

REPLY BRIEF OF APPELLANT

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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

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16-48

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OTHA STEWART, JR.,

Appellant,

v.

ROBERT A. MCDONALD,  
SECRETARY OF VETERANS AFFAIRS,

Appellee.

SHAWN D. MURRAY  
CHISHOLM, CHISHOLM & KILPATRICK  
One Turks Head Place, Suite 1100  
Providence, RI 02903  
(401) 331-6300 (telephone)  
(401) 421-3185 (facsimile)

Counsel for Appellant

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## APPELLANT'S REPLY ARGUMENTS

- I. The Board's decision lacked adequate reasons or bases because it based its conclusion entirely on an opinion which failed to account for material lay evidence. Simply because the Board mentioned the existence of the lay evidence does not mean its discussion and legal analysis was sufficient.**

The Secretary suggests that the Board gave due consideration to the Veteran's lay statements, in which he explained that braces worn due to his service-connected disabilities caused significant wear and tear on his clothing, because it mentioned those statements in its decision. Sec. Brief at 6. To be clear, Mr. Stewart recognized in his opening brief that the Board discussed his lay statements in its analysis. Apa. Open Brief at 8. The issue, as the Veteran pointed out, is that the Board simply found his lay statements to be outweighed by the Chief of the Prosthetics Treatment Center's ("Chief") opinion, even though that opinion did not consider or address the Veteran's contentions. *Id.* Both the Board and the Secretary fail to appreciate that merely listing evidence before stating a conclusion does not constitute an adequate statement of reasons or bases. *See Dennis v. Nicholson*, 21 Vet.App. 18, 22 (2007).

The Secretary offers his interpretation of 38 U.S.C. § 1162, the statute governing entitlement to a clothing allowance, and suggests that it "requires that the prosthetic or orthopedic appliance tends to wear out or tear clothing, not that it actually must do so." Sec. Brief at 6. He then proffers the dictionary definition of the word "tend" in support of this interpretation. *Id.* The statute itself reads:

The Secretary under regulations which the Secretary shall prescribe, shall pay a clothing allowance . . . to each veteran who—because of a service-connected disability, wears or uses a prosthetic or orthopedic appliance (including a wheelchair) which the Secretary determines tends to wear out or tear the clothing of the veteran[.]

38 U.S.C. § 1162. Although the plain language of the statute indicates that the Secretary has the discretion to determine which prosthetic or orthopedic appliances tend to wear out clothing, nothing in this language supports the Secretary’s interpretation set forth in his brief that the prosthetic “must be one that has a demonstrated history of wearing out or tearing clothing or one that has design features that would achieve the same effect.” Sec. Brief at 6. Furthermore, the statute reads “tends to wear out or tear the clothing of *the veteran*.” 38 U.S.C. § 1162 (emphasis added). The fact that the statute contains this language suggests a degree of subjectivity, *i.e.* that the Secretary is to make this determination for each individual veteran based on that veteran’s circumstances. The Secretary’s interpretation suggests an objective measurement which the plain language of the statute simply does not support.

When a statute is ambiguous, “interpretive doubt is to be resolved in the veteran’s favor.” *Brown v. Gardner*, 513 U.S. 115, 118 (1994). Courts are precluded from substituting their judgment for that of VA, unless . . . the Secretary’s interpretation is unfavorable to veterans, such that it conflicts with the beneficence underpinning VA’s veterans benefits scheme, and a more liberal construction is available that affords a harmonious interplay between provisions. *Trafter v. Shinseki*, 26

Vet. App. 267, 272 (2013). As the Secretary offers no support for his reading of the statute in the present case, the Court should put no weight on his assertion that the prosthetic in question must have “a history of wearing out clothing” in order for a clothing allowance to be warranted. Any doubt regarding what the statute requires should be resolved in the Veteran’s favor. To the extent that this interpretation is set forth for the purposes of the present litigation, the Secretary’s interpretation of what the statute requires should not factor into the Court’s decision. *See Martin v. Occupational Safety & Health Review Comm’n*, 499 U.S. 144, 146 (1991) (holding that litigating positions are not entitled to judicial deference when they are merely counsel’s “*post hoc* rationalizations” for agency action and are advanced for the first time on appeal).

Although he suggests that the Veteran is not eligible for a clothing allowance because his braces do not have a demonstrated history of wearing or tearing clothing, the Secretary appears to contradict this position by suggesting the Board might have weighted other lay evidence such as photographs or statements from friends and relatives more favorably. Sec. Brief at 6-7. This suggests that the Secretary’s interpretation of what the statute requires lacks any solid foundation. Either the Veteran is not eligible for a clothing allowance because his braces “do not have a demonstrated history of wearing or tearing clothing,” in spite of any damage to clothing they actually cause, or he is eligible if the Board had additional lay evidence to consider. *See* R-7 (Board statement that there is no indication from treatment records

that Veteran's braces cause wear and tear of clothing and noting lack of additional lay evidence). The Secretary cannot have it both ways, but seeks to do so in this case.

The Board erred when it relied on the lack of an indication in VA examination reports and VA treatment records that the Veteran's braces damaged his clothing, but faulted the Veteran for failing to provide additional lay evidence proving the damage. *Id.* The Court has held that when the record does not adequately reveal the current state of a claimant's disability, the fulfillment of the statutory duty to assist requires a thorough and contemporaneous medical examination. *Palczewski v. Nicholson*, 21 Vet.App. 174, 181 (2007); *Apa*. Open Brief at 8. However, the "examination" the Board relied on here was anything but thorough, as there is no evidence it even considered the Veteran's statements that the reason for the wear and tear on his clothing was the fact that he needed to wear his braces outside of his clothes to prevent skin irritation. *See* R-1679-82; R-1685.

Mr. Stewart never contended that exposed panels or metal hinges on his braces caused damage to his clothing; rather he stated that it was his need to wear his braces *over* the clothing due to skin irritation that led to the damage. *Id.* The Board's conclusion, however, relies on an opinion from the Chief of Prosthetics that the braces do not have exposed panels or metal hinges. R-1682; R-7. Accordingly, the Board fails to adequately explain its reliance on this examination as more probative than the Veteran's lay statements, and the Secretary's argument to the contrary is unavailing.

**II. Even if the Board was required by statute to rely on the Chief's opinion in reaching its decision, it failed to ensure compliance with VA's duty to assist because it could have remanded the issue for an opinion that properly considered the Veteran's lay assertions.**

The Secretary seeks to defend the Board's reliance on the Chief of Prosthetic's opinion by distinguishing the Court's holding in *Dalton v. Nicholson*, 21 Vet.App. 23 (2007), cited in the Veteran's opening brief, from the facts of the present case. Sec. Brief at 7-8. While it is true that *Dalton* dealt with 38 U.S.C. § 1154(b), this does not change the applicability of the holding in *Dalton* to the present case. The Court in *Dalton* held, without any qualifications, that the Board improperly relied on a medical examination that "impermissibly ignored the appellant's lay assertions that he had sustained a back injury during service." *Dalton* at 38. In this case, nothing in the Secretary's argument suggests that it was permissible for the Chief to ignore the Veteran's lay assertions in rendering her opinion. Simply because *Dalton* dealt with a separate statute and distinguishable facts does not render its holding any less applicable to the present dispute. This is a distinction without a difference.

The fact remains that the Chief was effectively acting as a medical examiner in this case, given the procedural history of the case up to the point of her opinion. The Veteran had already been denied benefits at the "regional office" level and filed a timely notice of disagreement. R-1678; R-1685. The Chief ignored the Veteran's lay statements in the statement of the case which followed the notice of disagreement, and certified only that the Veteran's braces lacked exposed rigid panels or metal

hinges. R-1682. The Veteran stated that he needed to wear his braces on the outside of his clothing due to skin irritation from the braces, and that because of this his clothing was damaged. R-1685. Accordingly, the proper inquiry that should have been undertaken was whether the Veteran's contentions regarding the damage to his clothing had merit, not whether the braces he used contained metal hinges or exposed rigid panels. Apa. Open Brief at 10-11.

Yet, the Board was content to rely on the Chief's opinion because the Chief had knowledge and familiarity with the specific braces used by the Veteran. R-7. However, she did nothing more than certify that those braces did not contain exposed panels or metal hinges. R-1682. The Veteran never alleged that his braces contained exposed panels or hinges, so this certification is largely irrelevant to the Veteran's claim. The Board found the Chief's opinion to be the most probative evidence, although it addressed something that the Veteran does not dispute. The result of the Board's reliance on this opinion is the same decision as would be rendered if the Veteran's lay statements were never made. The Board's simple reliance on a medical examination that failed to consider material lay assertions would be a clear violation of the duty to assist. *See Dalton*, 21 Vet.App. at 39. There is no reason the same logic should not apply here. Apa. Open Brief at 11.

Mr. Stewart recognizes that the Under Secretary for Health (or his or her designee) must certify that the Veteran applicant wears or uses certain prosthetic or orthopedic appliances that tend to wear or tear clothing in order to be entitled to a

clothing allowance under 38 U.S.C. § 1162. *See* 38 C.F.R. § 3.810(a)(1)(ii)(A) (2016).

However, this does not free the Board from its duty to assist the Veteran in substantiating his claim. *See* 38 U.S.C. § 5103A(a)(1).

Contrary to the Secretary's assertion, the reasons set forth in the Chief's opinion do not "sufficiently explain why Appellant's braces do not tend to wear out or tear clothing." Sec. Brief at 8. Rather, the opinion only explains that the Veteran's braces do not contain metal hinges or rigid panels. *See* R-1682. The Secretary correctly notes that the Board must determine the credibility and weight of the evidence, but this does not change the fact that the Board violates its duty to assist if it relies on an inadequate medical opinion for its conclusion. The fact that the Board addressed the Veteran's statements that the Chief ignored makes no difference, since the board relied entirely on the Chief's opinion for its decision. Sec. Brief at 9. To the extent that the Board was required to rely on the Chief's opinion for its decision by 38 U.S.C. § 1162 and the applicable regulations, R-8, it had the capability to remand the issue to ensure the Chief provided an opinion that properly addressed all relevant evidence. Because it did not do so, and simply accepted the Chief's opinion as most probative despite its inadequacies, the Board failed to comply with its duty to assist the Veteran.

## **CONCLUSION**

Based on the foregoing reasons, as well as the arguments contained in the Appellant's opening brief, the Court should vacate the Board's decision and remand

the appeal with instructions to readjudicate the issue of the Veteran's entitlement to a clothing allowance for the year 2014 in accordance with the Court's opinion.

Respectfully Submitted,

Otha Stewart, Jr.  
By His Representatives,

/s/ Shawn D. Murray  
Shawn D. Murray  
Chisholm, Chisholm & Kilpatrick  
One Turks Head Place, Suite 1100  
Providence, RI 02903  
(401) 331-6300  
(401) 421-3185 Facsimile