APPELLANT'S REPLY BRIEF

UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

17-4772

CONNIE E. HOLLANDER,

Appellant,

v.

ROBERT L. WILKIE,
SECRETARY OF VETERANS AFFAIRS

Appellee.

SEAN A. RAVIN, ESQ.
COUNSEL FOR APPELLANT

1550 MADRUGA AVENUE, SUITE 414
CORAL GABLES, FLORIDA 33146
PHONE: (202) 607-5731
FAX: (202) 318-0205

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Regulations

Record Citations

IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 17-4772

CONNIE E. HOLLANDER,

Appellant,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,

Appellee.

APPELLANT'S REPLY BRIEF

REPLY ARGUMENT

A. Mr. Hollander accepts the Secretary's concession of error that the Board provided an inadequate statement of reasons or bases and failed to comply with the terms of a prior remand.

In his brief, Mr. Hollander argued that the Board erred when it found that he (1) he did not engage in combat with the enemy, and (2) his reported stressor as it related to his fear of hostile military activity was inconsistent with the places, types, and circumstances of his service. Appellant's Brief (App.Br.) at 11-20. In particular, Mr. Hollander argued that the Board's findings were clearly erroneous. Id. To wit, Mr. Hollander noted that in a prior decision, the Board favorably found that his reported stressor as it related to hostile military activity in the Korean demilitarized zone was consistent with the places, types, and circumstances of his service. App.Br. at 15-20. As such, Mr. Hollander argued that reversal with instructions to the Board to award service connection for Post-Traumatic Stress

Disorder (PTSD) was warranted. App.Br. at 20. In the alternative, Mr. Hollander argued that the Board's reasons or bases were inadequate and that it had failed to comply with the terms of a prior remand agreement. App.Br. at 21-25. On this alternative basis, Mr. Hollander prayed that the Court set aside the Board's decision. App.Br. at 25.

In response, the Secretary conceded that for the reasons discussed in Mr. Hollander's brief, the Board's decision should be set aside and the matter remanded. Secretary's Brief (Sec.Br.) at 10-11. Specifically, the Secretary conceded that the Board's reasons or bases were inadequate and that the Board had failed to ensure compliance with the terms of a prior remand agreement. Id. In addition, the Secretary argued remand and not reversal was the proper remedy because the Board was not bound by its prior favorable finding and that the Court must find every finding by the Board to be clearly erroneous before reversal would be warranted. Sec.Br. at 7-10.

Mr. Hollander accepts the Secretary's concessions of error that (1) the Board provided an inadequate statement of reasons or bases in light of its prior favorable finding that his reported stressor relating to the fear of hostile military activity was consistent with the places, types, and circumstances of his service; and (2) the Board failed to comply with the terms of a prior remand agreement. As argued below, Mr. Hollander asserts that reversal, and not remand, is the appropriate remedy in this matter.

B. The Secretary's arguments against reversal are unpersuasive, and there is no basis in law for the Secretary's argument the Board was not bound by its prior favorable finding.

Notwithstanding the Secretary's concessions of error, the Secretary's arguments against reversal are unpersuasive, and there is no basis in law for the argument that the Board was not bound by its prior favorable finding.

The Secretary advanced three arguments in support of his assertion that the Board was not bound by its prior favorable finding that Mr. Hollander's reported stressors were consistent with the places, types, and circumstances of his service in Korea. In his first argument against reversal, the Secretary asserted that the Board is not bound by a prior favorable finding if that finding was made for the purpose of determining whether the Secretary has a duty to provide a medical examination or opinion to a claimant. Sec.Br. at 7-8. Here, the Secretary wrote, in pertinent part:

> The Board was not bound by its October 2013 statement that Appellant's lay statements were consistent with the time, place, and circumstances of his service in Korea. When the Board stated in its October 2013 remand that an examination was necessary because Appellant's lay statements were consistent with the time, place, and circumstances of his service in Korea, it was making a determination under *McLendon v. Nicholson*, 20 Vet.App. 79 (2006), rather than a final determination on the merits. (R. at 321). The threshold for the Board to order an examination under *McLendon* is by design a "low threshold," nowhere near the level of certainty needed to find favorably for the veteran. *McLendon*, 20 Vet.App. at 83. **For the Board to be bound to make a favorable factual finding in a later decision because it had echoed the same conclusion in an earlier *McLendon* remand would be to merge the *McLendon* analysis with the merits analysis.**

Sec.Br. at 7-8. (**Bold emphasis added**).

In the October 2013 decision, the Board recited Mr. Hollander's reported stressors of combat in the Korean demilitarized zone and found that these reported stressors were

consistent with the time, place, and circumstances of his service. R. 321 (317-323). Here, the Board wrote, in pertinent part:

> The Veteran claims that he has PTSD which is related to service. In this regard, the Board notes that VA outpatient treatment records show a diagnosis of PTSD. The Veteran has alleged that his PTSD is due to stressors experienced while serving in Korea. Specifically, the Veteran has asserted in statements and personal hearing testimony that he believes he has PTSD as a result of events in Korea while participating in missions into the demilitarized zone (DMZ) involving firefights and the killing of infiltrators. The Veteran also appears to be asserting that his PTSD is related to a general fear of coming under attack whenever he was in close proximity to the DMZ.
>
> A VA examination has not been conducted regarding this claim. **Moreover, the Veteran has reported fear of being attacked, which is consistent with the time, place, and circumstances of his service in Korea.** Therefore, a VA examination is needed to confirm the diagnosis of PTSD and determine if there is a nexus to service under the new regulations.

R. 321 (317-23) (**Bold** emphasis added).

In short, there is no basis in law for the Secretary's argument, and the Secretary does not support his argument with citation to either controlling or persuasive authority. While the Secretary cited to the Court's decision in ***McLendon***, as discussed below, that decision had nothing to do with whether the Board is bound by a prior favorable finding.

In ***McLendon***, the Court held that the third prong of §3.159(c)(4)(i), which requires that the evidence of record "indicates" that "the claimed disability or symptoms may be associated with the established event," establishes "a low threshold" in order to trigger the Secretary's duty to provide a medical examination or opinion. *McLendon v. Nicholson*, 20 Vet.App. 79, 83 (2006). ***McLendon*** does not lower the threshold for the Board to make a finding, nor does it stand for the proposition that the Board is not bound by a prior favorable finding made in the course of its analysis as to whether the Secretary is obligated to

provide a medical examination or opinion.

In other words, contrary to the Secretary's argument, if the Board makes a favorable finding as part of its ***McLendon*** analysis, it is bound by that favorable finding unless there is a relevant exception to the general rule that the Board is bound by its own previous favorable findings and conclusions. ***See Browder v. Brown***, 5 Vet.App. 268, 270 (1993); ***see also Johnson v. Brown***, 7 Vet.App. 25, 26 (1994) ("Where a case is addressed by an appellate court, remanded, then returned to the appellate court, the 'law of the case' doctrine operates to preclude reconsideration of identical issues."); ***see also Chisem v. Brown***, 8 Vet.App. 374, 375 (1995).

In his second argument against reversal, the Secretary asserted that the Board is not bound by a prior favorable finding if there is an intervening remand from this Court. Sec.Br. at 8-9. In other words, when the Board is obligated to reexamine the evidence following remand from this Court, it is not bound by a prior favorable finding. Here, the Secretary wrote, in pertinent part:

> Additionally, the intervening Court remand between the October 2013 Board remand and the November 2017 Board decision below required the Board to re-evaluate the basis for its decision. As the parties reminded the Board in the May 2017 JMR, a Court remand requires the Board "reexamine the evidence of record, seek any other evidence the Board feels is necessary, and issue a timely, well-supported decision in this case." (R. at 89)(quoting *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991)). The Court has more recently emphasized that "[a] remand is meant to entail a critical examination of the justification for the decision." *Kahana v. Shinsekii,* 24 Vet.App. 428, 437 (2011)(quoting *Fletcher,* 1 Vet.App. at 397). The Board did not provide an adequate basis for re-examining its earlier conclusion that Appellant's lay statements were consistent with the time, place and circumstances of his service in Korea. *See infra* at 10-11. Bur the board was not bound by its previous statement to find that Appellant satisfied the relevant regulatory criteria.

Sec.Br. at 8-9.

As with the first argument, there is no legal basis for the Secretary's argument. When the Board's decision on appeal to the Court is vacated as to any issue on appeal, neither the favorable findings nor the favorable conclusions are vacated, and the Board is bound by all favorable findings of fact and conclusions of law absent a relevant exception to the law of the case doctrine.

In addition to having no basis in law, the Secretary's proposition is contrary to the law of the case doctrine, which has remained controlling authority since 1993. ***See Browder v. Brown***, 5 Vet.App. 268, 270 (1993); ***see also Johnson v. Brown***, 7 Vet.App. 25, 26 (1994) ("Where a case is addressed by an appellate court, remanded, then returned to the appellate court, the 'law of the case' doctrine operates to preclude reconsideration of identical issues."); ***see also Chisem v. Brown***, 8 Vet.App. 374, 375 (1995). In ***Chisem***, the Court recognized three exceptions in which deviation from the law of the case may be appropriate, and these are:

> (1) when the evidence at trial was substantially different from that in the former trial upon which the appellate court based its decision;
> (2) when the controlling authority has since made a contrary decision of law;[ ]
> (3) when the appellate decision was clearly erroneous.

Chisem v. Brown, 8 Vet.App. at 375 (1995). None of the exceptions identified in ***Chisem*** relate to the situation in which the Court vacates the Board's decision and remands the matter for a new adjudication consistent with the Court's decision.

In his third argument against reversal, the Secretary asserted that in order for reversal to be appropriate, the Court would have to find that all of Mr. Hollander's statements

submitted in support of his claim were credible. Sec.Br. at 9-10. Again, there is no basis in law for the Secretary's argument. As argued previously, the Board was bound by its prior favorable finding that Mr. Hollander's reported stressors were consistent with the time, place, and circumstances of his service in Korea. Pursuant to both 38 C.F.R. §§ 3.304(f)(2) and (f)(3), reversal is warranted based on the Board's favorable finding. As the Board acknowledged, Mr. Hollander has a PTSD diagnosis that is linked to his reported stressors of engaging in combat with the enemy in the Korean demilitarized zone. The favorable finding by the Board was the last element missing in order to satisfy the criteria for service connection for PTSD. As there is no indication that any exception applies to the law of the case doctrine, reversal is appropriate and warranted.

In summary, there is no basis in law for the Secretary's arguments against reversal. For the reasons discussed above, the Secretary's arguments are unconvincing.

CONCLUSION AND PRAYER FOR RELIEF

Appellant prays that the Court reverse the Board's decision with an order to award Mr. Hollander service connection for PTSD. In the alternative, appellant prays that the Court set aside the Board's decision.

Respectfully submitted.

/s/ SEAN A. RAVIN

Sean A. Ravin, Esq.
1550 Madruga Avenue, Suite 414
Coral Gables, Florida 33146
(202) 607-5731
(202) 318-0205 FAX

Date: May 9, 2019