UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

Vet. App. No. 18-7183

DONIS PARKER,

Appellant,

v.

ROBERT L. WILKIE, M.D.,
Secretary of Veterans Affairs,

Appellee.

BRIEF FOR APPELLANT

Alan J. Nuta, Esq,
9529 Ash Hollow Place
Montgomery Village, MD 20886
240-401-7490

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STATEMENT OF THE CASE

Mr. Parker (the "Veteran") served honorably in the U.S. Army from February, 1968, to February, 1970. R. at 152 (DD 214) He was stationed on Okinawa, Japan, from September, 1969, to February, 1970, R. at 84 (84-85) in the 137th Ordinance Company. He died in August, 2008, due to Shy-Drager Syndrome and suspected myocardial infarction. R. at 595

In 2007, Mr. Parker filed for service-connected compensation, based on exposure to Agent Orange while he was stationed in Okinawa. R. at 1104-1113. In addition to direct exposure to Agent Orange in Okinawa, he claimed that " . . . my job exposed me to what ever entered or left 'Vietnam' including the dogs used in Vietnam". R. at 796, See also 774-775

After the Veteran's death, Mrs. Donis Parker ("Mrs. Parker" or the "Appellant") filed a claim. R. at 747-748 See also the DIC claim, R. at 507, in which the Appellant claims the Veteran was exposed to Agent Orange in Okinawa.

She was being advised by an attorney, who was not accredited by the VA. R. at 476. In a BVA remand dated June 22, 2015, the Appellant was advised to get a different representative. R. at 162 (159-164) The Appellant said she would represent herself. R. at 155

On September 26, 2018, the Board of Veterans' Appeals ("BVA") issued a Decision (R. at 3-18). In that Decision, the Veterans Law Judge ("VLJ") ruled that there was new and material evidence to reopen the claim for entitlement to service connection for the Veteran's death. The VLJ then denied the claim for service connection. R. at 7 (3-18)

On November 12, 2015, the Joint Services Records Research Center confirmed that the Veteran's unit was stationed in Okinawa during 1969-1970 but that they were unable to locate the unit's records. Therefore, they were "unable to verify or document that Mr. Parker was exposed to Agent Orange or other tactical herbicides as a result of being exposed to supplies that passed through . . . " R. at 136-138

In December, 2015, the Appellant wrote that the Air Force notified the VA that Agent Orange type herbicides were stored in Okinawa, and that a recent BVA decision granted service connection to Agent Orange exposure in Okinawa. R. at 127

In addition, the Appellant filed several documents in support of her claim, including but not limited to information she was submitting from the History News Network. R. at 96

a. From: The Japan Times, "Okinawa dump site may be proof of Agent Orange" R. at 112-114, stating that barrels found in Okinawa contained herbicides, including dioxin. The article also stated that at least three of the barrels were from Dow Chemical Co., a primary manufacturer of Agent Orange. The article also referred to a "1971 U.S. Army report on Agent Orange" on Okinawa. R. at 113-114

b. An article titled: "Agent Orange on Okinawa – The Smoking Gun: U.S. army report, photographs show 25,000 barrels on island in early 70's" R. at 110-111 noted that an Army report published in 2003, stated, *inter alia*, that 25,000 barrels of Agent Orange were stored on Okinawa in the early 1970's during the Vietnam War. The article further stated this was the first time the military acknowledged this fact. The article noted "A previous statement from the U.S. Department of Veterans Affairs in 2009 stated, 'The records pertaining to Operation Red Hat show herbicide agents were stored and then later disposed in Okinawa from August 1969 to March 1972.' However attempts to access the sources the VA used to make that statement – including the filing of multiple

Freedom of Information Act requests – have been hampered by U.S. authorities." R. at 110

c. An Article in the History News Network R. at 106-109, titled "Collateral Damage – Agent Orange on Okinawa," stated that workers found metal barrels, and the tests showed traces of dioxin. R. at 108 The article stated, "The U.S. Department of Veterans Affairs has granted compensation to another former service member for exposure to Agent Orange while stationed on Okinawa during the Vietnam War era." The BVA decision was dated October, 2013. R. at 109

In a Statement in Support of Claim dated December 1, 2016, the Appellant again requested that the VA contact the Marine Corps Historical Institute "to verify the deployment of phenoxy herbicides on the island of Okinawa . . ." She continued, "This needs to go directly to the Marine Corps and not to JSCRUR." R. at 55 In the Decision, the VLJ wrote that in May 2017 the Appellant reported that she was told by her then representative that the Air Force Historical Institute determined that the Marine Corps used Agent Orange in Okinawa. R. at 14-15 (3-18)

The government's response to Appellant's request for assistance was as follows: On August 3, 2016, Compensation Services wrote that, pursuant to

inquiries, they received information from the Department of Defense (DoD) stating that Agent Orange was not on Okinawa. R. at 84-85

In a "SSOC" Notice Response dated May 8, 2017, the Appellant wrote that her then representative learned from the Air Force Historical Institute that Agent Orange was used on Okinawa by the Marines prior to the Veteran being stationed there and requested that the VA contact the Marine Corps Historical Institute in Quantico, Va. R. at 53

The VA did not further respond to the Appellant with regard to her specific requests that the VA obtain documents, give her any additional information, or assist the Appellant by informing her that she had to get the information herself, if she wanted it to be included in the Record.

The Appellant is appealing the BVA decision dated September 26, 2018, which is now before this Court.

In the decision on appeal, the VLJ ruled that there was new and material evidence (the Veteran's statement that he worked with dogs that had been in Vietnam) to reopen the claim. R. at 4-5 The VLJ also ruled that because the RO previously decided the issue of service connection for Mr. Parker's death, there could be no prejudice to the Appellant. R. at 7 The VLJ stated that ". . . the principal question before the Board is whether the Veteran was exposed to herbicide agents, to include Agent Orange while in Okinawa, Japan . . ." R. at 11

The VLJ found that the Veteran was not exposed to herbicide agents or Agent Orange on active duty. R. at 12

The VLJ stated repeatedly that the Department of Defense (DoD) was in the best position to determine whether Agent Orange was used, or even present, on the island of Okinawa while the Veteran was on active duty. R. at 13; ("more probative weight to the DoD report," R. 15); ("In any event, The Board affords greater weight to the DoD's statement," R at 16); ("Questions of competency notwithstanding, the Board affords greater probative weight to the 2016 Report of Compensation Service, based on information from DoD . . .", R. at 17); (". . . DoD has stated that Agent Orange was not . . . in Okinawa. The Board affords such determination high probative value, as DoD would be in the best position to know . . . ", R. at 17) In addition to the above, the VLJ referred to the "thorough development performed by the AOJ". R. at 12

With regard to the development of the case, the Board noted both that the Appellant claimed " . . . the Air Force Historical Institute had determined that the Marine Corps used Agent Orange at Okinawa. . .", and also that the Appellant requested that the VA contact the Marine Corps. The VLJ ruled, "The Board has considered the appellant's request, but notes that the Air Force and Marine Corps are part of DoD." R. at 14

The VLJ noted that the Veteran reported that while stationed in Okinawa, the Veteran "was exposed to whatever entered or left Vietnam, including the dogs used in Vietnam." The VLJ wrote that neither the Veteran nor the Appellant were "competent" to state whether exposure to animals or items which had been in Vietnam ". . . would have exposed the Veteran to herbicide agents." R. at 15

The VLJ concluded, "Indeed, there is no competent evidence that herbicide agents, to include Agent Orange, were used, or were even present, on Okinawa during the Veteran's active service there." R. at 17

ARGUMENTS

1. <u>The VA committed prejudicial error, because the decision was not supported by sufficient reasons or bases.</u>

a. Based on the number of times it was stated, the VLJ's primary "reasons or bases" seemingly was "How do I know? The DoD told me so." This is contrary to law, because law doesn't say DoD statements control the outcome of a claim. In any case, if the VA is going to give great weight to the assumption that the DoD rarely - if ever - has made either a misstatement or a factual mistake concerning the Vietnam War, the VLJ must weigh that assumption against all material, contrary evidence. And the VLJ's conclusions and reasoning must be

explained consistent with reasons or bases requirements. This analysis was not done in this case.

The VLJ wrote there was "no competent evidence" that Agent Orange was in Okinawa. R. at 17 (3-18) In addition to noting that absence of evidence is not evidence of absence, the Appellant notes that there is an Army report referred to in the record confirming that Agent Orange was on Okinawa and a 2009 statement from the VA confirming the same, during the general time period the Veteran was there. R. at 110-111 Neither the AOJ nor the VLJ tried to obtain or read that documentation, and they did not explain why they did not make any effort. With regard to VA documents mention in the article, the VA had constructive possession of the documents to which the article referred. This failure to make an effort to obtain, read, and analyze all of this relevant evidence that supported the Appellant's claim, or in the alternative, to notify the Appellant to obtain the evidence herself violated the duty to assist. In addition, the failure to consider this material – without explanation and analysis - violated the VLJ's duty to support the decision with reasons or bases. *Moore v. Derwinski*, 1 Vet. App. 401, 404 (1991), *Gilbert v. Derwinski*, 1 Vet. App. 49, 52 (1990) When records have been lost, as the unit records were in this case, the VA has a heightened duty to obtain and evaluate relevant documents that might support a claim. *Washington v. Nicholson*, 19 Vet. App. 362, 370 (2005), *Dixon v. Derwinski*, 3 Vet. App. 261, 263 (1992),

O'Hare v. Derwinski, 1 Vet. App. 365, 367 (1991) In addition, "[I]n cases involving lost records, the Board has a heightened duty to explain its findings." *Daye v. Nicholson*, 20 Vet. App. 512, 515 (2006)

b. The VLJ erred when ruling that "no prejudice to the appellant has resulted" because the RO has considered the case on the merits. The VLJ relied on *Bernard v. Brown*, 4 Vet. App. 384 (1993). R. at 7. However, not only did that case have a substantially different procedural history than the case before this Court but also the *Bernard* case confirmed that in any case a VLJ has a duty both to assist the appellant and also to set forth sufficient reasons or bases in the BVA decision.

As part of setting forth its reasons and bases for its findings and conclusions, "the Board must analyze the credibility and probative value of the evidence, account for the evidence that it finds persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the claimant." 38 U.S.C. § 7104(d)(1), *Dalton v. Nicholson*, 21 Vet.App. 23 (2007) The Board did not do so in this case. Remand is appropriate "where the Board has incorrectly applied the law, failed to provide an adequate statement of reasons and bases for its determination, or where the record is otherwise inadequate." *Tucker v. West*, 11 Vet. App. 369, 374 (1998).

Any or all legal errors set forth in, or implied by, the arguments in this Brief

could have resulted in prejudicial error. For examples, obtaining requested documents from the Air Force or Marines may have contained information confirming the Veteran's unit history in whole or part as well as possible exposure to Agent Orange or herbicides that could have caused the Veteran's impairments, and reading documents referred to in the article "Agent Orange on Okinawa – The Smoking Gun . . ." may have resulted in the AOJ or VLJ believing that there was Agent Orange used or stored in Okinawa. *Quinn v. Wilkie*, 5/9/19, U. S. Court of Appeals for Veterans Claims No. 17-4555

2. The VA committed prejudicial error because it did not assist the Veteran.

a. Although the Appellant requested that the VA attempt to obtain records from the Marine Corps Historical Institute and the Air Force Historical Foundation, neither the agency of original jurisdiction (OAJ) nor the VLJ attempted to contact either of those organizations to see if there were additional records than the ones reviewed by the DoD, even though the VA knew that the DoD had lost the Veteran's unit records. The VLJ merely assumed – without explanation - that both organizations contained no records or evidence other than that reviewed by the DoD. R. at 14-15 In fact, this Court should take judicial notice that the Air Force Historical Association is an independent tax-exempt non-profit organization. In addition to not assisting the Appellant by attempting to

obtain those records, neither the AOJ nor the VLJ notified the Appellant that they were not going to do so and that if she wanted that evidence in the Record she would have to obtain and submit it herself. Given that the AOJ had attempted to obtain unit records from the DoD, the Appellant would have every reason to believe that the AOJ and VLJ would attempt to obtain records from these other organizations also, since she was told nothing to the contrary and both the AOJ and VLJ knew the Appellant was *pro se*. There was an increased duty to assist the Appellant because the Veteran's unit records were lost by the DoD. *Tatum v. Shinseki*, 26 Vet. App. 443 (2014), *Godwin v. Derwinski*, 1 Vet. App. 419 (1991)

b. The VLJ ruled that the Veteran's contention that he was exposed to Agent Orange by working with dogs that had been in Vietnam was new and material evidence. R. at 7 The VLJ also ruled that there was no proof that this exposure resulted in the Veteran's claimed medical impairments because there was no medical proof to that effect and the Veteran and Appellant ". . . are not competent to state whether exposure to animals or items which were present in Vietnam would have exposed the Veteran to herbicide agents." R. at 15 If the VLJ needed "competent" evidence, why didn't the VLJ assist the Appellant by obtaining a nexus opinion? It should be noted that military personnel who came into contact with some airplanes that had been used in Vietnam are presumed to be subject to certain medical conditions due to that exposure. 38 C.F.R. §3.307 Why,

medically, couldn't exposure to other things that had been in Vietnam have medical consequences – only a nexus opinion could eliminate that possibility?

CONCLUSION

For the foregoing reasons, the Appellant respectfully requests that the Court vacate the Board's September 26, 2018, decision that denied service connection for the claimed disabilities. The Appellant further respectfully requests that the Court remand this claim to the Board with instructions both to assist the Appellant for reasons set forth in this Brief and also to require the BVA then to issue a new Decision containing sufficient reasons or bases.

Respectfully submitted,

FOR THE APPELLANT

/s/ Alan J. Nuta
Alan J. Nuta
9529 Ash Hollow Place
Montgomery Village, Maryland 20886
(240) 401-7490