IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

No. 18-3700

LARRY O. PENDLETON

Appellant,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,

Appellee.

BRIEF OF APPELLANT

Linda E. Blauhut
Deputy General Counsel

Jennifer A. Zajac
Associate General Counsel
Paralyzed Veterans of America
3941 Shenandoah Dr.
Oceanside, CA 92056
760-639-0765
jenniferz@pva.org

Attorneys for Appellant

April 26, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Regulations

Miscellaneous

RECORD CITATIONS

Page(s)

Record Citation

ISSUES PRESENTED

1. Whether the Board of Veterans' Appeals (Board) violated Mr. Pendleton's Fifth Amendment Due Process rights when it reversed its own prior favorable finding that Mr. Pendleton was credible, without notice.

2. Whether the Board misinterpreted the law when it *de facto* determined that Mr. Pendleton needed to establish a back disability in service.

3. Whether the Board provided adequate reasons or bases for its decision, when it (1) failed to consider service personnel records that supported Mr. Pendleton's testimony and (2) discounted Mr. Pendleton's private medical opinion.

4. Whether the Board erred when it did not return the May 2011 Compensation & Pension (C&P) examination as inadequate for rating purposes, when the examiner failed to consider whether Mr. Pendleton's service had an effect on his back or to provide any real rationale for the opinion.

5. Whether the Board erred when it determined that the Secretary had complied with his duty to assist, when it did not attempt to obtain clinical records from the National Personnel Record Center (NPRC).

STATEMENT OF THE CASE

I. NATURE OF THE CASE.

The appellant, Larry O. Pendleton, appeals a final Board of Veterans' Appeals decision, which denied entitlement to service connection for a lower back disability.

A. STATEMENT OF FACTS AND COURSE OF PROCEEDINGS

Mr. Pendleton honorably served in the U.S. Army from March 1968 to February 1970. R. 462. During this time, he served in Germany, mainly as a driver. *See* R. 347 (R. 337-457), R. 368 (R. 337-457), R. 384 (R. 337-457). His

service personnel records show that, in 1969, he was in three vehicular accidents: one in Mannheim, Germany; one in Nuremberg, Germany; and one in an unnamed city in Germany. R. 347 (R. 337-457), R. 368 (R. 337-457).

Mr. Pendleton applied for service connection for a lower back disability in September 2003, noting he injured his back in 1969, while he was in Germany, and that he had received treatment at an Army hospital there. R. 2361-88. He submitted to three C&P examinations in February 2004, all of which diagnosed him with degenerative disc disease and acknowledged his stated history of back strain while in Germany. R. 2135-36, R. 2137-38, R. 2139-41. None of the opinions, however, offered an opinion on the etiology of Mr. Pendleton's current back condition. *Cf. id.* The Regional Office (RO) denied the claim on May 12, 2004. R. 2129-34.

In response, Mr. Pendleton explained that the RO was confusing that he had been injured in the early 2000s with the fact that he "was injured in a trucking accident while [he] was stationed in Germany." R. 1938. He continued that he

> drove large trucks for the army and [he] put in over 100,000 miles while in the service. [His] back/spine and both legs were injured while in that accident in Germany. [His] back/spine and both legs were reinjured recently while in Mobile, Al. This latest accident aggravated my injury that started while in the military in Germany.

Id.

He further noted in a Statement in Support of Claim that "he was driving everyday and went to the hospitals in [Stuttgart], Germany and [Mainz], Germany because of constant stress of driving everyday in cramped quarters." R. 1604. He continued he is "6'5" tall and the truck and cars were too small for [him]. [He] rode on cobblestone streets, back roads and the woods." *Id.*

Mr. Pendleton also provided two letters from a fellow service member, Mr. Charles Cann. R. 754, R. 850. In the first letter, Mr. Cann explained that he had taken Mr. Pendleton to the hospital in Germany in 1969. R. 850. In his second letter, Mr. Cann explained that Mr. Pendleton would go to the doctor "every day" for pain in his back.[1] R. 754.

Additionally, Mr. Pendleton submitted reports from psychological testing he had undergone in relation to his claim for Social Security Administration benefits. R. 2070-77. The examiner noted that Mr. Pendleton immediately began discussing his back and that he had "experienced low back difficulties since serving in the Army during the Vietnam War." R. 2070 (R. 2070-77). The examiner continued that Mr. Pendleton "reported that he drove a 2 ½ ton truck in Europe, went to the hospital twice, was told that it was a back strain and given muscle relaxers and pain pills, then sent back on the road." *Id.* The examiner also noted that Mr.

[1] Mr. Cann's statement may not be quite literal; however, Mr. Pendleton did testify that he would go to different doctors while en route and would often need to rest. *See* R. 1382-1403.

Pendleton's "back pain was less severe until approximately two years ago when he was involved in a motor vehicle accident, at which time the injury was aggravated." *Id.*

Moreover, Mr. Pendleton provided a private medical opinion from a chiropractor, Dr. Carter A. Smith. R. 330-32. Dr. Smith noted Mr. Pendleton's "occupation as an army vehicle driver consisted of carrying luggage and parts throughout Europe over rough terrain for a period of 2 years." R. 330 (R. 330-32). He continued that when Mr. Pendleton was riding, "due to [his] height], he was constantly placed in a cramped position, squatting, and leaning forward." *Id.* Dr. Smith concluded that,

> [b]ased on history, subjective complaints and objective findings, inclusive of radiographs, it is evident and conclusive that Mr. Pendleton's low back disorder originated from active military service. Mr. Pendleton had to squat, lean forward, and remain in that position for a prolonged period of time. The force of riding over a rough terrain and the jarring of the truck caused his disc to bulge leading to displacement of the nucleus with inner annular fiber disruption. Automobile accidents in 2001 and 2002 exacerbated an already existing low back problem.

R. 331-32 (R. 330-32).

At a May 2009 Board hearing, Mr. Pendleton testified that he injured his back in the Army. R. 1387 (R. 1382-1403). He again explained that he drove 2 ½ ton trucks "which was a cramped area for [him] standing 6 feet 5. [His] head was in the roof and [his] knees [were] up against the dashboard and [he] had to shift

gears and bouncing up and down in there, [he] injured [his] back." R. 1388 (R. 1382-1403).

In response to this the Board member inquired whether Mr. Pendleton was "talking about over a period of time being cramped up and bouncing" or whether there was "one incident where [he] just had an accident and injured it." R. 1388 (R. 1382-1403). Mr. Pendleton responded that he "*hurt it one time then I had to, you know I just kept hurting it*. It kept happening. It kept happening the whole time. I kept going to the military hospital." *Id.* (emphasis added).

In April 2011, the Board remanded Mr. Pendleton's claim. R. 814-21. The Board noted that Mr. Pendleton "asserts that his military occupation as a light vehicle driver required him to ride in cramped vehicles over rough terrain, which resulted in wear and tear on his back." R. 816 (R. 814-21). The Board continued that Mr. Pendleton "has consistently reported that he has experienced back problems since service, and, significantly, that his post-service back injuries only aggravated already existing back problems." R. 817 (R. 814-21). Therefore, the Board remanded Mr. Pendleton's claim to obtain an examination to determine "to the extent possible, the etiology of any diagnosed low back disorder." *Id.*

Specifically, the Board ordered an "examination of his spine by an individual with the appropriate expertise." R. 818 (R. 814-21). The Board continued that the "*reviewer should specifically consider and address (1) the*

Veteran's assertion that he experienced low back pain in connection with his military occupation as a vehicle driver, and (2) what role, if any, the documented post-service back injuries in 2001 and 2002 played in the development of such disability." *Id.* (emphasis in original).

A physician assistant (PA) conducted the Spine C&P examination on May 17, 2011. R. 796-800. The PA noted that Mr. Pendleton's service medical records[2] did not show "back trouble," that his claims file included a 1999 record that showed complaint of back pain after doing yard work, a 2000 record that showed complaint of back pain "after imprudent lifting," and a Workman's Compensation note. R. 797 (R. 796-800). With regard to the "circumstances of injury onset," the PA noted Mr. Pendleton did not recall a specific injury, but "reports that his lower back started hurting because of his job assignment as a truck driver." *Id.*

In response to the questions posed by the Board, the PA found that Mr. Pendleton was diagnosed with "lumbar spine degenerative disk disease and DJD diagnosed after service and status post Workman's Compensation injury 2001. Therefore, it [was] less likely than not caused by or related to service or service-connected condition." R. 800 (R. 796-800). The PA did not specifically address

[2] Mr. Pendleton's service medical records consist of his separation examination, some records from his time in Germany, and his pre-induction record. R. 147-90.

Mr. Pendleton's testimony or claims that his injury began in service and was related to his MOS.

The Board issued a new decision on Mr. Pendleton's claim on December 8, 2011. R. 735-46. Mr. Pendleton appealed to the Court, which granted a Joint Motion for Remand with instructions for the Secretary to attempt to obtain additional in-service medical records. *See* R. 686-89.

Mr. Pendleton attended another Board hearing on July 16, 2014. R. 641-58. He testified to specific cities where he had visited clinics while on the road in his role as a driver in Germany, that it was easier for him to be on the road because he could stop over in different locations and just sleep (as opposed to being with his unit, where he would need to go to sick call), and that his sergeant had advised him to stop going to sick call. R. 645-54 (R. 641-58). Shortly thereafter, the Board remanded Mr. Pendleton's claim again. R. 629-40.

On April 6, 2015, the RO requested additional service treatment records from the NPRC. R. 471. The NPRC responded "all available personnel records and STRs were shipped to the contracted scan vendor for upload into VBMS." R. 472. These consisted of Mr. Pendleton's service personnel records, but did not include any new or additional service medical records. *See* R. 229 (R. 227-31).

On April 19, 2017, the Board remanded Mr. Pendleton's claim yet again, to ensure that it would be fruitless to continue the search for the requested medical

records. R. 85-89. The RO submitted a Memorandum of Unavailability on August 28, 2017, noting that it had requested Mr. Pendleton's service treatment records, but that any further attempts to obtain these records would be futile. R. 61. The claim was then returned to the Board. R. 20.

B. THE BOARD'S MARCH 30, 2018, DECISION

The Board began its discussion by explaining that the Secretary had complied with his duty to assist in attempting to obtain Mr. Pendleton's service medical records from his time in Germany. R. 4-5 (R. 1-14). The Board noted a "2017 Memorandum of Unavailability indicating that the RO [had] determined that the STRs are unavailable" and that "the Memorandum appears to accurately outline the efforts the RO made in obtaining the STRs." *Id.* Thus, the Board found "that the RO provided sufficient assistance to the Veteran to attempt to retrieve his medical records." R. 6 (R. 1-14).

Turning to the substantive arguments, the Board held "the evidence does not substantiate that the Veteran sustained a low back injury in service." R. 10 (R. 1-14). The Board continued that Mr. Pendleton's "service treatment records do not reflect treatment for such an injury, and he specifically denied any history of back problems of any kind in his January 1970 separation report of medical history, and no pertinent abnormalities were noted on examination." R. 11 (R. 1-14). The

Board also found that Mr. Pendleton's "statements concerning the type of injury sustained in service have been inconsistent." *Id.*

Turning to the "third element of service connection, the Board [found] that the evidence of record does not support a finding that any alleged back injury sustained in service is etiologically related to the Veteran's current low back disability." *Id.* Specifically, the Board found the private chiropractor's assessment unpersuasive. *Id.*

Therefore, the Board concluded Mr. Pendleton is not entitled to service connection for a low back disability. R. 12 (R. 1-14).

SUMMARY OF ARGUMENT

Mr. Pendleton suffers from a chronic back disability, which medical records show began well before 1999 and well before auto accidents that occurred in the early 2000s. Mr. Pendleton's service personnel records show that he was in three vehicular accidents while serving in Germany. Finally, Mr. Pendleton's claims folder contains a well-reasoned private medical opinion linking his time in service to his current condition.

Nonetheless, the Board denied Mr. Pendleton's claim, neglecting the in-service accidents, finding – without basis and inconsistent with an earlier decision – that Mr. Pendleton's testimony and those of his fellow service member were not

credible, finding the private medical opinion to be unpersuasive, and denying Mr. Pendleton due process.

With in-service accidents, a current disability, and medical and testimonial evidence connecting the two, there is sufficient evidence of record to grant service connection, and the Court should so order. Alternatively, the Court should remand to give the Board the opportunity to correct its multitude of mistakes.

ARGUMENT

I. JURISDICTION AND STANDARD OF REVIEW

Mr. Pendleton timely appeals the March 30, 2018, final Board decision, giving this Court jurisdiction to hear his appeal under 38 U.S.C.A. § 7252 (West 2014). Mr. Pendleton timely filed his Notice of Appeal on July 10, 2018, in accordance with 38 U.S.C.A. § 7266 (West 2014) and VET. APP. R. 4.

The Court reviews the question of law – whether the Board violated Mr. Pendleton's Fifth Amendment Due Process Rights and whether adequate reasons or bases have been provided – *de novo*. *Cushman v. Shinseki*, 576 F.3d 1290, 1299-1300 (Fed. Cir. 2009); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995). The Court reviews questions of fact – whether the May 2011 VA examination is adequate – under the clearly erroneous standard. *See D'Aries v. Peake, M.D.*, 22 Vet.App. 97, 104 (2008).

II. THE BOARD VIOLATED MR. PENDLETON'S DUE PROCESS RIGHTS WHEN IT REVERSED – WITHOUT NOTICE – ITS PRIOR FAVORABLE FINDING THAT MR. PENDLETON'S TESTIMONY WAS CREDIBLE.

The Federal Circuit has made clear that veterans benefits are protected by the Due Process Clause of the Fifth Amendment and as such, that the veteran is entitled to a "fundamentally fair adjudication." *Cushman v. Shinseki*, 576 F.3d 1290, 1299-1300 (Fed. Cir. 2009). One such aspect of a "fundamentally fair adjudication" in the VA system is "[providing] for notice and an opportunity to be heard at virtually every step in the process." *Thurber v. Brown*, 5 Vet.App. 119, 123 (1993). Moreover, such notice is not limited to Veterans Claims Assistance Act of 2000 (VCAA) notice, but also includes, for example, notice that the Board may reconsider an RO's decision that new and material evidence has been submitted to reopen a claim, such that the veteran would be made aware of what additional arguments he or she needs to present to the Board. *See* VA GEN. COUNS. PREC. OP. No. 05-92 (1992); *see Futrell v. Brown*, 45 F.3d 1534, 1539-40 (Fed. Cir. 1995) (Newman, C.J., dissenting).

Here, the April 2011 Board noted Mr. Pendleton "has consistently reported that he has experienced back problems since service, and, significantly, that his post-service back injuries only aggravated already existing back problems." R. 817 (R. 814-21). The Board continued Mr. Pendleton

> *is competent to describe his back condition since service, Espiritu v. Derwinski*, 2 Vet.App. at 494-95, and while the service treatment records are silent concerning the Veteran's back (with the January 1970 separation examination showing that the Veteran denied back trouble of any kind), *evidence received since the Board's June 2009 remand* ***strengthens the credibility of his assertions.*** *Specifically, private treatment records, received in November 2010, reflect a 1999 complaint of low back pain, and the Veteran's report of past back trouble.*

Id. (emphasis added); *see Jandreau v. Nicholson*, 492 F.3d 1372, 1376-77 (Fed. Cir. 2007); *Buchanan v. Nicholson*, 451 F.3d 1331, 1336 (Fed. Cir. 2006).

This makes clear that the Board found Mr. Pendleton's testimony regarding how he initially injured his back and his ongoing pain since that time credible. As such, a reasonable veteran would think it would not be necessary to submit any additional information on this particular aspect of his claim. *Cf.* VA GEN. COUNS. PREC. OP. No. 05-92 (1992); *see Futrell*, 45 F.3d at 1539-40 (Newman, C.J., dissenting).

Nevertheless, in the decision on appeal, the Board reverses this favorable determination and finds that Mr. Pendleton's testimony is not credible. R. 11 (R. 1-14). At no point did the Board notify Mr. Pendleton that this particular issue was something of concern or that it was possible for the Board to reverse its own prior favorable findings. *Cf.* VA GEN. COUNS. PREC. OP. No. 05-92 (1992); *see Futrell*, 45 F.3d at 1539-40 (Newman, C.J., dissenting). This deprives Mr. Pendleton of his fundamental right to notice, as well as his fundamental right to

meaningfully participate in his adjudication. *See Cushman*, 576 F.3d at 1299-1300; *Thurber*, 5 Vet.App. at 123; *see also Ruel v. Wilkie*, 918 F.3d 939, 942-43 (Fed. Cir. 2019).

That is, at no point after the April 2011 Board's finding was Mr. Pendleton made aware that the Board questioned his testimony or that he needed to provide additional evidence to strengthen his credibility. Had he been notified that this was still an area of concern for the Board, he could have provided additional testimony or obtained additional letters of support. *See* 38 C.F.R. § 3.103 (2011); *see also* 38 U.S.C. § 5104A (2018).[3]

By failing to notify Mr. Pendleton of this change, the Board deprived Mr. Pendleton of his fundamental due process rights, and the decision should be vacated. *See Cushman*, 576 F.3d at 1300.

III. THE BOARD MISINTERPRETED THE LAW WHEN IT DE FACTO REQUIRED MR. PENDLETON TO ESTABLISH AN INJURY IN SERVICE THROUGH MEDICAL RECORDS.

After noting there were no medical records to support Mr. Pendleton's claims that his back began to bother him in service, and determining Mr.

[3] While at the time of the Board decision, there was no specific section of Title 38 addressing favorable findings, the Veteran Appeals Improvement and Modernization Act of 2017 includes language that a favorable finding by the Secretary is binding on all subsequent adjudicators and cannot be overturned unless clear and convincing evidence is shown to the contrary. 38 U.S.C. § 5104A (2018).

Pendleton's testimony and the testimony of his fellow service member were not credible, contrary to its prior decision, the Board found that Mr. Pendleton had not established that he meet the second *Caluza* criteria – an injury in service. R. 10-12 (R. 1-14); *see generally Caluza v. Brown*, 7 Vet.App. 498, 506 (1995). As such, the Board found Mr. Pendleton was not entitled to service connection. R. 10-12 (R. 1-14).

The Board's analysis misinterprets the law. The Court has never held that a veteran has to specifically show a disability in service or that there has to be medical records verifying that the veteran was injured. Rather, as early as 1992, the Court held that if the veteran can establish that something happened to him or her in service that resulted in disability, that was sufficient. *See Godfrey v. Derwinski*, 2 Vet.App. 352, 355-56 (1992); *Douglas v. Derwinski*, 2 Vet.App. 103, 107-108 (1992).

In *Godfrey*, the veteran served in the Army during the 1940s as a weapons instructor. *Godfrey*, 2 Vet.App. at 353. His separation physical showed no hearing loss, however, Mr. Godfrey claimed that he was seen during service for hearing loss. *Id.* Unfortunately, his service records were destroyed during the NPRC fire in 1973, and so there were no records to corroborate his claim of being seen during service for his hearing loss. *Id.*

Nonetheless, Mr. Godfrey applied for service connection for hearing loss in 1989, over 40 years after being discharged. *Id.* The RO and Board denied his claim, finding his separation examination showed normal hearing and therefore he was not entitled to service connection. *Id.* at 354. Mr. Godfrey appealed, arguing for reversal.

The Court agreed that the Board had made a mistake, but held that remand was the appropriate outcome. *Id.* at 355. The Court explained that the "Board treated the lack of evidence that appellant experienced hearing loss during service as dispositive of his claim" and therefore, that the "Board has evidently misinterpreted the law." *Id.* at 356. The Court continued that if the "evidence should sufficiently demonstrate a medical relationship between the veteran's *in-service exposure to loud noise* and his current disability, it would follow that the veteran incurred an injury in service; the requirements of section 1110 would be satisfied." *Id.* (citing *Douglas v. Derwinski*, 2 Vet.App. 103, 107-08 (1992)) (emphasis added). In other words, Mr. Godfrey did not have to show hearing loss while in service or that his exit examination showed a difference in his hearing at that time; he simply had to show that he was exposed to loud noises during service and that resulted in his disability.

Similarly, in *Douglas*, the veteran sought service connection for basal-cell carcinoma. *Douglas*, 2 Vet.App. at 104. In his initial claim, the veteran attributed

his cancer to exposure to ionizing radiation, *id.*; however, during his Board hearing, the veteran's representative raised the issue that the veteran's cancer might be related to his excessive sun exposure as a deckhand in the Pacific Theatre. *Id.* The Board denied his claims, failing to directly address the sun exposure argument, and the veteran appealed. *Id.* at 107-108.

The Court held that "direct service connection for a disease or injury may be established by demonstrating *that it was actually incurred in or aggravated during military service*." *Id.* at 108 (emphasis added). Therefore, "the numerous references in the veteran's sworn testimony and elsewhere in the record, indicating a potential relationship between his basal-cell carcinoma *and sun exposure in service as a deckhand*, implicitly raised the issue of direct service connection for his basal-cell carcinoma" and the Secretary should have obtained an opinion "to determine whether his deckhand exposure to the sun could reasonably have caused his basal-cell carcinoma." *Id.* at 110 (emphasis added).

Applying these quarter-century old decisions, the Board should have found that Mr. Pendleton met the second *Caluza* factor – evidence of an in-service injury. *See Caluza*, 7 Vet.App. at 506. In addition to all of the nuances of Mr. Pendleton's particular situation – he was an extremely tall man driving along cobblestone in a small cab space – his service personnel records establish that Mr. Pendleton was in not one, *but three*, motor vehicle accidents while he was stationed in Germany.

R. 347 (R. 337-457), R. 368 (R. 337-457). Thus, irrespective of whether the Board now finds Mr. Pendleton's testimony "inconsistent" – a characterization that Mr. Pendleton finds puzzling, especially in light of its earlier determination, *see infra* Arg. IV – Mr. Pendleton's records and his personal testimony clearly establish in-service incidences akin to sun exposure or exposure to loud noises, and has therefore established an "in-service injury." *See Godfrey*, 2 Vet.App. at 355-56; *Douglas*, 2 Vet.App. at 110.

As such, the Court should reverse the Board's holding that Mr. Pendleton has not established an in-service injury. *See Godfrey*, 2 Vet.App. at 356; *Douglas*, 2 Vet.App. at 107-108.

IV. THE BOARD'S DETERMINATION THAT MR. PENDLETON'S TESTIMONY HAS BEEN INCONSISTENT SHOULD BE REVERSED.

In *Buchanan*, the Federal Circuit held "the lack of [contemporaneous medical records] does not, in and of itself, render lay evidence not credible. Such an interpretation is unreasonable because it would render portions of the statutes and regulations meaningless." *Buchanan*, 451 F.3d at 1336. There, the Board had held the veteran's "recollections of medical problems some 20 years after the veteran's separation from service have slight probative value and lack credibility absent confirmatory clinical records to substantiate such recollections." *Id.* (internal quotations omitted). The Federal Circuit found the first part of this assessment "within the Board's discretion to weigh the evidence submitted," *id.*;

however, the circuit court continued the "second portion of the Board's statement reflects a legally untenable interpretation of the above enumerated statutory and regulatory provisions: that absent confirmatory medical evidence, lay evidence lacks credibility." *Id.* As such, the Federal Circuit vacated the Court's decision and remanded for further proceedings. *Id.* at 1337. Several years later, the Court reiterated the Federal Circuit's decision, and confirmed that when the Board makes a credibility determination, it must provide adequate reasons or bases for this determination. *See Frost v. Shulkin*, 29 Vet.App. 131, 141 (2017).

Yet despite this clear precedents, the Board both required "confirmatory medical evidence" and failed to provide adequate reasons or bases for its finding that Mr. Pendleton's testimony was not credible, especially after its prior finding that Mr. Pendleton's testimony was credible.[4] *Cf. Buchanan*, 451 F.3d 1336-37; *Frost*, 29 Vet.App. at 141; R. 817 (R. 814-21). While Mr. Pendleton maintains the Board's reversal of position is a due process violation, *see supra* Arg. II, should the Court disagree, the Board's handling of the testimonial evidence was also in error.

Discussing whether Mr. Pendleton had established the second *Caluza* factor, the Board found there were no medical records to support Mr. Pendleton's contention that he was injured during service, and then found "the Veteran's statements regarding sustaining a back injury in service" were not credible. R. 11

[4] *See supra* n.3.

(R. 1-14). This is exactly what the Federal Circuit held the Board cannot do; the Board cannot find Mr. Pendleton's testimony "lacks credibility merely because it is unaccompanied by contemporaneous medical evidence." *Buchanan*, 451 F.3d at 1336; *see also Kahana v. Shinseki*, 24 Vet.App. 428, 440 (2011) (explaining the Board cannot infer silence in the medical records as negative evidence, if there is a question as to whether the records are complete). This requires the Board's decision to be vacated. *Id.* at 1337.

Moreover, the other parts of the Board's credibility determination do not save the decision, as the rest of the Board's reasons or bases are not supported by the record. *See Buchanan*, 451 F.3d at 1337 (explaining the Board could find lay evidence was not credible "because of possible bias, conflicting statements, etc."). For example, the Board took issue with the fact that Mr. Pendleton had "indicated that he injured his back in a 'trucking accident,' . . . [but] in May 2011, he reported that he could not recall any specific back injury in service, and indicated that his back problems were due to the cumulative effect of driving in a cramped position due to his height." R. 11 (R. 1-14).

First, the Board's insinuation that Mr. Pendleton is making up his facts fails to acknowledge that there are *service personnel records* that establish that Mr. Pendleton was in a "trucking accident." R. 347 (R. 337-457), R. 368 (R. 337-457). In other words, his testimony is corroborated by the record.

Second, the Board creates a dichotomous situation where none exists. In other words, the Board views the world as though both of Mr. Pendleton's statements cannot be true – that either he was injured during a "trucking accident" or he was injured by his "driving conditions," but that both cannot be true. *See* R. 11 (R. 1-14). However, Mr. Pendleton offered a reasonable explanation for how this all fits together: at his Board hearing in May 2009, Mr. Pendleton explained that there was an initial injury and after that point, driving around Germany, in a cramped cabin over cobblestone roads, he continually re-injured his back. R. 1387-89 (R. 1382-1403); *see Kahana*, 24 Vet.App. at 439 (J. Lance, concurring) (explaining the Board is allowed to make reasonable inferences).

Finally, the different theories that Mr. Pendleton has offered do not amount to *inconsistencies* in his testimony. He never claimed that he was not in an accident; he simply stated he didn't remember. He never stated that he was *only* injured by the type of driving that he did. He just emphasized this as his claim progressed.

Therefore, as the Board disregarded the Federal Circuit's holding in *Buchanan* and failed to provide adequate reasons or bases for its credibility determination, the Court should vacate the decision. *See Buchanan*, 451 F.3d at 1336-37; *Frost*, 29 Vet.App. at 141.

V. THE BOARD FAILED TO PROVIDE ADEQUATE REASONS OR BASES FOR ITS DETERMINATION THAT MR. PENDLETON WAS NOT ENTITLED TO SERVICE CONNECTION.

The Board failed to provide adequate reasons or bases when it failed to discuss favorable evidence; when it failed to adequately explain its determination of credibility; when it based its decision on an inaccurate factual basis; and when it failed to adequately explain why it found a well-reasoned private medical opinion unpersuasive. Based on these failures, the Board's decision should be vacated. *See Allday*, 7 Vet.App. at 527.

A. The Board Failed to Discuss Favorable Evidence.

While the Board acknowledged that Mr. Pendleton stated he had gotten into a "trucking accident," its only discussion of the accident was in terms of creating a credibility problem for Mr. Pendleton, on the basis that he had switched stories of *how* he was injured. *See* R. 11 (R. 1-14). At no point did the Board address whether this evidence (1) could in and of itself establish an "in-service injury," *see supra* Arg. III, (2) supported Mr. Pendleton's testimony, and specifically his Board hearing testimony that he had hurt his back one time, and then continued to keep hurting it, s*ee* R. 1388 (R. 1382-1403), or (3) gave credence to Mr. Cann's testimony that he had taken Mr. Pendleton to the hospital in 1969. *See Thompson v. Gober*, 14 Vet.App. 187, 188 (2000) (holding the Board must discuss favorable evidence); *see Kahana*, 24 Vet.App. at 439.

The Board's failure to offer any meaningful discussion of this pertinent evidence requires vacating the decision. *See Thompson*, 14 Vet.App. at 188.

B. The Board Offers No Explanation for Why It Did an Outright Reversal of Mr. Pendleton's Credibility Determination.

The crux of the Board's decision is the finding that Mr. Pendleton's testimony, and that of his fellow service member, was not credible. R. 10-11 (R. 1-14). However, in April 2011, the Board found Mr. Pendleton was

> *competent to describe his back condition since service*, *Espiritu v. Derwinski*, 2 Vet.App. at 494-95, and while the service treatment records are silent concerning the Veteran's back (with the January 1970 separation examination showing that the Veteran denied back trouble of any kind), *evidence received since the Board's June 2009 remand strengthens the credibility of his assertions. Specifically, private treatment records, received in November 2010, reflect a 1999 complaint of low back pain, and the Veteran's report of past back trouble.*

R. 817 (R. 814-21) (emphasis added).

The Board offers no explanation for its departure. *See Buchanan*, 451 F.3d 1336-37; *Frost*, 29 Vet.App. at 141. No evidence was procured that altered the fact that the 1999 medical record reported "past back trouble" and at that time, Mr. Pendleton's story of how his back was injured included both "theories."

It simply makes no sense that the Board would find Mr. Pendleton's testimony credible in 2011 – so much so that it determined a C&P examination was necessary – and then turn around and state that it no longer found the same

evidence credible. The Board's failure to explain requires the decision to be vacated. *See Buchanan*, 451 F.3d 1336-37; *Frost*, 29 Vet.App. at 141.

C. <u>The Board's Determination that Mr. Pendleton Was First Treated for Back Pain in 1999 Is Factually Incorrect</u>.

After discussing the opinion evidence of record, the Board discusses the medical records in Mr. Pendleton's claims file, noting specifically that "[p]rivate medical records provided by the Veteran reflect that he was first treated for back pain in September 1999." R. 9 (R. 1-14). This misstates the record. First, the September 1999 record does not state that Mr. Pendleton was first treated in 1999 for low back pain. *Cf.* R. 849 (R. 848-49). Rather, it states that this particular doctor had not seen Mr. Pendleton before. *Id.* Second, and more importantly, the Board's statement insinuates that the private medical record establishes that Mr. Pendleton's back condition began in 1999. This is not true. The record actually states Mr. Pendleton

> comes in with low back pain which started when he was hoeing some weeds and such in his yard over the weekend. *He has had back trouble before, typically just about like this*. . . . He wants to try a very conservative course first and I think that this would be more appropriate *in light of the fact that this is a chronic problem*.

R. 848-49 (emphasis added). Thus, contrary to the Board's assertion that the private record establishes Mr. Pendleton's back condition began in 1999, the doctor's notes establish that Mr. Pendleton has suffered from the current pain

before, and that the condition had been chronic, i.e., not something that first began when he was weeding the prior weekend.

The Board's misunderstanding of this record also corrupted the framework through which it viewed the rest of the evidence and the medical opinions. Had the Board correctly assessed this record and the favorable evidence contained within, it should have taken issue with the C&P examiner's failure to acknowledge that Mr. Pendleton had suffered from lower back pain prior to his workplace accidents and remanded for clarification. *See Bowling v. Principi*, 15 Vet.App. 1, 12 (2001) (reiterating the Board's duty to return a report if clarification is needed); 38 C.F.R. § 19.9(a) (2017).

D. The Board's Explanation for Discounting the Private Medical Opinion Lacks Sound Reasoning.

As the adjudicator, the Board's role includes making determinations of persuasiveness. In doing so though, its decisions must make sense. *See McNair v. Shinseki*, 25 Vet.App. 98, 105 (2011) (explaining it is the Board's duty to weigh and determine credibility and explain its findings in statement of reasons or bases).

Here, the Board's rationale for rejecting Dr. Smith's opinion makes no sense, denouncing the private medical opinion because it "was primarily based on the Veteran's self-reported medical history and was wholly conclusory in nature." R. 11 (R. 1-14). Neither of these statements is true.

The chiropractor did not rely on Mr. Pendleton's "self-reported medical history," but rather based his opinion on Mr. Pendleton's description of his driving experiences: "Mr. Pendleton had to squat, lean forward, and remain in that position for a prolonged period of time." R. 331-32 (R. 330-32). As the Board did not find this information lacked credibility, it cannot fault the examiner for relying on it.

With regard to the opinion being "conclusory," the exact opposite is true. The chiropractor used the information gathered from his examination and the information of Mr. Pendleton's driving conditions and concluded that, after being in such a position, "the force of riding over a rough terrain and the jarring of the truck caused his disc to bulge leading to displacement of the nucleus with inner annular fiber disruption." R. 332 (R. 330-32); *see Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 301 (2008) (explaining an adequate examination provides a reasoned medical explanation connecting the conclusion with the data). The Board's failure to recognize this renders its reasons or bases inadequate.

Based on all of the above, the Board has failed to provide adequate reasons or bases for its decision, and it must be set aside. *See Allday*, 7 Vet.App. at 527.

E. <u>The Only Relevant and Probative Evidence Is In Mr. Pendleton's Favor, and The Court Should Grant Service Connection for a Lower Back Disability</u>.

If the Court agrees that the chiropractor's medical opinion is probative, and that Mr. Pendleton has provided credible evidence of an in-service injury, the

Court should reverse the Board's holding and grant Mr. Pendleton service connection. *See Beaty v. Brown*, 6 Vet.App. 532, 538-39 (1994) (holding when all of the evidence supports a finding of service connection, reversal is appropriate).

Mr. Pendleton's service personnel records, supported by his personal statements and his buddy statements, established an in-service injury. The Board conceded that Mr. Pendleton has a current disability. Finally, as discussed above, Mr. Pendleton's chiropractor has provided clear, concise, and reasoned nexus evidence. *See* 38 U.S.C.A. § 5125 (West 2014). There is simply no probative evidence to the contrary, and remanding the case to develop it further could be taken as an invitation for the Secretary to obtain evidence against the claim. *Cf. Mariano v. Shinseki*, 17 Vet.App. 305, 312 (2003).

Therefore, as all of the material evidence is in Mr. Pendleton's favor, the Court should reverse the Board's decision and award Mr. Pendleton service connection for a lower back disability. *See Beaty*, 6 Vet.App. at 538-39.

VI. IF THE COURT DOES NOT FIND REVERSAL APPROPRIATE, REMAND IS STILL REQUIRED TO CORRECT SIGNIFICANT ERRORS IN EVIDENCE GATHERING.

In addition to the above noted errors, if the Court does not agree that reversal is appropriate, the Court should also address whether the May 2011 Spine C&P Examination report was adequate for rating purposes, *see Barr v. Nicholson*, 21 Vet.App. 303, 311 (2007), *overruled on other grounds*, *Walker v. Shinseki*, 708

F.3d 1331 (Fed Cir. 2011), and whether the Secretary complied with his duty to assist when he did not attempt to obtain clinical records from the NPRC. *See VA Adjudication Manual*, M21-1, Part III(iii), Ch. 2(B)(4) ("Procedures for Obtaining Clinical Records"); M21-1, Part III(iii), Ch. 2(B)(4)(c) (explaining "clinical records are rarely included in STRs because the treating facilities that create them retain the records for the time periods shown in the table below and then send them to NPRC. . . . When review of the actual clinical records is necessary, request them from the treating facility or NPRC."); 38 C.F.R. § 3.159(c)(2) (2017).

A. <u>The May 2011 Spine C&P Examination Was Inadequate</u>.

While the Secretary is not required to obtain an examination in every claim, when he does request one, he must ensure that the examination is adequate. *Barr*, 21 Vet.App. at 311. This did not happen here.

First, the Board specifically requested that the examiner "consider and address (1) [Mr. Pendleton's] assertion that he experienced low back pain in connection with his military occupation as a vehicle driver." R. 818. The May 2011 C&P examiner does not address this theory. *Cf.* R. 797-800.

Second, the PA noted that Mr. Pendleton had been in several accidents *after* service, R. 797 (R. 797-800), and concluded this was why he has a current back disability. R. 800 (R. 797-800). Yet, the PA fails to acknowledge that Mr.

Pendleton complained of chronic back pain *prior* to those accidents occurring. *See* R. 848-49, R. 1107, R. 1306.

Third, the PA noted that Mr. Pendelton's service records were silent for any low back problem, condition, or injury. R. 797 (R. 797-800). This is problematic for two reasons: (1) the Secretary has already determined that records for this particular time period are missing. R. 61; *see Kahana*, 24 Vet.App. at 440. Thus, allowing the examiner to hold a lack of contemporaneous records against Mr. Pendleton is to give the examiner permission to infer negative evidence. And while the examiner is not making a legal conclusion, his opinion is being used to form one, and should be held to a similar standard as the Board with regard to what inferences can be drawn from a lack of evidence and in what situations those inferences can be made. *See id.* And (2), by making this statement, the examiner has "impermissibly ignored the appellant's lay assertions that he sustained a back injury during service," *see Dalton v. Nicholson*, 21 Vet.App. 23, 40 (2007), and ignored the fact that Mr. Pendleton was in motor vehicle accidents while in service. R. 368 (R. 337-457).

Therefore, for the individual reasons stated above, as well as their cumulative effect, the Board erred in finding the examination adequate and the Court should reverse the Board's finding and remand for readjudication. *See*

Reonal v. Brown, 5 Vet.App. 458, 461 (1993) (holding an medical opinion must be based on an accurate factual premise to have any probative value).

B. The Secretary Did Not Comply with His Duty to Assist When He Did Not Attempt to Obtain Clinical Records from the NPRC.

On August 8, 2014, the Board remanded for the RO to make one final attempt to obtain Mr. Pendleton's service treatment records. R. 629-40. On April 6, 2015, the RO asked the NPRC to furnish Mr. Pendleton's entire personnel file and to "please do a thorough search for any STRs that pertain to veterans treatment for his low back disability at military medical facilities located in Wiesbaden, Mainz, Heidelberg, and Stuttgart Germany from 1968 to 1970." R. 471. The NPRC responded that they had sent Mr. Pendleton's entire service personnel record to be scanned into the system. R. 472. Once it became apparent that the requested STRs were not available though, a Memorandum of Unavailability was drafted for Mr. Pendleton's claims file. R. 61.

In reviewing this process, the Board failed to acknowledge that there was at least one other step that the RO could have taken: the RO could have requested clinical treatment records from the NPRC for the specific Army hospitals that Mr. Pendleton visited. *See VA Adjudication Manual*, M21-1, Part III(iii), Ch. 2(B)(4); M21-1, Part III(iii), Ch. 2(B)(4)(c). The Secretary's failure to take this final step requires the Court to remand. *See* 38 C.F.R. § 3.159(c)(2).

CONCLUSION

Based on the foregoing, Mr. Pendleton requests that the Court reverse the Board's decision and find that the record supports Mr. Pendleton's application for service connection for a lower back disability.

Alternatively, Mr. Pendleton requests that the Court (1) reverse the Board's decision, (2) find the May 2011 VA examination inadequate, (3) order the Board to reconsider Mr. Pendleton's testimony and the private medical opinion, (4) attempt to obtain the clinical records from the NPRC, and (5) after additional development is completed, order the Secretary to readjudicate the claim.

Respectfully submitted,

Linda E. Blauhut
Deputy General Counsel

/s/ Jennifer A. Zajac
Jennifer A. Zajac
Counsel for the Appellant
Paralyzed Veterans of America
3941 Shenandoah Dr.
Oceanside, CA 92056
760-639-0765
jenniferz@pva.org