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.

REPLY BRIEF OF APPELLANT

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SUMMARY OF ARGUMENT

Mr. Pendleton has been fighting for service connection for his back for almost 16 years. His claim has already been to the Court once and has had several remands from the Board. The current reasons or bases errors are not duplicative and are not mooted by the Secretary's concession of error with regard to the inadequate medical opinion. As such, the Court should address all of the errors, to better guide the Board on remand. It is time for Mr. Pendleton to get off the "hamster wheel."

With regard to Mr. Pendleton's due process claim, the Court should not be persuaded by the Secretary's request to avoid constitutional issues or his argument that no issue exists here. The Federal Circuit has explained that when the issue will continue to pervade the case on remand, the issue should be addressed. The Supreme Court and Federal Circuit have also explained that notice matters. Such is the case here.

Finally, the Secretary misunderstands the nature of the evidence that Mr. Pendleton provided and how his chiropractor used that information to render an opinion on how Mr. Pendleton injured his back. If the Court agrees with Mr. Pendleton's assessment, the Court should reverse the Board's decision that the chiropractor's opinion was not probative, and award Mr. Pendleton service connection.

Alternatively, if the Court agrees with Mr. Pendleton's arguments, but does not find the evidence to warrant an outright grant, Mr. Pendleton requests that the Court remand with guidance on all of the issues presented.

ARGUMENT

I. IF THE COURT AGREES THAT REMAND IS APPROPRIATE, THE COURT SHOULD ADDRESS *ALL* OF THE ISSUES PRESENTED BY APPELLANT AND STOP THE HAMSTER WHEEL.

In his Brief, the Secretary argues that the Court should *only* address the Board's failure "to ensure satisfaction of the duty to assist by obtaining adequate medical examination evidence," based on "the stated practice of this Court to decide appeals on the narrowest possible grounds." Secretary's (Sec'y) Brief (Br.) at 12 (citing *Best v. Principi*, 15 Vet.App. 18, 20 (2001)). While this may be appropriate in most cases, it is not a steadfast rule and is inappropriate here. *See Quirin v. Shinseki*, 22 Vet.App. 390, 395 (2009).

The Court explained in *Quirin* that the Federal Circuit "has recognized the need to address additional arguments, after the court determines that remand is necessary, in order to provide guidance to the lower court" and "to ensure a proper decision on remand." *Id.* (citing *Xerox Corp. v. 3Com Corp.*, 458 F.3d 1310, 1314-15 (Fed. Cir. 2006)). Such guidance is necessary here. *See Molitor v. Shulkin*, 28 Vet.App. 397, 410 (2017) (explaining additional arguments would be addressed to provide "guidance" to the Board on remand).

The Board's decision does not solely rest on the issue of nexus. *See* R. 6-12 (R. 1-14); *see also* Sec'y Br. at 16 ("reiterat[ing] that the Board's denial of entitlement to service connection was made on two alternate bases"). Rather, the Board denied Mr. Pendleton's claim for service connection for a back disability based on *both* a failure to establish an in-service injury (*Caluza* step two) *and* a failure to establish a nexus between Mr. Pendleton's time in service and his current disability (*Caluza* step three). *See Caluza v. Brown*, 7 Vet.App. 498, 506 (1995). The issue that the Secretary concedes only addresses *Caluza* step three, and does not moot the other arguments made. *Cf. Crumlich v. Wilkie*, -- Vet.App. --, 2019 WL 2375557, *9 (Vet.App. June 6, 2019).

In other words, the fact that the Board needs to obtain an adequate medical opinion on remand does not address that, on remand, the Board would still be free to: find Mr. Pendleton's testimony of how he injured his back not credible, despite finding it credible in 2011 and failing to explain the shift in its perspective; find Mr. Pendleton has not established an in-service event, despite service records that show Mr. Pendleton was in three accidents; and erroneously conclude Mr. Pendleton's back pain began in September 1999. *Cf.* Appellant's Br. at 11-30. As such, even if the Board obtains a medical opinion that complies with the Secretary's duty to assist, the Board could still erroneously find that Mr. Pendleton fails to establish the second *Caluza* criteria – an in-service event – and Mr.

Pendleton would undoubtedly be right back before this Court, arguing the same issues that are currently before the Court.

Mr. Pendleton has been fighting for service connection for almost 16 years. There is nothing prohibiting this Court from addressing all of the issues raised, and the Secretary's insistence to limit the decision in this situation exemplifies why veterans believe the VA adjudication system is a "hamster wheel" that they cannot get off. *See Quirin*, 22 Vet.App. at 395; *see also Coburn v. Nicholson*, 19 Vet.App. 427, 434 (2006) (Lance, J., dissenting) (acknowledging the "hamster-wheel reputation of veterans law").

Mr. Pendleton requests that the Court stop the hamster wheel, and address all of the issues raised, so that the Board can make an adequate decision on remand. *See Quirin*, 22 Vet.App. at 395.

II. THE SECRETARY FAILS TO APPRECIATE THE OVERARCHING EFFECT OF THE DUE PROCESS VIOLATION.

In 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).

The Board obtained the medical opinion requested and later issued the decision on appeal. R. 1-14. In that decision, the Board reversed course and found Mr. Pendleton's testimony relating when he injured his back not credible, and therefore that he had not established an in-service injury. R. 11 (R. 1-14).

In Appellant's Brief, Mr. Pendleton argued that this constituted a reversal of a favorable finding, and therefore violated Mr. Pendleton's due process rights, as he was not informed that the Board no longer found his testimony credible and that he should provide additional evidence to support his testimony. App. Br. at 11-13.

In response, the Secretary argues that Mr. Pendleton's due process argument should not be addressed, as he concedes remand is appropriate, that "constitutional questions are to be avoided whenever possible," and, alternatively, that no due process violation occurred. Sec'y Br. at 19-20 (citing *Bucklinger v. Brown* 5 Vet.App. 435, 441 (1993)). The Court should not be persuaded. *See Cushman v. Shinseki*, 576 F.3d 1290, 1299-1300 (Fed. Cir. 2009).

A. The Court Should Address the Constitutional Issue, As It Would Continue to Pervade Any Future Decision.

In *Cushman*, the Federal Circuit made clear a "fundamentally fair adjudication . . . is constitutionally required in all cases, and not just in the large majority." *Id.* at 1300. And if an unfair process leads to "a 'reasonable probability of a different result' " absent that unfair process, then the claimant has been prejudiced by the unfair process, and the decision should be vacated. *Id.* (quoting *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)).

Mr. Pendleton has been prejudiced by the Board's unfair process. Had the Board continued to find Mr. Pendleton's testimony credible, it would have found him eligible for service connection, as he would have established all three of the *Caluza* elements: (1) a current back disability, (2) an in-service event, and (3) a nexus between the two (as the medical opinion from the chiropractor would also then be considered probative, as it would then be based on credible testimony). As such, the Board's decision – and specifically that portion which found Mr. Pendleton's testimony not credible – should be vacated. *Id.*

B. The Secretary's Alternative Argument that There Was No Due Process Violation, Because The April 2011 Board Did Not Make a Favorable Finding Does Not Make Sense.

The Secretary argues that the Board did not actually make a finding of credibility when it issued its decision in 2011, but rather provided "an explanation

of the reasoning behind the Board's finding that a medical examination was necessary." Sec'y Br. at 20. This defies the Court's case law and logic.

To make the decision that a medical examination is necessary, the Secretary first needs to be convinced that the evidence establishes "competent evidence of a current disability" and "that the claimant suffered an in-service event, injury, or disease." *McLendon v. Nicholson*, 20 Vet.App. 79, 81-82 (2006). Only if these two elements are satisfied does the Secretary consider whether there is some sort of indication that the current disability "may be associated" with the claimant's service. *Id.* at 83. It would be a waste of the Secretary's time to obtain a medical opinion if he was not already convinced that there was evidence of "an in-service event, injury, or disease." *See Douglas v. Shinseki*, 23 Vet.App. 19, 22 n.1 (2009) (explaining the Secretary has a duty to protect the public fisc). Therefore, while the Board may not have specifically held Mr. Pendleton's testimony of an in-service event was credible, it was implicit by its actions.

Second, the issue of concern here is what *the veteran* would have understood from the information he received from the Secretary, not whether the Board officially made a finding. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950) (explaining due process requires that notice inform the person of what actions must be taken to accomplish the goal). And, at the point in time that Mr. Pendleton read the Board's statement in the April 2011 remand

directive that the additional evidence "strengthened" the credibility of his prior statements, he would have taken away several things: (1) the Board had previously found Mr. Pendleton's assertions that his back had bothered him since service credible, (2) the information provided since June 2009 *increased* that level of credibility, and (3) the Board was seeking an opinion on the connection between his in-service events and his current disability. *See* Strengthen, MERRIAM-WEBSTER DICT., *available online at https://www.merriam-webster.com/dictionary/strengthen* (last visited July 23, 2019) (defining "strengthen" as "to make stronger," "to make more forceful," "to make more effective"); *see Nielson v. Shinseki*, 23 Vet.App. 56, 59 (2009) (explaining it "is commonplace to consult dictionaries to ascertain a term's ordinary meaning").

There would be no reason for Mr. Pendleton to think he would need to provide any additional testimony or explanation on how he was injured. This was later validated by the Joint Motion to Remand granted by the Court, which acknowledged the December 2011 Board's findings of credibility were not in accordance with the law and that *the Secretary*, not Mr. Pendleton, needed to obtain additional information. *See* R. 705-11; *see also* R. 686-89.

To be clear, at no point after the Joint Motion to Remand was Mr. Pendleton specifically informed that the credibility of his testimony was still at issue. Vacating a decision means that the decision does not exist, *see DeSousa v. Gober*,

10 Vet.App. 461, 468 (1997), and the prior "findings" of credibility in the April 2011 Board decision – that Mr. Pendleton's evidence of an in-service event was sufficient, *see McLendon*, 20 Vet.App. at 81-82 – should have been settled. *See DeSousa*, 10 Vet.App. at 468.

Had Mr. Pendleton known that his testimony was still at issue, he could have sought out additional buddy letters from other service members or provided additional testimony. By failing to inform Mr. Pendleton that the Secretary had changed his mind, the Secretary deprived Mr. Pendleton of due process and the opportunity to be heard in his case, and would continue to do so on remand if the issue is not specifically addressed. *See Cushman*, 576 F.3d at 1299-1300.

III. THE SECRETARY DOES NOT UNDERSTAND THE DIFFERENCE BETWEEN A "MEDICAL HISTORY" AND A DESCRIPTION OF EVENTS THAT OCCURRED, AND HOW THE LATTER WAS USED TO FORM AN OPINION.

The Secretary argues

> Appellant's argument [regarding Mr. Pendleton's testimony] appears to seek a difference where none exists. Appellant argues that the 2010 private medical examiner did not rely on Appellant's self-reported history, but then states that the examiner relied on Appellant's self-reported history. (App. Br. at 25). There appears to be no substantive difference between the Board's conception of the medical opinion and Appellant's. Moreover, Appellant's statement that the Board did not find his statements on this point to lack credibility is simply inconsistent with the Board's decision.

Sec'y Br. at 17-18.

The Secretary is wrong.

First, in Appellant's Brief, Mr. Pendleton argued that the 2010 private medical examiner did not rely on Mr. Pendleton's "self-reported *medical* history," not just his "self-reported history." Appellant's Br. at 25. The inclusion of the word "medical" is important and the essence of Mr. Pendleton's point: in rendering his opinion, the chiropractor did not rely on Mr. Pendleton's relaying of a diagnosis by a prior doctor or prior test results, or even Mr. Pendleton relaying that he was hurt while in Germany. This would be a "self-reported *medical* history." Instead, the chiropractor relied on Mr. Pendleton's description of events that occurred when he was in Germany, and based on his knowledge of the human body and his chiropractic education, concluded that driving around in those conditions would result in an injury. *See* R. 332 (R. 330-32).

Second, the Board never stated that Mr. Pendleton's statements that he drove around on cobblestone streets in a cramped car were not credible. R. 11 (R. 1-14. The Board's finding of credibility was only related to Mr. Pendleton's statements that he injured his back during this time, as they lacked contemporaneous medical support. *Id.* These are not the same thing.

Again, the chiropractor did not rely on Mr. Pendleton's statement that he injured his back to reach his medical conclusion. Instead, the chiropractor relied

on Mr. Pendleton's description of the streets that he drove on and how Mr. Pendleton needed to sit in the car, and based on his knowledge of the human body and chiropractic education, he opined on what driving on cobblestones streets would do to someone like Mr. Pendleton. *See* R. 330-32. This is the opposite of conclusory, *see Stefl v. Nicholson*, 21 Vet.App. 120, 124-25 (2007), and the Board erred in finding it so.

CONCLUSION

Based on the foregoing, and the arguments made in Appellant's Brief, 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) vacate 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, using the correct standard, (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,

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