

APPELLANT'S BRIEF

**UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS**

No. 18-6827

**THOMAS C. GRAHAM,
Appellant,**

v.

**ROBERT L. WILKIE,
SECRETARY OF
VETERANS AFFAIRS,
Appellee.**

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**IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS**

THOMAS C. GRAHAM,)	
Appellant,)	
)	
v.)	Vet. App. No. 18-6827
)	
ROBERT L. WILKIE,)	
Secretary of Veterans Affairs,)	
Appellee.)	

BRIEF OF THE APPELLANT

Pursuant to U.S. Vet. App. R. 28 and 31, Thomas C. Graham (Appellant or Veteran or Claimant) respectfully submits to the United States Court of Appeals for Veterans Claims (Court) the initial Brief of the Appellant stating that there are errors of law contained within the Department of Veterans Affairs (VA) decision of August 16, 2018 in which the Board of Veterans' Appeals (Board or BVA) denied the Appellant's claims of entitlement to service connection for a lumbar spine disability, cataracts, a cardiovascular disability and prostate gland hypertrophy. In support of his position, Appellant relies on the information contained within the Record Before the Agency (RBA or R.) as filed with the Court and the following Brief of the Appellant.

This Honorable Court has jurisdiction to review the August 16, 2018 Board decision under the authority of 38 U.S.C. §§ 7252(a), 7261(a), and 7266.

STATEMENT OF THE ISSUES

- I: WHETHER THE BOARD CLEARLY ERRED IN FAILING TO ENSURE VA FULFILLED ITS STATUTORY DUTY TO ASSIST.**
- II: WHETHER THE BOARD FAILED TO SUPPORT ITS DECISION WITH ADEQUATE REASONS OR BASES.**

STATEMENT OF THE CASE

I. Nature of the Case

The Veteran, Thomas C. Graham, appeals an August 16, 2018 decision by the Board that denied his claims of entitlement to service connection for a lumbar spine disability, cataracts, a cardiovascular disability and prostate gland hypertrophy. *See* Record (R.) at 1-16.

II. Course and Results of Proceedings Below

This appeal arises from a July 2003 rating decision. *See* R. at 1695-1700. The Veteran timely submitted his notice of disagreement (NOD) (R. at 1595) and, after Decision Review Officer (DRO) review, perfected his appeal (R. at 1335) leading to the further denial by the Board in a decision of August 16, 2018. *See* R. at 2-16.

III. Statement of the Facts

The Veteran, Thomas C. Graham, served honorably on active duty in the U.S. Army from November 1956 to November 1959. *See* R. at 2136. The Veteran contends that his lumbar spine disability, cataracts, cardiovascular disability and prostate gland hypertrophy are due to service because of his in-service radiation exposure. *See* R. at 6;

see also R. at 161-162. VA concedes that the Veteran was exposed to radiation. *See* R. at 4 (2-16).

The present appeal stems from a July 2003 Rating Decision. *See* R. at 1695-1700. The Veteran timely filed a Notice of Disagreement (NOD) (R. at 1595) and appealed to the Board of Veterans' Appeals (Board or BVA). *See* R. at 1335. Thereafter, in January 2007, the Veteran testified at a hearing before a Board member. *See* R. at 1257-1305. In an April 2007 decision, the Board denied the Veteran's claims. *See* R. at 1173-1184. However, the Veteran appealed to the U.S. Court of Appeals for Veterans Claims (Court or CAVC) and, in a March 2010 Memorandum Decision, the Court vacated the Board's decision and remanded the matter. *See* R. at 1066-1069.

Thereafter, the Board remanded the claims for additional development in September 2010 (R. at 1032-1044) and August 2012 (R. at 530-533). In February 2013, the Veteran testified at another hearing before a Board member. *See* R. at 471-489. Subsequently, the Board again remanded the matter for additional development in April 2013. *See* R. at 447-461. In November 2016, an opinion was provided by the Post-9/11 Era Environmental Health Program Director. *See* R. at 131. The Veteran testified at another Board hearing in May 2017.¹ *See* R. at 44-57. Subsequently, in November 2017, a Veterans Health Administration (VHA) medical opinion was provided. *See* R. at 25-26.

¹ This hearing was provided because the Veterans Law Judges before which the Veteran had previously testified retired.

Most recently, in an August 16, 2018 decision, the Board denied the Veteran's claims. *See* R. at 2-16. The Board found that "[t]he weight of the evidence is against a finding that a lumbar spine disability, cataracts, cardiovascular disability and prostate gland hypertrophy manifested in service, manifested within a year from service or are otherwise due to active service including as due to radiation exposure." R. at 4. Therefore, the Board concluded that service connection for a lumbar spine disability, cataracts, cardiovascular disability and prostate gland hypertrophy was not warranted. *See* R. at 5. A timely appeal to this Honorable Court followed.

ARGUMENT

Summary

The Appellant contends that the Board in this instance clearly erred in failing to ensure VA fulfilled its statutory duty to assist. Further, the Board failed to support its decision with adequate reasons or bases.

I. THE BOARD CLEARLY ERRED IN FAILING TO ENSURE VA FULFILLED ITS STATUTORY DUTY TO ASSIST.

In accordance with the non-adversarial system of veterans' benefits created by Congress, VA has a duty to assist a claimant "in obtaining evidence necessary to substantiate the claimant's claim for a benefit under a law administered by the Secretary." 38 U.S.C. § 5103A (2006); *see Jaquay v. Principi*, 304 F.3d 1276, 1280 (Fed. Cir. 2002)

(“Congress has created a paternalistic veterans’ benefits system to care for those who served their country in uniform”). The U.S. Court of Appeal for the Federal Circuit (Federal Circuit) has stated that “[t]he government’s interest in veterans cases is not that it shall win, but rather that justice shall be done that all veterans so entitled receive the benefits due them.” *Comer v. Peake*, 1362, 1369 (Fed. Cir. 2009) (citing *Barrett v. Nicholson*, 466 F.3d 1038, 1044 (Fed. Cir. 2006)). When a veteran’s service medical records are unavailable, through no fault of the veteran, there is also a heightened duty to assist the veteran in the development of the case. *See O’Hare v. Derwinski*, 1 Vet. App. 365, 367 (1991).

Claims based on radiation exposure must be developed and considered under 38 C.F.R. § 3.311. *See Hilkert v. West*, 12 Vet. App. 145, 148 (1999). This regulation provides a framework and procedure for adjudicating radiation exposure-based claims. *See Id.* Once radiation exposure has been acknowledged, “the VARO is then required to refer the case to the Under Secretary for Benefits for further consideration.” *Id.*; *see Ramey v. Gober*, 120 F.3d 1239, 1244 (Fed. Cir. 1997).

In denying the Veteran’s claims, the Board relied on a record that does not reflect proper development under 38 C.F.R. § 3.311. The Board primarily relied on a November 2016 medical opinion from the Director of the Post 9/11 Era Environmental Health Program (Director’s opinion). *See R.* at 12 (“the Board places great weight of probative value on and finds persuasive the November 2016 dose estimate and opinion of the Director ... regarding the likelihood of the Veteran’s conditions being the result of his exposure to radiation while he was in active service”); *see also R.* at 131. However, the

November 2016 Director's opinion does not adequately address the factors listed in 38 C.F.R. § 3.311(e), which are to be specifically considered in determining whether a veteran's disability resulted from exposure to radiation in service. These factors include: (1) the probable dose, in terms of dose type, rate and duration as a factor in inducing the disease, (2) the relative sensitivity of the involved tissue to induction, by radiation, of the specific pathology, (3) the veteran's gender and pertinent family history, (4) the veteran's age at time of exposure, (5) the time lapse between exposure and onset of the disease, and (6) the extent to which exposure to radiation, or other carcinogens, outside of service may have contributed to the development of the disease. *See* 38 C.F.R. § 3.311(e). The Director's opinion failed to adequately address all pertinent information and, therefore, the Board erred in relying upon this opinion to deny the Veteran's claims.

Given that the Veteran's records were destroyed by fire, neither the Director's opinion nor the Board provided adequate reasons or bases to explain how the estimated total radiation dose was reached. *See Pruitt v. Derwinski*, 2 Vet. App. 83, 85 (1992) (in cases where the veteran's records were likely destroyed in the 1973 NPRC fire, the Board has a "heightened" duty to explain the reasons or bases for its decision). Further, while the Director's opinion mentioned that the Veteran "worked as a missile crewman", it failed to discuss the nature or extent of the Veteran's radiation exposure. *See* R. at 131. During a January 2011 VA examination, the Veteran explained that, "on a daily basis, he would maintain radar, including standing in front of the beam and holding up a testing tube" and "he would carry in pants pockets of his jumpsuit radioactive material for four

to five days at a time.” R. at 673 (673-684). The examiner noted that, upon physical examination, it was revealed that the Veteran has “... a rather severe actinic keratosis of sun-exposed areas and some actinic keratoses and seborrheic keratoses in normally sun-exposed areas, such as the thighs. This corroborates the veteran’s statement that he was exposed to microwave radiation in the military.” R. at 676. This evidence was not considered nor was it explained what impact this type of exposure would have on a dose estimate.

Given these deficiencies, the Board clearly erred in failing to ensure VA fulfilled its statutory duty to assist in developing the Veteran’s radiation exposure claims. Accordingly, remand is warranted.

II. THE BOARD FAILED TO SUPPORT ITS DECISION WITH ADEQUATE REASONS OR BASES.

The Board is to include in its decision a statement of the reasons or bases for its findings and conclusions on all material issues of fact and law presented on the record, with such statement being adequate to enable an appellant to understand the precise basis for the Board’s decision as well as to facilitate review by this Court. *See* 38 U.S.C. § 7104(d)(1); *see also Allday v. Brown*, 7 Vet. App. 517, 527 (1995); *Gilbert v. Derwinski*, 1 Vet. App. 49, 56-57 (1990). To fulfill this requirement, the Board must “... set forth the precise basis for its decision, [] analyze the credibility and probative value of all

material evidence submitted by and on behalf of a claimant in support of the claim, and [] provide a statement of its reasons or bases for rejecting any such evidence.” *Gabrielson v. Brown*, 7 Vet. App. 36, 40 (1994). In cases where the veteran’s service records are unavailable, VA has a heightened duty to explain its findings and conclusions and to carefully consider the benefit of the doubt rule. *See O’Hare v. Derwinski*, 1 Vet. App. 365, 367 (1991); *see also Pruitt v. Derwinski*, 2 Vet. App. 83, 85 (1992). If the Board fails to provide an adequate statement of reasons or bases, remand is the appropriate remedy. *See Tucker v. West*, 11 Vet. App. 369, 374 (1998); *see also Washington v. Nicholson*, 19 Vet. App. 362, 371 (2005) (remand is the appropriate remedy when the Board fails to provide an adequate statement of reasons or bases for its determination).

The Board is required to consider *all evidence of record* and to consider, and discuss in its decision, all “potentially applicable” provisions of law and regulation. *See* 38 U.S.C. § 7104(a); *Charles v. Principi*, 16 Vet. App. 370, 373 (2002). “The BVA is not free to ignore regulations which the VA has adopted” *Schafrath v. Derwinski*, 1 Vet. App. 589, 592 (1991); *Young v. Brown*, 4 Vet. App. 106, 109 (1993) (VA may not ignore its own regulations). “VA is required to apply all relevant law in adjudicating the claim even though not raised by the appellant.” *Norris v. West*, 12 Vet. App. 413, 417 (1999). Vacatur and remand is appropriate where the Board failed to consider all possible theories of entitlement. *See Combee v. Brown*, 34 F.3d 1039, 1045 (Fed. Cir. 1994) (service connection may be considered under more than one theory of entitlement if reasonably raised by the evidence).

Here, the Veteran raised an alternate theory of entitlement which the Board wholly neglected to consider. Specifically, in his hearing testimony, the Veteran suggested, as an alternate theory, that his claimed disabilities were caused by exposure to toxic fuel chemicals while in service. *See* R. at 1274-1278. The Veteran provided specific details into the nature and type of exposure related to the missiles he worked on. *See Id.* The Board erred in failing to consider this theory of entitlement. Accordingly, remand is warranted.

Further, the Board relied on the November 2016 opinion to deny the Veteran's claims; however, for the reasons discussed *supra*, that opinion is deficient and the Board failed to provide adequate reasons or bases for its reliance on it to deny the claim. *See* R. at 12 ("the Board places great weight of probative value on and finds persuasive the November 2016 dose estimate and opinion of the Director ... regarding the likelihood of the Veteran's conditions being the result of his exposure to radiation while he was in active service"). Given the extent of the Veteran's in-service exposure, and the unavailability of the Veteran's records, it is unclear how the dose estimate was reached and can be deemed reliable. *See* R. at 131; *see also* R. at 161; R. at 673 ("on a daily basis, he would maintain radar, including standing in front of the beam and holding up a testing tube" and "he would carry in pants pockets of his jumpsuit radioactive material for four to five days at a time"); R. at 676 (examiner noted that, upon physical examination, it was revealed that the Veteran has "... a rather severe actinic keratosis of sun-exposed areas and some actinic keratoses and seborrheic keratoses in normally sun-exposed areas, such

as the thighs. This corroborates the veteran's statement that he was exposed to microwave radiation in the military").

In light of these deficiencies, the Board failed to support its August 16, 2018 decision with adequate reasons or bases. Accordingly, remand is warranted.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that the August 2018 Board decision be set aside and the case remanded for further adjudication consistent with this Court's decision and applicable law.

Respectfully submitted,

August 26, 2019

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