

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

APPELLANT'S REPLY BRIEF

VET. APP. NO. 18-1449

**CLARENCE HOPKINS,
Appellant**

V.

**ROBERT L. WILKIE,
SECRETARY OF VETERANS AFFAIRS,
Appellee.**

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PRELIMINARY STATEMENT

In his principal brief, Mr. Hopkins argued that the Board did not satisfy the Department of Veteran Affairs statutory duty to assist because it relied upon an inadequate examination and review of Mr. Hopkins' medical records. In the Appellant's Brief, Mr. Hopkins argued that the review of his medical records specifically the records from his January 1968 hospitalization (RBA 1050) (a) was not supported by complete analysis of the relevant facts (b) concluded that the kidney problems manifested themselves during service and (c) that each subsequent decision and opinion rendered after his January 1968 hospitalization and 45 days prior to discharge (RBA 1043 and 1050) repeated the error of not analyzing or not taking into account the laboratory findings contained therein stating that Mr. Hopkins specific gravity test was outside normal ranges. (d) characterized the laboratory findings contained in medical records from the January 1968 hospitalization (RBA 1043 and 1050) as being lay evidence.

The Secretary responded to the above by requesting the Court to affirm the Board's decision because the decision was supported by a plausible basis and an adequate statement of reasons and bases. Secretary's Brief ("Sec. Br.") states that a March 2011 examination states that Appellant had no note of renal insufficiency during service. (Sec. Br. 3) The examiner opined that neither hypertension nor kidney disease were manifest during Appellant's active service. (Sec. Br. 3) The Board found that the lay statements were not competent, and all the lay statements weigh against the Appellant (Sec. Br. 8).

The Board found that “the question of whether kidney disease is related to military service or a service-connected disability is a complex medical question that is not subject to lay observation alone.” (Sec. Br. 7) “This reasoning is consistent with controlling precedent because kidney disease is more akin to a complex condition like cancer than a simple condition of a broken leg.” (Sec. Br. 7)

ARGUMENT

I. THE COURT SHOULD REJECT THE SECRETARY’S ARGUMENT THAT THE BOARD PROVIDED ADEQUATE REASONINGS OR BASES WHEN THEY CONSIDERED MEDICAL CONCLUSIONS DERIVED FROM LABORATORY TESTS CONDUCTED AT UNITED STATES AIR FORCE ACADEMY AS BEING LAY EVIDENCE

The Secretary cites the laboratory test results conducted October 1967 (RBA 1018-21) (Sec. Br. 2) which the laboratory test results were normal but fails to mention the laboratory test (RBA 1043 and 1050) conducted 2 months later at the United States Air Force Academy in January 1968, while citing the diagnosis of the narrative summary in the January 1968 medical records that both show the Appellant had urine specific gravity tests results outside the normal range (RBA 1043 and 1050) – The urinary specific gravity test of the urinalysis is a measure of the concentration of solutes in the urine. It measures the ratio of urine density compared with water density and provides information on the kidney’s ability to concentrate urine. The urinary specific gravity measurement is a routine part of urinalysis. Ideally, urine specific gravity results will fall between 1.002 and 1.030 if your kidneys are functioning normally. (<https://www.healthline.com/health/urine-specific-gravity#results>) (Rugheed Ghadban, Latest Medical News, Clinical Trials,

Guidelines – Today on MedScape Log In, <https://www.medscape.com/> (last visited Jan. 11, 2019). The Secretary argues that the urinalysis test results that were taken in October 1967 (RBA 1018 - 21) (Sec. Br. 2) shows that the endocrine system was clinically normal; however, the Secretary briefly cites the hospital visit at United States Air Force Academy in January 1968 (RBA 1043 and 1050) where both urine specific gravity test results were outside the normal range, concluded that these laboratory findings are lay evidence. (38 CFR § 3.159 (a)(2)) This rule defines lay evidence. It should be noted that the test conducted at United States Air Force Academy in January 1968 (RBA 1043 and 1050) – 45 days prior to the Appellant's discharge showed two urinalysis test results that were outside the normal ranges, by characterizing these test results as lay evidence, thus making them the subject of opinion. The Secretary wants to accept the test results within normal ranges but the test results that were taken 2 months later – 45 days prior to discharge, the Secretary wants to characterize these laboratory findings as lay evidence. By characterizing the 1968 laboratory test results as lay evidence, the Secretary can put an opinion on laboratory test results (RBA 1043 and 1050). Laboratory findings are pure science – Pure science is science free of deductions from demonstrated truths, such as mathematics or logic, are studied without regard to practical applications. The Board took the laboratory test results and reached the conclusion that there were no kidney problems when in fact the results show that Mr. Hopkins kidneys were not functioning within the normal range. The Secretary failed to mention while he cites the hospital visit at the United States Air

Force Academy in January 1968 (RBA 1043 and 1050) in his brief (Sec. Br. 2), that these test results were abnormal and make statements that are inconsistent with the facts contained therein when he states that the Appellant has never had any problems with his kidneys.

In *Jones v. Shineski*, 23 Vet. App. 382, 390 (2010); see VA Adjudication Procedures Manual M21-1, III (VA may only accept a medical examiner's conclusion that an opinion would be speculative if the examiner has explained the basis for such an opinion, identifying what facts cannot be determined, or the basis for the opinion is otherwise apparent in VA's review of the evidence." In Mr. Hopkins' case, the Secretary wants to use the laboratory findings of the October 1967 hospitalization (RBA 1018 – 21) where it states that everything was normal, and then characterize the results from the January 1968 hospitalization (RBA 1043 and 1050) as being lay evidence because these numbers or laboratory conclusions did not fall within the normal limits. The Secretary and the Board and all examinations done after January 1968 (RBA 1050) have all taken the position that test results from the January 1968 hospitalization (RBA 1050) with a specific gravity level of 1.031 (RBA 1043) and 1.086 (RBA 1050) which is abnormal for every urine specific gravity test, it should be noted that the laboratory tests were performed 45 days prior to discharge. (RBA 1043 and 1050) Encompassed in the "Duty to Assist" in 38 U.S.C. 5103 (a)(c) is the understanding that the records the Board, the Secretary, and the VA have in their possession will be read or reviewed. This duty also encompasses that the Secretary, the Board or the VA will not make

statements that are inconsistent with the records or the findings contained therein. The VA records show kidney problems at the United States Air Force Academy in January 1968 (RBA 1043 and 1050), the VA makes statements like “the Veteran’s service treatment records are entirely **negative** for complaints or findings of a kidney disability” (RBA 4); the VA makes statement “Veteran was **never** treated for hypertension or a kidney issue during service.” (RBA 6) These statements are not true.

Stefl vs. Nicholson 21 Vet. App. 120; Colvin vs. Derwinski, 1 Vet. App. 171, 175 (1991) (holding that the Board may only consider independent medical evidence and may not substitute its own medical opinion.)

Every time that its repeated after knowledge is gained therein that said statements are not true, it becomes an actionable occurrence.

II. THE COURT SHOULD REJECT THE SECRETARY’S ARGUMENT THAT THE BOARD PROVIDED ADEQUATE REASONINGS OR BASES WHEN ALL ARGUMENTS AND PREVIOUS DECISIONS WERE BASED UPON THE PREMISE THAT A KIDNEY ABNORMALITY, OR DISEASE HAD NOT MANIFESTED ITSELF DURING SERVICE.

The Secretary asserts in his brief (Sec. Br. 2) that the medical records from the January 1968 hospitalization at the United States Air Force Academy (RBA 1043 and 1050) were reviewed; however, the conclusion reached by the Secretary that “there were no kidney problems or kidney issues”, are inconsistent with the findings from the medical records at the United States Air Force Academy January 1968 (RBA 1043 and 1050). The laboratory findings found at the specific gravity number were outside the normal range; however, the Secretary concluded that

there has never been any kidney problem or kidney issues with Mr. Hopkins during service when the test results clearly show that his kidneys were functioning outside the normal range.

Appellee (Sec. Br. 6) argues that diagnosing kidney disorder is like diagnosing cancer and the Appellant analogizes that it is more akin to Blood Pressure (see Dorland's Illustrated Medical Dictionary 2002 edition at 889.) (Dorland's is cited in Veteran's Benefits Manual) If your systolic is greater than 140 and your diastolic is greater than 90, you have high blood pressure or hypertension. Your blood pressure should be in these ranges. ("What is Blood Pressure?", About Heart Attacks (2016), <https://www.heart.org/en/health-topics/high-blood-pressure/what-is-high-blood-pressure> (last visited Jan. 11, 2019) The urinary specific gravity test of the urinalysis is a measure of the concentration of solutes in the urine. It measures the ratio of urine density compared with water density and provides information on the kidney's ability to concentrate urine. A urinary specific gravity measurement is a routine part of urinalysis. Ideally, urine specific gravity results will fall between 1.002 and 1.030 if your kidneys are functioning normally. (<https://www.healthline.com/health/urine-specific-gravity#results>) (Rugheed Ghadban, Latest Medical News, Clinical Trials, Guidelines – Today on Medscape Log In, <https://www.medscape.com/> (last visited Jan. 11, 2019). Mr. Hopkins kidneys were obviously not functioning properly given the fact the United States Air Force Academy had to repeat the urinalysis testing after the January 8, 1968 admission (RBA 1043 and 1050) which both contain

urinalysis specific gravity results that fall outside the normal range for kidney functions. All decisions, opinions and examinations failed to take this fact from 1968 (RBA 1050) 45 days prior to his discharge into account and states facts that are directly contradictory thereto. ***Reonal vs. Brown 5. Vet. App. 458-460-61 (1993)* states “Decisions based upon inaccurate factual premise have no probative value.” This court is the only one who can correct this mistake.

38 U.S.C. § 7261 – U.S. Code – Unannotated Title 38, Veteran’s Benefits § 7261 (c) hold unlawful and set aside decisions, findings (other than those described in clause (4) of this subsection), conclusions, rules, and regulations, found to be – (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

To consistently say there is no history, no indication of any kidney problems is arbitrary and capricious.

(B) contrary to constitutional right, power, privilege, or immunity;

To characterize the scientific test conducted at the United States Air Force Academy as lay evidence only for the purpose of denying Mr. Hopkins his benefits is a violation of his constitutional right to the benefits it would entitle him to.

(C) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right;

The fact that this problem was detected 45 days prior to discharge (RBA 1050), and the fact he was leaving the military does not mean that this test did not occur in service and to conclude such is a violation of this right.

or

(D) without observance of procedure required by law;

The law says that if it was found during service, there are some presumptions he is entitled to and to deny him these presumptions is a violation of this right.

CONCLUSION

For the foregoing reasons, or the reasons explained in the initial brief, Mr. Hopkins requested that the Court issue an order vacating and remanding the Board's February 15, 2017 rating decision with instructions that the (1) Board obtain an adequate medical opinion regarding findings contained in the medical records. (2) the Board provide an adequate statement of reasons and bases for all records including the January 1968 Medical Record. (RBA 1050), (3) the Board provide an adequate statement of reasons and bases for denying his claim for compensability with its service records evidencing that kidney problems had manifested itself prior to discharge.

Respectfully submitted,

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