

In the
UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS
APPELLANT'S REPLY BRIEF

No. 15-4227

ROBERT H. PATTON

Appellant

v.

ROBERT A. MCDONALD
SECRETARY OF VETERANS AFFAIRS

Appellee

September 6, 2016

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Appellant's Reply Arguments

I. The Secretary, like the Board applies the wrong legal standard. Material evidence does not have to prove service connection, it must simply relate to the prior reason for denial.

As argued in his opening brief, the new evidence relates to a medical nexus, it does not prove a medical nexus. See Brief for the Appellant, at 4-9. The Board erred because it failed to discuss whether Dr. Kang's letter relates to the third *Caluza* element, as explained in *Savage v. Gober* 10 Vet.App. 488 (1997). See Brief for the Appellant, at 5. There is no requirement that Mr. Patton must prove his claim in order to reopen it, and Mr. Patton never argued this – despite the Secretary's assertions to the contrary.

The Secretary asserted multiple times in his brief that the new evidence is not material because it did not prove service connection. For example:

- "The Board ... found the additional evidence ... [is] not material because it does not show the Veteran's back disability had its onset during active military service"

Brief for Appellee, at 7.

- "The Board found that Dr. Kang does not relate the current low back disorder to service" *Id.*, at 9.

- "At no time does Dr. Kang state that the current back disorder is related to service." *Id.*

- "Arguendo, even if Dr. Kang's letter is new and material, it fails to show a nexus."

Id. At 10. "[T]he Board determined that Dr. Kang's letter does not provide a medical nexus" *Id.*, at 11.

These statements by the Secretary demonstrate a complete lack of understanding of what material evidence requires. Evidence is not material because it proves the claim. Rather, evidence is material because it "relates to an unestablished fact necessary to substantiate the claim." See 38 C.F.R. § 3.156(a).

The Board and the Secretary make clear, as demonstrated by the above quotes, that the Board did not consider whether the evidence is material under 38 C.F.R. § 3.303(b) and *Savage*. Rather, these statements show that the Board required the new evidence to prove a nexus in order to be material. The Secretary's own statements bolster Mr. Patton's argument that the Board failed to provide adequate reasons and bases for its decision.

2. The Secretary misconstrued Dr. Kang's September 2014 letter.

The Secretary, like the Board, misconstrued the contents of Dr. Kang's September 2014 letter. The Board interpreted Dr. Kang's letter as "provid[ing] a sequence of events from the in-service complaints of low back pain in service and the post service injuries and conclude[ing] that the Veteran is disabled and cannot work." R. at 19. The Secretary, in his brief, also interprets Dr. Kang's letter to communicate a medical history. Brief for the Appellee, at 6-7. Specifically, the Secretary states "Dr. Kang's letter only relate [sic] an 'apparent' history of back injuries going back to the

'1960's' and are no more definitive than the speculative opinion rendered by Dr. Malpass" Brief for the Appellee, at 9.

However, this is not what the letter says. Dr. Kang's letter communicates four points. First, Dr. Kang "reviewed Mr. Robert Patton's old VA medical records." The details of the letter confirm this record review included the service records and the post service records. Second, Dr. Kang reports a "longstanding history of recurrent back injuries since the 1960s," which was "apparent" from the **medical evidence** he reviewed.

The Secretary makes hay of Dr. Kang's use of the word apparent. Although it is not exactly clear from the context what the Secretary is trying to say, it appears that he is trying to show that Dr. Kang made an equivocal statement on the presence of a history of back injuries. However, the Secretary took this word out of context. First, the Secretary left out the adjective "recurrent" when describing the history of back injuries. Brief for the Appellee, at 9. As argued in his opening brief, the use of the word recurrent is significant. It conveys a disorder that comes and goes instead of distinct, separate injuries suffered over the years. Brief for the Appellant, at 8. Furthermore, a close reading of the letter shows that Dr. Kang used the word "appears" in order to communicate that the history of recurrent back problems was apparent from his review of the medical records. R. at 175

Third, Dr. Kang reported the first two injuries were in 1964. This puts the onset during service. The August 1964 injury was the first of many "recurrent back injuries."

Fourth, Dr. Kang concludes by saying Mr. Patton "continued in his lifetime to have problems with his lower back." R. at 175.

These two interpretations of this letter –BVA/Secretary vs. Mr. Patton – are far apart from one another. In fact, the VA's interpretation does not account for the words used by Dr. Kang, and does not interpret the letter as it applies to 38 C.F.R. § 3.303(b). Section 3.156(a) requires the VA to consider new evidence as it relates to all legal theories supporting entitlement to benefits. See *Duty to Assist*, 66 Fed. Reg. 45620, 45629 (Aug. 29, 2001) (affirming the VA's obligation to consider all legal theories when considering whether evidence is new and material). The Secretary takes words out of context, paraphrases the letter in a way that is not true to the plain meaning of the letter, and altogether argues for an interpretation that is not supported by the evidence.

The Secretary's arguments confuse the matter, which was already confused by the Board's less than thorough analysis of the evidence and the law. The Board did not provide adequate reasons and bases, and the Secretary could not point to any part of the Board's analysis that remotely approaches an analysis of § 3.303(b) and *Savage*. Therefore, the Court should vacate this decision and remand the appeal.

3. The Secretary misstated Mr. Patton's description of the 2014 Board testimony.

The Secretary incorrectly states "Appellant concedes ... his testimony at the 2014 Board hearing is duplicative of the of his [sic] 2004 RO hearing." Brief for the Appellee, at 7. This is not correct. Mr. Patton stated the 2014 testimony was "similar"

to the earlier testimony. Brief for the Appellant, at 7. Mr. Patton argued the 2014 testimony clarified the existence of back pain throughout service, and clarified that his back would "get well for a while and come back, the same condition." R. at 1741.

The evidence considered in 2005 did not necessarily communicate that the back condition would "get well for a while and come back." The prior evidence only showed that the back pain was present. For the first time Mr. Patton himself communicated to the VA that the same condition would get better and worse over the years – including while still in service. This testimony is deemed credible for purposes of determining whether the evidence is new and material. See *Duran v. Brown*, 7 Vet.App. 216, 220 (1994).

The Secretary, like the Board, missed the nuance of this testimony. Mr. Patton's central argument is that the Board failed to consider § 3.303(b). The 2014 testimony, which is credible as a matter of law for the purposes of reopening the claim, tells the VA that his original back injury never fully healed. Rather it came and went (i.e. recurred) over the years, and was always "the same condition." R. at 1741.

4. The Secretary confuses the Board's duty to consider the entire evidence of record with its duty to provide adequate reasons and bases for its factual determinations.

The Secretary argues that the Board, in 2005, "considered and discussed" Dr. Malpass' medical opinion. Brief for Appellee, at 8. This may be true, but Mr. Patton never argued the Board did not consider this evidence. Instead, Mr. Patton argued that

the Board ignored the opinion contained in Dr. Malpass' letter that supported service connection under 3.303(b). Brief for Appellant, at 8. And, contrary to the Secretary's argument, Mr. Patton did not present any arguments that the 2005 Board decision failed to discuss Dr. Malpass' letter. See Brief for Appellee, at 8.

Instead, Mr. Patton argued the Board has an obligation, in its current decision, to discuss the new evidence and explain whether it is material on its own, or "with previous evidence of record." Brief for Appellant, at 8-9. The Board's duty, under 38 U.S.C. § 7104(d)(1), is to fully explain its decision so that Mr. Patton and the Court have an understanding for why the Board ruled the way it did. In this case, the Board did not discuss § 3.303(b), continuity of symptoms, or how the two private medical opinions do or do not relate to the issue of nexus, as described in *Savage*. Therefore, we are left to wonder what law the Board actually considered.

5. Dr. Kang's opinion is material because it relates to the nexus element under *Savage* and § 3.303(b).

The Secretary argues that to reopen the claim, Mr. Patton is required to present evidence that proves his back is related to the 1964 injuries. Brief for Appellee, at 5-12. This statement of the law is incorrect. First, the law only requires the new evidence relate to the reason for the prior disallowance. See § 3.156(a). Mr. Patton's prior claim was denied due to a lack of nexus. Therefore, any evidence that relates to a nexus – whether under *Caluza* or *Savage* – is material. The Secretary never really addressed this

part of Mr. Patton's argument. Instead, he insists the evidence was not material because it did not prove service connection.

However, all of his argument on this point is a distraction since the Board never considered this theory. The Board is the fact finder, and the Board must provide adequate reasons and bases for its decision. See §§ 7261(c) and 7104(d)(1). This was not done; therefore, remand is required.

6. The Secretary's entire "arguendo" argument is misguided. He argues facts that were not decided by the Board, which the Court is precluded from considering.

The Secretary spends nearly a third of his argument on issues that were not addressed by the Board. Brief for the Appellee, at 10-12. The Secretary argues the evidence fails to show a nexus. *Id.*, at 10. Presumably, this is to show that the claim would fail due to a lack of evidence supporting service connection. However, the Board never reached this question. The Board found the claim was not reopened; therefore, the Board made no determination as to whether Mr. Patton had proven his claim.

Additionally, had the claim been reopened, the Board would be required to determine whether the duty to assist would require the VA to provide a medical exam and nexus opinion. See 38 C.F.R. § 3.159(c)(4). There are lots of if-then arguments that can be made, but the Court is limited to reviewing facts, **as decided by the Board**. See § 7261(c). Mr. Patton never argued the evidence proved service connection. He argued the evidence **related** to a nexus under § 3.303(b) and *Savage*. The Secretary's

red herring serves only to distract the issue on appeal and introduce facts not decided by the Board. See *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 156 (1991) ("'[L]itigating positions' are not entitled to deference when they are merely appellate counsel's 'post hoc rationalizations' for agency action, advanced for the first time in the reviewing court.").

7. The Secretary, in arguing to affirm the denial of CUE, failed to address Mr. Patton's arguments. Therefore, he has conceded this point.

Mr. Patton argued, in the instant appeal, that the Board failed to consider his allegation of CUE; instead, the Board decided a separate allegation. Brief for the Appellant, at 9-12. The Secretary, "having defaulted in the obligation to brief [his] position and thus provide the court with the incidental benefits of his views on the facts and law, is deemed to concede the validity of [Mr. Patton's] legally plausible position." See *MacWhorter v. Derwinski*, 2 Vet.App. 133, 134 (1992). Mr. Patton's arguments are "relevant, fair, and reasonably comprehensive." *Id.* at 136 (quoting *Alameda v. Sec'y of Health, Ed. & Welfare*, 622 F.2d 1044, 1049 (1st Cir. 1980)). The Secretary did not respond appropriately; therefore, he has conceded this issue.

In this appeal, the Board found "[t]he Veteran's argument is equivalent to an argument that the November 2005 Board decision improperly weighed and evaluated the evidence of record." R. at 8. However, "Mr. Patton actually alleged the November 2005 Board decision failed to apply 38 C.F.R. 3.303(b)" Brief for the Appellant, at 9.

The Secretary presented a broad, conclusory statement for his argument, but failed to provide any analysis of the facts and the law.

The Secretary said "[t]he Board correctly determined that the 2005 Board decision did not contain CUE and that Appellant's CUE argument is equivalent to a disagreement with the weighing of the evidence" Brief for the Appellee, at 12. The Secretary then uses 22 lines presenting case law, and then re-states the above sentence saying "[t]he Board considered Appellant' [sic] request for revision based upon CUE based upon the argument as Appellant put forth below and found that it amounted to a disagreement with the weight the Board assigned to the evidence in the 2005 decision." *Id.*, at 12-13.

The Secretary then spends another five lines citing more case law. *Id.*, at 13. However, nowhere does the Secretary address Mr. Patton's arguments concerning the language in the actual CUE motion. See Brief for the Appellant, at 10-11. Nor does the Secretary discuss the Board's obligation to provide a sympathetic reading of all CUE allegations in conjunction with the other evidence and the law. See Brief for the Appellant, at 10; and *Andrews v. Nicholson*, 421 F.3d 1278, 1282-1283 (Fed. Cir. 2005).

The Secretary then presented an argument based upon a hypothetical asserting no prejudice could possibly exist where the Board fails to decide an issue presented. Brief for the Appellee, at 14-15. However, as discussed below the Secretary asserted facts not decided by the Board. Finally, the Secretary states "even if the Board **provided an inadequate statement** regarding ... § 3.303(b), no prejudicial error

occurred. Brief for the Appellee, at 14. (Emphasis added). This statement demonstrates that the prior argument presented by the Secretary was based solely on Mr. Patton's alternative reasons and bases argument. In *MacWhorter* this Court rejected the Secretary's invitation to "proceed on its own to a complete and thorough examination of the record, the complex regulatory structure and the underlying statutory law" *MacWhorter*, at 135. The Court should reject this invitation today.

8. The Secretary, in arguing to affirm the denial of CUE, asserted facts that were not decided by the Board.

The Secretary argues "the 2005 Board found that Appellant did not suffer from a chronic back disorder during service" Brief for Appellee, at 14. However, the 2005 Board did not actually say this. Instead, the 2005 Board found "it has not been shown that the veteran's back disorder is related to service or any incident thereof". R. at 639. The Board came to this conclusion after weighing positive and negative evidence. Furthermore, the 2015 Board did not address this fact. The 2015 Board focused its analysis on whether a request to reweigh the evidence can constitute CUE. R. at 7-8.

Next the Secretary asserts that even if the Board did provide inadequate reasons and bases, "no prejudicial error occurred." Brief for Appellee, at 14. He states "the underlying premise that the evidence proves continuity of symptomatology is easily debatable." *Id.* However, the 2015 Board never reached this question. The Board limited its analysis on whether a request to reweigh the evidence can constitute CUE.

R. at 7-8. The Secretary is presenting, as fact, determinations not decided by the Board. See § 7261(c). See *Martin, supra*.

Finally, the Secretary doubles down saying "[e]ven if one could conclude that Appellant's contentions of § 3.303 error are correct, he has not demonstrated how the correction of such errors would have entitled him to an award of service connection." Brief for Appellee, at 15. This statement misses the point. The Board never addressed whether the 2005 Board decision committed CUE by failing to apply § 3.303(b). The Secretary cannot get around this void by presenting arguments and purported facts that have not been decided by the Board. See *Martin, supra*.

The Board's error – not addressing Mr. Patton's CUE argument – is prejudicial as a matter of law. See *Russell v. Principi*, 3 Vet.App. 310, 319 (1992). Mr. Patton argued the Board committed CUE by failing to apply § 3.303(b), and the Board said there is no CUE because reweighing of evidence is not CUE. There is no analysis from the Board that even mentions § 3.303(b), *Savage*, or continuity of symptoms. Mr. Patton has no clue what the Board would have ruled had the proper allegation of CUE been addressed. This is prejudicial.

9. The Secretary, in arguing the Board had jurisdiction over Mr. Patton's CUE motion, once again failed to address Mr. Patton's arguments.

Therefore, he has also conceded this point.

Mr. Patton argued alternatively that his CUE motion was not plead to the requisite specificity. Brief for the Appellant, at 12-14. Mr. Patton thoroughly discussed

the language of the motion pointing out the motion asserted incorrect facts, failed to cite to any law that would offer relief, and failed to explain how the outcome would be manifestly different, but for the error. Brief for the Appellant, at 13. Mr. Patton continued that the motion seemed to raise allegations related to § 3.303(b); 38 C.F.R. § 3.309(a); or a reweighing of the evidence. *Id.*

The Secretary's argument can be summed up as follows: the intention was clear, it was sufficiently specific, and the Board was correct in its decision. Brief for the Appellee, at 15-16. The Secretary argued "[Mr. Patton's] allegation was sufficiently specific: the 2005 Board decision failed to recognize that his post-service treatment in December 1966 for lumbosacral strain, and apparently an eventual herniated disc, is associated with his treatment in 1965." *Id.*, at 16. The Secretary flippantly concludes that Mr. Patton "now takes issue with the math he presented in his CUE Motion" *Id.*, at 16.

However, a motion for CUE must be pled with specificity. See 38 C.F.R. §20.1404(b). This regulation governs the pleading requirements for all CUE motions presented to the Board, and requires the Board dismiss any motion that "fail[s] to comply with the requirements set forth in [§ 20.1404(b)]." An error in "math" is not a simple thing. Presumptions are based on math, and different laws apply depending on when a condition manifests. The Secretary did not even cite to § 20.1404. Other than incorrectly asserting a CUE allegation with incorrect facts is sufficiently plead, the Secretary failed to offer any real argument in support of the Board's decision. Once

again the Secretary offered no rebuttal argument except to say the Board was correct. Once again, the Court should decline to entertain this conclusory argument. See *MacWhorter, supra*.

Conclusion

For the reasons set forth above and in his opening brief, Mr. Patton respectfully requests that this Court provide relief by vacating the Board's two September 2015 decisions, and remand the matters to provide adequate reasons and bases that are responsive to the issues raised by Mr. Patton and evidence of record.

Respectfully submitted,

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