

Vet.App. No. 19-3199

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

MARIO B. TOMSICH,
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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Secretary of Veterans Affairs,)	
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Appellee.)	

**ON APPEAL FROM THE
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**BRIEF OF THE APPELLEE
SECRETARY OF VETERANS AFFAIRS**

I. ISSUE PRESENTED

In its January 15, 2019, decision, the Board of Veterans' Appeals (Board) denied entitlement to service connection for a sleep disorder, to include as secondary to an acquired psychiatric disorder. The Board explained that Appellant did not meet the diagnostic criteria for a sleep disorder, as his sleep dysfunction was a symptom of his major depressive disorder, rather than a separate or discrete disorder. Should the Court affirm the Board's decision where there is no clear error and the VA examination was both adequate and substantially complied with the prior remand order?

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

The United States Court of Appeals for Veterans Claims (Court) has jurisdiction under 38 U.S.C. § 7252(a), which grants this Court exclusive jurisdiction to review Board decisions.

B. Nature of the Case

Appellant, Mario B. Tomsich, appeals the Board's January 15, 2019, decision denying entitlement to service connection for a sleep disorder, to include as secondary to an acquired psychiatric disorder. [Record Before the Agency (R.) at 5-9].

C. Statement of Facts

Appellant served on active duty in the United States Army from May 7, 1968, to December 8, 1969. [R. at 826, 5715].

On September 5, 2007, Appellant filed his original claim for a sleep disorder and a mental disorder. [R. at 5587-88]. On July 29, 2008, the Regional Office (RO) denied Appellant's claims for a sleep disorder and mental condition. [R. at 5234-35 (5234-40)]. On January 21, 2011, the Board affirmed the RO's denial of Appellant's claims. [R. at 4751-65]. See *also* [R. at 5162-90 (May 2009 Statement of the Case), 5215-20 (July 2008 Notice of Disagreement)].

On January 31, 2013, Appellant submitted a request to reopen his claim. [R. at 3765-66]. On July 13, 2015, the Board issued a decision preserving Appellant's

“sleep disability . . . including as secondary to an acquired psychiatric disability” claim. [R. at 2292 (2289-2300)].

On June 26, 2017, the Board denied Appellant’s claim, finding that “a sleep disorder was not incurred or aggravated in service.” [R. at 689 (685-716)]; *see also* [R. at 1676-90 (January 2017 supplemental statement of the case)]. The Board explained that there was no evidence of a diagnosis or treatment for a sleep disorder. [R. at 693 (685-716)]. The Board also granted service connection for Major Depressive Disorder (MDD). [R. at 706 (685-716)].

Appellant appealed the Board decision to this Court and, on February 9, 2018, the parties filed a joint motion to remand the claim “for the Board to determine under *McLendon* whether Appellant is entitled to an examination to determine whether Appellant has a sleep disorder and, if so, whether it is related to service” or his service-connected depression. [R. at 519-20 (517-23)].

On remand, the Board determined that an examination was necessary to adjudicate Appellant’s claim, and thus it remanded the claim for a VA examination. [R. at 454-55 (454-57)] (June 2018 Board remand). The June 2018 remand order further instructed the examiner to determine, *inter alia*, whether Appellant had a current sleep disorder. [R. at 455 (454-57)].

On October 27, 2018, Appellant underwent a VA examination. [R. at 24 (24-27)]. The examiner reviewed the record and conducted an in-person examination, and ultimately opined that “the claimed condition was less likely than not (less than 50 percent probability) incurred in or caused by the claimed in-service injury, event,

or illness.” [R. at 25 (24-27)]. The examiner further noted that Appellant’s sleep dysfunction was a symptom of his service-connected MDD, and it could not be considered separate or discrete. *Id.* As such, no nexus applied. *Id.*

In January 2019, the Board issued the decision currently on appeal, in which it denied service connection for a sleep disorder including as secondary to an acquired psychiatric disorder. [R. at 5-9].¹ This appeal followed.

III. SUMMARY OF THE ARGUMENT

The Court should reject Appellant’s arguments and affirm the Board’s decision. First, the Board relied on an adequate October 2018 VA medical examination to find that Appellant does not have a sleep disorder distinct from his service-connected MDD, so there is nothing else to connect to service. The VA medical examination was based on a review of Appellant’s complete medical history, along with a review of the criteria listed in the DSM-5. Further, the examiner explained that Appellant does not have a separate sleep disorder. Consequently, the medical examination and the Board’s statement of reasons and bases is adequate.

Second, the Board ensured substantial compliance with its prior remand order because the October 2018 VA medical examination directly answered the

¹ Although it is not of record, the Court should note that the Agency is in the process of rating Appellant’s MDD, which will likely include consideration of the sleep disorders and which will have the benefit of the October 2018 examination report, lest the Court assume that there would be no consideration of compensation for this symptomatology.

questions raised in the prior remand order. As such, the Board's conclusion was not based on its own medical judgment, but instead, was based on an adequate medical examination.

Accordingly, the Board's decision denying service connection for a sleep disorder, to include as secondary to an acquired psychiatric disorder, should be affirmed.

IV. ARGUMENT

A. Standard of Review.

The Court applies the "clearly erroneous" standard when reviewing the Board's application of facts to established law to determine eligibility for service-connected benefits. *Lennox v. Principi*, 353 F.3d 941, 946 (Fed. Cir. 2003). The Supreme Court has held that a finding is clearly erroneous "when although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985) (explaining how an appellate court reviews factual findings under the "clearly erroneous" standard); see *Padgett v. Nicholson*, 19 Vet.App. 133, 146 (2005) (quoting same). In addition, the Supreme Court has held that under the clearly erroneous standard of review, "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson*, 470 U.S. at 574.

It is relevant to the Court's standard of review that an appellant generally bears the burden of demonstrating error in a Board decision. *Hilkert v. West*, 12

Vet.App. 145, 151 (1999), *aff'd* 232 F.3d 908 (Fed. Cir. 2000). An appellant's burden also includes the burden of demonstrating that any Board error is harmful. *Waters v. Shinseki*, 601 F.3d 1274, 1278 (Fed. Cir. 2010). Furthermore, arguments not raised in the initial brief are generally deemed abandoned, and the Court should find that Appellant has abandoned any argument not presented in his initial brief. See *Carbino v. West*, 168 F.3d 32, 34 (Fed. Cir. 1999) (“[C]ourts have consistently concluded that the failure of an appellant to include an . . . argument in the opening brief will be deemed a waiver of the . . . argument.”).

B. The Board relied on an adequate medical examination and provided an adequate statement of reasons and bases for doing so.

The Board correctly relied on the adequate October 2018 VA medical examination to deny Appellant's claim. A medical opinion is 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)) (internal quotation marks omitted). “There is no reasons or bases requirement imposed on examiners.” *Acevedo v. Shinseki*, 25 Vet.App. 286, 293 (2012). Further, an examination is adequate when it rests “on correct facts and reasoned medical judgment.” *Id.* Whether a medical opinion is adequate is a finding of fact subject to review under the deferential “clearly erroneous” standard. *D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008).

The October 27, 2018, examination indicated that the examiner reviewed Appellant's medical history. [R. at 24 (24-27)]. Specifically, the examiner reviewed Appellant's medical records from 1969, 2008, 2010, 2012, 2015, 2016, and 2017. Appellant's history included several instances of Appellant's self-reported sleep issues.

The medical examiner explained that "per the DSM5, [MDD] is a condition which has a cluster of symptoms which cause significant impairment." *Id.* The medical examiner further explained that Appellant "does not meet DSM or ICD criteria for a sleep disorder" and his "sleep dysfunction is a symptom of his [MDD] and cannot be considered to be a separate or discrete sleep disorder." [R. at 25 (24-27)]. As a result, Appellant did not qualify for a separate sleep disorder diagnosis because, "[Appellant's] problems related to sleep doe [sic] not reach the threshold for a separate or discrete sleep disorder as they are better accounted for by the diagnosis of [MDD]." *Id.*

The medical examination included citations to Appellant's medical history, the criteria considered as prescribed by the DSM-5, and an explanation as to why Appellant's sleep issues could not be considered a separate disorder. Therefore, Appellant's prior medical history, current diagnoses, and relevant history, were all reviewed by the medical examiner and ultimately allowed the Board to provide a fully informed evaluation. As such, the medical examination relied upon by the Board was adequate, and the Board's decision contained an adequate statement of the reasons and bases for its conclusion.

Appellant argues that the examination is inadequate because the examiner did not “explain why a sleep study was not required to determine whether a separately diagnosable sleep disorder was present.” Appellant’s Brief (Br.) at 7. This argument is essentially a dispute with the VA examiner’s competence to conduct a proper medical examination. But Appellant did not argue below that the VA examiner was not competent, and thus, the Board was entitled to presume that the October 2018 VA examiner evaluated the claimed condition. See *Francway v. Wilkie*, 940 F.3d 1304, 1308 (Fed. Cir. 2019). Additionally, contrary to Appellant’s contention, the law does not impose a reasons-or-bases requirement on medical examiners. See *Acevedo v. Shinseki*, 25 Vet.App. 286, 293 (2012); see also Appellant’s Br. at 7. Further, although a September 2017 hepatology treatment note noted a “follow-up with [primary care physician] for sleep issues and consider sleep study,” this notation does not show that a sleep study was necessary. [R. at 164 (164-171)].

Appellant also argues that the examiner did not adequately explain why sleep impairment is a symptom of his MDD, rather than tinnitus and restless leg syndrome. See Appellant’s Br. at 7 (noting that the examiner “noted that there were other causes of his difficulty sleeping”). However, the examiner did not state that Appellant’s sleep impairment was caused by tinnitus and restless leg syndrome. Instead, the examiner concluded that the sleep disorder was related to Appellant’s MDD. Further, the examiner did not have a duty to provide a definitive opinion on etiology, or cause, of Appellant’s disability. See *Jones v. Shinseki*, 23 Vet.App.

382, 388 (noting that law does not require VA examiner to provide definitive statement of the cause of the disability). Thus, the examiner was not required to provide a definitive etiology of sleep problems, and adequately explained that there is no separate sleep disorder. It is also important to note that tinnitus is a service-connected condition that is not currently on appeal, and service connection for restless leg syndrome was denied. To the extent that Appellant is relating a sleep condition to tinnitus and restless leg syndrome, a claim for restless leg was denied and the evaluation for tinnitus was not before the Board.

Appellant further argues that the examiner did not explain how MDD caused chronic sleep impairment when trouble sleeping pre-dated his claim for PTSD. However, Appellant does not explain why symptoms of sleep impairment cannot possibly be part of service connection for MDD merely because they pre-date his *claim* for MDD. This argument amounts to a disagreement with the examiner's expert opinion.

C. The Board ensured substantial compliance with its prior remand order in accordance with the Court's holding in *Stegall*.

Despite Appellant's arguments to the contrary, the Board substantially complied with its prior remand order in accordance with *Stegall v. West*, 11 Vet.App. 268, 271 (1998). In *Stegall*, the Court held that, "a remand by this Court or the Board imposes upon the Secretary of Veterans Affairs a concomitant duty to ensure compliance with the terms of the remand." *Id.* at 271. Substantial

compliance, rather than strict compliance, is required. *Dyment v. West*, 13 Vet.App. 141, 147 (1999).

In the instant case, the Board remanded the matter in June 2018 for a “VA examination to determine the nature and etiology of any sleep disorder secondary to an acquired psychiatric disorder.” [R. at 454-57]. Appellant underwent a VA examination on October 27, 2018, and the examiner directly responded to the questions presented in the June 2018 remand. As noted above, the examiner found that Appellant did not meet the criteria for a separate sleep disorder, per the measures prescribed by the DSM-5. The examiner answered the questions, concluded that Appellant had no separate sleep disorder, found it to be a symptom of his MDD, and opined no nexus to service.

Accordingly, the Board substantially complied with its prior remand order in accordance with *Stegall*.

CONCLUSION

For the foregoing reasons, the Court should affirm the Board’s decision.

Respectfully submitted,

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