Vet.App. No. 19-8762

IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

BRANDON MORRIS,
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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Appellant,	)	
	)	
v.	)	Vet.App. No. 19-8762
	)	
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

Whether the August 26, 2019, Board of Veterans' Appeals (Board) properly denied the claim for entitlement to service connection for a right hip disability, where the Board provided a clear statement of reasons or bases explaining why a medical examination was not necessary, and where it adequately and plausibly explained that service connection was denied because the disability was not manifested in service, and was not etiologically related to a disease, injury, or event in service.

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 the Court exclusive jurisdiction to review Board decisions.

B. Nature of the Case

Appellant, Brandon Morris, appeals the August 26, 2019, Board decision that denied entitlement to service connection for a right hip disability. [Record Before the Agency (R.) at 1-12].

C. Statement of Relevant Facts

Appellant served on active duty with the United States Army from December 30, 2014, through February 11, 2015, for a total of one month and twelve days. [R. at 1022]. Upon entry, at his enlistment examination in September 2014, Appellant noted no heart trouble or high blood pressure. [R. at 554 (553-556)]. However, one day after entry into active duty, on December 31, 2014, Appellant admitted to the post immunization team that he withheld information pertaining to both high blood pressure and a leaky heart valve conditions prior to enlistment. [R. at 549]. Beneath this admission, the post immunization team member wrote "do not train," and "refer for EPTS (existed prior to service)" for a potential military discharge. [R. at 549]. On the same date, a physician specifically instructed that

Appellant remain on bedrest except for latrine breaks and meals, with no duty, no details, and no formations, for 72 hours. [R. at 528].

January 5th and 6th notes from 2015 indicated Appellant had a history of chest pain and hypertension and Appellant had excessive risk to his health for continued training and should be referred to possible EPTS. [R. at 632-634]. A January 5, 2015, medical note's "History of present illness" section stated that "[t]his is a healthy appearing 23 yo in reception battalion *awaiting the beginning of basic training*. He has been in the ER for chest pain greatly disproportionate to all of his normal findings." (emphasis added) [R. at 636]. It further noted "…his story has changed repeatedly and the only constant is an exaggerated history which is inconsistent. It seems that recommending EPTS is the best thing for the Army and the individual…" [R. at 636-638]. A January 7, 2015, physical profile note indicated that Appellant had high blood pressure (hypertension) that existed prior to service, which would have prevented enlistment had it been detected. [R. at 545]. On the same date, Appellant again admitted that his condition existed prior to entry into active duty, that he previously took medication for it, and that he had made a bad choice and wanted to go home. [R. at 546]. The examiner instructed that Appellant be immediately removed from all training and physical activity, and "expeditiously separated" from active duty. [R. at 545]. The examiner also noted that Appellant could not perform a 2 mile run, do sit-ups or push-ups, or any other functional activities other than wear military boots and uniform for 12 hours a day and sit in a

military vehicle for 12 hours a day. [R. at 545]. Appellant's service treatment records are entirely silent as to any hip complaints. [R. at 522-662].

In September 2017, Appellant filed a claim for entitlement to service connection for a right hip disability. [R. at 1018-1021]. A January 2018 Rating decision denied this claim. [R. at 339-348]. In response, Appellant timely filed a Notice of Disagreement (NOD) with this decision in March 2018. [R. at 307-317]. A January 2019 Statement of the Case again denied Appellant's claim. [R. at 199-231]. Appellant properly appealed this decision to the Board in April 2019. [R. at 80-81]. In August 2019, after making a credibility determination and finding that Appellant's right hip injury did not manifest in service, nor did it etiologically relate to a disease, injury, or event in service, the Board again denied Appellant's claim. [R. at 5-10]. This appeal followed.

III. SUMMARY OF THE ARGUMENT

The Court should affirm the Board's August 26, 2019, decision because Appellant fails to demonstrate that the Board misapplied the law in relation to his claim, overlooked any evidence, or otherwise did not provide a plausible and adequate analysis of the evidence in support of its ultimate conclusions. Instead, Appellant's arguments reflect a misreading of the law, along with an effort to invite this Court to reweigh evidence already weighed and considered by the Board, in an attempt to obtain an alternate conclusion. As such, Appellant is not entitled to remand on any of his theories of error.

IV. ARGUMENT

A. Standard of review.

The Court reviews the Board's findings of fact, such as the determination of whether to award service connection and whether a medical examination is adequate, under the "clearly erroneous" standard of review. 38 U.S.C. § 7261(a)(4); *see Gilbert v. Derwinsk*i, 1 Vet.App. 49, 52 (1990) (a finding of fact is not clearly erroneous if there is a plausible basis for it in the record); *see also D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008) (whether an examination report is adequate is a finding of fact reviewed under the "clearly erroneous" standard of review). 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).

The Court also reviews the Board's decision to determine whether the Board supported its decision with a "written statement of [its] findings and conclusions, and the reasons or bases for those 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." *Allday v. Brown*, 7 Vet.App. 517, 527 (1995). This statement of reasons or bases must also, among other things, analyze the credibility and probative value of all material evidence

submitted by and on behalf of a claimant and provide the reasons for its rejection of any such evidence. *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995). However, § 7104(d)(1) does not require the Board to use any particular statutory language or "terms of art," and it does not require "perfection in draftsmanship." *Jennings v. Mansfield*, 509 F.3d 1362, 1366 (Fed. Cir. 2007); *McClain v. Nicholson*, 21 Vet.App. 319, 321 (2007). Additionally, the Board is presumed to have considered all the evidence of record, even if the Board does not specifically address each item of evidence. *Newhouse v. Nicholson*, 497 F.3d 1298, 1302 (Fed. Cir. 2007).

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); *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) (holding that the Appellant bears the burden of demonstrating prejudicial error). 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 Provided Adequate Reasons or Bases in Denying Appellant Service Connection for A Right Hip Disability

Throughout his brief, Appellant makes numerous assertions, but ultimately fails to demonstrate, that the Board erred in providing adequate reasons or bases in finding that his condition did not arise in service. Instead, the Board adequately supported its decision in denying Appellant's service connection claim by providing a concise and plausible statement of reasons and bases in finding that neither Appellant's statement, nor his private examiner's opinion in relation to the etiology of his right hip disability, are credible.

i. The Board Correctly Found that Appellant is not Credible

Appellant first argues that the Board, in denying his claim to service connection for a right hip disability erred in determining that Appellant's statements concerning his right hip disability are not credible. *See Appellant's Brief* at 2-4; 7-8. Appellant is incorrect. The Board has wide latitude when it comes to deciding matters of fact, including credibility determinations and the weight to be assigned to evidence. *See Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 574 (1985) (noting the Board's wide latitude in making credibility determinations and assigning weight to evidence); *Buchanan v. Nicholson*, 451 F.3d 1331, 1336-37 (Fed. Cir. 2006) (noting that, in evaluating the credibility of lay statements, the Board may consider whether the statements conflict with and are inconsistent with other statements or evidence); *McLendon v. Nicholson*, 20 Vet.App. 79, 84 (2006)

(holding the Board may reject lay statements if it finds them to be mistaken, incorrect, untrustworthy, or otherwise unreliable).

In addressing Appellant's claim, after noting that Appellant's service treatment records are silent regarding any right hip complaint or treatment, the Board observed that one day after entry into active duty, during physical processing and after the discovery of an unreported pre-existing cardiac disability, the military placed Appellant on an extensive physical profile, to include evaluation for discharge. [R. at 7]. This profile explicitly included no training, no strenuous activity such as running, and bedrest for 72 hours [R. at 7]; [R. at 545]. The Board further noted that, despite Appellant's assertions to the contrary, his military record does not demonstrate that he engaged in extensive running or strenuous activities during service, to include because one day after entry into active duty, while still undergoing processing, Appellant's file explicitly makes notation he was ordered not to train. [R. at 8]. As such, the Board determined that Appellant's condition did not manifest during service from either a reported or unreported injury therein, and found Appellant's reports of engagement in "extensive running and strenuous activities during service" to be "inconsistent with, and contradicted by contemporaneous records from his military records." [R. at 8]. The Board further noted that Appellant failed to report a pre-existing cardiac disability on his pre-induction examination prior to entry into active duty, and ultimately determined, based on the circumstances at hand, that Appellant's account of engaging in

extensive running and strenuous activities during his very brief stint in service was neither plausible nor credible. [R. at 8].

Appellant now attempts to rebut this credibility finding, acknowledging he "may well have been put on an exercise profile due to his hypertension condition in basic training," based on a handwritten statement that explicitly instructed Appellant should not train, but pointing out that the same form located elsewhere in the record does not contain those same handwritten instructions. *See Appellant's Brief* at 3-4; [R. at 586]; [R. at 550]. Appellant asserts the disparity in these two forms raises the question of whether or not he was in fact training during his time in service, despite the fact that Appellant himself should know the answer to this question. Further, Appellant points out that other STR's indicate Appellant exercised 30 minutes a day during basic training, even after the military put him on profile, demonstrating "no clear evidence that Appellant was not exercising in basic training, even if he was put on a profile…" *See Appellant's Brief* at 3; [R. at 627-631]; [R. at 632-634].

Appellant's arguments that the Board erred in making its credibility finding are unconvincing. First, the Board never stated that Appellant did not exercise during his time in service in making its credibility finding. Instead, the Board found Appellant's theory of causation not credible, as the evidence of record demonstrates that he did not engage in extensive running and strenuous activities. R. at 8. Despite Appellant's assertions to the contrary, any disparity in the forms is irrelevant as the extensive evidence of record is consistent that Appellant's

activities were significantly restricted during active service, including the testimony of Appellant himself. Specifically, in addition to the note in question limiting his activities, the record reflects that an examiner placed Appellant on bedrest for 72 hours one day after entry into service. [R. at 528]. Further, on January 7, 2015, during evaluation for separation from service, Appellant's physical profile noted that he could only ride for 12 hours in a military vehicle, and wear military boots for 12 hours a day, while limiting all other functional activities, and indicated that he should be expeditiously separated from service. [R. at 545]. Finally, in relation to another claim, Appellant previously testified that he was diagnosed with three high blood pressure readings, that he was dismissed to "the back of the room to a chair," by his drill sergeant, and that "[t]his room and hall is where I would be held for the next several weeks. During the weeks that followed, I was only granted to go to chow and come right back to the bay or the room. It was confinement for the entire time." [R. at 667 (667-673)]. Based on the aforementioned evidence, including Appellant's testimony, which conflicts with Appellant's theory of entitlement, the Board properly exercised its wide discretion in finding his statements inconsistent with the evidence of record.

To the extent that Appellant takes issue with the Board not explicitly acknowledging notations of moderate exercise in service, where a plausible basis for a Board decision may be ascertained, as is the case here, its statement of reasons or bases is adequate. *See Johnson v. Shinseki*, 26 Vet.App. 237, 247 (2013). In other words, while the Board cannot dismiss favorable evidence without

first addressing it, Appellant cannot secure a remand of his claim on appeal without at least showing that the Board's failure to discuss that favorable evidence prejudiced the Court's ability to conduct effective judicial review of the issues raised on appeal. Appellant fails to do so in this case, as the Board clearly laid out why it found his theory of causation to be inconsistent with the evidence of record, and any deficiency in the Board's discussion is, therefore, at most, harmless and non-prejudicial. Whether the Board could have viewed or weighed the evidence differently to reach a different disposition is thus irrelevant. *Gilbert v. Derwinski*, at 52.

Finally, Appellant argues for the first time on appeal that the Board erred in failing to address whether a February 2018 notation of a capsular defect entitled him to service connection based on an aggravation basis. *See Appellant's Brief* at 7-8. Specifically, Appellant argues that, medically speaking, "a defect is a flaw or imperfection, and it may be congenital (present at birth). *See Appellant's Brief* at 7; [R. at 265-266]. Although Appellant is correct that service connection may be established by a disease or injury incurred or aggravated by service, per 38 U.S.C. § 1110 and 38 C.F.R. § 3.303, which the Board acknowledged, Appellant's frankly speculative theory of causation again fails for numerous reasons.

Despite representing Appellant since at least 2018, [R. at 329-30], this is the first time Appellant's counsel has attempted to argue he had a preexisting disability. The Court should reject this attempt at piecemeal litigation. *Fugere v. Derwinski,* 1 Vet.App. 103, 105 (1990) ("Advancing different arguments at

successive stages of the appellate process does not serve the interests of the parties or the Court. Such a practice hinders the decision-making process and raises the undesirable specter of piecemeal litigation."), *aff'd,* 972 F.2d 331 (Fed. Cir. 1992). Additionally, Appellant conveniently ignores that service connection may not be granted for congenital defects, so he fails to show how this is relevant in establishing service connection. 38 C.F.R. §§ 3.303(c), 4.9. And, the evidence actually suggests that the capsular defect is a post-surgical change, not one that preexisted surgery, so Appellant's argument is also based on a misrepresentation of the evidence. [R. at 1002].

Moreover, the Board acknowledged that an October 2017 statement from Appellant's orthopedic surgeon noted a capsular defect, [R. at 7]. The Board did not err in failing to address Appellant's now-raised speculative theory of entitlement because it was not explicitly raised nor reasonably raised by the evidence that suggested it was related to surgery, not service. *See Hyder v. Derwinski,* 1 Vet.App. 221, 225 (1991) (holding that "[l]ay hypothesizing, particularly in the absence of any supporting medical authority, serves no constructive purpose, and cannot be considered"); *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"). Thus, Appellant's argument is meritless.

ii. The Board Provided Adequate Reasons or Bases in Finding No Probative Value in the Private Examiners' Findings, and in Denying Appellant a VA Examination Under the Duty to Assist

Next, Appellant argues the Board erred in placing no probative value in the findings of a private medical examiner. *See Appellant's Brief* at 5, 5-7 Appellant posits that the Board erred in dismissing the findings of the private examiner: (1) because of favorable evidence of record, (2) because the Board substituted its own judgment for that of a medical expert, and (3) because the private nexus opinions are "likely sufficient to grant service connection, even without a VA examination, since the law now encourages the use of private medical examinations." *See Appellant's Brief* at 5, 5-7. Further, Appellant claims the Board erred in failing to provide Appellant a VA exam under the duty to assist. App. Br. at 6-7. Appellant's arguments fail on all counts, because, at its crux, the Board found that Appellant did not experience an in-service injury, and that the private examiners based their findings on an inaccurate factual premise. *See, i.e.* [R. at 9].

As previously noted, it is the responsibility of the Board to assess the credibility and weight to be given to evidence. *See D'Aries v. Peake* at 107. Further, there are many factors that the Board may consider when deciding the credibility of evidence. For example, as it did here, the Board may discredit evidence if it finds that the evidence is based upon other, previously discredited or inaccurate information. *See, e.g., Kowalski v. Nicholson*, 19 Vet.App. 171, 179-80 (2005) (Board may disregard medical opinion if found to be based on discredited history provided by veteran); *Reonal v. Brown*, 5 Vet.App. 458, 460-61 (1993)

(medical opinion based on inaccurate factual premise may properly be rejected as non-probative). Here, the Board acknowledged Appellant's current right hip disability, and noted that a February 2017 private treatment note indicated that Appellant received treatment for right hip pain of over a year's duration, with Appellant reporting regularly going to the gym. [R. at 7]. Further, the Board noted that Appellant's physician provided a medical history of treatment, indicating that Appellant suffered from a capsular defect and suffered from an "ailment" that more likely than not resulted from repetitive running or other repetitive exercise during military service engaged in while "on Active Duty." [R. at 7-8]. The examiner provided no rationale as to why he made this finding.

In discounting both the private examiner's and Appellant's claim that his current right hip disability stems from service, the Board thoroughly explained that not only are Appellant's STR's silent on any hip injury in service, but that the earliest documentation of any hip complaints came two years post-discharge, with Appellant complaining of his pain beginning about one year prior in 2016. [R. at 8]. More importantly, in finding neither Appellant's nor the examiner's statements credible, the Board noted that Appellant's own military record does not demonstrate that he engaged in extensive running or strenuous activities during service, including because one day after entry into active duty, while still undergoing processing, Appellant was explicitly told not to train. [R. at 8]. Thus, the factual basis of the private examiner's opinion is faulty because there is no

evidence of repetitive running or other repetitive exercise during Appellant's brief period of service.

In addressing Appellant's first argument that the Board erred in placing no probative weight in the findings of the private medical examiner, the Board properly addressed statements provided by Appellant's private orthopedic surgeon from October 2017 and February 2018. [R. at 665] (October 2017 Private Medical Statement); [R. at 265-267] (February 2018 Private Medical Statement). Despite indicating review or familiarity with Appellant's claims file for both statements, the Board concluded that the private surgeon provided no explanation for his finding that Appellant engaged in extensive running and strenuous activities in service, "considering that the Veteran was placed on profile prohibiting such on the day following the date of his entry on active duty." [R. at 9]. The Board further noted that this profile, which was clearly indicated in the record, "suggests, at the least, a lack of familiarity with the Veteran's military records." [R. at 9] (emphasis in original). The Board further noted that the private examiner's own records noted Appellant's condition began around 2016, well after exit from service, and began after running. [R. at 9]. Finally, the Board discussed the examiner's own earlier records, which documented Appellant's history as a police officer, with no restrictions, and regular training at a gym. [R. at 9]. Despite the private examiner's relaying of Appellant's work history, the Board noted the examiner failed to address Appellant's post-service work history and activities in providing his nexus finding, and found that the examiner must have relied on the inaccurate factual premise

provided by Appellant in making his determination. [R. at 9]. As such, the Board properly evaluated the available evidence at hand, and, finding that the examiner relied on an inaccurate factual premise, appropriately afforded the opinions of the private examiner no probative value. *See Nieves–Rodriguez v. Peake,* 22 Vet.App. 295, 300 (2008) (The Board is permitted to favor one medical opinion over another, so long as it gives adequate reasons or bases for doing so).

Turning to Appellant's second argument, the Board did not substitute its own medical judgment for that of the private examiner. *See Appellant's Brief* at 5. In attacking the Board's opinion, Appellant asserts that "the Board presents no evidence or arguments as to why Appellant's doctor is not qualified to give his opinion." *See Appellant's Brief* at 5. This is a gross misrepresentation of the Board's findings. The Board, as noted above, explicitly found that the private examiner's findings were not based on a review of the record, and were based on an inaccurate factual premise, namely, information provided by Appellant himself, which is not credible. [R. at 9]. Although Appellant attempts to spin this finding by stating that the private examiner is a qualified specialist who is competent to opine on the etiology of Appellant's hip condition, the Board never asserted otherwise. *See Appellant's Brief* at 5. Instead, the Board based its findings on a lack of familiarity with the record and Appellant's own lack of credibility. To the extent Appellant now asserts the Board impermissibly acted in the role of the medical examiner and substituted their own judgment for that of an expert's, Appellant is simply incorrect. Further, to the extent Appellant asserts the timeline of events

provided by both the examiner and Appellant are plausible and could link back to service, Appellant again misses the mark. *See Appellant's Brief* at 6; R. at 8-9. Although the Board did note a lack of any noted in-service complaints in making its negative nexus findings, its primary basis for excluding the private examiner's opinions centered on a lack of credibility in relation to Appellant's claims, a lack of familiarity with Appellant's STR's, and a lack of appropriate rationale provided by the private examiner. [R. at 8-9]. [R. at 254-264] (May 2018 Private DBQ); [R. at 265-267] (February 2018 Private Medical Statement); [R. at 665] (October 2017 Private Medical Statement). Thus, Appellant's accusations ultimately simmer down to a mere disagreement with the Board's weighing of the evidence, which cannot constitute a basis for remand. *See Madden v. Gober,* 125 F.3d 1477, 1481 (Fed. Cir. 1997) (it is the "duty [of] the Board to analyze the credibility and probative value of evidence"); *Washington v. Nicholson*, 19 Vet.App. 362, 368 (2005) (holding that it is the responsibility of the Board to assess the probative weight of the evidence); *Owens v. Brown*, 7 Vet.App. 429, 433 (1995) (holding that it is the responsibility of the Board, not the Court, to assess the credibility and weight to be given to the evidence).

Next, Appellant argues that, even without a VA exam, the private examiner's finding of a positive nexus is likely sufficient for the Board to grant service connection, and that the Board erred in failing to discuss this evidence or law. *See Appellant's Brief* at 7. As previously discussed, the Board extensively discussed the opinions provided by the private examiner, and Appellant is incorrect. Further,

simply gaining a positive medical opinion, whether private or from VA, does not a guarantee of service connection make. Rather, per 38 U.S.C. § 1110 and 38 C.F.R. § 3.303, service connection may be established for a disability *due to disease or injury that was incurred in or aggravated by service.* (emphasis added). As the Board addressed, Appellant has failed to prove this, and as the Board properly and plausibly explained, the positive private opinions are entitled to no probative weight because they are based on inaccurate factual premises of extensive running and exercise in service, which is a noncredible allegation from Appellant. [R. at 9].

Finally, having failed to prove that the Board erred in placing no probative value in the VA examiner's opinions, Appellant argues the Board erred in not providing a VA examination for Appellant's right hip disability, presumably under the duty to assist. *See Appellant's Brief* at 6-7. Appellant is correct that in some cases the duty to assist requires the Secretary to provide a medical examination for an Appellant. Specifically, the Secretary must provide a medical examination if there is: (1) competent evidence of a current disability or persistent or recurrent symptoms of a disability; (2) evidence that the event, injury or disease occurred in service; (3) an indication that the disability or persistent or recurrent symptoms of a disability may be associated with the established in-service event, injury or disease or with another service-connected disability; and (4) there is insufficient competent medical evidence on which to decide the claim. See 38 C.F.R. § 3.159(c)(4); *see also McLendon v. Nicholson*, at 85-86.

However, as the Board noted, although Appellant established the first prong of this test, it found no credible evidence of a "related disease or injury in service," and thus "an examination to secure a nexus opinion (regarding a relationship between a current hip disability and a disease or injury in service" is not necessary. [R. at 10]. In so finding, the Board met its requirement of determining whether an examination is necessary based on consideration of "all information and lay or medical evidence." 38 U.S.C. § 5103A(d)(2). Appellant's arguments focus on the third *McLendon* prong, *Appellant's Brief* at 6-7, but he ignores that the Board's determination that he did not meet the second *McLendon* prong is not arbitrary and capricious. *See McLendon*, 20 Vet.App. at 80. As such, because the Board provided adequate reasons or bases in finding Appellant not credible, placing no probative value in the positive nexus provided by Appellant's private examiner, and finding a VA medical examination to be unnecessary, Appellant has failed to demonstrate that the Board erred in making its findings, and his arguments must fail.

iii. Active Duty Service Does Not Encompass the Delayed Entry Program

Finally, in an apparent misunderstanding of the rules governing entitlement to service connection, Appellant argues that the Board should have addressed whether his condition arose during his delayed entry period, thus allegedly entitling him to service connection. *See Appellant's Brief* at 4. Appellant acknowledges he did not enter *active* service until December 30, 2014. (emphasis added) However, he notes his DD-214 reflects participation in the delayed entry program from

September 4, 2014, to December 29, 2014. [R. at 1022]. Thus, Appellant claims this somehow raises the theory of entitlement that his symptoms began while participating in the delayed entry program and preparing for active duty, which the Board should have addressed. *See Appellant's Brief* at 4-5. However, the Board had no duty to address this theory – raised again for the first time on appeal by Appellant despite being represented by the same attorney since 2018 – as it is not a basis for entitlement to service connection. *See Fugere,* 1 Vet.App. at 105.

Specifically, as previously addressed, service connection may be granted for a disability resulting from personal injury suffered or disease contracted in the line of duty, or for the 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). As clearly defined by 38 U.S.C. § 101 (24), the term "active military, naval, or air service" includes:

> active duty, any period of active duty for training during which the individual concerned was disabled or died from a disease or injury incurred or aggravated in line of duty, and any period of inactive duty training during which the individual concerned was disabled or died from an injury incurred or aggravated in the line of duty.

As the Delayed Entry Program does not constitute active service as defined under 38 U.S.C. § 101 (24), any injury incurred during this time would not qualify as an injury incurred or aggravated in service, and his argument fails. To find otherwise would lead to an absurd result, and contradict the well-founded principles of Veterans' law. And moreover, other than his general speculation, Appellant cites to no law that suggests the Delayed Entry Program constitutes active service. The Court should therefore reject this underdeveloped contention. *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).

C. Appellant has abandoned all issues not argued in his brief

Because Appellant has limited his arguments to those addressed above, the Court should hold that he has abandoned any other errors that may be in the Board's decision. *See, e.g., Disabled Am. Veterans v. Gober*, 234 F.3d 682, 688 n.3 (Fed. Cir. 2000) (stating that the Court would "only address those challenges that were briefed"); *Mason v. Shinseki*, 25 Vet.App. 83, 95 (2011) (holding that "the Court will not invent an argument for a represented party who had ample opportunity and resources to make that same argument, but, for whatever reason—be it strategy, oversight, or something in between—did not do so"). Any and all issues that have not been addressed in Appellant's Brief have therefore been abandoned.

V. CONCLUSION

In light of the foregoing, Appellee, the Secretary of Veterans Affairs, respectfully submits that the Court should affirm the August 26, 2019, decision of the Board of Veterans' Appeals.

Respectfully submitted,

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