

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

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| JOE E. MORGAN, |) | |
| |) | |
| Appellant, |) | |
| |) | |
| v. |) | Vet. App. No. 15-1306 |
| |) | |
| ROBERT A. MCDONALD, |) | |
| Secretary of Veterans Affairs, |) | |
| |) | |
| Appellee. |) | |

**SECRETARY’S MOTION FOR RECONSIDERATION OF THE COURT’S
AUGUST 24, 2016, SINGLE-JUDGE MEMORANDUM DECISION**

Appellee, Secretary of Veterans Affairs (Secretary), respectfully moves this honorable Court to reconsider its August 24, 2016, single-judge decision to the extent that the decision vacated and remanded the part of the February 18, 2015, Board of Veterans' Appeals (Board) decision that denied entitlement to service connection for post-traumatic stress disorder (PTSD). See U.S. Vet. App. R. 35(a). As grounds for this relief, the Secretary submits that the Court appears to have overlooked or misunderstood points of law and fact surrounding the Board’s statement of reasons or bases.

As a factual background, Appellant had active duty service from August 1976 to May 1983. R. at 388-89. In August 2002, Appellant submitted an informal claim of entitlement to service connection for PTSD to the RO. R. at 699-704. Private medical records dated from November 2002 to July 2003 document medical treatment and psychological evaluations as a result of Appellant’s

incarceration for sexually assaulting his underage daughter repeatedly. See R. at 535-71. In a December 2002 rating decision, the RO denied Appellant entitlement to service connection for PTSD. R. at 674-78. Appellant continued to appeal the RO's denial, which led to litigation before the Court.

In this case, the Board concluded that "the evidence of record is negative for a diagnosis of PTSD." R. at 10 (2-18). In reaching its conclusion, the Board noted that November 2002 and June 2003 private medical records only documented diagnoses of depressive disorder, anxiety disorder, and malingering and mood disorder, not otherwise specified (NOS). *Id.* The Board explained that "all of this evidence provides highly probative evidence against the claim that the Veteran has PTSD at this time." *Id.*

Despite the aforementioned, the Court, in its August 24, 2016, decision, found error in the Board's statement of reasons or bases, finding that "the Board's finding that the appellant's symptoms are not attributable to PTSD is in error, as it was not based on the opinion of any medical examiner, but rather on the Board's own unsubstantiated medical judgment that, because the appellant was diagnosed with other psychological conditions, his symptoms are not indicative of PTSD." Slip Op at 6.

However, the Court overlooked the fact that the Board does not, at any point in the decision on appeal, make the finding that "Appellant's symptoms are not attributable to PTSD." See R. at 2-18. Instead, the Board found that "the Veteran does not have PTSD" and that "the evidence of record is negative for a

diagnosis of PTSD.” R. at 7; 10 (2-18). Moreover, while the November 2002, May 2003, June 2003, and July 2003 private psychological examinations may have “considered only whether the appellant was mentally fit to stand trial and were neither asked to consider nor thought to consider whether the appellant’s symptoms are not attributable to PTSD,” they do not contain diagnoses of PTSD and do provide a plausible basis for the Board’s finding that the evidence of record did not show a diagnosis of PTSD. See *Gilbert v. Derwinski*, 1 Vet.App. 49, 52-53 (1990) (finding of fact is not clearly erroneous if there is a plausible basis for it in the record). In other words, the examiners could not have possibly related any of Appellant’s symptoms to PTSD (whether they were asked to opine on that issue or not) as they explicitly did not diagnose that condition. Accordingly, the Board did not err in finding that Appellant’s symptoms were unrelated to a condition that was not diagnosed.

Additionally, the Court also misunderstood the point of law in *Colvin*. In that case, it was held that **the Board may only consider independent medical evidence** and may not substitute its own medical opinion. See *Colvin v. Derwinski*, 1 Vet.App. 171, 175 (1991) (emphasis added). To this end, it appears in this case that the Court is faulting the Board for following the law espoused in *Colvin*. Particularly, the Board considered the independent November 2002, May 2003, June 2003, and July 2003 private psychological examinations in making its determination, but yet, the Court finds it error for doing so in clear contravention to the Court’s controlling caselaw.

Because the Board never made the finding that Appellant's symptoms were attributable to a condition other than PTSD and because the Board properly relied on the independent medical evidence of record in determining that there was no diagnosis of PTSD, the Court should reconsider that portion of its August 24, 2016, decision that vacated and remanded the issue of entitlement to service connection for PTSD.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On the 14th day of September 2016, a copy of the foregoing was mailed, postage prepaid, to:

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I certify under the penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

/s/ Jonathan G. Scruggs
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Counsel for Appellee