IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

JUAN PENA MEDINA,
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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ROBERT L. WILKIE, Secretary of Veterans Affairs,	)	
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I. ISSUES PRESENTED

Whether the Court of Appeals for Veterans Claims (Court) should affirm the February 5, 2019, Board of Veterans' Appeals' (Board) decision that denied entitlement to service connection for a low back disability and denied entitlement to a total disability rating based on individual unemployability (TDIU) due to service-connected disabilities.

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

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

B. Nature of the Case

Appellant, Juan D. Pena-Medina, appeals the February 5, 2019, Board decision that denied entitlement to service connection for a low back disability and denied entitlement to a TDIU due to service-connected disabilities. (Record (R.) at 3-14). Appellant does not contest the Board's denial of his claim for entitlement to an initial rating in excess of 30% for posttraumatic stress disorder (PTSD). *Bowers v. Shinseki*, 26 Vet. App. 201, 210 n.12 (2013) (recognizing an appellant's right to expressly abandon parts of his appeal).

C. Statement of Facts

Appellant had active duty service from May 1951 to June 1953 and from June 1956 to June 1959. (R. at 431-32).

In September 2010, Appellant submitted a claim, *inter alia*, for entitlement to service connection for all conditions listed in an attached letter from a physician. (R. at 665, 671 (665-72)). Attached to Appellant's claim was a letter from Dr. Nanette A. Ortiz-Valentin, who wrote that Appellant had injured his back in-service as a result of continuously carrying heavy equipment on his back, which she explained "can put a lot of strain at the back area causing continuous spasm and inflammatory changes which in the long term can cause degenerative changes at column area." *Id*. at 671. She opined that his back problems were "service connected secondary to his duties while at service." *Id*. at 671.

Appellant also submitted a claim for TDIU in November 2010. (R. at 648-49).

Appellant was afforded a VA back conditions examination in October 2012. (R. at 509-21). The examiner diagnosed Appellant with mild lumbar myositis with a date of diagnosis of 2012. *Id*. at 509-10.

The Regional Office (RO) issued a rating decision that same month that, *inter alia*, denied entitlement to service connection for mild lumbar myositis, claimed as back pain, and TDIU. (R. at 488 (487-91, 496-502)). Appellant filed a notice of disagreement (NOD) (R. at 464), and the RO issued a Statement of the Case (SOC) in January 2015 (R. at 435-61). In January 2015, Appellant filed a VA Form 9. (R. at 434). The Board remanded Appellant's claims in April 2016 for additional development including, among other things, scheduling him with a new examination to address the etiology of his back condition. (R. at 404-05 (393-407)).

Appellant was afforded a VA medical examination in August 2016. (R. at 282-90). The examiner noted that Appellant could not recall when his condition began and denied trauma or injury, asserting that his condition began "acute and sudden." *Id*. at 282 (capitalization omitted). She opined that Appellant's condition was less likely as not caused by Appellant' s military service, explaining that there was no clinical or objective evidence that supported a diagnosis of a back condition and that she concurred with the findings of the October 2012 VA medical opinion. *Id.* at 290. The examiner noted that Appellant's service treatment records (STRs) and VA records did not show evidence of treatment, follow-up, or diagnosis and

that the diagnosis of a back condition was not given for "many years after active duty" in 2012. *Id*. (capitalization omitted).

The RO issued a Supplemental Statement of the Case (SSOC) in September 2016 (R. at 252-77), and the Board again remanded Appellant's claims in December 2016, finding the August 2016 VA examination was inadequate and ordering a new examination. (R. at 241-43 (239-45)).

In January 2017, Appellant was afforded a new VA examination, which found that Appellant's claimed low back disorder was less likely as not related to his military service. (R. at 206-08). The examiner found that there was no clinical and objective evidence that supported the diagnosis of a back condition and concurred with the previous examination of October 2012. *Id*. at 207. In September 2017, the Board again remanded Appellant's claim for further development and again order a new examination. (R. at 135-37 (133-39)).

Appellant was afforded his final VA examination in November 2018. (R. at 99-108). The examiner opined that Appellant's condition was less likely than not related to service, reasoning that there was no evidence in his records of any back injuries that would cause the actual condition and that heavy lifting does not cause pain in the affected area after more than 40 years. *Id.* at 99. In December 2018, the RO issued an SSOC. (R. at 65-81).

III. SUMMARY OF ARGUMENTS

Appellant argues that the Board improperly relied on an inadequate VA medical examination to deny his low back disability claim. However, the Board

provided an adequate statement of reasons and bases for its decision after relying on the necessary and well-developed VA examination of record, which addressed all pertinent medical questions at issue and considered Appellant's entire medical history. As such, the Board's February 5, 2019, decision should be affirmed.

IV. ARGUMENT

The Board's decision must include 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; the statement must be adequate to enable an appellant to understand the precise basis for the Board's decision, and to facilitate informed review in this Court. *See* 38 U.S.C. § 7104(d)(1); *Allday v. Brown,* 7 Vet.App. 517, 527 (1995); *Gilbert v. Derwinski,* 1 Vet.App. 49, 57 (1990). To comply with this requirement, the Board must analyze the credibility and probative value of the evidence, account for the evidence it finds persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence 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).

Pursuant to 38 U.S.C. § 5103A, the Secretary is obligated, in appropriate cases, to provide claimants with a thorough and contemporaneous medical examination. *See* 38 U.S.C. § 5103A(d)(2); *McLendon v. Nicholson,* 20 Vet.App. 79, 81 (2006); *Green v. Derwinski,* 1 Vet.App. 121, 124 (1991). A medical opinion arising from a medical examination is considered adequate "where it is based upon 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.'" *Stefl v. Nicholson,* 21 Vet.App. 120, 123 (2007) (quoting *Ardison v. Brown,* 6 Vet.App. 405, 407 (1994)). The opinion "must support its conclusion with an analysis that the Board can consider and weigh against contrary opinions." *Id.* at 124. Whether a medical opinion is adequate is a finding of fact, which the Court reviews under the "clearly erroneous" standard. *See* 38 U.S.C. § 7261(a)(4); *Nolen v. Gober,* 14 Vet.App. 183, 184 (2000).

Appellant argues that the Board erred by relying on the November 2018 VA examination. (Appellant's Brief (App. Br.) at 5-8). He avers that the November 2018 VA examiner failed to provide any detail or medical rationale for his findings and made several unsupported statements, including finding Dr. Ortiz-Valentin did not review all available medical records in her private medical opinion, heavy lifting injuries did not cause pain after forty years, and there was no evidence in Appellant's records to indicate any back injuries. *Id*. at 6-8. Appellant argues that the examiner also inappropriately used the fact that Appellant did not seek therapy from a VA medical institution to doubt his credibility. *Id.* at 8. Lastly, Appellant contends that the Board provided an inadequate statement of reasons or bases for why it favored the November 2018 VA examination over the September 2010 private medical opinion and that it made a bare conclusory statement about the

credibility of the November 2018 VA examination without providing supporting analysis of evidence it found persuasive or unpersuasive. *Id*. at 8-10.[1]

In this case, the Board provided an adequate statement of reasons or bases for its determination based on the probative evidence of record. *Gilbert,* 1 Vet.App. at 57. Here, the Board found that the November 2018 VA examiner's opinion was the most probative evidence of record, noting the examiner's familiarity with the record and clear explanation of the rationale. (R. at 7 (3-14)). It cited to his outlining of Appellant's medical history and the consideration of his lay statements, finding that the opinion was "fully articulated with clear conclusions based on accurate factual foundation and supported by sound reasoning." *Id*.

The Board's decision is supported by the record. As the Board found, the examiner noted consideration of Appellant's full medical history, including his denial of lumbar traumas during service, his diagnosis of lumbar myositis in 2010, the onset of his lumbar pain in 2012, and the fact that his pains were "on/off in nature" and not associated with any radicular signs. (R. at 99, 101 (99-108)) (capitalization omitted). He conducted a physical examination of Appellant where he fully assessed his lumbar disability and addressed whether the "actual back condition of lumbar myositis is service related." *Id*. at 99, 102-08 (capitalization omitted). Additionally, the examiner specifically addressed Appellant's claim that

[1] Appellant also argues that his TDIU claim must be remanded as inextricably intertwined with Appellant's low back disability claimed. (App. Br. at 10-11). However, because the Board's denial of this claim is proper, this argument is rendered moot.

"heavy lifting" during his military service caused his back disability but found that this claimed in-service occurrence would not cause pain in Appellant's affected area. *See id*. at 99. Because the examiner considered Appellant's medical history and included a reasoned rationale for the opinion, it is sufficient for rating purposes. *Stefl*, 21 Vet.App. at 123.

Appellant's arguments amount to a mere disagreement with the examiner's findings and the Board's weighing of evidence, which are insufficient to establish clear error. 38 U.S.C. § 7261(a)(4); *Gilbert,* 1 Vet.App. at 52; *Hilkert v. West,* 12 Vet.App. 145, 151(1999) (en banc) (appellant bears burden of demonstrating error on appeal); *Shinseki v. Sanders,* 556 U.S. 396, 409 (2009) (explaining that "the burden of showing that an error is harmful normally falls upon the party attacking the agency's determination"). As noted above, the Board's reliance on the fully developed November 2018 VA examination was proper.

To the extent that Appellant argues that the examination is inadequate, as previously explained, the examiner considered Appellant's medical history and gave sufficient rationale for his opinion. In particular, he considered Appellant's medical history, to include that his denial of lumbar trauma during service and the onset of pain in 2012; described his disability as lumbar myositis; and supported the opinion with rationale that heavy lifting does not cause pain in affected area more than 40 years thereafter (R. at 99, 101). While Appellant argues that the examiner failed to provide more rationale for his opinion or failed to accord his lay statements more probative weight (App. Br. at 6-8), these arguments are

tantamount to imposing a reasons or bases requirement on the examiner, which is not required by law. *Acevedo v. Shinseki*, 25 Vet.App. 286, 294 (2012) (noting that the law imposes no reasons-or-bases requirement on examiners). Appellant makes the mistake of failing to read the examination as a whole, and simply focuses on portions of the medical opinion while ignoring the overall findings. *See id. at* 294 (in determining the adequate of medical reports, reports "must be read as a whole").

Similarly, Appellant's argument that the Board's reasons or bases for its reliance on the November 2018 VA examination over Dr. Ortiz-Valentin's opinion is unavailing. (App. Br. at 9-10); *Owens v. Brown*, 7 Vet.App. 429, 433 (1995) ("It is not error for the [Board] to favor the opinion of one competent medical expert over that of another when the Board gives an adequate statement of reasons and bases."). Here, the Board relied on the "sound reasoning" of the November 2018 VA examiner, who found that Dr. Ortiz-Valentin examiner did not appear to consider all medical records at issue. (R. at 99). This finding is supported by a plain reading of Dr. Ortiz-Valentin's opinion, which does not indicate a review of the relevant medical evidence of record. *See* (R. at 671). As such, the Board's determination is supported, and Appellant has failed to establish error or prejudice in this case. *Hilkert,* 12 Vet.App. at 151; *Sanders,* 556 U.S. at 409. Moreover, the Board need only provide adequate reasons or bases for relying on one competent medical opinion over the other. *Owens*, 7 Vet.App. at 433. And here, the Board offered more than adequate rationale for its reliance on the November 2018 VA

examination including the examiner's familiarity with the record, the clear explanation of rationale, the "outlin[ing]" of Appellant's medical history, the sound rationale for the discounting the private medical opinion, and the fact that it was "fully articulated with clear conclusions based on accurate factual foundation and supported by sound reasoning." (R. at 7 (3-14)). Accordingly, Appellant's arguments amount to mere disagreements with the Board's weighing of the medical opinions, which is insufficient to constitute error. *Owens*, 7 Vet.App. at 433.

The Secretary has limited his response to only those arguments reasonably construed to have been raised by Appellant in his opening brief. *Bowers*, 26 Vet. at 210 n.12 (recognizing an appellant's right to expressly abandon parts of his appeal). It is axiomatic that any issues or arguments not raised on appeal are abandoned. *Pieczenik v. Dyax Corp.*, 265 F.3d 1329, 1332-33 (Fed. Cir. 2001); *Norvell v. Peake*, 22 Vet.App. 194, 201 (2008).

V. CONCLUSION

In light of the foregoing, Appellee, the Secretary of Veterans Affairs, requests that the Court affirm the February 5, 2019, Board decision.

Respectfully submitted,

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