

(1) Table of Contents

Table of Authorities	pg. ii.
Statement of Issue	pg. iii
Citations to Record before the Agency	pg. iv
Statement of Case	pg. v
Argument	pgs. 1-2
Conclusion	pg. 3

TABLE OF AUTHORITIES

Brief page no.

CASES

Gilbert v. Derwinski 1 Vet App 49, 55-56 (1990)

1

STATUTES

38 CFR sec. 3.102

1

38 USC sec. 5107(b)

1

CITATIONS TO RECORD BEFORE THE AGENCY

Brief page no.

R at 8 (4-14) BVA Decision of February 26, 2019	2
R at 8 (4-14) BVA Decision of February 26, 2019	3
R at 2066 Letter from Minneapolis Tribune	2
R at 4036 (4024-4037) BVA decision of December 5, 2017-Remand	3

Statement of the Issues

Entitlement to a finding of service connection for an acquired psychiatric disability; to include PTSD and major depressive disorder.

Statement of the Case

- i. Rating decision granting disability pension benefits effective May 7, 2014. RBA 5046-5047.
- ii. Application for Compensation reopening claims for PTSD, TBI, depression, and frostbite, 10/28/2015, RBA 4782-4783.
- iii. Rating decision, 10/28/2015 denying service connection for depression, frostbite, PTSD and TBI. RBA 4717-4719
- iv. Notice of Disagreement for all denied claims, 01/14/2016, RBA4695-4696
- v. Statement of the Case, 03/23/2016 denying service connection for TBI, depression, PTSD, and frostbite, RBA 4086- 4103.
- vi. VA 9 appeal to BVA, 03/29/2016. RBA 4084.
- vii. Board of Appeals decision, 12/05/2017- denying claims for service connection to TBI, frostbite, and bilateral hearing loss and remanding for further development as to PTSD, RBA 4025-4037.
- viii. Supplemental Statement of the Case, 03/14/2018, Entitlement to service connection for a psychiatric disorder including PTSD and depression remains denied. RBA 2700-2713.
- ix. Rating decision, 10/04/2018 denying service connection for frostbite for both feet RBA 92-100.
- x. Notice of Disagreement re frostbite, 12/17/2018- RBA 68-69.
- xi. Supplemental Statement of the Case, 01/07/2019. Denied service connection for a psychiatric disability; including PTSD and depression. RBA 26-38.
- xii. Board of Veterans' Appeals decision 02/26/2019 denying service connection for an acquired psychiatric disability, to include PTSD and major depressive disorder, RBA 4-14.
- xiii Notice of Appeal with CAVC, 05/20/2019

ARGUMENT

It is the contention of the Appellant that the evidence is clearly in equipoise and that he is entitled to the benefit of the doubt rule. It is submitted by the Appellant that the VA failed to follow the said rule and also failed to fulfill its obligation involving the duty to assist.

The benefit of the doubt rule requires that, after consideration of all of the evidence, if there is an approximate balance of positive and negative evidence, the benefit of the doubt in resolving each such issue should be given to the claimant. Pursuant to 38 CFR sec. 3.102 any reasonable doubt must be resolved in favor of the claimant when there is such an approximate balance regarding any issue material to the determination of the matter.

The veteran would then prevail by operation of 38 USC section 5107 (b). See *Gilbert v. Derwinski* 1 Vet App. 49, 55-56 (1990).

In the present case there are two main factors that make it extremely difficult for the Appellant to establish the true set of facts that make up the claim. In the first instance the fact that the veteran's records were destroyed in a fire places an undue burden on him in regard to verifying his service history.

Perhaps even more troublesome is the fact that the veteran was engaged in a secret, covert mission during the time of the Berlin Crisis, so that his records may very well be sealed. The failure to obtain these records has clearly caused the VA in all of its investigations to question his credibility.

It is the contention of the Appellant that these two factors place a heightened duty on the VA to assist the veteran in any way possible and go above and beyond the usual procedures no matter how burdensome they may be.

One example of the failure to exercise a heightened duty to assist the claimant is the comment in the BVA decision of February 26, 2019, RBA 4-14, pg. that to follow up with the list of individuals provided by the veteran indicating names of people with whom he served in Berlin, Germany, would be unreasonable and tantamount to a fishing expedition. There is no evidence to indicate that any attempt was made to follow up in any way.

An important piece of evidence that was not sufficiently addressed by the BVA decision was the letter of June 23, 1974 from the Minneapolis Tribune. The author wrote that he had learned of the veteran's CIA background from contacts within the government and was interested in interviewing him about his activities. This certainly strengthens the Appellant's credibility about his activities.

CONCLUSION

It is therefore submitted that for the above reasons that the ALJ did not have all of the facts upon which to make an informed decision.

Even more importantly, the aforementioned BVA decision of February 26, 2019 should not carry any weight since the remand order in the BVA decision of December 5, 2017, RBA 4024-4037, was not followed in that on page 4036 it was ordered to schedule the Veteran for a VA psychiatric examination in order to determine all of the issues that were in fact decided as part of the final BVA decision including the proper diagnoses and whether it is more likely than not , less likely than not, or at least as likely as not that any current psychiatric disorder, including PTSD and depression had its clinical onset during active duty, and to include any verified stressor.

It is therefore clear that the claim requires a remand for the purpose of having the appellant examined in accordance with the said BVA order.

Thank you for your attention.

Respectfully submitted

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