

THOMAS J. BUERGER,)
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Appellant,)
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)
)
v.) Docket No. 18-6733
)
)
ROBERT L. WILKIE,)
SECRETARY OF)
VETERANS AFFAIRS,)
)
Appellee.)
)

**APPELLANT’S BRIEF BEFORE THE
UNITED STATES COURT OF
APPEALS FOR VETERANS’ CLAIMS**

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THOMAS J. BUERGER)
Appellant,)
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v.) Docket No. 18-6733
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ROBERT L. WILKIE,) Date: July 17, 19.
SECRETARY OF)
VETERANS AFFAIRS,)
Appellee.)
)

BRIEF FOR THE APPELLANT,
THOMAS J. BUERGER

1. The BVA erred as a matter of law by denying Mr. Buerger a service connection for his psychiatric disorder – after expanding the issue to include any psychiatric disorder, including post-traumatic stress disorder and major depressive disorder (“PTSD”).
 - i. The BVA erred as a matter of law in finding that the Veteran did not satisfy the requirements for service-connected post-traumatic stress disorder.
 - ii. The BVA erred as a matter of law in finding that the Veteran did not satisfy the requirements of service-connected major depressive disorder.
2. The BVA erred as a matter of law by denying Mr. Buerger service connection for ischemic heart disease.

II. Statement of the Case

Mr. Buerger entered into the Navy in 1967, and following boot camp, entered into O school and learned how to perform a special land-based sonar reading of grams from hydra flows off the ocean floor. RBA at 551-2. After arriving in Cape Hatteras, Mr. Buerger was approached for a top-secret mission and was flown to Guam, then to Saigon, then to the Mekong Delta where he worked for six weeks. RBA at 553. While on this mission, Mr. Buerger was in a combat situation where he was wounded. RBA at 553-4. Then, while being transported from this scene, Mr. Buerger was in a helicopter accident and this was his last recollection of Vietnam. RBA at 554. When he awoke in the hospital, he was informed by an officer that his record was being wiped, and on paper he would not have served in Vietnam.

Following this, Mr. Buerger was stationed in Nantucket, where he began a work as a sonar tech O. RBA at 554. During this time, he was involved in sinking Russian submarines in response to the Russians sinking American submarines. This was the breaking point for Mr. Buerger, leading to a stay in the psychiatric ward for a period of three months. RBA at 555. Following this, Mr. Buerger was tricked into leaving the Navy with 4 years left in his enlistment. RBA at 556.

In August of 2018, Mr. Buerger was denied a service connection for an acquired psychiatric disorder to include post-traumatic stress disorder (“PTSD”),

as well as a service connection for ischemic heart disease. RBA at 4. The issues of entitlement to a rating greater than 40 percent for a lumbosacral strain and entitlement to a total disability rating (“TDIU”) based on unemployability due to service-connected disability were remanded. RBA at 4.

III. Argument

1. The BVA erred as a matter of law by denying Mr. Buerger a service connection for his psychiatric disorder – after expanding the issue to include any psychiatric disorder, including post-traumatic stress disorder and major depressive disorder (“PTSD”).

In its August 2, 2018 decision, the BVA held that Mr. Buerger was not entitled to a service-connected disability for his psychiatric disorder, after the issue was expanded to include any psychiatric disorder and not limited to post traumatic stress disorder. RBA at 4. The BVA failed to properly weigh the positive and negative evidence in its decision, categorically dismissing favorable medical and lay evidence in favor of the Veteran without sufficient explanation. RBA 8-14. In incorrectly weighing the evidence and failing to provide explanations for its reasoning, the BVA abused its discretion and therefore its opinion should not be granted any deference by this Court. *See* 38 U.S.C. § 7261(a)(3)(A).

- i. The BVA erred as a matter of law in finding that the Veteran did not satisfy the requirements for service-connected post-traumatic stress disorder.

The BVA stated that if the Veteran did not engage in combat, or the claimed stressors are not related to combat, then the claimant’s testimony alone is not

sufficient to establish a service connection for post-traumatic stress disorder and he must provide evidence of the claimed stressors. RBA at 8. But, as Mr. Buerger testified in his May 2017 videoconference, as he was working on a top-secret project, his record was wiped clean of any record of the stressors and his service in Vietnam. RBA at 554. The BVA focused entirely on the fact that the Veteran had no service records to back up his claim, and improperly dismissed his testimony of the events which he endured in Vietnam, calling it “incredible”. RBA at 10.

According to 38 U.S.C. § 5107(b), “The Secretary shall consider all information and lay and medical evidence of record in a case before the Secretary with respect to benefits under laws administered by the Secretary. 38 U.S.C. § 5107(b). When there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant.” 38 U.S.C. § 5107(b). The character of veteran’s benefits statutes is strongly and uniquely pro-claimant. *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998). When evaluating whether there is a service connection under the “benefit of the doubt” doctrine, all pertinent medical and lay evidence must be considered. *AZ v. Shinseki*, 731 F.3d 1303, 1310 (Fed. Cir. 2013).

The doctrine not only applies to the overall merits, but to every material element of the claim. *Robinson v. O’Rourke*, 891 F.3d 976, 988 (Fed. Cir. 2018)

(Newman, J. concurring in part and dissenting in part). Whether or not Mr. Buerger suffered from stressors that led to his PTSD is clearly a material element of his claim, and therefore the benefit of the doubt doctrine applies. The Board is required to consider all evidence of record and to consider, and discuss in its decision, all potentially applicable provisions of law. *Rankin v. Peake*, 2009 U.S. App Vet. Claims LEXIS 6, 12 (Vet. App. Jan. 8, 2009). The Board must also analyze and provide reasoning for its determinations concerning credibility of evidence. *Id.* at 13. The Board must also provide the reasons for its rejection of any material evidence which is favorable to the claimant. *Id.*

The BVA stated that there was no evidence which helped establish Mr. Buerger's claim of in-service stressors. RBA at 10. This fails to take into account favorable medical evidence to the Veteran, as a February 2006 medical examination noted that Mr. Buerger's symptoms were consistent with combat related post-traumatic stress disorder. RBA at 449. As there is pertinent medical and lay evidence (given his credible¹ testimony) concerning Mr. Buerger's PTSD, the Veteran should have been afforded the benefit of the doubt and the BVA should have analyzed and discussed the evidence presented by Mr. Buerger. In the

¹ While the BVA stated that there was there was no credible supporting evidence that the reported stressors occurred, the BVA decision appears void of the administrative judge finding Mr. Buerger's testimony *not credible*. This lack of supporting evidence is why this matter must be remanded to the Agency to contact the military for clarification or confirmation of Mr. Buerger's claim.

alternative, if the BVA questioned Mr. Buerger's top-secret mission, it should have at a minimum sent the matter back to the VARO in order for it to get clarification from the military that Mr. Buerger did or did not participate in this top-secret mission.

- ii. The BVA erred as a matter of law in finding that the Veteran did not satisfy the requirements of service-connected major depressive disorder.

If there are non-service connected stressors that have contributed to major depressive disorder, this does not preclude a finding of service-connected major depressive disorder when the non-service-related stressors cannot be separated from the service-connected stressors. *Stuart v. McDonald*, No. 14-2774, 2015 U.S. App. Vet. Claims LEXIS 1365, 5 (Vet. App. Oct. 7, 2015). While the BVA cited the medical examiner listing non-service-related stressors in his report as evidence that the Veteran's depression was not service-connected, service-related stressors were also noted – disliking his job in the service and feeling upset about petty offenses which he had committed. RBA at 12.

The BVA is required to provide “reasons or bases” to support its findings. *North v. Brown*, 1997 U.S. Vet. App. LEXIS 319, 10 (Vet. App. Apr. 4, 1997). Additionally, it must provide a clear and succinct analysis of the findings it deems crucial to its decision and account for evidence which it deems to be persuasive or unpersuasive. *Id.* at 11. The BVA cited that the symptoms of depression were not

chronic during service with no explanation of this finding. RBA at 13.² The non-service connected stressors from which Mr. Buerger suffers cannot be separated from the service connected stressors, as all were discussed in the same medical examiner's report in service. RBA at 483.³ As the BVA failed to adjudicate this possibility and systematically dismissed the Veteran's claim for service connected major depressive disorder, this issue should be remanded for full adjudication.

2. The BVA erred as a matter of law by denying Mr. Buerger service connection for ischemic heart disease.

The BVA found in its August 2, 2018 decision that Mr. Buerger was not entitled to service connection for his diagnosed ischemic heart disease. RBA at 14. This conclusion is solely from the finding that the Veteran's testimony was not credible to find that he served in Vietnam on a top-secret mission and therefore

² The BVA stated: "Service treatment records document complaints and findings of anxiety and depression, but these were not shown to be chronic during service. Rather, following an extensive period of in-service observation and hospitalization, the diagnosis was revised to a personality disorder." This fails to take into account that it is possible for a person to be suffering from both a personality disorder and depression. The BVA does not state its reasoning that the Veteran was not suffering from depression in addition to a personality disorder. Or even if the personality disorder was caused by or exacerbated by Mr. Buerger's time in service.

³ The report states: "According to the patient he became increasingly depressed after leaving his SONAR school. The sources of the depression were several fold. His sister who has had Hodgkins disease for approximately four years is now dying. His father's Real Estate business has been doing poorly. He has also been depressed about his job at Nantucket which he feels is too repetitive and has no future for him. In response to the anger at being in the service, he has tended to this anger upon himself and become more depressed. It has also been shown in his acting out in petty offenses, e.g., going UA." It appears without a doubt that Mr. Buerger's time in service exacerbated if not directly caused his mental health conditions.

was not exposed to Agent Orange. RBA at 14. Mr. Buerger's situation is unique, and requires the BVA to afford him the benefit of the doubt in his claim. Mr. Buerger has been diagnosed with atherosclerotic cardiovascular disease, and therefore there is evidence of the ischemic heart disease. RBA at 14. Paired with Mr. Buerger's testimony, this creates at least an equal balance of positive and negative evidence of this material fact and the Veteran should have been afforded the benefit of the doubt in accordance with 38 U.S.C. § 5107(b).

When afforded the benefit of the doubt, Mr. Buerger's testimony satisfies the elements of 38 C.F.R. § 3.303 to establish a service connection. As the categorical dismissal of Mr. Buerger's testimony was improper, the issue of whether the Veteran's atherosclerotic cardiovascular disease is service connected must be remanded for further adjudication.

IV. Conclusion

The BVA's decision denying service connection for Mr. Buerger's psychiatric disorders and ischemic heart disease was made with clear and unmistakable error. First, The BVA erred as a matter of law by denying Mr. Buerger a service connection for his psychiatric disorder – after expanding the issue to include any psychiatric disorder, including post-traumatic stress disorder and major depressive disorder (“PTSD”). Second, the evidence when weighed given this benefit of the doubt as required by the statute supports a finding that the

Veteran's injuries were sustained during his time in service and have been chronic since then. Finally, even without the benefit of the doubt doctrine, the evidence shows that the Veteran satisfies the three elements as defined in 38 C.F.R. § 3.303 and his injuries should therefore be considered service connected.

Respectfully submitted,
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On July 17, 2019, the undersigned filed this document and all parties were served via the Court's e-file.

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