

APPELLANT'S BRIEF

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

No. 15-4060

KENT S. HUGHES,

Appellant,

v.

**ROBERT A. MCDONALD,
SECRETARY OF VETERANS AFFAIRS,**

Appellee.

**Ashley C. Gautreau
175 2nd Street
Belleville MI 48111
(800) 971-4109**

Attorney for Appellant

TABLE OF CONTENTS

	Page:
Statement of the Issues	2
I. WHETHER THE CLEARLY ERRED IN FAILING TO ENSURE VA FULFILLED ITS STATUTORY DUTY TO ASSIST THE VETERAN.	
II. WHETHER THE BOARD FAILED TO SUPPORT ITS SEPTEMBER 28, 2015 DECISION WITH ADEQUATE REASONS OR BASES.	
Statement of the Case	2
Argument	4
Conclusion	12

TABLE OF AUTHORITIES

CASES	Page:
<i>Ardison v. Brown</i> , 6 Vet. App. 405 (1994)	5
<i>Barr v. Nicholson</i> , 21 Vet. App. 303 (2007)	4
<i>Caffrey v. Brown</i> , 6 Vet. App. 371 (1994)	5
<i>Combee v. Brown</i> , 34 F.3d 1039 (Fed. Cir. 1994)	11
<i>Comer v. Peake</i> , 552 F.3d 1362 (Fed. Cir. 2009)	4
<i>Gabrielson v. Brown</i> , 7 Vet. App. 36 (1994)	9
<i>Gilbert v. Derwinski</i> , 1 Vet. App. 49 (1990)	5, 9
<i>Hersey v. Derwinski</i> , 2 Vet. App. 91 (1992)	5
<i>Jaquay v. Principi</i> , 304 F.3d 1276 (Fed. Cir. 2002)	4
<i>Littke v. Derwinski</i> , 1 Vet. App. 90 (1990)	6, 9
<i>Nieves-Rodriguez v. Peake</i> , 22 Vet. App. 295 (2008)	7, 8
<i>Pond v. West</i> , 12 Vet. App. 341(1999)	5
<i>Reonal v. Brown</i> , 3 Vet. App. 458 (1993)	8
<i>Schafrath v. Derwinski</i> , 1 Vet. App. 589 (1991)	10
<i>Stefl v. Nicholson</i> , 21 Vet. App. 120 (2007)	6, 7
<i>Washington v. Nicholson</i> , 19 Vet. App. 362 (2005)	9, 11
STATUTES	
38 U.S.C. § 5103A	4
38 U.S.C. § 7104	9, 10
REGULATIONS	
38 C.F.R. § 3.159(c)	4
38 C.F.R. § 3.303(b)	10, 11
38 C.F.R. § 3.309(a)	11
38 C.F.R. § 4.2	5
CITATIONS TO RECORD BEFORE THE AGENCY	
R. at 2-16 (September 28, 2015 Board decision)	2
R. at 4	3
R. at 5	6, 8
R. at 15	2, 3
R. at 145 (DD214)	2
R. at 157 (STR)	3, 7, 8, 11
R. at 192-193 (STR)	2, 7, 11
R. at 226-227 (STR)	2, 7, 11

CITATIONS TO RECORD BEFORE THE AGENCY CONT'D	Page:
R. at 266 (substantive appeal)	2, 3
R. at 441 (NOD)	2, 3
R. at 523-526 (September 2010 Rating Decision)	2, 3
R. at 527-529 (June 2010 VA examination)	6
R. at 527	8
R. at 529	7, 11
R. at 584 (informal claim)	3
R. at 586-596(VA form 21-526)	3

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

KENT S. HUGHES,)	
Appellant,)	
)	Vet. App. No. 15-4060
v.)	
)	
ROBERT A. MCDONALD,)	
Secretary of Veterans Affairs,)	
Appellee.)	

BRIEF OF THE APPELLANT

Pursuant to U.S. Vet. App. R. 28 and 31, Kent S. Hughes (Appellant or Veteran or Claimant) respectfully submits to the United States Court of Appeals for Veterans Claims (Court) the initial Brief of the Appellant stating that there are errors of law contained within the Department of Veterans Affairs (DVA or VA) decision of September 28, 2015 in which the Board of Veterans' Appeals (Board or BVA) denied the Appellant's claim of entitlement to service connection for hypertension. In support of his position, Appellant relies on the information contained within the Record Before the Agency (RBA or R.) as filed with the Court and the following Brief of the Appellant.

This honorable Court has jurisdiction to review the September 28, 2015 Board decision under the authority of 38 U.S.C. §§ 7252(a), 7261(a), and 7266.

STATEMENT OF THE ISSUES

- I. **WHETHER THE CLEARLY ERRED IN FAILING TO ENSURE VA FULFILLED ITS STATUTORY DUTY TO ASSIST THE VETERAN.**
- II. **WHETHER THE BOARD FAILED TO SUPPORT ITS SEPTEMBER 28, 2015 DECISION WITH ADEQUATE REASONS OR BASES.**

STATEMENT OF THE CASE

I. Nature of the Case

The Veteran, Kent S. Hughes, appeals a September 28, 2015 decision by the Board that denied his claim of entitlement to service connection for hypertension. *See* Record (R.) at 1-16.

II. Course and Results of Proceedings Below

This appeal arises from a September 2010 Rating decision. *See* R. at 523-526. The Veteran timely submitted his notice of disagreement (NOD) (R. at 441) and, after Decision Review Officer (DRO) review, perfected his appeal (R. at 266) leading to the further denial by the Board in a decision of September 28, 2015. *See* R. at 15.

III. Statement of the Facts

The Veteran served honorably on active duty in the U.S. Army from March 1972 to June 1973. *See* R. at 145. While in service, the Veteran had at least three (3) documented high blood pressure readings. *See* R. at 226 (226-227) (Radiographic Report of 8/1/72 notes a blood pressure reading of 150/100); *see also* R. at 192 (192-193) (Clinical record of 8/3/72 documents a blood pressure reading of 170/108); R. at

157(service treatment record (STR) of 6/26/73 indicates the Veteran had a blood pressure reading of 140/80).

In July 2009, the Veteran filed a claim of entitlement to service connection for hypertension. *See* R. at 584; *see also* R. at 586-596. In a September 2010 Rating Decision, VA denied the Veteran's claim of entitlement to service connection for hypertension. *See* R. at 523-526. The Veteran timely filed a Notice of Disagreement (NOD) (R. at 441) and appealed to the Board of Veterans' Appeals (Board or BVA). *See* R. at 266.

Thereafter, in a September 28, 2015 decision, the Board denied the Veteran's claim of entitlement to service connection for hypertension. *See* R. at 15 (2-15). The Board found that the Veteran's "[h]ypertension was not manifest in service, was not manifest within one year of separation and is not related to service." R. at 4. Therefore, the Board concluded that the Veteran's "[h]ypertension was not incurred in or aggravated by service, and may not be presumed to have been incurred therein." *Id.* A timely appeal to this Honorable Court followed.

ARGUMENT

Summary

The Appellant contends that the Board clearly erred in failing to ensure VA fulfilled its statutory duty to assist the Veteran in affording him with an adequate medical examination. Further, the Board failed to support its September 28, 2015 decision with

adequate reasons or bases insofar as the Board neglected to consider all potentially applicable provisions of law and regulation.

I. THE BOARD CLEARLY ERRED IN FAILING TO ENSURE VA FULFILLED ITS STATUTORY DUTY TO ASSIST.

In accordance with the non-adversarial system of veterans' benefits created by Congress, VA has a duty to assist a claimant "in obtaining evidence necessary to substantiate the claimant's claim for a benefit under a law administered by the Secretary." 38 U.S.C. § 5103A; *see Jaquay v. Principi*, 304 F.3d 1276, 1380 (Fed. Cir. 2002) ("Congress has created a paternalistic veterans' benefits system to care for those who service their country in uniform"). The U.S. Court of Appeals for the Federal Circuit (Federal Circuit) has stated that "[t]he government's interest in veteran cases is not that it shall win, but rather that justice shall be done that all veterans so entitled receive the benefits due them." *Comer v. Peake*, 552 F.3d 1362, 1369 (Fed. Cir. 2009) (citing *Barrett v. Nicholson*, 466 F.3d 1038, 1044 (Fed. Cir. 2006)).

The duty to assist includes, *inter alia*, "providing a medical examination or obtaining a medical opinion when such an examination or opinion is necessary to make a decision on the claim." 38 U.S.C. § 5103A(d)(1) (2012); 38 C.F.R. § 3.159(c) (2011). When VA undertakes to provide a VA examination or obtain a medical opinion, it must ensure that the examination or opinion is adequate. *See Barr v. Nicholson*, 21 Vet. App. 303, 312 (2007). To be adequate, a medical opinion must be based upon consideration of the veteran's prior medical history and also describe the disability in sufficient detail so

that the Board’s “evaluation of the claimed disability will be a fully informed one.” *Ardison v. Brown*, 6 Vet. App. 405, 407 (1994) (quoting *Green v. Derwinski*, 1 Vet. App. 121, 124 (1991)); *see also Caffrey v. Brown*, 6 Vet. App. 377, 381 (1994) (“[t]he medical examination must consider the records of prior medical examinations and treatment in order to assure a fully informed examination”). If an examination report is inadequate to evaluate a disability, it is incumbent upon the rating board to return the report as “inadequate for evaluation purposes.” 38 C.F.R. § 4.2 (2013).

The Board’s determination on whether VA satisfied its duty to assist is a finding of fact that the Court reviews under the clearly erroneous standard of review. *Gilbert v. Derwinski*, 1 Vet. App. 49, 57 (1990). Similarly, the Board’s determination on the adequacy of a medical opinion is also a finding of fact which this Court reviews under the clearly erroneous standard of review. *D’Aries v. Peake*, 22 Vet. App. 97, 104 (2008). A finding of fact is clearly erroneous when, “although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed.” *Hersey v. Derwinski*, 2 Vet. App. 91, 94 (1992) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)). When the Board fails to ensure VA fulfilled its duty to assist, remand is the appropriate remedy. *See Pond v. West*, 12 Vet. App. 341, 346 (1999) (holding that remand is the appropriate remedy when the Board fails to ensure proper development of the claim). Likewise, this Court has deemed the Board’s reliance on an inadequate medical opinion as remandable error. *See Ardison*, 6 Vet. App. at 407 (holding that an inadequate medical examination frustrates

judicial review); *see also Littke v. Derwinski*, 1 Vet. App. 90, 92 (1990) (remand appropriate where the Board relied upon an inadequate medical opinion).

In the instant case, the Veteran underwent a VA examination in June 2010 by Karni W. Frank, M.D. (Dr. Frank). *See R.* at 527-529. The Board found "... that the June 2010 VA examination report is adequate for purposes of rendering a decision in the instant appeal." *R.* at 5. As such, the Board also found that VA fulfilled its statutory duty to assist. *See Id.* ("VA has also fulfilled its duty to assist"). However, as discussed *infra*, Dr. Frank's June 2010 VA medical examination is inadequate as he failed provide sufficient rationale and based his medical opinion on a factually inaccurate premise. As such, the Board clearly erred in failing to ensure VA fulfilled its statutory duty to assist. Accordingly, remand is warranted. *See Littke*, 1 Vet. App. at 92 (remand is the appropriate remedy when the Board relies upon an inadequate medical opinion).

To be adequate, a medical opinion must not only state a conclusion as to the etiology of a medical condition, but must also support that conclusion with sufficient rationale and explanation. *See Stefl v. Nicholson*, 21 Vet. App. 120, 124 (2007). In *Stefl*, the Court explained that some types of information that a doctor might discuss in supporting his or her opinion, "include, but are not limited to, why the examiner finds cited studies persuasive or unpersuasive, whether the veteran has other risk factors for developing the claimed condition, and whether the claimed condition has manifested itself in an unusual manner." *Stefl*, 21 Vet. App. at 124. (citing *Claiborne v. Nicholson*, 19 Vet. App. 181, 186 (2005)); *see Guerrieri v. Brown*, 4 Vet. App. 467, 470-71 (1993). The Court in *Stefl* held "... that a mere conclusion by a medical doctor is insufficient to

allow the Board to make an informed decision as to what weight to assign to the doctor's opinion." *Stefl*, 21 Vet. App. at 125. Further, this Court has explained that "[i]t is the factually accurate, fully articulated, sound reasoning for the conclusion ... that contributes probative value to a medical opinion." *Nieves-Rodriguez v. Peake*, 22 Vet. App. 295, 304 (2008); see *Prejean v. West*, 13 Vet. App. 444, 448-449 (2000) (factors for assessing the probative value of a medical opinion are the physician's access to the claims file and the thoroughness and detail of the opinion).

In the instant case, Dr. Frank concluded that the "[V]eteran's elevation of blood pressure in the 1970s is unrelated to the hypertension with which he was diagnosed 30 y[ea]rs later." R. at 529. However, Dr. Frank failed to support this opinion with sufficient rationale. Dr. Frank explained that the "Veteran was [worked up] for hypertension while he was in the service, in the 1970s. The [work up] was negative and the [V]eteran was never started on medication. He began taking antihypertensive med[ication]s in 2004, when he was diagnosed with hypertension and has been on antihypertensive medi[cation]s since then." *Id.* This is an insufficient rationale. A simple lapse in time does not adequately explain why the Veteran's high blood pressure readings in service are not related to his currently diagnosed hypertension. In other words, the VA examiner, Dr. Frank, failed to sufficiently explain why the onset of the Veteran's diagnosed hypertension was not in-service when he first experienced documented high blood pressure readings. See R. at 226 (Radiographic report of 8/1/72 notes a blood pressure reading of 150/100); see also R. at 192 (Clinical record of 8/3/72 documents a blood pressure reading of 170/108); R. at 157 (STR of 6/26/73 indicates the Veteran had

a high blood pressure reading of 140/80). Consequently, since Dr. Frank failed to support the provided medical opinion with sufficient rationale, the June 2010 VA medical examination is inadequate.

Moreover, Dr. Frank failed to consider all of the Veteran's documented high blood pressure readings in service. For a medical opinion to be considered probative, it must be "factually accurate, fully articulated [with] sound reasoning for the conclusion." *Nieves-Rodriguez*, 22 Vet. App. at 304. A medical opinion based upon an incorrect factual premise is of no probative value. *See Reonal v. Brown*, 5 Vet. App. 458, 461 (1993). In his medical opinion, Dr. Frank observed that the Veteran was found to have high blood readings in 1972, but wholly neglected to consider the Veteran's third high blood pressure reading in service, which is documented in a STR of June 26, 1973 with a reading of 140/80. *See R.* at 157; *see also R.* at 527 (Dr. Frank noting that "in 1972, [the Veteran] was found to have elevated BP [blood pressure]"). Without a factually accurate medical opinion that fully considered and discussed all of the Veteran's in-service high blood pressure readings, the June 2010 VA medical examination was based on a factually inaccurate premise and, therefore, holds no probative value. *See Reonal*, 5 Vet. App. at 461.

In light of the foregoing deficiencies, the June 2010 VA medical examination is inadequate and the Board clearly erred in finding that VA had fulfilled its statutory duty to assist. *See R.* at 5 (the Board found that VA fulfilled its statutory duty to assist and further found "that the June 2010 VA examination report is adequate for purposes of

rendering a decision in the instant appeal”). Accordingly, remand is warranted. *See Littke*, 1 Vet. App. at 92.

II. THE BOARD FAILED TO SUPPORT ITS SEPTEMBER 28, 2015 DECISION WITH ADEQUATE REASONS OR BASES.

The Board is to include in its decision a statement of the reasons or bases for its findings and conclusions on all material issues of fact and law presented on the record, with such statement being adequate to enable an appellant to understand the precise basis for the Board’s decision as well as to facilitate review by this Court. *See* 38 U.S.C. § 7104(d)(1); *see also Allday v. Brown*, 7 Vet. App. 517, 527 (1995); *Gilbert v. Derwinski*, 1 Vet. App. 49, 56-57 (1990). To fulfill this requirement, the Board must “... set forth the precise basis for its decision, [] analyze the credibility and probative value of all material evidence submitted by and on behalf of a claimant in support of the claim, and [] provide a statement of its reasons or bases for rejecting any such evidence.” *Gabrielson v. Brown*, 7 Vet. App. 36, 40 (1994). If the Board fails to provide an adequate statement of reasons or bases, remand is the appropriate remedy. *See Tucker v. West*, 11 Vet. App. 369, 374 (1998); *see also Washington v. Nicholson*, 19 Vet. App. 362, 371 (2005) (remand is the appropriate remedy when the Board fails to provide an adequate statement of reasons or bases for its determination).

In the instant case, the Board failed to support its decision with adequate reasons or bases insofar as it failed to consider all potentially applicable provisions of law and regulation. The Board is required to make a decision based on a review of the entire

record and consideration of all potentially applicable provisions of law. *See* 38 U.S.C. § 7104(a) (the Board is required, as the final trier of fact, to make a decision based on consideration of the entire record and all applicable provisions of law); *see also* *Schafrath v. Derwinski*, 1 Vet. App. 589, 593 (1991); *Weaver v. Principi*, 14 Vet. App. 301, 302 (2001) (per curiam order). The Board may not ignore or disregard a claim merely because the veteran did not expressly raise the appropriate legal provision that corresponds to the benefit sought.” *Strott v. Derwinski*, 1 Vet. App. 114, 121 (1991). Service connection for VA disability compensation purposes will be awarded to a veteran when the record contains (1) a medical diagnosis of a current disability, (2) medical evidence of incurrence or aggravation of a disease or injury in service, and (3) medical evidence of a nexus between the in-service injury or disease and the current disability. *See* 38 U.S.C. § 1110; *see also* *Caluza v. Brown*, 7 Vet. App. 498 (1995), *aff'd*, 78 F.3d 604 (Fed. Cir. 1996); *McClain v. Nicholson*, 21 Vet. App. 319, 320-21 (2007).

Here, the Board failed to consider the potential application of entitlement to service connection for hypertension on the basis of chronicity. *See* 38 C.F.R. § 3.303(b).

In regards to establishing chronicity, VA regulation provides:

With chronic disease shown as such in service ...so as to permit a finding of service connection, subsequent manifestations of the same chronic disease at any later date, however remote, are service connected, unless clearly attributable to intercurrent causes. *** For the showing of chronic disease in service there is required a combination of manifestation sufficient to identify the disease entity, and sufficient observation to establish chronicity at the time, as distinguished from merely isolated findings or a diagnosis including the word ‘chronic’.

38 C.F.R. § 3.303(b); *see Falzone v. Brown*, 8 Vet. App. 398, 405-406 (1995). Pursuant to VA regulation 38 C.F.R. § 3.309(a), hypertension is one of the conditions listed as a chronic disease, thus the provisions of chronicity are applicable.

The Veteran had at least three (3) documented high blood pressure readings while in service. *See* R. at 226 (Radiographic report of 8/1/72 notes a blood pressure reading of 150/100); *see also* R. at 192 (Clinical record of 8/3/72 documents a blood pressure reading of 170/108); R. at 157 (STR of 6/26/73 indicates a high blood pressure reading of 140/80). To support his negative nexus opinion at the June 2010 VA examination, Dr. Frank relied on the lapse of time of almost thirty years before the Veteran required medication for his hypertension (R. at 529); however, for purposes of chronicity, “subsequent manifestations of the same chronic disease at any later date, however remote, are service connected[.]” 38 C.F.R. § 3.303(b). Thus, the lapse of time is irrelevant to determining whether the Veteran is entitled to service connection for hypertension on the basis of chronicity. The Board wholly neglected to consider or discuss this provision of law. Consequently, vacatur and remand is warranted as that is the appropriate remedy where the Board failed to consider all possible theories of entitlement. *See Combee v. Brown*, 34 F.3d 1039, 1045 (Fed. Cir. 1994) (service connection may be considered under more than one theory of entitlement if reasonably raised by the evidence).

In light of the foregoing deficiencies, the Board failed to support its September 28, 2015 decision with adequate reasons or bases. Accordingly, remand is warranted. *See Washington*, 19 Vet. App. at 371.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that the September 28, 2015 Board decision be set aside and the case remanded for further adjudication consistent with this Court's decision and applicable law.

Respectfully submitted,

May 31, 2016

/s/ Ashley C. Gautreau
Ashley C. Gautreau
Attorney for Appellant
175 2nd Street
Belleville MI 48111
(800) 971-4019