Vet. App. 19-4777

THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS
625 INDIANA AVENUE, N.W. SUITE 900
WASHINGTON, D.C. 20004-2950

CARY E. SMITH
Appellant,

v.

ROBERT L. WILKIE
Secretary, Veterans Affairs,
Appellee.

APPELLANT INFORMAL BREIF IN SUPPORT OF APPEAL

CARY E. SMITH
2509 HUNTWICK ST.
GRAND PRAIRIE, TEXAS 75050

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APPELLANT INFORMAL BRIEF IN SUPPORT OF APPEAL

ISSUES PRESENTED

Whether Board June 19, 2019 decision erred in: **(1)** denying veteran entitlement to an earlier effective date prior to 09/08/2015 for award of right knee patellofemoral syndrome; **(2)** denying Veteran entitlement to an earlier effective date prior to 09/08/2015 award for left knee patellofemoral syndrome; **(3)** denying Veteran entitlement to service connection for: 38 CFR section 3.317 Undiagnosed illnesses or Medically unexplained chronic multisymptom illness associated with borderline to abnormal laboratory results of micoalbuminemia; enlarged occipital horn of lateral ventricles with mildly thickened TH eoptic nerves; increased risk for kidney disease & diabetes due to Gulf War exposure.

STATEMENT OF THE FACTS

A. Jurisdictional Statement

Appellate jurisdiction is predicated on 38 USC section 7252.

B. Nature of the Case

Whether Board June 19, 2019 decision erred in: **(1)** denying veteran entitlement to an earlier effective date prior to September 8, 2015 for award of right knee patellofemoral syndrome; **(2)** denying Veteran entitlement to an earlier effective date prior to September 8, 2015 for award of left knee patellofemoral syndrome; **(3)** denying Veteran entitlement to service connection for: Undiagnosed illnesses or Medically unexplained chronic multisymptom illness associated with borderline to abnormal laboratory results micoalbuminemia; enlarged occipital horn of lateral ventricles with mildly thickened TH eoptic nerves; increased risk for kidney disease & diabetes due to Gulf War exposure.

C. Statement of the Facts;

1. Cary E. Smith (Veteran) had inactive Reserve service in the U.S. Army in 1987; on March 7, 1989 entered active duty service in the U.S. Army and stationed in Delta Co. 12th Engineering Battalion in Dexhiem Germany; in January 1991 was Deployed to Southwest Asia for Operation Desert Shield/Storm; in May 1991 returned to Germany and

then reported to new duty station on November 1991 at Ft. Campbell, KY. Assigned to Charlie Co. 326th Engineer Battalion; and on March 6, 1993 was Honorably released from active duty and transferred to USAR Control Group (Reinforcement) until expiration of Reserve obligation ended on March 7, 1995.

2. DD214 verify Veteran was awarded the following decorations relative to service against hostile forces: Southwest Asia Service Medal with/2BSS; Saudi Arabia Kuwait Liberation Medal; and Air Assault Badge.

3. Military service department Health Risk Appraisal Profile dated October 24, 1991 note Veteran [Blood Pressure 130/96] hypertension mildly high; **VA December 16, 1997** Lab Results Chem Profile [laboratory test] reported: CO2 [30.9-Hi] ; WBC – 9.3 [Top of range]; MCHC – 33.2 [Bottom of range]; Glucose – 76 [Bottom of range]; Creatinine 1.1 [Top of range]; COMPARED TO – **LabCorp 6/1/2011** Lab Results reporting: Glucoase [OK]; BUN 9 [Bottom of range]; Creatinine 1.06 [Top of range]; BUN/Creatinine Ratio 8 Lo [Abnormal bottom of range]; ***increase risk for kidney disease***; Sodium – 144 [Borderline Abnormal Top of range]; Protein, total 6.5 [Abnormal Bottom of range]; A/G Ration 1.7 [Bottom of range]; Bilirubin, total & direct [Bottom of range]; Iron – 59 [Bottom of range]; Triglycerides – 48 [Bottom of range]; WBC 10.8 [Abnormal Top of range]; MCV – 93 [Top of range]; MCHC – 32.8 [Bottom of range]; Platelets – 196 [Bottom of range]; Basos – 0 [Borderline Bottom of range]; Neutrophils (Absolute) 7.2 [Top of range]; Hemoglobin A1c – 5.5 [Borderline Abnormal Top of range] ***increase risk for diabetes***

4. Department of Veterans Affairs **July 30, 1998** rating decision concede under its "Evidence" section to have reviewed Veterans service treatment records dating from September 8, 1987 through January 6, 1993.

5. RO initial rating decision dated (August 10, 1998) conceded at the that time, that the service records "on hand" showed that the Veteran was seen and treated for "Bilateral patellofemoral pain syndrome" from September 19, 1992 to December 8, 1992, and rating specialist concluded:

> "Although we have no recent medical treatment records, reasonable doubt has been resolved in favor of the claimant."

then erroneously assigned Veteran a 0% percent evaluation rating in contradiction with provision of 38 CFR Part 4 Schedule for rating disabilities; and section 3.159(c)(4)(i) {medical opinion}.

RO 07/30/98 rating specialist conceded in contradiction with 38 CFR section 3.159(c)(4) that VA **did not** provide a medical examination or obtain required medical opinion}; and stated:

> "we have no recent medical treatment records, reasonable doubt has been resolved in favor of the claimant," and additionally stated: "Veteran received treatment for his bilateral knee condition within 3 months of release from active duty, and there is no indication that the condition had resolved; AND

indirectly conceded Veteran condition had worsened in severity within months since Veteran March 6, 1993 separation from service, where VA July 20, 1998 rating decision assigned a January 23, 1998 effective date for now diagnosed condition: "Bilateral Patellofemoral Pain Syndrome" originally claimed as {bilateral knee condition}, warranted higher than 0% percent rating for {DC-5262} Tibia & Fibula, impairment loose motion warranted 40% percent rating based on a complete medical description of Patellofemoral Pain Syndrome," in comparison with description of a [DC-5257] 30% "Knee impairment" lateral instability.

6. Director {EIC] **April 18, 2016** decision letter failed to comply with 38 CFR section 3.159(c)(4)(i){provide required medical opinion, & x-ray examination test results}; for comparison with RO **07/30/98** rating specialist decision challenged by veteran as [CUE] clear and unmistakable error where RO admitted in the record the following statement determined a contradiction with 38 CFR section 3.159(c)(4) conceded that VA **did not** provide a {medical examination or obtain required medical opinion} stated:

> "we have no recent medical treatment records, reasonable doubt has been resolved in favor of the claimant," and additionally stated: "Veteran received treatment for his bilateral knee condition within 3 months of release from active duty, and there is no indication that the condition had resolved; AND

then conceded Veteran condition had worsened in severity within months since Veteran March 6, 1993 separation from service, where VA

July 20, 1998 rating decision assigned a January 23, 1998 effective date for now diagnosed condition: "Bilateral Patellofemoral Pain Syndrome" originally claimed as {bilateral knee condition}, warranted higher evaluation rating of 60% percent rating based on a more complete medical description of "Bilateral Patellofemoral Pain Syndrome," in comparison with symptoms described solely for a "Knee condition."

7. Director [SOC] concede: A "September 19, 2017 examination advised that examinations of the "central nervous system" revealed no abnormalities on MRI; examination of the "endocrine system" revealed no diagnosis of diabetes or other endocrine conditions; there were no findings of a chronic kidney condition; OTHER than microalbuminuria likely due to hypertension;" AND concluded Veteran did not have "chronic illnesses" or "conditions due to or caused by environmental exposure in SW Asia; ***WHILE arguable*** based on lack of knowledge of disease's caused by SW Asia environmental exposure; laboratory test concede {veteran claimed conditions} cannot attribute to any clinical diagnosis meet the following 38 CFR section 3.317 regulatory provision requirement:

> Veteran who exhibits objective indications of chronic disability resulting from an illness or combination of illnesses manifested by one or more signs or symptoms such as those listed in paragraph (b) of this section, provided that such disability: [i] became manifested during military service in the SW Asia theater of operations during the Persian Gulf War; [ii] by history, physical examination, and laboratory test cannot be attributed to any known clinical diagnosis; [iii] existed

> for 6 months or more, exhibited intermittent episodes of improvement and worsening over a 6-month period will be considered chronic; and rated under Part 4 of this chapter';

clearly failed to explain unknown etiology or cause of abnormal lab results as follow, defined as an indication of undiagnosed illness:

> Health Risk Appraisal Profile dated October 24, 1991 note Veteran [Blood Pressure 130/96] hypertension mildly high; **VA December 16, 1997** Lab Results Chem Profile [laboratory test] reported: CO2 [30.9-Hi] ; WBC – 9.3 [Top of range]; MCHC – 33.2 [Bottom of range]; Glucose – 76 [Bottom of range]; Creatinine 1.1 [Top of range]; COMPARED TO – **LabCorp 6/1/2011** Lab Results reporting: Glucoase [OK]; BUN 9 [Bottom of range]; Creatinine 1.06 [Top of range]; BUN/Creatinine Ratio 8 Lo [Abnormal bottom of range]; ***increase risk for kidney disease***; Sodium – 144 [Borderline Abnormal Top of range]; Protein, total 6.5 [Abnormal Bottom of range]; A/G Ration 1.7 [Bottom of range]; Bilirubin, total & direct [Bottom of range]; Iron – 59 [Bottom of range]; Triglycerides – 48 [Bottom of range]; WBC 10.8 [Abnormal Top of range]; MCV – 93 [Top of range]; MCHC – 32.8 [Bottom of range]; Platelets – 196 [Bottom of range]; Basos – 0 [Borderline Bottom of range]; Neutrophils (Absolute) 7.2 [Top of range]; Hemoglobin A1c – 5.5 [Borderline Abnormal Top of range] ***increase risk for diabetes***

8. Director {EIC} **03/12/2018** [SOC] decision erred in it reasons and bases that concluded:

> "We must confirm our previous decision in which evaluations of 10% percent were assigned for bilateral patellofemoral pain syndrome; in absence of appreciable limitation of motion, based on objective painful motion; AND;
>
> "Entitlement to {no more than} 10% percent rating and; {no earlier} than assigned effective date of 09/08/2015 for: "bilateral patellofemoral pain syndrome; (date of receipt of informal claim); ***incorrectly applied*** 38 CFR section 3.400(o)(2) {earliest date, of which it is ascertainable that an increase in disability occurred}; contradictory to
>
> RO July 30, 1998 rating decision that denied rating in excess of 0% (zero) percent; contrary to regulatory provisions of 38 CFR section 3.400(o)(1) {effective date for an award of increased compensation will be the date of receipt of claim or the date entitlement arose, whichever is later; AND

contrary to Veteran July 25, 2016 [NOD] disagreeing with RO denial of rating in excess of 10% percent & earlier effective date than September 8, 2015 for:

> "Right patellofemoral pain syndrome" evaluated by rating specialist under (DC-5257) for painful motion of the knees;"

AND denying veteran rating in excess of 10% percent for: "Left patellofemoral pain syndrome" now evaluated by rating specialist under (DC-5260) based on painful motion of the knees" AND additionally concluded "No Revision Warranted" in R.O. original 07/30/98 rating decision that initially:

> denied Veteran higher evaluation than 0% percent {noncompensable} for: "Bilateral Patellofemoral Pain Syndrome" because rating specialist at the time of original decision determined ***absence*** of recurrent subluxation or lateral instability symptoms {but failed to weigh incapacitating episodes having a total duration of 6 weeks during the past 12 months}; then concluded record justified denial of higher rating for assigned veteran service connected: Bilateral Patellofemoral Pain Syndrome"

in contradiction with schedule for rating musculoskeletal system overlooked 38 CFR Part 4 section 4.71a (DC 5256) Knee, ankyloses of due to {extremely unfavorable flexion}; also failed to note absence of (DC-5257) Knee, other impairment of {Recurrent subluxation or lateral instability}) where ***Barron's Dictionary of Medical Terms*** defined "***patellofemoral syndrome***" as a condition that involve the hip, thigh, knee, and main nerve of the anterior part of the thigh; establishing

Veteran required evaluation under ***Diagnostic code* 5250** {Hip, ankyloses of} favorable in flexion, at an angle between 20 degrees and 40 degrees and slight adduction or abduction warranting 60% percent rating.

SUMMARY OF THE ARGUMENTS

Board [**R.at pg. 7**] concede on the record that matter comes before the Board of Veterans Appeals (Board) on appeal from an April 2016 rating decision that awarded a 10% percent rating for bilateral knee, patellofemoral syndrome; AND assigned an effective date of September 2015 date Veteran filed [CUE] motion to revise a July 1998 rating decision that Initially denied Veteran rating in excess of 0% percent for Veteran's claim of "bilateral patellofemoral syndrome" of the knees based on [CUE] clear and unmistakable error; thereby conceded to have been challenging the [**R.at pg. 9**] R.O incorrectly applied noncompensable assigned rating for: "bilateral patellofemoral syndrome" where ***Barron's Dictionary of Medical Terms*** defined "***patellofemoral syndrome***" as a condition that involve the hip, thigh,

knee, and main nerve of the anterior part of the thigh; establishing Veteran required 60% percent evaluation under ***Diagnostic code* 5250** {Hip, ankyloses of}; where regional office 0% percent rating incorrectly applied [**DC-5260**] provisions of 38 CFR Part 4 Schedule for rating 4.71a musculoskeletal system, in finality of the July 1998 rating decision.

ARGUMENT

Board [**R.at pg.10**] erred in remand of "decision only addressing the earlier effective date claim as it pertains to the evidence submitted within one year of the September 2015 claim for an increase rating for bilateral patellofemoral syndrome of the knees; where Board reasons and bases for finding and conclusions concede [**R.at pg.7**] that "Veteran raised a CUE claim challenging the July 1998 rating decision [assigned 0% rating] subject of September 2015 [CUE] motion to revise the July 1998 rating decision, [not effective date]; are inextricably intertwined adjudication(s) of the same rating claim resulting in RO April 2016

erroneous award of 10% percent for bilateral patellofemoral syndrome of the knees; not determined RO adjudication of the claim on the first instance. [**R.at pg.11**]

ARGUMENT

Board [**R.at pg. 14**] erroneously conclude "that there is no adequate and competent medical evidence in the record that support an increased risk of diabetes mellitus or kidney disease that warrants service connection at this time;" is contradicted by [**R.at pg.12**] 38 USC section 1117(a)(2); 38 CFR section 3.317(a)(2)(i)(B) "A qualifying chronic disability" [**R.at pg.13**] where September 2017 examination, examiner concluded that if the Veteran "Micoalbuminemia" is chronic; it is likely due to Veterans hypertension; not environmental exposure. Examiner explained that albumin concentration in the blood is an ***early indication of renal disease***. Micoalbuminuria is indicative of: Diabetes Mellitus; Hypertension; Cardiovascular disease; Nephropathy; Urinary bleeding;

Hemoglobinuria; or Myoglobinuria; information from the National Institutes of Health {NIH}; WHERE in contradiction Board [**R.at pg.13**] conclude: "While he had microalbuminuria at the September 2017 examination, there is no evidence that it is a chronic condition. Even if it were, the preponderance of the evidence suggest it is the result of his hypertension, a non-service connected disability.

Board erroneously concluded that examiner September 2017 examination, concluded: "there is no evidence that it is a chronic condition; WHERE examiner examination actually stated: that if the Veteran "Micoalbuminemia" is chronic; it is likely due to Veterans hypertension; is defined by 38 CFR section 3.102 reasonable doubt: "When after careful consideration of all procurable and assembled data, a reasonable doubt arises regarding service origin, the degree of disability, or any other point, such doubt will be resolved in favor of the Veteran. Reasonable doubt exist because of an approximate balance of

positive and negative evidence which does not satisfactorily prove or disprove the claim. The reasonable doubt doctrine is also applicable even in the absence of official records, particularly if the basic incident allegedly arose under combat, or similarly strenuous conditions, and is consistent with the probable results of such known hardships. [Authority: 38 U.S.C. 501]

Board is required to consider all theories of entitlement to VA benefits that are either raised by the claimant or reasonably raised by the record; See, ***Robinson v. Peake***, 21 Vet. App. 545, 553 (2008) *aff'd sub. Nom. Robinson v. Shinseki, 557 F.3d 1355 (Fed. Cir. 2009)*

"An adequate examination is "based upon consideration of the veteran's prior medical history and examinations and also describes the disability in sufficient detail so that the Board's evaluation of the claimed disability will be a fully informed one." ***Id. at 310-11*** quoting

(***Ardison v. Brown,*** 6 Vet. App. 405, 407 (1994)) (internal quotation marks omitted).

VA medical opinion is viewed under ***Hood v. Shinseki***, 23 Vet. App. 295, 296 (2009); & ***Perman v. Brown***, 5 Vet. App. 237, 241 (1993) (finding that speculative or equivocal medical opinions may be considered "non-evidence" and have no probative value); ***Obert v. Brown***, 5 Vet. App. 30, 33 (1993) (finding that VA medical opinion that are speculative, general, or inconclusive in nature cannot support a denial of a claim).

Whether a medical opinion is adequate, or the evidence preponderates for or against the presence of a current disability, is a finding of fact that the Court reviews under the "clearly erroneous" standard. ***D'Aries v. Peake***, 22 Vet. App. 97, 103 (2008) & ***McLendon v. Nicholson,*** 20 Vet. App. 79, 82 (2006).

CONCLUSION

WHEREFORE based on the evidence and arguments presented above by the Veteran demonstrate entitlement to higher evaluation rating; service connection and appropriate effective date, the Court is left with one solution to Vacate and Remand Board of Veterans Appeals June 19, 2019 decision.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on this 21 day of October 2019 Appellant file the following Informal Brief in Support of Appeal with the U.S. Court of Appeals for Veterans Claims, 625 Indiana Avenue, NW., Suite 900, Washington, D.C. 20004 with copy to the Office of the General Counsel 810 Vermont Avenue, NW., Washington, D.C. 20420, sent by certified mail.

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