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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 16-3738

ERNEST L. FRANCWAY, JR., APPELLANT,

V.

DAVID J. SHULKIN, M.D.,
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, Ernest L. Francway, Jr., through counsel appeals an October 13, 2016, Board of Veterans' Appeals (Board) decision that denied entitlement to disability compensation for a low back disability. Record (R.) at 1-16. 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 October 13, 2016, decision.

I. BACKGROUND

The appellant served on active duty in the U.S. Navy from August 1968 to May 1970. R. at 213. Service treatment records show that the appellant received medical treatment during service, including for back pain. In November 1969, the appellant was seen for a painful, swollen wrist, following a motorcycle accident. R. at 91. On December 9, 1969, the appellant was seen for low back pain on the right side; he was given medication for pain relief, instructed to treat his back with warm soaks, and asked to return to sick call later that morning. *Id*. Later that day, the appellant returned with the same complaint of low back pain, and examination revealed limited range of motion without pain, no deformity, negative test for fracture, and some pain on rotation. *Id*. On

December 10, 1969, the appellant was seen again for low back pain, and he reported that symptoms first began on November 19 when he was involved in a motor vehicle accident and that the "present episode" began on December 8. R. at 92. Examination revealed symptoms at L5-S1 without radiation and on the right sacroiliac joint, and the appellant was placed on light duty. *Id*.

A March 1978 report of medical examination for the U.S. Naval Reserve revealed a normal back. R. at 94-95. In a contemporaneous report of medical history, the appellant reported that he was in good condition and denied currently having or having had any recurrent back pain, but he disclosed currently having or having had "[s]wollen or painful joints" and a "'[t]rick' or locked knee." R. at 96-97. He also reported that he had been hospitalized after a motorcycle accident in 1976 for surgical removal of cartilage from his left knee and a bone fragment from his right shoulder. R. at 97.

A March 1995 non-VA medical record reflects the appellant's complaint of back pain which started after he lifted weights. R. at 2078.

An October 2002 VA treatment record reflects the appellant's complaint of arthritis in his shoulders and hands and his denial of any other physical complaints. R. at 1989-90. The record also noted the 1976 motor vehicle accident that resulted in a left ankle sprain and surgical repair of a right shoulder injury as well as a left knee injury. R. at 1989.

In April 2003, the appellant filed multiple claims for VA benefits, including entitlement to disability compensation for a "back injury on [his] left side dated 5/69. . . . [sustained o]n the U.S.S. Oriskany." R. at 1995. In May 2003, a VA regional office (RO), among other things, denied entitlement to disability compensation for a back condition. R. at 1927-29. In June 2003, the appellant filed a request "to reopen" his prior claims, including for a back condition. R. at 1921. In January 2004, the RO "confirmed [the] previous decision" denying the appellant's claim. R. at 1883. The appellant timely perfected his appeal of the denial. R. at 1855-57 (Mar. 2004 Substantive Appeal), 1863-81 (Feb. 2004 Statement of the Case), 1882 (Feb. 2004 Notice of Disagreement).

In October 2005, the appellant testified at a hearing before the Board, during which he stated that he had injured his back on a flight deck when a gust of wind knocked him over and he fell onto the wheel chocks that he was carrying. R. at 1821. He explained that he fell onto the chocks and injured his abdomen, after which he was carried on a stretcher to sickbay where he stayed for a couple of weeks. *Id*. The appellant stated that he was diagnosed in service with a muscle strain and that he was also assigned to light duty for 3 months. R. at 1821-22. The appellant

denied receiving any treatment for his back after service until he got a muscle cramp in 2004, which was treated with muscle relaxants. R. at 1822. Before 2004, the appellant stated that he would treat his back pain by taking over-the-counter medication and sick leave. R. at 1823-24. In January 2006, the Board remanded the claim for further development. R. at 1800-05.

In May 2006, the appellant underwent a VA examination, during which the appellant reported that he had strained his back in 1969, which "took about three months to go away," after which he experienced intermittent back pain that "got worse" in 2004, when he was told that he may have arthritis. R. at 1617. The examiner, an orthopedist, diagnosed the appellant with lumbosacral strain, concluding that it is not likely that his current back symptoms are related to "a simple strain back in 1969, but rather a natural[ly] occurring phenomenon." *Id*. Contemporaneous diagnostic testing revealed "[m]inimal arthritis" of the lumbosacral spine. R. at 1618. In July 2007, the appellant underwent another VA examination with the same examiner, who diagnosed the appellant with lumbosacral strain with minimal arthritis and reiterated his opinion that this condition was not related to service. R. at 1582. In August 2007, the appellant sought medical treatment and disclosed that he had been rear-ended in a motor vehicle accident, after which he began to experience a stiff neck and headache. R. at 1351.

In May 2009, the Board denied the appellant's claim of entitlement to disability compensation for a low back disorder. R. at 1428-44. In September 2009, the appellant appealed the Board's decision to the Court. R. at 1113. In December 2010, the parties filed a joint motion for partial remand (JMPR), in which they agreed that "it did not appear that [the May 2006 and July 2007 VA] medical opinions provided an adequate rationale for a fully-informed decision by the Board" and that it was "unclear whether the Board properly considered the adequacy of . . . [these] examination reports." R. at 1155, 1158. Later that month, the Court granted the parties' motion. R. at 1115. In May 2011, the Board remanded the claim for further development. R. at 1073-79.

In December 2011, the same examiner who provided the May 2006 and July 2007 VA medical opinions, upon review of the claims file, diagnosed the appellant with spinal stenosis and opined that it was "less likely than not related to service but natural age progression." R. at 1051. In January 2012, a different examiner, a VA internist, reviewed the record and interviewed, but did not examine, the appellant. R. at 1026, 1029. She noted that neither the appellant's narrative of his in-service back injury nor his complaint of recurrent back pain after that injury was reflected

in his service treatment records. R. at 1028. She also observed that the appellant had made "various orthopedic complaints (knee, shoulder) [in October 2002] but expressed no complaint of back pain" until 2005, when he claimed to have a history of chronic back pain, which she further observed was not noted in his VA treatment records or claims file. R. at 1028-29. Upon review of the record and interview of the appellant, the examiner diagnosed him with degenerative disk disease (DDD), opining that spinal stenosis and DDD are less likely than not related to "an acute back strain that occurred more than 30 years prior to his next back complaint and even further from the time of a diagnosis of spinal stenosis." R. at 1029.

In April 2012, the appellant underwent a VA examination by a physician's assistant. R. at 997-1010. The examiner noted the appellant's history of motor vehicle accidents, both prior to service in 1964 and after service in 1976, as well his denial of any back pain after those accidents. R. at 997. The appellant reported that he had low back pain in 1995 secondary to bending over to pick up a 10-pound weight. *Id*. He further stated that he has had chronic and constant low back pain since injuring his back in service but, as observed by the examiner, he did not report having received any medical treatment from the time of his discharge from service until 1995; he stated that his back pain was not formally addressed until 2004 when he received VA treatment for his back. R. at 998. The examiner opined:

> There are no medical records of evidence from 1970-2004 to establish a nexus therefore it would be less likely than not that the [appellant's] spinal stenosis is related to the injury he describes . . . . It would be more likely than not [that] his spinal stenosis is related to natural age progression with consideration [of] wear and tear throughout his life.

R. at 1009-10.

In January 2013, the appellant submitted a statement dated November 2012 from a person, G.P., whom he had known since the 1970s. R. at 960-61. G.P. stated that the appellant had told him he had injured his back in service, that he had "seen [the appellant] in some really bad pain," that the appellant had treated his back pain with over-the-counter medicine, and that the appellant has had back pain since G.P. has known him. R. at 960. In March 2013, the Board remanded the claim for further development, to include a directive that the appellant's claims file "should be reviewed by an appropriate medical specialist for an opinion," who, among other things, "should reconcile any opinion provided with the statements from the [appellant] and G.P. as to reported episodes of back pain since active service." R. at 958.

In September 2014, the appellant underwent another VA medical examination with the same examiner who provided the May 2006, July 2007, and December 2011 VA medical opinions. R. at 376-84. The examiner diagnosed the appellant with lumbosacral strain and spinal stenosis, concluding that "it is less likely that his current [spinal] stenosis is related to one eve[n]t over 40 years ago but rather natural age progression." R. at 377, 383-84.

In March 2015, a VA addendum opinion was provided by the same examiner who wrote the January 2012 VA opinion. R. at 347-48. After reviewing the appellant's claims file, VA treatment records, and the lay statement of G.P., the examiner opined:

> While it is possible that the [appellant] injured or developed disease in his spine after his military service, it's not possible to relate post-service conditions to the self-limited back strain documented in service without resorting to speculation. It is a rare service member or civilian who does not, at one time or another, experience a self-limited musculoskeletal back strain. However, one such event does not qualify as a chronic condition or cause spinal stenosis or any other disease. [G.P.'s] [] statement confirming back pain during the 1970s and thereafter is insufficient to establish the existence of an initial in-service condition that would cause the symptoms and findings occu[r]ring after the service.

R. at 347-48.

On October 13, 2016, the Board denied the appellant's claim for disability compensation for a low back disability. R. at 1-16. This appeal followed.

II. ANALYSIS

The appellant argues, essentially, that the Board erred in (1) relying upon medical opinions that are inadequate and failed to substantially comply with the Board's prior remand directives, and (2) failing to provide adequate reasons or bases in support of its finding that lay statements by the appellant and G.P. carried less probative value than other evidence of record. Appellant's Brief (Br.) at 11-19; Reply Br. at 5-11. The Secretary contends that the Board properly relied upon adequate medical opinions, which substantially complied with prior remands, and that it provided sufficient reasons or bases in assigning less probative value to the lay statements of the appellant and G.P. Secretary's Br. at 8-24.

A. Duty To Assist

"[O]nce the Secretary undertakes the effort to provide an examination [or opinion] when developing a service-connection claim, . . . he must provide an adequate one." *Barr v. Nicholson*, 21 Vet.App. 303, 311 (2007). A medical examination or opinion is adequate "where it is based

upon consideration of the veteran's prior medical history and examinations," *Stefl v. Nicholson*, 21 Vet.App. 120, 123 (2007), "describes the disability, if any, in sufficient detail so that the Board's 'evaluation of the claimed disability will be a fully informed one,'" *id*. (quoting *Ardison v. Brown*, 6 Vet.App. 405, 407 (1994)) (internal quotation marks omitted), and "sufficiently inform[s] the Board of a medical expert's judgment on a medical question and the essential rationale for that opinion," *Monzingo v. Shinseki*, 26 Vet.App. 97, 105 (2012) (per curiam). The law does not impose any reasons-or-bases requirements on medical examiners and the adequacy of medical reports must be based upon a reading of the report as a whole. *Id*. at 105-06.

Additionally, a remand by the Board or this Court "confers on the [appellant] . . . , as a matter of law, the right to compliance with the remand orders," and the Board errs when it fails to ensure compliance with the terms of such a remand. *Stegall v. West*, 11 Vet.App. 268, 271 (1998). Although the Secretary is required to comply with remand orders, it is substantial compliance, not strict compliance, that is required. *See Dyment v. West*, 13 Vet.App. 141, 146-47 (1999) (holding that there was no *Stegall* violation when the examiner made the ultimate determination required by the Board's remand, because such determination "more than substantially complied with the Board's remand order"), *aff'd sub nom. Dyment v. Principi*, 287 F.3d 1377 (Fed. Cir. 2002); *Evans v. West*, 12 Vet.App. 22, 31 (1998) (holding that remand was not warranted because the Secretary substantially complied with the Board's remand order).

The Board's determination of whether there was substantial compliance with a remand and "[w]hether a medical [examination] or opinion is adequate [are] finding[s] of fact, which the Court reviews under the 'clearly erroneous' standard." *D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008) (per curiam); *see Gill v. Shinseki*, 26 Vet.App. 386, 391-92 (2013) (reviewing the Board's finding of substantial compliance for clear error), *aff'd per curiam sub nom. Gill v. McDonald*, 589 F. App'x 535 (Fed. Cir. 2015). 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.

The Board found that VA had satisfied its duty to assist. The Board concluded that the VA opinions it relied upon were adequate in all respects:

> The April 2012 examiner provided a complete rationale based upon a review of the claims file and a physical examination. The March 2015 examiner conducted an additional review of the claims file, including lay statements and medical records, and provided a detailed medical opinion based on the history and findings. The VA examiners provided detailed rationales and cited supporting data for their conclusions.

R. at 4-5. In addition, the Board determined that "the development ordered in the May 2011 and March 2013 remands has been completed, and no further action is necessary to comply with the remand directives" under *Stegall*, 11 Vet.App. at 271. R. at 3.

Ultimately, the Board denied the appellant's claim based, in part, on the opinions of the "April 2012 and March 2015 VA examiners [who] opined that the [appellant's] current low back disability is not likely related to service." R. at 11. The Board observed again that the opinions were supported by review of the appellant's claims file, specifically finding that their medical opinions were "competent and highly probative, and based on adequate rationales." *Id*. The Board further observed: "The April 2012 examiner found that it was unlikely that spinal stenosis is related to the [appellant's] described in-service injuries. The March 2015 examiner concluded that back strain in service does not qualify as a chronic condition and would not cause spinal stenosis." *Id*. Based upon the foregoing, the Board concluded that there was "no competent evidence of a medical nexus between the current low back disability and an incident of service." *Id*.

The appellant has submitted various arguments in support of his position that the April 2012 VA examination report and the March 2015 VA addendum opinion are each separately inadequate and that they failed to substantially comply with the Board's March 2013 remand. However, as shown above, the Board relied on these opinions collectively, not individually, to determine that VA had satisfied its duty to assist and to find "no competent evidence of a medical nexus between the current low back disability and an incident in service." R. at 11; *see* R. at 4-5.

The appellant first argues that the April 2012 VA examination report and the March 2015 VA addendum opinion are not supported by adequate rationales. With respect to the April 2012 VA examination, the appellant asserts that the opinion was not supported by an adequate rationale in compliance with "the terms of the prior remand in which the parties agreed that future medical examinations or opinions must *provide more clarity . . . and a more robust rationale* than a simple statement that a nexus is unlikely because a particular diagnosed back condition is a naturally

occurring phenomenon." Appellant's Br. at 13 (emphasis added); Reply Br. at 2. With respect to the March 2015 VA addendum, the appellant argues that the opinion "is nonsensical and unresponsive to the medical questions presented," Appellant's Br. at 14-15, and that "the . . . examiner's rationale did not make any sense," Reply Br. at 3. In particular, the appellant appears to take issue with the March 2015 examiner's rationale that (1) the appellant's in-service back strain does not qualify as a chronic condition or cause spinal stenosis or any other disease and (2) G.P.'s statements concerning the appellant's back pain are "insufficient to establish the existence" of a condition that would cause any current low back disability. Reply Br. at 3; *see* Appellant's Br. at 14-15.

The appellant's arguments that the VA medical opinions in question lacked sufficient rationale are not persuasive. Although the Board did not provide an extensive explanation for its finding that the examiners provided detailed rationales, the appellant provides no specific analysis in support of his general contention that the April 2012 examiner did not provide a robust rationale that complied with the terms of the JMPR. Appellant's Br. at 13. Without more, his argument amounts to a disagreement with the Board's assessment of the evidence, which is insufficient to demonstrate that the Board's findings were clearly erroneous. *See D'Aries*, 22 Vet.App. at 104. Similarly, with respect to the March 2015 VA opinion, it is clear from the Board's decision that the Board understood the basis for the examiner's negative nexus opinion—the appellant's in-service "self-limited back strain . . . . does not qualify as a chronic condition or cause spinal stenosis or any other disease" and G.P.'s "statement confirming back pain in the 1970[s] and thereafter is insufficient to establish the existence of an initial in-service condition that would cause the symptoms and findings occurring after service." R. at 10. The Board found that the examiner supported her conclusion with a "detailed rationale" and "data," R. at 5, and the Court finds that the appellant's arguments to the contrary amount to no more than a disagreement with the opinion as well as the Board's reliance upon it to find no evidence of a nexus between the appellant's current low back disability and an in-service incident. *See D'Aries*, 22 Vet.App. at 104.

The appellant next argues that the April 2012 examiner failed to consistently diagnose the appellant with lumbar strain or DDD and provide a nexus opinion for those disabilities, Appellant's Br. at 13; Reply Br. at 2, 7. However, the appellant fails to cite any legal authority supporting the argument that VA examiners must provide consistent diagnoses. Moreover, the Court is not convinced that any error in this regard is prejudicial in light of the Court's determination that the

Board did not err in relying on the March 2015 opinion that it is "not possible to relate post-service conditions to the self-limited back strain documented in service without resorting to speculation. . . . [because] one such event does not qualify as a chronic condition or cause spinal stenosis or any other disease," R. at 347-48.

Additionally, the appellant maintains that the April 2012 examiner could not have substantially complied with the March 2013 remand directive that the examiner address a January 2013 statement by G.P., because the examination predated G.P.'s statement. Appellant's Br. at 14. As a result, he contends that the opinion was "not based on all pertinent evidence" and lacks all probative value. Reply Br. at 3, 7-8. However, the Board's March 2013 remand was directed at obtaining a new opinion to address the appellant's and G.P.'s statements regarding episodes of back pain since service, *see* R. at 958, which the Board in the decision on appeal found was accomplished by the March 2015 VA addendum opinion. R. at 3; *see* R. at 5 (noting that the March 2015 examiner reviewed "lay statements"), 10 (noting that the examiner addressed the January 2013 statement). Moreover, the appellant fails to provide legal support for his contention that the April 2012 opinion would lack all probative value on this basis alone, especially considering that, as the Board noted, the appellant had directly reported to the examiner that he experienced chronic and constant low back pain since discharge. *See* R. at 998; *see also Monzingo*, 26 Vet.App. at 107 (noting, "even if a medical opinion is inadequate to decide a claim," it may be entitled to some probative weight "based upon the amount of information and analysis it contains").

Finally, the appellant asserts that the Board failed to ensure substantial compliance with the March 2013 remand directive that an opinion "should be [obtained] by an appropriate medical specialist" because the March 2015 examiner, a VA internist, is "not an appropriate medical specialist to provide an opinion on a back disorder like an orthopedic surgeon." Appellant's Br. at 14; Reply Br. at 6. Although the Board found substantial compliance with the March 2011 and March 2013 remands, R. at 3 (citing *Stegall*, 11 Vet.App. at 271), it did not specifically address whether the March 2015 examiner was an appropriate medical specialist.

Initially, the Court notes that "VA benefits from a presumption that it has properly chosen a person who is qualified to provide a medical opinion in a particular case," *Parks v. Shinseki*, 716 F.3d 581, 585 (Fed. Cir. 2013) (citing *Sickels v. Shinseki*, 643 F.3d 1362, 1366 (Fed. Cir. 2011)), and the appellant does not argue, nor does the record reflect, that he raised this issue below. Additionally, the appellant does not assert that the record itself reasonably raises some irregularity

in VA's selection process. *Cf. Wise v. Shinseki*, 26 Vet.App. 517, 525-27 (2014) (holding that the presumption of competence does not attach where the face of the examination report reveals some irregularity in the selection of the examiner). Thus, the Board was not required to provide a statement of reasons or bases establishing the medical examiner's competence before relying on her opinion. *See Rizzo v. Shinseki*, 580 F.3d 1288, 1291-92 (Fed. Cir. 2009) (holding that the Board is not required to affirmatively establish the competence of a medical examiner, unless the veteran raises the issue); *see also Parks*, 716 F.3d at 585-86 (holding that the appellant waived his right to rebut the presumption that a nurse practitioner selected by VA was competent because the appellant never challenged the examiner's competence before the Board).

However, even assuming the appellant is not precluded from raising this issue for the first time on appeal, the appellant fails to demonstrate prejudicial error because he fails to explain why an internal medicine specialist may not qualify as "an appropriate medical specialist," given the Board's broad and nonspecific request for an "appropriate medical specialist," and thus fails to explain how or why the March 2015 opinion does not substantially comply with the Board's request. *See Dyment*, 13 Vet.App. at 146-47; *see also D'Aries*, 22 Vet.App. at 104-05 (noting that *Stegall* requires substantial "not strict compliance," and affirming the Board's determination that obtaining an expert opinion from a neurologist substantially complied with VA's request for an opinion by an "'internal medicine specialist'").

For the reasons stated above, the Court is not persuaded by the appellant's arguments on appeal.[1] *Berger v. Brown*, 10 Vet.App. 166, 169 (1997) (the appellant "always bears the burden of persuasion"); *see Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000) (table). The Court finds that the appellant's arguments are undeveloped or lacking support in legal authority and therefore do not satisfy his burden of persuasion on appeal to show Board error. *See Coker v. Nicholson*, 19 Vet.App. 439, 442 (2006) (per curiam) ("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."),

[1] The Court declines to address the appellant's additional arguments—raised for the first time in his reply brief—challenging the adequacy of the March 2015 examiner's opinion. *See* Reply Br. at 8. The Court has consistently discouraged parties from raising new arguments after the initial briefing. *See Carbino v. West*, 168 F.3d 32, 34 (Fed. Cir. 1999) ("[I]mproper or late presentation of an issue or argument . . . ordinarily should not be considered."), *aff'g sub nom. Carbino v. Gober*, 10 Vet.App. 507, 511 (1997) (declining to review argument first raised in appellant's reply brief); *Untalan v. Nicholson*, 20 Vet.App. 467, 471 (2006); *Fugere v. Derwinski*, 1 Vet.App. 103, 105 (1990).

vacated on other grounds sub nom. Coker v. Peake, 310 F. App'x. 371 (Fed. Cir. 2008) (per curiam order); *see also Locklear v. Nicholson*, 20 Vet.App. 410, 416 (2006) (holding that the Court is unable to find error when arguments are undeveloped); U.S. VET. APP. R. 28(a)(5).

Additionally, the appellant has failed to meet his burden of demonstrating that the Board committed prejudicial error. *See Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) (holding that harmless-error analysis applies to the Court's review of Board decisions and that the burden is on the appellant to show that he suffered prejudice as a result of VA error); *see also Coker*, 19 Vet.App. at 442.

B. Evidentiary Findings

It is the Board's duty, as factfinder, to determine the credibility and weight to be given to the evidence. *Washington v. Nicholson*, 19 Vet.App. 362, 367-68 (2005); *Owens v. Brown*, 7 Vet.App. 429, 433 (1995) (holding that the Board is responsible for assessing the credibility and weight of evidence and that the Court may overturn the Board's decision only if it is clearly erroneous). This duty includes assessing the probative value of medical evidence. *See Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 302 (2008) ("Part of the Board's consideration of how much weight to assign [a medical opinion] is the foundation upon which the medical opinion is based."). 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*, 7 Vet.App. at 527; *see* 38 U.S.C. § 7104(d)(1); *Gilbert*, 1 Vet.App. at 56-57.

In its decision, the Board found the following:

> [T]he [appellant's] statements made in connection with a claim for VA compensation benefits [are] to be of lesser probative value than his more contemporaneous history, including medical records showing that he sought treatment for other complaints but did not report back pain and the absence of complaints or treatment for many years after service. The lay statement of G.P. regarding the [appellant's] complaints of back pain symptoms since the 1970's is likewise considered less probative than the contemporaneous medical records which indicate that the [appellant] denied recurrent back pain.

R. at 11-12.

The appellant argues that the Board provided insufficient reasons or bases for finding that the lay statements of the appellant and G.P. were outweighed by other evidence. Appellant's Br. at 17-18; Reply Br. at 9-10. Specifically, the appellant maintains that the Board "considered and rejected favorable evidence" from the appellant and G.P. and relied upon the "absence of medical

evidence of treatment or complaints of a back disorder since service . . . .[, although n]one of these factors relate in any way to the observations in the certified statement made by [G.P.]." Appellant's Br. at 17. The appellant also contends that "the Board did not cite to any other contemporaneous medical record in which [the appellant] denied recurrent back pain." Reply Br. at 9-10.

The Court is not persuaded by the appellant's arguments on appeal. *Berger*, 10 Vet.App. at 169; *see Hilkert*, 12 Vet.App. at 151. As shown above, the Board, in assigning the lay statements lesser probative value concerning continuity of symptomatology, did not "reject" the contested lay statements. Rather, the Board's analysis reflects that it deemed the appellant's statements less probative because the "more contemporaneous history, *including* medical records" did not reflect continuous complaints, reports, or treatment for back pain for many years after service. R. at 11 (emphasis added). *See Buchanan v. Nicholson*, 451 F.3d 1331, 1337 (Fed. Cir. 2006) (noting it was not ruling out that the Board may "weigh the absence of contemporaneous medical evidence against the lay evidence of record"). Additionally, the Board ascribed lesser probative value to G.P.'s statements concerning the appellant's back symptoms because contemporaneous medical records, i.e., the 1978 examination, showed that the appellant denied recurrent back pain after discharge from service. *See id*. The appellant cites no legal authority requiring the Board to cite to additional contemporaneous medical evidence, other than the March 1978 report of medical history and report of medical examination, in order to find G.P.'s statements of lower probative value. The Court finds that the reasons or bases provided by the Board are sufficient and clearly explain its findings. *See Allday*, 7 Vet.App. at 527; *see* 38 U.S.C. § 7104(d)(1); *Gilbert*, 1 Vet.App. at 56-57. Moreover, as maintained by the Secretary, the appellant's arguments amount to mere disagreement with how the Board weighed the evidence. Secretary's Br. at 23.

III. CONCLUSION

After consideration of the parties' pleadings and a review of the record, the Board's October 13, 2016, decision is AFFIRMED.

DATED: February 6, 2018

Copies to:

Sean A. Ravin, Esq.

VA General Counsel (027)

Designated for electronic publication only
NON-PRECEDENTIAL

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 16-3738

ERNEST L. FRANCWAY, JR. APPELLANT,

V.

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

Before ALLEN, MEREDITH, and TOTH, *Judges*.

O R D E R

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

On February 6, 2018, the Court issued a memorandum decision that affirmed the October 13, 2016, Board of Veterans' Appeals (Board) decision that denied entitlement to disability compensation for a low back disability. On February 27, 2018, the appellant filed a motion for panel decision pursuant to Rule 35 of the Court's Rules of Practice and Procedure. The motion for a panel decision will be granted.

Based on review of the pleadings and the record of proceedings, it is the decision of the panel that the appellant fails to demonstrate that 1) the single-judge memorandum decision overlooked or misunderstood a fact or point of law prejudicial to the outcome of the appeal, 2) there is any conflict with precedential decisions of the Court, or 3) the appeal otherwise raises an issue warranting a precedential decision. U.S. VET. APP. R. 35(e); *see also Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990).

Absent further motion by the parties or order by the Court, judgment will enter on the underlying single-judge decision in accordance with Rules 35 and 36 of the Court's Rules of Practice and Procedure.

Upon consideration of the foregoing, it is

ORDERED that the motion for panel decision is granted. It is further

ORDERED that the single-judge memorandum decision remains the decision of the Court.

DATED: May 3, 2018 PER CURIAM.

Copies to:

Sean A. Ravin, Esq.

VA General Counsel (027)

Not Published

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO: 16-3738

ERNEST L. FRANCWAY, JR., APPELLANT,

V.

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

JUDGMENT

The Court has issued a decision in this case, and has acted on a motion under Rule 35 of the Court's Rules of Practice and Procedure.

Under Rule 36, judgment is entered and effective this date.

Dated: May 25, 2018

FOR THE COURT:

GREGORY O. BLOCK
Clerk of the Court

By: /s/ Michael V. Leonard
Deputy Clerk

Copies to:

Sean A. Ravin, Esq.

VA General Counsel (027)