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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-4957

CHARLES E. BROWN, APPELLANT,

V.

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

Before MEREDITH, *Judge*.

MEMORANDUM DECISION

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

MEREDITH, *Judge*: The appellant, Charles E. Brown, through counsel appeals a March 28, 2019, Board of Veterans' Appeals (Board) decision that declined to reopen a claim for entitlement to disability benefits for a lumbar spine disability; denied entitlement to disability benefits for prostate cancer, fibromyalgia, and gastroesophageal reflux disease (GERD); and dismissed his request for special monthly compensation (SMC) based on the need for aid and attendance or by reason of being housebound. Record (R.) at 4-19. Additionally, the Board determined that new and material evidence was received to reopen claims for disability benefits for cellulitis and major depressive disorder (MDD); and remanded the issues of entitlement to benefits for cellulitis, deep vein thrombosis, post-traumatic stress disorder (PTSD), MDD, and obstructive sleep apnea, and a total disability rating based on individual unemployability. The Court may not disturb the Board's favorable findings, *see Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007), *aff'd in part and dismissed in part sub nom. Medrano v. Shinseki*, 332 F. App'x 625 (Fed. Cir. 2009); *see also Bond v. Derwinski*, 2 Vet.App. 376, 377 (1992) (per curiam order) ("This Court's jurisdiction is confined to the review of final Board . . . decisions which are adverse to a claimant."), and the remanded matters are not before the Court, *see Breeden v. Principi*, 17 Vet.App. 475, 478 (2004) (per curiam order) (a Board remand "does not represent a final

decision over which this Court has jurisdiction"); *Hampton v. Gober*, 10 Vet.App. 481, 483 (1997) (claims remanded by the Board may not be reviewed by the Court). The appellant does not raise any argument concerning the Board's denial of disability benefits for prostate cancer or the dismissal of his request for SMC. Therefore, the Court finds that he has abandoned his appeal of these issues and will dismiss the appeal as to the abandoned issues. *See Pederson v. McDonald*, 27 Vet.App. 276, 285 (2015) (en banc).

This appeal is timely, and the Court has jurisdiction to review the Board's decision pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the following reasons, the Court will affirm the Board's decision declining to reopen a claim for entitlement to disability benefits for a lumbar spine disability and denying disability compensation for fibromyalgia and GERD.

I. BACKGROUND

The appellant served on active duty in the U.S. Marine Corps from March 1975 to March 1979. R. at 5301-05. He sought treatment from a VA medical facility in October 2000 for back pain from an injury that occurred the year prior while doing heavy lifting. R. at 5249-50. He had a follow-up visit in August 2001; the physician noted that the injury occurred in October 1999 while working construction. R. at 5246. In August 2005, he filed a claim for disability compensation for a back disability that he asserted began in July 1976. R. at 5272-86. He submitted a statement in support of his claim asserting that he injured his back during service when he fell from a cliff; VA made a formal finding that his service medical records are unavailable; and a VA regional office (RO) denied the claim in May 2006, finding that the "condition neither occurred in nor was caused by service." R. at 5073; *see* R. at 5059-77, 5091, 5189. He did not appeal that decision.

In April 2007, the appellant underwent a private psychological pain evaluation; the psychologist noted that his score on the Beck Depression Inventory II indicated severe symptoms of depression and that he endorsed fatigue. R. at 4032; *see* R. at 4031-34. In February 2014, he sought to reopen his claim for a back disability and filed a new claim for fibromyalgia, on either a direct basis or as secondary to a mental health condition, including PTSD; and acid reflux, on a direct basis or as secondary to a mental health condition, including PTSD, and medication prescribed to treat his service-connected disabilities. R. at 4992-93. Regarding his back, the appellant stated that, in approximately 1975, he fell off a cliff during training at Camp Pendleton,

California, and that he was treated with bed rest and limited duty. R. at 4993. He submitted statements from his brother and niece, noting that he was injured during training in Japan and that he experienced chronic back pain, respectively, R. at 4787, 4792-93, and a private medical record reflecting that since July 2013 he had been taking an antacid at bedtime, R. at 1728. The RO declined to reopen the claim for a low back disability and denied service connection for fibromyalgia and GERD in August 2015, R. at 3948-63; he disagreed, R. at 3897-912; VA continued the denial in a Statement of the Case, R. at 871-905; and he perfected his appeal, R. at 849-51.

The Board issued the decision on appeal on March 28, 2019, concluding that VA treatment records and lay statements were duplicative of previously considered records and statements and, thus, new and material evidence had not been submitted to warrant reopening his claim for a low back disability. R. at 8-10. Regarding the fibromyalgia and GERD claims, the Board denied service connection because he did not have a diagnosis of either condition and the evidence did not otherwise indicate an impairment in earning capacity. R. at 12-13. This appeal followed.

II. ANALYSIS

The appellant argues that the Board erred in declining to reopen his lumbar spine disability claim because the Board improperly discounted corroborating lay statements; relied on an irrelevant work-related injury; and should have remanded the claim for an examination for his back. Appellant's Brief (Br.) at 4-8. Further, he asserts that the Board overlooked favorable evidence with regard to his fibromyalgia and GERD claims and that both claims are inextricably intertwined with the remanded claims for a psychiatric disorder. *Id.* at 2-4, 8-9. The Secretary disputes these arguments and urges the Court to affirm the Board's decision. Secretary's Br. at 2-15.

A. Lumbar Spine Disability

For claims to reopen decided prior to February 19, 2019, *see* 38 C.F.R. § 19.2(a), "[i]f new and material evidence is presented or secured with respect to a claim which has been disallowed, the Secretary shall reopen the claim and review the former disposition of the claim," 38 U.S.C. § 5108 (2018);[1] *see* 38 C.F.R. § 3.156(a) (2019). The evidence "must be both new and material."

[1] The statutory and regulatory provisions governing reopening have been amended effective February 19, 2019, as part of VA's transition to a new appeals process. *See* Veterans Appeals Improvement and Modernization Act of 2017 (VAIMA), Pub. L. No. 115-55, § 2(q)(1), 131 Stat. 1105 (Aug. 23, 2017); 84 Fed. Reg. 2449 (Feb. 7, 2019) (providing notice that the effective date of the new VA appeals system outlined in the VAIMA is February 19, 2019).

Smith v. West, 12 Vet.App. 312, 314 (1999). "New evidence is evidence not previously part of the actual record before agency adjudicators," and material evidence is "existing evidence that, by itself or when considered with previous evidence of 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.*; *see Shade v. Shinseki*, 24 Vet.App. 110, 121 (2010).

The Board's determination of whether new and material evidence has been submitted is a finding of fact, which the Court reviews for clear error. *See Prillman v. Principi*, 346 F.3d 1362, 1366-67 (Fed. Cir. 2003). A finding of fact is clearly erroneous when the Court, after reviewing the entire evidence, "is left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948); *see Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990). As with any material issue of fact or law, the Board must provide a statement of the reasons or bases for its determination "adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court." *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *see* 38 U.S.C. § 7104(d)(1); *Gilbert*, 1 Vet.App. at 56-57.

Here, the Board acknowledged that the prior May 2006 denial included consideration of the appellant's assertion "that he had injured his low back when he fell from a cliff while training in service" and that he was involved in a postservice, work-related injury in 1999, R. at 9; the Board further noted that no mention of an earlier back injury exists in the medical records from 1999 through 2006, *id.* The Board then concluded that new and material evidence had not been received because the lay statements relating that he fell from a cliff and experienced chronic back pain are duplicative of statements "considered in the 2006 rating decision," and that "VA treatment records obtained since 2006 are also duplicative, in that while they demonstrate a previous back injury . . . they do not mention or link the back injury with the [appellant's] service." *Id.* Additionally, the Board found that the appellant had not alleged a new theory of entitlement that

However, the regulatory changes apply only to claims in which an initial decision is issued after February 19, 2019, unless a "legacy" claimant elects to use the modernized review system. 84 Fed. Reg. at 177. There is no assertion that the new statute or rule should apply here; thus, the Court's analysis is confined to the law in effect at the time of the August 2015 RO decision.

would trigger the duty to assist, nor had the duty been triggered by the new medical evidence. R. at 10.

The appellant essentially contends that the Board erred in discounting the statements by his family members because his service medical records are missing, the available personnel records are largely illegible, and there was a sparsity of evidence at the time of the prior denial. Appellant's Br. at 5-6. He asserts that the statements are favorable and corroborate that he sustained an in-service back injury and subsequent back pain. *Id.* His argument is not persuasive because he does not contend that, or explain how, the statements are substantively different than those considered in the 2006 final denial and thus fails to demonstrate error in the Board's determination that the statements are duplicative. *See 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). Additionally, as the Secretary argues, and the appellant did not file a reply brief contesting, the unavailability of his service medical records does not create a presumption that evidence is new and material or eliminate the requirement that, to warrant reopening, a claimant must submit evidence relating to an unestablished fact necessary to substantiate the claim. Secretary's Br. at 8 (citing *O'Hare v. Derwinski*, 1 Vet.App. 365, 367 (1991)).

The appellant further suggests that the Board erred by finding that his back injury is related to a postservice work injury and that the Board should have remanded the claim to afford him a VA back examination. Appellant's Br. at 7-8. However, the Board did not find that his back condition is related to the postservice injury; rather, as indicated above, it declined to reopen the claim because the lay statements and treatment records are duplicative and do not show that the back injury may be related to service. R. at 9. Further, the appellant fails to show that VA should have afforded him a medical examination because, as argued by the Secretary, the duty to provide a medical examination does not apply until a claim has been reopened and, here, the appellant has not demonstrated error in the Board's refusal to reopen the claim. Secretary's Br. at 9-10; *see Shade*, 24 Vet.App. at 121 (citing 38 C.F.R. § 3.159(c)(4)(iii) (2010)). Accordingly, the Court will affirm the Board's decision declining to reopen the claim for benefits for his low back disability.

B. Fibromyalgia and GERD

Establishing that a disability is service connected for purposes of entitlement to VA disability compensation generally requires medical or, in certain circumstances, lay evidence of

(1) a current disability, (2) incurrence or aggravation of a disease or injury in service, and (3) a nexus between the claimed in-service injury or disease and the current disability. *See* 38 U.S.C. § 1110; *Shedden v. Principi*, 381 F.3d 1163, 1166-67 (Fed. Cir. 2004); *see also Davidson v. Shinseki*, 581 F.3d 1313, 1316 (Fed. Cir. 2009); 38 C.F.R. § 3.303 (2019). Additionally, in *Saunders v Wilkie*, 886 F.3d 1356, 1368 (Fed. Cir. 2018), the U.S. Court of Appeals for the Federal Circuit held that "pain in the absence of a presently-diagnosed condition can cause functional impairment," which may qualify as a "disability" under section 1110. Whether the record establishes entitlement to service connection is a finding of fact, which the Court reviews under the "clearly erroneous" standard of review. *See Russo v. Brown*, 9 Vet.App. 46, 50 (1996). As mentioned above, the Board must provide an adequate statement of reasons or bases for its determination. *Allday*, 7 Vet.App. at 527; *Gilbert*, 1 Vet.App. at 56-57.

In the decision on appeal, the Board denied entitlement to benefits for fibromyalgia and GERD because the evidence did not show a current disability. R. at 12-13. With regard to fibromyalgia, the Board acknowledged the appellant's assertion that he suffered from the disorder, his report of aches and chronic pain, and his belief that the disorder is related to service or a psychiatric disorder. R. at 12. The Board noted that VA and private treatment records do not reflect a diagnosis and further noted that, although a diagnosis is not required to show a current disability, there is no indication that the appellant's pain alone caused an impairment in earning capacity. R. at 12 (citing *Saunders*, 886 F.3d at 1364-65). The Board found the appellant competent to report aches and pains, but not competent to diagnose fibromyalgia, as it is "a disease that requires specific medical testing and knowledge." R. at 13.

Similarly, with regard to GERD, the Board acknowledged the appellant's assertions that he suffered from the disorder, or acid reflux, which he related to service or a psychiatric disorder, and that "he was treated for this condition in 2006 or 2007 by VA," but found that "a review of [] VA and private treatment records does not reflect a diagnosis of GERD or acid reflux." *Id.* Further, the Board found that the "[appellant] is competent to report acid reflux-like symptoms," but that he did not "put forth the necessary contentions or statements or documentary evidence first establishing that he has the claimed condition, much less on account of his service." *Id.*

First, regarding fibromyalgia, the Court concludes that the appellant has not demonstrated how any failure by the Board to discuss the 2007 psychological pain evaluation, in which he reported fatigue, is prejudicial. Appellant's Br. at 3 (citing R. at 4032); *see* 38 U.S.C. § 7261(b)(2)

(requiring the Court to "take due account of the rule of prejudicial error"); *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) (holding that the harmless-error analysis applies to the Court's review of Board decisions and that the burden is on the appellant to show that he or she suffered prejudice as a result of VA error). The appellant avers that he "experiences fatigue as a result of his depression," "fatigue is a symptom of fibromyalgia," and, thus, it "is especially relevant, considering how [his] fibromyalgia is claimed as secondary to his psychiatric disorder." Appellant's Br. at 3 (citing THE MERCK MANUAL 269-70 (20th ed. 2018)). However, he does not contest the Board's finding that a diagnosis of fibromyalgia "requires specific medical testing and knowledge," R. at 13, or explain how his report of fatigue in 2007 suffices despite the lack of a medical diagnosis.[2] Further, his argument that his claim for fibromyalgia is inextricably intertwined with the remanded claim for a psychiatric disorder is unpersuasive because he fails to explain how service connection for a psychiatric disorder would have any impact on his claim for fibromyalgia, which was denied due to the lack of a current disability. *See Berger*, 10 Vet.App. at 169; *see also Hilkert*, 12 Vet.App. at 151; *Henderson v. West*, 12 Vet.App. 11, 20 (1998) ("[W]here a decision on one issue would have a significant impact upon another, and that impact in turn could render any review by this Court of the decision on the other [issue] meaningless and a waste of judicial resources, the two [issues] are inextricably intertwined." (internal quotation marks and alterations omitted)).

With regard to GERD, the Court also concludes that the appellant has not demonstrated that the Board committed prejudicial error when it did not discuss the private medical record reflecting that he takes an antacid "at bedtime." Appellant's Br. at 3 (citing R. at 1728); *see Sanders*, 556 U.S. at 409. The appellant does not contest the Board's finding that, "[w]hile [he] is competent to report experiencing acid reflux-like symptoms, he has not put forth the necessary contentions or statements or documentary evidence first establishing he has this claimed condition." R. at 13. Further, he does not point to any evidence of record that indicates that taking an antacid at bedtime should be construed as a diagnosis of GERD or acid reflux, or that he experiences any functional impairment of earning capacity due to his symptoms. *See Sanders*, 556 U.S. at 409. Additionally, as with fibromyalgia, he does not explain how his claim for GERD or acid reflux is inextricably

[2] The Court notes that the appellant does not contest the Board's reliance on *Saunders*, 886 F.3d at 1364-65, for its determination that there was no indication that his pain alone caused an impairment in earning capacity. R. at 12; *see* Appellant's Br. at 2-4.

intertwined with the remanded claims for MDD or PTSD considering the Board's finding that he lacks a current disability. *See Berger*, 10 Vet.App. at 169; *see also Hilkert*, 12 Vet.App. at 151; *Henderson*, 12 Vet.App. at 20. Accordingly, the Court will affirm the Board's decision denying service connection for fibromyalgia and GERD.

III. CONCLUSION

The appeal of the Board's March 28, 2019, decision denying entitlement to disability benefits for prostate cancer and dismissing his request for entitlement to SMC are DISMISSED. After consideration of the parties' pleadings and a review of the record, the Board's decision declining to reopen a claim for entitlement to disability benefits for a lumbar spine disability and denying disability compensation for GERD and fibromyalgia is AFFIRMED.

DATED: May 12, 2020

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