IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

CONNIE E. HOLLANDER,	)	
Appellant,	)	
	)	
v.	)	Vet. App. 17-4772
	)	
ROBERT L. WILKIE,	)	
Secretary of Veterans Affairs,	)	
Appellee.	)	

APPELLEE'S RESPONSE IN OPPOSITION TO THE MAY 23, 2019, MOTION OF APPELLANT FOR ORAL ARGUMENT

Pursuant to U.S. Vet. App. R. 27(b), the Secretary responds in opposition to Appellant's May 23, 2019, motion for oral argument (Motion). The Court should deny Appellant's Motion because Appellant has not demonstrated that oral argument before the Court will materially assist in the disposition of this appeal. Appellant has also failed to demonstrate that single-judge disposition would be inappropriate in this case. *See Winslow v. Brown*, 8 Vet.App. 469, 471 (1996) (denying motion for oral argument where Court does not believe it will materially assist the disposition of the appeal).

This Court has held that oral argument will be allowed only at the order and discretion of the Court, where it "believes oral argument will materially assist in the disposition of [an] appeal." *Hackett v. Principi*, 18 Vet.App. 477, 478 (2004) (per curiam). Oral arguments are, generally, not granted where single-judge disposition is appropriate. U.S. Vet. App. R. 34(b). Single-judge disposition is appropriate when a case on appeal is of relative simplicity and the case (1) does not establish a new rule of law; (2) does not alter, modify, criticize, or clarify an existing rule of law; (3) does not apply an established rule of law to a novel fact situation; (4) does not constitute the only recent binding precedent on a particular point of law; (5) does not include a legal issue of continuing public interest; and (6) the outcome is not reasonably debatable. *Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990).

1. Appellant's Assertion of Reversible Error Obscures a Settled Issue with a Novel Veneer

Appellant seeks oral argument to resolve whether the Board is bound by a statement made in a prior Board decision as part of a remand order for a new examination under *McLendon v. Nicholson*, 20 Vet.App. 79 (2006). *See* Motion at 5; *see also* (R. at 321 (October 2013 Board remand finding that an examination is necessary because Appellant's lay statements were consistent with the time, place, and circumstances of his service in Korea)). Appellant couches this question in terms of the specific regulation at issue, namely 38 C.F.R. § 3.304(f), which in PTSD claims requires evidence of a current diagnosis of PTSD, credible supporting evidence that the claimed in-service stressor actually occurred, and medical evidence of a nexus between the current symptomatology and the claimed in-service stressor. *Id*. Specifically, Appellant's claim sounds in § 3.304(f)(3), which allows veterans whose claimed stressor is related to their fear of hostile military activity to establish eligibility under § 3.304(f) with the opinion of a VA psychiatrist or psychologist if "the claimed stressor is consistent with the places, types, and circumstances of his or her service."

Appellant's invocation of the specific regulation at issue in this case gives no cause to disturb the well established *McLendon* principle or hold oral argument on whether to do so. In the mine run of *McLendon* remands, as in this case, the Board remands for an examination after concluding that there is (1) competent evidence of a current disability, (2) evidence of in-service occurrence, (3) sufficient evidence to "indicate" that the current disability may be associated with the in-service event, and (4) insufficient competent medical evidence to decide the claim. *McLendon*, 20 Vet.App. at 81; (*see* R. at 321). Each of these subordinate findings might be loosely described as a "favorable factual finding": for instance, the Board might conclude that there is sufficient evidence of a nexus between in-service blood pressure readings and the veteran's present hypertension to warrant an examination. But the Court has never suggested that, when the Board makes the necessary findings to order an

examination under *McLendon*, the Board is later bound by these findings at the merits stage of the case. (*See* Sec. Brief at 7-9). Appellant's argument regarding 38 C.F.R. § 3.304(f) would thus establish a new principle of law, carving out an exception to *McLendon* for *McLendon* findings made under § 3.304(f). But in the absence of any reason for this Court to disturb the familiar *McLendon* framework, this Court should not accept Appellant's invitation to hold oral argument to consider Appellant's proposed exceptions. *See Janssen v. Principi*, 15 Vet.App. 370, 379 (2001) (holding that oral argument is inappropriate when it would not "materially assist in the disposition of this appeal").

2. Oral Argument Is Unnecessary To Resolve What Little Daylight There Is Between the Parties' Remaining Positions

Beyond Appellant's attempt to read a binding favorable factual finding into a *McLendon* remand, there is very little daylight between the parties' positions. When Appellant argued that the Board committed reversible error by failing to follow its discussion of 38 C.F.R. § 3.304(f) in its October 2013 remand (App. Br. at 15-17), the Secretary responded that the Board committed remandable error by failing to address why it was now finding that Appellant did not satisfy § 3.304(f)(3) when it had previously found the regulation sufficiently satisfied to order an examination. (Sec. Br. at 10). When Appellant argued that the Board committed reversible error by, *inter alia*, erroneously describing Appellant's training, the circumstances under which Appellant lost his teeth, and the likelihood that someone with Appellant's training would be asked to kill infiltrators (App. Br. at 17-21), the Secretary responded that these errors were at most remandable, as Appellant had not established that his description of his service was the sole permissible view of the evidence of record. (Sec. Br. at 9-10). Oral argument is thus not warranted for the *McLendon* issue described above or for any other issue raised by this case.

WHEREFORE, the Secretary respectfully requests that the Court deny Appellant's motion for oral argument.

Respectfully submitted,

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