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BEFORE THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

LEO ROBINSON, Appellant, v. ROBERT A. MCDONALD, Secretary of Veterans Affairs, Appellee.	**CASE NO. 15-4105** **RULE 35 MOTION FOR RECONSIDERATION AND MOTION FOR DECISION BY THREE JUDGE PANEL IN THE EVENT RECONSIDERATION IS NOT GRANTED** **HEARING DATE: NONE** **HEARING TIME: N/A** **JUDGE: HONORABLE MARGARET BARTLEY**

Now comes Appellant with this motion before this honorable Court requesting the decision of a single judge, the honorable Margaret Bartley, by reconsidered. In the alternative if Judge Bartley does not grant reconsideration Appellant moves for a decision by a three judge panel under Rule 35(a) and Rule 35(b) of the Rules or the CAVC. The basis for the motion is serious errors in law and serious errors

in fact in which the Court overlooked in its haste to render a decision after Appellant's motion for an expedited decision was granted. Further, this case raises critically important legal issues of benefit of all veterans, the Secretary and the public especially the public perception of the manner in which veterans are treated by the entire system created to assist veterans and adjudicate claims as well as legal issues pertinent to veterans. The precise assignment of numerous errors is articulated below following the procedural history. If this case does not constitute CUE then CUE does not exist. Although Congress created CUE, it appears to be like a unicorn; people talk about it but no one has ever seen one.

PROCEDURAL HISTORY

10/28/2015: Timely Notice of Appeal Filed.

05/10/2016: Telephonic Briefing Conference Held.

06/01/2016: Appellant's Brief Filed.

06/20/2016: Revised Appellant's Brief Filed.

08/19/2916: Motion of Appellee for Extension of 45 Days to File Brief.

08/22/2016: Appellant's Opposition to File Brief Because of Age of Veteran (Age: 94) and his Failing Health.

08/262016: Secretary's Motion Granted in Part and Denied in Part Requiring Brief to be Filed by September 6 2016.

09/02/2016: Joint Motion for Stay Based on Assertion Case could or should

be Resolved by Agreement for Reversal or Remand.

09/06/2016: Motion for Stay Granted.

09/23/2016: Motion of Appellee to be Stayed Until September 26, 2016.

09/23/2016: Motion of Appellant for Decision Absent Secretary's Brief.

09/26/2016: Motion of Appellee for Leave to File 7-Day Stay.

09/27/2016: Motion of Appellee Granted without Response from Appellant.

09/27/2016: Motion of Appellee to Continue Stay of Proceedings Until September 30, 2016.

09/27/2016: Motion Granted without Allowing Response from Appellant.

09/30/2016: Appellees Brief Filed. (note: Approximately same Time as Appellees First Request which was Denied in Part).

10/06/2016: Motion of Appellant for Decision Absent Brief of Secretary Denied.

10/112016: Appellant's Reply Brief.

10/25/2016: Motion of Appellant for Expedited Decision.

10/28/2016: Motion Granted.

11/29/2016: Memorandum Decision.

ASSIGNMENT OF ERROR

Appellant raises twenty-seven errors in either law or fact. In addition, Appellant

denotes the reasons why this case is important for others besides the veteran and counsel for the veteran.

ERRORS IN LAW

There are numerous errors in law in the Memorandum Decision. The first error in law is as follows:

1) Court erred by failing to apply the Presumption of Soundness in its analysis by attributing the tear to the rotator cuff to some phantom, non-existent cause.

The Court appeared to be confused by the irrelevant information provided by the Secretary regarding events that took place in 1978. The only relevant information is that which was available to the rater at the time of the alleged CUE. In this case the rating decision under attack took place in 1946. The tear in the rotator cuff was noted at some point after the jeep accident and before the rating in 1946. Upon entering the Army, the veteran had an induction physical showing no signs of any medical disease or disability in his shoulder. There is no case in which the Presumption of Soundness is excluded from a CUE claim. There is no logical or rational reason that the Soundness doctrine would be omitted. Hence, the Court avoided any discussion of the Soundness doctrine in its discussion of the assertion of CUE by Appellant. Appellant documented in his brief evidence of a rotator cuff tear in the medical records between 1944 and 1946 and at no other time prior to the jeep accident. It appears the Court completely missed the required

application of the Presumption of Soundness to Mr. Robinson's claim in 1946. Instead the Court attributed the rotator cuff tear to some other unknown cause. This is an impermissible legal conclusion especially when the nature of the accident and the damage to Mr. Robinson's shoulder were directly attributed to the serious accident that killed the driver of the vehicle. A Three Judge Panel should review the case and set precedent for requiring any Veterans' Court to conduct an analysis of whether the veteran had any injuries, disabilities or disease in the part of the body which is the subject of the collateral attack on the rating decision. Since there was no medical disability noted on the entrance physical of Mr. Robinson's shoulder, he is presumed to be functioning soundly at the beginning of his active duty service in the Army (*Wagner v. Principi,* 370 F.3d 1089 (Fed. Cir. 2004; *Horn v. Shinseki,* 25 Vet.App. 231 (2012)). It appears the Judge in the Robinson matter concluded the presumption of soundness did not apply in a CUE. In fact, the law is just the opposite in that the presumption of soundness applies unless clear and unmistakable evidence rebuts the presumption (*D'Amato v. Brown,* 4 Vet. App. 481 (1993)). There was absolutely no evidence the veteran had a rotator cuff tear at the time he entered the service. It appears the Court confused the issues regarding how CUE and the presumption of soundness are applied together in a CUE case such as this one. Further, *Moray v. Brown* (5 Vet. App. 211 (1993) appeared to only confuse matters. There was never a

determination by the RO or the BVA that Mr. Robinson's shoulder injury occurred prior to service. The Court erred as to enter speculation into its decision regarding the origin of the tear to the supraspinatus muscle.[1]

The second assignment of error in law is as follows:

> **2) The Court made an impermissible assumption there were no damages from the Due Process violations made by the VA and found to be inexcusable. Constitutional violations can be inferred from the nature of the Due Process Violation.**

In the Court's decision it first analyzed whether there were blatant violations of the veteran's due process right by causing the aging veteran to have his case delayed unnecessarily over ten years. It referred to the violations as inexcusable. The use of the word inexcusable implies not just negligence but gross negligence. This Court erred in stopping its analysis on concluding there were violations of the Due Process clause of the Constitution then simply labeling the errors described by the Court as "inexcusable" (Court Opin. P. 10, para. 2 & p. 11, para. 1) then labeling those inexcusable actions by the DVA as harmless. The Court

[1] Throughout this motion the word supraspinatus and rotator cuff are used synonymously because the supraspinatus muscle is part of a group of muscles referred to as the rotator cuff. Appellant provided ample medical evidence available at the time of the rating showing this type of injury was identified and common in the medical community.

failed, as a matter of established Federal Law, to apply various damages set forth in learned treatises and law for violations of Constitutional rights (See D Dobbs, Handbook on the Law of Remedies § 3.1 (1973); *Carey v. Piphas,* 435 U.S. 247 (1978) as well as a few hundred cases following after *Carey.* The Court ignored the legal obligation to either presume compensatory damages such as the severe psychological stress Mr. Robinson faced in his latter years of life given the abject agony he suffered for more than ten years awaiting justice.[2]

The Court also had the choice to do what Federal Courts do when there is an issue of damages attached to a Constitutional violation. They allow the person damaged to prove up all damages in connection with the violation. In this matter if the Court failed to presume damages it should have remanded the case to the BVA to allow Appellant to prove any and all damages for the inexcusable treatment by the VA.

The third assignment of error in law is as follows:

3) The determination by the Court that *DeLuca v.*

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[2] We understand the Court is not familiar with the application of damages in a VA matter for negligence, gross negligence and Intentional Acts. The VA General Counsel was notified by Martin Hockey, Chief of the Appeals Branch at DOJ of the error made by the VA causing undo delay (see Appellant's brief). The VA personnel did nothing but delay the fair administration of justice for many years!

***Brown,* Vet. App. did not apply because it did not exist at the time of the 1946 rating decision in question and that the retroactivity rule did not apply to CUE constitutes a serious error in law.**

The Court found Appellant's brief correct on the recitation of the meaning of retroactivity rule but made two errors combined in its analysis. The Court's analysis (p.7, last full para.) erroneously concludes the retroactivity error does not apply to CUE as a matter of law. The Court cites *Russell* to presume that the retroactivity rule doesn't apply to a CUE case. The logic of the Court's decision is confusing at best, and wrong in the recitation of the long standing retroactivity rule in Federal Law in place for many decades. A Court cannot simply overturn established Federal Law in one or two sentences, especially the CAVC, which must follow the precedent of well-established Federal Law. The Court over-reached by attempting to carve out an exception not established by Congress or relevant case law. The Court failed to apply all of the legal points in *DeLuca* due to loss of use of a shoulder from the pain it caused. Specifically, there was no analysis of 38 C.F.R. § 4.40 and 38 C.F.R. § 4.45. The complaints of pain by the veteran were replete in the medical records at the time. These complaints entailed weakness, fatigue when he tried to use his arm, incoordination and pain whenever he tried to use his arm. Appellant's brief cited so many complaints of pain that it caused the Army to order a medical board leading to the discharge of the veteran.

Part of the logic for rejecting *DeLuca* to Mr. Robinson's CUE case is that *Deluca* did not exist in 1946. The Court failed to understand two critical legal issues. First, CUE did not exist in 1946 and if one follows the logic of the Court's decision no case interpreting CUE following the 1946 rating would be applicable either. Simply dismissing the retroactivity rule because CUE is a collateral attack on a rating decision creates new law and undermines the intent of Congress in creating CUE and our Supreme Court, The United States Court of Appeals for the Federal Circuit and all other Federal Appellate Courts. Second, under the Constitution, Congress makes law (U.S. Const., Art. I, sec. 8) and not the Courts. This Court erred in making a new law regarding how the retroactivity rule applies to cases. Nothing in the Congressional Record pertaining to the establishment of CUE by Congress set forth any relevant exceptions and no language either plain in the statute and regulations establishing CUE or even in the statutory construction of CUE leads to a conclusion eliminating the retroactivity rule in CUE cases.

Simply calling CUE a collateral attack on a rating, which it is, does not negate the use of case law to assist the Court in interpreting how the law should be applied at the time. The Court cited *Russell v. Principi,* 3 Vet. App. 310 (1992), as a justification for not applying the retroactivity rule (Ct. Opin., p.8, para.2, sen.1))

The holding in *Russell* did not conclude anything about the retroactivity rule. The application of the retroactivity rule was a novel legal theory proffered in this case. *Russell* had nothing to do with this case as it analyzed the applicability of a regulation not a case subject to the retroactivity rule. Further, the three judge panel in *Russell* ruled in favor of the veteran's CUE claim making the analysis by the Court with this case as a non sequitur.

The fourth assignment of error in law is as follows:

4) The Court failed to apply the Federal Rule on Circumstantial Evidence to the matters before it.

The Court ignored the jurisprudence of circumstantial evidence in deciding Appellant's case. We understand judges at the CAVC rarely deal with evidentiary doctrine but the fundamental of it are essential especially in a CUE case. The rule from the model jury instructions is applicable:

Rule 1.5 Manual of Model Criminal Jury Instructions:

1.5 DIRECT AND CIRCUMSTANTIAL EVIDENCE

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as testimony by a witness about what that witness personally saw or heard or did. Circumstantial evidence is indirect evidence, that is, it is proof of one or more facts from which one can find another fact.

You are to consider both direct and circumstantial evidence. Either can be used to prove any fact. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It is for you to decide how much weight to give to any evidence.

It may be helpful to include an illustrative example in the instruction:

By way of example, if you wake up in the morning and see that the sidewalk is wet, you may find from that fact that it rained during the night. However, other evidence, such as a turned-on garden hose, may provide an explanation for the water on the sidewalk. Therefore, before you decide that a fact has been proved by circumstantial evidence, you must consider all the evidence in the light of reason, experience, and common sense.

The application of this definition is relevant to the case. The Court misunderstood the importance of circumstantial evidence and/or somehow concluded it did not apply to a CUE case. For Mr. Robinson, he had documentation in his medical records of a tear to his rotator cuff. There was no other possible cause mentioned, identified, assumed or connected to this damage to his shoulder but the serious jeep accident. The law of circumstantial evidence requires a judge to attach the rotator cuff to the jeep accident and the failure to do so is an error in legal reasoning.

The fifth assignment of error in law is as follows:

5) The Court used tautological reasoning in coming to the standard of review for the case.

Many CUE cases are analyzed with tautological reasoning in determining the standard of review. The Court has the authority to review matters of law de novo. Other matters are reviewed under the arbitrary and capricious standard. CUE cases are matters of law and statutory interpretation of 38 U.S.C. § 5109A and 39 U.S.C. § 7111 along with the relevant regulations pertinent to those statutes. The Court looked at the BVA opinion. It seemingly performed an analysis whether there was CUE in the 1946 rating recognized by the VA. Then it concluded with essentially no evidence that there was no CUE missed by the BVA so the arbitrary and capricious standard was applicable. This is an example of faulty logic. CUE cases are matters of law and their adjudication should always be reviewed under the de novo standard.

6) The Court erred in creating its own facts and attributing them to the rater in 1946.

Although there was no record of the rater in 1946 even considering the tear that was found after the jeep accident the Court took the impermissible stance that the rater must have considered the tear to the rotator cuff at the time of the rating despite the fact there is not a scintilla of evidence in the record of consideration of a rotator cuff tear only in the records after the jeep accident. This is yet another problem of fundamental evidence. The objection to the Court's analysis if presented in a litigated setting would be "Objection, assuming facts not in evidence." There were no facts whatsoever the rater in 1946 ever even considered the rotator cuff tear during the rating of Mr. Robinson's shoulder problems. Mr. Robinson had an entrance physical at the beginning of his service. No problem with his shoulder or any part of his body, other than in one eye, was discovered. The only references in the medical record regarding a tear to the veteran's shoulder came after the jeep accident and prior to the 1946 rating decision. No Court can rely on phantom facts drawn from ethereal space. Doing so, as this Court did is a very serious error in law.

7) The seventh error in law is the Court's misunderstanding of the meaning of *DeLuca.*

Although the Court dismissed use of *DeLuca* as not applicable to a CUE case it performed an analysis of one of the *DeLuca* factors and failed to understand the multi-factorial analysis required by the case. A critical aspect in a *DeLuca* analysis is consideration of pain in the overall rating. The Court assumed that pain was only relevant as to a limitation of motion. Pain is an independent side effect of damage to the human body. There is an entire body of medical and psychological treatises on the numerous ways that pain adversely effects the individual. Limitation of movement is but one of dozens of serious problems affecting the human condition. Appellant documented numerous complaints in the record prior to the 1946 rating. It is well documented that pain has an adverse effect on the brain (Stephen Hunt and Martin Koltzenburg, *The Neurobiology of Pain*, Oxford Press (2005) and Michael Margoles and Richard Weiner, *Chronic Pain,* CRC Press (1999). Mr. Robinson' symptoms of pain were so bad along with complaints of the lack of use of his right shoulder he underwent a medical board and was separated from the Army because of these very problems.

They erred in assuming *DeLuca* only allowed an analysis by a rater on how pain adversely affected limitation of motion. This overlooks the actual holding in the case and the appropriate factors to consider in evaluating a veteran with an injury.

Everyone experiences pain.[3] In fact, pain plays an essential role in the survival of the species. Pain prevents us from keeping our hands on a fire or a hot stove or tells us to slow down if we pull a hamstring muscle. Pain becomes a significant problem when it is chronic in nature. Chronic pain is described as pain that "lasts beyond the time unnecessary for healing and resists normal treatment."[4] Further, "chronic pain is destructive and serves no useful purpose."[5] The American Academy of Pain Medicine estimates there are fifty (50) million people who suffer in chronic pain in the United States.[6] The American Pain Society estimates there are 75 million people in chronic pain.[7] The American Medical Association (AMA) estimates there are one hundred (100) million people suffer from chronic

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[3] S.B. McMahon & M. Koltzenburg. Textbook of Pain 5th Ed., Elsevier (2006).

[4] S. Fishman, "The War on Pain", at p. 51 (2001) Quill.

[5] Supra note 1 at p. 5.

[6] See American Association of Pain Management

[7] See American Pain Society <www.ampainsoc.org>

pain.[8] Whether there are fifty million or one hundred million people in the United States who suffer from chronic pain, the existence of such a large group of individuals experiencing human suffering is a national public health crisis. One group of researchers found that headaches, arthritis, back and musculoskeletal pain alone has led to a loss of productivity of 13% in the United States work force and cost a staggering $62.1 billion dollars per year.[9] In this regard pain has been characterized as a disease itself.[10] It is well known which diseases, illnesses and injuries are likely to cause chronic pain. It is also well known that many of these conditions are nonmalignant. Pain affects a diverse group of people from

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[8] See AMA, J. of Am. Med. Assn. (2003)

[9] Harris Allen, David Hubbard & Sean Sullivan (2005), The Burden of Pain and Employee Health and Productivity at a Major Provider of Business Services, 47 J. Occup. Environ. Med 658.

[10] A. Dunkin. "When Pain Itself is the Disease", *Business Week*, Jan. 27 1992.

professionals to the unemployed.[11] In 2005 there are recognized medical conditions that cause severe chronic pain and have no identifiable cure.[12]

8) The Court failed to address the use by the rater of the 1933 rating manual versus the 1943 VA manual.

The rating in this matter was accomplished in 1946. There was a new manual published in 1943. Despite this and the argument of counsel the Court relied on the 1933 VA manual. Appellant argued the rater in 1946 should have applied the 1943 VA Manual of Disabilities versus the 1933 older version. The record is clear the rater in 1946 used the older manual. Appellant argued it was CUE to use an older manual for the sake of convenience. The Court failed to address use of an older outdated Manual in a rating in which there was a new manual issued three years before the rating decision.

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[11] S.H. Johnson, "Disciplinary Actions and Pain Relief: Analysis of the Pain Relief Act", *24 J. L.M. &E 319* (1996).

[12] See S.B. McMahon & M Koltzenburg. Textbook of Pain 5th Ed. Elsevier (2006). Some of these maladies include Complex Partial Pain Syndrome, Complex Sympathetic Dystrophy, Fibromyalgia, Chronic Fatigue Syndrome along with neck and back disorders.

The ninth error of law is as follows:

9) The Court violated Congressional intent when Congress created the legal concept of clear and unmistakable evidence.

Public Law 105-111 of the 105th Congress established a right of veterans to revise a rating made at some distant point in time on November 21, 1997. They did so writing 38 U.S.C. § 5109(A) and 38 U.S.C. § 7111. The Court erred in law by adopting and continuing such a stringent standard for CUE to exist that makes it virtually impossible for any veteran to prevail on a CUE claim in violation of the intent of Congress when it established CUE for veterans in two statutes. Congress never used the word "rare" either in discussions prior to passing legislation on CUE nor does the word "rare" appear in either 38 U.S.C. 5109A or in 38 U.S.C. 7111. This Court and other have created the unicorn effect. The notes from the Congressional Record as so clear that the intent of Congress has been ignored by this entire Court and the VA. The relevant section are as follows:

CONGRESSIONAL RECORD

https://www.congress.gov/congressional-record/1997/4/16/house-section/article/h1566-1?q=%7B%22search%22%3A%5B%227111%22%5D%7D&r=1

Mr. STUMP. Mr. Speaker, I yield myself such time as I may consume. This bill was introduced by the gentleman from Illinois [Mr. Evans] last year as H.R. 1483. It passed the House in May 1986, but was never considered in the other body.

H.R. 1090 extends the grounds upon which a veteran may appeal an adverse benefit decision to the Board of Veterans Appeals and to the Court of Veterans Appeals. The bill allows appeals based on what is known as a clear and unmistakable error. Veterans who have been denied benefits which have been in error like this must be given the right to have their claims reexamined. This should greatly improve the recourse provided to veterans when they believe that the VA has reached the wrong conclusion in a VA benefit decision.

Mr. Speaker, I would like to commend the gentleman from Illinois [Mr. Evans], the ranking minority member of the committee, for introducing this bill and for all the hard work that he has put into this.

Mr. Speaker, I reserve the balance of my time.

{time} 1345

Mr. EVANS. Mr. Speaker, I yield myself such time as I may consume.

Mr. Speaker, first of all, I want to thank the gentleman from Arizona, Bob Stump, for helping us get this bill through the committee process so quickly this year. Without his diligence we would not be here this afternoon. I appreciate it very much, Mr. Speaker.

Mr. Speaker, the most significant change made by this bill would be the new authority for veterans with prior claims involving clear and unmistakable errors to resubmit their claims for new review by the Board of Veterans Appeals. Under present law, a veteran has no right to obtain review of clear and unmistakable errors in the previous decision of the board, no matter how blatant that error.

In the cases where the asserted error was made by the regional office of the Department of Veterans Affairs, this right already exists by regulation. My bill would codify this regulation in title 38.

The kinds of errors which this bill would rectify are those which are undebatable. These are errors which when called to the attention of a subsequent reviewer, compel the conclusion that but for the error, the result would have been manifestly different.

The bill also addresses the situations where evidence in the

veteran's file at the time of the prior decision was ignored or wrongfully evaluated under the law as it existed at the time of the original decision. This legislation would give veterans the same kind of opportunity to pursue an erroneous claim decision now provided to Social Security beneficiaries when they had been given misinformation. Veterans deserve the same rights as Social Security recipients to have errors corrected.

The tenth assignment of error in law is as follows:

> **10) The Court should have granted Appellant's motion for a decision absent the brief of the Secretary as the conduct of the Secretary's staff was improper.**

The facts of the case demonstrate the Secretary acted in bad faith and was rewarded for it. Appellant's brief was filed timely in the case on June 01/2016 and subsequently on June 20, 2016. On the day Appellees brief was due they filed for an extension of 45 days to file their brief knowing that the veteran was ninety-four-year-old. They had 60 days to file their brief but failed to file it with the Court. Appellant opposed the motion because of the veterans age and failing

health.[13] Judge Bartley denied the full delay and ordered the brief be filed by September 6, 2016. Counsel for the Secretary reached out to Appellant's counsel 4 days before his brief was due and asked Appellant to stipulate to a joint motion for a delay based upon his attempt to obtain authority either for a remand or a complete reversal. On September 23, 2016 counsel for the Secretary requested yet more time and the Court ruled without comment from Appellant. Appellant filed a motion for a decision absent the brief of the Secretary. This motion should have been granted as counsel for the VA subsequently asked for a stay of the proceedings until September 30, 2016 which was granted without a response from Appellant. The Secretary was able to obtain, essentially, the very same date it had requested initially for an extension of time to file its brief which was denied in part. Every day of a delay for Mr. Robinson is a day that is realistically closer to his death. The Court recognized this in its ruling on August 26, 2016. There is evidence of bad faith on the part of the Secretary to drag out the proceedings with tactics that have the appearance of lacking good faith. Given all the facts and circumstances the Court should have granted the motion as a reasonable and legitimate consequence for unduly delaying the proceedings. The actions of the

[13] Appellant rarely opposes requests for extension but given the age of Mr. Robinson, his poor health and the inexcusable eleven year delay the unique circumstances led to the opposition.

Secretary in this case bring discredit on the VA and reflect a rather laze faire attitude to the Court's rulings.

The eleventh assignment of error in law is as follows:

11) The Court erred by its failure to discuss the probable fraud in the medical records of the veteran.

Appellant document irregularities in the medical record of the veteran that are especially relevant to the issue of CUE and the rating conducted in 1946. Specifically, there were typed notes followed by handwriting classifying the veteran's medical injuries to his shoulder as "severe." Then someone drew a line through the references to "severe" and handwrote the word "moderate." A close inspection of the record indicates it was clearly not written by the physician who wrote the typewritten note by someone else. This serious irregularity in the record should have shifted the burden in the CUE analysis from the veteran to the VA. Appellant documented these irregularities in his brief but the court ignored the issue which may have been dispositive as to the proper rating for Mr. Robinson.

The twelfth error in law is as follows;

The Court made an impermissible assumption there were no damages from the Due Process violation made by the VA and found to be inexcusable.

Constitutional violations can be inferred from the nature of the Due Process violation.

THE COURT ERRED IN FINDING THE INEXCUSABLE DUE PROCESS VIOLATION HARMLESS AND FURTHER ERRED IN FAILING TO CONSIDER REMEDIES FOR THIS VIOLATION.

In the Court's decision, it first analyzes whether there was blatant violations of the veteran's Due Process right by causing the aging Veteran to have his case unnecessarily delayed for a period close to ten years. The court found these violations to be blatant as it referred to them as "inexcusable" (Court Opin. P. 10, ¶ 3 & P.11, ¶ 1). The word "inexcusable", as interpreted in context, sets the violation beyond the scope of mere negligence and calls for a minimum of gross negligent behavior.

The injuries to the veteran, who is now 94 years old, are beyond measure as time is naturally against him. Had this prejudicial, blatant violation, of Due Process not happened he may have had the opportunity to find remedy through the civil system under 42 USCS § 1983, or possibly been able to have the case remanded the BVA to allow Appellant to prove any and all damages arising from this

inexcusable treatment. Further, since the Veteran was already 85 years old when he appealed the VA decision, the amount of psychological burden is immeasurable; every day, since May 2007, Mr. Robinson had to worry if he would live long enough to receive justice: his constitutionally right. As the Court acknowledges, this was seemingly beyond negligent but rather willful conduct on the behalf of the VA, as the Court states "the Court well understands the basis for Mr. Robinson's belief that VA was 'dragging out his case until he dies[d]'" (Court Opin. P. 10, ¶ 3). In the light of these facts it becomes incomprehensible that the court would find this violation of Due Process to be harmless.

Considering the lack of sincere remedies that are available for Mr. Robinson, it would be appropriate to exclude the secretary's brief as this will fulfill the function of deterrence and is prima facie cost-neutral. There is an array of law on the topic pertaining to Constitutional violations that does not involve seeking remedy through the civil court system. If Mr. Robinson had been a young man, this would likely have been a sufficient remedy, but in the light of his age it is improbable that Mr. Robinson would ever see a remedy come to fruition through the civil process. Instead, turning to these other non-monetary remedies that do exist, we argue that excluding the brief would be both a just and an adequate remedy for this transgression on Mr. Robinsons constitutional right to Due

Process. The basic principle of one of the more common nonmonetary remedies, the exclusionary rule is, as stated by Judge Friendly: "[t]he beneficent aim of the exclusionary rule to deter police misconduct can be sufficiently accomplished by a practice ... outlawing evidence obtained by flagrant or deliberate violation of rights." The Bill of Rights as a Code of Criminal Procedure, 53 Calif. L.Rev. 929, 953 (1965). Also, as stated by Chief Justice Roberts in *Herring*: "In determining whether the exclusionary rule applies, the benefits of deterrence must outweigh the costs. Judicial precedent has never suggested that the exclusionary rule must apply in every circumstance in which it might provide marginal deterrence. To the extent that application of the exclusionary rule could provide some incremental deterrent, that possible benefit must be weighed against its substantial social costs. The principal cost of applying the rule is, of course, letting guilty and possibly dangerous defendants go free". *See Herring v. United States*, 555 U.S. 135, 141 (2009). Here, the actors are different, but the utilitarian goal remains the same: to deter the flagrant or deliberate violation of people's constitutional rights. Also, there is no associated cost of letting possibly dangerous defendants go free. Further, Due Process violations are not uncommon in the VA, and nothing so far has served as an adequate deterrent. The application of the exclusionary rule to exclude the secretary's brief in certain VA cases would help assure that the constitutional rights of all veterans are preserved in their quest for just benefits.

ERRORS IN FACT

1) The Court in its haste concluded the BVA recognized the evidence of a rotator cuff injury when it made it decision finding no CUE in the 1946 rating.

This is a serious error because it is absolutely incorrect. The BVA did not recognize nor discuss the specific notations in Appellant's medical record identifying the tear to the supraspinatus muscle. Nowhere in the BVA decision did it address or discuss the tear to the supraspinatus muscle form the record before them. The evidence was in the form of medical notes clearly cited by Appellant in his brief before the Court. The Court cannot simply assume the BVA engage in some type of analysis but must find legal and competent evidence in the opinion of the BVA. There is no such evidence. This is a fundamental error in fact as well as an error in logic. The Court cannot create facts but it is bound by the facts before it. In reality the BVA missed the evidence and failed to discuss it. This error in logic by the Court is similar to the impermissible error made when it assumed the tear to the veteran's rotator cuff came from some phantom source when the only event in the records of the veteran likely to cause the tear was the jeep action.

2) The Court erred in its discussion of the damages to Mr. Robinson's shoulder and confused dramatically different medical injuries.

In the decision of the Court the Judge actually referred to a chip fracture of the shoulder which did exist with a tear in the rotator cuff. The Court referred to a chip in the supraspinatus muscle and confused the muscle tear with a chip fracture which was diagnosed. There is no such medical diagnosis of a chip to a muscle and there never has been. The confusion in this critical fact indicates a misunderstanding of the facts and circumstances in the case.[14] The Court seemed to confuse matters by assuming a chip to a bone was akin to a rotator cuff tear. It is not and there is no medical authority on the planet that draws this comparison. A person can break a bone and tear a muscle. A break and a tear are distinct injuries.

Appellant's brief noted seven different medical diagnoses in the records of the veteran prior to his 1946 rating. Appellant cited competent medical authority in support of the distinction of these different syndromes yet the Court concluded all were essentially the same. It is tantamount to concluding a veteran's arm was broken and his hand was severed but both happened on the same arm so they are equivalent. It is absolutely dispositive in medical textbooks at the time of the

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[14] Granted, Appellant's counsel is partly responsible for this egregious error by petitioning for an expedited decision. An error like the one in the Court's opinion confusing a chip in a muscle is probably the result of haste.

1946 rating that no bone could be torn and no muscle could be broken. Besides of the medical treatises at the time it is a conclusion any rational and logical person must acknowledge. There were multiple pathologies in the right arm of the veteran extant in 1946. The rater at that time missed them. This is CUE!

The third assignment of error of fact is as follows:

3) The Court concluded the BVA listed every complaint set forth by the veteran as written in Appellant's Brief.

This is completely false and a serious error in fact. If the Court compares the complaints of the veteran discussed by the BVA with all of the documented complaints made by the veteran in his medical records the only conclusion is the BVA failed to address all of the complaints made by the veteran. This conclusion appears to be the product of haste which, while understandable, is unacceptable in a legal opinion affecting the life of a 94-year-old veteran or any veteran.

Important Public Policy Matters of the Case

There is a new Administration coming to the Government in January, 2017. Appellant, Mr. Robinson is 94 years old and is seeking benefits based upon CUE as well as violations of his due process rights. There is public interest on this case and contacts have been made with the new administration. The ultimate outcome, if perceived as unfair to a World War II veteran may very well have significant repercussions for the VA and the judiciary. We have good reason to believe

members of the transition team for the President-elect are aware of this case and may be following it. It is not just the DVA the new administration is considering changing dramatically but all parts of the system including the judiciary.

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It should be clear no Court in adjudicating VA cases has dealt with the assignment of damages for Constitutional violations against veterans. This is the case for the CAVC to address the damages along with a process for veterans to establish their specific damages. It is no stretch to presume that an eleven-year delay for an eighty-four-year-old veteran leads to serious psychological harm. There is a need to hold the VA accountable for its bad acts when they are identified by a Court.

The issue of whether the exclusionary rule should be applied to cases pertaining to veteran's law is a matter of first impression.

This appeal raises the issue of whether the brief of the Secretary should have been excluded either as a remedy for a serious due process violation or as the result of inappropriate conduct and delay by the VA.

Appellant filed the equivalent of a Form 9 in his CUE claim in 2005. The VA ignored this document appealing the Statement of the Case from the Regional Office. That led to years of unnecessary litigation in this matter. Appellant could

not convince the VA of the fact that an equivalent Form 9 had been filed twice with them. It was not until the chief of the appeals branch for the Department of Justice intervened that the VA was convinced the matter had been appealed within the appropriate time constraints. Thereafter, Appellant returned to the RO and litigated the CUE Claim with them, to the BVA and finally to this Court. It is somewhat of a miracle this veteran is still alive. He could easily have been one of the thousands of veterans who cases remained undecided because of the death of their death.

CONCLUSION

In light of the many serious errors in law in the Robinson decision, the errors in fact and the important public policy issues this case presents for the Court and the fair treatment of Veterans the most appropriate action is for the case to be heard by a three judge panel.

12/07/2016

/SIGNED/

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