

BRIEF OF APPELLANT

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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

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16-646

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DANIEL R. BARNETT,

Appellant,

v.

ROBERT A. MCDONALD,  
SECRETARY OF VETERANS AFFAIRS,

Appellee.

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**TABLE OF CONTENTS**

STATEMENT OF THE ISSUES..... 1

STATEMENT OF THE CASE..... 2

SUMMARY OF THE ARGUMENT..... 4

STANDARD OF REVIEW..... 5

ARGUMENT..... 6

I. The Board misinterpreted the law when it failed to consider the provisions of 38 C.F.R. § 3.317 (2016) in adjudicating the Veteran’s claim despite the Veteran’s service in the Persian Gulf in 2004 and uncertainty regarding the etiology and pathophysiology of the Veteran’s sleep apnea..... 6

II. The Board failed to ensure that the duty to assist the Veteran was satisfied because it relied on a VA examination which was inadequate for adjudication purposes..... 11

III. The Board erred when it relied on the June 2013 VA examination because the examination failed to consider all procurable data and failed to comply with VA guidance regarding proper rating procedures for veterans who served in the Persian Gulf..... 13

CONCLUSION..... 15

## **TABLE OF AUTHORITIES**

### **Cases**

<i>Beasley v. Shinseki</i> , 709 F.3d 1154 (Fed. Cir. 2013).....	5
<i>Butts v. Brown</i> , 5 Vet. App. 532 (1993) ( <i>en banc</i> ).....	5
<i>Davis v. West</i> , 13 Vet.App. 178 (1999).....	5
<i>Gilbert v. Derwinski</i> , 1 Vet.App. 49 (1990).....	6
<i>Gutierrez v. Principi</i> , 19 Vet.App. 1 (2004).....	13
<i>Hayes v. Brown</i> , 9 Vet.App. 67 (1996).....	5
<i>Jones v. Shinseki</i> , 23 Vet.App. 382 (2010).....	15
<i>Majeed v. Principi</i> , 16 Vet.App. 421 (2002).....	6
<i>McCall v. McDonald</i> , 2016 WL 3383410 (Vet.App. June. 20, 2016).....	10, 11
<i>Nieves-Rodriguez v. Peake</i> , 22 Vet.App. 295 (2008).....	14
<i>Reliford v. McDonald</i> , 27 Vet.App. 297 (2015).....	9
<i>Simington v. West</i> , 11 Vet.App. 41 (1998).....	7

### **Statutes**

38 U.S.C. § 1117.....	<i>passim</i>
38 U.S.C. § 7104(d)(1).....	6
38 U.S.C. § 7261(a)(1).....	5

### **Regulations**

38 C.F.R. § 3.317 (2016).....	<i>passim</i>
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## Record before the Agency (“R”) Citations

R-2-10 (January 2016 Board Decision).....	4, 7, 11
R-15-16 (January 2010 Certification of Appeal).....	3
R-17-25 (July 2013 Supplemental Statement of the Case).....	4
R-26-27 (June 2013 VA Examination).....	4, 11, 12
R-40-50 (May 2013 Rating Decision).....	4
R-54-67 (May 2013 Board Decision).....	3, 4
R-84-89 (February 2010 Supplemental Statement of the Case).....	3
R-110-111 (October 2009 VA Form 9).....	3
R-114-118 (October 2009 Veteran Statement).....	3
R-121-139 (September 2009 Statement of the Case).....	3
R-150 (May 2009 Notice of Disagreement).....	3
R-157-163 (May 2008 Rating Decision).....	3
R-167-169 (March 2008 VA Examination).....	3
R-262-265 (June 2006 Sleep Study).....	2, 7
R-276-279 (April 2005 Treatment Note).....	2
R-314-327 (August 2007 Claim for Service Connection).....	3
R-410-416 (March 2005 Post-Deployment Health Assessment).....	2, 7, 14
R-458 (DD 214).....	2, 7
R-460 (DD 214).....	2

## STATEMENT OF THE ISSUES

- I. The Board misinterpreted the law when it failed to consider granting the Veteran service connection for his sleep apnea in accordance with the provisions of 38 C.F.R. § 3.317 (2016) governing medically unexplained chronic multi-symptom illnesses for veterans who served in the Persian Gulf. The Board failed to explain why the laws concerning presumptions for Gulf War illnesses did not require it to consider service connection for the Veteran's sleep apnea in light of the uncertainty regarding the etiology or pathophysiology of the disability. Did the Board err when it did not address why all of the relevant evidence did not require it to consider granting service connection for this condition in accordance with the presumptions afforded to veterans who served in the Persian Gulf?
  
- II. The Board failed to ensure that its duty to assist the Veteran was satisfied when it relied on a medical opinion that did not fully discuss the etiology nor discuss the pathophysiology of the Veteran's sleep apnea. The examiner also failed to consider all procurable and assembled data because he did not consider VA Training Letter 10-03, which provides guidance for rating veterans exposed to environmental hazards during service in Persian Gulf. The Board also failed to provide adequate reasons or bases for relying on this opinion. Did the Board commit prejudicial legal error?

III. VA Training Letter 10-03 states that VA rating authorities should be prepared to recognize disabilities relating to potential exposure to environmental hazards for veterans with service in Iraq during Operation Iraqi Freedom whenever such issues are reasonably raised by the record. The Veteran is under no obligation to “claim” exposure to environmental hazards and rating authorities must be “vigilant” in reviewing such claims. In this case, both the Board and the VA examination it relied on failed to comply with the guidance set forth in Training Letter 10-03. Was this failure prejudicial to Mr. Barnett’s claim for benefits?

### **STATEMENT OF THE CASE**

Daniel R. Barnett served on active duty in the United States Army from November 1985 through April 1986, and from January 2004 through April 2005. R-460; R-458. His latter period of active duty included service in Kuwait and Iraq in support of Operation Iraqi Freedom. R-458. In his post-deployment health assessment, completed in March 2005, Mr. Barnett noted some exposure to vehicle exhaust, JP8 or other fuels, and sand/dust. R-414 (410-16). A treatment note from April 2005 indicated that the Veteran became sick for several days that January while deployed in Iraq where he suffered from headache, sinus congestion, and fever. R-276 (276-79).

In June 2006, Mr. Barnett underwent a sleep study due to snoring and sleep maintenance insomnia. R-262-65. The study resulted in a diagnosis of moderate to

severe Obstructive Sleep Apnea Syndrome. R-262. The Veteran submitted a claim for service connection and compensation for sleep apnea, pulmonary embolism, and other issues, in August 2007. R-314-27. He indicated that his sleep issues resulted in him being in a constant tired state and led to trouble staying awake and alert during the day. R-326.

The Veteran underwent a VA respiratory diseases examination in March 2008. R-167-69. The examination diagnosed pulmonary embolus, but did not connect it to the Veteran's service. R-169. A May 2008 rating decision denied the Veteran service connection for obstructive sleep apnea and pulmonary embolus. R-159 (157-63).

Mr. Barnett submitted a timely notice of disagreement in May 2009. R-150. A statement of the case which continued to deny service connection for both conditions was issued in September of that year. R-121-39. The following month, the Veteran submitted a letter in which he stated that he began having difficulty sleeping while deployed in Iraq but did not seek medical attention because he believed the condition would improve once he returned home. R-117 (114-18). He submitted his VA Form 9 to perfect his appeal later that month. R-110-11. His appeal was certified before the Board in January 2010. R-15-16. The following month, a supplemental statement of the case continued to deny service connection for obstructive sleep apnea and for pulmonary embolus. R-84-89.

The Board issued a decision in May 2013 which granted the Veteran service connection for pulmonary embolism. R-62 (54-67). The decision also remanded the

issue of service connection for obstructive sleep apnea for a VA examination on the issue. R-62-64. A rating decision later that month assigned a 60 percent rating for pulmonary embolus from August 2007 to July 2010, and a non-compensable rating from July 2010 forward. R-46 (40-50).

The VA sleep apnea examination took place in June 2013. R-26-27. The examiner opined that while it was likely individuals deployed to a combat area will have some sleep disturbances, stress is not a known cause of obstructive sleep apnea. R-26. She stated that although it was within the “realm of possibility” that the Veteran’s condition began while on active duty, it was less likely than not that it had its onset during service. *Id.* VA issued a supplemental statement of the case in July 2013, which continued to deny service connection for sleep apnea. R-17-25.

On January 12, 2016, the Board issued the decision presently on appeal. R-2-10. The Board continued to deny entitlement to service connection for sleep apnea, finding the June 2013 examination “highly persuasive.” R-7-8. This appeal followed.

### **SUMMARY OF THE ARGUMENT**

The Board misinterpreted the law when it failed to consider the possibility that the Veteran’s sleep apnea is a diagnosed illness without conclusive pathophysiology or etiology as described in 38 U.S.C. § 1117, and that service connection was warranted in light of the presumptions afforded to Veterans who have served in the Persian Gulf pursuant to the statute and 38 C.F.R. § 3.317.

It further erred by failing to ensure compliance with the duty to assist the Veteran when it relied on an inadequate VA examination in reaching its conclusion. The examination was inadequate because it also failed to consider the provisions of 38 U.S.C. §1117 and 38 C.F.R. § 3.317 and failed to provide adequate reasons for its conclusion. Furthermore, both the examiner and the Board failed to comply with VA guidance on the matter of rating disabilities of veterans who served in the Persian Gulf and were exposed to certain environmental hazards during Operation Iraqi Freedom. Remand is warranted to address these issues.

### **STANDARD OF REVIEW**

The Court reviews the Board's decisions regarding claims for service connection under the clearly erroneous standard. A determination regarding service connection is an issue of fact. *Hayes v. Brown*, 9 Vet.App. 67, 72 (1996). The Board's answer to that question is subject to review for clear error. *Davis v. West*, 13 Vet.App. 178, 184 (1999).

However, the Court reviews claimed legal errors by the Board under the *de novo* standard, by which the Board's decision is not entitled to any deference. 38 U.S.C. § 7261(a)(1); see *Butts v. Brown*, 5 Vet. App. 532, 538 (1993) (*en banc*). The Court will set aside a conclusion of law made by the Board when that conclusion is determined to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Butts*, 5 Vet. App. at 538. The scope of the legal obligation imposed upon VA by its duty to assist is a question of law. *Beasley v. Shinseki*, 709 F.3d 1154, 1157 (Fed.

Cir. 2013). The Court should determine whether the Board's decision, in which the Board failed to ensure that the duty to assist was satisfied, failed to properly apply the law, and failed to provide adequate reasons and bases for its decision, is not in accordance with the law.

## ARGUMENT

**I. The Board misinterpreted the law when it failed to consider the provisions of 38 C.F.R. § 3.317 (2016) in adjudicating the Veteran's claim despite the Veteran's service in the Persian Gulf in 2004 and uncertainty regarding the etiology and pathophysiology of the Veteran's sleep apnea.**

The Board erred in its decision, which denied the Veteran entitlement to service connection for sleep apnea. Specifically, the Board failed to consider the provisions of 38 C.F.R. § 3.317 (2016) in adjudicating the Veteran's claim despite the Veteran's service in the Persian Gulf in 2004-05. The Board also relied on an examination that was inadequate for adjudication purposes because it too failed to address section 3.317 or adequately support its conclusion and failed to comply with VA guidance on the matter.

A Board decision must consider all relevant evidence of record, and discuss all "potentially applicable" laws and regulations. *Majeed v. Principi*, 16 Vet.App. 421, 431 (2002). Under 38 U.S.C. § 7104(d)(1), a decision of the Board shall include a written statement of the Board's findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented on the record. *Gilbert v. Derwinski*, 1 Vet.App. 49, 56 (1990). Deficiencies in the Board's

analysis in the instant case preclude effective judicial review. *See Simington v. West*, 11 Vet.App. 41, 45 (1998).

There is no dispute that Mr. Barnett served in the Persian Gulf in support of Operation Iraqi Freedom from February 2004 through March 2005. R-458. He reported that he was exposed to environmental hazards during his deployment. R-414. It is also undisputed that the Veteran was diagnosed with moderate to severe sleep apnea following his return from the Persian Gulf in 2006. R-262-64. The Board acknowledged that the Veteran suffered from sleep apnea, but determined that service connection was not warranted because the weight of the competent evidence was against a finding that the condition was related to service. R-7.

The Board failed to consider the provisions of 38 C.F.R. § 3.317 in reviewing the Veteran's claim, despite his service in the Persian Gulf and exposure to environmental hazards. Although the Veteran carries a diagnosis of sleep apnea, the Board failed to consider whether it was of uncertain etiology or pathophysiology, yet pointed to no evidence in the record which spoke to the etiology of the condition and did not discuss the issue in its analysis. While it is true that 38 C.F.R. § 3.317(a) provides "[c]ompensation for disability due to undiagnosed illness," the Board failed to appreciate that the regulation also provides compensation for certain diagnosed disabilities of unknown pathophysiology or etiology.

38 C.F.R. § 3.317(a)(2)(ii) explicitly states that "[f]or purposes of this section, the term medically unexplained chronic multisymptom illness means a diagnosed

illness without conclusive pathophysiology or etiology.” (emphasis added). The regulation also specifies that “signs or symptoms involving the respiratory system” and “sleep disturbances” are recognized as a “medically unexplained chronic multisymptom illness.” 38 C.F.R. § 3.317(b). Simply because the Veteran’s ailment may be “attributed . . . to a specific, identifiable disability,” this does not preclude the possibility that it is still medically unexplained as far as pathophysiology or etiology. As such, it was error for the Board to fail to consider service connection for the Veteran’s sleep apnea under the provisions of § 3.317 in rendering its decision.

The law is clear that under 38 C.F.R. § 3.317 and 38 U.S.C. § 1117, service connection may be awarded for Gulf War veterans who experience certain diagnosed illness with inconclusive etiologies. On February 4, 2010, VA issued Training Letter 10-01, which acknowledged that “subsequent amendments to 38 U.S.C. § 1117 expanded the definition of a chronic disability to include certain diagnosed illnesses with inconclusive etiologies.” The Training Letter explained how the recent amendments were intended to broaden the scope of disabilities considered beyond the three previously identified as qualifying. In addition, the Training Letter goes on to explain that a diagnosis will be considered “medically unexplained” only when it is not “understood in terms of etiology or pathophysiology.” *See* VA Training Letter 10-01, “*Adjudicating Claims Based on Service in the Gulf War and Southwest Asia*,” February 4, 2010. While the training letter has since been rescinded and incorporated into the M21-1 VA Adjudication Manual, the Board was not free to ignore its guidance given

its relevance to Mr. Barnett's claim. *See Reliford v. McDonald*, 27 Vet.App. 297, 303 (2015) (holding that the "Board erred by failing to follow the Secretary's own established procedures" as outlined in a Fast Letter).

Mr. Barnett also recognizes that language added to the M21-1 Manual effective November 30, 2015, states that sleep apnea cannot be presumptively service-connected under the provisions of 38 C.F.R. § 3.317 since it is a diagnosable condition, and that, "[i]f claimed, sleep apnea must be considered on a non-presumptive SC basis." *See* VA Adjudication Manual, M21-1, Part IV.ii.2.D.1.n. However, the VA Manual's language is inconsistent with 38 U.S.C. § 1117 and VA's regulations and should therefore not be given weight by the Court. As discussed *supra*, the statute specifically allows presumptive service connection for diagnosed illnesses. *See* 38 U.S.C. § 1117(a)(2).

VA's regulation also notes that part of the definition of a medically unexplained chronic multi-symptom illness ("MUCMI") is that the condition be a "*diagnosed* illness without conclusive pathophysiology or etiology[.]" 38 C.F.R. § 3.317(a)(2)(ii) (emphasis added). In addition, both the pre- and post-November 2015 versions of the VA Manual acknowledge that a *diagnosed* illness may be considered a MUCMI. Thus, the fact that sleep apnea is a diagnosable condition does not automatically preclude presumptive service connection. While VA may be able to preclude service connection for sleep apnea as an "undiagnosed illness" because of a diagnosis, it cannot preclude service connection as a MUCMI on that same basis.

The categorical preclusion of sleep apnea from being considered as a MUCMI prevents veterans from obtaining the benefit of a presumption which VA's own regulations provide to veterans meeting the requirements of 38 C.F.R. § 3.317(a)(2)(ii). The regulation requires *only* that the condition be a "diagnosed illness without conclusive pathophysiology or etiology, that is characterized by overlapping symptoms and signs and has" certain features. Sleep apnea involves sleep disturbances and signs or symptoms involving the respiratory system, both of which are listed in the regulation as signs or symptoms that may be manifestations of a MUCMI. Under the plain language of the regulation, a veteran's sleep apnea may qualify as a MUCMI if it meets those criteria.

As no panel decision has yet addressed the question of whether the new language in the M21-1 Adjudication Manual specific to sleep apnea is the proper interpretation of the relevant statute and regulations, discussion of a single judge decision on the issue is instructive in this case. *See* U.S. Vet. App. R. 30(a). In *McCall v. McDonald*, No. 15-2457, 2016 WL 3383410 at \*5 (Vet.App. June. 20, 2016), the Court addressed the Secretary's argument that sleep apnea cannot be presumptively service-connected based on the new language of the M21-1. The Court rejected this argument on the grounds that it was a post-hoc conclusion, as the Board decision on appeal in that case took place prior to the change in the M21-1 language. The Court also stated the following in a footnote:

In addition, the Court notes that the provision appears to state only that sleep apnea cannot be service connected under that part of section 3.317 that pertains to undiagnosed illness, since it merely iterates that sleep apnea is a “diagnosed” condition. The provision would not appear to preclude service connection as to a medically unexplained chronic multi-symptom illness (MUCMI) under § 3.317 because § 3.317(a)(2)(ii) clearly indicates that MUCMI “means a *diagnosed* illness without conclusive pathophysiology or etiology.” (emphasis added). Thus, the fact sleep apnea is a “diagnosed” condition would not preclude application of the MUCMI rules. *See* 38 C.F.R. § 3.317 (a)(2)(ii).

*Id.* at \*5, n. 2.

Mr. Barnett respectfully asserts that this is the proper reading of the new M21-1 language, and the provision at issue does not preclude a finding of service connection for sleep apnea based on the MUMCI rules. As such, the Board erred in failing to consider the provisions of 38 C.F.R. § 3.317 and 38 U.S.C. § 1117 in rating the Veteran’s sleep apnea, in light of the Veteran’s service in the Persian Gulf and the fact that no evidence demonstrated a confirmed etiology of the condition.

**II. The Board failed to ensure that the duty to assist the Veteran was satisfied because it relied on a VA examination which was inadequate for adjudication purposes.**

In reaching its decision, the Board relied almost entirely on a June 2013 VA sleep apnea examination. R-7-8; *see* R-26-27. This examination also failed to consider the provisions of 38 C.F.R. § 3.317 and 38 U.S.C. § 1117, failed to comply with applicable VA guidance, and was inadequate for adjudication purposes due to the lack of rationale for its conclusion. The examiner failed to offer any probative insight into whether the Veteran’s condition was understood in terms of etiology or

pathophysiology. R-26-27. Instead, she merely opined that “although within the realm of possibility, since the Veteran was on [Active Duty] 15 months of his roughly 50 years on earth, it is less likely than not that his OSA had its onset during service.” R-26. The examiner’s only justification for this opinion was that it was more likely than not that individuals deployed to a combat area would suffer stress that may impact sleep, and that fluctuations in the Veteran’s BMI suggested his sleep problems were not due to OSA. *Id.*

As such, the Board should have remanded the case to obtain an examination which adequately addressed whether the Veteran’s sleep apnea is part of a medically unexplained chronic multisymptom illness. According to VA Training Letter 10-01, even if a claimant’s disability pattern differs from one of the identified chronic conditions, it is appropriate for VA to provide an examination to determine if the disability can be characterized as a disability pattern with an inconclusive etiology or pathophysiology. While the examination arguably discussed the potential etiology of the Veteran’s sleep apnea, R-26, there can be no serious contention that the pathophysiology was considered.<sup>1</sup> Moreover, to the extent the examiner *discussed* etiology, she did not opine that the etiology of the Veteran’s sleep apnea was

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<sup>1</sup> Etiology is “The science of causes, causality; in common usage, cause.” (1997) *Stedman’s Concise Medical Dictionary for the Health Professional*. (Illustrated-3<sup>rd</sup> ed.). Baltimore: Williams & Wilkins. Pathophysiology is “Derangement of function seen in disease; alteration in function as distinguished from structural defects.” *Id.*

conclusive. Nonetheless, 38 C.F.R. § 3.317(a)(2)(ii) requires that the Veteran need establish *either* an inconclusive etiology *or* an inconclusive pathophysiology, not both.

As the examiner's discussion of the etiology of the Veteran's sleep apnea was lacking, and there was no discussion of the pathophysiology of the condition, it is inadequate to allow the Board to determine whether the provisions of 38 C.F.R. § 3.317 may warrant a grant of service connection on a presumptive basis. *See Gutierrez v. Principi*, 19 Vet.App. 1, 6, 8 (2004) ("The regulation does not require that physicians make such a diagnosis [of an undefined disease]. . . . [The claimant] was not required to provide evidence linking his current conditions to events during service and the Board erred by imposing such a nexus requirement."). As such, the Board failed to ensure compliance with the duty to assist the Veteran when it relied on this examination in reaching its conclusion.

**III. The Board erred when it relied on the June 2013 VA examination because the examination failed to consider all procurable data and failed to comply with VA guidance regarding proper rating procedures for veterans who served in the Persian Gulf.**

In addition to the examiner's failure to consider 38 C.F.R. § 3.317, VA failed to ensure that the examiner had all procurable and assembled data when rendering her decision. In accordance with VA Training Letter 10-03, when a medical opinion is obtained pertaining to chemical exposure, "Fact Sheets explaining the various environmental hazards . . . must be made available to the VA medical examiner for review." *See* VA Training Letter 10-03, "*Environmental Hazards in Iraq, Afghanistan, and*

*Other Military Installations*,” April 26, 2010. Training Letter 10-03 also states that “rating authorities must . . . be prepared to . . . recognize[ ] potential exposure issues whenever they are reasonably raised by the record.” *Id.* It further provides that “not all Veterans will be aware of such exposure or will associate such exposure with particular disabilities,” and instructs regional office personnel to be “vigilant” in reviewing such claims. *Id.* The aforementioned Fact Sheets “ensure that such [medical] opinions are fully informed based on all known objective facts.” *Id.*

The Veteran noted that he was exposed to environmental hazards in the form of exhaust, JP8 or other fuels, and sand/dust during Operation Iraqi Freedom. R-414. The burden is not on the Veteran to directly claim exposure to environmental hazards and tie it to a current disability. The burden is on VA to be “vigilant” in determining whether there is such a connection, particularly in cases where exposure to environmental hazards has been reported. This includes ensuring that VA examiners are fully aware of the guidance and procedures put forth in documents such as VA Training Letter 10-03. There is no indication that the June 2013 examiner had such information when rendering her opinion.

The Court has determined that “[p]art of the Board’s consideration of how much weight to assign is the foundation upon which the medical opinion is based.” *Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 302 (2008). VA’s failure to furnish the June 2013 examiner with the necessary Fact Sheets was contrary to its own established policy. *See* VA Training Letter 10-03. As held by the Court, “it must be clear, from

either the examiner's statements or the Board decision, that the examiner has indeed considered 'all procurable and assembled data,' by obtaining all tests and records that might reasonably illuminate the medical analysis." *Jones v. Shinseki*, 23 Vet.App. 382, 390 (2010). When the record leaves this issue in doubt, it is the Board's duty to remand for further development. *Id.* Here, the June 2013 opinion was not "based on sufficient facts" or "all procurable and assembled data," because it failed to consider and comply with the guidance put forth in Training Letter 10-03. Thus, the examination was inadequate for adjudication purposes and the Board committed prejudicial legal error when it relied on the examination to reach its conclusion. *Id.*

## **CONCLUSION**

In view of the foregoing, the Board's decision that denied Mr. Barnett entitlement to service connection for sleep apnea was in error. The Board misinterpreted the law when it failed to consider granting service connection for a diagnosed disability under the provisions of 38 C.F.R. § 3.317. It also failed to ensure that the duty to assist the Veteran was satisfied because it relied on an examination that was inadequate for adjudication purposes, and both the Board and the examiner failed to comply with relevant VA guidance regarding veterans who served in the Persian Gulf during Operation Iraqi Freedom. The Board's decision should therefore be vacated and the appeal remanded with instructions for the Board to properly apply the law, ensure that the duty to assist is satisfied, and provide adequate reasons and bases for its decision.

Respectfully submitted,

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