ ] on all material issues of fact and law presented on the record" which it did here with its explanation that Appellant's buddy statement was duplicative of evidence submitted prior to the last final denial. 38 U.S.C. § 7104(d)(1).

Additionally, the duty to assist does not attach until a claim is reopened. *See generally Shade v. Shinseki*, 24 Vet.App. 110, 121 (2010) (citing 38 C.F.R. § 3.159(c)(4)(iii) (explaining that the duty to provide a medical examination or opinion does not attach until a claim is reopened)). Accordingly, because Appellant cannot demonstrate error in the Board's determination that his duplicative theory of entitlement was not new and material evidence sufficient to reopen his claim, he cannot demonstrate error in the Board's failure to provide a medical examination or explanation of which evidence he should have submitted to substantiate his claim. *See Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (holding that an appellant bears the burden of demonstrating error on appeal), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000).

ii. The Court Should Affirm the March 28, 2019, Board's Denial of Entitlement to Service Connection for Fibromyalgia and GERD Because the Board's Findings are Supported by the Record and are Not Clearly Erroneous.

i. Legal Standard

Service connection may be granted for a disability resulting from personal injury suffered or disease contracted in the line of duty or for aggravation of a pre-existing injury or disease in the line of duty. 38 U.S.C. § 1110; 38 C.F.R. § 3.303(a). In order to establish service connection for a claimed disorder, there must be (1) medical evidence of a current disability; (2) medical, or in certain circumstances, lay evidence of in-service incurrence or aggravation of a disease or injury; and (3)

medical evidence of a nexus between the claimed in-service disease or injury and the current disability. *See Hickson v. West*, 12 Vet.App. 247, 253 (1999).

A finding that a particular disability occurred in or is the result of service is a finding of fact subject to review by this Court under the "clearly erroneous" standard of review. *Irby v. Brown*, 6 Vet.App. 132, 135 (1992); *see also* 38 U.S.C. § 7261(a)(4). Accordingly, this Court must set aside a finding of fact as "clearly erroneous" only when there is no plausible basis in the record for the Board's findings at issue. *Gilbert v. Derwinski*, 1 Vet.App. 49, 53 (1990). In addition, the Board is required to provide a written statement of the reasons or bases for its "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*, 1 Vet.App. at 57. To comply with this requirement, the Board must analyze the credibility and probative value of the evidence, account for the evidence that it finds to be persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the claimant. *D'Aries*, 22 Vet.App at 104 (citing *Caluza*, 7 Vet.App. at 506).

ii. **Fibromyalgia**

In March 28, 2019, decision, the Board found that entitlement to service connection for fibromyalgia was not warranted because the preponderance of the competent evidence failed to show a current disability that was related to his military service. R. at 12 (1-19). Although a current disability in this context "refers

to the functional impairment of earning capacity, not the underlying cause of said disability[,]" *Saunders v. Wilkie*, 886 F.3d 1356, 1363 (Fed. Cir. 2018), the most straightforward evidence of a current disability is usually a medical diagnosis, which is still required in some claims. *See, e.g., Young v. McDonald*, 766 F.3d 1348, 1354 (Fed. Cir. 2014) ("VA has long required a medical diagnosis of PTSD to establish service connection."). The Board noted that no evidence reflected a diagnosis of fibromyalgia or testing to reflect fibromyalgia or a similar disease process. *Id*. Appellant does not refute the finding or present any evidence or argument that *Saunders* is applicable to his case, *see* App. Br. at 2-4; but rather, he asserts that "[t]he record shows that a psychological pain evaluation found that [he] experiences fatigue as a result of his depression." App. Br. at 3.

The Board did not err in its finding that fibromyalgia was not shown by the record. R. at 12 (1-19). Contrary to Appellant's assertion, *see* App. Br. at 3 (citing R. at 4032 (4031-34) (noting Appellant endorsed fatigue)), fatigue is not fibromyalgia. *See*, *e.g.*, DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 711 (31st ed. 2007) (defining "fibromyalgia" is "pain and stiffness in the muscles and joints that either is diffuse or has multiple trigger points"); *Schedule for Rating Disabilities; Fibromyalgia*, 64 Fed. Reg. 32,410, 32,411 (Jun. 17, 1999) ("Fibromyalgia is a 'nonarticular' rheumatic disease"). Additionally, the very treatment record Appellant cites as support found that "[p]sychological factors are not thought to play a role in the etiology of [Appellant's] pain[.]" R. at 4033 (4031-34).

In sum, Appellant cannot demonstrate error in the Board's determination that he does not have fibromyalgia because he has not shown a diagnosis of the condition, or anything to reflect that he suffers from a rheumatic disease. The Board determined that Appellant was not competent to diagnose the condition. R. at 13 (1-19). Similarly, Appellant cannot demonstrate competence to show that fatigue is associated with a psychiatric disability, or fibromyalgia. *See generally*, *Kahana v. Shinseki*, 24 Vet.App. 428, 438 (2011) (Lance, J., concurring) ("[A]ny given medical issue is either simple enough to be within the realm of common knowledge for lay claimants and adjudicators or complex enough to require an expert opinion."); *see also 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"). Accordingly, without any competent evidence to show that Appellant has fibromyalgia, the Board could not have erred in its denial of Appellant's claim. *See Hilkert*, 12 Vet.App. at 151.

iii. **GERD**

In the Board's decision on appeal, the Board also denied Appellant's claim of entitlement to service connection for GERD because no competent evidence showed that he had the condition, or that it was related to service. R. at 13 (1-19). Although Appellant asserts that because he took over the counter medication, he must have a current disability, *see* App. Br. at 8-9, his assertion is inadequate to demonstrate error in the Board's decision. *See Kern*, 4 Vet.App. at 353. Self-treatment for a condition with over the counter medication is not indicative or

determinative of functional impairment of earning capacity. *See Saunders*, 886 F.3d at 1363. Simply put, without some evidence to show a diagnosis, or functional impairment of earning capacity due to symptoms of the condition, the Board decision cannot be clearly erroneous. *See Gilbert*, 1 Vet.App. at 52 (1990) ("'Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.'") (quoting *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573-74, 105 S.Ct. 1504, 84 L.Ed. 518 (1985)).

To the extent Appellant baldly asserts his GERD claim should have been remanded alongside his PTSD claim, although Appellant asserts the two are related, there is no evidence suggesting as much. App. Br. at 9. Appellant fails to present any evidence as to how a decision granting entitlement to service connection for PTSD could have any impact on his GERD claim, particularly as PTSD is not service connected nor is there any evidence relating GERD to PTSD. *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 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). Accordingly, the Board's denial should be affirmed.

V. CONCLUSION

In view of the foregoing argument, Appellee, Secretary of Veterans Affairs, requests that the Court affirm the Board's March 28, 2019, Board's denials of

entitlement to service connection for fibromyalgia and GERD and reopening of Appellant's claim of entitlement to service connection for a lumbar spine disability.

Respectfully submitted,

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