No. 16-3039

In the

UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

APPELLANT'S REPLY BRIEF

Re

RICHARD D. SIMMONS,

Appellant,

versus

DAVID J. SHULKIN, M.D.,

Secretary of Veterans Affairs,

Appellee.

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Summary of Rebuttal Arguments

Mr. Simmons' opening brief made two specific averments of error by the Board in its May 2016 decision. Specifically, Mr. Simmons' asserts that the Board failed to correctly apply the provisions of 38 U.S.C. § 105 and that the Board failed to correctly apply the provisions of 38 U.S.C. § 1111. The Secretary in his Brief, however, responded that the Board had provided a **satisfactory explanation** for the determination that the September 1974 rating decision properly applied 38 U.S.C. § 105 and 38 U.S.C. § 1111. A satisfactory explanation by the Board for the determination that the September 1974 rating decision properly applied 38 U.S.C. § 105 and 38 U.S.C. § 1111 does not equate to the **correct application** of these provisions of law. This Court should consider this response to be a waiver by the Secretary of any argument that the Board correctly applied the provisions of 38 U.S.C. § 105 and 38 U.S.C. § 1111. This Court should, therefore, consider Mr. Simmons' averments of error by the Board to have been conceded by the Secretary.

I.

The Secretary's Brief does not respond to Mr. Simmons' averments of error by the Board in its 2016 decision.

Although the Secretary framed the issue in his brief as an affirmative assertion that the May 2016 Board decision that determined that a clear and unmistakable error was

not present in the VA's September 1974 rating decision was not arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law, VA's Brief, pp. 8-17, the Secretary in his brief did not respond to Mr. Simmons' averments of error. Mr. Simmons averred that the Board had failed to correctly apply the provisions of 38 U.S.C. § 105 and 38 U.S.C. § 1111. Appellant's Opening Brief, pp. 4-14. The Secretary did not demonstrate that the Board had correctly applied the provisions of 38 U.S.C. § 105 and 38 U.S.C. § 1111. Instead, the Secretary merely asserted that the Board had provided a satisfactory explanation for the determination that the September 1974 rating decision properly applied 38 U.S.C. § 105 and 38 U.S.C. § 1111.

This Court reviews "whether an applicable law or regulation was not applied" under the *de novo* standard. *Acciola v. Peake*, 22 Vet. App. 320, 324 (2008); *Joyce v. Nicholson*, 19 Vet. App. 36, 42-43 (2005). Thus, the Secretary's assertion that the Board had provided a satisfactory explanation for the determination that the September 1974 rating decision properly applied 38 U.S.C. § 105 and 38 U.S.C. § 1111 is not responsive to whether the Board erred in conducting its review of the VA's decision to deny Mr. Simmons's request for revision of the VA's September 1974 rating decision based on allegation of clear and unmistakable error.

In *MacWhorter v. Derwinski*, 2 Vet. App. 133 (1992), this Court held that when the Department of Veterans Affairs' General Counsel defaults in its obligation to brief the Secretary's position in an appeal and to provide this Court with the incidental benefit of

his views on the facts and the law, such an omission would be deemed by this Court to have been a concession as to the validity of the appellant's legally plausible position. Mr. Simmons in his opening brief presented a legally plausible position that the Board failed to correctly apply the provisions of 38 U.S.C. § 105 and 38 U.S.C. § 1111. Thus, in accordance with the rule of law set out by this Court in *MacWhorter*, this Court should deem that the Secretary has conceded the validity of Mr. Simmons' legally plausible position that the Board failed to correctly apply the provisions of 38 U.S.C. § 105 and 38 U.S.C. § 1111.

The Secretary presented the following circular argument:

> The Court should affirm the May 13, 2016, Board decision on appeal, which concluded that there was no CUE in a September 18, 1974, rating decision that denied entitlement to service connection for an acquired psychiatric disorder. [R. at 2-21]. The Board decision correctly provided a thorough analysis of the pertinent facts and law in support of this determination. The Board carefully considered each of Appellant's CUE allegations and supported its findings with reasoned analysis, pointing to the persuasive evidence of record underlying each finding. Thus, the Board's conclusion that there was no CUE in the September 1974 rating decision is not arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law, and the Court should not disturb this decision.

VA's Brief, p. 8. Nowhere in this circular argument does the Secretary assert that the Board correctly applied the provisions of 38 U.S.C. § 105 and 38 U.S.C. § 1111. The Secretary merely proffered meaningless generalizations.

The Secretary also incorrectly stated:

> The Board correctly determined and fully explained that Appellant's diagnosed immature personality in service, is a congenital or developmental abnormality not subject to VA compensation. [R. at 9]; see also [R. at 130-131]. Based on the law in September 1974, "service connection connotes many factors but basically it means that the facts, shown by evidence, establish that a particular injury or disease resulting in disability was incurred coincident with service in the Armed Forces, or if preexisting such service, was aggravated therein." 38 C.F.R. § 3.303(a) (1974). Congenital or developmental defects, refractive errors of the eye, personality disorders, and mental deficiencies, however, are not diseases or injuries within the meaning of the applicable legislation. 38 C.F.R. §§ 3.303(c), 4.9 (1974); see also 38 C.F.R. §§ 3.310 and 4.127 (2016).

VA's Brief, p. 9. This statement is directly at odds with the Federal Circuit's decision in *O'Bryan v. McDonald*, 771 F.3d 1376 (Fed Cir 2014). In *O'Bryan*, the Federal Circuit held the VA's General Counsel had correctly interpreted § 3.303(c) as excluding from the definition of "congenital or developmental defects" diseases and not plainly erroneous or inconsistent with the regulation. As a result, a "disease" as opposed to a "defect" incurred during or aggravated by service such as a progressive hereditary condition was a disease rather than a defect. Therefore, the Board **did not** correctly determine and fully explain why Mr. Simmons's diagnosis of immature personality in service precluded consideration of his entitlement to the benefit of the presumption of service connection under the provisions of 38 U.S.C. § 105(a) for an acquired psychiatric disability, to include anxiety reaction with depressive features. Mr. Simmons was not seeking service

connected compensation for a disability based on his diagnosis of immature personality in service. Mr. Simmons, in June 1974, was seeking service connected disability compensation for his post service disabilities from rheumatoid arthritis and mental depression. RBA 52. On September 18, 1974, the VA denied Mr. Simmons disability compensation for both rheumatoid arthritis and a nervous condition with depressive features. RBA 1448-1449. The VA in its 1974 decision found that Mr. Simmons' currently diagnosed anxiety reaction was not seen to have been related to the immature personality for which he was separated from service. Overlooked by the VA in 1974 and the Board in May 2016 was the alternative theory of entitlement to service connected compensation based on the relationship to Mr. Simmons' rheumatoid arthritis which was noted during service.

Also overlooked by the VA in its 1974 decision and by the Board in its May 2016 decision was that, during Mr. Simmons' period of active duty service, his medical records noted that he experienced chronic physical and emotional complaints. RBA 127-128, RBA 129, and RBA 130-131. It was these complaints which resulted in Mr. Simmons being recommended for an administrative discharge based upon unsuitability. Further overlooked by the VA in its 1974 decision and by the Board in its May 2016 decision was that, on December 7, 1972, the VA awarded Mr. Simmons a non service-connected pension, based upon a determination that Mr. Simmons was totally and permanently disabled as a result of polyarthritis in multiple joints, effective September 15, 1972. RBA

69-70. Thus, at the time of the VA's 1974 decision, Mr. Simmons was receiving nonservice connected pension for a total and permanent disability from polyarthritis in multiple joints. These undisputed facts were not addressed by the Board in its May 2016 decision.

The Secretary claims:

> The Board directly addressed Appellant's argument that the RO failed to consider and to apply the statutory presumption under 38 U.S.C. § 105(a). Appellant makes the same argument in his brief, and specifically argues that the Board did not address whether the presumption of service connection was triggered by the in-service notation of "depressive reaction." App. Br. at 7-8. However, the Board noted Appellant's argument in that Appellant's symptoms of depressive reaction, and situational depression in-service, warranted a grant of service connection. [R. at 16]. The Board reasoned that this argument was a disagreement with the Agency's weighing of the evidence of record, which does not rise to the level of clear and unmistakable error under *Russell v. Principi*, 3 Vet.App. 310, 313-14 (1992). [R. at 16]. **The Board then also explained that, legally, Appellant was not entitled to the benefit of 38 U.S.C. § 105 because Appellant did not demonstrate a disability incurred in service**. [R. at 16].

VA's Brief, pp. 11-12. (emphasis added). The Secretary's claim is belied by his reliance on a misinterpretation § 105.

The Secretary's misinterpretation of § 105 is shown by the Federal Circuit's decision in *Shedden v. Principi*, 381 F.3d 1163 (Fed. Cir. 2004). The Secretary references the holding in *Shedden* following this misstatement of the law:

> Simply put, symptoms of depression, in the absence of a diagnosis of depression, or other acquired psychiatric disability, does not trigger the presumption of service connection.

VA's Brief, p. 12. This statement of the law is contradicted by both VA regulation and this Court's case law. VA regulations do not require inservice complaints or diagnoses of a disability for a grant of service connection. *See* 38 C.F.R. § 3.303(a)("Service connection connotes many factors but basically it means that the facts, shown by evidence, establish that a particular injury or disease resulting in disability was incurred coincident with service. . . ."), (d) (recognizing that a veteran may be granted service connection for a disability that was not initially diagnosed until many years after service); *see also Cosman v. Principi*, 3 Vet.App. 503, 505 (1992) (explaining that, under § 3.303(d), "even though a veteran may not have had a particular condition diagnosed in service, or for many years afterwards, service connection can still be established."). This same misstatement of the law was made by the Board in its May 2016 decision. RBA 1-21 at 16.

Furthermore, both the Secretary and the Board in its May 2016 decision ignored the Federal Circuit's unambiguous statement of the law under § 105(a) that:

> . . . there is not, as the government contended at oral argument, any requirement to show a causal relationship between the present disability and the particular event or circumstance that gave rise to the in-service injury or aggravation.

Shedden, 381 F.3d 1167. It is evident that the Secretary has relied upon a misinterpretation of § 105(a) as well as a misunderstanding of the Federal Circuit's decision in *Shedden*.

The Secretary incorrectly contends:

> The Secretary also notes that Appellant completely ignores the fact that, at the time of the September 1974 rating decision, he was not service connected for arthritis, nor was the evidence of record sufficient to warrant service connection for arthritis. **The fact that Appellant was not service connected for arthritis at the time of the September 1974 rating decision is determinative, because Appellant's diagnosed anxiety reaction with depressive features was deemed secondary to his arthritic condition**. [R. at 1453-1457]. **There is no legal basis upon which to award service connection for a disability that is claimed as secondary to a disability that is not service connected**. *See* 38 U.S.C. § 1101 (1974), 38 C.F.R. § 3.310; *see also Sabonis v. Brown*, 6 Vet. App. 426, 430 (1994) (where the law and not the evidence is dispositive, the Board should deny the claim based on a lack of legal merit). **Because Appellant's claim for service connection for his acquired psychiatric disability was diagnosed as secondary to his non-service-connected arthritis, his claim for service connection had no basis in law**.

VA's Brief, p. 13. (emphases added).

This contention is unwarranted for three reasons. *First*, the Secretary's legal analysis is wrong. The VA's 1974 decision dealt with a claim for service connected compensation for **both** his post service disabilities from rheumatoid arthritis and mental depression. RBA 1448-1449. The Secretary acknowledges, VA's Brief, p. 13, that Mr.

Simmons' acquired psychiatric disability was diagnosed as secondary to his non-service-connected arthritis, a condition noted during his period of active duty service. RBA 127-128, RBA 129, and RBA 130-131. *Second*, the Secretary cites no regulation or provision of law which precludes the revision of a VA decision which failed to award service connection for a condition noted during service based upon the failure to correctly adjudicate a secondary claim. *Third*, and most important, the Secretary's arguments pertained to the underlying VA decision and **not** to Mr. Simmons' averment of error by the Board. The Secretary's obligation was to address Mr. Simmons' averment of errors as made by the Board and not to defend the Board's explanation for its decision not to revise. When this Court reviews a Board determination that there was no clear and unmistakable error in a prior final decision, the Court "cannot conduct a plenary review of the merits of the original decision." *Archer v. Principi*, 3 Vet. App. 433, 437 (1992). Additionally, Mr. Simmons did not make an averment of error based on the Board's inadequate statement of its "reasons or bases" in violation of 38 U.S.C. § 7104(d).

For example, the Secretary asserts:

> The Board decision specifically reviewed and responded to Appellant's argument that the Board failed to find CUE in the September 1974 rating decision because it improperly applied the presumption of soundness. App. Br. at 10-13.

VA's Brief, p. 14. This assertion is meaningless because Mr. Simmons' averment of error was that the Board failed to correctly apply the provisions of 38 U.S.C. § 1111.

Therefore, whether the Board "specifically reviewed and responded to" Mr. Simmons' arguments or allegations of clear and unmistakable error is of no moment. What was required of the Secretary was to explain to this Court precisely how the Board correctly applied the provisions of 38 U.S.C. § 1111 in its May 2016 decision.

Instead, the Secretary declares, without supporting authority, that: "the Board explained that because there was no finding of preexistence to service, 38 U.S.C. § 1111 and 38 C.F.R. § 3.304 were not applicable." VA's Brief, p. 15. This declaration is yet another example of the Secretary's failure to respond to the averment of error made by Mr. Simmons' appeal. The Secretary once again fails to explain to this Court how the Board correctly applied § 1111 in its May 2016 decision based on the Board's "explanation" that, because there was no finding of preexistence to service, 38 U.S.C. § 1111 and 38 C.F.R. § 3.304 were not applicable.

The Secretary evidences a misunderstanding of how the presumption of soundness operates. It is not triggered by a finding that a disability preexisted service. To the contrary, the Board evaded the VA's obligation to consider and apply the presumption of soundness because of the existence of a diagnosis of a personality disorder in the record. RBA 1-21 at 17. Neither the Board nor the Secretary apparently understood that every veteran is presumed sound upon entry into service, except for defects, infirmities, or disorders **noted at entry**. 38 U.S.C. § 1111. (emphasis added). Thus, in this case, the pertinent question was whether, at Mr. Simmons' entry to service,

did his examination note a preexisting condition? If not, when a condition is not noted upon entry into service, the evidentiary burden shifts to the VA to rebut the presumption of soundness by clear and unmistakable evidence that the injury or disease manifested in service was both preexisting and not aggravated by service. *Id.*; *see Wagner v. Principi*, 370 F.3d 1089, 1096 (Fed. Cir. 2004). Overlooked or misunderstood by the Secretary and the Board in its 2016 decision is that no mental disease, such as "depressive reaction," was noted upon Mr. Simmons' entry to service and that his depression manifested in service. *See* RBA 49 and RBA 127-128, RBA 129, and RBA 130-131. The Board in its May 2016 decision made a clear error of law when it failed to correctly apply the provisions of § 1111.

The Secretary proffers:

> The Board further noted that Appellant's September 1974 claim was not based upon aggravation of a preexisting psychiatric disorder, and that Appellant is merely attempting to distract from the direct service connection theory. [R at 17]. Notably, the Board's finding that Appellant was sound on entry is more favorable to Appellant because it potentially afforded him service connection for more than just the degree aggravated by service. The Board provided a more than satisfactory explanation as to why there was no finding of preexistence to service, and that 38 U.S.C. § 1111 and 38 C.F.R. § 3.304 did not apply. The Board's analysis was not arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law and should be affirmed.

VA's Brief, p. 15. Once again, the Secretary erroneously focused on what the Board said about Mr. Simmons' allegation of clear and unmistakable error and not on the

relevant question of whether the Board did or did not correctly apply the provisions of § 1111.

The Secretary continues to incorrectly focus on what Mr. Simmons did not do rather that on whether the Board correctly applied the provisions of § 1111, as shown by the following:

> Appellant failed to cite any evidence which indicates that Appellant had a preexisting psychiatric disability prior to entering service, or that he had a psychiatric disability noted upon entrance into service. No doubt, Appellant exhibited psychiatric symptoms in service, and was diagnosed with an immature personality in-service, but there is simply no evidence Appellant can cite which shows that a psychiatric disability pre-existed service. [R at. 121-131]. Appellant boldly declares that "because there was evidence that a mental disease, "depressive reaction," was not noted upon entry to service and his depression manifested in service" that he was entitled to the presumption of soundness. App. Br. at 12-13. The September 1974 rating decision, did not put at issue Appellant's soundness at entry, and therefore accepted him as sound upon entry. [R at. 1447-1449]. Appellant argues that error was committed, in that he was entitled to the presumption of soundness. App. Br. at 11-13. However, the September 1974 rating decision did not dispute his soundness. Appellant fails to even propose an error which can amount to CUE.

VA's Brief, pp. 15-16. The Secretary's critique of Mr. Simmons' allegation of clear and unmistakable error simply begs the question presented by this appeal. The Secretary simply chooses not to answer the question of law presented by Mr. Simmons' appeal, which is why this Court should consider the issues conceded. *See MacWhorter*, *supra*.

The Secretary correctly observes that Mr. Simmons has made the same averment of error in this appeal concerning the Board's error in its May 2016 decision as he made in his allegation of clear and unmistakable error made by the VA in its September 1974 decision. VA's Brief, p. 16. It is evident, however, that the Secretary does not understand that, although these arguments are the same, the former is to be decided by the Board and the latter is to be decided by this Court. The burden of proof in the former is clear and unmistakable and the burden of proof in the later is merely clear error. Thus, the Secretary continues to present meaningless observations in his brief rather than substantive and responsive legal argument.

The Secretary ends his brief as it was begun:

> The Board provided a satisfactory explanation as to whether the September 1974 rating decision committed CUE in light of 38 U.S.C. § 1111. Since the Board clearly explained that 38 U.S.C. § 1111 did not even apply to the September 1974 rating determination given the evidence of record, and the Board's explanation that even if it did apply, it would not have affected the outcome of the September 1974 rating decision, the Court should affirm the Board's decision.

VA's Brief, p. 17. Simply because the Board provided a satisfactory explanation as to whether the September 1974 rating decision committed CUE in light of 38 U.S.C. § 1111 does not demonstrate that the Board correctly applied § 1111. Thus, this Court is wholly without the benefit of the Secretary's view on the question of law presented by Mr. Simmons' appeal, which is whether the Board correctly applied § 105 and § 1111.

Conclusion

The Board made a clear error of law in failing to correctly apply the provisions of 38 U.S.C. § 105 and by failing to correctly apply the presumption of soundness in consideration of Mr. Simmons' request for revision of the VA's September 18, 1974 rating decision. The Board's decision must be set aside as unlawful and remanded to the Board, with instructions from this Court to correctly apply the presumption of service connection under 38 U.S.C. § 105(a) and the presumption of soundness under the provisions of 38 U.S.C. § 1111. Because the Secretary failed to respond to the plausible legal argument made by Mr. Simmons, this Court should deem these issues conceded.

Respectfully submitted by:

/s/Kenneth M. Carpenter
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Electronically filled on July 5, 2017