

BRIEF OF APPELLANT

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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

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16-2149

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FRANCISCO L. MARCELINO,

Appellant

v.

ROBERT A. MCDONALD,  
SECRETARY OF VETERANS AFFAIRS,

Appellee

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## ISSUE PRESENTED FOR REVIEW

The Board relied on its own medical speculation to rule that obesity is not a disease for purposes of 38 U.S.C. § 1110. But every authoritative source, including VA itself, defines obesity as a disease. Did the Board misinterpret the term obesity and the law as stated in 38 U.S.C. § 1110, render a decision contrary to VA policy, and misinterpret the law governing the Board's role and expert evidence when it determined that obesity is not a disease?

## STATEMENT OF THE CASE

Francisco L. Marcelino served honorably in the United States Navy from December 1983 to December 2003. R-65. The Veteran was overweight in service. R-15 (1-27); R-965 (1997 in-service treatment record); *see* R-422 (2014 treatment record). After discharge, he was diagnosed with morbid obesity. R-1387 (1387-88).

In May 2004, Mr. Marcelino filed a claim for service connection for obesity. R-1766; *see* R-1703. That November, the Regional Office denied the Veteran's claim. R-1696 (1689-702). The Veteran filed a notice of disagreement the following March. R-1629. An August 2006 statement of the case continued to deny service connection. R-1612 (1587-615). Mr. Marcelino perfected his appeal later that month. R-1582 (1582-86).

In March 2012, a primary care physician noted that "Mr. Marcelin[o] has a knee condition established to be service connected and severe . . . [his] immobility and physical restrictions that are caused by his knee condition have contributed to him

developing obesity[.]” R-1301 (1299-302). He opined that it was “reasonable” to conclude that the Veteran’s knee condition caused him to gain weight. R-418. The Veteran underwent an examination in August 2012. R-1267-77. The examiner opined on the avenues available to the Veteran to lose weight. R-1274-75. The supporting rationale stated that the Veteran's service-connected knee condition did not proximately cause his obesity, because his “bilateral knee condition does not cause him to eat more” and because his ability to run, walk, or exercise is “not a factor in his present obesity.” R-1274. In April 2016, the Board denied the Veteran service connection for obesity. R-17. This appeal ensued.

### **SUMMARY OF THE ARGUMENT**

The Board denied Mr. Marcelino service connection and compensation for his obesity because it erroneously relied on its own medical speculation to determine that obesity is not a disease. However, the proper definition of obesity, based on both medical authority and VA’s own internal policy, is that obesity is a disease. The Board thus misinterpreted the terms obesity and disease, as well as 38 U.S.C. § 1110, to hold that obesity is not a disease and not covered by the law. Its reliance on its own unsupported conjecture is contrary to case law that prohibits the Board from providing its own unsubstantiated medical opinion, and prevented the Board from analyzing whether a VA medical nexus opinion was needed to adjudicate the claim.

But for these errors, the Veteran may have been entitled to increased compensation or a VA examination to evaluate whether his obesity is at least as likely

as not related to service, or to his service-connected PTSD. In light of this prejudice, remand is warranted.

### **STANDARD OF REVIEW**

A determination regarding service connection for purposes of rating a disability is an issue of fact. *Hayes v. Brown*, 9 Vet. App. 67, 72 (1996). The Board's answer is subject to review under the clearly erroneous standard. *Davis v. West*, 13 Vet.App. 178, 184 (1999).

However, the Court reviews claimed legal errors by the Board under the *de novo* standard, by which the Board's decision is not entitled to deference. 38 U.S.C. § 7261(a)(1); see *Butts v. Brown*, 5 Vet.App. 532, 538 (1993) (*en banc*). The Court will set aside a conclusion of law made by the Board when such a conclusion is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Butts*, 5 Vet.App. at 538. The Court should determine whether the Board's decision, in which it misinterpreted the law and failed to provide sufficient reasons or bases, was erroneous, without affording the Board any deference.

### **ARGUMENT**

#### **The Board erred when it determined that obesity is not a disease.**

Mr. Marcelino's service medical records show he was overweight in service, and he has since been diagnosed with morbid obesity. R-965; R-1387; see R-1614. The Board, however, concluded that service connection for Mr. Marcelino's obesity was not warranted because "obesity, in and of itself, is not a disability for VA

compensation purposes.” R-11. It discussed the definitions of disability and disease before reasoning that “[w]ithout underlying pathology, VA does not recognize obesity as a disease entity for purposes of compensation.” R-12. Ultimately, the Board determined that “obesity, being overweight, or having problems with controlling weight, or a particularity of body type alone, is not considered a disability” for disability purposes. *Id.*

The Board’s erroneous medical determination that obesity is not a disease is contrary to every authoritative definition of the term and was not supported by any medical evidence of record or recognized medical treatises. *See* R-11-13. Under the proper interpretation of the terms, obesity is a disease. The Board’s denial rests on a misinterpretation of the terms obesity and disease, and it misinterprets 38 U.S.C. § 1110 to hold that it does not encompass obesity. Instead of relying on the correct definition of the terms obesity and disease, the Board relied on its own medical speculation, which it is forbidden from doing. *Colvin v. Derwinski*, 1 Vet.App. 171, 174 (1991).

**A. Obesity is a disease.**

“VA has previously defined ‘disease’ as ‘any deviation from or interruption of the normal structure or function of any part, organ, or system of the body as manifested by a characteristic set of symptoms and signs and whose etiology, pathology, and prognosis may be known or unknown.’” *Fountain v. McDonald*, 27 Vet.App. 258, 269 (2015).



Obesity is defined as “an increase in body weight beyond the limitation of skeletal and physical requirement, as the result of an excessive accumulation of fat in the body.” DORLAND’S ILLUSTRATED MEDICAL DICTIONARY (“DORLAND’S”) 1329 (31<sup>st</sup> ed. 2007). VA itself has recognized obesity is a disease. VA medical centers use International Classification of *Diseases* (ICD) codes to classify a veteran’s medical history, including histories of obesity. *See, e.g.*, R-1363 (1363-65) (2007 VAMC psychiatry note noting the veteran’s obesity, classified as “ICD-9-CM 278.00”); R-1369 (1367-71) (2010 VAMC sleep medicine note). ICD codes categorize “[a]n official list of categories of *diseases*, physical and mental, issued by the World Health Organization[.]” *International Classification of Diseases* (n.d.), Mosby’s Medical Dictionary, 8th edition (2009), *available at* <http://medical-dictionary.thefreedictionary.com/International+Classification+of+Diseases>, (last accessed Nov. 4, 2016) (emphasis added). *See also VA/DoD Clinical Practice Guideline for Screening and Management of Overweight and Obesity, Version 2.0*, at 10, <http://www.healthquality.va.gov/guidelines/CD/obesity/CPGManagementOfOverweightAndObesityFINAL041315.pdf> (last accessed Aug. 11, 2016) (“Obesity is a chronic disease”); *see also VA Research Currents: Do doctors dislike overweight patients?*, *available at* <http://www.research.va.gov/currents/0815-2.cfm> (last accessed, August 11, 2016) (discussing researchers’ reactions to the categorization of “obesity as a ‘disease’”).

VA's MOVE! Weight Management Program hosts a website where veterans can access information about the program and other weight management resources. *See MOVE*, <http://www.prevention.va.gov/MOVE.asp> (last accessed, August 11, 2016). The site includes links to additional resources, one of which is called "Healthfinder: Watch Your Weight[.]" *See id.* This government website provides information on "[h]ealth [c]onditions and [d]iseases" including obesity. *See Health Conditions and Diseases: Obesity, available at* <https://healthfinder.gov/HealthTopics/Category/health-conditions-and-diseases/obesity>, (last accessed Aug. 11, 2016).

Other government agencies have defined obesity as a disease. For example, in a preamble to final regulations, the Food and Drug Administration stated that "obesity is a disease." 65 Fed. Reg. 1000, 1027 (Jan. 6, 2000). The Social Security Administration also defines obesity as "a complex, chronic disease[.]" *Social Security Program Operations Manual System (POMS)*, at POLICY INTERPRETATION:, *available at* <https://secure.ssa.gov/poms.nsf/lnx/0424570001> (last accessed November 29, 2016).

Finally the medical community recognizes obesity as a "disease" in its own right. The National Heart, Lung, and Blood Institute, part of the National Institutes of Health, describes obesity as a "complex, multifactorial chronic disease." *Clinical Guidelines on the Identification, Evaluation, and Treatment of Overweight and Obesity in Adults* (1998), at xi, *available at* [http://www.nhlbi.nih.gov/guidelines/obesity/ob\\_gdlns.pdf](http://www.nhlbi.nih.gov/guidelines/obesity/ob_gdlns.pdf)

(last accessed November 29, 2016). The World Health Organization recognizes obesity as a chronic disease. *See American Society for Metabolic and Bariatric Surgery: Disease of Obesity*, available at <https://asmbs.org/patients/disease-of-obesity> (last accessed Jul. 7, 2016). The American Medical Association (“AMA”) adopted a policy recognizing obesity as a disease in its own right in 2013. *See American Medical Association*, available at <http://www.ama-assn.org/ama/pub/news/news/2013/2013-06-18-new-ama-policies-annual-meeting.page> (last accessed November 26, 2016).

Based on the foregoing literature, published by VA and other government entities, obesity is not, as the Board characterized it, merely a “particularity of body type alone[.]” *See* R-12. The Board misinterpreted the terms obesity and disease, as well as 38 U.S.C. § 1110, and acted contrary to VA policy when it found that obesity is not a disease for purposes of entitlement to service connection and compensation. *See* 38 U.S.C. § 1110; *VA/DoD Clinical Practice Guideline for Screening and Management of Overweight and Obesity*, *supra*.

**B. The Board cannot rely on its own speculation or the lack of a diagnostic code to deny service connection.**

Instead of relying on the correct definition of the terms obesity and disease, the Board improperly relied on its own medical speculation to determine that obesity is not a disease. *Colvin*, 1 Vet.App. at 174; R-12. The Board did not cite any medical support for its determination, and the overwhelming medical authority, as well as VA’s own internal policies, stands in direct opposition. *See* R-11-13; ICD codes,

MOVE! Weight Management Program, *supra*. The Board may only base its decision on evidence, and it must use proper definitions or terms or its decision lacks standards. *See* 38 C.F.R. §§ 5103, 7104 (2016); *Gray v. McDonald*, 27 Vet.App. 313, 322 (2015). The Board's failure to rely on independent medical evidence was in error. *See Colvin*, 1 Vet.App. at 172.

Moreover, VA regulations provide that “[w]hen an unlisted condition is encountered it will be permissible to rate under a closely related disease or injury[.]” 38 C.F.R. § 4.20 (2016). Thus, the simple fact that the rating schedule does not specifically contemplate obesity is not dispositive to the inquiry of whether Mr. Marcelino's obesity was eligible for direct service connection. Such an interpretation of the rating schedule would render the purpose of analogous ratings superfluous. *See* 38 C.F.R. § 4.20; R-12 (Board relying on the rating schedule which “does not contemplate a separate disability rating for obesity”).

### **C. The Board's errors prejudiced the Veteran.**

Had the Board properly interpreted and applied the law and followed VA policy, it may have determined that Mr. Marcelino was entitled to benefits for his disabling obesity on a direct basis due to his large weight gain in service. R-422. Mr. Marcelino is obese now, was overweight in service, and gained weight in service. *See* 38 C.F.R. § 3.303 (2016); R-422; R-965; R-1387. Alternatively, he may have been entitled to a VA opinion addressing the etiology of his obesity because he meets the

four *McLendon* elements. *See McLendon v. Nicholson*, 20 Vet.App. 79, 81(2006); 38 U.S.C. § 5103A(d); *cf.* R-7-9.

There is no dispute over the Veteran's diagnosis of obesity. *See* R-965; R-1387. Treatment notes have acknowledged the connection between the Veteran's obesity and his service-connected knee condition. R-1301; R-418; *see McLendon*, 20 Vet.App. at 81. The Board determined that the August 2012 examiner opined that the Veteran's obesity was not related his service-connected knee condition. R-14. However, the examiner actually opined that the Veteran's *sleep apnea* was less likely than not related to his knee condition. R-1273-75. Accordingly, had the Board recognized that obesity is a disease for purposes of section 1110, it would have taken this low threshold analysis into account and obtained a medical opinion as to the link between the Veteran's knee condition and his obesity if it could not grant the claim direct service connection. Remand is warranted for the Board to consider whether the Veteran's disease of obesity is at least likely as not related to his service.

## **CONCLUSION**

The record reflects that Mr. Marcelino was overweight during active service, and he has become morbidly obese in the time since. The Board erred when it applied its own medical speculation to find that obesity is not a disease. The Board's conjecture is contrary to all medical authority and VA's own policy, and it also misinterpreted 38 U.S.C. § 1110. This prejudiced the Veteran, because it resulted in the denial of service connection and potential compensation for his obesity.

The Board's decision should thus be vacated and the appeal remanded with instructions for the Board to properly apply the law, provide adequate reasons and bases for its decision, and assist the Veteran in fully developing his claim for service connection. The Veteran asks the Court to hold that obesity is a disease and covered by section 1110.

Respectfully submitted,

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