

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

**No. 17-4053**

**ROY L. RUYLE,**

**Appellant,**

**v.**

**ROBERT L. WILKIE,**

**Secretary of Veterans Affairs,**

**Appellee.**

***APPELLANT'S REPLY BRIEF***

**Janet Totter  
2005 Rogge Lane  
Austin, Texas 78723  
763-443-6962  
wil-tott@bitstream.net**

**COUNSEL FOR THE APPELLANT**

## TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES .....	ii
INTRODUCTION .....	1
APPELLANT REPLY.....	1
I.    THE SECRETARY HAS FAILED TO PERSUASIVELY REBUT THE ARGUMENTS RAISED BY MR. RUYLE IN HIS INITIAL BRIEF IN REGARD TO HIS CLAIM FOR SERVICE CONNECTION FOR A CHRONIC DISEASE .....	1
A. The Secretary failed to demonstrate that the Board had a plausible basis for concluding that Mr. Ruyle’s lay statements were not credible.....	1
B. The Secretary failed to demonstrate that the Board had a plausible basis for attributing less probative weight to the medical nexus opinion of Mr. Ruyle’s private medical provider .....	4
C. The Secretary failed to demonstrate that the Veterans Law Judge fulfilled her responsibilities under 38 C.F.R. § 3.103(c)(2).....	6
II.   THE SECRETARY HAS FAILED TO PERSUASIVELY REBUT THAT THE BOARD DECISION SHOULD BE VACATED AND REMANDED BECAUSE THE BOARD COMMITTED PREJUDICIAL ERROR .....	8
CONCLUSION AND STATEMENT OF RELIEF SOUGHT .....	8

## TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES

### CASES

<i>Buchanan v. Nicholson</i> , 451 F.3d 1331, 1336-37 (Fed. Cir. 2006).....	3
<i>Buczynski v. Shinseki</i> , 25 Vet. App. 221, 224 (2011) .....	2, 3
<i>Caluza v. Brown</i> , 7 Vet. App. 498, 510-11 (1995).....	4
<i>Horn v. Shinseki</i> , 25 Vet. App. 231, 239 (2012).....	2, 3
<i>Kowalski v. Nicholson</i> , 19 Vet. App. 171, 179 (2005) .....	6
<i>Macwhorter v. Derwinski</i> , 2 Vet. App. 655, 657 (1992).....	3, 8
<i>Romanowshy v. Shinseki</i> , 26 Vet. App. 289, 295 (2014).....	5

### STATUTES

38 U.S.C. § 7261(b)(2) .....	8
------------------------------	---

### CODE OF FEDERAL REGULATIONS

38 C.F.R. § 3.103(c)(2) .....	6, 9
38 C.F.R. § 3.303(b).....	6, 8

### RECORD BEFORE THE AGENCY

R. at 1-13 - September 20, 2017 Board Decision .....	1
R. at 11 - September 20, 2017 Board Decision .....	2, 3, 5
R. at 41 - 2017 Board Hearing Transcript .....	7
R. at 46 - 2017 Board Hearing Transcript .....	4
R. at 50 - 2017 Board Hearing Transcript .....	7
R. at 61 - 2017 Board Hearing Transcript .....	7

R. at 112 - May 23, 2016 C & P Examination .....	5
R. at 556 - DD214 .....	1
R. at 593 - 2015 Board Hearing Transcript .....	6
R. at 594 - 2015 Board Hearing Transcript .....	6
R. at 598 - 2015 Board Hearing Transcript .....	4
R. at 610 - 2015 Dr. Sucgang Medical Nexus Opinion .....	5
R. at 1337-38 - Military Service Medical Records .....	2

## **INTRODUCTION**

Appellant, Roy L. Ruyle (“veteran” or “Appellant”) honorably served in the U.S. Army<sup>1</sup> from September 13, 1954 until August 31, 1956. R. at 556.

Mr. Ruyle files this reply brief to respond to the arguments presented by the Secretary of Veterans Affairs in his brief (“Sec. Br.”). As discussed below, the Court should reject the Secretary’s arguments for affirmance, and should instead vacate and remand those parts of the decision of the Board of Veterans’ Appeals (“Board”) dated September 20, 2017, which denied entitlement to service connection based on its findings that the veteran’s current back disability (arthritis of the spine) was not manifested during service or within one year of separation, and is not otherwise related to his active service. Record Before the Agency (“RBA” or “R.”) at 1-13.

## **ARGUMENT**

### **I. THE SECRETARY HAS FAILED TO PERSUASIVELY REBUT THE ARGUMENTS RAISED BY MR. RUYLE IN HIS INITIAL BRIEF IN REGARD TO HIS CLAIM FOR SERVICE CONNECTION FOR A CHRONIC DISEASE.**

#### **A. The Secretary failed to demonstrate that the Board had a plausible basis for concluding that Mr. Ruyle’s lay statements were not credible.**

In Mr. Ruyle’s initial brief, he asserted that the Board failed to provide an adequate statement of reasons and bases for its finding of fact that Mr. Ruyle

---

<sup>1</sup> Appellant’s attorney mischaracterized Appellant’s military service in Appellant’s Brief. Sec. Br. at 2; App. Br. at 2.

reported back pain since service was not credible. The Board concluded that Mr. Ruyle was not an accurate historian because Mr. Ruyle's discharge physical examination report was silent as to back pain and Mr. Ruyle's lay statements contradicted medical evidence of record as to the diagnosis of arthritis of his spine. Appellant's Brief ("App. Br.") at 14. However, the Board failed to establish a proper foundation for drawing inferences against Mr. Ruyle's claim due to an absence of medical treatment records. See *Horn v. Shinseki*, 25 Vet. App. 231, 239 (2012). See also *Buczynski v. Shinseki*, 24 Vet. App. 221, 224 (2011) ("[w]hen assessing a claim, the Board may not consider the absence of evidence as substantive negative evidence.") The Board simply concluded that Mr. Ruyle's lay statements were not credible by finding that the passage of time was an impediment to Mr. Ruyle's ability to recollect events. App. Br. at 15.

The Secretary responded in his brief that remand of the Board's decision was not appropriate as the Board had a plausible basis for its conclusion that Mr. Ruyle's lay statements were not credible. Sec. Br. 1-26. The Secretary argued that Mr. Ruyle was not diagnosed with degenerative arthritis of his spine while he was on active duty so Mr. Ruyle could only establish service connection by showing continuity of symptomatology. Sec. Br. at 11. In support of his position, the Secretary argued that the Board's decision is based on the veteran's failure to support his claim because Mr. Ruyle was not diagnosed of degenerative arthritis until 2009 and the veteran did not provide medical treatment records prior to 2000. Sec. Br. at 13.

The Court should reject the Secretary's argument as it is not persuasive. The Secretary, as well as the Board, continue to confuse continuity of symptomatology with continuity of treatment. The Secretary's assertion that Mr. Ruyle's lay statements were not found to be credible based on lack of medical treatment records or documents is contrary to *Buczynski* and *Horn*. Sec. Br. at 11-13. See *Horn*, 25 Vet. App. at 239. See also *Buczynski*, 24 Vet. App. at 224. The Board based its findings, in part, by noting that Mr. Ruyle's "discharge physical examination report is silent as to back concerns and includes a normal physical examination of his spine, arms, and legs. His other STRs are silent for any reports of back problems." R. at 11 (1-13). However, Mr. Ruyle's contention that his back pain was reported during his discharge physical is credible because Mr. Ruyle has evidenced that his military service medical records are incomplete. App. Br. at 15. R. at 1337-38. Although, the Secretary argued that the Board was not competent to explain the relevance of Mr. Ruyle's missing military service medical records, the Board is competent to weigh lay statements. See *Buchanan v. Nicholson*, 451 F.3d 1331, 1336-37 (Fed. Cir. 2006). The Board found that Mr. Ruyle's lay statements were not credible, although the statements were inconsistent with only the portion of Mr. Ruyle's military service medical records that could be located. R. at 11 (2-13). Because the Secretary failed to respond to Mr. Ruyle's argument the Secretary concedes to the Board's error. Sec. Br. at 17. See *Macwhorter v. Derwinski*, 2 Vet. App. 655, 657 (1992).

Further, the Secretary, and the Board, mischaracterized Mr. Ruyle's testimony during his 2015 and 2017 Board hearings. Sec. Br. at 12. The 2015 Board hearing testimony transcript referenced by the Secretary is Mr. Ruyle's response to the Veterans Law Judge's ("VLJ") question as to when Mr. Ruyle realized that he "ha[d] a full-blown back problem." R. at 598 (578-606). Mr. Ruyle's response was "[y]ah, '89, '90, somewhere thereabouts." *Id.* Sec. Br. 12. As such, Mr. Ruyle did not state that his back pain manifested in 1989 or 1990, as the Secretary asserts. Sec. Br. 12. The 2017 Board hearing testimony transcript referenced by the Secretary is Mr. Ruyle's response to the VLJ's question as to "when did you first get problems with your back. . ." R. at 46 (41-67). Mr. Ruyle's response was "[o]h, off and on, from the '70s, but I could get a massage--." *Id.* Sec. Br. at 12. Again, Mr. Ruyle did not state that his back pain manifested in the '70s, as the Secretary asserts. Contrary to *Caluza*, the Board used excerpts from Mr. Ruyle's testimony out of context and, therefore, found Mr. Ruyle was not credible. *Caluza v. Brown*, 7 Vet. App. 498, 510-11 (1995).

**B. The Secretary failed to demonstrate that the Board had a plausible basis for attributing less probative weight to the medical nexus opinion of Mr. Ruyle's private medical provider.**

In Mr. Ruyle's initial brief, he asserted that the Board failed to provide an adequate statement of reasons or bases as to the Board's resolution of the medical discrepancies between the VA examiner's medical nexus opinion and Mr. Ruyle's private medical provider's ("Dr. Sucgang") medical nexus opinion. Specifically, the Board gave great probative weight to the VA examiner's opinion that "the condition



of degenerative arthritis of the spine . . . is due to age rather than related to the Veteran's military service to include potentially due to the in-service related airplane crash" because Mr. Ruyle was not diagnosed with arthritis until 2009. R. at 112 (104-112). R. at 11 (1-13). App. Br. 24. The Board gave less probative weight to Dr. Sucgang's opinion that Mr. Ruyle's "back pain . . . [is] a direct result of his plane crash in 1955." R. at 610. R. at 11 (1-13). App. Br. 22.

The Secretary responded in his brief that remand of the Board's decision was not appropriate as the decision was supported by a plausible basis because Dr. Sucgang's medical nexus opinion contradicts the record. Sec. Br. at 19. In support of his position, the Secretary argued that the newspaper clipping of the T-33 aircraft mishap, which reports the pilot and passenger escaped injury, is proof that Mr. Ruyle's arthritis of his back could not have been a result of the military accident. *Id.*

The Court should reject the Secretary's argument as it is not persuasive. It appears the Secretary concedes that Dr. Sucgang is Mr. Ruyle's treating physician and has submitted three statements related to the veteran's claim for service connection for back pain. Sec. Br. at 18-19. However, the Secretary did not respond to Mr. Ruyle's argument that the Board failed to address whether a new opinion is required to resolve the discrepancies between two competing nexus opinions, as the Board is not permitted to resolve medical discrepancies. See *Romanowshy v. Shinseki*, 26 Vet. App. 289, 295 (2014).

Instead, the Secretary mischaracterized Mr. Ruyle's testimony during his 2015 Board hearing as self-serving lay testimony. Sec. Br. 20. The Secretary argued that merely because Mr. Ruyle stated that he had been in an airplane accident in no way suggests Mr. Ruyle's current medical condition can be attributed to an in-service onset. Sec. Br. 20. However, the Secretary has taken Mr. Ruyle's testimony out of context; making the statement appear to be a self-serving lay statement. The 2015 Board hearing transcript reads as follows: "had you ever been in a car wreck." R. at 593 (578-606). App. Br. at 23. "And [Dr. Sucgang] asked me that question 3 or 4 times. And the last time it occurred to me, no, I've never been in a car wreck but I've been in an airplane crash. . . And [Dr. Sucgang] said that's it. At that point there was no doubt in [Dr. Sucgang's] mind that that was where the pain was coming from." R. at 594 (578-606). App. Br. 23. As such, the Board may not disregard a medical opinion solely on the rationale that the medical opinion was based on a history given by the veteran. See *Kowalski v. Nicholson*, 19 Vet. App. 171, 179 (2005).

**C. The Secretary failed to demonstrate that the Veterans Law Judge fulfilled her responsibilities under 38 C.F.R. § 3.103(c)(2).**

In Mr. Ruyle's initial brief, he asserted that the Veterans Law Judge ("VLJ") failed to fulfill her responsibilities ascribed under 38 C.F.R. § 3.103(c)(2), when the VLJ denied Mr. Ruyle's request to produce his private medical physician, Dr. Sucgang, as a witness. App. Br. 27. Instead the VLJ held the veteran's claim

record open for 60 days post-hearing so that Mr. Ruyle could submit a DBQ.<sup>2</sup> App. Br. at 28.

The Secretary responded in his brief that the VLJ fulfilled her duty to fully explain the issues and suggest the submission of evidence to the veteran. Sec. Br. at 25. In support of his position, the Secretary argued that Mr. Ruyle knew he could produce a witness because there was an observer from Disabled American Veterans (“DVA”) in attendance at the 2015 Board hearing. Sec. Br. 23.

The Court should reject the Secretary’s arguments as without merit. An observer in training from an advocacy group, such as Disabled American Veterans, has no relationship to a veteran’s right to present witnesses during his Board hearing. R. at 41 (41-68).

Furthermore, during the 2017 Board hearing, Mr. Ruyle’s DVA representative informed the VLJ that Mr. Ruyle’s record already evidenced a medical nexus opinion from Dr. Sucgang. R. at 50 (41-67). So, the VLJ had Dr. Sucgang’s 2015 nexus opinion before her when she requested another nexus opinion to answer her “important question.” R. at 61 (41-68). App. Br. 28. Therefore, the Secretary’s argument that the VLJ fulfilled her responsibility when she requested another nexus opinion without providing Mr. Ruyle with further information as to the deficiencies in Dr. Sucgang’s 2015 nexus opinion is not persuasive.

---

<sup>2</sup> Disability Benefits Questionnaire

Finally, it appears the Secretary concedes that a completed DBQ by the veteran's private medical provider would not have been required in order for the veteran to offer evidence of a positive medical nexus opinion. Sec. Br. at 17. See *Macwhorter*, 2 Vet. App. at 657.

**II. THE SECRETARY HAS FAILED TO PERSUASIVELY REBUT THAT THE BOARD DECISION SHOULD BE VACATED AND REMANDED BECAUSE THE BOARD COMMITTED PREJUDICIAL ERROR.**

In Mr. Ruyle's initial brief, he asserted that the Board committed prejudicial error when it failed to provide an adequate statement of its reasons or bases for finding that Mr. Ruyle's lay statements were not credible, attributed less probative weight to the medical nexus opinion of Mr. Ruyle's private medical provider and failed to provide Mr. Ruyle with an adequate Board hearing. See 38 U.S.C. § 7261(b)(2).

The Secretary argues that even if the Board erred in finding that Mr. Ruyle's lay statements not credible, attributed less probative weight to the medical nexus opinion of Mr. Ruyle's private medical provider and was not provided with an adequate Board hearing; these errors did not prejudice Mr. Ruyle's claim. However, a VA finding that Mr. Ruyle's lay statements are not credible resulted in the denial of Mr. Ruyle's claim for entitlement to service connection under 38 C.F.R. § 3.303(b). Therefore, Board's error is prejudicial.

**CONCLUSION AND STATEMENT OF RELIEF SOUGHT**

For the foregoing reasons, Mr. Ruyle respectfully requests the Court issue an order to vacate and remand the Board's September 20, 2017 decision that

denied Mr. Ruyle's claim of entitlement to service connection for a back disability so the Board can provide an adequate statement of reasons and bases for its findings. Alternatively, the Board should provide Mr. Ruyle with an adequate medical examination. Finally, the Board should provide Mr. Ruyle with an adequate hearing so that he may produce witnesses in support of his claim, as ascribed under 38 C.F.R. § 3.103(c)(2).

Respectfully submitted,

/s/ Janet Totter  
Janet Totter  
2005 Rogge Lane  
Austin, Texas 78723

Counsel for the Appellant