

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.

APPELLANT'S REPLY TO APPELLEE'S BRIEF

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TABLE OF AUTHORITIES

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Pursuant to the United States Court of Appeals for Veterans Claims Rules and Procedures Rule 28(c), Appellant hereby files this, his Reply to the Appellee's Answer to Appellant's Brief.

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?

Further Argument

Issue I.

A. Regarding the lack of diagnosis of sarcoidosis as it relates to subpart (A)(1) of Appellant's brief (The BVA's erroneous finding that Appellant did not have an undiagnosed illness).

The Secretary argues that Appellant did in fact receive a diagnosis of sarcoidosis during his January 2015 C&P examination. Secretary's Brief at 6 (stating "it is apparent that the [January 2015] examiner was not reliant on an 'incidental' finding to

base her diagnosis, but on the medical evidence of record including the numerous aforementioned tests.”) This is not so.

A review of the record shows the January 2015 examiner never rendered an independent diagnosis of sarcoidosis. Instead, the examiner simply states Appellant was diagnosed in 2007 with sarcoidosis, R. 2460, and then reiterates that “Veteran’s sarcoidosis was found incidentally in 4/07[.]” R. 2464. In essence, the 2015 examiner substituted the opinion of the 2007 examiner for her own. Although, Appellant has been unable to find case law prohibiting this practice, as argued in the opening brief, Appellant never received a diagnosis of sarcoidosis in 2007. Thus, the BVA relied on a 2015 medical opinion of sarcoidosis, that in turn relied on a 2007 medical opinion of sarcoidosis, that in turn is nonexistent.

B. Regarding medically unexplained chronic multisymptom illness defined by a cluster of signs or symptoms (subpart (A)(2) of Appellant’s brief).

The Secretary argues that the ““medically unexplained chronic multisymptom illness ...that is defined by a cluster of signs or symptoms” prong of the definition of “qualifying chronic disability” is equally inapplicable to Appellant.

First, the Secretary argues that sarcoidosis is not “medically unexplained” as “the January 2015 VA respiratory condition examination specifically found that sarcoidosis was a disease that occurs across the general population and that current medical literature does not link the development or aggravation of sarcoidosis to Gulf War environmental hazards.” Secretary’s Brief at 8. This argument completely overlooks the definition of “medically unexplained” as well as the facts of the case. “Medically unexplained” means “[a] diagnosed illness without conclusive pathophysiology or

etiology[.]” 38 C.F.R. §3.317(a)(2)(ii). This is exactly the case here; the January 2015 examination noted that sarcoidosis is a disease of “unknown origin,” R. 88, and Appellant’s 2008 Progress Notes states that there was an “unknown etiology of lung disease.” R. 1926.

Next, the Secretary argues “Appellant makes little showing of any symptoms that are associated with his sarcoidosis and has made *no argument* that any symptoms overlap.” Not so. “Overlapping” simply means occurring at the same time, and, as the brief points out, the record is clear that appellant had signs and symptoms and that those signs and symptoms are overlapping. Appellant’s 2008 CT scan showed “interstitial changes in the lungs,” overlapping with “several nodular densities particularly in the right middle lung zone,” and overlapping with “bilateral hilar and subcarinal adenopathy.” R. 1893. Appellant’s 2015 examination also noted a series of overlapping signs or symptoms by stating that Appellant had (1) persistent symptoms in the form of prominent and abnormal hila, diffuse interstitial and nodular infiltrates of both lungs, large matted mediastinal and hilar lymph nodes, soft tissue pulmonary nodules in the lungs, bilateral nodular densities in the lungs, bilateral hilar adenopathy, many acute and chronic inflammatory cells interspersed with alveolar macrophages, and mild obstructive and restrictive ventilatory impairment with moderate reduction in Diffusing Capacity, (2) Chronic hilar adenopathy, (3) pulmonary involvement, and (4) progressive pulmonary disease. R. 84-86.

Next, the Secretary argues “Appellant does not argue that his symptomatology contains ‘sign or symptom’ of a medically unexplained chronic multisymptom illness

contained in 38 U.S.C. § 1117 or 38 C.F.R. § 3.317, such as: [...] signs or symptoms involving the respiratory system[.]” Secretary’s Brief at 9. This is not true. Despite the Secretary’s argument, all the signs and symptoms listed in the previous paragraph relate to Appellant’s respiratory system.

In conclusion, the Secretary’s arguments fail. 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.

Issues II and III.

By failing to address these issues, the Secretary has conceded the errors presented in them. Because of this, the Court should remand the case to the BVA to correct the errors.

“Where appellant has presented a legally plausible position in the form of a ‘relevant, fair and reasonably comprehensive’ brief, with appropriate record references ..., and the Secretary has failed to respond appropriately, the Court deems itself free to assume, and does conclude, the points raised by appellant, and ignored by the General Counsel, to be conceded.” *MacWhorter v. Derwinski*, 2 Vet.App. 133 (1992)(opinion amended on other grounds)

Appellant raised three issues in his opening brief. Each issue was briefed in a relevant, fair and comprehensive manner with the appropriate citations to the record. *See* Appellant’s Brief, pp 14-21. Despite this, the Secretary responded only to the first

issue and put forth no viewpoint or argument on Issues II or III, leaving this Court to “ferret[] out [the Secretary’s] implicit or possible contentions.” *Id.* at 135.

Under Rule 31(b) of the United States Court of Appeals for Veterans Claims Rules and Procedures, upon the failure of the Secretary to file an appropriate response, “the Court may take appropriate action.”

Based on the above, the Court should remand Issues II and III to the BVA.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, LUKE D. WILSON, certify that today, 3 May 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