

**Vet. App. No. 14-1811**

---

**IN THE UNITED STATES COURT  
OF APPEALS FOR VETERANS CLAIMS**

---

**DAVID P. HILL,**  
Appellant,

v.

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

---

**ON APPEAL FROM THE  
BOARD OF VETERANS' APPEALS**

---

**SUPPLEMENTAL MEMORANDUM OF THE APPELLEE,  
SECRETARY OF VETERANS AFFAIRS**

---

**LEIGH A. BRADLEY**  
General Counsel

**MARY ANN FLYNN**  
Chief Counsel

**EDWARD V. CASSIDY, JR.**  
Deputy Chief Counsel

**REBECCA A. BAIRD**  
Senior Appellate Attorney  
Office of the General Counsel (027J)  
U.S. Department of Veterans Affairs  
810 Vermont Avenue, N.W.  
Washington, D.C. 20420  
(202) 632-6903  
Attorneys for Appellee

## TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	iii
QUESTIONS PRESENTED ..	1
SUMMARY OF THE SECRETARY’S ARGUMENT.....	2
THE SECRETARY’S ARGUMENT .....	2
1. Did the Board establish that Mr. Hill was a Veteran and, if so, is the Board’s determination regarding Mr. Hill’s Veteran status a favorable finding of fact that the Court may not disturb, pursuant to <i>Medrano v. Nicholson</i> , 21 Vet.App. 165, 170 (2007)? .....	2
2. If a claimant establishes Veteran status by showing that a disability was incurred in or aggravated during a period of [active duty for training] ACDUTRA, does the claimant’s Veteran status then entitle him to the presumption of aggravation of a <i>different</i> , preexisting disability claimed to have been aggravated during the same period of ACDUTRA? .....	4
3. If the answer to Question 2 is yes, does the claimant need to have a military entrance examination prior to his period of ACDUTRA or is other evidence acceptable to establish the baseline of his preexisting condition? .....	7
CONCLUSION .....	10

## TABLE OF AUTHORITIES

### FEDERAL CASES

<i>Biggins v. Derwinski</i> , 1 Vet.App. 474 (1991) .....	<i>passim</i>
<i>Donnellan v. Shinseki</i> , 24 Vet.App. 167 (2010) .....	1, 7, 8, 9
<i>Medrano v. Nicholson</i> , 21 Vet.App. 165, 170 (2007) .....	1, 2, 3
<i>Paulson v. Brown</i> , 7 Vet.App. 466 (1995) .....	1, 6, 7
<i>Smith v. Shinseki</i> , 24 Vet.App. 40, 48 (2010) .....	<i>passim</i>
<i>Struck v. Brown</i> , 9 Vet.App. 145, 152 (1996) .....	2, 7
<i>Wagner v. Principi</i> , 370 F.3d 1089 (Fed. Cir. 2004).....	9

### FEDERAL STATUTES

38 U.S.C. § 101(2) .....	4
38 U.S.C. § 101(24) .....	2, 4
38 U.S.C. § 1111 .....	3
38 U.S.C. § 1153 .....	<i>passim</i>
38 U.S.C. § 7252 .....	1

**IN THE UNITED STATES COURT OF APPEALS  
FOR VETERANS CLAIMS**

<b>DAVID P. HILL,</b>	)	
	)	
Appellant,	)	
	)	
v.	)	Vet.App. No. 14-1811
	)	
<b>ROBERT A. McDONALD,</b>	)	
Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

**SECRETARY'S SUPPLEMENTAL MEMORANDUM OF LAW  
IN RESPONSE TO THE COURT'S ORDER  
DATED MARCH 29, 2016**

Appellee, Robert A. McDonald, Secretary of Veterans Affairs, hereby submits this Supplemental Memorandum of Law in response to the Court's March 29, 2016, Order. The Secretary will address the following points in turn, which correspond to the questions enumerated in the Court's order:

(1) Did the Board establish that Mr. Hill was a veteran and, if so, is the Board's determination regarding Mr. Hill's veteran status a favorable finding of fact that the Court may not disturb, pursuant to *Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007)?

(2) If a claimant establishes veteran status by showing that a disability was incurred in or aggravated during a period of ACDUTRA, does the claimant's veteran status then entitle him to the presumption of aggravation of a *different*, preexisting disability claimed to have been aggravated during the same period of ACDUTRA?

In responding to this question, the Court asks both parties to discuss *Donnellan v. Shinseki*, 24 Vet.App. 167 (2010); *Smith v. Shinseki*, 24 Vet.App. 40, 48 (2010); *Paulson v. Brown*, 7 Vet.App. 466 (1995); and *Biggins v. Derwinski*, 1 Vet.App. 474 (1991).

(3) If the answer to Question 2 is yes, does the claimant need to have a military entrance examination prior to his period of ACDUTRA or is other evidence acceptable to establish the baseline of his preexisting condition?

### **SUMMARY OF THE SECRETARY'S ARGUMENT**

The Secretary contends that the Board's determination that Appellant is a Veteran as defined at 38 U.S.C. § 101(24) is a favorable finding of fact that the Court may not disturb.

Further, where a claimant establishes Veteran status by showing that a disability was incurred in or aggravated during a period of ACDUTRA, his Veteran status generally would then entitle him to the presumption of aggravation of a different, preexisting disability claimed to have been aggravated during the same period of ACDUTRA. However, in order to invoke the presumption of aggravation under 38 U.S.C. § 1153, such an ACDUTRA claimant must establish a baseline for determining aggravation of that condition through an entrance examination pertaining to the relevant period of ACDUTRA, or the submission of other, relevant medical evidence contemporaneous to the entry into the relevant period of ACDUTRA.

### **THE SECRETARY'S ARGUMENT**

**1. Did the Board establish that Mr. Hill was a Veteran and, if so, is the Board's determination regarding Mr. Hill's Veteran status a favorable finding of fact that the Court may not disturb, pursuant to *Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007)?**

In response to the Court's first inquiry, a determination of status is a finding of fact, which, if favorable, the Court may not disturb. See *Struck v. Brown*, 9

Vet.App. 145, 152 (1996) (whether a claimant has the requisite status as veteran necessarily includes a determination regarding active duty service and this is a finding of fact reviewed under the “clearly erroneous” standard of review), *abrogated on other grounds by Gardner v. Shinseki*, 22 Vet.App. 415 (2009); 38 U.S.C. § 7261(a)(4) (2015) (Court shall set aside or reverse “a finding of material fact adverse to the claimant.”).

In the April 7, 2014, Board decision on appeal, the Board stated that Appellant “had a period of ACDUTRA from June 7, 1997 to June 21, 1997. Service connection has been established for a right knee disability based on this June 1997 period, which is therefore considered to be a period of active service.” R. 10. The Board also specifically stated, “the appellant has achieved Veteran status with regard to the June 7-21, 1997 period of ACDUTRA.” R. 18. Thus, the Board found that Appellant had a qualifying period of active service so as to establish Veteran status. These are favorable findings which cannot be disturbed. *Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007); 38 U.S.C. § 7261(a)(4).

However, as the Court held in *Smith v. Shinseki*, 24 Vet.App. 40, 45 (2010), when it addressed the presumption of soundness, “Veteran status . . . is not the only requirement” for that presumption to apply. The Court found that 38 U.S.C. § 1111 “requires that there be an examination prior to entry into the period of service on which the claim is based. . . . In the absence of such an examination, there is no basis from which to determine whether the claimant was

in sound condition upon entry into that period of service on which the claim is based.” As discussed further *infra*, the Court should reach a similar conclusion with regard to the presumption of aggravation at 38 U.S.C. § 1153 — that establishing Veteran status does not end the inquiry of whether the presumption of aggravation should apply.

**2. If a claimant establishes Veteran status by showing that a disability was incurred in or aggravated during a period of ACDUTRA, does the claimant’s Veteran status then entitle him to the presumption of aggravation of a *different*, preexisting disability claimed to have been aggravated during the same period of ACDUTRA?**

A claimant who establishes Veteran status by showing that a disability was incurred in or aggravated during a period of ACDUTRA may then be entitled to the presumption of aggravation of a different, preexisting disability alleged to have been aggravated during the same period of ACDUTRA.

As defined in 38 U.S.C. § 101(2), a “Veteran” is a “person who served in the active military, naval or air service, and who was discharged or released therefrom under conditions other than dishonorable.” 38 U.S.C. § 101(2) (2015). Further, “active military, naval, or air service” includes “any period of active duty for training during which the individual concerned was disabled or died from a disease or injury incurred or aggravated in line of duty.” 38 U.S.C. § 101(24)(B) (2015).

In *Biggins v. Derwinski*, 1 Vet.App. 474, 477 (1991), the Court determined that “in the absence of any *other* claimed or documented disability from injury or

disease during her period of [ACDUTRA], it necessarily follows that [the claimant's] period of [ACDUTRA] was not one 'during which [appellant] was disabled . . . from a disease or injury incurred in or aggravated in line of duty.'" (emphasis added).

In his concurring opinion, Judge Kramer perceived a "Catch-22" because "Congress . . . directed that the presumption [in 38 U.S.C. § 1137] apply to those on active duty for training" but "if both disease and disability must actually be present during active duty for training, use of the presumption may never be possible," since a claimant would need to "us[e] the presumption to obtain the presumption." *Id.* at 479. He reasoned, however, that this Catch-22 could be resolved in "a case where there is *another* 'claimed or documented disability from injury or disease during . . . active duty for training.'" *Id.* (emphasis added). *Biggins*, 1 Vet.App. at 479.

Similarly, Judge Steinberg presented a hypothetical where an injury sustained during ACDUTRA could lead to the application of a presumption for another condition:

On its face, section 101(24) of title 38, U.S. Code, includes as a period of "active duty for training" (ADT) which qualifies as "active military, naval, or air service" "**any**" ADT "during which the individual concerned was disabled . . . from **a** disease or injury incurred . . . in line of duty" (emphasis added). Hence, the unassailable phrase in the Court's opinion: "In the absence of any **other** claimed or documented disability from injury or disease during [appellant's] period of active duty for training. . . ." *Ante*, at 478 (emphasis added). If the appellant, for example, had suffered a lasting back disability during service from her in-service back "sprain" suffered on January 3, 1984 (R. at 20), which she did not apparently, then that back

disability would be “a disability” that would have qualified her ADT service period as “active . . . service” within the section 101(24) definition. That would have made her eligible for the benefit of the presumption under 38 U.S.C. §§ 1131, 1137, and 1112(a)(4) (formerly §§ 331, 337, and 312(a)(4)) for multiple sclerosis arising within seven years of such service.

*Id.* (emphasis in original).

Thus, although the fact pattern presented in *Biggins* can be distinguished from the instant case, Judge Steinberg’s concurrence supports the Secretary’s position that if one disability arose from an injury or disease during ACDUTRA, the application of a presumption pertaining to a second disability can be appropriate if that disability resulted from an injury or disease during the same period of ACDUTRA.

In *Paulson v. Brown*, 7 Vet.App. 466, 470 (1995), the Court discussed *Biggins* and held that “an individual who has served only on active duty for training must establish a service-connected disability in order to achieve [V]eteran status and to be entitled to compensation.” The *Paulson* Court also held that because the claimant had not established Veteran status, “the Board did not err in concluding that the presumption of soundness was inapplicable” and also did not err in concluding that the “presumption of aggravation under 38 U.S.C. § 1153” was not applicable on the same grounds. *Id.* at 470-71.

However, neither the holding in *Biggins* nor in *Paulson* addressed what effect a disability resulting from injury or disease during ACDUTRA would have on a claim based on aggravation of a different, preexisting condition during that

same period of ACDUTRA. Similarly, *Donnellan v. Shinseki*, 24 Vet.App. 167 (2010) and *Smith v. Shinseki*, 24 Vet.App. 40 (2010) addressed aggravation of a preexisting condition during ACDUTRA, but neither Mr. Donnellan nor Ms. Smith had also sustained disability resulting from an injury or disease during the same period of ACDUTRA, so as to establish Veteran status and to be able to avail themselves of the legal presumptions.

In short, *Biggins*, *Paulson*, *Donnellan* and *Smith* are not directly on point, but the Secretary discerns nothing in those cases that contradicts the conclusion that the incurrence of a disability resulting from injury or disease during a period of ACDUTRA renders a claimant a Veteran for purposes of that period of ACDUTRA, such that he or she may be entitled to the application of the presumption of aggravation for a different, preexisting disability, claimed to have been aggravated during the same period of ACDUTRA.

**3. If the answer to Question 2 is yes, does the claimant need to have a military entrance examination prior to his period of ACDUTRA or is other evidence acceptable to establish the baseline of his preexisting condition?**

Based on the phrasing of question 3 as a corollary to question 2, and its reference to “the claimant,” the Secretary interprets question 3 as referring to an ACDUTRA Veteran who was injured during ACDUTRA and who consequently may be entitled to the presumption of aggravation of a second condition that preexisted but allegedly was aggravated during the same period of ACDUTRA.

The presumption of aggravation is codified at U.S.C. § 1153 and provides:

A preexisting injury or disease will be considered to have been aggravated by active military, naval, or air service, where there is an increase in disability during such service, unless there is a specific finding that the increase in disability is due to the natural progress of the disease.

38 U.S.C. § 1153 (2015).

As discussed above, once an ACDUTRA Veteran attains Veteran status by having incurred disability as a result of injury or disease during that period of ACDUTRA, generally, he or she may be entitled to other statutory presumptions pertaining to other disabilities incurred during the same period of ACDUTRA.

However, as a practical matter, ACDUTRA Veterans are not provided with routine examinations, as regular, military service personnel are. Therefore, in ACDUTRA-based claims, there will likely be an absence of evidence as to a condition that preexisted a period of ACDUTRA and whether that condition was aggravated during that distinct period of ACDUTRA.

As the Court suggested in *Smith*, the relevant medical evidence for an ACDUTRA claimant seeking to demonstrate aggravation of a preexisting condition necessarily would pertain to the period immediately prior to the period of ACDUTRA at issue. Thus, in accordance with *Smith*, the Secretary reasons that if relevant medical evidence existed that was contemporaneous to the ACDUTRA Veteran's entry into the relevant period of ACDUTRA, that evidence would suffice to establish a baseline as to the severity of the injury or disease for purposes of determining whether such injury or disease was aggravated during ACDUTRA.

This is also consistent with the Court's holding in *Donnellan* that 38 U.S.C. §§ 1110 and 1153 should be "read together." The *Donnellan* Court cited *Wagner v. Principi*, 370 F.3d 1089 (Fed. Cir. 2004) for the proposition that, "section 1153 creates a presumption of aggravation that is triggered *when a veteran establishes that a preexisting condition, which was noted upon entry into service, worsens during service.*" *Donnellan*, 24 Vet.App. at 174 (emphasis added).

Thus, when the two sections are read together, it is clear that the only pre-existing injuries or diseases for which the presumption of aggravation could apply would be those (a) "noted" on entry or (b) for which the available evidence rebuts the presumption of soundness at entry into the relevant period of ACDUTRA. Therefore, an ACDUTRA claimant, who sustained disability from an injury or disease during a period of ACDUTRA and who seeks to demonstrate aggravation of another, preexisting injury or disease during that same period of ACDUTRA via the presumption of aggravation at 38 U.S.C. § 1153, must establish an evidentiary baseline for the preexisting injury or disease through an entrance examination pertaining to that period of ACDUTRA, or other evidence contemporaneous with entry into the relevant period of ACDUTRA.

Finally, it is important to note that if no contemporaneous evidence were available so that the presumption of aggravation could not apply, an ACDUTRA Veteran still may demonstrate aggravation of a preexisting injury or disease without application of the presumption under 38 U.S.C. § 1153. As the Court explained in *Smith*, whereas "the presumption of aggravation only requires

evidence of an actual worsening of a preexisting condition *during* service, not caused by service,” an ACDUTRA-only claimant, i.e., without the benefit of an evidentiary presumption, must show direct evidence of 1) an increase in disability in ACDUTRA and 2) that the increase was caused by ACDUTRA. *Smith*, 24 Vet.App. at 47-48.

## CONCLUSION

**WHEREFORE**, the Secretary submits the foregoing in response to the Court’s March 29, 2016, Order.

Respectfully submitted,

**LEIGH A. BRADLEY**  
General Counsel

**MARY ANN FLYNN**  
Chief Counsel

/s/ Edward V. Cassidy, Jr.  
**EDWARD V. CASSIDY, JR.**  
Deputy Chief Counsel

/s/ Rebecca A. Baird  
**REBECCA A. BAIRD**  
Senior Appellate Attorney  
Office of General Counsel (027J)  
U.S. Department of Veterans Affairs  
810 Vermont Avenue, N.W.  
Washington, D.C. 20420  
(202) 632-6903

For Appellee,  
the Secretary of Veterans Affairs