

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

No. 19-3228

ROBERT I. ATKINSON, APPELLANT,

V.

ROBERT L. WILKIE,  
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before ALLEN, *Judge*.

**MEMORANDUM DECISION**

*Note: Pursuant to U.S. Vet. App. R. 30(a),  
this action may not be cited as precedent.*

ALLEN, *Judge*: Self-represented appellant Robert I. Atkinson served the Nation honorably in the U.S. Navy from December 1977 to April 1982.<sup>1</sup> In this appeal, which is timely and over which the Court has jurisdiction,<sup>2</sup> he contests a March 19, 2019, Board of Veterans' Appeals decision that denied service connection for sleep apnea, including as secondary to service-connected anxiety.<sup>3</sup> Because the Board's decision is not clearly erroneous and is supported by an adequate statement of reasons or bases, we will affirm.

**I. ANALYSIS**

Establishing service connection generally requires medical or, in certain circumstances, lay evidence of (1) a current disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a nexus between the claimed in-service disease or injury and the present disability.<sup>4</sup> Additionally, secondary service connection is appropriate when either a service-connected

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<sup>1</sup> Record (R.) at 67.

<sup>2</sup> See 38 U.S.C. §§ 7252(a), 7266(a).

<sup>3</sup> R. at 3-8.

<sup>4</sup> See *Davidson v. Shinseki*, 581 F.3d 1313 (Fed. Cir. 2009); *Hickson v. West*, 12 Vet.App. 247, 253 (1999); *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table).

disability causes another disability, or a service-connected disability proximately causes the worsening of (aggravates) a preexisting disability.<sup>5</sup> The Court reviews the Board's findings regarding service connection for clear error.<sup>6</sup> The Court may overturn the Board's factual findings only if there's no plausible basis in the record for the Board's decision and we are "left with the definite and firm conviction that" the Board's decision was in error.<sup>7</sup> As factfinder, the Board has the responsibility to assess and weigh the evidence.<sup>8</sup> For all its findings on a material issue of fact and law, the Board must support its decision with an adequate statement of reasons or bases that enables a claimant to understand the precise bases for the Board's decision and facilitates review in this Court.<sup>9</sup>

Because appellant is proceeding pro se, he's entitled to both a sympathetic reading of his informal brief and a liberal construction of his arguments.<sup>10</sup> Applying that liberal construction to his informal brief, appellant challenges the Board's consideration of the evidence, asserting that the Board erred when it found the VA medical evidence more probative than the private medical evidence of record.<sup>11</sup> He asserts that he should be service connected for sleep apnea secondary to his PTSD. Because appellant makes no argument about the direct-service-connection theory, the only issue before us concerns the secondary-service-connection theory.<sup>12</sup>

In its decision, the Board concedes that appellant has a current diagnosis of sleep apnea and is service connected for an anxiety disorder. The Board, however, denies secondary service connection because it determined that the preponderance of the evidence shows that appellant's sleep apnea was neither caused nor aggravated by his anxiety. To support its decision, the Board comprehensively considered the private and VA medical evidence of record. The Board found that

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<sup>5</sup> 38 C.F.R. § 3.310(a), (b) (2019); *see generally* *El-Amin v. Shinseki*, 26 Vet.App. 136, 138 (2013).

<sup>6</sup> *Dyment v. West*, 13 Vet.App. 141, 144 (1999).

<sup>7</sup> *See Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990).

<sup>8</sup> *See D'Aries v. Peake*, 22 Vet.App. 97, 107 (2008).

<sup>9</sup> 38 U.S.C. § 7104(d)(1); *Gilbert*, 1 Vet.App. at 53.

<sup>10</sup> *De Perez v. Derwinski*, 2 Vet.App. 85, 86 (1992).

<sup>11</sup> Appellant's Informal Brief (Br.) at Attachment 2.

<sup>12</sup> Because appellant makes no argument concerning direct service connection for sleep apnea, we deem his appeal of that issue abandoned. *See Pederson v. McDonald*, 27 Vet.App. 276, 281-86 (2015) (en banc).

"[t]he facts in this case show the [v]eteran has not experienced worsening of symptoms, rather the opposite is true; his disability improved and a reduction in treatment is documented."<sup>13</sup>

The Board also found the March 2015 private opinion from Dr. Jabbour less probative than the September 2015 VA medical opinion and corresponding June 2017 addendum. Dr. Jabbour stated that he had been treating appellant for PTSD and, based on research, that "PTSD might not cause sleep apnea, but might exacerbate the symptoms," opining that appellant's PTSD "might worsen his sleep apnea symptoms."<sup>14</sup> The VA examiner opined that appellant's obstructed sleep apnea (OSA) is less likely as not caused or aggravated by service-connected anxiety and PTSD, explaining that "OSA[] is the most common type of sleep apnea and is caused by complete or partial obstructions of the upper airway. With anxiety and PTSD, [those who suffer from anxiety or PTSD] have sleep disturbance but it does not cause the physiological anatomical change that occur[s] with [OSA]."<sup>15</sup> The Board concluded that Dr. Jabbour's opinion was less probative than the VA opinion because it was too "equivocal," and although he cited research, Dr. Jabbour based his opinion only on a review of the 2011 sleep study.<sup>16</sup> While on the contrary, the VA examiner's opinion was based on an examination as well as a review of both the 2011 and 2015 sleep studies. A review of the record confirms the Board's characterizations.

It is the Board's prerogative to weigh the evidence subject to deferential review before the Court.<sup>17</sup> "The Board may favor the opinion of one competent medical expert over another if its statement of reasons and bases is adequate to support that decision."<sup>18</sup> In this case, the Board fully explained its reasoning for favoring the VA opinion over Dr. Jabbour's. The Court can't conclude that the Board's assessment is clearly erroneous, so appellant's challenge to the Board's decision on this ground must fail.

Appellant also argues that the Board erred when it reached a decision at odds with decisions the Board reached in matters concerning other veterans.<sup>19</sup> This claim of error ignores that, by

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<sup>13</sup> R. at 7.

<sup>14</sup> R. at 348.

<sup>15</sup> R. at 311.

<sup>16</sup> R. at 7.

<sup>17</sup> See *Washington v. Nicholson*, 19 Vet.App. 362, 369 (2005); *Owens v. Brown*, 7 Vet.App. 429, 433 (1995).

<sup>18</sup> *Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 300 (2008) (citing *Owens*, 7 Vet.App. at 433).

<sup>19</sup> See Appellant's Informal Br. at Attachment 2.

regulation, Board decisions are not precedential and are binding only with respect to a particular veteran's case.<sup>20</sup> Moreover, appellant tells us nothing about the other cases to which he alludes, a failure that does not allow a comparison between this and other cases, even if that were an appropriate consideration. This failure makes appellant's argument underdeveloped.<sup>21</sup>

Finally, appellant argues that, per the "luck of the draw," veterans law judge been assigned to his case, he or she would have granted his claim.<sup>22</sup> This argument is entirely unpersuasive. Appellant has not identified any information or evidence that the Board failed to consider that could have led to a different result. Therefore, appellant's argument is not only speculative, but also unsupported and the Court need not consider it further.<sup>23</sup> We will note yet again in an appeal from an appellant living in North Carolina that the use of whatever form includes this "luck of the draw" argument is not helpful. Whoever is advising pro se appellants to use this argument should stop.

## II. CONCLUSION

After consideration of the parties' briefs, the governing law, and the record, the Court AFFIRMS the March 19, 2019, Board decision.

DATED: April 30, 2020

Copies to:

Robert I. Atkinson

VA General Counsel (027)

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<sup>20</sup> See 38 C.F.R. § 20.1303 (2019); *see also Lynch v. Gober*, 11 Vet.App. 22, 27 (1997) (recognizing nonbinding nature of Board decisions beyond the specific case at hand); *Hillyard v. Derwinski*, 1 Vet.App. 349, 351 (1991) (same).

<sup>21</sup> See *Locklear v. Nicholson*, 20 Vet.App. 410, 416-17 (2006).

<sup>22</sup> Appellant's Informal Br. at Attachment 2.

<sup>23</sup> See *Locklear*, 20 Vet.App. at 416-17.