UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

CONNIE E. HOLLANDER, **Appellant** **v.** **ROBERT L. WILKIE,** **Secretary of Veterans Affairs,** **Appellee.**	**No. 17-4772**

APPELLANT'S OPPOSED MOTION FOR ORAL ARGUMENT

Appellant moves for an order directing the parties to participate in oral argument. *See* U.S. Vet.App. Rule 34.

Summary of the Case

Connie Eugene Hollander ("appellant or the veteran") served honorably in the U.S. Army from February 1963 to December 1964. Record (R.) at 1357 (1357-58)

He seeks reversal of a November 22, 2017 decision of the Board of Veterans' Appeals ("Board") which denied entitlement to service connection for post-traumatic stress disorder ("PTSD"). This appeal is timely and the U.S. Court of Appeals for Veterans Claims ("Court") has jurisdiction pursuant to 38 U.S.C. §§ 7252, 7266 (2018).

Mr. Hollander filed his initial claim for entitlement to service connection for PTSD in September 2005 and has continuously prosecuted his claim through multiple remands from this Court since that date. Record (R.) at 1268 (1268-78); **see Vet.App. 09-2310; 12-2106; 16-2056**. In every instance, the Court granted the parties joint motion for remand and set aside the Board's decision. R. 529, 358, 87 (529-33, 358-60, 86-91).

In the underlying matter, Mr. Hollander has asserted that he has PTSD due to his

service patrolling and engaging in firefights with infiltrators attempting to cross into the Korean demilitarized zone from the Democratic People's Republic of Korea (North Korea). R. 330 (329-30). While his service personnel records are sparse and do not include any awards for engaging in combat, they indicate that he served as a light weapons infantryman with expert marksmanship badge in a unit that served at UnChon-Ni and Tangduchon-Ni, Korea. R. 1357, 431 (1357-58, 428-33). Mr. Hollander has stated, in pertinent part:

> **While stationed in Korea, I served with Company B, 1st Battalion, 17th Infantry.** My Military Occupational Specialty (MOS) was Light Weapons Infantry. Company B was situated at UnChon-Ni and Tangduchon-Ni, Korea, two small villages located approximately 7 miles and 11 miles south of the demilitarized zone (DMZ), respectively. The locations of my service in Korea have been verified by the US Army Center for Military History (CMH) and the Center for Unit Records Reseaerch (CURR).
>
> There were two separate U.S. Military installations at these locations, known as **Camp Kaiser** and Camp Casey. As part of our duties with the Light Weapons Infantry and due to our close proximity to the DMZ, it was our duty to patrol along the DMZ and within the DMZ to ensure the safety and protection of the border. It was also our duty to train South Korean soldiers in guerilla warfare. From our locations at UnChon-Ni and Tangduchon-Ni we would either ride in ¾ ton trucks to the DMZ or we would walk. **We had several incidents involving enemy combatants during which intense firefights broke out. It was our job to search out, ambush, and kill any infiltrators attempting to cross the border. During these fights, we were fired upon by enemy soldiers and returned fire ourselves, killing an unknown number of enemy soldiers.** …

R. 330 (329-30) (**Bold** emphasis added).

In every denial, the Board found that Mr. Hollander's report of combat was not credible. R. 561, 376, 106 (551-65, 365-79, 92-109). In each appeal, the parties asked that the Court set aside the Board's decision. R. 529, 358, 87 (529-33, 358-60, 86-91). In an October 2013 decision, the Board remanded for provision of a medical opinion and found

that Mr. Hollander's reported stressors were consistent with the time, place, and circumstances of his service. R. 321 (317-23). 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). By decision dated November 22, 2017, the Board denied entitlement to service connection for PTSD. R. 19 (1-21). This appeal follows.

Contentions of the Parties

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. Mr. Hollander noted that in a prior decision, the Board 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 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 terms of a prior remand. App.Br. at 21-25.

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. 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.

In reply, Mr. Hollander accepted the Secretary's concessions of error but reaffirmed that reversal is the appropriate remedy in this matter. App.Rply. at 3-7. In particular, Mr. Hollander argued that notwithstanding the Secretary's concessions of error, there is no basis in law in support of the Secretary's argument that the Board was not bound by its prior favorable finding that Mr. Hollander's combat related stressor was consistent with the places, types, and circumstances of his service. Id.

Argument

Oral argument presents an opportunity for judges to ask questions directly of the attorneys representing the parties and for the attorneys to highlight arguments that they view as particularly important.[1] The case on appeal is not a relatively simple matter and has the potential to establish a new rule of law as it pertains to the standard of review of 38 C.F.R. § 3.304(f)(3); the overlap between section 3.304(f)(2) and (f)(3); and whether the Board is bound by a prior favorable finding made as part of a remand order directing the Secretary to provide a medical examination or opinion. ***Frankel v. Derwinski***, 1 Vet.App. 23, 25-26 (1990).

Here, Mr. Hollander asserts that the Board made a favorable finding with regard to whether his reported combat stressor in the Korean demilitarized zone was consistent with the places, types, and circumstances of his service. Further, Mr. Hollander asserts that the Board was bound by its prior favorable finding because there was no relevant exception to the law of the case doctrine. Finally, Mr. Hollander asserts that reversal is warranted with an order instructing the Board to award entitlement to service connection for PTSD.

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[1] Michael Duvall, *When is Oral Argument Important? A Judicial Clerk's View of the Debate*, 9 J.App. Prac. & Process 121 (2007).
Available at: https://lawrepository.ualr.edu/appellatepracticeprocess/vol9/iss1/5

The Secretary Opposes this Motion for Oral Argument

The Secretary is opposed to this motion for oral argument and will file a written opposition.

Mr. Hollander asserts that whether a veteran's lay statement regarding combat or fear of hostile military or terrorist activity is consistent with the places, types, and circumstances of the veteran's service is a finding of fact. 38 C.F.R. §§ 3.304(f)(2), (f)(3).

In opposing reversal, the Secretary has taken the position that the Board **did not find** that Mr. Hollander's stressor relating to combat is consistent with the places, types, and circumstances of his service. At no point in his brief, did the Secretary ever concede that the Board ever made a **finding of fact** that appellant's reported combat stressor was consistent with the places, types, and circumstances of his service. Sec.Br. at 1-11. In his summary of the argument, the Secretary called the finding a "**statement**". Sec.Br. at 6. Here, the Secretary wrote, in pertinent part:

> The Board was not obligated to find that Appellant's reported in-service stressor was consistent with the time[,] place[,] and circumstances of his service **merely because the Board had made such a statement** in the context of a remand for a new examination several years prior.

Sec.Br. at 6. Throughout his argument, the Secretary consistently referred to the Board's finding under section 3.304(f)(3) as either a **statement** or a **conclusion**. Sec.Br. at 7-9. Here, the Secretary wrote, in pertinent part:

> Appellant argues that reversal is warranted **because the Board was bound to follow its October 2013 statement** that Appellant's lay statements were consistent with the time, place, and circumstances of his service in Korea …
> …
> **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.
> …
> 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.
> ….
> 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.
> …
> But the Board was not bound **by its previous statement** to find that Appellant satisfied the relevant regulatory criteria.

Sec.Br. at 7-9.

The Secretary has not explained his steadfast refusal to call the Board's determination a finding of fact verses a **statement** or **conclusion**, and yet, while the Court has certainly addressed amended section 3.304(f)(3), it does not appear that the Court has ever held that such a determination under section 3.304(f)(3) is a finding of fact. ***See Foreman v. Shulkin***, 29 Vet.App. 146 (2018)(amended section 3.304(f)(3) was not a liberalizing rule for the purposes of the regulation governing the effective date of an award due to changes of law) ; ***Ervin v. Shinseki***, 24 Vet.App. 318 (2011)(amended section 3.304(f)(3) was applicable to cases pending before the Court on the effective date of the amendment); ***Emerson v. McDonald***, 28 Vet.App. 200 (2016)(VA was required to reconsider claim for PTSD based on amended section 3.304(f)(3) upon receiving official service department records); ***Acevedo v. Shinseki***, 25 Vet.App. 286 (2012)(amended section 3.304(f)(3) not applicable to claim for PTSD as a result of military sexual trauma).\

Prayer

Mr. Hollander prays that the Court order oral argument.

Respectfully submitted,

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Date: May 23, 2019