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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 13-1534

MALCOLM H. MELANCON, APPELLANT,

v.

SLOAN D. GIBSON,
ACTING SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before SCHOELEN, *Judge*.

MEMORANDUM DECISION

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

SCHOELEN, *Judge*: The appellant, Malcolm H. Melancon, through counsel, appeals an April 22, 2013, Board of Veterans' Appeals (Board) decision in which the Board awarded an initial compensable rating of 10% for hepatitis C virus (HCV) effective November 5, 2001, to December 31, 2004, but denied a compensable rating after January 1, 2005. Record of Proceedings (R.) at 3-18. The appellant does not address the Board's decision assigning a 10% rating for the period from November 5, 2001, to December 31, 2004. Accordingly, the appellant has abandoned any challenge to the Board's decision regarding this matter, and the Court need not address the Board's decision with respect to it. *See Ford v. Gober*, 10 Vet.App. 531, 535 (1997) (claims not addressed in appellant's pleadings are considered abandoned); *Bucklinger v. Brown*, 5 Vet.App. 435 (1993). 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 decision with respect to the matter appealed to the Court.

I. BACKGROUND

The appellant served on active duty in the U.S. Navy from August 1987 to August 1991. R. at 521. A June 2004 biopsy indicated that although there was mild to moderate portal and lobular inflammation, there was minimal cellular damage present. R. at 494. The diagnosis was chronic hepatitis, consistent with hepatitis C, grade 2, stage 2. *Id.* That same month, during a VA medical examination, the examiner noted that the appellant weighed 139 pounds and reported no "vomiting, hematemesis, or melena" and "no abdominal pain, distention, fatigue, weakness, depression, or anxiety." R. at 583. The examiner noted that the appellant had been diagnosed with hepatitis B in service and that tests performed at that time were negative for hepatitis A and C. *Id.* The examiner diagnosed chronic hepatitis C, and opined that "[i]t is at least as likely as not that his hepatitis C was contracted while on active military service, as the risk factors for it were present during that period." R. at 584. In June 2004, the appellant began interferon and ribavirin treatments. R. at 495. An August 2004 rating decision granted service connection for HCV and assigned a noncompensable rating, effective March 5, 2004. R. at 501.

Following additional adjudication, the appellant underwent another VA medical examination in October 2007. R. at 352-62. The examiner noted that following the completion of the appellant's treatment with interferon and ribavirin in December 2004, the appellant had "no detectable viral load." R. at 354. Although the examiner noted that the 2004 liver biopsy revealed that the appellant had stage II liver disease, the examiner determined that the appellant's liver functions were normal, and that his last screening was negative for hepatitis B and positive for hepatitis C. R. at 355. The examiner opined that the appellant "was misdiagnosed in the Navy and did not have hepatitis B," adding that it was his "firm belief that [the appellant] actually had hepatitis C while he was in the Navy and continued to suffer from it for a couple of years after his discharge." R. at 356.

In November 2007, the regional office (RO) granted an earlier effective date of November 5, 2001. R. at 328-35. In February 2009, the appellant testified before the Board. R. at 198-211. The appellant testified that in 2004, he went through successful interferon treatment. R. at 203. He further stated that since his treatment, he had "very few symptoms of [] hepatitis C" and that his doctors considered his HCV to be in remission. R. at 203. When asked about the severity of his current symptoms, the appellant reiterated that currently he had no symptoms though he fears that

it could come back at any time. R. at 204. Although he is asymptomatic and is not taking any medication, the appellant did express that he must watch what he eats and drinks and that "it's a constant disability just to keep everything in check." R. at 204-05. The appellant also asserted that a 1991 rating decision that denied his claim for hepatitis B contained clear and unmistakable error (CUE) because the Navy doctors had misdiagnosed him. R. at 208-09. An April 2009 Board decision denied the appeal for an initial compensable rating for HCV and an earlier effective date for the grant of service connection. R. at 181-97. The Board also denied the appellant's CUE motion. R. at 195. On appeal to this Court, an April 2011 decision vacated the part of the Board decision denying an initial compensable rating and remanded the matter for the Board to consider staged ratings. *Melancon v. Shinseki*, No. 091752, 2011 WL 1479586 (U.S. Vet. App. April 19, 2011); R. at 129-38. The Court also affirmed the Board's decision on the CUE motion. R. at 137.

On remand, the RO obtained additional treatment records and provided the appellant another medical examination. R. at 44-54, 59-98. In the October 2012 VA examination and opinion, the examiner reviewed the appellant's claims file and medical records, including diagnostic tests. R. at 44-54. The examiner stated that the appellant did not have any current signs or symptoms attributable to chronic or infectious liver diseases; that is, the appellant did not have fatigue, malaise, anorexia, nausea, vomiting, arthralgia, weight loss, right upper quadrant pain, hepatomegaly, or other indications of malnutrition due to his HCV. R. at 47. The appellant also reported zero episodes of incapacitation in the prior 12 months. R. at 48. Although the examiner acknowledged biopsy results from 2004 showing grade 2, stage 2 disease, he indicated that the appellant did not have any signs or symptoms attributable to cirrhosis of the liver. R. at 46, 48. The examiner also noted that a number of laboratory studies were performed from 2004 to 2012, including the liver biopsy, and he found that there were no significant findings or results. R. at 51-52. Following this opinion, the RO issued a Supplemental Statement of the Case (R. at 27-39), and the appellant appealed his claim to the Board (R. at 26).

In the April 2013 decision on appeal, the Board found that VA had satisfied the duty to assist. R. at 7. The Board found that from November 5, 2001, to December 31, 2004, the appellant's HCV caused intermittent fatigue, malaise, nausea, vomiting, and anorexia. R. at 13-14. Accordingly, the Board awarded the appellant a 10% disability rating for this period. *Id.* Finding that the evidence

revealed that after his interferon treatment, the appellant was essentially asymptomatic with no detectable viral load, the Board continued the appellant's 0% disability rating for the period after January 1, 2005. R. at 14. This appeal followed.

II. ANALYSIS

The appellant asserts that the October 2012 examination was inadequate, and therefore, the Board erred in relying on it. Appellant's Brief (Br.) at 11. The appellant further argues that he suffers from permanent primary, secondary, and tertiary consequences from his HCV¹ that are inextricably intertwined with his HCV claim but need to be developed and rated separately. *Id.* at 15. The Secretary contends that the medical examination was adequate and the opinion was supported by a sufficient rationale. Secretary's Br. at 7. Moreover, the Secretary contends that the appellant's remaining arguments are underdeveloped and unsupported by the record, and therefore, the appellant has failed to meet his burden of demonstrating error. *Id.*

A. The October 2012 Medical Examination

The appellant asserts that the October 2012 medical examination is inadequate because (1) the examination was conducted by a physician's assistant; (2) the laboratory results the examiner relied on were not included in the record before the agency (RBA); and (3) the examiner did not address evidence in the record of chronic symptoms of HCV, permanent liver damage, and permanent long-term effects of interferon and ribavirin. Appellant's Br. at 12. The Secretary counters that the appellant has not met his burden of demonstrating error and that his challenge to the record is untimely. Secretary's Br. at 11.

The Secretary's duty to assist includes "providing a medical examination or obtaining a medical opinion when such an examination or opinion is necessary to make a decision on the claim." 38 U.S.C. § 5103A(d). "[O]nce the Secretary undertakes the effort to provide an examination, . . . he must provide an adequate one." *Barr v. Nicholson*, 21 Vet.App. 303, 311 (2007). An

¹ "The unadjudicated implied and inferred claims include, but are not limited to, depression, anxiety, chronic fatigue, diabetes type II from pancreatic damage due to hepatitis type C, cirrhosis of the liver due to damage from hepatitis type C, and fibromyalgia and pain from the interferon." Appellant's Br. at 15.

examination is adequate "where it is based upon consideration of the veteran's prior medical history and examinations and also describes the disability, if any, in sufficient detail so that the Board's 'evaluation of the claimed disability will be a fully informed one.'" *Stefl v. Nicholson*, 21 Vet.App. 120, 123 (2007) (quoting *Ardison v. Brown*, 6 Vet.App. 405, 407 (1994)) (internal quotation marks omitted). The examiner's opinion "must support its conclusion with an analysis that the Board can consider and weigh against contrary opinions." *Id.* at 124; *Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 301 (2008) (noting that "a medical examination report must contain not only clear conclusions with supporting data, but also a reasoned medical explanation connecting the two").

VA medical examinations must be "provided by a person who is qualified through education, training, or experience to offer medical diagnoses, statements, or opinions." *Cox v. Nicholson*, 20 Vet.App. 563, 569 (2007) (quoting 38 C.F.R. § 3.159(a)(1) (2006)). This Court has also held that "the Board is entitled to assume the competence of a VA medical examiner." *Id.* at 569; *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) ("[T]he Board implicitly accepted [the VA examiner's] competenc[e] by accepting and relying upon the conclusions in her opinion."), *aff'd*, 232 F.3d 908 (Fed. Cir. 2000). Although VA is entitled to presume the competence of a VA expert, and need not present affirmative evidence of a physician's qualifications in every case, VA may not rely on the presumption of competence when a claimant raises specific reasons why the examiner is not qualified to render the requested opinion. *See Rizzo v. Shinseki*, 580 F.3d 1288, 1291 (Fed. Cir. 2009) (absent some challenge to "a VA medical expert's competence or qualifications before the Board, . . . VA need not affirmatively establish that expert's competenc[e]"); *see also Bastien v. Shinseki*, 599 F.3d 1301, 1307 (Fed. Cir. 2010) ("[A]ny challenge 'to the expertise of a VA expert' . . . must set forth the specific reasons why the litigant concludes that the expert is not qualified to give an opinion." (quoting *Rizzo*, 580 F.3d at 1291)). "Whether a medical opinion is adequate is a finding of fact, which this Court reviews under the 'clearly erroneous' standard." *D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008).

The appellant's arguments are unpersuasive. First, as noted above, VA is entitled to presume the competence of a VA expert in the absence of specific reasons why the examiner is not qualified to render the requested opinion. *See Rizzo, supra*. The appellant's argument that the examination is inadequate because it was conducted by a physician's assistant is devoid of support or any specific

challenge to the examiner's qualifications. *See* Appellant's Br. at 11. Accordingly, the appellant has not properly challenged the presumption of competence of the VA's expert. *See Rizzo and Bastien*, both *supra*.

Second, the appellant contends that the 2012 examination is inadequate because although the examination report notes a number of laboratory tests that were performed, the results of these tests "do not appear to be present in the record now before the Court." Appellant's Br. at 11. The appellant asserts that these tests are essential because the damage to his liver caused by HCV is central to the ratings assigned in this case. *Id.* Although the October 2012 examination report did not include the laboratory results, the report does indicate that the examiner reviewed the laboratory reports and determined that they did not present significant findings or results. R. at 51-52. The Court recognizes that the appellant is essentially raising an *untimely* challenge to the RBA. *See* U.S. VET. APP. R. 10(b) (any dispute with the RBA must be filed within 14 days after the RBA is served). The Court reminds the parties that they are both obligated to ensure that the record contains any document cited in a brief or otherwise before the Secretary and the Board that is relevant to the issues on appeal to the Court. *See* U.S. VET. APP. R. 28.1(a)(1)(B).

Moreover, there are no fairness or due process issues because the appellant fails to demonstrate why the test results are relevant given that HCV has already been diagnosed and that under Diagnostic Code (DC) 7354, the rating criteria for HCV are presented not in terms of laboratory results but as observable symptoms including "intermittent fatigue, malaise, and anorexia; or, incapacitating episodes (with symptoms such as fatigue, malaise, nausea, vomiting, anorexia, arthralgia, and right upper quadrant pain) having a total duration of at least one week, but less than two weeks during the past 12 month period." 38 C.F.R. § 4.114, DC 7354 (2014). Accordingly, the Court finds that the appellant's argument fails to demonstrate error. *See Locklear v. Nicholson*, 20 Vet.App. 410, 416 (2006) (holding that the Court will not entertain underdeveloped arguments); *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (holding that the appellant bears the burden of demonstrating error on appeal).

The appellant also appears to challenge the examiner's findings that the appellant did not exhibit current signs or symptoms attributable to chronic or infectious liver diseases. Appellant's Br. at 12. Although the appellant asserts that the "record is replete with complaints" regarding the

appellant's chronic symptoms of HCV as well as damage caused by the interferon treatment (*id.*), the only evidence the appellant points to is his own testimony that he must watch what he eats and drinks which creates "a constant disability just to keep everything in check" (R. at 205). The rating criteria for HCV does not include such lifestyle changes.² *See* DC 7354. Similarly, although the appellant repeatedly argues that VA has "recognized the long term and permanent effects of interferon treatment," he does not identify any specific symptoms that the appellant is experiencing. Appellant's Br. at 12. Moreover, the appellant's 2009 Board testimony directly contradicts both arguments. The appellant consistently testified that he was asymptomatic after the interferon treatment. R. at 204-07. Even after the Board member explained to the appellant that if he was not currently experiencing symptoms, "there's really no basis to assign a higher rating," the appellant did not identify any current symptoms. R. at 207. Accordingly, the Court concludes that the appellant's argument lacks merit. *See Locklear* and *Hilkert*, both *supra*.

To the extent that the appellant argues that the examiner failed to address the "permanent liver damage" the appellant has sustained, his argument lacks evidentiary support. Contrary to the appellant's assertions, the 2004 biopsy report does not reveal a finding that the appellant's liver has been permanently damaged. R. at 494. Moreover, the July 2004 treatment note does not include any indication of fibromyalgia from the interferon treatment. R. at 495. Therefore, in asserting that these disabilities exist, the appellant is making unsupported medical conclusions that neither he, nor his counsel, has established that they are competent to make, and therefore, these arguments are improper. *See Kern v. Brown*, 4 Vet.App. 350, 353 (1993) ("[A]ppellant's attorney is not qualified to provide an explanation of the significance of clinical evidence.").

As to the appellant's implication that he has diabetes as a consequence of HCV liver damage that the October 2012 examiner failed to discuss, there is no evidence in the record that supports a link between high blood glucose readings and HCV. As noted above, neither the appellant nor his

² To the extent that the appellant argues that his condition can return at any time, the Court reminds the appellant that should his disability picture change such that his symptoms get worse or he develops a condition that could be related to his HCV, he can file a claim for a rating increase at that time. *See* 38 C.F.R. §§ 3.310 and 3.157 (2014).

attorney is competent to offer a medical opinion on this issue. *See Kern, supra; see also Jandreau v. Nicholson*, 492 F.3d 1372, 1377 (Fed. Cir. 2009).

The Court finds that the October 2012 examiner's opinion is based upon consideration of the appellant's prior medical history and examinations and describes his HCV disability in sufficient detail for the Board's evaluation to be fully informed. *See Stefl, supra*. Accordingly, the appellant has not demonstrated that the October 2012 medical examination was inadequate or that the Board erred in relying on it.

B. Other Arguments

The Court finds the appellant's other arguments are neither clear nor developed. In arguing that the appellant suffers from a number of disabilities that are secondary to his HCV, the appellant fails to identify any evidence that these issues were raised before the RO or the Board. Appellant's Br. at 15. Furthermore, the appellant repeatedly states that the appellant's hearing testimony questioned a "vanishing 30% rating" (*Id.* at 3, 10, 13, 15), but as the Secretary points out, this issue was part of a CUE motion that was decided in a prior Board decision and affirmed by this Court. Secretary's Br. at 18. Therefore, it is not before the Court at this time. Additionally, despite repeating the same point multiple times in his brief, the appellant does not make any argument identifying an error. This approach to appellate advocacy is insufficient to demonstrate error in the Board's decision and falls short of carrying the appellant's burden of persuasion on appeal. *See Berger v. Brown*, 10 Vet.App. 166, 169 (1997); *see also Locklear*, 20 Vet.App. at 416 (Court unable to find error when arguments are "far too terse to warrant detailed analysis by the Court"); *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."), *rev'd on other grounds sub nom. Coker v. Peake*, 310 F. App'x 371 (Fed. Cir. 2008) (per curiam order); *Hilkert, supra*.

III. CONCLUSION

After consideration of the appellant's and the Secretary's pleadings, and a review of the record, the Board's April 22, 2013, decision is AFFIRMED with respect to the matter appealed to this Court.

DATED: July 11, 2014

Copies to:

Robert P. Walsh, Esq.

VA General Counsel (027)