IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

MARVIN H. JOHNSON, Appellant, v. ROBERT L. WILKIE, Secretary of Veterans Affairs, Appellee.	)	Vet.App. No. 18-6798

APPELLANT'S MOTION FOR PANEL CONSIDERATION

Pursuant to the Court's Rule of Practice and Procedure 35(b), (e)(1), Marvin H. Johnson respectfully requests that this Court refer this case to a panel for consideration. In its November 7, 2019 memorandum decision, the Court concluded that Mr. Johnson "unambiguously [stated] that his condition 'is not associated with exposure to dioxin.'" Memorandum Decision at 5 (quoting R-553). However, the Court overlooked or misunderstood that he explicitly claimed that his hypertension was caused by *herbicide* exposure, despite his later statement. *See* R-553; R-633. He thus appears to have been confused about the meaning of "dioxin," but read liberally, he did not limit the scope of his claim for hypertension or withdraw the claim to the extent that it was based on exposure to Agent Orange or herbicides. As a result of this misunderstanding, the Court did not reach the issue of whether the NAS reports

linking hypertension and herbicide use were constructively in the record and erroneously affirmed the Board's decision.

A panel decision is necessary in this case because resolution of this issue would establish a new rule of law, clarify an existing rule of law, apply existing law to a novel fact pattern, and constitute the only recent binding precedent on what is necessary to limit the scope of a claim or effectively withdraw part of a claim; and whether a claimant has a burden of scientific knowledge in describing a claim. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). This case also involves legal issues of continuing public interest—what scientific knowledge a veteran is presumed to have and what documents are considered to be constructively in the record. *See id.*

First, in reviewing the record, the Court overlooked or misunderstood that Mr. Johnson explicitly claimed that his hypertension was caused by *herbicide* exposure, even though he later stated that his hypertension was not due to *dioxin* exposure. *See* R-553; R-633; *see also* Memorandum Decision at 5 (noting that the Court may review the entire record in determining whether the Board's errors were prejudicial). His assertion as to herbicide exposure is critical, because a pro se claimant's submission must be construed in the light most favorable to him, keeping in mind the limits of an unsophisticated claimant's knowledge. *See Ingram v. Nicholson*, 21 Vet.App. 232, 255 (2007). His submissions must also be read in context, and not in isolation from the remainder of the record. *See Rivera v. Shinseki*, 654 F.3d 1377, 1380 (Fed. Cir. 2011); *Evans v. Shinseki*, 25 Vet.App. 7, 14 (2011). In contrast, the memorandum decision

has imposed a burden of scientific knowledge on the claimant, and failed to read his submissions liberally to encompass all reasonably raised arguments in support of his claim of entitlement to benefits based on hypertension.

Dioxin is a chemical compound used in herbicides including Agent Orange. 38 U.S.C. § 1117(f).[1] On the section of his March 2009 VA Form 21-526 prompting him to "[t]ell [VA] if any of the [claimed] disabilities . . . were because of exposures," Mr. Johnson indicated that he was exposed to "*Agent Orange* or other *herbicides*." R-633 (emphases added). The next question asked him to identify his disability, and he listed "high blood pressure," among others. *Id.* In its November 2009 letter to the Veteran, VA informed him that it would consider that his hypertension was "associated with *dioxin* exposure" if he submitted "scientific or medical evidence showing that [his hypertension] is medically associated with *dioxin* exposure." R-588 (emphasis added). Nowhere in this letter did VA use the terms that were used on the VA Form 21-526—"Agent Orange" or "herbicides." *See* R-585-95. Nor did it explain that it was using "dioxin" as a synonym for those terms. *See id.* In response to this letter, Mr. Johnson said in December 2009 that "my claimed condition[] [is] not associated with exposure to dioxin." R-553.

[1] Although the statute identifies dioxin as an example of a "chemical compound in an herbicide agent," VA's regulatory definition of "herbicide agent" does not include the word "dioxin." *See id.*; 38 C.F.R. § 3.307(a)(6)(i) (2019).

There is no indication in the record that Mr. Johnson—a layperson—was aware that dioxin is a chemical compound found in herbicide agents such as Agent Orange. Nothing in the VA Form 21-526 nor VA's November 2009 letter informed him of this fact. *See* R-585-95; R-633. In concluding that Mr. Johnson "informed VA he was not pursuing" service connection based on herbicide exposure, the Court did not consider this fact and instead imposed a burden of scientific knowledge on the claimant, contrary to *Clemons v. Shinseki*, 23 Vet.App. 1, 5 (2009) ("Although the RO has no duty to read the mind of the claimant, the RO should construe a claim based on the reasonable expectations of the non-expert, self-represented claimant and the evidence developed in processing that claim."). *See* Memorandum Decision 5-6.

Nor did the Court read Mr. Johnson's statement in the context of the March 2009 VA Form 21-526's use of the terms "Agent Orange" and "herbicides," the November 2009 VA letter's use of the term "dioxin," and the distinction in those terms. *See id.*; *see also* R-588; R-633. As a result, the Court overlooked or misunderstood that when determining whether the Board committed prejudicial error, it was required to read Mr. Johnson's submissions in context and in a light most favorable to him. *See Rivera*, 654 F.3d at 1380; *Evans*, 25 Vet.App. at 14; *Ingram*, 21 Vet.App. at 255.

Second, the Court overlooked or misunderstood that Mr. Johnson did not withdraw the part of his claim that was based on the theory that his hypertension was caused by his in-service Agent Orange exposure. The Court concluded that in his

November 2009 statement, Mr. Johnson "expressly disavowed" that his claim was based on the herbicide theory. Memorandum Decision at 5. It further concluded that as a result of this "disavowal," the "claim was not . . . based on herbicide exposure." *Id.* But Mr. Johnson's "disavowal" that his hypertension was "not associated with exposure to dioxin" was not an effective withdrawal of a claim for hypertension based on herbicide exposure. *See DeLisio v. Shinseki*, 25 Vet.App. 45, 57 (2011) (withdrawal of a claim is only effective where the withdrawal is explicit, unambiguous, and done with a full understanding of the consequence of such action on the part of the claimant.")[2] None of the factors of a valid withdrawal of a claim are met here, as there is no evidence in the record establishing that Mr. Johnson understood that herbicide exposure was the same as dioxin exposure.

Although, as the Court noted, Mr. Johnson did not "explain why VA had a duty to address or develop a theory of entitlement that he expressly disavowed," there was no reason for him to do so. *See* Memorandum Decision at 5. As argued above, he did not disavow such a theory, because there is no indication that he understood the term "dioxin"—the word VA used in its November 2009 letter—to be a synonym for "Agent Orange" or "herbicides"—the words used in the VA Form 21-526. *See* R-

[2] Although the purported withdrawal in *DeLisio* was verbal and occurred during a hearing, a panel of this Court is currently considering the applicability of these factors where the purported withdrawal is written and submitted to the RO. *See Shoemaker v. Wilkie*, Vet.App. 18-1023. Oral argument was held in that case on September 5, 2019, and at the Court's request, the parties submitted supplemental briefing on November 12, 2019.

553; R-633. The Secretary correctly did not argue that the November 2009 statement limited the scope of the claim or was a valid withdrawal of a part of the claim. Therefore, there was no reason for Mr. Johnson to have addressed these issues in his briefs.

The Court's conclusion that Mr. Johnson's November 2009 statement limited the scope of his claim or was otherwise a valid withdrawal of a part of the claim harmed Mr. Johnson. The NAS reports finding a link between hypertension and herbicide exposure have a direct relationship to Mr. Johnson's claim and were therefore constructively in the record before the Board. Appellant's Br. 7-15; Appellant's Reply Br. 1-5. Alternatively, the Board was required to take official notice of the fact that the NAS reports have found such a link. *See* Appellant's Reply Br. at 6-13. As a result, the Board erred in failing to obtain a medical opinion as to the relationship between *Mr. Johnson*'*s* hypertension and his in-service herbicide exposure. *See* Appellant's Br. at 15-18; Appellant's Reply Br. at 13-15. Because the Court concluded that the claim before the Board was not based on herbicide exposure, it did not address any of these arguments.

Therefore, Mr. Johnson respectfully requests that this Court refer this case to a panel for consideration. A panel decision by this Court could establish or clarify the circumstances under which the Board can conclude that a claimant has narrowed the scope of a claim and/or withdrawn part of the claim. It could also clarify whether and under what, if any, circumstances, a claimant is required to be precise about the

scientific basis of a claim. And it could also clarify the scope of the Court's holding in *Euzebio v. Wilkie*, 31 Vet.App. 394 (2019), and establish the circumstances under which the Board is required to take official notice of certain facts.

WHEREFORE, Mr. Johnson respectfully requests that this Court refer this case to a panel for consideration.

Respectfully submitted,

/s/ Amy F. Odom

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