

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

**Vet. App. No. 19-3502**

**RICHARD CARTNEY,**

**Appellant**

**v.**

**ROBERT L. WILKIE,**

**SECRETARY OF VETERANS AFFAIRS**

**Appellee.**

---

**APPELLANT'S BRIEF**

---

**John S. Berry,  
Attorney for Appellant**

**Jerusha L. Hancock,  
Attorney for Appellant**

**Cameron Kroeger,  
Attorney for Appellant**

**BERRY LAW FIRM, PC  
6940 O Street, Suite 400  
Lincoln, NE 68510  
(402) 466-8444**

**TABLE OF CONTENTS**

Page

TABLE OF CONTENTS .....i

TABLE OF CASES AND AUTHORITIES .....i

RECORD CITES ..... ii

STATEMENT OF THE ISSUES PRESENTED ..... 1

STATEMENT OF THE CASE..... 1

ARGUMENTS AND AUTHORITIES.....2

CONCLUSION ..... 10

CERTIFICATE OF SERVICE ..... 11

**TABLE OF CASES AND AUTHORITIES**

**Federal Courts of Appeal**

*King v. Shinseki*, 700 F.3d 1339 (Fed. Cir. 2012) ..... 4

**Court of Appeals for Veterans Claims**

*Atencio v. O’Rourke*, 30 Vet. App. 74 (2018). ..... 9, 10

*Frost v. Shulkin*, 29 Vet. App. 131 (2017) ..... 6

*Kahana v. Shinseki*, 24 Vet. App. 428 (2011). ..... 4

*Robinson v. Peake*, 21 Vet. App. 545 (2008)..... 7

*Stewart v. Wilkie*, 30 Vet. App. 383 (2018). ..... 9

**Statutes**

38 U.S.C. § 1117 ..... 7

38 U.S.C. § 7104..... 10

38 U.S.C. § 7252..... 1

**Regulations**

38 C.F.R. § 3.310 ..... 3, 6

38 C.F.R. § 3.317 ..... 8, 9

**Record Cites**

[R 2-7 (BVA decision)]..... 1, 2  
[R 297-298 (April 2017 VAF-9)] ..... 1  
[R 299-328 (April 2017 SOC)] ..... 1  
[R 360-369 (March 2017 NOD)] ..... 1, 4  
[R 1227-1232 (July 2016 exam)] ..... 3, 5, 6, 7, 8, 9  
[R 1540 (July 1989 treatment note)]..... 5  
[R 1542 (May 1989 treatment note)] ..... 5  
[R 1560 (March 1988 chronological record of medical care)] ..... 5  
[R 1600 (April 1991 chronological record of medical care)] ..... 5  
[R 1604 (September 1990 treatment note)] ..... 5  
[R 1607 (June 1990 chronological record of medical care)] ..... 5, 6  
[R 1608 (June 20, 1990 medical note)] ..... 6  
[R 1612 (March 1990 chronological record of medical care)] ..... 5  
[R 1615 (February 1990 chronological record of medical care)]..... 5, 6  
[R 3766 (DD-214)] ..... 2, 8  
[R 3767 (DD-215)] ..... 2, 8

**Other Sources**

Department of Veterans Affairs, *Memorandum, VAOGCPREC 1-2017*  
<https://www.va.gov/OGC/docs/2017/VAOPGCPREC1-2017.pdf>  
(January 6, 2017). ..... 3  
*The Merck Manual of Diagnosis and Therapy* (Robert S. Porter, MD et al. eds.,  
20<sup>th</sup> ed., Merck, Sharp & Dohme Corp. 2018) ..... 3

## I. STATEMENT OF THE ISSUES

- A. **Whether the Board of Veterans' Appeals commits remandable error when it fails to provide an adequate statement of reasons and bases for discounting or ignoring favorable evidence.**
- B. **Whether the Board of Veterans' Appeals commits remandable error when it fails to provide an adequate statement of reasons and bases for relying on inadequate/incomplete exam reports.**
- C. **Whether the Board of Veterans' Appeals commits remandable error when it fails to provide an adequate statement of reasons and bases for failure to consider reasonably raised theories of service connection.**

## II. STATEMENT OF THE CASE

### A. Jurisdiction

Appellant Richard Cartney (Cartney) invokes this Court's appellate jurisdiction granted through 38 U.S.C. § 7252.

### B. Nature of the Case / Result Below

Appellant was denied service connection for his gastroesophageal reflux disease on a Rating Decision dated November 1, 2016. The veteran timely appealed to the Board. [R 360-369 (March 2017 NOD); 299-328 (April 2017 SOC); 297-298 (April 2017 VAF-9)] He now appeals the Board's February 23, 2018 decision, denying service connection for gastroesophageal reflux disease. [R 2-7 (2018 BVA decision)]

### C. Relevant Facts

Appellant has honorable service in the Air Force from April 27, 1987

through April 26, 1991. He was awarded the Good Conduct Medal, the National Defense Service Medal, and the Southwest Asia Service Medal, in addition to other awards and decorations. [R 3766, 3767 (DD-214, DD-215)]

Appellant appeals the Board's February 1, 2019 decision that denied his claims for service connection for gastroesophageal reflux disease (GERD). [R 2-7 (BVA Decision)]

### **III. ARGUMENTS & AUTHORITIES**

- A. The Board failed to provide an adequate statement of reasons and bases for discounting or not considering favorable evidence.**
- B. The Board failed to provide an adequate statement of reasons and bases explaining its reliance on the inadequate/incomplete exam reports.**
- C. the Board failed to provide an adequate statement of reasons and bases for failure to consider reasonably raised theories of service connection.**

First, the examiner and the Board ignored or discounted favorable evidence linking the veteran's GERD to service; and the Board failed to give an adequate statement of reasons and bases for discounting this favorable evidence and in relying on the inadequate or incomplete exam reports. The examiner says that the veteran's GERD has a known etiology, however she does not determine the cause of the veteran's GERD, besides stating that obesity is a risk factor, or it may be a symptom of his allergic rhinitis. She states that obesity is a risk factor for GERD, but then ignores evidence that the veteran was obese in service, which should link

his GERD to service. She ignores symptoms of GERD in the veteran's service treatment records. She ignores the veteran's lay statements; and she ignores the fact that the record contains no post-service exposures that would have caused GERD.

When denying service connection, the examiner does not explain why evidence of an in service causal factor did not cause this veteran's GERD. The examiner notes that obesity is a risk factor for GERD in finding that his GERD is not related to service. However, the examiner inexplicably ignores the fact that the veteran was obese in service. Obesity is defined as a body mass index (BMI) of 30 or higher. See *The Merck Manual of Diagnosis and Therapy*, "Obesity and Metabolic Syndrome" at 19 (Robert S. Porter, MD et al. eds., 20<sup>th</sup> ed., Merck, Sharp & Dohme Corp. 2018). The examiner notes that the veteran's BMI in 1991 was 30. [R 1227-1232 (July 2016 exam)] The veteran was still in the military through April of 1991. The evidence of obesity in service and the examiner's finding that obesity is a risk factor for GERD make it more likely that the veteran's GERD is related to his in-service obesity, and thus is related to service. Yet, this evidence is ignored by the examiner and by the Board.

The VA's general counsel has also has found that obesity may be an "intermediate step" between a service connected disability and a current disability that may be service connected on a secondary basis under 38 C.F.R. § 3.310(a); see Department of Veterans Affairs, *Memorandum, VAOGCPREC 1-2017*

<https://www.va.gov/OGC/docs/2017/VAOPGCPREC1-2017.pdf> (January 6, 2017). The facts are similar in Appellant's case; as a showing that the veteran's obesity caused his GERD, when the veteran was obese in service, is similar to a showing that a service connected disability caused obesity which caused a secondary disability.

The examiner and Board ignored or discounted other relevant evidence submitted by the veteran, and the Board did not provide an adequate statement of reasons or bases as to why. The veteran states that while in service in Southwest Asia, he was exposed to thick smoke from burning oil fires for approximately three months. The veteran also states that he began experiencing symptoms of GERD within two years of discharge, in approximately 1993. The veteran also states that he is a non-smoker, and he works in an office environment in the medical field. [R 360-369 (March 2017 NOD)]

Thus, the veteran describes in-service exposures to smoke (that may have caused his GERD), and he describes an onset of GERD that occurred very shortly after service. A lay person is competent to report to the onset and continuity of his symptomatology. See *King v. Shinseki*, 700 F.3d 1339 (Fed. Cir. 2012); *Kahana v. Shinseki*, 24 Vet. App. 428, 433-434, 438 (2011).

However, the examiner then mischaracterizes the veteran's lay statement to mean his onset of GERD symptoms occurred five years after service, not two years; and the only cause she gives for GERD is that obesity is a risk factor, or

that it may be caused by his allergic rhinitis, and she fails to give an opinion as to the cause of the veteran's rhinitis. [R 1227-1232 (July 2016 exam)]

Nor does the examiner explain what did cause the veteran's GERD, which is a fair question, considering the fact that he had no other post-service exposures. The fact that the veteran's GERD onset was within two years of leaving service, not five; and the fact that the veteran had no post-service exposures that would cause GERD, is favorable evidence that was ignored or discounted by the examiner and the Board.

The examiner also ignores service treatment records noting symptoms of GERD. The examiner notes that a symptom of the veteran's GERD is coughing. [R 1227-1232 (July 2016 exam)] Coughing is reflected in the veteran's service treatment record. [R 1540 (July 1989 treatment note); 1560 (March 1988 chronological record of medical care); 1600 (April 1991 chronological record of medical care) (with "line of duty" circled "yes"); 1612 (March 1990 chronological record of medical care); and 1615 (February 1990 chronological record of medical care)]

The service treatment record also shows that the veteran exhibited other possible symptoms of GERD in service, to include nausea and vomiting [R 1542 (May 1989 treatment note)]; a painful lesion in the back of his tongue; and a small lesion on his left proximal tongue [R 1604 (September 1990 treatment note)]; a throat condition or tonsillitis [R 1607 (June 1990 chronological record of medical



care)]; discomfort or painful oral lesions, and aphthous ulcers [R 1608 (June 20, 1990 medical note)]; and tonsillitis again [R 1615 (February 1990 chronological record of medical care)].

Considering all the errors in the examination report noted above, it is inadequate; and the Board failed to give an adequate statement of reasons and bases for why it relied on this clearly inadequate examination report.

Second, the examiner and the Board erred in not considering reasonably raised theories of service connection; as the examiner found in part that the veteran's non-service connected allergic rhinitis may be a cause of his GERD. [R 1227-1232 (July 2016 exam)] The examiner and the Board should have either determined whether the veteran's allergic rhinitis is entitled to service connection; or, if the veteran is entitled to service connection for his GERD through his allergic rhinitis.

The record does not show that the veteran has ever filed a claim for allergic rhinitis. Nor has the VA ever issued the veteran a rating decision for allergic rhinitis. There is no temporal requirement requiring that a primary disability be service connected, or even diagnosed, at the time the secondary condition is incurred. *Frost v. Shulkin*, 29 Vet. App. 131, 134 (2017), interpreting 38 C.F.R. § 3.310 regarding entitlement to secondary service connection.

Yet, the VA has made no determination the on whether the veteran's GERD and cough should be service connected through his allergic rhinitis, even though

he has never filed a claim for allergic rhinitis.

Additionally, by filing a claim for GERD with a raised Southwest Asia service theory of service connection, and in an examination entitled “Gulf War Medical Examination” revealing that a cause of the veteran’s GERD symptoms is his allergic rhinitis, the examiner should have determined whether the veteran’s allergic rhinitis is related to service, especially considering how signs or symptoms involving the upper or lower respiratory system are conditions entitled to presumptive service connection with Southwest Asia service, see 38 U.S.C. § 1117 (compensation for disabilities occurring in Persian Gulf War veterans); *Robinson v. Peake*, 21 Vet. App. 545 (2008) (holding the VA has an obligation to consider and decide all issues reasonably raised by the claim).

The examiner does state that the veteran’s entrance exam noted hay fever. [R 1227-1232 (July 2016 exam)] However, this finding would not preclude the possibility that the veteran’s pre-service hay fever had been acute, then arose causally by his military service; nor does it preclude the theory that the veteran’s allergic rhinitis would have been aggravated by military service, entitling him to service connection on an aggravation theory.

Regardless of the theory, the veteran has been afforded no C&P examination for allergic rhinitis, nor has the VA ever issued a rating decision for the veteran’s allergic rhinitis. If a cause of the veteran’s GERD is allergic rhinitis, the examiner and the VA should have either determined service connection

entitlement for allergic rhinitis, or whether the veteran's GERD should be linked to service through allergic rhinitis on a secondary basis, and they did not do so.

Third, the examiner errs by conflating primary service connection tests with presumptive service connection tests. The examiner's reasons for denying service connection for the veteran's GERD include that he was not treated for GERD in service; that his obesity is a risk factor for GERD; and that his GERD started about 5 years after service (though if the examiner would have properly reviewed the record, she would have found that he first notice GERD symptoms about two years after service, see First argument, *supra*). [R 1227-1232 (July 2016 exam)]

However, the entitlement to presumptive service connection for Persian Gulf illnesses only requires that the disorder becomes manifest to a degree of 10 percent or more not later than December 31, 2021. See 38 C.F.R. § 3.317. The year 2021 has not happened yet, so it should be irrelevant whether the veteran's GERD was diagnosed in service, 2 years after service, 5 years after service, or yesterday, when considering entitlement to the presumption.

Fourth, the July 2016 examination was inadequate, as the examiner used an incorrect burden of proof in determining whether the veteran's GERD is related to Southwest Asia service.

The veteran has Southwest Asia service. [R 3766, 3767 (DD-214, DD-215) (noting award of the Southwest Asia service medal)] The examiner denied service connection for the veteran's GERD due to Southwest Asia service, however, by

finding that the veteran's GERD or his cough are diagnosable conditions with a "clear and specific" etiology. [R 1227-1232 (July 2016 exam)]

However, the examiner used the wrong test in order to determine whether the veteran's disability is a medically unexplained multisymptom illness (MUCMI), in accordance with 38 C.F.R. § 3.317. "Clear and specific etiology" is not the test used. The correct test to deny service connection is a finding that the disability is of "conclusive etiology or pathophysiology," see *Stewart v. Wilkie*, 30 Vet. App. 383, 398 (2018). The examiner used the wrong test to consider the etiology of the veteran's GERD, and she did not even consider the pathophysiology of the veteran's GERD. An examiner is required to address either the conclusive etiology or pathophysiology of the disorder. *Stewart, supra*. By not doing so, this examination is inadequate.

To the extent that the Appellee may argue that the veteran's GERD is excluded as a disability entitled to a MUCMI theory of service connection, we note that the exclusion in 38 C.F.R. § 3.317 applies to structural gastrointestinal diseases. Functional gastrointestinal diseases, on the other hand, are entitled to the presumption. Nowhere in the veteran's case file does the VA make a determination that the veteran's GERD is a structural gastrointestinal disease, rather than a functional gastrointestinal disease.

To the extent that *Atencio v. O'Rourke* finds that GERD is excluded from the presumptive entitlement as being a structural gastrointestinal disease, it is

distinguishable. In *Atencio*, neither party contested that the veteran's GERD was a structural gastrointestinal disease; 30 Vet. App. 74, 82–83 (2018). In Cartney's case, however, there is no evidence in the record that the veteran's GERD is a structural disease rather than a functional disease.

### **CONCLUSION**

Absent adequate reasons and bases explaining why the Board discounted or ignored favorable evidence; for relying on an inadequate examination report; and for ignoring reasonably raised theories of service connection; appellant and the Court are denied an opportunity for meaningful judicial review. See 38 U.S.C. § 7104(d). The Board committed remandable or reversible error for these reasons; and his claim should be remanded or reversed.

Respectfully submitted,  
RICHARD CARTNEY, Appellant

/s/ Cameron Kroeger  
Cameron Kroeger, Esq.  
BERRY LAW FIRM, PC  
6940 O Street, Suite 400  
Lincoln, NE 68510  
402-466-8444  
402-466-1793 Fax  
[cameronk@jsberrylaw.com](mailto:cameronk@jsberrylaw.com)  
Attorney for Appellant

## CERTIFICATE OF SERVICE

I hereby certify, to the best of my knowledge and ability, under penalty of perjury under the laws of the United States, that copy of the forgoing was served electronically to the attorney of record for the party below:

Lamar D. Winslow, Esq.  
Office of the General Counsel  
Department of Veterans Affairs  
810 Vermont Ave., NW  
Washington DC 20420

on November 5, 2019.

/s/ Cameron Kroeger  
Cameron Kroeger, Esq.