

*Before the United States Court  
of Appeals for Veterans Claims*

---

**LEO ROBINSON,  
Appellant**

**Versus**

**DEPARTMENT OF VETERAN AFFAIRS,  
Appellee**

---

Appellant's Reply Brief

---

Bruce W. Ebert, Ph.D., J.D., LL.M., ABPP  
Counsel for Appellant  
300 Harding Blvd., Suite 116  
Roseville, CA 95661  
Telephone: (916) 781-7875  
Facsimile: (916) 781-2632  
Email: [bpsylaw@aol.com](mailto:bpsylaw@aol.com)

**CONTENTS**

REPLY BRIEF..... 1

CLARIFICATION OF THE NATURE OF THE CASE..... 1

CLARIFICATION OF THE RELEVANT FACTS ..... 2

THE ARGUMENT OF COUNSEL..... 5

CONCLUSION..... 7

**TABLE OF AUTHORITIES**

**Cases**

*Wagner v. Principi*, 370 F.3d 1089 (Fed. Cir. 2004) ..... 3

**Statutes**

§403 of the Federal Rules of Evidence ..... 5

38 U.S.C. §1111 ..... 3

**Other Authorities**

RBA 2389 ..... 3

RBA 2475 ..... 3

RBA, 120 ..... 4

RBA, 158 ..... 4

RBA, 191 ..... 4

RBA, 2130 ..... 2

RBA, 43 ..... 4

## **REPLY BRIEF**

### **CLARIFICATION OF THE NATURE OF THE CASE**

If this case isn't CUE then CUE does not exist! Contrary to the description of the Nature of the Case by the Secretary this case is not about the assignment of a forty percent rating for serviced connected postoperative residuals from the accident, described in Appellant's brief, in which Mr. Robinson was injured severely. Nothing in this case deals with postoperative residuals. The Secretary fails to this day to understand what was documented in the medical record of Mr. Robinson prior to his 1946 rating. Appellant described the clear references to the tear in the supraspinatus muscle he suffered as the result of the accident. The medical professionals in the Army described the injury to Mr. Robinson's shoulder very clearly in medical terminology. The Secretary seems to be arguing that because the medical professionals used medical terms (e.g. supraspinatus) and not a broader term such as rotator cuff that damage to this muscle group somehow never occurred. This case is about the only claim filed in this matter for Mr. Robinson. In fact, this Court clearly articulated that status in its response to Appellant's motion for reconsideration of the decision made regarding Appellant's case when he was represented by counsel who was deceased at the time of the decision of the Court. This very Court, on December 8, 2003, concluded no CUE claim had been filed by Mr. Robinson as a matter of law. There is no other way to view the plain language of this Court.

Then the Secretary wasted ten years of Mr. Robinson's life by its failure to recognize that a Form-9 equivalent had been filed by current counsel once he was involved in the case.

The strongest case for this was the recognition of this very fact by Martin Hockey, then Department Chief of the United States Department of Justice who represented the Secretary at the United States Court of Appeals for the Federal Circuit. The case at that level was designed to have the VA recognize the two letters of appeal filed with the BVA in 2007 as the equivalent of a Form-9 in the days when equivalent methods were acceptable. Mr. Hockey had Appellant's case returned to the VA General Counsel with instructions on how to handle the error. Mr. Hockey has been available as a witness and for consultation by the Secretary yet no one ever contacted him.

The jurisdictional arguments of the Secretary are specious and have no relevance in light of the prior opinion of this Court. It is as though the Secretary would like the current Judge(s) deciding this matter to ignore prior clear decisions of this Court. Further, as the result of those decisions the Secretary is collaterally estopped from making the argument it does in paragraph two of his brief. This is the very first time Appellant has had the VA Regional Office, BVA and now this Court consider whether the rating decision in 1946 was CUE.

The Secretary confuses matters with information long after 1946 by citing to the record instances of matters contained in the Record Before the Agency (RBA) that came after the rating decision at issue.

#### **CLARIFICATION OF THE RELEVANT FACTS**

It is clear the Secretary cherry picked certain facts far different than the most relevant facts applicable to whether the rater in 1946 committed CUE or not. The VA tries to rely on a brief record only nine days after the accident (RBA, 2130) which fails to report what the Secretary claims it does. The Secretary claims this medical record nine days after the accident which

injured Mr. Robinson describes him as having a normal range of motion when the record is completely silent on that subject. In addition, the reliance on this particular record is irrelevant as the detection the of tear to the supraspinatus muscle took place subsequently and before the rating decision in 1946. Leo Robinson suffered for two years complaining of severe problems to his shoulder and was given seven different diagnoses all documented on page twelve of Appellant's brief. On page three of the Secretary's brief there is additional confusion as the reference to an old injury took place in 1978 and in 1997 and is not relevant to a CUE claim. It is as though the Secretary wants this Court to draw an impermissible conclusion that information thirty years after the specific date of the CUE claim as there is no old injury that is relevant to this case as it pertains to the CUE claim. The note at RBA 2475 refers to an old injury and the only injury Mr. Robinson had was in the accident in 1944. We need not waste the Court's time discussing the Presumption of Soundness doctrine (See 38 U.S.C. §1111; also see *Wagner v. Principi*, 370 F.3d 1089 (Fed. Cir. 2004)). However, by referencing old injuries at RBA 2389 the Secretary seems to wants things both ways. Clearly he concedes the existence of a tear to the supraspinatus muscle. That tear was not rated in 1946. It could not have come from any other place but the accident in 1944. The medical records meticulously set forth in Appellant's brief demonstrate this. When the medical evidence is coupled with the presumption of soundness it could not have come from any other place than the horrific accident Mr. Robinson was a victim of in 1944.

The Secretary cannot have matters both ways. There cannot be normal functioning of the right shoulder and an old tear to the supraspinatus muscle plus the damage to the humerus plus the bursitis (RBA, 158) and the Arthritis (RBA, 43) and the Synovitis (RBA, 120), the

calcification of the right shoulder (RBA, 191) and the chip fracture of the right humeral head (RBA, 57). The secretary would like this Court to ignore the multiple disease processes in the Appellant extant during the 1946 rating and somehow just accept the rater's evaluation of one condition that was present at the time of the rating decision. The record is replete with examples how devastating the injury to this veteran's shoulder was and documented in Appellant's brief.

It is disturbing for the Secretary to seem to want to punish 94-year-old Leo Robinson for not appealing the 1946 and 1947 rating decisions. If he had appealed then he could not file a CUE claim at this time. Plus, any reference to the 1947 rating is irrelevant and should be stricken from the record.

On page six of the Secretary's brief he would like to have the Court think the first time there was a diagnosis of a rotator cuff injury was in March, 1978. This is false as the documentation in the medical record of a tear to the supraspinatus appears before 1946. This is the rotator cuff just documented in medical terminology. Any discussion of the case other than the CUE claim is completely irrelevant and only designed to create confusion, distract the trier of fact or confuse the issues. If the argument was made in a trial a large part of the brief of the Secretary especially several pages of the Relevant Facts would be dismissed on an objection citing §403 of the Federal Rules of Evidence.

Matters from 1978 through 1999 until current counsel became involved are irrelevant and inapplicable to this appeal. This is the case because this very Court made a clear determination that CUE had never been raised in regards to the litigation involving Mr. Robinson with the VA.

## THE ARGUMENT OF COUNSEL

As noted previously in Appellant's brief the matter is subject to a de novo review of the BVA's decision. Whether CUE exists is a matter of law. The case argued by Mr. Robinson clearly identifies how his entitlement to a forty percent rating or higher based upon CUE of the 1946 rating is undebatable. Please refer to the painstakingly detailed identification in the records of Mr. Robinson following his accident while on active duty up until the 1946 rating. It is undebatable he is entitled to CUE. The entire record demonstrates seven different conditions independently and separately diagnosed of Mr. Robinson and unequivocal evidence of damage to a critical muscle group of the rotator cuff that the rater of the VA in 1946 failed to rate.

How would the outcome be manifestly different? Mr. Robinson, a World War II veteran would have had a rating of forty percent or higher for thirty-two years before it was recognized. Appellant has clearly documented the error made by the VA rater in 1946 with a level of detail rarely seen in a CUE brief. The Secretary failed to understand the simple connections in Mr. Robinson's brief that severe pain over a long period of time beginning at the point where he suffered a severe truck accident while on active duty through the medical evidence diagnosing a tear in the supraspinatus muscle to the failure of the rater in 1946 to rate this and other conditions makes the perfect case for CUE. The reference by the Secretary that Mr. Robinson was not previously diagnosed with a rotator cuff tear until 1978 asks this Court to ignore the plain and simple evidence in the record specifically mentioning the tear to the supraspinatus muscle from 1944 to 1946.

The Secretary seems to want to have this Court suspend reality in viewing this case by discussing on page fifteen of his brief that the tear was diagnosed thirty-two years later.

Appellant's brief points out the specific places in the record where the tear to the supraspinatus muscle has been diagnosed prior to the 1946 rating, where the evidence from learned treatises identifies this key component of the rotator cuff and where the evidence existed at the time of the 1946 rating NOT thirty-two years later. It is akin to a slight of hand maneuver. On the one hand the Secretary is asking this Court to go along with the pretend situation that the supraspinatus muscle and rotator cuff are not interchangeable. There is an affirmative duty by each party to acknowledge clear facts and circumstances which in this case means recognizing the existence of the diagnosis of a rotator cuff injury prior to 1946 because rotator cuff and tear to the supraspinatus muscle are interchangeable and the medical treatises offered in support make this point crystal clear. The Secretary argues that Mr. Robinson used medical treatise evidence that was not in the record. Appellant was not interjecting a lay opinion but using a recognized form a legal argument by the use of learned treatises in a legal brief. Clearly, the Secretary is not actually arguing that medical treatises must be in the record to support a CUE claim because Congress has never required this nor has any Court.

Much like case law is not in the record of a claim's file, medical treatises have been recognized by every Federal Court to be usable in a legal brief outside of the record at issue. Preventing an Appellant from the use of learned medical treatises similar to how lawyers use case law would be an unprecedented change in legal jurisprudence in America. The learned treatise information was offered at the BVA hearing on Mr. Robinson's CUE claim. Of course there was no intent to misstate any facts as alleged by the Secretary, the fact is Mr. Robinson suffered from seven different conditions he did not come into the Army with causing a severe injury. This is just basic logic.

As for the retroactively argument of Deluca it is referenced quite clearly in Appellant's brief. What is very important is the Secretary does in fact concede additional error in the use by the VA rater of the 1933 Schedule of Ratings as opposed to the 1945 Schedule for Rating Disabilities. What is one major difference. Much more was known about the rotator cuff and the supraspinatus muscle group in 1945 than in 1933 as set forth in medical textbooks.

As for the Due Process arguments in Appellant's brief it is important because it caused an unacceptable delay of some ten years before Mr. Robinson could get this far and have a Court decide the merits of his case. It should be considered unacceptable to deprive a veteran of his fundamental due process rights. There should be no doubt this Court has de novo jurisdiction and this Court should reverse the decision of the BVA.

#### **CONCLUSION**

Appellant Mr. Leo Robison, age 94, has been waiting for justice for seventy years. If this case does not entail CUE then CUE has no real substance to it. Yet, Congress created CUE and there is no better case than this one for the CUE that Congress set forth in legislation to be found in a case involving veteran's benefits. Please reverse the decision of the BVA made on September 8, 2015 .

Respectfully Submitted,

/SIGNED/

---

Bruce Walter Ebert, Ph.D., J.D., LL.M.  
Attorney for Appellant, Leo Robinson