APPELLANT'S REPLY BRIEF

UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

No. 18-6026

MICHELLE K. MERCURIO,

Appellant,

v.

ROBERT L. WILKIE,
Secretary of Veteran Affairs,

Appellee.

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INTRODUCTION

Appellant incorporates by reference her arguments presented in Appellant's Initial Brief (Ap. Br.) and respectfully submits her Reply Brief in response to the Secretary's Brief (Sec. Br.), which failed to overcome the Board's inadequate decision.

ARGUMENT

In Appellee's Brief, the Secretary conceded that remand is appropriate for Appellant's claims of entitlement to service connection for hallux valgus and entitlement to service connection for vertigo. Sec. Br. at 5. Thus, the only remaining issue is that of reopening a previously denied claim of entitlement to service connection for bilateral fibroadenoma based on new and material evidence.

This claim was originally denied because Appellant was diagnosed with fibroadenoma prior to entering service. Record Before the Agency (R.) at 2754−65. She was denied despite the fact that new tumors emerged during service. *Id.* She subsequently submitted evidence that her service included exposure to tumor-causing elements, to include radiation and highly stressful environments. R. at 1390−95. She also supplied a medical article explaining that these elements are causes of benign tumors. R. at 1404−07.

As Appellant's Initial Brief noted, this evidence was not discussed by the Board in its denial. R. at 11−12; *see also* Ap. Br. at 5, 16. The only supplemental evidence that the Board cited was the evidence of ongoing fibroadenomas and the argument that these new tumors are evidence of "an aggravation of her bilateral breast fibroadenoma during

service." *Id.* The Board completely omitted the evidence regarding radiation and stress exposure. By not discussing this supplemental evidence, the Board frustrated judicial review. There is technically no finding for the Court to review and remand is warranted. The Secretary did not address this argument at all, focusing instead on the merits of whether the evidence was new and material without stopping to consider whether the Board had adequately explained why it was not. Had the Secretary attempted to defend the Board's decision in this regard, he would have realized that there is nothing to defend because the Board failed to discuss this evidence.

While the Board failed to discuss the medical article and lay testimony, Appellant argues that this evidence was both material and new. The Secretary asserted that the Court should reject Appellant's arguments because "regardless of whether [the evidence] is new, it is not material because it does not raise a reasonable possibility of substantiating the claim." Sec. Br. at 11. However, the Secretary failed to explain this in terms consistent with the Court's holding in *Shade v. Shinseki*. 24 Vet. App. 110, 118 (2010). Specifically, the Secretary stated that the treatise information "cannot be enough to substantiate her claim." Sec. Br. at 13. However, in *Shade*, the Court made clear that VA did not intend to deny reopening based on the fact that "an adequate medical nexus opinion was not provided *by the claimant*." *Shade*, 24 Vet. App. at 118 (emphasis original). "Indeed," the Court continued, "this would require the claimant to submit medical evidence in every case in which VA's previous negative determination regarding nexus or a current disability stood between the claimant and disability benefits." *Id.*

The Court also made clear in *Shade* that it is improper for the Board to require the nexus element be satisfied prior to reopening in a case where there was new and material evidence relating to a previously unestablished fact necessary to substantiate the claim. *Id.* at 119. Here, Appellant has provided evidence relating to a previously unestablished fact in the form of lay testimony regarding her in-service exposure to radiation and stress. R. at 1390−95. Requiring medical evidence of a nexus as well is a higher burden than required to reopen a previously denied claim. *Shade*, 24 Vet. App. at 119. Going further, the Court in *Shade* held that the "reasonable possibility" standard is pro-veteran and "contemplates the likely entitlement to a nexus medical examination if the claim is reopened." *Id.* at 121. The newly submitted evidence in this case does seem likely to result in entitlement to a nexus medical examination because it raises the possibility that her tumors were aggravated by exposure to radiation and stress. While VA previously denied Appellant's claim with full knowledge that she developed new tumors during service, it was not previously aware of her exposure to elements that cause tumors. R. at 2754−65.

Finally, the issue of direct causation and aggravation in this case is complicated. The Secretary's point that those issues have been conflated stems from this complication. Sec. Br. at 13. The record does not contain any medical evidence explaining that a new tumor is an aggravation of the same pre-existing condition, or if instead, a new tumor developing in service could have been directly caused by service. Appellant is not qualified to make that assessment, and neither is the Board. *Colvin v. Derwinski*, 1 Vet. App. 171, 175 (1991). Regardless, contrary to the Secretary's assertion that any argument about

"direct service connection causation, as opposed to aggravation" must fail because it was already adjudicated, both theories of service connection are available to Appellant if she clears the hurdle of providing new and material evidence. Sec. Br. at 12. Her claim seeks to reopen the previous denial which is permitted pursuant to 38 C.F.R. § 3.156(a, meaning that the fact that this was already adjudicated is an inherent part of the case and not a roadblock because of the ability to reopen claims. 38 C.F.R. § 3.156(a).

If the Court finds that the evidence submitted by Appellant was new and material, reversal is appropriate. *Shade*, 24 Vet. App. at 123−24 ("Court will reverse the Board's decision … and direct that the appellant's claim be reopened") (citing *Gutierrez v. Principi*, 19 Vet. App. 1, 10 (2004)). However, the Board's failure to discuss the supplemental evidence means that there is no decision to reverse. As a result, remand is appropriate.

CONCLUSION

For the foregoing reasons and for any reasons the Court deems proper and just, Ms. Mercurio respectfully requests that the Court vacate and remand the September 27, 2018, Board decision denying entitlement to service connection for vertigo, hallux valgus, and bilateral fibroadenoma.

Respectfully submitted,

Dated: December 12, 2019

/s/ Samantha Farish

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