IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 15-0031

LAWRENCE J. ACREE
Appellant,

v.

Robert A. McDonald,
Secretary of Veterans Affairs
Appellee.

On appeal from the Board of Veterans Appeals

REPLY BRIEF OF APPELLANT LAWRENCE J. ACREE

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INTRODUCTION

The issue presented on appeal is whether to revive the claims of a combat veteran who served in Iraq and has been diagnosed with posttraumatic stress disorder (PTSD). The basis for the requested revival is that the withdrawal was legally ineffective according to 38 C.F.R. § 20.204 and this Court's interpretation thereof. Rather than acknowledge that the proceedings before the VLJ were not in accordance with the protections afforded to veterans, the Secretary expends the full reach of government resources to litigate for a result that would leave veterans further exposed – with fewer procedural protections than a criminal defendant or a *pro se* litigant in an Article III federal court. The Secretary's willingness to find itself in "uncompromising litigation" over relief that would cost it nothing but would imbue "special beneficence from a grateful sovereign" is without reason. *Aldridge v. McDonald*, No. 2015-7115, 2016 WL 4709877, at *5 (Fed. Cir. Sept. 9, 2016) (Newman, J., dissent).

It is well-established that witnessing harm on the battlefield serves as a trigger for psychological breakdown and re-adjustment difficulties after the soldier has returned home. *See generally* Marlow, David H., Psychological and psychosocial consequences of combat and deployment with special emphasis on the Gulf War (RAND 2001) (examining neuroscience data collected from surveys conducted after the first Gulf War). Mr. Acree seeks disability benefits for exactly the type of re-adjustment difficulties he continues to experience, including persistent nightmares. The VA's response to Mr. Acree's appeal illustrates just how far we have fallen in administering a statutory and regulatory regime that Congress created to protect veterans. Rather than take the

Veteran's diagnosis of PTSD and an anxiety disorder at face value, the government's brief attempts to paint this appeal as a situation where statements in the Veteran's medical record excuse the VLJ's abdication of duty.

There is no substitute for handling the adjudication of rights the correct, humane way. Mr. Acree has carried his burden in demonstrating the VLJ's error. This Court is now tasked with enforcing the plain language of its previous decisions and requiring that a VLJ exercise some care in explaining the ramifications of claim withdrawal in the absence of any writing confirming the Veteran's intent.

ARGUMENT

I. The Board and VLJ failed to make any factual findings but did commit legal error.

The Secretary characterizes this dispute as one of fact, urging that the Court of Appeals for Veterans Claims ("Veterans Court") defer to the Agency without conducting *de novo* review. Yet, there are no findings to support this manner of review. The clearly erroneous standard of review is not available because the Board made no findings of fact. To the contrary, the Board deemed the claims withdrawn without conducting any analysis as to whether the withdrawal was proper. Mr. Acree's appeal specifically challenges whether the VLJ and the Board erred under the legal requirements set forth in *DeLisio*. Because a single word—"yes"—does not and cannot connote "a full understanding of the consequences," the conclusion that the claims were withdrawn is legal error. The Secretary cannot recite a deferential standard of review but not point to any factual findings that warrant deference on appeal. *De novo* review is the appropriate standard.

See 38 U.S.C. § 7261(a)(1) (granting the Veterans Court the authority to decide "all relevant questions of law" and define statutory and regulatory language); *see also Lane v. Principi*, 339 F.3d 1331, 1339 (Fed. Cir. 2003) (requiring the Veterans Court to review *de novo* Board interpretation of a regulation). This appeal presents the purely legal question of whether the purported withdrawal in this case was effective under 38 C.F.R. § 20.204 and this Court's interpretation thereof or, alternatively, whether 38 C.F.R. § 3.103(c)(2) demands that a VLJ explain the issues pertinent to claim withdrawal.

II. The Secretary's argument that this Court should refuse to entertain Mr. Acree's arguments pursuant to *Maggitt* must be rejected.

This Court is empowered to decide the issue raised in Mr. Acree's appeal – an issue turning on the interplay between its own precedent and the governing regulations. The Secretary does not argue otherwise. Indeed the Secretary acknowledged that in *Maggitt v. West* the Federal Circuit recognized the Veterans Court had jurisdiction to hear arguments raised in the first instance. *See* Sec. Br. at 10 (citing *Maggitt v. West*, 202 F.3d 1370, 1377 (Fed. Cir. 2000)). The Secretary merely asks that the Veteran be denied adjudication of issues that are now ripe, understanding that any remand to address his arguments will introduce persistent delay when the litigant is already battling a life threatening disease. *See Maggitt*, 202 F.3d at 1377 ("If exhaustion will result in prejudicial delay to the individual, . . . the doctrine should not be invoked.").

Maggitt stands for the proposition that this Court has jurisdiction to consider appellate arguments related to a Board decision denying benefits, including issues that an appellant raises for the first time at this Court. *Maggitt*, 202 F.3d at 1377. In deciding

whether to consider an issue raised in the first instance, the Federal Circuit recognized that the Veterans Court "is uniquely positioned to balance and decide the considerations regarding" whether an appellant is required to raise an issue in a particular case. *Id.* at 1378. In this case, *Maggitt* does not require invocation of the doctrine of issue exhaustion because it would frustrate the purpose of VA's non-adversarial proceedings and render moot VA's duty to assist. *See id.* (stating that "perhaps most important [] for the determination of whether exhaustion should be invoked in a particular case" is whether "invocation of the doctrine would frustrate the purpose or purposes of which Congress has created a particular statutory arrangement"). As a non-adversarial administrative review process, the agency, "not the claimant, has primary responsibility for identifying and developing the issues" when legal representation is minimal or absent. *See Sims v. Apfel*, 530 U.S. 103, 112 (2000). Permitting Mr. Acree's arguments to go unheard after expending the resources to fully brief them would frustrate the "uniquely pro-claimant principles" underlying the veterans' benefit system. *See Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs*, 710 F.3d 1328, 1330 (Fed. Cir. 2013).

Moreover, the proceedings before this Court are the first time Mr. Acree has had access to counsel. Should this Court decline to exercise jurisdiction, the practical reality is uncertainty as to whether the arguments could be as competently advanced on remand. *See Comer v. Peake*, 552 F.3d 1362, 1369 (Fed. Cir. 2009) (stating that "representation by [a VSO] is not equivalent to representation by a licensed attorney"). Access to counsel is

precisely the type of "realistic considerations" that courts must appreciate when viewing the issue raised in view of the larger statutory scheme:

> [C]ourts must appreciate the statutory system in which a party is seeking to avoid invocation of the exhaustion doctrine. If, for example, invocation of the doctrine would frustrate the purpose or purposes for which congress has created a particular statutory arrangement, to the detriment of the individual, that point must be accounted for in reaching a decision whether to invoke the doctrine. *See* [*McCarthy v. Madigan*, 503 U.S. 140, 144 (1992)].
>
> Realistic considerations may reduce the ability of a veteran to mount legal challenges in the regional office or at the Board. Although veterans may obtain assistance within the system in fashioning their claims, independent counsel is unlikely to assist in that process until after the Board reaches its final decision. *See* 38 U.S.C. § 5904(c)(1) (1994) (attorneys and agents may not charge any fee for services provided prior to the time the Board issues a final decision in a case). Although the veteran's benefit system is intended to be "user friendly" to the veteran, these considerations suggest that the system may not be particularly "user friendly" for the presentation by a veteran of a legal challenge to the Secretary's position, either in a regional office or before the Board.

Maggitt, 202 F.3d at 1378 (quoting *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992)).

To deny Mr. Acree his day in Court now would frustrate the strongly pro-claimant adjudicative system established by Congress and would require duplicative Government expenditures to re-litigate issues that are already ripe. It would further introduce a gross inequity when this Court recognizes that "it is often difficult for an unrepresented claimant to specifically raise all the technical legal arguments that might be applicable to his or her claim." *Twiss v. West*, 17 Vet. App. 345, 2000 WL 344188, at *4 (Vet. App. Mar. 17, 2000); *see also Massie v. Shinseki*, 25 Vet. App. 123, 126 (2001) (cautioning against application of "exhaustion of remedies doctrine against a party such that the party's arguments go unheard"). Where, as here, jurisdiction is proper, the Veterans

Court should carry out independent judicial appellate review of a Federal agency decision. *See Frankel v. Derwinski*, 1 Vet. App. 23, 25 (1990) (examining Court's authority as appellate court); *see also* H.R. Rep. No. 100-963, at 4 (1988) (purpose of creating Veterans Court was to "establish an independent court" to review Board decisions).

III. The Secretary has failed to rebut Mr. Acree's arguments that the Board and VLJ failed to adduce a record with respect to the *DeLisio* requirements.

The Secretary does not dispute that *DeLisio* applies in this case but, instead, argues that "the facts of this case are distinguishable from *DeLisio*, thus consideration under *DeLisio* was not reasonably raised to the Board." Sec. Br. at 11. The Secretary's argument is misplaced. *DeLisio* stands for the "well settled" proposition 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. The *DeLisio* requirements apply here regardless of whether *DeLisio*'s facts are analogous. The Board cannot decline to discuss the *DeLisio* requirements on the basis that *DeLisio*'s facts are distinguishable. The *DeLisio* requirements are both relevant and applicable, and as the Secretary acknowledges, "the Board must consider relevant law." Sec. Br. at 14-15 (quoting *Gilbert*, 1 Vet. App. at 57).

The Secretary also argues that *DeLisio* does not apply because here "there was no confusion regarding the breadth of the withdrawal." Sec. Br. at 12. But the issue in *DeLisio* is not whether there was confusion regarding the breadth of the withdrawal. Again, the issue is whether "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. Here, as in *DeLisio*, there was "neither an *explicit discussion* of withdrawal nor any indication that [Mr. Acree] *understood* that he might be withdrawing claims for benefits for any disabilities not discussed." *Id.* at 58 (emphasis added). Rather than *discuss* the claims with Mr. Acree to determine whether Mr. Acree *understood* they might be withdrawn, the VLJ presumed that those claims were already withdrawn. *See* App. Br. at 13 (quoting R. 979-80 (JUDGE: "So let me address the issues that have been withdrawn first.")). Contrary to the Secretary's argument, the VLJ and the Board failed to make any findings with respect to whether Mr. Acree's alleged withdrawal was "with full understanding of the consequences." *DeLisio*, 25 Vet. App. at 57.

Similarly misplaced is the Secretary's argument that "there was no reason for the Board to doubt Mr. Acree's intent to withdraw certain claims." Sec. Br. at 15. *DeLisio* requires that "withdrawal of a claim is *only* effective where the withdrawal is explicit, unambiguous, and done with a full understanding of the consequences," not merely when the Board doubts the veteran's intent to withdraw claims. *DeLisio*, 25 Vet. App. at 57 (emphasis added). Mr. Acree's intent is neither known nor relevant if he did not understand the basic premise of what withdrawal was and what he was agreeing to. The relevant issue is that the Board "failed to provide an adequate statement of reasons or bases for its determination" that Mr. Acree's alleged withdrawal of the claims at issue was effective. Neither the Board nor the VLJ mentioned or analyzed the *DeLisio* factors. *See* App. Br. at 7.

As with *DeLisio*, the Secretary's attempt to distinguish *Isenbart* and *Kalman* lacks merit. The Secretary argues that "the concern in *Isenbart* and *Kalman*, that the appellants withdrew appeals of claims that were not specifically identified, is not present here." Sec. Br. at 14. But there was no issue in those cases regarding whether claims were specifically identified. As the Secretary acknowledges, in *Isenbart*, the Court's holding turned on the fact that a "few words spoken orally [did not provide] the formality or specificity that withdrawal or an NOD requires." Sec. Br. at 14 (quoting *Isenbart v. Brown*, 7 Vet. App. 537, 539 (1995)). Similarly, here, a single spoken word does not provide the specificity that withdrawal requires.

The Secretary focuses on portions of the record dating back to 2008 to argue that Mr. Acree "consistently has been found to have normal thought processes and good judgment."[1] Sec. Br. at 3-6, 17. But none of the cited record is germane to Mr. Acree's thought process or judgment *on the day of the hearing* and is therefore irrelevant to whether Mr. Acree withdrew claims "with full understanding of the consequences" *on the day of the hearing*. *See DeLisio*, 25 Vet. App. at 57. Chronicling Mr. Acree's medical history and psychological assessments back to 2008 does not establish whether the Veteran fully understood claim withdrawal when he was before the VLJ. The only means by which his understanding of withdrawal could have been established (and what should

[1] The Secretary likewise highlights that Mr. Acree completed a bachelor's degree and was working on a Master's Degree. Sec. Br. at 17. Even assuming this background were relevant to the issue before the Court (it is not), the underlying reality is that if Mr. Acree was impaired by psychotropic pharmaceuticals on the date of the hearing, no amount of education could protect against the side effects of those chemical agents.

have occurred) would have been for the VLJ to make an inquiry of Mr. Acree on the date of the hearing to determine whether he had a full understanding of the consequences of withdrawing claims.

Focusing on the same irrelevant portions of the record, the Secretary also argues that Mr. Acree "can clearly manage his VA benefits," that he "had the requisite cognition to understand the effect of withdrawing the claims," and that he was "exaggerating his symptoms" and "obtaining financial compensation." Sec. Br. at 16-18. As a threshold matter, the Secretary's argument improperly invites the Court to make credibility determinations on appeal. But more fundamentally, the Secretary cannot presume that a veteran comprehends the legal concept of claim withdrawal, or that his circumstances in the past should be imputed to the present. The Secretary relies on conjecture rather than record evidence to contend that Mr. Acree demonstrated the requisite understanding.

IV. The Board and VLJ failed to adduce a record with respect to the *DeLisio* requirements.

The Secretary argues that there is no duty under 38 C.F.R. § 3.103(c)(2) for a hearing officer to explain the consequences of withdrawing claims. Sec. Br. at 18. As this Court held in *Bryant v. Shinseki*, 23 Vet. App. 488 (2010), "the hearing officer has a duty to fully explain the issues still outstanding that are relevant and material to substantiating the claim." In this case, one of the "issues still outstanding" at the hearing before the VLJ was whether Mr. Acree was withdrawing the claims now at issue on appeal. Pursuant to § 3.103(c)(2), the VLJ should have at a minimum inquired as to

whether Mr. Acree had the capacity to appreciate the consequences of dismissing the claims at issue.

V. The Secretary would divest veterans of protections conferred on *pro se* litigants in Article III federal court

According to the Secretary, there is no reason to consider the procedural safeguards afforded to all litigants by the United States Constitution when assessing whether withdrawing claims for veterans' disability benefits is proper. *See* Sec. Br. at 11, 19-22. Instead, the Secretary asks this Court to presume Mr. Acree's competence, presume that his service-connected conditions of PTSD and anxiety were properly medicated, and presume that an unrepresented veteran grasped the severity of the word "yes" in this hyper-technical context. *Id*. The Secretary's request to absolve the VLJ for his failure to inquire into the Veteran's psychological or emotional state at the time of withdrawal is an effective divestiture of a litigant's most basic rights.

Mr. Acree's opening brief explains that it is error to presume criminal defendants competent without developing the appropriate factual record. *See* App. Br. at 14-17. The Secretary does not rebut this point, taking the alarmingly narrow view that veterans seeking benefits earned in serving their country are entitled to fewer protections than litigants facing criminal charges. This approach cannot be what Congress envisioned when it mandated a "benefit-of-the-doubt" rule to generously construe evidence and resolve ambiguities in the veteran's favor. *See Harris v. Shinseki*, 704 F.3d 946, 948-49 (Fed. Cir. 2013) (internal citations omitted).

Relatedly, if the Secretary's approach were the governing rule – i.e., presuming competence without any inquiry establishing a veteran's level of understanding when withdrawing a claim during a hearing – then Mr. Acree and other veterans in his position would experience diminished protections compared to *pro se* litigants proceeding in the Article III federal system. Again, the Secretary's approach would yield the absurd result where a *pro se* litigant seeking social security benefits in federal court would be less vulnerable than a veteran proceeding in a purportedly pro-claimant system. Indeed, federal courts recognize that because of the "beneficent purposes" of the Social Security Act, the Secretary of the Department of Health and Human Services "is not obligated to furnish a claimant with counsel, but the ALJ has a *special duty to protect the rights of a pro se claimant*." *Lopez v. Sec. of Dept. of Health and Human Servs*., 728 F.2d 148, 149-50 (2d Cir. 1984) (emphasis added) (internal citations omitted). As is the case here, "[w]hen the ALJ fails to develop the record fully, he does not fulfill his duty . . ." *Id*. at 150 (citing *Hankerson v. Harris*, 636 F.2d 893, 895 (2d Cir. 1980) ("[T]he ALJ has a "duty . . . to scrupulously and conscientiously probe into, inquire of, and explore for all the relevant facts. . . . ")); *see also Rodriguez v. Barnhart*, No. 05-cv-3383, 2006 WL 988201, at *5 (S.D.N.Y. Apr. 13, 2006) (explaining, when a claimant was on the antidepressant Celexa for treatment of a mental condition, "[the] failure to inquire into the issue of whether plaintiff suffers from a disabling mental impairment is inconsistent with an ALJ's responsibility to 'protect the rights of [the] *pro se* litigant by ensuring that all of the relevant facts are sufficiently developed and considered."').

Similarly, *pro se* litigants in Article III federal courts enjoy liberal construction of their arguments and courts must afford such a plaintiff "the benefit of any doubt" because they are proceeding without counsel. *See Karim-Panahi v. L.A. Police Dep't*, 839 F.2d 621, 623 (9th Cir. 1988); *see also Anaya v. Heckler*, 592 F. Supp. 624, 627 (W.D.N.Y. 1984) ("In that plaintiff appeared *pro se*, the ALJ had a particular responsibility to ensure that plaintiff's rights were adequately protected."). "The policy of liberally construing *pro se* submissions is driven by the understanding that '[i]mplicit in the right to self-representation is an obligation on the part of the court to make reasonable allowances to protect *pro se* litigants from inadvertent forfeiture of important rights because of their lack of legal training.'" *Randolph v. Lindsay*, 837 F. Supp. 160, 162 (W.D.N.Y. 2011) (quoting *Abbas v. Dixon*, 480 F.3d 636, 639 (2d Cir. 2007); *Traguth v. Zuck*, 710 F.2d 90, 95 (2d Cir. 1983)); *see also Szubielski v. Pierce*, 152 F.Supp.3d 227, 233 (D. Del. 2016) (stating that in the Third Circuit the district court has a responsibility to inquire *sua sponte* as to whether a *pro se* litigant is competent to litigate his action). Here, the Secretary is leaving no room for a VLJ to protect veterans from inadvertent forfeiture of rights. Rather than promote the letter and spirit of the holding in *DeLisio*, the Secretary advocates for a set of presumptions that would allow Mr. Acree no recourse for either his failure to understand the legal construct he was agreeing to or his impairment for the side effects of powerful medications.

Protections for unrepresented veterans are not an esoteric construct. In the veterans' uniquely pro-claimant system of awarding benefits, systematic justice and fundamental considerations of procedural fairness are critical. *See Hayre v. West*, 188

F.3d 1327, 1334 (Fed. Cir. 1999) (citing S. Rep. No. 101–126 at 294, reprinted in 1989 U.S.C.C.A.N. 1469, 1700); *see also Gambill v. Shinseki*, 576 F.3d 1307, 1316 (Fed. Cir. 2009) ("[t]he veterans' disability compensation system differs dramatically from a conventional adversarial process. This court and the Supreme Court have long recognized that the character of the veterans' benefits statutes is strongly and uniquely pro-claimant.") (internal citations and quotation marks omitted); *Hodge v. West*, 155 F.3d 1356, 1363 (Fed. Cir. 1998) ("[I]n the context of veterans' benefits where the system of awarding compensation is so uniquely pro-claimant, the importance of systemic fairness and the appearance of fairness carries great weight.").

In this case the Secretary has demonstrated its willingness to deprive a veteran like Mr. Acree of necessary safeguards and to tell him to return to the starting gate[2] rather than require its own personnel to develop the appropriate record. Accordingly, it is up to this Court to adhere to the governing legal principles and decline an interpretation of precedent that would put veterans in the nonsensical predicament of having fewer protections than *pro se* litigants in Article III courts.

CONCLUSION

For the foregoing reasons, Mr. Acree respectfully asks this Court to vacate the Board's decision dismissing his claims for entitlement to an increased rating for arthritis of the left shoulder, entitlement to earlier effective dates for the awards of service

[2] The Secretary brazenly suggests that a veteran such as Mr. Acree does not experience a deprivation of rights when claims are improperly deemed withdrawn based on a single word because the Veteran may re-file a new claim. Sec. Br. at 21.

connection for arthritis of the left shoulder, a lumbar strain, PTSD, and sinusitis, entitlement to service connection for exposure to Gulf War hazards, and entitlement to TDIU, and remand with instructions for the Board to send the case back to the RO for further factual development in accordance with this Court's opinion.

Dated: September 27, 2016

Respectfully submitted,

/s/ *Natalie A. Bennett*

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