

Vet.App. No. 18-4434

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

LOUIS P. KNIPP,
Appellant,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,
Appellee.

ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS

**BRIEF OF APPELLEE
SECRETARY OF VETERANS AFFAIRS**

RICHARD J. HIPOLIT
Acting General Counsel

MARY ANN FLYNN
Chief Counsel

RICHARD A. DALEY
Deputy Chief Counsel

JAMES L. HEIBERG
Appellate Attorney
Office of General Counsel (027E)
U.S. Dept. of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, D.C. 20420
202-632-8312

Attorneys for the Secretary

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
I. ISSUE PRESENTED	1
II. STATEMENT OF THE CASE	1
A. Jurisdictional Statement	1
B. Nature of the Case	1
C. Statement of Facts	2
III. SUMMARY OF THE ARGUMENT	5
IV. ARGUMENT	5
A. The Board's Statement of Reasons or Bases Is Inadequate for Failing to Address a Buddy Statement Corroborating Appellant's Reports of His In-Service Injury	6
B. The July 2013 VA Examination Report was Adequate	9
V. CONCLUSION	10

TABLE OF AUTHORITIES

CASES

<i>Acevedo v. Shinseki</i> , 25 Vet. App. 286 (2012)	9
<i>Buchanan v. Nicholson</i> , 451 F.3d 1331 (Fed. Cir. 2006)	7
<i>Buczynski v. Shinseki</i> , 24 Vet. App. 221 (2011)	8
<i>Caluza v. Brown</i> , 7 Vet. App. 498 (1995)	6, 7
<i>Gabrielson v. Brown</i> , 7 Vet. App. 36 (1994)	9
<i>Gilbert v. Derwinski</i> , 1 Vet. App. 49 (1990)	7
<i>Hilkert v. West</i> , 12 Vet. App. 145 (1999)	6
<i>Kirkpatrick v. Nicholson</i> , 417 F.3d 1361 (Fed. Cir. 2005)	2
<i>McPhail v. Nicholson</i> , 19 Vet. App. 30 (2005)	2
<i>Monzingo v. Shinseki</i> , 26 Vet. App. 97 (2012)	9
<i>Newhouse v. Nicholson</i> , 497 F.3d 1298 (Fed. Cir. 2007)	6
<i>Shinseki v. Sanders</i> , 556 U.S. 396 (2009)	6

STATUTES

38 U.S.C. § 5103A(d)	10
38 U.S.C. § 7104(d)(1)	6
38 U.S.C. § 7252	1
38 U.S.C. § 7261(b)(2)	6

REGULATIONS

38 C.F.R. § 3.159(c)(4)	10
-------------------------------	----

RECORD CITATIONS

R. at 5-16 (August 7, 2018, Board Decision)	2, 4, 5, 8, 9
R. at 391-92 (August 2013 VA Treatment Note)	9
R. at 459-61 (August 2017 Supplemental Statement of the Case)	4
R. at 1770 (DD-214)	2
R. at 1819 (DD-214)	2
R. at 2030-34 (May 2016 Board Decision)	4

R. at 2115 (June 2015 Buddy Statement).....	4, 7, 9
R. at 2116-31 (June 2015 Hearing Transcript).....	2, 4, 8, 9
R. at 2832 (May 2014 VA Form 9)	4
R. at 2836-53 (April 2014 Statement of the Case)	4
R. at 4032-35 (August 2013 Rating Decision).....	4
R. at 4043-47 (July 2013 Rating Decision)	4
R. at 4052-65 (July 2013 VA Examination)	3, 4, 8, 9
R. at 4131-33 (March 2013 Application for Disability Compensation).....	3
R. at 4194-96 (July 2006 Service Treatment Record).....	2, 3, 8

LOUIS P. KNIPP,)
Appellant,)
)
v.) Vet. App. No. 18-4434
)
ROBERT L. WILKIE,)
Secretary of Veterans Affairs,)
Appellee.)

**BRIEF OF APPELLEE
SECRETARY OF VETERANS AFFAIRS**

Whether the Court should partially vacate the August 7, 2018, decision of the Board of Veterans' Appeals (Board) denying service connection for a cervical spine disability, and for radiculopathy of the left upper extremity, and remand the matters for the Board to provide an adequate statement of reasons.

Appellant, Louis P. Knipp, appeals that part of the August 7, 2018, Board decision denying service connection for a cervical spine disability, and for

radiculopathy of the left upper extremity.¹ (See Record (R.) at 5-16 (Board's decision at 1-12)).

C. Statement of Facts

Appellant completed active duty for training (ACDUTRA) from February 2000 to July 2000 and served on active duty in the United States Army from October 2005 to August 2007 with prior and subsequent periods of service in the Iowa Army National Guard. (R. at 1770, 1819). In July 2006, while serving in Iraq, Appellant reported falling from a truck onto the turret of an armored vehicle, hitting his head and incurring a laceration to his right cheek. (R. at 4194-96, 2118 (2116-31)). Contemporaneous service treatment records (STRs) show that, when Appellant sought treatment, he was oriented and had no nausea, dizziness, or blurred vision. (R. at 4195). The STR noted that Appellant received a facial injury to the right zygomatic region, involving a 1-centimeter laceration, inferior and lateral to the right orbital margin. (*Id.*). There was swelling around the laceration and bleeding. (*Id.*). There was no tenderness on palpation of the zygomatic arch or orbital bones. An examination of the neck revealed a normal appearance and no tenderness on palpation. (*Id.*). There was a full range of

¹ Appellant does not challenge the portion of the Board's decision denying service connection for a respiratory disability, other than the already service-connected allergic rhinitis. See *McPhail v. Nicholson*, 19 Vet. App. 30, 33 (2005) ("This Court has consistently held that any claims not raised on appeal are abandoned."). The Board remanded a service-connection claim for hypertension and a claim for an initial compensable rating for allergic rhinitis, and those issues are not before the Court. *Kirkpatrick v. Nicholson*, 417 F.3d 1361 (Fed. Cir. 2005).

motion of the neck and no pain on motion. (*Id.*). There was no tenderness of the lymph nodes on palpation. (*Id.*). Appellant was diagnosed with an open wound of the cheek, which was sutured. (R. at 4196). Appellant was prescribed Acetaminophen for the injury. (*Id.*).

In March 2013, Appellant filed a disability claim for back and back nerve injuries. (R. at 4131-33). VA provided a medical examination to Appellant in July 2013. (R. at 4052-65). The examiner noted that Appellant had undergone a left C6-C7 foraminotomy with discectomy six weeks earlier. (R. at 4052). In reviewing Appellant's medical history, the examiner referenced the in-service laceration. (*Id.*). Appellant reported to the examiner that, in approximately December 2012 when he was attending community college for training as a diesel mechanic, he woke up one day with numbness in his left arm. (R. at 4055). He reported to the examiner there was no specific event or unusual activity to account for his symptoms and denied sustaining any prior injury to the cervical spine. (*Id.*).

Based on her review of the claims file and the in-person examination, the examiner opined that Appellant's current herniated C6-C7 disc and associated left-sided radiculopathy were less likely than not incurred in or caused by service. (R. at 4064). In support of her opinion, the examiner noted that there was no record of injury, problems, signs, or symptoms relating to the neck in the STRs, and repeated post-deployment health assessments were negative for musculoskeletal issues. (*Id.*). The examiner observed that the STRs did indicate line-of-duty (LOD) determinations for other medical issues. (*Id.*). The examiner

also noted that Appellant's symptoms did not onset until December 2012 and that he denied any specific past injury to his neck. (R. at 4052, 4064).

Following the July 2013 VA examination, the Des Moines, Iowa, Regional Office (RO) issued a rating decision later that month denying the claims. (R. at 4043-47). Appellant filed a notice of disagreement (NOD) with the rating decision in August 2013. (R. at 4032-35). The RO then issued a statement of the case (SOC) in April 2014, continuing its denial of the claims. (R. at 2836-53). And Appellant, in turn, appealed to the Board in May 2014. (R. at 2832).

Appellant testified before the Board in June 2015, where he stated that he fell 10 feet from a truck onto the turret of a vehicle. (R. at 2118 (2116-31)). He claimed that he experienced a whiplash-type injury from the fall when his head snapped back upon impact. (R. at 2119). Also that month, Appellant submitted a buddy statement from a fellow soldier who claimed to have witnessed Appellant's fall from the truck and described that Appellant's head flew backwards from the impact of the fall, that he gashed his right cheek bone, and that he complained of neck and arm pain afterwards. (R. at 2115). The Board remanded the claims for additional development in May 2016. (R. at 2030-34). And the RO issued a supplemental statement of the case (SSOC) in August 2017, continuing to deny the claims. (R. at 459-61).

In its current decision, the Board found that the July 2006 STR regarding the cheek laceration did not involve Appellant's neck or his neurological system. (R. at 9). The Board noted that the remainder of Appellant's STRs, including

multiple subsequent health assessments, did not show any diagnoses, complaints, or treatment pertaining to the cervical spine or radiculopathy. (R. at 9-10). The Board concluded that, in considering the 2006 STR and the medical history reported to the 2013 VA examiner, Appellant's more recent assertions of a whiplash or neck injury during the 2006 accident were not credible. (R. at 10).

This appeal ensued.

III. SUMMARY OF THE ARGUMENT

The Board provided an inadequate statement of reasons or bases for finding Appellant's lay statements concerning the details of injuries he received from an in-service fall from a truck not credible when it failed to consider a supporting buddy statement corroborating Appellant's account. Accordingly, vacatur of the Board's decision and remand is warranted for the Board to address the supporting buddy statement. Appellant's other arguments that the Board relied on the absence of contemporaneous medical records, the gap in time between Appellant's in-service fall and the onset of his symptoms, and an inadequate July 2013 VA examination report to deny the claims are not supported by the evidence of record.

IV. ARGUMENT

The Court should vacate the Board's decision and remand the issues of service connection for a cervical spine disability and radiculopathy of the left upper extremity, as it ultimately rests on an inadequate statement of reasons or bases. A Board decision must be supported by a statement of reasons or bases, which

adequately explains the basis of the Board's material findings of fact and conclusions of law. 38 U.S.C. § 7104(d)(1). This standard generally requires the Board to analyze the probative value of the evidence, account for that which it finds persuasive or unpersuasive, and explain the basis of its rejection of evidence materially favorable to the claimant. *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995). The Board, however, need not comment upon every piece of evidence contained in the record. *Newhouse v. Nicholson*, 497 F.3d 1298, 1302 (Fed. Cir. 2007).

In all cases, the burden is on the appellant to demonstrate error in the Board decision. *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (holding that the appellant bears the burden of demonstrating error). Moreover, to warrant judicial interference with the Board decision, the appellant must show that such demonstrated error was prejudicial to the adjudication of his claim. *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) (holding that the appellant bears the burden of demonstrating prejudicial error). Appellant bears the burden of demonstrating error on appeal, 38 U.S.C. § 7261(b)(2), and, although he has done so as to one of his allegations (*i.e.*, the Board's failure to consider his buddy statement), he has not done so as to his remaining allegations. *Sanders*, 556 U.S. at 406; *Hilkert*, 12 Vet.App. at 151. Therefore, the Court should vacate the decision now on appeal.

A. The Board's Statement of Reasons or Bases Is Inadequate for Failing To Address a Buddy Statement Corroborating Appellant's Reports of His In-Service Injury

Appellant submitted a buddy statement corroborating the details of his in-service fall from the back of the truck, but the Board failed to address the buddy

statement in its decision. (R. at 2115). Accordingly, the Board's negative credibility determination as to Appellant's accounts of his in-service injury was based on an incomplete consideration of the evidence of record, rendering its statement of reasons or bases inadequate, and warranting vacatur and remand. *Gilbert v. Derwinski*, 1 Vet. App. 49, 57 (1990). Remand is required for the Board to address the buddy statement as part of its overall analysis of the credibility and probative value of all material evidence submitted by and on behalf of Appellant in its adjudication of the claims. *Caluza*, 7 Vet.App. at 506.

Although the Board's failure to consider the buddy statement was clearly erroneous, Appellant's other arguments that it relied on the lack of contemporaneous medical records and the lapse of time between his in-service fall and his initial reports of neck and arm pain to deny his claims for service connection are unpersuasive. (App. Br. at 10-13). To the extent that Appellant argues that *Buchanan* disallows reliance on the lack of contemporaneous medical records in a credibility determination, he overstates the law. (App. Brief, at 10-12). *Buchanan* itself clarified that the Board's role includes weighing the credibility of the lay evidence and discounting it where appropriate, including considering the absence of contemporaneous medical evidence against such lay evidence. *Buchanan v. Nicholson*, 451 F.3d 1331, 1337 (Fed. Cir. 2006). All that was barred in that case was using the lack of evidence as the sole reason for an adverse credibility finding. (*Id.*). However, here, the Board expressly relied on a contemporaneous STR noting that Appellant's neck was examined after the fall,

its appearance was normal with negative tenderness on palpation, and that he had full range of motion and no complaints of pain. (R. at 9-10, 4195). It also relied on Appellant's explicit denial to the July 2013 VA examiner of any previous injury to his spine. (R. at 4195). (R. at 9-10, 4055, 4194-96). Thus, the Board relied, not on the absence of evidence, but upon substantive negative evidence weighing against the claim. The consideration of such substantive negative evidence is fully allowed within the law. See *Buczynski v. Shinseki*, 24 Vet.App. 221, 224 (2011) (explaining that where there is a lack of notation of medical condition or symptoms where such notation would normally be expected, the Board may consider this as evidence that the conditions or symptoms did not exist). Notwithstanding the Board's failure to address the buddy statement, its reliance on the contemporaneous STR noting no cervical or neurological injuries and Appellant's denial of a prior cervical injury as evidence weighing against the credibility of Appellant's lay statements was not in error.

Similarly, Appellant presents a strawman argument that the Board "explicitly" relied on the passage of time between Appellant's in-service fall and his reports of neck and arm pain as the basis for denying his claims. (App. Br. at 12). During the June 2015 hearing, the Board merely referenced the time gap as the apparent basis for the RO's denial of the claims. (R. at 2126). There is no indication from either the hearing transcript (R. at 2116-31) or the Board's decision itself (R. at 5-16) that it specifically relied on the passage in time between Appellant's in-service fall and the onset of his symptoms as a basis to deny the claims. Rather, as

indicated by its citation to *Caluza*, the Board's decision was based on finding Appellant's account of his in-service injury inconsistent with his denials to the VA examiner of having previously injured his neck. (R. at 10).

B. The July 2013 VA Examination Report Was Adequate

Appellant also contends that the July 2013 VA examination report was inadequate for its failure to specifically mention his in-service fall and its effect on his disabilities. (App. Br. at 13-15). An adequate examination need only rest on correct facts and reasoned medical judgment so as to inform the Board as to the medical question. *Acevedo v. Shinseki*, 25 Vet.App. 286, 293 (2012). An examiner need not comment on every piece of evidence (or lack of evidence), *Monzingo v. Shinseki*, 26 Vet.App. 105, 116 (2012), and does not have the same reasons-or-bases duties as the Board. See *Gabrielson v. Brown*, 7 Vet.App. 36, 40 (1994). Here, the examiner conducted an in-person examination and reviewed the claims file. (R. at 4054). The examiner was clearly aware of the laceration caused by the in-service fall. (R. at 4052). However, Appellant specifically denied having had a previous spinal injury. (R. at 4055). Moreover, Appellant's subsequent lay and buddy statements, as well as his hearing testimony detailing the account of his in-service fall, were not in the claims file at the time of the July 2013 examination. (R. at 391-92, 2115, 2116-31). Given the absence of any notation of neck or neurological injury at the time of the 2006 in-service fall, the lack of reference to any cervical condition prior to 2012, and Appellant's denials of a prior neck injury, there was no reason for the VA examiner to have addressed

the effect of that fall based on the evidence of record at the time of the examination. Appellant fails to demonstrate how the examiner's failure to comment on evidence not yet associated with the record renders her opinion inadequate. Moreover, Appellant advances no other argument alleging inadequacies concerning the July 2013 VA examination.

On remand, should the Board determine that the buddy statement is credible, it may provide a medical examination to consider that statement and other evidence related to the details of Appellant's in-service fall that were not of record at the time of the July 2013 VA examination. 38 U.S.C. § 5103A(d); see 38 C.F.R. § 3.159(c)(4).

V. CONCLUSION

In light of the foregoing, the Court should vacate and remand the Board's August 7, 2018, decision denying service connection for a cervical spine disability and for radiculopathy of the left upper extremity.

Respectfully submitted,

RICHARD J. HIPOLIT
Acting General Counsel

MARY ANN FLYNN
Chief Counsel

/s/ Richard A. Daley
RICHARD A. DALEY
Deputy Chief Counsel

/s/ James L. Heiberg

JAMES L. HEIBERG

Appellate Attorney

Office of General Counsel (027E)

U.S. Department of Veterans Affairs

810 Vermont Avenue, N.W.

Washington, D.C. 20420

202-632-8312