**Vet. App. No. 15-31**

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

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**LAWRENCE J. ACREE,**
Appellant,

v.

**ROBERT A. McDONALD,**
Secretary of Veterans Affairs,
Appellee.

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**ON APPEAL FROM THE BOARD OF VETERANS' APPEALS**

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# BRIEF OF THE APPELLEE, SECRETARY OF VETERANS AFFAIRS

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**LEIGH A. BRADLEY**
General Counsel

**MARY ANN FLYNN**
Chief Counsel

**KENNETH A. WALSH**
Deputy Chief Counsel

**REBECCA A. BAIRD**
Senior Appellate Attorney
U.S. Department of Veterans Affairs
Office of the General Counsel (027J)
810 Vermont Avenue, N.W.
Washington, D.C. 20420
(202) 632-6903

Attorneys for Appellee

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**ON APPEAL FROM THE BOARD OF VETERANS' APPEALS**

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# BRIEF OF THE APPELLEE

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## I. ISSUE PRESENTED

Whether the Board of Veterans' Appeals (Board), in its November 20, 2014, decision, properly dismissed Appellant's claims of entitlement to an initial rating in excess of 10 percent and an effective date earlier than April 24, 2008, for degenerative arthritis with tendonitis of the left shoulder; an effective date earlier than April 24, 2008, for the grant of service connection for lumbar strain, post-traumatic stress disorder (PTSD) and sinusitis; service connection for exposure to Gulf War hazards; and entitlement to TDIU.

## II. STATEMENT OF THE CASE

### A. JURISDICTIONAL STATEMENT

Appellate jurisdiction is predicated on 38 U.S.C. § 7252(a), which gives this Court exclusive jurisdiction to review final Board decisions.

### B. NATURE OF THE CASE

Appellant, Lawrence J. Acree, appeals the Board's decision dated November 20, 2014, that dismissed his claims of entitlement to an initial rating in excess of 10 percent and an effective date earlier than April 24, 2008, for degenerative arthritis with tendonitis of the left shoulder; an effective date earlier than April 24, 2008, for the grant of service connection for lumbar strain, PTSD and sinusitis; service connection for exposure to Gulf War hazards; and entitlement to a total disability rating based on individual unemployability (TDIU). Because the Board properly found that Appellant had withdrawn those claims at his September 2014 hearing, the Board's decision should be affirmed.

The Board also remanded Appellant's claims for an increased, initial rating in excess of 10 percent for lumbar strain and PTSD, as well as his claim for an initial compensable rating for sinusitis and his claim for service connection for sleep apnea. Therefore, those issues are not before the Court. *Breeden v. Shinseki,* 17 Vet.App. 478 (2004).

## C. STATEMENT OF THE FACTS

Appellant served on active duty from June 1985 to June 1989, and from June 2007 to April 2008. [Record (R.) at 1990, 3591]. The Secretary appreciates his service.

In a Social Security Administration (SSA) assessment completed in June 2008, Appellant stated "I am on so much medication[,] I cannot function." [R. at 1073 (1066-1079)]. However, upon observing Appellant, the SSA examiner noted Appellant had no difficulty hearing, reading, understanding, concentrating, talking, or answering, and no problem with coherency. [R. at 1070].

At an October 2008 VA examination, Appellant reported depression and anxiety, but his attention and concentration were intact. He was found to be competent for VA purposes. [R. at 1255 (1239-1257)].

At a May 2009 mental health assessment, Appellant was alert and oriented with normal speech and logical thought processes. [R. at 831 (831-834)]. His insight and judgment were noted as good. [R. at 833]. In August of that year, he was found to have average intellectual functioning and normal thought processes, communication and speech. [R. at 808-810, 814 (805-815)].

In a July 2009 rating decision, a VA Regional Office (RO) granted service connection and a 10 percent rating for PTSD; service connection

and a non-compensable rating for sinusitis; service connection and a 10 percent rating for degenerative arthritis with tendonitis of the left shoulder; and service connection and a 10 percent rating for lumbar strain. All of these grants had an effective date of April 24, 2008. The RO denied Appellant's claim based on Gulf War exposure and his claim for a TDIU rating. [R. at 2783-2794].

In a September 2010 clinic visit, Appellant reported no worsening depression or anxiety symptoms. [R. at 706 (704-708)].

At a January 2011 VA clinic visit, Appellant reported he was working on a Master's Degree in television production. [R. at 690-691]. In February 2011, he was oriented with intact memory and thought processes and was noted to have an above average intellect, [R. at 658 (657-660)], and in April 2011, he again reported no worsening depression or anxiety. [R. at 622-626].

In a January 2011 VA compensation evaluation, Appellant reported trouble sleeping, depression, anxiety and panic attacks. He complained of memory problems and the examiner noted some tangential thinking. However, Appellant reported that he was "managing activities of daily living without too much difficulty." [R. at 610 (606-612)]. He reported that he had just divorced from his wife the prior month. [R. at 606]. The examiner concluded, "He does appear to be competent to manage his affairs in the VA sense, though does report that his wife was doing that before she left.

It is not known that there is anything going on with the veteran that would impair his ability to manage his finances competently." [R. at 610].

In May 2011, he presented as appropriately-groomed, alert and attentive. [R. at 600-601]. He underwent another VA examination in May 2012, wherein he reported auditory hallucinations. [R. at 483 (470-496)]. The examiner diagnosed mild PTSD and a personality disorder. She concluded that his mental condition was "not severe enough either to interfere with occupational and social functioning or to require continued medication." [R. at 485].

Following psychological testing, she concluded:

> All testing except for the [Morel Emotional Numbing Test for PTSD] was indicative of malingering. . . . . Going on the premise the veteran was accurately diagnosed with PTSD back in 2008, I will bend towards the veteran and assume he is exaggerating some genuine symptoms in an attempt to create the appearance of a more severe form of psychopathology. I will discuss PTSD and the personality disorder only. I will not address self-report psychosis. This is done for several reasons, the veteran had been diagnosed with PTSD in the past thus again, I am bending toward the veteran and saying he is simply exaggerating. The personality disorder is evident in the original exam as well. The hallucinations/delusions cannot be commented on. The only other time the veteran mentioned these type of symptoms were during his last C&P exam. After that he never mentioned them to mental health providers. Thus the existence of these symptoms [is] suspect."

[R. at 496]. She concluded that Appellant could handle his VA benefits and pay bills. [R. at 494].

An April 2013 mental health note indicates Appellant had just graduated from college. [R. at 288 (280-291)].

In March 2014, Appellant reported to a mental health professional that he had been diagnosed with cancer for the third time. [R. at 67-71]. He was a fulltime student, obtaining a graduate degree in educational counseling, and enjoyed school. [R. at 68, 69]. He had a depressed mood but affect, speech and thoughts were normal. He denied memory problems and his judgment was good. [R. at 70]. At a September 2014 VA clinic visit, Appellant reported no worsening depression or anxiety. [R. at 40 (37-42)].

At a September 2014 Board hearing, Appellant was represented by Greg Belak, an accredited representative from the Disabled American Veterans. [R. at 978-1017]. At that time, Appellant reported he was taking classes at Lindsey Wilson College. [R. at 1010]. The Board Judge stated:

> The issues certified for appellate consideration today, well there's more issues certified than what we're going to be discussing because some of the issues have been withdrawn.
>
> So let me address the issues that have been withdrawn first[:] the issue of an increased rating for degenerative arthritis of the tendonitis of the left shoulder[;] [a]n earlier effective date for service connection for degenerative arthritis with tendonitis of the left shoulder, lumbar strain, [PTSD] and sinusitis; [e]ntitlement to service connection for exposure to Gulf War hazards and entitlement to [TDIU]. You're withdrawing your appeal with respect to all of those issues, is that correct, Mr. Acree?

[R. at 979].

Appellant responded, "Yes." *Id*. He actively testified in support of the claims on appeal. [R. at 978-1017].

In the November 2014 decision on appeal, the Board determined that Appellant had withdrawn the appeal of the claims for an initial rating in excess of 10 percent and an effective date earlier than April 24, 2008 for degenerative arthritis with tendonitis of the left shoulder; an effective date earlier than April 24, 2008, for the grant of service connection for lumbar strain, PTSD and sinusitis; service connection for exposure to Gulf War hazards; and entitlement to TDIU. [R. at 5 (1-13)].

## III. SUMMARY OF THE ARGUMENT

The Board properly determined that Appellant withdrew his claims for an initial rating in excess of 10 percent and an effective date earlier than April 24, 2008, for degenerative arthritis with tendonitis of the left shoulder; an effective date earlier than April 24, 2008, for the grant of service connection for lumbar strain, PTSD and sinusitis; service connection for exposure to Gulf War hazards; and entitlement to TDIU in a September 2014 hearing.

Appellant has not established any basis for the Board to have questioned his competence at the time of the hearing, and his other arguments similarly fail to demonstrate that the Board erred.

## IV. THE SECRETARY'S ARGUMENT

**THE COURT SHOULD AFFIRM THE BOARD'S DETERMINATION THAT APPELLANT WITHDREW HIS CLAIMS FOR ENTITLEMENT TO AN INTIIAL RATING IN EXCESS OF 10 PERCENT AND AN EFFECTIVE DATE EARLIER THAN APRIL 24, 2008, FOR DEGENERATIVE ARTHRITIS WITH TENDONITIS OF THE LEFT SHOULDER; AN EFFECTIVE DATE EARLIER THAN APRIL 24, 2008, FOR THE GRANT OF SERVICE CONNECTION FOR LUMBAR STRAIN, PTSD AND SINUSITIS; SERVICE CONNECTION FOR EXPOSURE TO GULF WAR HAZARDS; AND ENTITLEMENT TO TDIU.**

### A. The Standard of Review

The question of whether a claim has been withdrawn is one of fact and reviewed under the "clearly erroneous" standard of review set forth in 38 U.S.C. § 7261(a)(4). *Kalman v. Principi*, 18 Vet.App. 522, 524 (2004); *Hanson v. Brown*, 9 Vet.App. 29, 32 (1996); *Gilbert v. Derwinski*, 1 Vet.App. 49, 53 (1990) ("[I]f there is a 'plausible' basis in the record for the factual determinations of the [Board], [the Court] cannot overturn them.").

Contrary to Appellant's contention that the Court reviews the dismissal of claims de novo, the proper standard is whether the Board's finding was clearly erroneous because whether a claim was withdrawn is a finding of fact. Although Appellant relies on *Evans v. Shinseki*, 25 Vet.App. 7 (2011), *Evans* addressed the Court's jurisdiction to review the Board's finding that certain issues were not appealed to it in the appellant's VA Form 9, Substantive Appeal. Thus, the crux of the issue was an

ambiguous appeal to the Board, not a withdrawal at a Board hearing. *Evans*, 25 Vet.App. at 11-12.

**B. The Law**

Under VA regulation, a Veteran or his representative may withdraw an issue on appeal before the Board on the record at a hearing or by submitting a written statement. 38 C.F.R. § 20.204 (2015). Withdrawal is effective when "received by the Board." 38 C.F.R. § 20.204(b)(3). Pursuant to 38 C.F.R. § 20.204(c), "[w]ithdrawal of an appeal will be deemed a withdrawal of the Notice of Disagreement and, if filed, the Substantive Appeal, as to all issues to which the withdrawal applies. Withdrawal does not preclude filing a new Notice of Disagreement and, after a Statement of the Case is issued, a new Substantive Appeal, as to any issue withdrawn, provided such filings would be timely under these rules if the appeal withdrawal had never been filed."

Before the Court, Appellant makes three allegations of error: first, that the Board did not ensure that the withdrawal of his appeals was made with a full understanding of the consequences; second, that Board judge who conducted the hearing failed to explain the consequences of withdrawal; and third, that the Board failed to develop any evidence regarding Appellant's state of mind at the time of his hearing. These arguments must fail and will be addressed in turn below. However, at the outset, Appellant did not previously raise to the Board any argument with

regard to its finding that he had withdrawn the seven claims at issue. Because the Board did not have an opportunity to respond to the arguments that Appellant now raises in the first instance before this Court, the Court should decline to entertain his belated assertions.

In *Maggitt v. West*, the Court of Appeals for the Federal Circuit held that this Court "has jurisdiction to hear arguments presented to it in the first instance, provided it otherwise has jurisdiction over the veteran's claim," and therefore has discretion to consider such arguments in the first instance, remand them for Board consideration, or simply decline to consider them on the ground that the veteran did not exhaust his or her administrative remedies prior to appealing to the Court. 202 F.3d 1370, 1377 (Fed. Cir. 2000). In choosing between these options, "[t]he test is whether the interests of the individual weigh heavily against the institutional interests the [exhaustion of administrative remedies] doctrine exists to serve," the primary interests being "to protect agency administrative authority and to promote judicial efficiency." *Id*.

In the instant case, not only has Appellant failed to previously raise any challenge to the Board's finding that he withdrew the seven claims on appeal at his September 2014 hearing, the record is devoid of any communication from Appellant between the September 2014 hearing and the November 2014 Board decision on appeal. Indeed, it was not until he

filed his brief that Appellant averred that the Board erred in finding he had withdrawn his claims.

Given that Appellant had ample opportunity to respond to the Board's statement at his September 2014 hearing that it was considering the seven claims at issue here withdrawn, the Court should not now entertain his belated assertion.

In the alternative, and as discussed in depth below, Appellant's arguments must fail on the merits.

**C. The Board did not err in not discussing *DeLisio v. Shinseki*.**

Appellant contends that the Board erred in not explicitly considering the factors set out in *DeLisio v. Shinseki*, 25 Vet.App. 45 (2011). Appellant's Brief (AB) at 6-10. This argument is misplaced because the facts of this case are distinguishable from *DeLisio,* thus consideration under *DeLisio* was not reasonably raised to the Board.

In *DeLisio*, the Board judge listed 15 matters that required adjudication and then asked Mr. DeLisio if he "got the issues straight," to which Mr. DeLisio responded that he "thought" so. *DeLisio*, 25 Vet.App. at 58. The Court noted that, although the Board member had mentioned claims raised by the appellant in an October 24, 1980, claim, he had "omitted mention of any matters raised solely in Mr. DeLisio's October 31, 1980, claim for benefits . . . ." Thus, the Court concluded that, "[a]lthough Mr. DeLisio 'thought' that the Board member had identified the issues to be

discussed, the transcript reflects *neither an explicit discussion of withdrawal nor any indication that Mr. DeLisio understood that he might be withdrawing claims for benefits for any disabilities not discussed*." *Id*. (emphasis added). Thus, the Court in *DeLisio* was concerned that the appellant may have waived the appeal of claims that were not specifically delineated.

In the instant case, there is no such concern because all of the claims being withdrawn were specifically listed by the Board judge, who stated:

> So let me address the issues that have been withdrawn first. The issue of an increased rating for degenerative arthritis of the tendonitis of the left shoulder. An earlier effective date for service connection for degenerative arthritis with tendonitis of the left shoulder, lumbar strain, Post-Traumatic Stress Disorder and sinusitis. Entitlement to service connection for exposure to Gulf War hazards and entitlement to a total disability rating based on individual unemployability.

[R. at 979]. Thus, the Board judge explicitly listed each claim subject to withdrawal and consequently, there was no confusion regarding the breadth of the withdrawal.

Further, the Court's second concern in *DeLisio* is also absent in this matter. In *DeLisio*, in light of the Board judge's incomplete recitation of the pending claims, followed by Mr. DeLisio's equivocal statement that he "thought" the Board member had identified all of the issues, the Court found no "explicit discussion of withdrawal nor any indication that Mr.

DeLisio understood that he might be withdrawing claims for benefits for any disabilities not discussed." *DeLisio,* 25 Vet.App. at 58. Thus, the Court was concerned with whether the appellant understood the scope of his withdrawal and stated, "it is well settled that withdrawal of a claim is only effective where the withdrawal is explicit, unambiguous, and done with a full understanding of the consequences of such action on the part of the claimant." *DeLisio*, 25 Vet.App. at 57 (citing *Hanson v. Brown*, 9 Vet.App. 29, 32 (1996)).

Conversely, in this matter, in response to the Board judge's explicit listing of the claims being withdrawn, Appellant clearly and affirmatively agreed with the Board judge when he responded "Yes" to the judge's question, "You're withdrawing your appeal with respect to all of those issues, is that correct, Mr. Acree?" [R. at 979]. Thus, it is clear in this matter that Appellant understood precisely the consequences of the withdrawal.

Because Appellant's withdrawal was explicit and unambiguous and did not raise the concerns presented in *DeLisio,* the Board had no duty to discuss *DeLisio*. *Robinson v. Peake*, 21 Vet.App. 545, 552–56 (2008), *aff'd sub nom. Robinson v. Shinseki,* 557 F.3d 1355 (Fed. Cir. 2009) (Board has a duty to address all issues reasonably raised either by the appellant or by the contents of the record.).

Appellant also relies on *Isenbart v. Brown*, 7 Vet.App. 537 (1995), and *Kalman v. Principi*, 18 Vet.App. 522 (2004) but the facts of those cases are also distinguishable. In *Isenbart*, the claimant stated at a 1990 hearing before the RO that the issues on appeal were evaluation of his service-connected skin condition and peptic ulcer, as well as service connection for a nervous condition, and that there were "no additional issues." *Isenbart*, 7 Vet.App. at 539. The Court found that those "few words spoken orally [did not provide] the formality or specificity that withdrawal of an NOD [as to a TDIU claim] requires." *Id*.

Similarly, in *Kalman*, the claimant's representative stated at a Board video hearing that he "[didn't] think there [was] any other issue," *Kalman*, 18 Vet. App. at 524, and the Court held "the statements that there were no other issues simply does (sic) not rise to a withdrawal of an appeal." *Kalman*, 18 Vet.App. at 525. Again, the concern in *Isenbart* and *Kalman*, that the appellants withdrew appeals of claims that were not specifically identified, is not present here.

Appellant's reliance on *Pitcher v. McDonald*, 2014 WL 6968055 (CAVC Dec. 9 2014) under Rule 30(a) for its "persuasive value" in asserting that the Court should remand the matter because the Board did not explicitly discuss *DeLisio* is unpersuasive and unnecessary. (AB at 9). It is unnecessary because the Court has long held that the Board must consider relevant law. *See Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990).

Thus, other precedent exists and *Pitcher* should not be considered under Rule 30(a). *See* R. 30(a) (citation of non-precedential authority permissible "provided that the party states that no clear precedent exists on point.").

Further, *Pitcher* pertained to a claimant who responded to a phone call from the RO, and during that phone call, stated that he would withdraw an effective date claim. The claimant then memorialized that statement, but subsequently expressed his hesitance about VA not considering his prior 22-year-history of symptoms. As with *Isenbart* and *Kalman*, these facts are distinguishable. Here, Appellant appeared at a hearing, accompanied by an accredited service representative and responded clearly to specific questioning by the Board judge, on the record. Given the very clear facts in this matter, and despite Appellant's attempt to draw analogies to cases that simply aren't on point, there was no reason for the Board to doubt Appellant's intent to withdraw certain claims.

In the alternative, that is, even if there was no duty on the Board to discuss *DeLisio*, Appellant contends that the record does not support the Board's conclusion that he effectively withdrew his claims because "there was reason to doubt that he had the requisite understanding" in light of his treatment for an anxiety disorder and for cancer. AB at 10.

Implicit in this assertion is Appellant's unsupported medical determination that his prescribed medications rendered him unable to meaningfully withdrawal his claims. Such a medical conclusion from a lay

person cannot stand. *See Jandreau v. Nicholson,* 492 F.3d 1372, 1376 (Fed. Cir. 2007) (noting general competence to testify as to symptoms but not medical diagnosis).

And again, Appellant cites a non-precedential case for the persuasive value of its logic but again, such reliance is unnecessary – the record discussed above, including opinions rendered by VA mental health care providers, demonstrates that Appellant had the requisite cognition to understand the effect of withdrawing the claims. *Cf*. 38 C.F.R. § 3.353 (VA definition of mentally incompetent person as "one who because of injury or disease lacks the mental capacity to contract or to manage his or her own affairs, including disbursement of funds without limitation.").

Appellant's reliance on *Clay v. Shinseki*, 2012 WL 2856113 (CAVC July 12, 2012), is unfounded because that case is distinguishable. AB at 10. In *Clay*, the record reflected that the appellant submitted an Income–Net Worth and Employment Statement, but then requested that the Secretary "stop this claim" because his "life has been threaten[ed] and it seems people plus the female who [took] me to file this claim at PVA wants me to[ ] go off." *Clay* at *1. Again, a couple months later, he submitted a "statement to stop claim" because "I fear my life is in danger of claim money," followed by a "letter to reopen claim, then other statements to stop his claim. In light of these delusional statements, the Court correctly found the Board's determination that there was "no evidence" showing an

inability to understand the consequences of his actions was suspect. *Clay*, at *2.

In contrast, in this matter, the record clearly evinces that Appellant had no such thought impairment. As discussed above, in 2014, Appellant had completed a bachelor's degree and was working on a Master's Degree, with assistance of VA educational benefits. Thus, he can clearly manage his VA benefits.

Further, he consistently has been found to have normal thought processes and good judgment. [R. at 70]. At a September 2014 VA clinic visit, Appellant reported no worsening depression or anxiety. [R. at 40 (37-42)].

The evidence relied upon by Appellant to indicate cognition impairment includes his partial reading of his 2008 application for SSA benefits. Although Appellant points to this statement that he was "on so much medication[,] [he could not] function," [R. at 1073], he completely fails to acknowledge that in the same report, the SSA examiner concluded that Appellant had no difficulty hearing, reading, understanding, concentrating, talking, or answering, and no problem with coherency. [R. at 1070].

Further, in the 2011 VA compensation examination, wherein Appellant reported delusional thinking, the examiner concluded, based on psychological testing, that Appellant was exaggerating his symptoms.

Notably, she remarked that one motivation for his malingering could be "obtaining financial compensation." [R. at 482].

In conclusion, Appellant has failed to point to any competent evidence that his capacity was diminished in any way at the time of the September 2014 hearing. Thus, he has failed to demonstrate that the Board erred in determining that he had withdrawn the seven claims at issue.

**D. The Veterans Law Judge did not fail to carry out his duty under 38 C.F.R. § 3.103(c)(2).**

Appellant also argues that the Board erred by failing to ensure the VA hearing officer properly executed his duties under 38 C.F.R. § 3.103(c)(2) because he did not explain the consequences of withdrawing the claims. AB at 11-14. However, there is no such duty under 38 C.F.R. § 3.103(c)(2).

As the Court explained in *Bryant v. Shinseki*, 23 Vet.App. 488 (2010), 38 C.F.R. § 3.103(c)(2) imposes "two distinct duties" on hearing officers: (1) "a duty to fully explain the issues still outstanding that are relevant and material to substantiating the claim," and (2) a duty to "suggest that a claimant submit evidence on an issue material to substantiating the claim when the record is missing any evidence on that issue or when the testimony at the hearing raises an issue for which there is no evidence in the record." *Bryant*, 23 Vet.App. at 492, 496. The duty

Appellant attempts to impose upon the VA hearing officer goes beyond those set forth in 38 C.F.R. § 3.103(c)(2) as described in *Bryant*, and Appellant has provided no legal authority to support such an expansive requirement under the regulation. *Bryant* and 38 C.F.R. § 3.103(c)(2) are clear that the hearing officer must provide further explanation only when evidence or an element of the claim before it remain "outstanding" or "missing." *Id*.

Appellant has not adequately explained, nor provided any authority, for how his belated assertion that he was not competent to withdraw his claims was an issue "outstanding" or "missing" from the claims before the Board. Thus, this argument must fail.

**E. Appellant demonstrated a full understanding of the effect of withdrawing his claims.**

Finally, Appellant avers that the *DeLisio* considerations track the "intelligent waiver" demanded in criminal cases before a court may accept a guilty plea. Again, his argument is premised on his unsubstantiated assertion that his medications rendered him incapable of understanding the consequences of withdrawing his claims. AB at 14-17. Although the Due Process Clause of the U.S. Constitution applies to proceedings in which VA decides whether claimants are eligible for Veterans' benefits, *Cushman v. Shinseki,* 576 F.3d 1290, 1296 (Fed. Cir. 2009), there is no

evidence in this matter that Appellant is not competent, so the Court should reject this line of argument out of hand.

Even if the Court were to consider due process requirements should apply, Appellant's alleged "parallel" between forfeiture of rights at a plea hearing and at a VA hearing wherein a claim is withdrawn is wholly unsupported, so his invocation of the rule espoused in *U.S. v. Cole*, 813 F.2d 43 (3d Cir. 1987) and Rule 11 of the Federal Rules of Criminal Procedure is without merit. In *Cole*, the appellant risked a 55-year imprisonment for violating federal drug trafficking laws. On the evening prior to his Rule 11 plea hearing, he ingested illegal, recreational drugs, including approximately $400 worth of heroin and $250 worth of cocaine, and conceivably was under the influence of those drugs the following morning at his hearing. *Cole*, at 44.

In this matter, Appellant has been prescribed medication to control his anxiety and to ameliorate the symptoms of other conditions, including but not limited to, cancer. The VA physicians who prescribe his medications are presumed competent to prescribe an appropriate dosage to mitigate Appellant's anxiety symptoms and generally afford him a better level of health. *Monzingo v. Shinseki*, 26 Vet.App. 97, 106-107 (2012) ("the general presumption of competence includes a presumption that physicians remain up-to-date on medical knowledge and current medical studies) (citing American Medical Association Code of Medical Ethics,

Principle of Medical Ethics V ("A physician shall continue to study, apply, and advance scientific knowledge, maintain a commitment to medical education ...."); *see also Sickels v. Shinseki*, 643 F.3d 1362, 1366 (Fed. Cir. 2011) (in the absence of clear evidence to the contrary, VA medical examiners are presumed competent). Thus, Appellant has failed to demonstrate how his situation is akin to *Cole*.

Further, withdraw of a claim does not lead to a forfeiture of rights on the scale of incarceration. Even assuming the pro-claimant nature of VA's adjudications, a VA benefits claimant who withdraws a claim at a VA hearing may refile that claim at any time and the pertinent regulation, 38 C.F.R. § 20.204 provides that, even after withdrawing an appeal of a claim:

> Withdrawal does not preclude filing a new Notice of Disagreement and, after a Statement of the Case is issued, a new Substantive Appeal, as to any issue withdrawn, provided such filings would be timely under these rules if the appeal withdrawn had never been filed.

38 C.F.R. § 20.204(c). Thus, Appellant's argument that the ramifications of entering a guilty plea are similar to those of withdrawing a claim for VA benefits strains credulity.

In conclusion, Appellant has failed to demonstrate that the Board's decision is clearly erroneous or that the Board committed any prejudicial error warranting remand. *See Hilkert v. West,* 12 Vet.App. 145, 151 (1999) (en banc) (appellant has the burden of demonstrating error), aff'd, 232 F.3d 908 (Fed. Cir. 2000) (table); *Sanders v. Shinseki*, 556 U.S. 396, 409-10

(2009) (explaining that the burden of demonstrating prejudice normally falls upon the party attacking the agency's determination).

Because Appellant limited his allegations of error to those noted above, Appellant has abandoned any other issues or arguments he could have raised but did not. *Woehlaert v. Nicholson*, 21 Vet.App. 456, 463 (2007). 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); *Shinseki*, 556 U.S. at 409-10.

## V. CONCLUSION

WHEREFORE, the Secretary respectfully urges the Court to affirm the Board's November 20, 2014, decision

Respectfully submitted,

LEIGH A. BRADLEY
General Counsel

MARY ANN FLYNN
Chief Counsel

/s/ Kenneth A. Walsh
KENNETH A. WALSH
Deputy Chief Counsel

/s/ Rebecca A. Baird
REBECCA A. BAIRD
Senior Appellate Attorney
Office of the General Counsel (027J)
U.S. Department of Veterans' Affairs
810 Vermont Avenue, NW
Washington, DC 20420
(202) 632-6903

Attorneys for the Appellee