

*Designated for electronic publication only*

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

No. 17-0744

GARY R. LARSON, JR., 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, Gary R. Larson, Jr., through counsel appeals a December 8, 2016, Board of Veterans' Appeals (Board) decision that denied entitlement to benefits for hypertension, morbid obesity, dysmetabolic syndrome, hypothyroidism/chronic lymphocytic thyroiditis (CLT), hypogonadism, fatigue, edema, skin tags, acanthosis nigricans, and striae.<sup>1</sup> Record (R.) at 1-18. In his briefs, the appellant raises no arguments with the Board's denial of benefits for hypertension, and the Court therefore considers that matter abandoned and will dismiss the appeal as to that matter.<sup>2</sup> *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

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<sup>1</sup> Dysmetabolic syndrome, also called metabolic syndrome, is "a combination including at least three of the following: abdominal obesity, hypertriglyceridemia, low level of high-density lipoproteins [(HDL)], hypertension, and high fasting plasma glucose level, associated with an increased risk for diabetes." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1839 (32d ed. 2012). Edema is "the presence of abnormally large amounts of fluid in the intercellular tissue spaces of the body, usually referring to subcutaneous tissues." *Id.* at 593. Acanthosis is "diffuse hyperplasia of the spinous layer of the skin," *id.* at 9; acanthosis nigricans is "diffuse velvety acanthosis with dark pigmentation, found in areas of body folds such as the axillae or groin," *id.* A stria is "a band, line, streak, or stripe." *Id.* at 1784.

<sup>2</sup> The Secretary contends that the appellant also abandoned any appeal of the Board's decision denying benefits for fatigue, Secretary's Brief (Br.) at 1, but the appellant includes fatigue among the "secondary conditions" he is appealing, *see* Appellant's Br. at 3 n.2. For the sake of concision, the Court will refer to fatigue, edema, skin tags, acanthosis nigricans, and striae as the appellant does in his briefs, as "secondary conditions." The appellant contends that these conditions are secondary to his obesity and dysmetabolic syndrome. *Id.* at 29-30.

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 vacate those portions of the Board decision that denied entitlement to benefits for hypothyroidism/CLT and hypogonadism and remand those matters for further proceedings consistent with this decision. The Court will affirm those portions of the Board decision that denied benefits for morbid obesity and dysmetabolic syndrome, as well as for the secondary conditions.

## I. BACKGROUND

The appellant served a period of active duty for training (ACDUTRA) in the U.S. Navy Reserves from June to November 1988 and served on active duty in the U.S. Navy from February 1989 to February 1993, including service in the Persian Gulf. R. at 1676, 1680. In August 2009, he filed a claim for benefits for numerous conditions, including acanthosis nigricans, edema, hypothyroidism/CLT, skin tags, dysmetabolic syndrome, morbid obesity, striae, hypogonadism, and fatigue. R. at 1191-95. He contended that "exposure to chemicals and vaccines" during service caused his claimed disabilities. R. at 1200.

The appellant underwent a VA medical examination in March 2010. R. at 1041-45. The examiner offered the following relevant opinions:

1. 40-year-old Navy veteran with history of chronic lymphocytic thyroiditis well documented. There is no family history of thyroid disease. Although it is impossible to state with certainty that [the appellant's] thyroid condition is related to environmental hazards that he encountered in the Gulf, giving [him] the benefit of the doubt, it is at least as likely as not that this condition is related to his military service.
2. Hypogonadism: Again this condition is of unknown etiology, but giving the [appellant] the benefit of the doubt, again in my opinion[,] it is at least as likely as not that this condition is related to his Gulf War Service and the environmental hazards to which he was exposed there.
3. There is no sufficient evidence to make a diagnosis of chronic fatigue syndrome other than mild post-prandial drowsiness[;] the [appellant] does not give a convincing history of chronic fatigue syndrome.

4. The [appellant] has been diagnosed with dysmetabolic syndrome, but not with diabetes mellitus.

R. at 1044-45. A VA regional office (RO) determined that the March 2010 examination report was insufficient in several respects and therefore sought clarification from the examiner. R. at 1032-35. In April 2010, a different VA examiner provided a clarifying opinion. Of note, the examiner stated: "Dysmetabolic syndrome is not a specific const[ell]ation of symptoms. It is associated with life[style], obesity[,] and genetic[s]. [T]here is no known asso[ci]ation between service during the first [G]ulf [W]ar with its various exposures to the development of dysmetabolic syndrome." R. at 1023-24. The examiner reiterated that the appellant did not meet the diagnostic criteria for chronic fatigue syndrome and stated that there is "no known association" between service in the Persian Gulf "with its various exposures" and the development of hypothyroidism or hypogonadism. R. at 1024.

The April 2010 VA examiner provided an addendum opinion in July 2010. R. at 1001-06. The examiner noted that there were no "clinical, objective indicators" for acanthosis nigricans, edema, fatigue, skin tags, or striae; there were "clinical, objective indicators" for dysmetabolic syndrome, hypogonadism, hypothyroidism, and morbid obesity. R. at 1005. The examiner stated that he was unable to determine whether the appellant's "disability pattern" was "(1) an undiagnosed illness, (2) a diagnosable but medically unexplained chronic multisymptom illness of unknown etiology, (3) a diagnosable chronic multisymptom illness with a partially explained etiology, or (4) a disease with a clear and specific etiology and diagnosis" without resorting to speculation. R. at 1005, 1006. He further stated that "None of the above conditions are due to or aggravat[ed] by any envi[ron]mental hazards exposure during the GULF war (presum[ed] to be the first Gulf Conflict) to include pyridostigmine bromide and ant[h]rax vaccination[,] since no association has been found based on review of the VA/[Department of Defense] envi[ron]mental health provider resource web site." R. at 1002.

In October 2010, the RO denied the appellant's claims for benefits. R. at 940-65. The appellant filed a Notice of Disagreement (NOD) with that decision, R. at 859-65, *see* R. at 751-55, and ultimately appealed to the Board, R. at 693-98.

The Board requested a medical expert opinion from a VA specialist in December 2013. R. at 578-81. A VA endocrinologist provided an opinion in February 2014. R. at 568-70. The expert stated:

1. It is not at least as likely as not that the claimed hypothyroidism and chronic lymphocytic thyroiditis, dysmetabolic syndrome . . . , [or] hypogonadotropic hypogonadism . . . first manifested during active service or are medically related to injury or disease in active service.

2. It is not at least as likely as not that [the appellant's] extreme weight gain during active service caused or was an early manifestation of the claimed hypothyroidism and chronic lymphocytic thyroiditis, dysmetabolic syndrome . . . , or hypogonadotropic hypogonadism . . . . In general[,] the above association is possible[;] however[,] it is not relevant to the case in review.

3. It is not determined that the claimed hypothyroidism and chronic lymphocytic thyroiditis, dysmetabolic syndrome . . . , or hypogonadotropic hypogonadism . . . first manifested during active service and/or are medically related [to] active service. Therefore[,] it is not at least as likely as not that one or all of these disorders caused or permanently worsened or aggravated the claimed fatigue, . . . morbid obesity, . . . edema, skin tags, acanthosis nigricans, and striae. In general[,] hypothyroidism and chronic lymphocytic thyroiditis, dysmetabolic syndrome . . . , [and/or] hypogonadotropic hypogonadism . . . may worsen or aggravate fatigue [and] morbid obesity, . . . and in turn[,] morbid obesity may worsen or aggravate dysmetabolic syndrome, . . . hypogonadotropic hypogonadism, . . . fatigue, . . . and/or edema. However[,] these associations are not relevant to the case in review.

My medical expert opinion is supported by integrating the data from the review of the claims file and the review of medical literature relevant to the claim in review. Specifically

1. Textbooks state that there is high prevalence of all claimed disorders in general population[.]

2. Review of the medical literature using professional website called PubMed that is the most common website used by physicians for literature searches shows multiple publications related to the Gulf War.

R. at 568-69.

In April 2014, the appellant submitted a lengthy challenge to the expert opinion. R. at 317-90. He asserted that the expert failed to review his claims file or service medical records, did not "perform adequate research" before reaching her conclusion, and was "completely unaware of the environmental exposures" relevant to his service. R. at 329. He further argued that the expert was "not competent enough" to provide an expert opinion in his case, citing her specialization in osteoporosis. R. at 331. Accordingly, he requested that the Board "disregard" the expert opinion.

R. at 329. The appellant also requested that the Board remand his appeal for the RO to consider his response in the first instance, R. at 317, and the Board did so in September 2014, R. at 295-301.

The RO issued a Supplemental Statement of the Case in October 2014 continuing to deny the appellant's claims. R. at 223-53. In a November 2014 response, the appellant again challenged the expert's competence. R. at 142-47. Upon return to the Board in June 2015, the Board sought an addendum opinion from the medical expert addressing the appellant's additional evidence and arguments. R. at 117-20. The expert provided the following addendum opinion in September 2015:

1. It is not at least as likely as not that the claimed hypothyroidism and chronic lymphocytic thyroiditis, dysmetabolic syndrome . . . , [or] hypogonadotrophic hypogonadism . . . first manifested during active service or are medically related to injury or disease in active service.

2. It is not at least as likely as not that [the appellant's] extreme weight gain of 58 pounds during active service caused or was an early manifestation of the claimed hypothyroidism and chronic lymphocytic thyroiditis, dysmetabolic syndrome . . . , [or] hypogonadotrophic hypogonadism . . . .

3. It is not determined that the claimed hypothyroidism and chronic lymphocytic thyroiditis, dysmetabolic syndrome . . . , [or] hypogonadotrophic hypogonadism . . . first manifested during active service and/or are medically related [to] active service. Therefore, it is not at least as likely as not that one or all of these disorders caused or permanently worsened or aggravated the claimed fatigue, . . . morbid obesity, edema, skin tags, acanthosis nigricans, and striae.

R. at 111. She further supported her conclusion by stating: "Publications relevant to Gulf War do not support the diagnoses in the cl[ai]m." R. at 112. In September 2016, the appellant again challenged the expert's competence to provide an opinion in his case. R. at 36-67.

In December 2016, the Board issued the decision on appeal, denying all the appellant's claims for benefits. Relevant to the issues on appeal, the Board found that obesity is "not a condition for which service connection can be granted." R. at 8. Regarding dysmetabolic syndrome, the Board explained that three possible components—hypertriglyceridemia, HDL, and fasting plasma glucose—are "abnormal laboratory findings, and not disabilities in and of themselves for which VA compensation benefits are payable." R. at 9 (citing 61 Fed. Reg. 20,440, 20,445 (May 7, 1996)). As to the other two possible components, the Board found that the appellant did not have hypertension and that, as stated above, obesity "is not listed in the rating schedule as a specifically ratable condition and there are no apparent manifestations of obesity that

may be ratable." *Id.* Accordingly, the Board concluded that the appellant was not entitled to benefits for metabolic syndrome because "it is not manifested by anything that would be ratable under VA's rating schedule." R. at 10. The Board relied on the expert medical opinion to deny the appellant's claims for benefits for hypothyroidism and hypogonadism and therefore also denied the appellant's claims for benefits for the secondary conditions. R. at 10-14. This appeal followed.

## II. ANALYSIS

### A. Pending Motions

On March 18, 2019, the appellant filed a motion for panel review and a motion for oral argument. The Secretary has not filed a response to either motion.

In his motion for panel review, the appellant argues that the U.S. Court of Appeals for the Federal Circuit's (Federal Circuit) recent decision in *Saunders v. Wilkie*, 886 F.3d 1356, 1363-64 (Fed. Cir. 2018), which defined "disability" in 38 U.S.C. § 1110 as the functional impairment of earning capacity, effectively overruled this Court's decision in *Marcelino v. Shulkin*, 29 Vet.App. 155, 158 (2018), which held that the Court lacks jurisdiction to determine whether obesity is or should be a disability for purposes of VA compensation. As will be explained in Part II.C below, however, *Marcelino* is still good law; therefore, the Court will deny the appellant's motion for panel review.

The Court will also deny the appellant's motion for oral argument. Generally, oral argument will be held when the Court determines that it will "materially assist" the Court in resolving the issue before it. *Beaty v. Brown*, 6 Vet.App. 532, 539 (1994); *see Winslow v. Brown*, 8 Vet.App. 469, 471 (1996); *Mason v. Brown*, 8 Vet.App. 44, 59 (1995). Because the Court concludes that this matter is squarely controlled by existing precedent, oral argument would not materially assist the Court. *See* U.S. VET. APP. R. 34(b) ("Oral argument normally is not granted on . . . matters being decided by a single Judge.").

### B. Hypothyroidism and Hypogonadism

On appeal, the appellant argues that the Board erred in finding the expert medical opinion adequate to decide his claims for benefits for hypothyroidism and hypogonadism because, among other reasons, the expert failed to provide sufficient rationale for her conclusions. Appellant's Br. at 9-11. The appellant also contends that the Board erred in extending the medical expert the presumption of competence without addressing his specific challenges to her qualifications. *Id.* at

11-14. Finally, he asserts that the Board provided inadequate reasons or bases for discounting the favorable March 2010 VA examination. *Id.* at 14-17. The Secretary concedes that the Board provided inadequate reasons or bases for finding the medical expert opinion and addendum adequate. Secretary's Br. at 5-8. He also concedes that the Board failed to address the appellant's challenges to the expert's qualifications. *Id.* at 8-10. He argues, however, that the Board provided adequate reasons or bases for rejecting the March 2010 VA medical opinion. *Id.* at 17-18. Nevertheless, the Secretary concedes that the Court should vacate the Board's denial of benefits for hypothyroidism and hypogonadism and remand those claims for readjudication. *Id.* at 5.

The Court agrees that the Board provided inadequate reasons or bases for finding the medical expert opinion and addendum adequate. The Board found only that the appellant was "provided with VA examinations and [medical expert] opinions which, collectively, contain a description of the history of the disabilities at issue; document and consider the relevant medical facts and principles; and provide opinions regarding the etiology of the [appellant's] claimed conditions." R. at 15. As the Secretary concedes, the Board failed to address potential deficiencies in the expert's opinion, including whether it lacked sufficient rationale for the conclusions. Appellant's Br. at 10-11; Secretary's Br. at 5-7; *see* 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1991).

The Court also agrees with the parties that the Board failed to adequately address the appellant's challenges to the medical expert's competence and qualifications. Although the Board acknowledged that the appellant had "contested" the expert's findings, it stated that, "[n]evertheless, 'the general presumption of competence includes a presumption that physicians remain up-to-date on medical knowledge and current medical studies.'" R. at 13 (quoting *Monzingo v. Shinseki*, 26 Vet.App. 97, 106-07 (2012) (per curiam)). When a claimant raises a specific challenge to an examiner's competence before the Board,<sup>3</sup> the Board must determine whether the presumption of competence has been rebutted. *See Rizzo v. Shinseki*, 580 F.3d 1288, 1291 (Fed. Cir. 2009); *see also Parks*, 716 F.3d at 585-86 (explaining that "[t]he first step to overcoming the presumption [of competence] is to object, even where . . . the veteran is acting pro

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<sup>3</sup> The Court notes that, with one exception, claimants are required to affirmatively challenge an examiner's competence before the Board; if they do not, the argument is waived. *Parks v. Shinseki*, 716 F.3d 581, 585-86 (Fed. Cir. 2013); *see Wise v. Shinseki*, 26 Vet.App. 517, 526-27 (2014) (holding that, where the face of the medical opinion shows some irregularity that raises the question of the examiner's competence, the presumption of regularity does not attach and the Board is required to address the examiner's competence sua sponte).

se"); *Sickels v. Shinseki*, 643 F.3d 1362, 1365 (Fed. Cir. 2011) (holding that the Board is not required to "give reasons and bases for concluding that a medical examiner is competent unless the issue is raised by the veteran" before VA, because such a requirement "would fault the Board for failing to explain its reasoning on unraised issues"); *Cox v. Nicholson*, 20 Vet.App. 563, 568-69 (2007) (noting that the record before VA contained no "argument or evidence" regarding a nurse practitioner's competence).

The parties disagree as to whether the question of an examiner's competence is a factual question that the Court reviews under the "clearly erroneous" standard of review, *see* Secretary's Br. at 9-11, or a legal question that the Court reviews de novo, *see* Appellant's Br. at 12. In light of the appellant's argument in his reply brief that the Court need not determine the proper standard of review because of the Secretary's concession that the Board should address the question in the first instance and the appellant's agreement that remand is the appropriate remedy, Reply Br. at 5-6, the Court will not decide this question at this time.

Given this disposition, the Court will not now address the remaining arguments and issues raised by the appellant as to hypothyroidism and hypogonadism. *See Quirin v. Shinseki*, 22 Vet.App. 390, 395 (2009) (noting that "the Court will not ordinarily consider additional allegations of error that have been rendered moot by the Court's opinion or that would require the Court to issue an advisory opinion"); *Best v. Principi*, 15 Vet.App. 18, 20 (2001) (per curiam order). On remand, the appellant is free to submit additional evidence and argument on the remanded matters, including the specific arguments raised here on appeal, and the Board is required to consider any such relevant evidence and argument. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002) (stating that, on remand, the Board must consider additional evidence and argument in assessing entitlement to the benefit sought); *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order). The Court reminds the Board that "[a] remand is meant to entail a critical examination of the justification for the decision," *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991), and the Board must proceed expeditiously, in accordance with 38 U.S.C. § 7112.

### C. Morbid Obesity, Dysmetabolic Syndrome, and Secondary Conditions

#### *1. Jurisdiction*

Here, the Board found that obesity "is not a condition for which [disability compensation] can be granted" and that "the rating schedule does not contemplate a separate disability rating for obesity." R. at 8. Additionally, the Board found that "metabolic syndrome does not satisfy the



requirement of a current disability because it is not manifested by anything that would be ratable under VA's rating schedule." R. at 10. The Board thus denied disability compensation for both conditions. R. at 5.

The appellant argues that the Court has jurisdiction to review the Board's findings that obesity and dysmetabolic syndrome are not disabilities for the purposes of 38 U.S.C. § 1110. Appellant's Br. at 18-26. In that regard, as noted above, he contends that this Court's decision in *Marcelino* was effectively overruled by the Federal Circuit's decision in *Saunders*. Appellant's Br. at 21. He further contends that, if the Court finds that it has jurisdiction, it should remand for the Board to determine under *Saunders* whether either condition results in functional impairment of earning capacity, rather than considering only whether any manifestations are listed in the rating schedule. Appellant's Br. at 26; Reply Br. at 6. The Secretary, relying on caselaw from this Court and the Federal Circuit, maintains that the Court lacks jurisdiction. Secretary's Br. at 18-26.

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 (2018).

In *Marcelino*, the appellant argued that whether obesity is a "disease" is a legal question that precedes the policy question of whether VA should compensate veterans for that condition. 29 Vet.App. at 157. The Court, however, found that "this argument is nothing more than a backdoor substantive challenge to the content of the rating schedule that this Court may not and will not entertain." *Id.* at 158; *see* 38 U.S.C. § 7252(b) ("The Court may not review the schedule of ratings for disabilities adopted under section 1155 of this title or any action of the Secretary in adopting or revising that schedule."). The Court stressed that, in *Wanner v. Principi*, the Federal Circuit held that "direct review of the content of the rating schedule is 'indistinguishable' from review of what should be considered a 'disability.'" *Id.* (quoting 370 F.3d 1124, 1131 (Fed. Cir. 2004)). Thus, the Court concluded that it "does not have jurisdiction to entertain the argument that obesity should be considered a *disability*."<sup>4</sup> *Id.* (emphasis added).

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<sup>4</sup> In *Wingard v. McDonald*, the Federal Circuit identified three exceptions to the principle that this Court may not review the rating schedule: (1) a case involving a constitutional challenge, (2) a case involving an interpretation

To establish service connection, section 1110 requires a "disability resulting from personal injury suffered or disease contracted in line of duty." 38 U.S.C. § 1110. *Saunders* held that "disability" in section 1110 "refers to the functional impairment of earning capacity, not the underlying cause of said disability." 886 F.3d at 1363. Although the appellant is correct that *Saunders* defined "disability," it did not, and could not, change the jurisdictional landscape under which this Court operates. *See Hayre v. Principi*, 15 Vet.App. 48, 51 (2001) ("Jurisdiction may not be 'assumed,' 'conceded,' or 'implied,' and cannot be bestowed on a court by the court itself, or any other court."), *aff'd*, 78 F. App'x 120 (Fed. Cir. 2003). To underscore this point, the Court notes that its jurisdiction-centric decision in *Marcelino* relied heavily on two Federal Circuit cases—*Wanner* and *Wingard*, *see Marcelino*, 29 Vet.App. at 157-58—and that the Federal Circuit in *Saunders* did not refer to either of those cases or suggest in any way that those cases are no longer good law, *see generally* 886 F.3d at 1360-69. Accordingly, the Court concludes that the caselaw addressing our jurisdiction under section 7252(b) is clear: The Court lacks jurisdiction to determine what conditions are or should be disabilities for VA compensation purposes. *See* 38 U.S.C. § 7252(b); *Wanner*, 370 F.3d at 1131; *Marcelino*, 29 Vet.App. at 158.<sup>5</sup>

Thus, the Court lacks jurisdiction to address the appellant's arguments that obesity and dysmetabolic syndrome constitute disabilities for purposes of VA disability compensation. Moreover, given this conclusion, the Court need not address the appellant's additional arguments as to whether the Board used an incorrect legal standard in determining that those conditions did not amount to disabilities or what standard it should apply on remand in assessing whether a current disability is present.

## 2. Equal Protection

The appellant argues that, even if the Court lacks jurisdiction to review the Board's determination that morbid obesity and dysmetabolic syndrome are not disabilities for VA purposes, the Court may review VA's actions to determine whether they comport with the Equal Protection Clause of the Fifth Amendment to the U.S. Constitution. Appellant's Br. at 26-29.

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of language in the regulations with regard to the rating schedule, and (3) a case involving a purely procedural challenge to the Secretary's adoption of schedule regulations. 779 F.3d 1354, 1356-57 (Fed. Cir. 2015). The appellant's constitutional argument will be addressed below.

<sup>5</sup> The Court acknowledges the appellant's argument that *Marcelino* was incorrectly decided and should be overturned. *See* Appellant's Br. at 26. A precedential decision by a panel of the Court may only be overturned by the Court sitting en banc. The appellant has not moved for en banc consideration and the Court has already concluded that panel review of this matter is not necessary.

More specifically, he contends that VA's decision to "deny disability compensation to a particular class of veterans (in this case, those with obesity or dysmetabolic syndrome) violates the equal protection clause because it is not rationally related to a legitimate governmental purpose." *Id.* at 26. This argument, then, arises under *Wingard's* first exception to the Court's inability to review the content of the rating schedule: a constitutional challenge. *See* 779 F.3d at 1356-57. The Court reviews constitutional questions de novo. *Buzinski v. Brown*, 6 Vet.App. 360, 365 (1994).

The Court declines to address the appellant's constitutional argument on the merits. First, in his principal brief, the appellant argues only that there is no rational basis for excluding obesity or dysmetabolic syndrome as disabilities for VA purposes. Appellant's Br. at 26-29. As the Secretary points out, however, the appellant does not argue that other similarly situated veterans are being treated differently than he is. Because "the first step in an equal protection case is determining whether the [claimant] has demonstrated that [he] was treated differently than others who were similarly situated to [him]," the appellant has not sufficiently alleged a constitutional violation. *Klinger v. Dep't of Corr.*, 31 F.3d 727, 731 (8th Cir. 1994); *see id.* ("Dissimilar treatment of dissimilarly situated persons does not violate equal protection."); Secretary's Br. at 27-28; *see also Gray v. McDonald*, 27 Vet.App. 313, 327-28 (2015) (finding no basis to assess an allegation of an equal protection violation in the absence of sufficient evidence that the appellant was similarly situated to other veterans).

Second, in his reply brief, the appellant contends that he is not required to demonstrate that he is similarly situated to other veterans to establish an equal protection violation because a Board decision "denying service connection for obesity and dysmetabolic syndrome is a facial classification that disadvantages veterans diagnosed with obesity or dysmetabolic syndrome by barring them from receiving a federal benefit." Reply Br. at 11. He does not, however, cite any authority for this proposition. *See id.* Accordingly, the Court finds the argument undeveloped and unsupported and will not address it. *See Locklear v. Nicholson*, 20 Vet.App. 410, 416 (2006) (holding that the Court is unable to find error when arguments are undeveloped).

### 3. Secondary Conditions

Finally, the only arguments the appellant raises with respect to the Board's denial of benefits for the secondary conditions—fatigue, edema, skin tags, acanthosis nigricans, and striae—is that they are inextricably intertwined with his claims for benefits for morbid obesity and dysmetabolic syndrome. Appellant's Br. at 29-30. Because the Court is affirming the Board's

denial of benefits for morbid obesity and dysmetabolic syndrome, the Court will likewise affirm the Board's denial of benefits for the secondary conditions.

### **III. CONCLUSION**

The appellant's motions for panel review and oral argument are denied. The appeal of the Board's December 8, 2016, decision denying entitlement to benefits for hypertension is **DISMISSED**. After consideration of the parties' pleadings and a review of the record, those portions of the Board's decision denying entitlement to benefits for hypothyroidism/CLT and hypogonadism are **VACATED** and the matters are **REMANDED** for further proceedings consistent with this decision. Those portions of the Board's decision denying benefits for morbid obesity, dysmetabolic syndrome, fatigue, edema, skin tags, acanthosis nigricans, and striae are **AFFIRMED**.

DATED: April 16, 2019

Copies to:

Christopher F. Attig, Esq.

VA General Counsel (027)