UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

VICTOR MANUEL AVILES-RIVERA, Appellant,	)	
v.	)	Vet. App. No. 19-5969
DENIS MCDONOUGH, Secretary of Veterans Affairs, Appellee.	)	

APPELLANT'S RESPONSE TO COURT'S ORDER OF MAY 7, 2021

Appellant Victor Manual Aviles-Rivera submits this memorandum to respond to the Court's Order of May 7, 2021. That Order directed the parties to address: (1) the effect of the Federal Circuit's decision in *Euzebio v. McDonough,* 989 F.3d 1305 (Fed. Cir. 2021), and (2) the effect, if any, of Mr. Aviles-Rivera's election into RAMP and the publication of the 11th NAS Update vis-à-vis the constructive possession doctrine. As explained more fully below, the arguments presented by Mr. Aviles-Rivera the initial brief are buttressed by the Circuit Court's decision in *Euzebio*. In fact, the Federal Circuit's legal analysis in *Euzebio* supports the proposition that Mr. Aviles-Rivera's arguments are correct.

The Federal Circuit's Decision in *Euzebio*

In the Federal Circuit Court, Mr. Euzebio argued that the Veterans Court (this Court) "relied on an erroneous legal standard [for determining whether the VA or Board was in "constructive possession" of evidence] when it refused to consider the [*NAS Update 2014*] because it lacked a 'direct relationship' to Mr. Euzebio's claim." *Euzebio v. McDonough,* 989 F.3d 1305, 1321 (Fed. Cir. 2021).

This Court had previously held that a "[*NAS Update 2014*] was not constructively" before the Board, because "even if [the] VA [wa]s aware of a report and the report contain[ed] general information about the type of disability on appeal, that [wa]s insufficient to trigger the constructive possession doctrine." *Euzebio*, 31 Vet. App. 394, 402 (2019) (emphasis and footnote omitted). This Court had also concluded that "there must also be a direct relationship to the claim on appeal" and there was no direct relationship between the *NAS Update 2014* and Mr. Euzebio's claim. *Id*.

However, agreeing with Mr. Euzebio argument, the Federal Circuit Court held that "the Veterans Court relied on an erroneous legal standard when it required Mr. Euzebio [to] establish a "direct relationship" between the *NAS Update 2014* and his claim. The constructive possession doctrine provides that evidence that is "within the Secretary's control" and "could reasonably be expected to be a part of the record 'before the Secretary and the Board,' " is constructively part of the administrative record. *Bell*, 2 Vet. App. at 613 (quoting 38 U.S.C. § 7252(b)); *see Lang*, 971 F.3d at 1353–55; 38 C.F.R. § 20.1403(b)." *Euzebio*, 989 F.3d at 1319.

Furthermore, the Federal Circuit said that it was incorrect for this Court to narrow "the constructive possession doctrine such that for evidence to be "reasonably ... expected to be part of the record," it must have a "specific," "direct relationship" to the veteran's claim—i.e., the document must have been created specifically for the veteran. *Monzingo*, 26 Vet. App. at 102–03;[7] *see Euzebio*, 31

Vet. App. at 401 (summarizing the reasonable expectation element of the constructive possession doctrine as requiring a veteran to "show that there is a direct relationship between the document and his or her claim" (emphasis omitted) (citing *Monzingo*, 26 Vet. App. at 101–03))." *Id*. Moreover, the Circuit Court explained that "[r]equiring that evidence bear a "direct relationship" or be "specific to" the veteran for constructive possession is without basis in relevant statute or regulation." *Euzebio*, 989 F.3d at 1320.

The Circuit Court also noted that the 2014 NAS Update was published prior to the Board's decision in 2019, and that is undisputed "that the "VA generally," and the Board specifically, "knew of the existence of the [*NAS Update 2014*] at the time of the decision on appeal." *Id*. It also indicated that "[a] constructive possession doctrine that allows an administrative judge to "ignore [an NAS Report] she knows exists" and knows "contains important ... information," cannot "possibly be the outcome of a rational system of adjudication, especially one designed to be pro-veteran and non-adversarial." *Euzebio*, 31 Vet. App. at 408–09 (Allen, J., dissenting)." *Euzebio*, 989 F.3d at 1321. The Circuit Court also stated that:

> ***The correct standard for constructive possession, as articulated in Bell and later Lang, and as applied throughout veterans benefit law, is relevance and reasonableness***. *Lang*, 971 F.3d at 1353; *Bell*, 2 Vet. App. at 612–13; *see Golz v. Shinseki*, 590 F.3d 1317, 1323 (Fed. Cir. 2010) ("The relevancy limitation allows [the] VA to focus its efforts on obtaining documents that have a reasonable possibility of assisting claimants in substantiating their claims for benefits."). This is not to say that any and every treatise, text, or medical record must now be part of the administrative record. *See,*

> *e.g.*, *AZ v. Shinseki*, 731 F.3d 1303, 1311 (Fed. Cir. 2013) (explaining that "[e]vidence that is insufficiently probative" is not "relevant"). Rather, ***where the Board has constructive or actual knowledge of evidence that is "relevant and reasonably connected" to the veteran's claim, but nonetheless fails to consider that evidence, Lang, 971 F.3d at 1354; see AZ, 731 F.3d at 1311 (explaining that, to be "relevant," evidence "must tend to prove or disprove a material fact")***, ***the Veterans Court must ensure that Board and VA decisions are not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 38 U.S.C. § 7261(a)(3)(A), and remand for further consideration or explanation where appropriate,*** *see id.* § 7252(a) (explaining that the Veterans Court has the "power to ... reverse a decision of the Board or to remand the matter, as appropriate"). (emphasis added) *Id*.

Perhaps the most significant aspect of the Circuit Court's decision was its highlighting "the importance of systemic fairness and the appearance of fairness" "in the context of veterans' benefits," including in the development of all necessary evidence. *Hodge v. West*, 155 F.3d 1356, 1363 (Fed. Cir. 1998); *see* 38 U.S.C. § 5103A(a)(1); 38 C.F.R. § 3.159(c)." *Euzebio*, 989 F.3d at 1326.

Additionally, the Federal Circuit said that "[t]he veterans' benefits system is 'uniquely pro-claimant.' *Sullivan v. McDonald*, 815 F.3d 786, 791 (Fed. Cir. 2016) *Sullivan v. McDonald*, 815 F.3d 786, 791 (Fed. Cir. 2016). It is 'not meant to be a trap for the unwary, or a stratagem to deny compensation to a veteran who has a valid claim[.]'*Comer v. Peake*, 552 F.3d 1362, 1369 (Fed. Cir. 2009); *see Barrett*, 466 F.3d at 1044 ***('The government's interest in veterans cases is not that it shall win, but rather that justice shall be done, that all veterans so entitled receive the benefits due to them.')***." (emphasis added) *Id*.

The Circuit Court concluded that "requiring a 'direct relationship' between the *NAS Update 2014* and Mr. Euzebio's claim, rather than relevance to his claim, the Veterans Court applied a legally erroneous standard." *Id.*

The Effect of the Federal Circuit's Decision in *Euzebio* vis-à-vis the Constructive Possession Doctrine.

The arguments advanced by Mr. Aviles-Rivera's in the initial brief (App. Br.) are buttressed by the Circuit Court's explanation of the "***relevance and reasonableness"*** standard in *Euzebio*. *Euzebio*, 989 F.3d at 1321; (emphasis added).

First, the Federal Circuit's decision broadens the requirement that the VA must retrieve all relevant documents where it has constructive notice of evidence necessary for the adjudication of a claim. *Euzebio*, 989 F.3d at 1321. This position is consistent with Mr. Aviles-Rivera's argument that the VLJ's April 2017 remand order explicitly directed the Board " to consider and analyze *all* relevant and available NAS Updates. (emphasis added)." App. Br. at 7. Furthermore, Mr. Aviles-Rivera argued that "the language in the VLJ's remand order did not identify any specific year nor set a timeframe, date or any edition of the NAS Updates that examiner and Board should have considered. In fact, the VLJ simply tasked the medical examiner and Board 'to consider [all] the NAS Updates [addressing the relationship between hypertension and Agent Orange]' that could aid in determining whether Mr. Rivera's hypertension was caused by his exposure to Agent Orange." App. Br. at 7-8. Here, the Board failed to comply

with the VLJ's remand order to evaluate all relevant NAS Updates, which should have included the 2018 Update (finding sufficient evidence an association between hypertension and Agent Orange), and this error should serves as a bases for remanding Mr. Aviles-Rivera's claim.

Second, Mr. Aviles-Rivera argued that the VLJ reasonably assumed that the VA and Board had all current NAS Updates and that those documents could be retrieved and included in the record of Mr. Aviles-Rivera's claim. App. Br. at 11-12. Specifically, the Mr. Aviles-Rivera argued that:

> Based upon the instructions provided in the remand order, it is clear that the VLJ's expectations were that the examiner and Board would thoroughly investigate, research and analyze the available medical studies dealing with the relationship between hypertension and Agent Orange. R. at 907; 909-910. And, the VLJ anticipated that a component of those efforts would include researching the NAS Updates. *Id*. In fact, the VLJ stated that it would be insufficient to simply recite boilerplate regulatory provisions as a justification for finding no relationship between hypertension and Agent Orange; but rather, the VLJ reasonably expected that the NAS Updates would give the Board greater insight into whether Mr. Rivera's hypertension was caused by his service in Vietnam and exposure to Agent Orange. *Id.* ***Additionally, because the Board's August 2019 decision referenced both the 2010 and 2014 NAS Updates, it is reasonable to assume that the Board had access to all current NAS Updates dealing with hypertension; and therefore, it is also reasonable to expect that the 2018 NAS Update would be a part of the record for this case.*** *Bowey* 11 Vet.App. 106 (1998) ("within the Secretary's control *and* ... could reasonably be expected to be a part of the record."). *Id,* (emphasis added).

Therefore, the Board erred when it failed to include 2018 NAS update in Mr. Aviles-Rivera's record of this case because it was reasonable to assume that the Board had access to all of the current NAS Update at the time of its decision

in August 2019. *Euzebio*, 989 F.3d at 1321 (“a constructive possession doctrine that allows an administrative judge to “ignore [an NAS Report] she knows exists” and knows “contains important ... information,” cannot “possibly be the outcome of a rational system of adjudication”).

Consequently, the Circuit Court’s decision in *Euzebio* reinforced the specific arguments advanced by Mr. Aviles- Rivera, as noted above; and therefore, the case should be remanded to the Board to correct the errors that were identified in Mr. Aviles-Rivera the initial brief.

The Effect, if any, of Mr. Aviles-Rivera's Election into RAMP and the Publication of the 11th NAS Update vis-à-vis the Constructive Possession Doctrine.

Notwithstanding the statement in the Board’s August 2019 decision that the evidentiary record was closed as of June 18, 2018, Mr. Aviles-Rivera argues that the VLJ’s April 2017 remand order expanded the scope and timeframe for adding relevant and reasonable documents in the record; and thereby, the VLJ’s April 2017 remand order actually supersedes the Board’s August 2019 statement. That is, “the language in the VLJ's remand order did not identify any specific year nor set a timeframe, date or any edition of the NAS Updates that the examiner and Board should have considered. In fact, the VLJ simply tasked the medical examiner and Board ‘to consider [all] the NAS Updates [addressing the relationship between hypertension and Agent Orange]’ that could aid in determining whether Mr. Rivera’s hypertension was caused by his exposure to Agent Orange.” App. Br. at 7-8. In other words, “when the Board relied on the

2010 and 2014 NAS Updates as the justification and bases for its decision, even though the most recent favorable 2018 Update was constructively in the record, the Board erred because the Updates relied on by the Board did not reflect the current medical research and findings concerning the relationship between hypertension and Agent Orange."[1] App. Br. at 13.

The Federal Circuit's decision in *Euzebio* is consistent with Mr. Aviles Rivera's argument regarding this issue; that is , the Circuit Court stated that a "constructive possession doctrine that allows an administrative judge to "ignore [an NAS Report] she knows exists" and knows "contains important ... information," cannot "possibly be the outcome of a rational system of adjudication, especially one designed to be pro-veteran and non-adversarial." *Euzebio*, 31 Vet. App. at 408–09 (Allen, J., dissenting)." *Euzebio*, 989 F.3d at 132. Therefore, allowing the Board in its August 2019 decision to ignore the 2018 NAS Update would be offensive to "a rational system of adjudication." *Id*.

Furthermore, additional support for Mr. Aviles-Rivera's argument that the RAMP election should not serve as a barrier to a favorable resolution of his case is found in the Circuit Court's description regarding the character of the veterans' benefits system and its processes that are non-adversarial in nature; and that the duty to assist a claimant with developing her/his claim should be the overriding objective to ensure that "***justice shall be done,* [and] *that all veterans so***

[1] *See Reonal v. Brown*, 5 Vet. App. 458, 461 (1993) (an opinion based upon an inaccurate factual premise has no probative value). App. Br. at 14.

entitled receive the benefits due to them." *Euzebio*, 989 F.3d at 1321, 1326. It is therefore very likely that the Federal Circuit, in Mr. Aviles-Rivera's case, would conclude that the VA's duty to assist and fundamental fairness require the Board to consider the favorable November 2018 NAS Update, because the Board was in constructive possession of that Update, even though the August 2019 decision stated that the record was closed in June 2018. *Id*.

Respectfully submitted,

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