IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

No. 19-3155

JOHN I. RUTCHICK

Appellant,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,

Appellee.

BRIEF OF APPELLANT

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ISSUES PRESENTED

1. Whether the Board of Veterans' Appeals (Board) provided adequate reasons or bases for the weight it assigned to the different medical opinions.

2. Whether the Board properly applied the plain language of § 1151.

3. Alternatively, whether the Board imposed a higher standard of proof than is required for § 1151 cases.

STATEMENT OF THE CASE

I. NATURE OF THE CASE.

Mr. Rutchick appeals a final Board decision that denied benefits under 38 U.S.C.A. § 1151.

A. STATEMENT OF FACTS AND COURSE OF PROCEEDINGS

Mr. Rutchick honorably served in the U.S. Army from 1964 to 1967, with service in Vietnam. R. 2528. He received the Vietnam Service Medal with one Bronze Service Star, a Bronze Star Medal, and an Army Commendation Medal, among other decorations. *Id.*

Mr. Rutchick has been service connected since 1967, for disabilities to include Post-Traumatic Stress Disorder, headaches, metatarsalgia with plantar warts, and conjunctivitis. R. 1361-66. He was granted Total Disability – Individual Unemployability (TDIU), as of October 4, 2006.[1] *Id.*

[1] Due to the nature of his service-connected disabilities, Mr. Rutchick is not eligible for special adaptive housing, an automobile grant, or special monthly

In September 2009, Mr. Rutchick was diagnosed with polymyalgia rheumatica[2] and placed on a daily dose of prednisone. R. 1300 (R. 1300-1301). His doctor advised him, at that time, to inform anyone doing any procedures on him that he was on prednisone, so that they could take the appropriate steps, such as prescribing antibiotics. *Id.*; *see generally* Prednisone, Drugs, Herbs & Supplements, MedlinePlus, U.S. NAT'L LIBRARY OF MEDICINE, NAT'L INSTITS. OF HEALTH, *available at https://medlineplus.gov/druginfo/meds/a601102.html* (last visited Nov. 7, 2019).

On March 4, 2010, Mr. Rutchick went to a VA dental office to be fitted for new dentures. R. 1300 (R. 1300-1301). While there, VA dentist Dr. Marco Rand "[did] some reduction of tooth #31, because the tooth" was super-erupted"[3] (also called an "occlusal adjustment," *see* R. 579), in order to make the upper partial denture fit better. R. R. 510. Dr. Rand did not provide any antibiotics.

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compensation. *See id*. Mr. Rutchick seeks § 1151 benefits for these ancillary benefits to improve his quality of life as a quadriplegic. *See* R. 500.

[2] Polymyalgia rheumatica is a disorder that causes muscle pain and stiffness in one's neck, shoulders, and hips. Polymyalgia Rheumatica, Health Topics, MedlinePlus, U.S.NAT'L LIBRARY OF MEDICINE, NAT'L INSTITS. OF HEALTH, *available at https://medlineplus.gov/polymyalgiarheumatica.html* (last visited Nov. 7, 2019).

[3] Super eruption occurs when a tooth emerges too far from the bone so that there isn't enough root in the jaw to hold the tooth in place. What Is Super Eruption?, SMILE COLUMBIA DENTISTRY, *available at https://www.smile columbia.com/blog/what-is-super-eruption/* (last visited Nov. 7, 2019).

Less than three weeks later, on March 26, 2010, Mr. Rutchick began losing feeling in his legs and was taken to the ER. R. 358-71. The ER doctor asked whether he had recently had any procedures, and Mr. Rutchick replied that he had had a dental procedure earlier that month. *See* R. 359 (R. 358-71). The doctor opined "this could have possibly [] caused bacteremia producing a spinal epidural abscess." *Id.* Surgical decompression was performed, as well as extensive antibiotic therapy. R. 668-69. Mr. Rutchick was subsequently discharged on April 16, 2010, with a diagnosis of "spinal epidural abscess involving thoracic and lumbar spines, status post drainage, currently on antibiotics," R. 368 (R. 358-71).

Mr. Rutchick has been diagnosed a quadriplegic, due to the spinal epidural abscess (SEA), since at least October 2010. *See* R. 33. At that time, he had "persistent neurologic deficits as a result of the abscess. Specifically, [Mr. Rutchick] fatigue[d] easily, [had] mild cognitive dysfunction, right leg weakness, right arm/shoulder weakness, chronic neuropathic pain and [was] being monitored for neurogenic bladder and bowel dysfunction." R. 669 (R. 668-69).

Almost two weeks after being discharged, Mr. Rutchick returned to the VA, complaining of tooth discomfort. R. 478. His #18 tooth was then extracted on April 30, 2010.[4] *Id.*

[4] The extracted tooth and the tooth with the occlusal adjustment were not the same. *Compare* R. 510 *with* R. 478. The two teeth are both on the lower jaw, but are on opposite sides of the mouth.

On June 3, 2010, Mr. Rutchick filed a claim for § 1151 benefits, claiming that it was negligent for Dr. Rand not to administer him antibiotics prior to the dental fitting. R. 1300-1301; *see also* R. 1304-1307. The Regional Office (RO) denied the claim on July 14, 2011. R. 722-30. Mr. Rutchick filed a timely Notice of Disagreement, R. 1308, and two days later, submitted a personal statement. R. 1304-1305; *see* R. 675-76.

Mr. Rutchick also submitted a statement from Dr. Patrick F. Doherty. R. 668-69. Dr. Doherty explained that, while Mr. Rutchick was hospitalized, "fluid samples revealed that [Mr. Rutchick] was suffering from a [SEA]. The organism identified was Streptococcus viridans, which is an organism consistent with oral flora." R. 668 (R. 668-69). Dr. Doherty continued that he could "state within a reasonable degree of medical certainty that the dental procedure performed on March 4, 2010 led to the introduction of the Streptococcus viridans, which caused the life & function threatening holospinal abscess. This is further substantiated by the timeline and the severity of the infection." *Id.* Finally, he opined "[a]s a result of the combined deficits, as a direct sequela of the holospinal abscess, [Mr. Rutchick's] degree of permanent disability is 100%." *Id.*

In light of this additional evidence, the RO requested a medical opinion on whether it was negligent for Dr. Rand to not have prescribed prophylactic antibiotics. *See* R. 580. Dr. Franklin E. McPhail, Chief of the Dental Department

at the Augusta VA Medical Center, provided the opinion on December 7, 2011. R. 579. He explained that current medical practices did not require prophylactic antibiotics for this type of procedure, as it was non-invasive. He further explained the procedure was "no more likely to cause systemic infection than normal daily routine including brushing, flossing, and eating." *Id.* Dr. Joseph Korwin, Medical Support Supervisor, concurred in Dr. McPhail's opinion, R. 580, and later explained "the veteran's [SEA] is considered a rare incident." R. 518.

Mr. Rutchick's Paralyzed Veterans of America representative submitted additional information on December 19, 2011, requesting that Mr. Rutchick be considered for loss of use, to enable him to receive the Special Adaptive Housing and Auto grant, and for Special Monthly Compensation at the R-1-level. R. 581. The representative noted that his "neurogenic bladder [had] gotten worse along with his extremity weaknesses." *Id.* She continued Mr. Rutchick had been "issued a scooter by the CNVAMC on 12/19/11 due to the increased lower extremity weakness" and that he "also has been issued a cane." *Id.* She further explained that Mr. Rutchick was "in need of aid & attendance. He need[ed] help consisting of cooking, cleaning, administering his medication, i.e. []he [was] unable to open the bottles and he [was] unable to handle the pills due to fine motor movement loss in the hands. He need[ed] assistance with bathing and dressing." *Id.*

The RO issued a Statement of the Case on May 10, 2013. R. 1321-38. Mr. Rutchick filed a VA Form 9, dated May 31, 2013. R. 493-97, R. 502-510, *see also* R. 471-492. The VA received this and other documents, to include treatise information and a second copy of the July 2011 letter from Dr. Doherty, on August 16, 2013. R. 414-16, R. 417-28, R. 429-47, R. 448-58, R. 475-77. Included in the treatise information was an excerpt from the *Merck Manual*, which noted that "clinicians should consider [the] diagnosis [of spinal epidural abscess] if patients have significant atraumatic back pain, particularly . . . if they have a fever or have had a recent infection or *dental procedure*." R. 414 (R. 414-16) (emphasis added). An article entitled "Spinal Epidural Abscess: a Diagnostic Challenge" in the journal *American Family Physicians* also noted "predisposing conditions [of SEA] include a compromised immune system." R. 417 (R. 417-28). An excerpt from the book *Infections in Neurosurgery* noted "*Streptococcus* species are the second most common isolates and often are the organisms cultured in patients with concomitant pneumonia *or who have recently undergone dental procedures*." R. 439 (R. 429-47) (emphasis added).

Thereafter, the RO sought another medical opinion. R. 337-40. The RO noted "we have conflicting medical evidence from different providers as to whether the dental treatment on March 4, 2010, is the direct cause of the Veteran's subsequent [SEA] and associated symptoms and disabilities." R. 340 (R. 337-40).

The RO then asked the dental expert to address the issue of proximate causation and whether the outcome was reasonably foreseeable. *Id.* The instructions continued that "if a positive opinion [was] rendered for any of the above questions," the examiner should "schedule the Veteran for a full examination to determine the current severity" of the conditions. *Id.*

On July 10, 2014, Dr. Z.W. Rajnay, Chief of Dental Services at the Dublin VA Medical Center, opined that it would be "mere speculation" to say the "extraction of the molar tooth #19 or cleaning caused the spinal abscess."[5] R. 331-32; *see also* R. 240-44. Based on this, and even though the opinion was not responsive to the questions posed, the RO again denied Mr. Rutchick's claim. R. 301-10. A personal hearing took place on December 3, 2014 at a VA RO, wherein Mr. Rutchick added a new theory that he was entitled to § 1151 benefits based on the fact that the events were not reasonably foreseeable. R. 256-89.

After the hearing, the RO sought yet another medical opinion. R. 250-52. The requester specifically asked the examiner to opine on the issue of reasonable foreseeability and *not* the issue of negligence. *Id.* In response, Dr. Rajnay forwarded a copy of his previous opinion. R. 247-48. The requester followed up with Dr. Rajnay again via email, specifically asking him to opine on whether the

[5] To be clear, the extraction of the molar tooth #18, not #19, took place *after* Mr. Rutchick had been hospitalized for an SEA. The occlusal adjustment was of tooth #31. *Compare* R. 510, R. 579 *with* R. 478.

residuals would have been reasonably foreseeable. R. 241 (R. 240-44). Dr. Rajnay replied that the spinal abscess was "an event not reasonably foreseeable." *Id.* (emphasis in original).

The requester followed up again with Dr. Rajnay, explaining that if the doctor was answering the second part of the § 1151 causation analysis in the affirmative, that he was also stating that it was "at least as likely as not" that the procedure led to the development of the spinal abscess. R. 240 (R. 240-44). In response, Dr. Rajnay stated "***I think I see what you mean***." *Id.* (emphasis added). He continued "the development of the abscess was an unforeseeable event that may or may not have any ties to the tooth extraction. . . . I would say that the spinal abscess IS LESS LIKELY AS NOT (LESS THAN A 50/50 PROBABILITY) CAUSED BY OR A RESULT OF the extraction or dental cleaning." *Id.* (emphasis in original)

B. THE BOARD'S MARCH 30, 2019, DECISION

The Board held that Mr. Rutchick's residuals of an extended SEA were not actually or proximately caused by VA treatment. R. 4-21. To reach this conclusion, the Board noted the "December 2011 VA opinion of Dr. [McPhail was] persuasive that the treatment provided was non-invasive and did not likely cause the infection that led to a spinal abscess." R. 15-16 (R. 4-21). It continued that Dr. McPhail's opinion was "supported by the information and causation

opinion provided by Dr. [Rajnay] in March and April 2015" and that no negligence was shown on the part of the VA dentist. R. 16 (R. 4-21). With regard to Dr. Doherty's opinion, the Board held that it was not probative, as Dr. Doherty had failed to explain the relevance of his determination that the severity of the SEA and the proximity in time to the dental procedure substantiated his assertions that the SEA was caused by the dental fitting and occlusal adjustment. R. 17 (R. 4-21).

Finally, the Board concluded "in light of [the] determination that there was no actual or proximate causation . . . the Veteran's claims that he had not given informed consent for that treatment and that his SEA was an event not reasonable foreseeable are moot." R. 17 (R. 4-21).

SUMMARY OF ARGUMENT

Mr. Rutchick seeks § 1151 benefits for residuals of an SEA, resulting from a visit to a VA dentist. The basic facts of this case are not in dispute: Mr. Rutchick went to a VA dentist to be fitted for new dentures, which required having his teeth adjusted. At the time, he was not a quadriplegic. A few weeks later, Mr. Rutchick went to the emergency room, where he was diagnosed with an SEA. When the fluid from the abscess was cultivated, it showed that the infection stemmed from a bacteria typically found in the oral cavity. Despite extensive treatment in the hospital, Mr. Rutchick is now a quadriplegic.

Mr. Rutchick presented evidence from his treating neurologist that the VA dental procedure caused the SEA, which led to his current state of quadriplegia and accompanying residuals. Two VA medical experts opined that the event was not reasonably foreseeable. Despite this favorable evidence, the Board found that the dental treatment did not actually or proximately cause Mr. Rutchick's SEA.

The Board's decision is wrong. It misstates the evidence before it, focuses on information that is irrelevant, fails to give favorable medical opinions the proper weight, and relies on evidence that not only should never have been obtained but is biased and lacking a foundation. Moreover, the Board applied the wrong standard in denying the claim. Had the Board applied the correct standard, it should have granted Mr. Rutchick his benefits.

Therefore, as all of the relevant evidence – when properly viewed – is in Mr. Rutchick's favor, the Court should vacate the Board's decision and grant Mr. Rutchick benefits under 38 U.S.C. § 1151.

ARGUMENT

I. JURISDICTION AND STANDARD OF REVIEW.

Mr. Rutchick timely appeals the March 30, 2019, final Board decision, giving this Court jurisdiction to hear his appeal under 38 U.S.C.A. § 7252 (West 2014). Mr. Rutchick timely filed his Notice of Appeal on May 13, 2019, in accordance with 38 U.S.C.A. § 7266 (West 2014) and VET. APP. R. 4.

Mr. Rutchick presents both questions of law and questions of fact to the Court. The question of whether adequate reasons or bases has been provided is a question of law, which the Court reviews *de novo*. *Butts v. Brown*, 5 Vet.App. 532, 539 (1993). The amount of weight given to a medical opinion is reviewed under the clearly erroneous standard. *D'Aries v. Peake*, 22 Vet.App. 97, 108 (2008). The question of statutory interpretation is also a question of law, which the Court reviews *de novo*. *Id.*

II. THE HISTORY OF § 1151 ESTABLISHES THE FRAMEWORK FOR THIS CASE.

As was recently reiterated by the Federal Circuit, section 1151 "has a long history and is used 'typically to provide benefits to veterans for nonservice related disabilities' resulting from VA medical care. *Brown v. Gardner*, 513 U.S. 115, 116 n.1 … (1994), …; *see also Viegas [v. Shinseki]*, 705 F.3d [1374,] 1381-82 [(Fed. Cir. 2013)]." *Ollis v. Shulkin*, 857 F.3d 1338, 1341 (Fed. Cir. 2017). Specifically, section 1151(a) provides that compensation "shall be awarded for a qualifying additional disability." 38 U.S.C.A. § 1151(a) (West 2014).

The statute continues that

> a disability or death is a qualifying additional disability or qualify death if the disability or death was not the result of the veteran's willful misconduct and –
>
> > (1) the disability or death was caused by hospital care, medical or surgical treatment, or examination furnished the veteran under any law administered by

> the Secretary, either by a Department employee or in a Department facility as defined in section 1701(3)(A) of this title, and the proximate cause of the disability or death was –
>
> > (A) carelessness, negligence, lack of proper skill, error in judgment, or similar instance of fault on the part of the Department in furnishing the hospital care, medical or surgical treatment, or examination; or
> >
> > (B) an event not reasonably foreseeable.

Id.

It is clear, therefore, that section 1151 cases involve three distinct analyses: (1) whether there is a qualifying additional disability (2) " 'caused by hospital care, medical or surgical treatment, or examination furnished' by the VA or in a VA facility," " and (3) whether the " 'proximate cause' of the veteran's disability" was due to a showing of negligence *or* " 'an event not reasonably foreseeable.' " *Viegas v. Shinseki*, 705 F.3d 1374, 1377 (Fed. Cir. 2013) (citing 38 U.S.C. § 1151(a)) (emphasis added).

Here, there is no question that Mr. Rutchick suffers from a "qualifying additional disability" – he was not a quadriplegic prior to the VA dental procedure and he became one shortly thereafter. R. 31, R. 33. There is also no question that Mr. Rutchick received VA care prior to contracting the "qualifying additional disability." R. 510. Finally, there is no question that the second causation element – that the event was not reasonably foreseeable – was met; VA's own Chief of

Dental Service *and* Chief of Compensation & Pension Service stated that this event was "not reasonably foreseeable" and "rare." R. 241 (R. 240-44), R. 518.

The only question before the Board, then, should have been whether Mr. Rutchick's injury was " 'caused by' the medical treatment or hospital care he received from the VA," *Viegas*, 705 F.3d at 1378, and based on Dr. Doherty's uncontradicted opinion, Dr. McPhail's opinion, and the supporting treatise information, Mr. Rutchick believes the answer is "yes."

III. THE BOARD'S ERRONEOUS ANALYSIS OF THE MEDICAL EVIDENCE LED TO AN INCORRECT CONCLUSION.

While the Board is charged with assessing the medical evidence before it, its reasons or bases for how it reached its determination of credibility and probative value must be adequate. *See Evans v. West*, 12 Vet.App. 22, 30 (1998). The Board fails to provide this here.

A. The Board's Focus on the Non-invasive Nature of the Procedure Is a Red Herring.

The Board noted that Dr. McPhail's opinion was persuasive, as he specifically noted that the procedure performed was non-invasive. R. 16 (R. 4-21). The Board continued Dr. Doherty's opinion was unpersuasive, as "no explanation was provided as to how the oral flora attributed to the SEA might be related to *non-invasive* VA dental treatment." *Id.* (emphasis added).

The fact that the VA dental procedure in question was non-invasive is a red herring. *See* BLACK'S LAW DICT. 1026 (7th ed. Abridged 2000). First, Dr. McPhail's focus on the non-invasive nature of the procedure is taken out of context. *See* R. 579. Dr. McPhail was addressing whether Dr. Rand should have provided prophylactic antibiotics, not whether one type of procedure would be more or less likely to lead to an SEA. *See id.* In other words, the Board is erroneously using Dr. McPhail's opinion to answer a question that was not asked of him and is extrapolating medical conclusions that were not provided. *Cf. Colvin v. Derwinski*, 1 Vet.App. 171, 172 (1991) (holding the Board cannot rely on its own unsubstantiated medical opinion).

Second, whether there is a higher likelihood of contracting the infection through an invasive procedure – a fact Mr. Rutchick does not concede and does not think the record supports[6] – does not shed light on whether Mr. Rutchick *could* have contracted the infection through *his* actual procedure, keeping in mind he was on prednisone. *See id*.; R. 417 (R. 417-28), R. 424 (R. 417-28); *see also Cohen v. Brown*, 10 Vet.App. 128, 141 (1997) (explaining the "eggshell plaintiff" rule of

[6] The record does not support the Board's assessment that the evidence of record shows "a lesser degree of association to non-invasive dental procedures." *See* R. 414 (R. 414-16), R. 424 (R. 417-28), R. 439 (R. 429-47) *with* R. 331 (R. 330-32). Moreover, the UpToDate information that Dr. Rajnay's references, which is a medical website often used by VA doctors, only states that where the "portal of entry can be identified, the most common sites of origin [for the source of the infection] are infections of skin and soft tissues and complications of spinal surgery or other invasive procedures." R. 331 (R. 330-32).

torts). That is, the Board was not tasked with comparing the likelihoods of the different ways one can contract this infection; the Board was only tasked with determining whether the actual procedure performed could have led to the infection in Mr. Rutchick. *See* VA Gen. Counsel. Prec. Op. 7-97 (Jan. 29, 1997) (VAOPGCPREC 7-97); *see Cohen*, 10 Vet.App. at 141.

As the Board's focus on the non-invasive nature of the procedure led it down an irrelevant path and to ignore the actual question presented, the Court should vacate the decision. *See* 38 U.S.C.A. § 7261(a)(1) (West 2014); 38 U.S.C.A. § 7104(d)(1) (West 2014); *Evans*, 12 Vet.App. at 30.

B. The Board Misstated Dr. McPhail's Conclusion, Thereby Incorrectly Categorizing the Evidence as Unfavorable.

The Board found Dr. McPhail's opinion "persuasive," in "that the treatment provided was non-invasive and did not likely cause the infection that led to a spinal abscess." R. 15-16 (R. 4-21). This is not what Dr. McPhail opined. R. 579.

Dr. McPhail stated the VA dental procedure was "*no more likely* to cause systemic infection than normal daily routine including brushing, flossing, and eating," ***not*** that the procedure "did not likely cause the infection." *Compare* R. 579 *with* R. 15-16 (R. 4-21). The actual words make a difference: Dr. McPhail's language speaks to a comparison between the procedure and one's "normal daily" oral health routine, and concludes that the procedure was not *more*

likely to cause the infection than one's daily routine, i.e. it was just as likely as one's daily routine.

Therefore, contrary to the Board's finding, Dr. McPhail's conclusion puts the two listed possibilities for contracting the infection – the dental procedure and brushing one's teeth – in equipose, and is therefore favorable evidence of causation for Mr. Rutchick . 38 U.S.C.A. § 5107(b) (West 2014); *see Wise v. Shinseki*, 26 Vet.App. 517, 530-32 (2014). The Board's finding otherwise is a perversion of Dr. McPhail's opinion and should be reversed. 38 U.S.C.A. § 7261(a)(4).

C. The Board Erred When It Essentially Dismissed Dr. Doherty's Opinion For Failing to Explain How the Timeline and Severity Substantiated His Opinion that the Dental Procedure Led to the SEA.

The Board acknowledged that Dr. Doherty "asserted the timeline and severity of the infection further substantiated the etiology opinion." R. 18 (R. 4-21). The Board continued, however, that since "no rationale was provided as to how it was determined that timeline and severity substantiated the opinion," less weight should be given. *Id.*

The Board's analysis misunderstands what information a doctor needs to provide for an opinion to be probative. *See Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 302-304 (2008); *Stefl v. Nicholson*, 21 Vet.App. 120, 124-25 (2007); *see also generally Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592 (1993) (explaining expert testimony is helpful to a court because the expert is

relying on the "knowledge and experience of his discipline"). In *Stefl*, the Court held that "a mere conclusion by a medical doctor is insufficient to allow the Board to make an informed decision as to what weight to assign the doctor's opinion." *Stefl*, 21 Vet.App. at 125. Thus, a doctor "must support [his or her] conclusion with an analysis that the Board can consider and weigh against contrary opinions." *Id.* at 124.

Here, Dr. Doherty did just that. He began his opinion that "within a degree of medical certainty [] the dental procedure performed on March 4, 2010 led to the introduction of the Streptococcus viridans, which caused the life & function threatening holospinal abscess." R. 668 (R. 668-69). He then took the next step and provided analysis, that his opinion is "substantiated by the timeline and the severity of the infection." R. 668 (R. 668-69); *see generally Daubert*, 509 U.S. at 592; *see also Althen v. Sec'y of Health & Human Servs.*, 418 F.3d 1274, 1278 (Fed. Cir. 2005) (explaining that to establish "causation in fact" under the National Childhood Vaccine Injury Act, a petitioner must provide "(1) a medical theory causally connecting the vaccination and the injury; (2) a logical sequence of cause and effect showing that the vaccination was the reason for the injury; and (3) *a showing of a proximate temporal relationship between the vaccination and injury*").

This is all that is required for a medical opinion to be probative and the Board erred in essentially dismissing Dr. Doherty's opinion for not providing more. *See Nieves-Rodriguez*, 22 Vet.App. at 301-304; *Stefl*, 21 Vet.App. at 124-25; *see also generally Daubert*, 509 U.S. at 592; *Evans*, 12 Vet.App. at 30. As such, the Board's finding that Dr. Doherty's opinion should essentially be ignored should be reversed. *See D'Aries*, 22 Vet.App. at 108.

D. Dr. Rajnay's Opinions Should Be Discarded As They Never Should Have Been Obtained, Discussed the Wrong Procedure, And Were Biased.

During a denture fitting, Dr. Rand did an occlusal adjustment on tooth #31, which was super-erupted. R. 510, R. 579. Mr. Rutchick claims that that procedure introduced the bacteria into his system, which led to his quadriplegia. R. 1300-1301. As noted above, Dr. Rajnay provided an initial opinion on July 10, 2014, that it would be "mere speculation" to say "extraction of the molar tooth #19 or cleaning caused the spinal abscess." R. 331-32. In response to a VA adjudicator's email regarding whether the event was reasonably foreseeable, Dr. Rajnay responded with this same opinion. R. 247-48.

Realizing that this opinion did not address the question presented, although not asking him to focus his opinion on the correct tooth or the correct procedure, the VA adjudicator followed up with Dr. Rajnay and specifically asked him to opine on whether the spinal abscess was an event reasonably foreseeable. R. 241

(R. 240-44). Dr. Rajnay responded, opining the spinal abscess was "an event not reasonably foreseeable." *Id.* (emphasis in original). The VA adjudicator once again followed up with Dr. Rajnay, explaining that if he was stating that the event was not reasonably foreseeable, that he was implicitly stating that the dental procedure had caused the SEA. R. 240 (R. 240-44). Dr. Rajnay responded that he "thinks he sees what [the adjudicator] mean[t]."

Dr. Rajnay's opinions on "actual causation" never should have been obtained, *see Mariano v. Principi*, 17 Vet.App. 305, 312 (2003), but once they were, they should have been given no weight. *See Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 302-304 (2008).

1. The Secretary Should Not Gather Evidence Against a Case.

In *Mariano*, the Court held "it would not be permissible for VA to undertake such additional development if a purpose was to obtain evidence against an appellant's case." *Mariano v. Principi*, 17 Vet.App. 305, 312 (2003) (explaining the Secretary cannot obtain evidence for the purpose of obtaining evidence against an appellant's case); *see also Colayong v. West*, 12 Vet.App. 524, 534-35 (1999) (explaining the VA cannot suggest the answer it wants in its correspondence with the examiner). In a roundabout way, this is what happened here.

At the time that the Secretary requested the opinion from Dr. Rajnay, Dr. Doherty, Dr. McPhail, and the treatise evidence provided by Mr. Rutchick had

already addressed the question of actual causation. *See supra* Arg. III (A)-(C); *infra* Arg. IV. The *only* question that Dr. Rajnay was tasked with answering was the issue of proximate causation. R. 337-40.

This, however, is not what occurred. Once Dr. Rajnay answered the § 1151(a)(1) question in the affirmative – that the event was not reasonably foreseeable – then the VA adjudicator improperly raised the question of "actual causation." R. 240 (R. 240-44). *See Mariano*, 17 Vet.App. at 312; *Colayong*, 12 Vet.App. at 534-44.

Yet, there is no reason for the Secretary to ask Dr. Rajnay to address proximate causation and then instruct him to assess the degree of additional disability, if the issue of actual causation has not already been answered to the Secretary's satisfaction. *See Viegas*, 705 F.3d at 1377 (delineating the three-step analysis that must take place for an § 1151 claim). This puts the cart before the horse, *see Paroline v. Unites States*, 572 U.S. 434, 444 (2014) (explaining proximate causation requires two separate inquiries, with the first being did the former cause the latter), and is a waste of government resources. *See Douglas v. Shinseki*, 23 Vet.App. 19, 22 n.1 (2009) (explaining inherent in the Secretary's duties is the duty to protect the public fisc).

Therefore, as there was no legitimate reason for the Secretary to gather further information on this specific issue and its method was improper under

Mariano, the Court should find that Dr. Rajnay's opinion on actual causation should be ignored. *See D'Aries*, 22 Vet.App. at 108.

2. If the Court Disagrees that Dr. Rajnay's Opinion Should Be Ignored under *Mariano*, the Court Should Still Find the Opinions Should Have Been Given No Weight, As They Are Based on a False Foundation.

For a medical opinion to be given any weight, its foundation must be accurate. *See Nieves-Rodriguez*, 22 Vet.App. at 302-304. Dr. Rajnay's opinions merit no weight because he offered his opinion about the *wrong* tooth and the *wrong* procedures. R. 16 (R. 4-21). Mr. Rutchick is not claiming that the extraction, which took place after he was hospitalized, caused his spinal abscess, nor that any cleaning did. *See* R. 1300-1301. Rather, Mr. Rutchick asserts a problem occurred during the denture fitting and subsequent adjustment to his super-erupted tooth, #31.[7] *See* R. 1300-1301; *see also* R. 510 (noting reduction of tooth #31); *Cohen*, 10 Vet.App. at 141. Therefore, as the foundation for the opinion is wrong, the Board erred in giving Dr. Rajnay's opinions any weight. *See Nieves-Rodriguez*, 22 Vet.App. at 302-304.

[7] Dr. Rajnay was also incorrect with which tooth was extracted. Mr. Rutchick's #18 molar was extracted, not #19. R. 478.

3. If the Court Disagrees that Dr. Rajnay's Opinion Should Be Ignored under *Mariano*, the Court Should Still Find that the Opinion Should Have Been Given No Weight, As Dr. Rajnay's April 2015 Opinion Is Biased.

In response to the VA adjudicator's email stating that, if Dr. Rajnay was stating the event was not reasonably foreseeable, he was also stating "it [was his] opinion that the extraction/dental procedure at least as likely as not led to the development of the spinal abscess," R. 240 (R. 240-44), Dr. Rajnay wrote "I think I see what you mean." *Id.*

This is the very essence of a biased opinion. Dr. Rajnay's answer hedges on whether he even understands what the adjudicator is asking of him, presumably trying to opine in a way that he thinks will give the adjudicator a certain answer. He further exemplifies his lack of understanding by stating the "main point from [his] perspective is that [he] did not find evidence of negligence on the part of the dentist who extracted the tooth," a point entirely irrelevant for an analysis based on whether the event was reasonably foreseeable. R. 240 (R. 240-44); *compare* 38 U.S.C.A. § 1151(a)(1)(a) *with* 38 U.S.C.A. § 1151(a)(1)(b).

If the "expert" does not understand the premise of the question and goes out of his way to demonstrate this, there should be no reliance on his opinion and the Board erred in finding Dr. Rajnay's opinion reliable. *See Guerrieri v. Brown*, 4 Vet.App. 467, 470-71 (1993) (explaining the probative value of a medical opinion is based, in part, on the physician's knowledge and skill in analyzing the data).

E. Had the Board Properly Analyzed the Evidence, It Would Have Found In Mr. Rutchick's Favor and So Should the Court.

Taken individually, each of these errors generally requires the Court to vacate the Board's decision and remand for readjudication. *See Gutierrez v. Principi*, 19 Vet.App. 1, 10 (2004). But the Court should not confuse the forest and the trees.

When these erroneous opinions are set aside though, the Court is left with only favorable evidence that the VA dental procedure caused Mr. Rutchick's SEA, that the event was not reasonably foreseeable, *see infra* Arg. IV, and that Mr. Rutchick has suffered from an additional disability because of it. Therefore, the Court should vacate and reverse the Board's decision. *See Gutierrez*, 19 Vet.App. at 10.

IV. THE BOARD'S FAILS TO UNDERSTAND THE ROLE OF PROXIMATE CAUSATION IN A § 1151 CASE.

The Board held that Mr. Rutchick had not established proximate causation and therefore, that the issue of whether Mr. Rutchick's SEA was an "event not reasonably foreseeable" was moot. R. 17 (R. 4-21). The Board also found that Dr. Korwin's opinion "that the Veteran's SEA was considered to be a rare incident with no way of knowing if it could have been due to negligent dental care [did] not specifically address the issues of actual or proximate causation." R. 16 (R. 4-21).

The Board misunderstands that veterans making claims based on medical care have two alternative ways to establishing proximate causation for § 1151 purposes; either a veteran establishes "the proximate cause of the death or disability" was "negligence" ***or*** "an event not reasonably foreseeable." 38 U.S.C.A. § 1151(a)(1) (emphasis added); *F.C.C. v. Pacifica Found.*, 438 U.S. 726, 739-40 (1978) (holding when a statute uses the disjunctive "or," each term has separate meaning); *Viegas*, 705 F.3d at 1378.

Thus, while Dr. Korwin agreed with Dr. McPhail that Dr. Rand's actions did not rise to the level of negligence, Dr. Korwin's statement that the SEA "was considered to be a rare incident" *does* address whether the event was "reasonably foreseeable," and therefore *does* address the issue of proximate causation. 38 U.S.C.A. § 1151(a)(1)(B). The Board's failure to understand that there are two different ways to establish proximate causation exemplifies the Board's misapplication of the law, and requires the Court to vacate the decision. 38 U.S.C.A. § 7261(a)(3)(A).

V. ALTERNATIVELY, THE BOARD IMPOSED THE WRONG STANDARD WHEN IT REQUIRED MR. RUTCHICK TO ESTABLISH THAT HIS VA DENTAL TREATMENT LIKELY CAUSED THE SPINAL ABSCESS.

In rendering its decision, the Board held that Mr. Rutchick was not entitled to § 1151 benefits because the "treatment provided was non-invasive and did not

likely cause the infection that led to a spinal abscess." R. 16 (R. 4-21). This is the wrong analysis.

The Federal Circuit has made clear that the "caused by" language, found in 38 U.S.C.A. § 1151(a)(1), simply connotes a basic causation requirement. *Ollis v.*, 857 F.3d at 1341-43; *see generally* VAOPGCPREC 7-97. It does not speak in terms of likelihoods or the "necessary degree of causal connection," *see* VAOPGCPREC 7-97 at 3; but rather, as the Supreme Court and VA's General Counsel has previously noted, merely requires a plausible causal link. *See Burrage v. United States*, 571 U.S. 204, 212 (2014) (acknowledging that while "courts regularly read phrases like 'results from' to require but-for causality, there can be "contextual indication to the contrary"); *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, (1985) (explaining the VA process is "designed to function throughout with a high degree of informality and solicitude for the claimant"); VAOPGCPREC 7-9 at 11.

The Board's determination otherwise, that the claimant must show that the VA procedure *likely* caused the additional disability, is not grounded in statute, case law, or agency precedent. *Cf.* 38 U.S.C.A. § 7104(b). The Court should therefore vacate the Board's decision, apply the proper standard, and grant Mr. Rutchick's § 1151 benefits. *See Gutierrez*, 19 Vet. App. at 10.

A. Neither the Governing Statute Nor Regulation Address the Question of How the VA Should Determine Whether There Is a Causal Connection Between the VA Medical Care and the Additional Disability.

When interpreting a statute, the Supreme Court, the Federal Circuit, and this Court have all been clear, the analysis begins with the plain language. *See Chevron*, *U.S.A., Inc. v. Nat. Resources Def. Council*, 467 U.S. 837, 842-43 (1984); *Procopio v. Wilkie*, 913 F.3d 1371, 1375-76 (Fed. Cir. 2019); *Atilano v. Wilkie*, 31 Vet.App. 272, 279-80 (2019). If the statutory language is ambiguous or does not answer the question presented, the reviewing court will give deference to an agency's interpretation set out in regulation. *See Chevron*, 467 U.S. at 842-43; *Quattlebaum v. Shinseki*, 25 Vet.App. 171, 176-77 (2012); *Jensen v. Shulkin*, 29 Vet.App. 66, 71 (2017).

If no regulation has been promulgated that directly addresses the issue, other agency interpretations, such as a General Counsel's opinion, can be persuasive. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *see also Mulder v. Gibson*, 27 Vet.App. 10, 18 (2014) (explaining that General Counsel opinions "constitute a body of experience and informed judgment" which the Court reviews for *Skidmore* power to persuade).

Here, neither the statute nor the regulation address *what* standard the Board should apply for determining whether a causal link exists. *Compare* 38 U.S.C.A. § 1151(a)(1); 38 C.F.R. § 3.361(c)(1) (2018) *with* 28 U.S.C.A. § 1346(b)(1) (West

2014) (applying state law to determine causation). The statute states "the disability or death was caused by hospital care, medical or surgical treatment, or examination furnished the veteran under any law administered by the Secretary." 38 U.S.C.A. § 1151(a)(1). It does not elaborate on *how* the claimant establishes the causal link or what standard should be used to assess whether the claimant has provided sufficient evidence of such a link.

The regulation fares no better. Section 3.361(c)(1) speaks in terms of what is not sufficient – "[m]erely showing that a veteran received care, treatment, or examination and that the veteran has an additional disability or died does not establish cause" – but does not explain what a veteran *should* show to establish the connection. *Compare* 38 C.F.R. § 3.361(c)(1) *with Althen*, 418 F.3d at 1278.

Therefore, as the plain language of the statute is not controlling and *Chevron* deference is not warranted to the agency's regulation, the Court should consider whether any other persuasive interpretations have been offered. *See Skidmore*, 323 U.S. at 140; *see Mulder*, 27 Vet.App. at 18.

B. VA's General Counsel Has Opined that, If the Specific Cause of the Injury Cannot Be Determined, the Benefit of the Doubt May Apply.

While the statute and regulation do not address the specific question before the Court, the agency has provided a persuasive General Counsel opinion. *Skidmore*, 323 U.S. at 140; *see Mulder*, 27 Vet.App. at 18.

In VA General Counsel Precedent Opinion 7-97, the VA General Counsel acknowledged that it "may be difficult in individual cases to determine whether an injury was caused by a condition or circumstance of hospitalization or was merely incurred coincident with hospitalization, but due to some other cause." VAOPGCPREC 7-97, at 5. The General Counsel continued that such a question "is basically a question of fact to be resolved by the factfinder" and "*in the absence of statutory or regulatory guidance* in making that determination," "some relevant guidance may be drawn from" other areas of federal law. *Id.* at 6 (emphasis added).

Looking at worker's compensation claims, the General Counsel explained that there are three types of cases: those associated with the employment, those personal to the claimant, and "neutral risks." *Id.* The General Counsel explained for the third category, courts have "presume[d] that such 'neutral' injuries arise out of employment, in view of the beneficient purposes of the worker's compensation statutes." *Id.* Finally, the General Counsel explained that when the specific cause of the injury during VA medical care "cannot be determined, the benefit-of-the-doubt doctrine in 38 U.S.C. § 5107(b) may militate in favor of a conclusion" that the incident "was attributable to the circumstances or conditions of" VA medical care, provided the claim was well-grounded. *Id.* at 11.

The General Counsel's opinion is well-supported, with analysis of other similar areas of law, and is not only consistent with the plain language of the statute, but also with the nonadversarial nature of the VA benefits scheme. *Mulder*, 27 Vet.App. at 18. The Court should therefore apply the General Counsel's conclusion that when the specific cause cannot be determined with certainty, as may be the case here even with the supporting letter from Dr. Doherty, the "benefit-of-the-doubt doctrine" would "militate" in Mr. Rutchick's favor, and award him § 1151 benefits. *See* VAOPGCPREC 7-97, at 11.

CONCLUSION

Based on the foregoing, Mr. Rutchick requests that the Court (1) vacate the Board's decision that he was not entitled to § 1151 benefits; (2) find Dr. Doherty and Dr. McPhail's opinions to be favorable; (3) find Dr. Rajnay's opinions to be inadequate for rating purposes; (4) and grant Mr. Rutchick § 1151 benefits.

Alternatively, Mr. Rutchick requests that the Court (1) vacate the Board's decision, (2) hold that the benefit-of-the-doubt should apply if the exact etiology cannot be definitively determined; and (4) award Mr. Rutchick § 1151 benefits.

Finally, if the Court does not agree that reversal is warranted here, Mr. Rutchick requests that the Court vacate the Board's decision and remand with instructions to readjudicate the claim within the parameters that Dr. Doherty and

Dr. McPhail's opinions are both favorable evidence and that Dr. Rajnay's opinions lack any probative value.

Respectfully submitted,

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