Vet. App. No. 17-2990

IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

LEMUEL C. BRAY,

Appellant *Pro Se*,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,

Appellee.

ON APPEAL FROM THE BOARD OF VETERANS APPEALS

REPLY BRIEF OF THE APPELLANT LEMUEL C. BRAY

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

[1] Board decision, May 11, 2017, RBA. 2-38.

Regulations

[1] Board decision, May 11, 2017, RBA. 2-38.

ISSUES PRESENTED

Whether this Court should reverse and remand the Board's May 11, 2017 decision[1] denying an effective date of 7/7/1974 for tinnitus under 38 CFR 3.105 (CUE) and an effective date prior to July 10, 2009 for the assignment of a Forty (40%) Percent rating due to Traumatic Brain Injury (TBI) to Bray because the Board acted arbitrarily and capriciously, abused discretion, or otherwise not in accordance with law under the Administrative Procedures Act (APA), 5 U.S.C. § 706 in denying Bray's right to Due Process of Law as required by the Fifth Amendment to the United States Constitution under the presumption of regularity where all federal agencies, including the VA and Department of Navy (Navy), must follow Due Process in conducting adjudications, but in Bray's case, the Secretary/Board failed to:

A. Consider all, rather than just some, of Bray's medical records in totality, an APA violation of Due Process; and how the Board choses,
B. Publish the legal standards used by the Board to determine Bray's claim, an APA violation of Due Process, so that Bray knows which standard of proof applies to his claim and the weight given to certain evidence over other types of evidence;
C. Explain which types of evidence are used by the Board to determining which veterans will receive service-connected disability benefits, a further violation of constitutional obligations and the APA, where the secrecy of the Board/Secretary makes it impossible for Bray to prepare effective applications or to understand what evidence is considered or how the Board arrives at its decision, all of which frustrates principles of fair adjudication; and
D. Explain why the Board's decision is not an Arbitrary and Capricious Abuse of Discretion under APA.

STATEMENT OF THE CASE

Appellant Bray filed *Pro Se* an application for disability benefits with the Veterans Administration (VA). Hearing was held on August 15, 2016. The Board of Veterans Appeals (Board) denied his claim for an earlier effective date for Traumatic Brain Injury (TBI). Bray appealed the decision.

On May 11, 2017, the Board denied Bray's application for an effective date of 7/7/1974 for tinnitus and earlier than July 10, 2009, for the assignment of his Forty (40%) percent service connection rating for TBI[2] Bray appealed to this Court, filing his Notice of Appeal on September 6, 2017. The Court received the Board's decision on October 5, 2017.

On November 11, 2017, the Secretary served the Record on the Court and Bray. On November 18, 2017, Bray moved to correct the Record under Rule 10(b) in that there were Twenty-Four (24) instances where the Secretary failed to produce relevant documents that Bray requested.

On December 1, 2017, the Court held Bray's motion in abeyance and ordered the Secretary to issue a report every Fifteen (15) days as to actions taken to resolve the dispute. Nevertheless, the matter remained unresolved for Seven (7) months (until July 17, 2018) when the Court ordered the Secretary to provide a detailed response. On August 6, 2018, the Secretary responded that

documents were missing, but the record was as complete as it could be. Bray objected because where documents remained missing, the Secretary was not in compliance with this Court's order to produce his complete Record.

The Court's October 17, 2018 Order indicates that the parties agreed to the Record as it existed and ordered Bray to file his Opening Brief within Twenty (20) days. Bray maintained that where documents remained missing, the Secretary remains in violation for failure to produce his entire record.

On December 4, 2018, Bray filed an Informal Opening Brief. In it, he raised the issues of missing records, the VA's refusal to provide all his records, failure of Due Process under the Fifth Amendment, and Breach of the VA's Duty to Assist.

The Secretary filed a Brief in Response on April 1, 2019, arguing that the Board correctly determined that an effective date earlier than July 10, 2009 for Forty (40%) percent rating for service connected TBI is not warranted because Bray had not demonstrated that the Board's findings were clearly erroneous. Brief in Response, p. 13-20. He noted that Bray had not specified how the Board failed to comply with laws. *Id*. Bray filed this Reply Brief on May 15, 2019.

STATEMENT OF FACTS

Lemuel Bray, born in 1941, enlisted in the United States Navy in 1961.Was stationed at the Great Lakes Naval Hospital in 1964-65. Was stationed at NavSupAct, Danang Vietnam in 1965, 66 & 67 where he served in duties of rate, HM2-HM1.

In 1969, he suffered a "quite severe" head injury[3] in a motor scooter accident. He was honorably discharged from the Navy in July 1974[4]. On November 1, 1984, Bray was evaluated by VA doctors for "a nervous condition"[5]. His MMPI[6] results showed: His MMPI[7] results showed:

> Depressed feelings, worry and pessimism. Moderate to severe anxiety and tension, a history of schizoid ideation, possible psychotic symptoms[8], and a need for chemotherapy for depressive symptomology. RBA 3785.

In 1985, Bray sought medical help from the VA for amnesia, memory deficits, difficulty with employment, nightmares, flashbacks, and depression[9]. His first EEG was "abnormal," and indicated a severe head injury in the past, with likely

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[3] Contusion of right frontal region of head, fracture of maxillary bone on right side. Unconscious for two days in Oakland Naval Hospital. Assessment: old frontal temporal contusion in accident. R. 1438-9, 3883.

[4] Board decision, May 11, 2017, p. 2.

[5] RBA 3722.

[6] A psychological test that assesses personality traits and psychopathology. It is primarily intended to test people who are suspected of having mental health or other clinical issues. https://psychcentral.com/lib/minnesota-multiphasic-personality-inventory-mmpi/

[7] Exhibit 1: MMPI report.

[8] All of these symptoms are listed in the 8045 Chart for diagnosis of TBI.

[9] All of these symptoms are listed in the 8045 Chart for diagnosis of TBI. Bray's relevant records from 1985 are in Exhibits 4-7.

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psychiatric problems[11]. The second EEG showed a lesion in the left intraparietal area of his brain[11]. On May 28, 1985, Dr. Michael Fine, MD diagnosed:

> Post Traumatic Syndrome Disorder (PTSD) with flashbacks, memory deficit, and depression. Possible chronic brain syndrome with impaired memory, intermittent and severe, with a lesion of the left parietal temporal area. [12] Traumatic Radial Nerve Damage and Depression.[13]

Clinically, this was expressed as focal dysplasia in the left hemisphere. The doctor who conducted the EEG, Michael Volpe, noted that these injuries cause memory deficits and poor work performance and "such changes may be seen in posttraumatic cases.[14] Bray's EEG was "abnormal, probably from a severe head injury in the past"[15]. Intelligence testing showed deficits consistent with brain impairment[16]. His verbal IQ was 125, but his nonverbal score was 98, significantly lower and consistent with brain injury[17]. *Id.*

Bray's psychological evaluation showed:

> (S)ignificant emotional problems, depressive in nature, with hysterical features in his behavior, which manifested in loss of efficiency, periods of confusion, and inability to concentrate, resistant to change, with withdrawal, guilt, anxiety and agitation with a major depressive disorder with somatic complaints that are functional in nature[18]. *Id.*

[11] RBA. 3783.
12 RBA. 3784.
13 RBA. 3780. All of these symptoms and testing results are listed in the 8045 Chart for diagnosis of TBI. RBA. 3779.
14 RBA. 3781 3779. All of these symptoms and test results are listed in the 8045 Chart for diagnosis of TBI.
15 RBA. 3779.
16 RBA. 3888. "Marked problem in his ability to work abstractly with visual problems that require mental dexterity, i.e. putting together puzzles. He exhibits visual spatial skills deficits consistent with head injury involving the right posterior cortex."
17 "Marked problems in ability to work abstractly with visual problems that require motor dexterity.. . . Similar difficulty with memory passages overall,. . . visual spatial skills consistent with head injury to posterior right cortex, possibly due to contrecap".
18 All these symptoms and test results are listed in the 8045 Chart for diagnosis of TBI.

On May 13, 1985, a VA examiner diagnosed Bray with Post Traumatic Syndrome Disorder (PTSD), but the Chief of Psychiatry changed the diagnosis to an "anxiety reaction[19]". On June 27, 1985, the Board considered a service connection for Bray's psychological condition[20], but denied it because:

> No record of psych condition noted, claimed. Treated or diagnosed during regulatory period following discharge from service to a degree of at least Ten (10%) percent, but no basis for service connection. RBA. 3811 – 3815.

In September 1985, Dr. Vulpe diagnosed Bray with Organic Depression and Post Traumatic Encephalopathy. Again in 1986, doctors diagnosed a "probable old cerebral contusion" which caused "Organic brain syndrome with personality and intellectual impairment."[21]

On March 19, 1986, Dr. Ira Sherwin, Chief of Neurology at the VA Outpatient Clinic, evaluated Bray because he complained of "decreased mental speed[22] ". Dr. Sherwin noted the 1969 motorcycle accident, including a contusion of the right frontal region of Bray's head[23]. Yet on July 26, 1986, the Board again rejected Bray's application because: (there was) "No probability of PTSD – no evidence of it." *Id.*

Bray applied to the Board again and was compensated for "traumatic brain disease with a service connected Thirty (30%) percent impairment" on May 28,

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[19] RBA. 3810.
[20] RBA 3809.
[21] RBA 1440-1444.
[22] RBA. 3883.
[23] Exhibits 8 and 9.

1987[24].

At the most recent hearing in May 2017, the Board considered Bray's claim, which he brought *Pro Se*[25], for an increase for service connected TBI as of July 10, 2009 of a Forty (40%) rating, the date his claim was received[26]. The Board held that the criteria for an effective date prior to July 10, 2009 for service connected TBI had not been met[27].[28] The Board explained that in a February 2002 decision, an administrative judge had granted a service connection for mixed organic personality syndrome with depression and assigned a Thirty (30%) disability rating as of October 11, 1984. The Board noted that the Diagnosis Code 8045 addresses brain disease due to trauma and addresses dementia due to head trauma. Yet, it concluded that Bray did not file a timely substantive appeal, making the February 2002 rating decision final. *Id.* p. 14[29].

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[24] RBA. 3724.

[25] The Board has a special obligation to read *Pro Se* filings liberally. This obligation extends to all proceedings before the Board. This requirement to liberally construe a veteran's argument extends to arguments not explicitly raised before the Board. *Comer v. Peake*, 552 F3rd 1362 (Fed. Cir. 2009), *Robinson v. Shinseki*, 557 F3d 1356 (Fed. Cir. 2009): All filings must be read "in a liberal manner' whether or not the veteran is represented. 38 CFR § 20.202. An allegation that the Board failed to comply with its obligation to read filings liberally may be addressed for the first time on appeal to the Veterans Court. *Id*. This includes the question as to what issues were raised. *Comer, Id.*

[26] Board Order, p. 5.

[27] The Board did not explain why an earlier onset date for TBI had not been met when faced with the fact that Bray was compensated for "traumatic brain disease with a service connected Thirty (30%) percent impairment" on May 28, 1987, 23 years earlier. This is *prima facia* error.

[28] *Id.,* p. 6.

[29] The Board refers to a personality disorder. It is a well-documented "secret" that "military commanders pressure clinicians to issue unwarranted psychiatric diagnoses". *Branding a Soldier With 'Personality Disorder'*, The New York Times, Feb. 24, 2012. https://www.nytimes.com/2012/02/25/us/a-military-diagnosis-personality-disorder-is-challenged.html. The Board ignored the obvious fact that the state of medical treatment and diagnostic standards has changed through time because of ongoing research. See Hagel's Memo 2014) and subsequent guidance for diagnosis of TBI as per the 8045 Chart. Thus, the

The Board noted that VA regulations provide that:

> . . . (I)f at any time after the VA issues a decision on a claim, if VA receives or associates with the claim file relevant office service department records that existed and had not been associated with the claim file when the claim was first decided, the VA will reconsider the claim. This regulation identifies service records related to a claimed in-service event, ---------- as relevant service department records. 38 CFR §3/156(c)(1)(i). *Id*., p. 15.

In Bray's case, the Board claimed that:

> (N)o additional service records were received. Therefore, 38 CFR § 3.156(c) is inapplicable. *Id.*

Continuing, the Board stated that:

> (A)ny communication or treatment record dated prior to July 10, 2009 would suffice, but that it did not find any such document which referenced TBI[30]. *Id.*

While the Board noted that the residuals of TBI, as expressed in Section 8045's table, *Evaluations of Cognitive Impairment and Residuals of TBI not*

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diagnosis of a personality disorder and failure to appeal it as a 'final decision' is now an arbitrary, capricious, and abusive conclusion, necessitating reversal under APA standards, where research has established that TBI is the correct diagnosis and it was diagnosed per the Chart factors as described in records from 1985. The Board must correct this mistake.

[30]All of the treatment records referenced on pages 5-7 from 1985-2002 were in the Board's possession when it made this statement. Thus, when the Board wrote that it needed "any communication or treatment record dated prior to July 10, 2009 which referenced TBI", it failed to understand that the diagnosis of TBI did not exist until well into the 21st Century: "Literature about TBI/concussion remained relatively silent during and after the Korean Conflict, Vietnam, and the Gulf War". DePalma, RG. *Combat TBI: History, Epidemiology, and Injury Modes.* Kobeissy FH, editor. *Brain Neurotrauma: Molecular, Neuropsychological, and Rehabilitation Aspects*. Boca Raton (FL): CRC Press/Taylor & Francis; 2015. Chapter 2. Available from: https://www.ncbi.nlm.nih.gov/books/NBK299230/. "Between 2000–2012, service members sustained a total of 255,852 TBIs. *Id.* This is why TBI is referred to as "the invisible injury." *Id*. This is also why the Board clearly erred in Bray's case. The Board should have used the criteria set forth in the 8045 Chart to apply descriptive terms used circa 1985 to current diagnostic and descriptive standards for TBI. It was clearly erroneous for the Board not to apply the 1985-2002 medical records to the Chart factors and fail to conclude that TBI did not totally disable Bray from 1985 to the present day.

otherwise classified (§ 4.124a5)[31], could be used as pertinent evidence to conclude that a TBI had been suffered for purposes of service-connected rating decisions, it failed to undertake that analysis and determine whether the "residuals" stated in Bray's records fit the present day rating decision. This failure was arbitrary, capricious or an abuse of discretion.

Instead, the Board noted a November 2008 report that Bray suffered from depression as the only evidence[32] which fit the descriptive words used in the Chart. (*Id*., p. 18), but concluded that there were 'no other objective findings prior to July 10, 2009' upon which to roll the date back in time. *Id*., p. 19. Thus, the Board held that:

> (I)t is not factually ascertainable that the Vet's disability more nearly approximated the criteria required for a Forty (40%) rating prior to July 10, 2009. As such, the Board concludes that an effective date prior to July 10, 2009 for the assignment of a Forty (40%) rating for TBI is not warranted. *Id.,* p. 19.

Had the Board applied the terms used to describe Bray's condition in medical records from 1985-2002, it would have been factually ascertainable that his disability approximated the criteria for a rating higher than Forty (40%) Percent. The Board's failure to apply the evidence of record to the required criteria of the 8045 Chart for TBI is arbitrary, capricious, an abuse of discretion and not in

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[31] Appendix Exhibits 1 and 2

[32] Appendix Exhibits 1-15 are medical records from the RBA from 1984 – 1993 which show diagnoses of 'nervous condition, depression, pessimism, anxiety, tension, amnesia, memory deficits, decreased memory, difficulty with every day actions, lack of concentration/attention, emotional/behavior problems, seizures, blackouts and concentration problems, tinnitus, and disorganized thinking'. All of these are symptoms used on the 8045 Chart to rate TBI. This Chart is Exhibit 2.

accord with law.

In closing, the Board offered that under 38 USCA § 5108, if:

1. "new and material evidence" not previously submitted,
2. related to an established fact necessary to substantiate the claim and
3. raised a real possibly of substantiating a claim, the Board would review this disposition of Bray's claim.

Here, there is a plethora of evidence from 1985 to the present to establish Bray's decreased memory, lack of concentration and attention, emotional and behavioral problems as well as testing which revealed physical injuries to his brain. This evidence was submitted to the VA in several previous applications, so it is not "New" now. This evidence establishes facts necessary to substantiate Bray's claim, and it raises very real possibilities of dating his claim for TBI as of 1985 instead of 2009, a difference of more than Twenty Four (24) years. Yet, the Board ignored evidence in the RBA[33] and clung to the premise that although the Diagnosis Code 8045 addresses brain disease due to trauma and dementia due to head trauma, it could not consider the 1985 evidence because Bray had not filed a substantive appeal, making the February 2002 rating decision final. *Id*. p. 14.

When presented with his medical records, the Board should have realized that although TBI went by different names and symptoms back in the day, this

[33] The Board must consider all evidence of Record. *Diggs v. Shulkin, Id., citing Douglass v. Derwinski*, 2 Vet. App. 435, 439 (1992).

constellation of symptoms is dynamic and specific enough as per the 8045 Chart to consider evidence applicable to the relevant benefit determination even if the package it came in from 1985- 2009 was not stamped in red ink with “TBI” on the cover. Different labels do not preclude the conclusion that no matter what it was called years ago, the imaging, symptoms, and psychological testing fit the criteria for TBI today.

Therefore, this Court should reverse and remand with directions to the Board to re-evaluate the 1985 - 2009 medical evidence of cognitive, emotional, behavioral, and physical issues along with current records in light of Section 8045’s Chart and conclude that Bray is entitled to a service connected award for TBI as of 1985 for greater than Forty (40%) Percent. In light of the evidence the Board rejected, it is arbitrary, capricious, an abuse of discretion and contrary to law to deny an increased award for TBI to Bray as of 1985.

TINNITUS

The RO in the 1992 Rating Decision discovered the EENT report at R. 4365 reporting tinnitus on 4/5/1965 and the denial of a forklift operator permit because of safety concerns for “inadequate hearing”, a definite industrial handicap eliminating jobs around equipment. In the BVA hearing on RBA 1332 it was postulated that the RO had determined a CUE and granted 10% for tinnitus but that a “clerical error” had misdated the effective date as 12-10-1989, the date of the claim for other issues, instead of the July 1974 claim for “hearing problems”, tinnitus not extracted from the “inadequate hearing” reported.

STANDARD OF REVIEW

The Secretary represents the United States Navy, an agency authorized and overseen by the United States. Agency actions, findings, and conclusions can be set aside if they are:

> Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]" 5 U.S.C. § 706(2)(A). "[T]his standard is exceedingly deferential[.]" *Fund for Animals, Inc. v. Rice*, 85 F.3d 535, 541 (11th Cir. 1996) in *CS-360, LLC v. U.S. Dep't of Veterans Affairs*, 101 F. Supp. 3d 29, 32 (D.D.C. 2015) and *Stewart v. McDonald*, No. 2014-7110, (Fed. Cir. Feb. 22, 2016), *Diggs v. Shulkin*, No. 2016-2243 (Fed. Cir. July 14, 2017.

An agency action may be found arbitrary and capricious:

> where the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. *Defenders of Wildlife v. U.S. Dep't of the Navy*, 733 F.3d 1106, 1115 (11th Cir. 2013) in *CS-360, LLC v. U.S. Dep't of Veterans Affairs*, 101 F. Supp. 3d 29, 32 (D.D.C. 2015).

The *CS-360* Court noted that this standard of review allows setting aside administrative decisions:

> Only for substantial procedural or substantive reasons as mandated by statute, not simply because the court is unhappy with the result reached. *Citizens for Smart Growth v. Sec'y of the Dep't of Transp*., 669 F.3d 1203, 1210 (11th Cir. 2012) (*quoting Fund for Animals*, 85 F.3d at 541-42).

A reviewing court is:

> to decide, on the basis of the record the agency provides, whether the action passes muster under the appropriate APA standard of review. *CS-360, Id*.

Argument

The Board failed to provide Due Process to Bray in determining his service-related benefit award for TBI.

As a veteran, Bray has a constitutional property interest right in his VA benefits. *Cushman v. Shinseki*, 576 F3d 1290 (Fed. Cir. 2009). Prior to depriving a person of their property rights, a law passed by Congress must outline adequate Procedural Due Process protections. Specifically,

> When the VA, in the guise of the Executive Branch, seeks to enforce a law, it must provide procedural process. Courts must ensure that the Executive and Legislative branches are providing veterans with the full array of "due process" under the law. Due process is adequate notice, an unbiased decision maker, an absence of *ex parte* communications, a right to present evidence, a record of proceedings, and written decisions based on the record and supported by reason and facts. *Id.*

Yet, the Board made decisions without considering the complete RBA, rendering its' decision contrary to and unsupported by actual facts in the RBA. Here, the Board wore two hats: one as a party arguing against the claim and the other as an adjudicator of the claim. *Id. Prima facie*, this dual status violates Due Process. It is impermissible for both functions to exist within one entity.

Beyond that error, Due Process requires an opportunity to confront witnesses. Yet, veterans are rarely allowed access to VA records or to question doctors, methodology, and procedures. Thus, Due Process fails them.

Further, veterans have no right to discovery of evidence. *Id.* Here, the Board refused to consider medical evidence relevant to Bray's case from the RBA during the past Thirty (30) years. Due Process failed here too.

Due Process also requires a complete record of proceedings. *Id.* Here, the Secretary admits that records are missing, and the Board refused to review the ones that did exist from 1985 to the present with one exception.

Further, 38 USC §7104(d)(1) requires that the Board must provide adequate reasons and bases for findings of fact and conclusions of law. *Id*. Claiming that records do not exist when they are present in the RBA does not pass muster. *Per se* violations of Due Process include using/providing the wrong file or misfiled/wrong files, ignoring evidence or failing to provide adequate reasons and bases from which to determine Bray's claim under Due Process. *Id*.

When the Secretary provides a claimant with process that is deficient in any respect, the APA framework requires courts to presume that this error is prejudicial and requires reversal unless the Secretary can demonstrate that:

1. The defect was cured by the veteran's actual knowledge or
2. Benefits could not have been rendered as a matter of law.
   Shinseki v. Sanders, 556 U.S. 396 (2008).

Here, the Secretary has not met this burden. Thus, the errors in this case are prejudicial to Bray and require reversal as a matter of law.

Section 7261(b)(2) requires adjudicators dealing with veterans to take due account of the rule of prejudicial error. The APA, 5 USC §706, uses the Harmless Error rule. Courts have held that Congress intended § 7261(b)(2) to incorporate the APA's approach. Thus, the Secretary must meet APA standards under the harmless error standard in order to provide adequate Due Process. In Bray's case, the Board failed to meet those standards.

A. The Board's failure to consider all of Bray's medical records constitutes an APA violation of Due Process.

The Board ignored Bray's medical records from 1985 – 2009. Yet there is a presumption of regularity in government affairs resulting in a high risk of erroneous decisions, all in violation of the Due Process guarantees. Here, the Board/Secretary applied this presumption knowing that Bray's medical record was incomplete, and the Board chose to ignore relevant portions (specifically, medical records in the RBA beginning in 1985 relevant to TBI) as a predicate to denial of his application. The Board failed to explain why the presumption of regularity was not rebutted in the face of evidence which contradicts the presumption, namely, an incomplete or "spotty" review of his medical records which do exist in the RBA. Thus, Due Process was not provided to Bray because the Secretary did not meet his Duty to Assist/Obtain[34]. For this reason, this Court must reverse and remand.

B. The Board's failure to explain the standards it used to determine Bray's claim, rather than the one it is required by law to use, is an APA violation of Due Process.

[34] The Secretary must make "reasonable efforts" to obtain military service records, VA records, records from private doctors and hospitals, and other pertinent federal records without being asked to do so under 38 USC § 5103A(6)(c). The Secretary has a duty to obtain information supporting a veteran's claim. The Secretary has a duty to notify the claimant of information needed to make the application complete enough to process (i.e. name, medical conditions claimed) and information needed to substantiate the claim. If the Secretary is unable to obtain all of the records sought, the Secretary must provide notice to the claimant that identifies the records that were unable to be obtained, briefly explain why, and what efforts were used and describe any further action to be taken by the Secretary. *Id*, *Nolen v. Gober*, 14 Vet App. 183, 184 (2000). In this case, these standards were not met, requiring reversal and remand. As shown *herei*n, the Secretary failed to meet this duty to assist/obtain in this case. Records are missing. Therefore, the Board's decision must be reversed and remanded for proper consideration under Due Process.

The Secretary has not explained how the presumption of regularity operates when it is rebutted and why it justifies a ruling that results in a lack of due process notice to Bray of the standards that will be/were actually used to adjudicate his application.

This violates Bray's constitutional right to Procedural Due Process because it violates the APA's guarantee of constitutional agency actions. Under 5 U.S.C. § 706, a court must:

> (H)old unlawful and set aside agency action" (that it finds) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2) (2012) in *VJG v. Sec. of Veterans Affairs*, 818 F.3d 1336 (Fed. Cir. 2016).

Bray's case is like the facts in *Jones v. Wilkie*, No. 2017-2120 (Fed. Cir. Mar. 13, 2019). In that case, the Veterans Court did not review Jones' complete treatment files. It noted that:

> The Secretary tacitly admits that the complete VA medical records from 2000 and 2001 are not in the record. *Jones, Id.*

In Bray's case, the Secretary argued that:

> (C)ontent of the RBA was agreed upon by both parties during the Court ordered conference on October 15, 2018 and (Bray) failed to show that there are records that have not been included in the RBA or his file. Brief in Response, p. 11.

In his Opening Brief, Bray argued that Due Process was denied to him because the VA refused to produce his medical records in violation of its duty to assist. Where records are missing, and the Board applies its presumption, but fails to explain why the presumption is not rebutted in the face of contrary evidence as required by Department of Defense regulations (DODI 1332.8, Sec.

E 3.5.5.5.5), this is an arbitrary and capricious act in violation of the APA §706(2)(A).

The APA "sets forth the full extent of judicial authority to review executive agency action for procedural correctness." *FCC v. Fox Television Stations, Inc*., 556 U.S. 502, 513, 129 S.Ct. 1800, 173 L.Ed.2d 738 (2009). It requires courts to "hold unlawful and set aside agency action, findings, and conclusions" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) *in CS-360, LLC v. U.S. Dep't of Veterans Affairs,* 101 F. Supp. 3d 29, 32 (D.D.C. 2015)[2] [35].

Under the APA, it is the agency's role to resolve factual issues to arrive at a decision that is supported by the administrative record. *CS-360, Id*.

In this case, the Board failed to consider relevant evidence from 1985, simply ignoring those medical records, and failed to apply the 8045 Chart to Bray's 1985 evidence. Therefore, Bray has been systematically denied statutorily mandated access to the upgrade procedures set forth by Congress and implemented by DOD as to his disability benefits.

As set forth in the Statement of Facts *herein*, documents in Bray's RBA were not considered by the Board, namely Bray's medical records from 1985-

[2] [35]
An agency is required to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n,* 463 U.S. at 43, 103 S.Ct. 2856 (internal quotation omitted).

(It is) not factually ascertainable that Bray's service-connected

2009 as to TBI. Thus, just as in *Jones,* the Secretary tacitly admits that existing VA medical records from 1985 - 2009 are not in the Record that the Board reviewed in Bray's case. The Board refused to consider the relevant medical evidence of TBI beginning in 1985 in light of Section 8045's Chart as to criteria and descriptive words used in the past that constitute a current diagnosis of TBI. The Board's failure to review these records is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law under APA.

> The Board ignored these records, fast forwarding to July 2009 to hold that: (It is) not factually ascertainable that Bray's service-connected disability approximated 40% rating prior to July 10, 2009. R. at 13-20 (2-30), 2462, 1906-14.

It was "not factually unascertainable" because the Board refused to review Bray's medical evidence beginning in 1985 and apply the 8045 Chart to the facts set forth therein. The Board's refusal to review Bray's relevant medical records is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, necessitating reversal and remand for proper consideration by the Board.

> The *Jones* decision shows that:
>
> (I)t was not harmless error for the VA to base its rating decision on a subset of a veteran's medical records. "The fact that the VA considered some of the relevant records . . . does not excuse the fact that it failed to consider all of them." (*Citing Moore v. Shinseki*, 555 F.3d 1369, 1374 (Fed. Cir. 2009). Moreover, we were unwilling to assume what the contents of the remaining records would show. "We fail to understand how the government, without examining the [omitted] records, can have any idea as to whether they would, or

> would not, support [the veteran's] claim for an increased disability rating." *Id.* at 1375.[36] *Jones, Id.*

The Board ignored Bray's medical records from 1985, clinging to the legalistic rule that Bray had waived the right to have them considered. In so holding, the Board completely failed to apply the 8045 Chart as directed in TBI cases. If it had, it is quite likely that the Board would have been compelled to award a service connection as of 1985 for TBI to Bray that is greater than Forty (40%) percent because:

> The Secretary should grant the award unless more evidence is against the claim than supports it. This leads to a benefit of the doubt rule. If there is a balance of evidence, the benefit goes to the veteran. 38 CFR § 3.102. Therefore, any reasonable doubt must be resolved in favor of the veteran. 38 USC §5107(6).

Where the Board refused to review relevant records in Bray's complete medical file, including evidence that meets the evidentiary requirement of Section 8045's Chart, the Board's decision is clearly erroneous and arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Hence, the Board acted outside the established evidentiary standards for determining service awards for TBI, all in violation of the APA and Due Process under the:

> C. The Secretary has failed to set forth evidentiary standards which veterans must meet to receive service-connected disability benefits in violation of the APA and Due Process.

[36] In *Jones*, the Secretary attempted to distinguish *Moore* on the grounds that it involved a claim for a higher disability rating, and the missing records related to a recent hospitalization. The Court held that "the Secretary does not explain why these distinctions would make a difference regarding the VA's requirement to consider complete medical records.

Because it has not published evidentiary standards, and it admits that relevant medical records were not reviewed in Bray's case, the Secretary has violated constitutional Due Process obligations in violation of APA. The Secretary's secrecy as to the applicable evidentiary standards necessary to obtain service-connected benefits for TBI makes it impossible for Bray to prepare effective applications or to understand how the Board arrived at a given outcome. This mystery makes obtaining benefits, which Congress has mandated that veterans like Bray are entitled to receive, literally impossible to attain, all of which is contrary to the principles of fair adjudication.

Effectively, the Secretary's failure to publish evidentiary standards renders the decision-making process akin to a "black box" where abuses of discretion in weighing evidence are impermissibly undetectable. These secret standards are patently unfair and contrary to Bray's constitutional right to Due Process. Instead, it becomes a pretense or sham decision-making process in which denial is a virtual certainly for any applicant before the Board due to prejudice inherently built into the Navy's system. Rather like shooting at a moving target in darkness, this practice is *prima facie* unconstitutional.

Under the APA, courts will "hold unlawful and set aside agency action" only if the action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Mortg. Investors Corp. v. Gober*, 220 F.3d 1375, 1378 (Fed. Cir. 2000). While "this review is `highly deferential' to the actions of the agency," (*Disabled Am. Veterans*, 234 F.3d at 691 (*citing LeFevre*

v. Sec'y, Dep't of Veterans Affairs, 66 F.3d 1191, 1199 (Fed. Cir. 1995)), rulemaking action is not arbitrary and capricious if there is a "rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (*citation and internal quotation marks omitted*); *Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs,* 669 F.3d 1340, 1348 (Fed. Cir. 2012) in *Vietnam Veterans of America v. CIA*, 811 F.3d 1068 (9th Cir. 2015).

Section 706(1) of the APA provides that a court:

> "shall compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). A court can compel agency action under this section only if there is "a specific, unequivocal command" placed on the agency to take a "discrete agency action," and the agency has failed to take that action. *Norton v. S. Utah Wilderness Alliance (SUWA)*, 542 U.S. 55, 63-64, 124 S.Ct. 2373, 159 L.Ed.2d 137 (2004) (*citation omitted*). The agency action must be pursuant to a legal obligation "so clearly set forth that it could traditionally have been enforced through a writ of mandamus." *Hells Canyon Pres. Council v. U.S. Forest Serv.,* 593 F.3d 923, 932 (9th Cir.2010) in *Vietnam Veterans of America v. CIA*, 811 F.3d 1068 (9th Cir. 2015)[37].

The *Vietnam Veterans* opinion recognized that courts are not permitted under § 706(1) to enter "general orders compelling compliance with broad

[37]Section 706(1) of the APA provides that a reviewing court "shall ... compel agency action unlawfully withheld." The word "shall" requires a court to compel agency action when, as here, there is a "specific, unequivocal command" that the agency must act. SUWA, 542 U.S. at 63-64, 124 S.Ct. 2373 (citation omitted). "The term `shall' is usually regarded as making a provision mandatory, and the rules of statutory construction presume that the term is used in its ordinary sense unless there is clear evidence to the contrary." *Firebaugh Canal Co.*, 203 F.3d at 573-74; cf. *United States v. Monsanto*, 491 U.S. 600, 607, 109 S.Ct. 2657, 105 L.Ed.2d 512 (1989) (finding that "Congress could not have chosen stronger words to express its intent that forfeiture be mandatory" than to state that a court "shall" order forfeiture).

statutory mandates." *SUWA*, 542 U.S. at 66, 124 S.Ct. 2373. In that case, the Court found that the Army had a duty to provide all former medical test subjects with newly acquired information that might affect their well-being, and that this duty was judicially enforceable under § 706(1). The Court found that the Army had a duty to provide all former medical test subjects with newly acquired information that might affect their well-being, and that this duty was judicially enforceable under § 706(1).

Likewise, the Navy has been specifically commanded by Congress to provide mandatory disability benefits to qualified veterans within a reasonable time and to establish a system which allows them to present evidence, receive a decision from an impartial panel, and appeal adverse decisions in accord with established Due Process standards in a timely fashion. Yet Bray is still in pursuit of benefits for injuries that he suffered more than Forty (40) years ago.

This case sheds light on a devious, shameful, and egregious violation of Congress' command to the Navy to provide disability benefits to sailors under stated Due Process standards in timely fashion. As such, the Board's refusal to comply with these standards is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. This Court must reverse and remand, directing the Secretary to order the Board to consider service-connected benefits for TBI to Bray using his medical records as of 1985 to the present and apply that medical evidence to the framework of the 8045 Chart for TBI and render a

determination that complies with Due Process requirements.

D. The Board's decision is an Arbitrary and Capricious Abuse of Discretion under APA.

The Secretary has acted arbitrarily and capriciously in abuse of his discretion and contrary to law, all in violation of the APA, §706(2)(A) because the Board failed to explain its reasons for applying particular legal standards in some cases, but not in all others, rendering the Board's decision *per se* arbitrary and capricious in violation of the APA.

Here, the Secretary, acting through the Board, abused his discretion by failing to explain the evidentiary standards under which applications are adjudicated. It is impossible for veterans like Bray to know what types of evidence the Board credits. Hence, it is impossible for veterans to prepare effective applications or appeal decisions effectively. Even worse, the Secretary's failure on this point makes it impossible for Bray to detect whether the Board has abused its discretion in weighing the evidence.

In short, the Board's failure to publish evidentiary standards for upgrading applications constitutes an illegal and arbitrary action in violation of the APA §706(2)(A). Thus, the Board's application of the presumption of regularity in government affairs is arbitrary and capricious in violation of the APA, 706(2)(A). This Court must reverse and remand with directions to the Secretary to comply with Due Process by setting for evidentiary standards used in these determinations.

The Secretary has exceeded the authority entrusted in him by Congress to establish a review board governed by the standards it enacted. The Secretary has failed to vindicate the statutory right created by Congress for veterans like Bray, all of which violates the APA, 5 USC 706(2)(C). This Court must reverse and remand for proper consideration under Due Process law.

Conclusion

The Secretary, through the Board's denial of Bray's application for benefits for service-connected TBI prior to July 10, 2009, took final agency action. In making this determination, the Board failed to consider Bray's medical reports or diagnoses under the 8045 Chart. The Secretary failed to meaningfully apply Due Process in considering the evidence establishing the degree to which Bray is impaired by TBI.

The Board failed to follow applicable rules when it refused to respond to all facts and issues raised in Bray's application. The Board applied the presumption of regularity in government affairs to Bray's case without explanation as to why it was justified, given the fact that some of Bray's medical records were lost, misplaced, discarded, barred or ignored. Further, the Board failed to provide Bray with any notice of how to rebut this presumption. The Board also failed to explain why the presumption was not rebutted and why privileges of spoliation do not apply in Bray's case.

For any or all of these reasons, the Secretary failed to meaningfully consider Bray's application and to respond to all the facts and issues raised as

required. The result must be that this decision is arbitrary and capricious, constituting an abuse of the Secretary's discretion contrary to law. Because this decision is contrary to the Due Process protections of the Fifth Amendment, the Secretary acted in excess of his statutory authority, all of which is in violation of the APA, 5 USC 706.

WHEREFORE, based on the facts and applicable law, Bray respectfully requests that this Court:

a. Reverse and remand the Board's decision for *de novo* review, and

b. Direct the Secretary to:

   i. Reconsider Bray's application under constitutionally and statutorily compliant adjudication procedures, including clarified evidentiary standards and the guidelines in the 8045 Chart as to diagnosis of TBI,
   ii. Meaningfully and consistently apply current procedural standards in considering the effects of Bray's TBI to determine whether to upgrade the percentage and date of his disability status,
   iii. Award all applicable fees and costs that Bray has incurred in this litigation to him, and
   iv. Any and all other just and proper relief in these premises.
   v.

Date: May 15, 2019

Respectfully submitted,

/s/ Lemuel C. Bray

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CERTIFICATE OF SERVICE

I hereby certify, under penalty of perjury under the laws of the United States of America, that on May 15, 2019, a copy of the foregoing Brief in Reply with Exhibits was electronically filed/mailed/faxed, postage prepaid to:

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