IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

SHERRY CRAIG-DAVIDSON,
Appellant,

v.

DENIS MCDONOUGH,
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. 20-4372
	)	
DENIS MCDONOUGH,	)	
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 Court should affirm the Board of Veterans Appeals' (Board or BVA) December 3, 2019, decision which denied a claim of entitlement to service connection for lung cancer.

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

The Court's jurisdiction in this matter is predicated on 38 U.S.C. § 7252(a), which grants the Court of Appeals for Veterans Claims exclusive jurisdiction to review final decisions of the Board.

B. Nature of the Case

Appellant, Sherry Craig-Davidson, appeals the Board's December 3, 2019, decision which denied a claim of entitlement to service connection for lung cancer. Record Before the Agency (R. at 5-8).[1]

C. Factual and Procedural History

The Veteran, Virgil Davidson, service on active duty in the U.S. Marine Corps from November 1955 to November 1961.[2] (R. at 1095-96). The Veteran filed a claim and corresponding application for benefits for service connection for lung cancer and residuals of lung cancer, in February 2019, stating that he was exposed to radiation during his training at Camp Pendleton Atomic Biology Warfare (ABW). (R. at 972-73); (R. at 56-61). The VA Regional Office (RO) responded to the Veteran's claim and requested completion of a Radiation Risk Activity Information Sheet in May 2019, and the Veteran responded and submitted the completed information sheet in June 2019. (R. at 47-52). The RO requested a record of occupational radiation exposure or DD 1141 Form Record of Occupational Exposure to Ionizing Radiation (DD 1141) from the Naval Dosimetry Center in June 2019. (R. at 44-45). The Naval Dosimetry Center responded and informed the RO that based on a review of the exposure registry by name, service

[1] This claim was processed pursuant to the Appeals Modernization Act of 2019 (AMA).
[2] The Veteran died on May 23, 2020, and Appellant, his surviving spouse, was granted substitution before the Court.

number, command and social security number, there were no reports of occupational exposure to ionizing radiation for the Veteran. (R. at 39).

The RO issued a rating decision in August 2019 denying the Veteran's claim. (R. at 20-30, 34-35). The Veteran filed a VA Form 10182, Notice of Disagreement (NOD) and requested direct review in October 2019. (R. at 16-19). The Board issued the decision on appeal which denied the Veteran's claim because it found that there is no competent evidence that he was exposed to ionizing radiation in service and residuals of lung cancer are not otherwise shown to be related to his military service. (R. at 5-8). This appeal ensued.

III. SUMMARY OF THE ARGUMENT

Appellant contends that the Board erred in failing to weigh credibility and probative value of the Veteran's lay statements and erred in denying him a VA medical examination, and thus reversal and remand are warranted. Appellant's Brief (App. Br. at 1-8). However, the Secretary maintains that the Court should reject Appellant's arguments and affirm the Board's December 3, 2019, decision denying a claim of entitlement to service connection for lung cancer because the Board considered all of the evidence of record and provided the required analysis and otherwise provided an adequate statement of reasons or bases for decision.

IV. ARGUMENT

A. Applicable Law

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). Establishing service connection generally requires competent and probative evidence of a current disability, an in-service incurrence or aggravation of an injury or disease, and a nexus between the in-service injury or disease and the current disability. *See Hickson v. West*, 12 Vet.App. 247, 253 (1999).

For claims based on exposure to ionizing radiation during service, entitlement can be established in three different ways. First, direct service connection can be established by showing that the condition was incurred or aggravated by military service. Second, service connection for certain conditions may be presumed for those who meet the requirements of a veteran who engaged in a radiation risk activity pursuant to 38 U.S.C. § 1112(c)(3) and 38 C.F.R. § 3.309(d)(3). Third, entitlement can be established pursuant to 38 C.F.R. § 3.311(b), which provides a list of "radiogenic diseases," that will be service connected, provided that certain conditions specified in that regulation are met. However, section 3.311 does not give rise to a presumption of service connection, rather it establishes a series of chronological steps for handling claims brought by radiation-exposed veterans. *See Ramey v. Gober*, 120 F.3d 1239, 1244 (Fed. Cir. 1997).

The Board's determination of service connection is a question of fact subject to review under the deferential clearly erroneous standard. *See Gilbert v. Derwinski*, 1 Vet.App. 49, 52-53 (1990) (finding of fact is not clearly erroneous if there is a plausible basis for it in the record). Under this standard of review, the Court cannot substitute its judgment for that of the Board and must affirm the Board's factual determinations so long as they are supported by a plausible basis in the record. *Id.* at 52; *see also Deloach v. Shinseki*, 704 F.3d 1370, 1380 (Fed. Cir. 2013) ("The Court of Appeals for Veterans Claims, as part of its clear error review, must review the Board's weighing of the evidence; it may not weigh any evidence itself."). The Court reviews the Board's determinations as to each of the factual prerequisites under the clearly erroneous standard and reviews *de novo* the ultimate legal question of whether, based on those factual determinations, a medical examination is required. *See* 38 U.S.C. § 7261(a)(3)(A); *McLendon v. Nicholson*, 20 Vet.App. 79 (2006).

The Board has wide latitude when it comes to deciding matters of fact and its factual determinations may be derived from any number of sources, to include credibility determinations, physical or documentary evidence, or inferences drawn from other facts. *See Anderson v. City of Bessemer City, N.C.,* 105 S.Ct. 1504 (1985). The mere fact that the evidence could be viewed differently does not render the Board's interpretation of the evidence clearly erroneous. *Id.* ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.").

Further, when rendering its decision, the Board must consider all relevant evidence of record and address all potentially applicable provisions of law and regulation in its decision. *Schafrath v. Derwinski*, 1 Vet.App. 589, 593 (1991); *see also Evans v. Brown*, 9 Vet.App. 273 (1996) (consideration must be given to all evidence since the last final denial of the claim.); *see also* 38 U.S.C. § 7104(a). Pursuant to 38 U.S.C. § 7104(d)(1), a "decision of the Board shall include . . . a written statement of the Board's 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." *Reyes v. Nicholson*, 21 Vet.App. 370, 377 (2007); *see also Gilbert,* 1 Vet.App. at 56.

Finally, it is long-established that Appellant carries the burden of presenting coherent arguments and of providing adequate support for those arguments. *See Mayfield v. Nicholson*, 19 Vet.App. 103, 111 (2005) (noting that "every appellant must carry the general burden of persuasion regarding contentions of error"), rev'd 444 F.3d 1328 (Fed. Cir. 2006); *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) ("An appellant bears the burden of persuasion on appeals to this Court.") aff'd per curiam, 232 F.3d 908 (Fed. Cir. 2000) (table); *Berger v. Brown*, 10 Vet.App. 166, 169 (1997) ("[T]he appellant . . . always bears the burden of persuasion on appeals to this Court.") ("[T]he appellant . . . always bears the burden of persuasion on appeals to this Court."). *See also Locklear v. Nicholson*, 20 Vet.App. 410, 416 (2006) (holding that the Court will not entertain underdeveloped arguments); *Coker v. Nicholson*, 19 Vet.App. 439, 442 (2006)

("The Court requires that an appellant plead with some particularity the allegation of error so that the Court is able to review and assess the validity of the appellant's arguments.").

B. The Board decision is supported by and adequate statement of reasons or bases for its decision and should be affirmed.

The Board properly found that there is no competent evidence of ionizing radiation exposure. (R. at 7). Where a radiogenic disease manifested after service and it is contended the disease is a result of exposure to ionizing radiation in service, "an assessment will be made as to the size and nature of the radiation dose or doses." § 3.311(a)(1). For claims based on exposure other than from atmospheric nuclear weapons testing or the military occupations of Hiroshima or Nagasaki, Japan, VA must request "any available records concerning the veteran's exposure to radiation," such as service medical records and "other records which may contain information pertaining to the veteran's radiation dose in service." *Id.* § 3.311(a)(2)(iii). The regulation then states that "[a]ll such records will be forwarded to the Under Secretary for Health, who will be responsible for preparation of a dose estimate." *Id.* However, "a preliminary assessment of exposure to radiation is required before the claim will 'be referred [to the Under Secretary for Benefits] for further consideration.'" *Wandel v. West*, 11 Vet.App. 200, 204 (1998) (quoting 38 C.F.R. § 3.311(b)(1)(iii)). Thus, "absent competent evidence that the veteran was exposed to radiation," VA is not required to comply with the special development procedures and considerations in § 3.311. *Id.* at

205; *see* 38 C.F.R. § 3.311(b)(1)(iii) ("If any of the foregoing 3 requirements has not been met, it shall not be determined that a disease has resulted from exposure to ionizing radiation under such circumstances.").

Here, the Board acknowledged that lung cancer is a radiogenic disease pursuant to 38 C.F.R. § 3.303(d) and then properly performed the preliminary analysis under the provisions of 38 C.F.R. § 3.311. (R. at 6-7). The Board acknowledged the Veteran's assertions that he was exposed to ionizing radiation in 1960 during his training at the ABW school in Camp Pendleton (R. at 972-73) and that he had to locate packages of radiation with Geiger meters. (R. at 18 (17-18)). The Board concluded that there is no competent evidence of record of ionizing radiation exposure. (R. at 7). This finding is supported by the record. In reviewing the Veteran's service treatment records (STRs) and service personnel record (SPRs), the Board noted that none of his records contained any evidence of exposure to radiation or a DD 1141. (R. at 7). Similarly, the Veteran's SPRs noted his education and training, to include instrument orientation class, track vehicle repairman course, non-commissioned officer (NCO) leadership school, turret repairman course and tracked vehicle engines course, but there is no mention of any courses at the ABW school. (R. at 1080-81); (R. at 1151-52). The Naval Dosimetry Center's response was negative as well. (R. at 39).

Appellant contends that the Board erred in failing to weigh the credibility and probative value of the Veteran's testimony. (App. Br. at 6-11). Specifically, Appellant asserts that the Board impermissibly rejected the Veteran's lay evidence

contrary to the U.S. Court of Appeals for the Federal Circuit's (Fed.Cir.) holding in *Buchanan v. Nicholson*, 451 F.3d 1331, 1336 (Fed. Cir. 2006). In *Buchanan* the Fed. Cir. held that the Board could not reject a veteran's lay evidence about an in-service medical condition solely because that incident was not reported in the veteran's service medical records (SMRs). *Id.* The Veteran's claim is distinguishable from *Buchanan*. In *Buchanan*, the Fed. Cir. addressed a situation in which a claimant argued that he displayed medical symptoms in service that were not recorded in his SMRs. The Fed. Cir. defined the issue before it as determining whether this Court had erred by requiring that "lay evidence of medical symptoms be accompanied by contemporaneous medical records." *Id.* at 1334. The Fed. Cir. held that although "the lack of contemporaneous medical records may be a fact that the Board can consider and weigh against a veteran's lay evidence, the lack of such records does not, in and of itself, render lay evidence not credible." *Id.* at 1336.

Appellant's argument fails to appreciate that section 3.311 lays out a detailed process for assessing radiation-related claims. *See* 38 C.F.R. § 3.311. Despite Appellant's implication that the Veteran's assertions alone suffice to establish in-service radiation exposure, the regulation requires "competent evidence that the veteran was exposed to radiation." *Wandel*, 11 Vet.App. at 205. Further, "in all cases, a non-combat veteran's lay statements must be weighed against other evidence, including the absence of military records supporting the veteran's lay assertions." *Bardwell v. Shinseki*, 24 Vet.App. 36, 40

(2010). In *Bardwell*, the Court concluded that the Board did not err in rejecting a veteran's "lay evidence that he was exposed to gases or chemicals . . . on the basis that such exposure [was] not documented in his personnel records." *Id.* (distinguishing *Buchanan*, 451 F.3d at 1331)). Appellant fails to demonstrate why the Court's reasoning in *Bardwell* does not have equal application here. Appellant has not provided any cognizable argument alleging an error by the Board, and she appears to simply disagree with the Board's decision, which does not warrant remand or reversal. *See Coburn v. Nicholson*, 19 Vet.App. 427, 431 (2006) (recognizing that where the Board has incorrectly applied the law, failed to provide an adequate statement of reasons or bases for its determinations, or where the record is otherwise inadequate, remand is the appropriate remedy); *see also Gutierrez v. Principi*, 19 Vet.App. 1, 10 (2004); *Johnson v. Brown*, 9 Vet.App. 7, 10 (1996) (finding that reversal is the appropriate remedy when the only permissible view of the evidence is contrary to the Board's decision). Accordingly, the Board's decision is plausibly based and it properly denied Appellant's claim.

Further, the Board also considered whether the direct service connection is warranted for the Veteran's claim and in doing so addressed the fact that he was not provided a VA examination. (R. at 7). Contrary to Appellant's argument, the Board applied the correct standard to conclude that an examination was not warranted and the Board's analysis is supported by the record. *Id.;* (App. Br. at 6-7). The Board's reference to 38 C.F.R. §3.311 in the context of the explanation for

why an examination was not warranted in this instance, is merely an acknowledgement of the Board's prior finding, rather than application of that regulation. (R. at 7). The Board was simply providing an adequate statement of reasons or basis for its finding that an examination is not warranted, as required. 38 U.S.C. § 7104(d)(1); *see also Gilbert*, 1 Vet.App. at 56.

The Secretary is required to provide a medical examination or opinion if (1) the record contains competent evidence of a current diagnosed disability or persistent or recurrent symptoms of disease; (2) the evidence establishes that the veteran suffered an in-service event, injury or disease; (3) the evidence indicates that the claimed disability or symptoms 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 of record to decide the claim. *McLendon v. Nicholson,* 20 Vet.App. at 85-86; *see also* 38 C.F.R. § 3.159(c)(4). While there is no dispute that the Veteran suffered from lung cancer, the Board determined that an examination/opinion is not required in this instance because the Veteran has not identified any other in-service injury, disease, or event and the STRs do not included any notation regarding his lungs. (R.at 7). In other words, while a current disability has been established, satisfying the first criteria for *McLendon*, Appellant has not satisfied the second. As discussed above, the Veteran's statements alone are not competent evidence of any ionizing radiation exposure. *See Bardwell v. Shinseki*, 24 Vet.App. 36, 40 (2010) (rejecting the argument that a veteran's lay evidence that an event occurred must be accepted

unless affirmative documentary evidence provides otherwise. "Rather, in all cases, a non-combat veteran's lay statements must be weighed against other evidence, including the absence of military records supporting the veteran's lay assertions."). Therefore, the Board properly concluded that because the Veteran's statements do not establish ionizing radiation exposure and that is the only allegation of an in-service event, the second prong of *McLendon* has not been satisfied.

To the extent that Appellant argues that the Board ignored the Veteran's "uncontroverted" statements that he handled radioactive materials and that is the only relevant evidence of record and further attempts to weigh the evidence herself to support her disagreement with how the Board assessed the evidence, her arguments are not persuasive. (App. Br. at 6-7). As the Board explained, the Veteran's allegation of ionizing radiation exposure in and of itself are insufficient to satisfy the second prong of *McLendon* and the Veteran is not otherwise competent to opine as to the complex medical question of the etiology of his lung cancer. (R. at 7). Appellant has not provided any compelling argument or cited to any evidence to contradict the Board's finding. *See Hyder v. Derwinski*, 1 Vet.App. 221, 225 (1991) ("Lay hypothesizing, particularly in the absence of any supporting medical authority, serves no constructive purpose and cannot be considered by this Court.") Therefore, the Board's finding that an examination is not warranted is not arbitrary and capricious. 38 U.S.C. § 7261(a)(3)(A); *see McLendon v. Nicholson*, 20 Vet.App. at 81.

Finally, Appellant has abandoned any other potential arguments, and the Court should decline to raise or address any additional arguments on Appellant's behalf. *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 issue or argument in the opening brief will be deemed a waiver of the issue or argument." (citing *Becton Dick. & Co. v. C.R. Bard, Inc.*, 922 F.2d 792, 800 (Fed. Cir. 1990)); *Mason v. Shinseki*, 25 Vet.App. 83, 95 (2011) ("[T]he 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."), aff'd, 496 Fed. App'x 86 (Fed. Cir. 2013).

The Secretary does not concede any material issue that the Court may deem Appellant adequately raised, argued, and properly preserved, but which the Secretary may not have addressed through inadvertence, and reserves the right to address same if the Court deems it necessary or advisable for its decision. The Secretary also requests that the Court take due account of the rule of prejudicial error wherever applicable in this case. 38 U.S.C. § 7261(b)(2).

V. CONCLUSION

WHEREFORE, for the foregoing reasons, the Secretary respectfully submits that the Board's December 3, 2019, decision contains should be affirmed.

Respectfully submitted,

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