

No. 15-3053

IN THE UNITED STATES COURT OF APPEALS  
FOR VETERANS CLAIMS

---

GLEN ALLEN CHAPMAN,  
*Appellant,*

v.

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

---

**BRIEF FOR APPELLANT**

---

**Luke D. Wilson**  
**MS Bar No.: 102198**  
**PO Box 1926**  
**Gulfport MS, 39502**  
**(office) 228.731.4003**  
**(fax) 228.205.4464**  
**Attorney for Appellant**

## TABLE OF CONTENTS

Cover.....	i
Table of Contents.....	ii
Table of Authorities.....	iv
Statement of the Issues .....	1
Statement of the Case .....	2
<b>A. Proceedings Below</b> .....	2
<b>B. Statement of the Facts</b> .....	2
Summary of the Arguments .....	5
Arguments.....	7
<b>I. THE BOARD OF VETERANS APPEALS ERRONEOUSLY CONCLUDED THAT PRESUMPTIVE SERVICE CONNECTION UNDER 38 U.S.C. § 1117 (PERSIAN GULF WAR) DID NOT APPLY.</b> .....	7
<b>Standard of Review</b> .....	7
<b>Law and Analysis</b> .....	7
<b>A. The BVA opinion erroneously found no “qualifying chronic disability.”</b> .....	8
1. <i>The BVA erroneously found Appellant not to have an “undiagnosed illness”</i> .....	8
2. <i>The BVA erroneously found Appellant did not have a medically unexplained chronic multisymptom illness that is defined by a cluster of signs or symptoms</i> .....	9

<b>B. The BVA opinion erroneously found “affirmative evidence” that the qualifying chronic disability was not incurred during service in the Persian Gulf War.</b> .....	11
<b>C. Conclusion</b> .....	13
<b>II. THE BOARD OF VETERANS APPEALS REASONS OR BASES FOR DENYING APPELLANT SERVICE CONNECTION UNDER THE PERSIAN GULF WAR PRESUMPTION OF 38 U.S.C.S. § 1117 ARE INADEQUATE.</b> .....	14
<b>Standard of Review</b> .....	14
<b>Law and Analysis</b> .....	14
<b>III. THE BOARD OF VETERANS APPEALS WAS CLEARLY ERRONEOUS IN RELYING ON AN INADEQUATE UNSUPPORTED NEGATIVE MEDICAL OPINION TO DENY APPELLANT SERVICE CONNECTION UNDER THE ONE YEAR PRESUMPTION OF 38 C.F.R. § 3.309 BECAUSE THE NEGATIVE MEDICAL OPINION CONTAINED NO EXPLANATION OR ANALYSIS TO SUPPORT THE OPINION.</b> .....	18
<b>Standard of Review</b> .....	18
<b>Law and Analysis</b> .....	18
Certificate of Service .....	13
Certificate of Compliance.....	14

## Cases

<i>Allday v. Brown</i> , 7 Vet.App. 517 (1995).....	16
<i>Hersey v. Derwinski</i> , 2 Vet.App. 91 (1992) .....	22
<i>D'Aries v. Peake</i> , 22 Vet.App. 97 (2008).....	20, 22
<i>El-Amin v. Shinseki</i> , 26 Vet.App. 136 (2013) .....	22
<i>Gilbert v. Derwinski</i> , 1 Vet.App. 49 (1990).....	15, 22
<i>Gutierrez v. Principi</i> , 19 Vet.App. 1 (2004) .....	13
<i>Lane v. Principi</i> , 339 F.3d 1331 (Fed. Cir. 2003) .....	7
<i>Muller v. Gibson</i> . 2014 WL 2452978 (Court of App. for Vet. Claims 2014).....	10
<i>Nieves-Rodriguez v. v. Peake</i> , 22 Vet. App. 295 (2008).....	22
<i>Pierce v. Principi</i> , 18 Vet.App. 440 (2004) .....	16
<i>Salve Regina College v. Russell</i> , 499 U.S. 225 (1991) .....	15
<i>SEC v. Chernery (Chenery II)</i> , 332 U.S. 194 (1947). .....	16
<i>Stefl v. Nicholson</i> , 21 Vet. App. 120 (2007).....	22
<i>Taylor v. McDonald</i> , 27 Vet.App. 158 (2014) .....	20
<i>United States v. U.S. Gypsum Co.</i> , 333 U.S. 364 (1948) .....	22

## US Code

38 U.S.C. § 7104 .....	15, 16
38 U.S.C. § 7261 .....	20, 22
38 U.S.C. § 1117 .....	passim
38 U.S.C. § 1101 .....	17

## Regulations

38 C.F.R. § 3.307 .....	21
38 C.F.R. § 3.309 .....	passim
38 C.F.R. § 3.317 .....	8, 11, 12

**Record Before the Agency**

R. 1 (BVA Decision) .....	2
R. 6 (BVA Decision) .....	3
R. 9 (BVA Decision) .....	9
R. 10-11(BVA Decision).....	passim
R. 11 (BVA Decision) .....	passim
R. 65 (Statement of the Case).....	2, 21
R. 88 (2015 C&P Examination) .....	3, 10, 21, 22
R. 1426 (2009 Pre-bronchoscopy Evaluation) .....	9
R. 1893 (2008 Medical Study Re. Appellant's Lung Condition) .....	9
R. 1923 (2007 Patholgy Report).....	9
R. 2460 (2015 C&P Note).....	2, 21
R. 2461 (2015 C&P Note).....	2
R. 3258 (2008 VA Letter) .....	2

## STATEMENT OF THE ISSUES

### I.

**WHETHER THE BOARD OF VETERANS APPEALS ERRONEOUSLY CONCLUDED THAT PRESUMPTIVE SERVICE CONNECTION UNDER 38 U.S.C. § 1117 (PERSIAN GULF WAR) DID NOT APPLY?**

### II.

**WHETHER THE BOARD OF VETERANS APPEALS REASONS OR BASES FOR DENYING APPELLANT SERVICE CONNECTION UNDER THE PERSIAN GULF WAR PRESUMPTION OF 38 U.S.C.S. § 1117 ARE ADEQUATE?**

### III.

**WHETHER THE BOARD OF VETERANS APPEALS WAS CLEARLY ERRONEOUS IN RELYING ON AN INADEQUATE UNSUPPORTED NEGATIVE MEDICAL OPINION TO DENY APPELLANT SERVICE CONNECTION UNDER THE ONE YEAR PRESUMPTION OF 38 C.F.R. § 3.309?**

## STATEMENT OF THE CASE

### A. Proceedings below.

Appellant appeals the 22 June 2015 decision of the Board of Veterans Appeals denying him service connection for his lung condition / sarcoidosis. R. 1.

### B. Statement of the Facts

Appellant, a Persian Gulf War veteran who served in the Southwest Area of Operations, served honorably on Active Duty in the United States Army from June 16, 1983, to September 16, 1983, and then again from January 16, 1985, to November 30, 2005. R. 65.

In April 2007, as part of treatment for prostate cancer, Appellant received a chest x-ray that showed abnormal lung conditions. R. 2460. A follow-up CT scan was performed in June 2007 that confirmed a number of abnormal lung conditions. *Id.*

Around June 1, 2007, Appellant made a claim for compensation based on the lung condition. R. 3258. This claim was, obviously, denied. *Id.*

Additional follow up CT scan were performed in 2008. R. 2460. The changes in the scans were interpreted as “highly suggestive of sarcoidosis.” *Id.* However, later -- in 2009 -- a VA medical examination noted that Appellant’s 2007 bronchoscopy came back as “undiagnostic.” R. 1426. Additional CT scans were taken in 2009, 2010, and 2013. R. 2461.

In January 2015, Appellant was sent for a C&P examination to determine the etiology of his lung condition. R. 6. The examiner stated the following:

Veteran's sarcoidosis was found incidentally in 4/07 on routine CXR screening pre-operatively for prostate cancer. Veteran left military service 11/2005. I can

only speculate as to when Veteran's CXR became abnormal, as 5-10% of sarcoid patients present without symptoms (such as in this Veteran). Thus, I can only speculate as to whether Veteran's sarcoidosis was incurred during military service, or even in the year post-military discharge (11/2005-11/2006). Veteran's CXR could have become abnormal only early in 2007.

Sarcoidosis is a chronic granulomatous disease of unknown origin; it occurs across the general population. In addition, current medical literature does not link the development of, or aggravation of, sarcoidosis to any specific Gulf War environmental hazards. Therefore, it is my medical opinion that it is less likely as not (less than 50/50 probability) that the Veteran's sarcoidosis is related to a specific exposure event experienced by the Veteran during service in Southwest Asia.

R. 88.

The BVA recognized the potential applicability of the Persian Gulf War presumption of service connection to Appellant. R. 7. However, without ever discussing whether Appellant's lung condition met the requirements of "qualifying chronic disability" the BVA found the presumption inapplicable stating,

In the case at hand, the January 2015 examiner is a physician who is qualified through education, training, or experience to provide competent medical evidence under 38 C.F.R. § 3.159(a)(1). *See Cox v. Nicholson*, 20 Vet. App. 563 (2007). The examiner thoroughly reviewed the claims file and interviewed and examined the Veteran. The examiner supported the opinion through citation to the Veteran's pertinent medical history, and he explained the basis for finding that the lung condition is not the result of the Veteran's service. The examiner stated it would be speculative to opine as to whether the Veteran contracted a lung disease in service, as the Veteran was free of symptoms when the disease was accidentally discovered two years after separation from service in 2007 on a routine chest x-ray screening pre-operatively for prostate cancer. Crucially, the examiner found that the Veteran's chest x-ray could have become abnormal only as early as in 2007, which is after service. Crucially, the examiner also clearly determined that there was no medical basis on which to support a finding that the Veteran's lung condition was related to environmental exposures in service. The Board finds the January 2015 VA examiner's opinion to be highly probative to the question at hand. Though there are VA treatment records pertaining to the Veteran's disability that note the Veteran's lung condition was of unknown etiology, this finding is consistent with the VA examiner's explanation that sarcoidosis is a chronic granulomatous disease of unknown origin that occurs across the general

population, but as further explained by the VA examiner, there is not a medically sound basis routed in medical literature that links the disease to Gulf War environmental hazards. Thus, there is affirmative evidence that the disability is not due to service in the Gulf War. Also, the examiner noted that the prior 1995 positive PPD and prophylactic treatment for this was not related to, or a causal factor in, the development of sarcoidosis. Consequently, the evidence does not show that the Veteran has a qualifying chronic disability (Le., an undiagnosed illness, a medically unexplained chronic multi-symptom illness, or a diagnosed illness that VA determined warranted a presumption of service connection). Therefore, service connection is not available under 38 U.S.C.A. § 1117; 38 C.F.R. § 3.317.

R. 10-11.

## **SUMMARY OF THE ARGUMENTS**

### **I.**

The Board of Veterans Appeals (BVA) denied Appellant presumptive service connection under 38 U.S.C.S. § 1117. Although the BVA purportedly analyzed the Persian Gulf War Presumption Rules, its reason(s) for finding no service connection based on the presumption is not entirely clear. It either determined that Appellant had no “qualifying chronic disability,” or it determined that despite a qualifying condition there was affirmative evidence in the record showing that the qualifying chronic disability was not incurred during service in the Persian Gulf War.

To the extent the BVA’s decided that Appellant’s lung condition / sarcoidosis was not a qualifying chronic disability, it is incorrect as the lung condition is a qualifying “undiagnosed illness,” or in the alternative, Appellant’s sarcoidosis is a “medically unexplained chronic multisymptom illness.”

To the extent that the BVA decided affirmative evidence existed to rebut the presumption of service connection it is wrong in that it relied on a lack of available medical evidence linking Appellant’s condition to his Gulf War service when the presumption of 38 U.S.C.S. § 1117 is specifically designed to compensate veterans for illnesses of unknown etiology.

### **II.**

In denying Appellant presumptive service connection under 38 U.S.C. § 1117 the Board of Veterans Appeals purported to put forth its reasons or bases for the denial within a single paragraph of the decision. Because it is unclear what that paragraph is

meant to say, what theories of service connection the Board was actually analyzing, what standards the Board used to deny the connection, or what burdens the Board put on the Appellant in making the decision, the Board's reasons or bases are inadequate.

### **III.**

In denying presumptive service connection under 38 C.F.R. § 3.309 for Appellant's lung condition, the Board of Veterans Appeals relied on an inadequate medical opinion. The opinion was specifically inadequate insofar as it purported to set a date as to when Appellant's lung condition was first manifest without providing any data, explanation, or analysis to support the opinion.

## Argument

### I.

#### **THE BOARD OF VETERANS APPEALS ERRONEOUSLY CONCLUDED THAT PRESUMPTIVE SERVICE CONNECTION UNDER 38 U.S.C. § 1117 (PERSIAN GULF WAR) DID NOT APPLY.**

#### **Standard of Review**

An agency's interpretation of a statute or regulation is a question of law reviewed de novo. *Lane v. Principi*, 339 F.3d 1331, 1339 (Fed. Cir. 2003). Mixed questions of law and fact are reviewed under an arbitrary, capricious, or abuse of discretion standard. *Westberry v. West*, 12 Vet.App, 510, 515 (1999).

#### **Law and Analysis**

Although the BVA analyzed the Persian Gulf War Presumption Rules, its reason(s) for finding no service connection based on the presumption is not entirely clear. R. 10-11. It either determined that Appellant had no "qualifying chronic disability," or it determined that despite a qualifying condition there was affirmative evidence in the record showing that the qualifying chronic disability was not incurred during service in the Persian Gulf War. *Id.* As discussed below, either conclusion is erroneous.

To be entitled to presumptive service connection under the special rules of 38 U.S.C.S. § 1117, the claimant must satisfy three requirements: (1) the veteran must qualify as a Persian Gulf War veteran; (2) the veteran must suffer from "a qualifying chronic disability" and (3) the particular qualifying chronic disability must have become manifest during active military service in the Southwest Asia theater of operations or to a degree of 10 percent at any time since the veteran's return from active duty in

Southwest Asia. There is no question of Appellant's status as a Persian Gulf War Veteran. Instead, the BVA seems to have possibly hinged its denial on the second prong; whether Appellant suffered from a qualifying chronic disability.

**A. The BVA opinion erroneously found no “qualifying chronic disability.”**

In its opinion, the BVA stated, “the evidence does not show that the Veteran has a qualifying chronic disability (i.e., an undiagnosed illness, a medically unexplained chronic multi-symptom illness, or a diagnosed illness that the VA determined warranted a presumption of service connection).” R. 11. “Therefore, service connection is not available under 38 U.S.C.A. § 1117; 38 C.F.R. § 3.317.” *Id.*

A “qualifying chronic disability” means any of the following:

- (A) An undiagnosed illness.
- (B) A medically unexplained chronic multisymptom illness (such as chronic fatigue syndrome, fibromyalgia, and irritable bowel syndrome) that is defined by a cluster of signs or symptoms.
- (C) Any diagnosed illness that the Secretary determines in regulations . . . warrants a presumption of service connection.

38 U.S.C.S. § 1117(a)(2).

38 C.F.R. § 3.317 further states,

Signs or symptoms of undiagnosed illness and medically unexplained chronic multisymptom illnesses. For the purposes of paragraph (a)(1) of this section, signs or symptoms which may become manifestations of undiagnosed illness or medically unexplained chronic multisymptom illness include, but are not limited to: [...] (8) Signs or symptoms involving the respiratory system (upper or lower).

1. *BVA erroneously found Appellant not to have an “undiagnosed illness.”*

Without explicitly stating, the BVA seemed to find that Appellant did not qualify

under the “*undiagnosed illness*” prong of the definition of “qualifying chronic disability” because Appellant in fact received a diagnosis of sarcoidosis.

The BVA states “the examiner reviewed the Veteran’s claims file and noted the 2007 diagnosis of sarcoidosis, and the Veteran’s various CT scans of the chest showing lung disease.” R. 9. While Appellant’s 2015 examination did state that Appellant had a 2007 diagnosis of sarcoidosis (R. 84), a review of the record shows no such diagnosis.

Appellant’s June 2007 report in reference to Appellant’s lungs has a section relating to “Diagnosis,” but makes no mention of sarcoidosis. R. 1923. While an August 2008 medical report notes that Appellant’s condition is “suggestive of sarcoidosis” (R. 1893), a later medical report notes that the June 2007 examination of Appellant’s lungs was “nondiagnostic” meaning there was not enough evidence to make a diagnosis. R. 1426.

Thus, it appears that while at some point there were concerns that Appellant may have sarcoidosis, he was never formally diagnosed with the condition. Therefore, despite the 2015 examination, Appellant’s lung condition remains an “undiagnosed illness” related to his respiratory system that is, therefore, a “qualifying chronic disability.”

*2. The BVA erroneously found Appellant did not have a medically unexplained chronic multisymptom illness that is defined by a cluster of signs or symptoms.*

Even if Appellant did properly receive a diagnosis of sarcoidosis, Appellant still qualified under the “medically unexplained chronic multisymptom illness ...that is

defined by a cluster of signs or symptoms” prong of the definition of “qualifying chronic disability.”

Sarcoidosis is by definition a chronic multisymptom illness defined by a cluster of signs or symptoms. *See* 38 C.F.R. § 3.309 (including sarcoidosis in a list of chronic diseases); R. 1893 (noting the multiple symptoms of Appellant’s lungs including “several nodular densities,” “bilateral hilar and subcarinal adenopathy,” and “a left adrenal nodular” which are “suggestive of sarcoidosis.”); The Foundation for Sarcoidosis Research, at <https://www.stopsarcoidosis.org/patient-resources/what-is-sarcoidosis/> (stating “Sarcoidosis is a multi-symptom disorder.”). Further, sarcoidosis is medically unexplained. *See* R. 88 (stating, “Sarcoidosis is a chronic granulomatous disease of *unknown origin*.”)(emphasis added); and R. 1929 (medical note stating Appellant’s lung disease was of “unknown etiology”).

Although not binding, a similar conclusion was reached in the unpublished case *Muller v. Gibson*. 2014 WL 2452978 (Court of App. for Vet. Claims 2014). In *Muller*, the Court considered whether the BVA’s reasons or bases were adequate for denying service connection for Muller’s sarcoidosis pursuant to the definition of medically unexplained chronic multi-symptom illness. *Id.* at 2. In *Muller*, the BVA found that Muller’s sarcoidosis did not meet the definition of medically unexplained chronic multi-symptom illness as the illnesses were “well documented” in Muller’s medical record. *Id.* The Court noted that, “that sarcoidosis is defined as “a chronic, progressive systemic granulomatous reticulosis of *unknown etiology*.” *Id.* (citing DORLAND’S at 1668)(emphasis in original). The Court found that “The Board [did] not address the

etiology and pathophysiology of Mr. Muller's sarcoidosis other than finding that it did not manifest during, or as a result of, service, which is not a requirement of § 3.317(a)(2)(ii).” *Id.* at 3. The Court went on to say, “Moreover, the Board overlooks that the record is replete with evidence of Mr. Muller experiencing signs or symptoms that the regulation explicitly states are associated with medically unexplained chronic multisymptom illnesses, including: fatigue, headaches, neuropsychological issues, gastrointestinal signs or symptoms, and problems with the respiratory system.” *Id.* at 2.

Similar to *Muller*, the BVA in Appellant’s case has misinterpreted 38 C.F.R. § 3.317(a)(2) and misapplied it to Appellant’s sarcoidosis. The BVA did no analysis of 38 C.F.R. § 3.317(a)(2), apparently overlooked the signs in the record that Appellant had respiratory system problems, and ultimately found sarcoidosis – an illness defined by its unknown etiology -- did not qualify as a “medically unexplained chronic multisymptom illness” because the examining doctor could not opine about its etiology. R. 11.

**B. The BVA opinion erroneously found “affirmative evidence” that the qualifying chronic disability was not incurred during service in the Persian Gulf War.**

The BVA also seems to deny the presumptive service connection by stating that “there is affirmative evidence that the disability is not due to service in the Gulf War.”

R. 11. This conclusion is erroneous.

It is correct that even if a veteran satisfies the three basic requirements in 38 U.S.C.S. § 1117 for service connection, the VA may be able to avoid finding a service connection if there is affirmative evidence showing one of the following: that the qualifying chronic disability was not incurred during service in the Persian Gulf War;

that it was caused by a supervening condition or event after the veteran left the area of the Persian Gulf; or that it is the result of willful misconduct or the abuse of alcohol or drugs by the veteran. 38 C.F.R. § 3.317(a)(7)(i)-(iii). However, the BVA's interpretation of this rule – as discussed below -- would turn the definitions of “qualifying chronic disability” under 38 U.S.C.S. § 1117(a)(2) into a nonsensical Catch-22.

As a basis for “affirmative evidence”, the BVA cited the 2015 medical opinion in the C&P examination that stated, “Though there are VA treatment records pertaining to Veteran’s disability that note Veteran’s lung condition was of unknown etiology, this finding is consistent with the VA examiner’s explanation that sarcoidosis is a chronic granulomatous disease of unknown origin that occurs across the general population ... [and] *there is not a medically sound basis routed in medical literature that links the disease to Gulf War environmental hazards.*” R. 11 (emphasis added). In essence, this attempts to establish a lack of medical evidence as affirmative evidence; in other words, since the medical community cannot explain what causes the disease, exposures in the Gulf War could not have caused the disease. This reasoning is completely against the purpose of the Persian Gulf War Presumption, as well as the definitions, of “qualifying chronic disability.” The presumption exists precisely because the etiology is unknown. *See Gutierrez v. Principi*, 19 Vet.App. 1, 7 (2004)(stating, “Congress has decided as a matter of policy, stemming at least in part from difficulty of proof, that, even though a Persian Gulf War veteran's symptoms may not at this time be attributed to a specific disease, the symptoms may nonetheless be related to conditions in the Southwest Asia

theater of operations and, for that reason, are presumed to be service connected.”) The unknown origin is exactly why “qualifying chronic disability” is defined as an undiagnosed illnesses and medically *unexplained* illnesses.

Thus, the BVA’s use of a lack of understanding of the etiology of sarcoidosis as affirmative evidence to prevent establishing service connection based on a legal presumption that is rooted in the “medically unexplained” is error.

### **C. Conclusion.**

Because Appellant’s lung condition / sarcoidosis qualifies for a presumptive service connection as a qualifying chronic disability, and there is a lack of competent affirmative evidence to rebut the presumption, Appellant is entitled to service connection for his condition. In the alternative, vacature and remand for readjudication is required for the BVA to properly address whether Appellant’s lung condition / sarcoidosis qualifies for a presumptive service connection as a qualifying chronic disability.

## II.

### **THE BOARD OF VETERANS APPEALS REASONS OR BASES FOR DENYING APPELLANT SERVICE CONNECTION UNDER THE PERSIAN GULF WAR PRESUMPTION OF 38 U.S.C.S. § 1117 ARE INADEQUATE.**

#### **Standard of Review**

An agency's decision must be supported by adequate reasons and bases. *Gilbert v. Derwinski*, 1 Vet.App. 49 (1990); 38 U.S.C. § 7104(d)(1). As there is no deference to give in deciding whether adequate reasons and bases were provided, the adequacy of the reasons and bases is reviewed de novo. *See Salve Regina College v. Russell*, 499 U.S. 225, 238 (1991)(stating, [w]hen de novo review is compelled, no form of appellate deference is acceptable.”)

#### **Law and Analysis**

In denying Appellant presumptive service connection under 38 U.S.C.S. § 1117 the Board of Veterans Appeals purported to put forth its reasons or bases for the denial within a single paragraph of the decision. *See* R. 10-11. Because it is unclear what that paragraph is meant to say, what theories of service connection the Board was actually analyzing, what standards the Board used to deny the connection, or what burdens the Board put on the Appellant in making the decision, the Boards reasons or bases are inadequate.

“The Board is required to consider all evidence of record and to consider, and discuss in its decision, all ‘potentially applicable’ provisions of law and regulation.” *Pierce v. Principi*, 18 Vet.App. 440 (2004)(citations omitted). “The Board is also required to include in its decision a written statement of the reasons or bases for its

findings and conclusions on all material issues of fact and law presented on the record; that statement must be adequate to enable an appellant to understand the precise basis for the Board's decision, as well as to facilitate informed review in this Court.” *Id.* (citing 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Gilbert*, 1 Vet.App. at 56-57 (1990)). The Supreme Court stated the requirement thusly,

If the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable. It will not do for a court to be compelled to guess at the theory underlying the agency's action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive.

*SEC v. Chernery (Chenery II)*, 332 U.S. 194 (1947).

As stated in Issue I above, the BVA’s reasoning for deciding that the Persian Gulf War Presumption of 38 U.S.C.S. § 1117 is not clear. In a single paragraph, the Board appears to have mixed a number service-connection theories without clearly explaining their applicability or lack thereof. R. 10-11. In one sentence of the paragraph the Board states “Crucially, the examiner found that the Veteran's chest x-ray could have become abnormal only as early as in 2007, which is after service.” *Id.* It is unclear why this opinion would be “crucial” to an analysis regarding the Gulf War Presumption, which is the service-connection theory the paragraph purports to address. This opinion seems to only be “crucial” to a “manifested within one year” presumption of 38 U.S.C.S. § 1101. In the next sentence the Board states, “Crucially, the examiner also clearly determined that there was no medical basis on which to support a finding that the Veteran's lung condition was related to environmental exposures in service.” R. 11. This opinion would appear to only be relevant to a “direct service connection” theory, which, again,

has no bearing upon the applicability of the Gulf War Presumption. The paragraph goes on to state, “as further explained by the VA examiner, there is not a medically sound basis routed in medical literature that links [Appellant’s] disease to Gulf War environmental hazards.” R. 11. This, again, seems to be discussing a direct service connection, as opposed to a presumptive service connection.

No where in this paragraph – which is the only paragraph where the BVA purports to address service connection under 38 U.S.C. § 1117 – does the BVA analyze whether Appellant’s lung condition / sarcoidosis qualifies as a chronic disability under 38 U.S.C.A. § 1117. *See* R. 10-11. Instead the Board, as stated above, discusses other service connection theories and then in a conclusory fashion states,

Consequently, the evidence does not show that the Veteran has a qualifying chronic disability (i.e., an undiagnosed illness, a medically unexplained chronic multi-symptom illness, or a diagnosed illness that VA determined warranted a presumption of service connection). Therefore, service connection is not available under 38 U.S.C.A. § 1117; 38 C.F.R. § 3.317.

R. 10-11.

To compound the confusion, the Board’s next sentence of the next paragraph states, “The Board notes that the only contrary opinion of record comes from the Veteran himself, who believes there is a link between his in-service environmental exposure and his current lung condition.” R. 11. First, it is unclear to whose opinion the Appellant’s opinion is supposed to be contrary to; is it the medical examiner’s opinion of a lack of a link between the disease and Gulf War environmental hazards, or is it contrary to the BVA’s opinion that service connection was not available pursuant to 38 U.S.C.A. § 1117?

But, more importantly, Appellant's "contrary opinion" would only have relevance to a "direct service connection" theory. By saying that Appellant's opinion is contrary to either the examiner's opinion or the Board's opinion that were put forth in the paragraph directly proceeding the "contrary opinion," the Board is implicitly saying one of two things; either that the preceding paragraph dealt with direct service connection, rather than the Gulf War Presumption, or that Appellant had burden to establish a link between his condition and the environmental hazards in order to qualify for the Gulf War Presumption.

Therefore, it is unclear what service connection theory or theories the Board was analyzing in that paragraph. It is further unclear what standards the Board used to analyze the theory or theories, or what burdens the Board put on Appellant when making its decision. Because of this, it is impossible for Appellant to decipher what exactly the Board decided or how it decided it so that Appellant can brief the issue(s). Further, it leaves this Honorable Court to "guess at the theory underlying the agency's action" and "chisel that which must be precise from what the agency has left vague and indecisive." Therefore, the Board's reasons or bases are inadequate.

### III.

**THE BOARD OF VETERANS APPEALS WAS CLEARLY ERRONEOUS IN RELYING ON AN INADEQUATE UNSUPPORTED NEGATIVE MEDICAL OPINION TO DENY APPELLANT SERVICE CONNECTION UNDER THE ONE YEAR PRESUMPTION OF 38 C.F.R. § 3.309 BECAUSE THE NEGATIVE MEDICAL OPINION CONTAINED NO EXPLANATION OR ANALYSIS TO SUPPORT THE OPINION.**

#### **Standard of Review**

“Whether a medical opinion is adequate is a finding of fact that the Court reviews under the ‘clearly erroneous’ standard.” *Taylor v. McDonald*, 27 Vet.App. 158, 164 (2014)(citing 38 U.S.C. § 7261(a)(4); *D’Aries v. Peake*, 22 Vet.App. 97, 104 (2008)). “A finding is ‘clearly erroneous’ when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.” *Id.* (citations omitted).

#### **Law and Analysis**

The BVA found that because Appellant’s 2015 C&P examination contained a medical opinion that “Veteran’s chest x-ray could only have become abnormal only as early as in 2007,” the presumption for service-connection of chronic diseases that manifest within one year of discharge under 38 C.F.R. § 3.309 was inapplicable. Because this finding relies wholly on a negative medical opinion that does not contain a rational for the opinion, the BVA’s finding is erroneous.

38 C.F.R. § 3.309 establishes that certain chronic diseases “shall be granted service connection although not otherwise established as incurred in or aggravated by service if manifested to a compensable degree within the applicable time limits under

§3.307[.]” Sarcoidosis is one of the enumerated chronic diseases. 38 C.F.R. § 3.309(a). Thus, under 38 C.F.R. § 3.307 if Appellant’s lung condition / sarcoidosis was manifested within one year of his discharge he would be entitled to service connection. Appellant was discharged on November 30, 2005. R. 65. His chest x-ray that showing definitive manifestation of lung disease occurred in April 2007, five months after the one-year presumptive period closed. R. 2460. This by itself does not mean that the lung disease was not manifest five months earlier, especially considering the doctor’s opinion that Appellant was asymptomatic at the time. *See* R. 88. It only means that the chest x-ray was the first chance the medical community had to observe the disease.

To establish that Appellant’s lung disease was not present on November 30, 2006, (during the one year presumptive period) but was present five months later, the BVA relied upon a single unsupported line in the C&P medical examiner’s report; as explained in the BVA’s opinion they found that, “Crucially, the examiner found that the Veteran’s chest x-ray could have become abnormal only as early as 2007, which is after service.” R. 10-11.

However, the examiner put forth no reasoning or rationale for her opinion that a lung disease as pronounced and prominent as Appellant’s was in April 2007, could not have been manifested five months before in November 2006. There is just the bare conclusion that “Veteran’s CXR could have become abnormal only as early in 2007.” R. 88. Additionally, without an analysis to give context to this statement, it is unclear what the examiner actually meant. Is she using the word “could” to mean “possible;” as in, “it is possible that the condition only manifested in 2007, (but it is also possible that the

condition manifested earlier)”? Or is she saying, “the condition could only have become manifest in 2007; it could not have manifested earlier”?

“Whether a medical opinion is adequate is a finding of fact, which the Court reviews under the ‘clearly erroneous’ standard.” *El-Amin v. Shinseki*, 26 Vet.App. 136, 139 (2013)(citing 38 U.S.C. § 7261(a)(4); *D’Aries v. Peake*, 22 Vet.App. 97, 103 (2008); *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990)). “A factual finding is ‘clearly erroneous’ when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.” *Id.* (citing *Hersey v. Derwinski*, 2 Vet.App. 91, 94 (1992) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 92 L.Ed. 746 (1948))).

To be adequate, a medical opinion should contain a sound analysis of how the facts led to the conclusion. *Nieves-Rodriguez v. Peake*, 22 Vet. App. 295, 304 (2008)(citing *Stefl v. Nicholson*, 21 Vet. App. 120, 125 (2007)). Where an examiner does not provide any explanation or analysis to support his or her negative opinion that a condition is not linked to service, the BVA errs in relying on that opinion because it contained absolutely no rationale. *Id.* “Neither a VA medical examiner report nor a private medical opinion is entitled to any weight in a service-connection or rating context if it contains only data and conclusions.” *Id.*

As stated above, the examiner’s conclusion is ambiguous. But further -- if the statement is read to mean that 2007 was the earliest Appellant’s condition could have become manifest -- without an analysis or rationale by the examiner to explain her negative opinion that Appellant’s chest x-ray could not have been abnormal before the

2007 examination it was error for the BVA to rely upon the opinion to foreclose service connection via 38 C.F.R. § 3.309. Reading the record as a whole, it appears that the examiner's opinion was based solely on the fact that the 2007 examination was the first opportunity the medical community had to examine Appellant's chest after he was discharged. She does not analyze the extensiveness of Appellant's lung condition in order to determine if a retrograde analysis could be performed to determine when Appellant would have first suffered from the condition; instead she rendered a bare conclusion with no supporting facts. The BVA's reliance on this opinion is erroneous. The BVA should have remanded the case for additional follow up on the origin of the opinion or additional examination to determine if it was at least as likely as not that Appellant's lung disease was manifest to a compensable degree in November 2006.

Respectfully Submitted,

/s/ Luke D. Wilson  
LUKE D. WILSON  
MS Bar: 102198  
PO Box 1926  
Gulfport, MS 39502  
228.731.4003

## **CERTIFICATE OF SERVICE**

I, LUKE D. WILSON, certify that today, 13 January 2016, a copy of the brief for appellant was served upon the Court of Appeals for Veterans Claims, and Counsel for the Secretary of Veterans Affairs by filing it through electronic case filing.

/s/ Luke D. Wilson  
LUKE D. WILSON