IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

CHRISTOPHER L. FULKS,	)	
	)	
Appellant,	)	
	)	
v.	)	No. 18-6232
	)	
ROBERT L. WILKIE,	)	
Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

APPELLANT'S OPPOSED MOTION TO STRIKE APPELLEE'S BRIEF IN PART

Pursuant to Rule 27(a), Appellant respectfully moves the Court to strike the medical records the Secretary appended to his brief filed on October 21, 2019, and any assertions as to the content of those documents in the Secretary's brief.

"Review in the Court shall be on the record of proceedings before the Secretary and the Board." 38 U.S.C. § 7252(b). Thus, the Court is precluded by statute from considering these documents.

I. Privacy Concerns

Initially, notwithstanding the issues pertaining to the Court's Rule 10 and *Bell v. Derwinski*, et al., discussed below, Mr. Fulks is troubled by the Secretary's unilateral decision to post his medical records to the internet without providing him any notice or input as to whether that should happen. The Court's E-Rule 13(a) cautions that documents filed electronically "are automatically linked to automated docket entries without prior review by personnel of the Court. Because of the

worldwide access to these electronic records, this fact should be carefully considered by all parties when filing documents."

The Secretary does not appear to have considered very carefully whether it was appropriate to provide "worldwide access" to private medical records about Mr. Fulks's surgical procedure, which also incidentally contain his date of birth. *See* Rule 6(a) ("parties shall refrain from putting a VA claims file number or other personal identifier (e.g., Social Security number, date of birth, financial account number, name of minor child) on any filings not locked or sealed"); E-Rules 1(a)(10), 4(a), 13(b) ("It is the responsibility of all parties to refrain from and prevent the filing with the Court of any electronic document that will not be locked that contains personal identifiers or information such as medical information otherwise protected by privacy statutes or regulations or that is deemed personal in nature…").

The Court's Rules allow parties who wish to challenge a redaction to do so "by filing a motion with the Court within 15 days of the redacted document's filing." Rule 6(c). Clearly this time limit applies to improper redactions of individual personal identifiers, e.g., showing more than the last four digits of a Social Security number. Rule 4(b)(1). Whether this time limit applies to total failures to redact individual personal identifiers, such as dates of birth, is less clear, and thus Appellant views this part of his motion to strike as timely under Rule 4.

Regardless of the personal identifier issue, however, Mr. Fulks believes he should have at least been notified and provided an appropriate period for response before the Secretary provided worldwide access to some of his protected health information. On December 18, nearly two months after initially posting this protected information online, the Secretary locked his brief on the Court's docket after he was contacted for his position on this motion. Regardless of this late attempt by the Secretary to correct for his actions, which he seems to now realize were harmful, Appellant asserts that the Court's Rules 4, 6, and E-Rule 13 serve as appropriate bases for striking the material appended to the Secretary's brief, and asks the Court to take such action as is deemed appropriate to prevent the Secretary from posting protected health information online again in the future.

II. Constructively Before the Board of Veterans' Appeals

The Secretary relies on the Court's holdings that the Secretary is deemed to have constructive knowledge of certain documents which are generated by VA agents or employees. Specifically, if those documents predate the Board decision on appeal, are within the Secretary's control, and could reasonably be expected to be part of the record, then "such documents are, in contemplation of law, before the Secretary and the Board and should be included in the record." *Dunn v. West*, 11 Vet. App. 462, 466-467 (1998) (applying *Bell v. Derwinski*, 2 Vet. App. 611, 612-13 (1992), to a record generated by a Vet Center). "If such material could be determinative of the claim and was not considered by the Board, a remand for

readjudication would be in order." *Id.* The implication of *Bell* is not, however, that certain records constructively within the Secretary's control must be made part of the record *before this Court*. The *Dunn* Court stated that because certain Vet Center records may have been new and material evidence, the Board's "failure to have obtained and considered those records warrants remand to determine whether the claim should be reopened." *Id.* at 466. In other words, the Board errs by not obtaining and reviewing certain records constructively within the Secretary's control, requiring the Court to remand for the Board to obtain and address them when the record before the Board indicates their existence. *See Dunn* at 467 (concluding that the Board "erred in failing to consider the Princeton Veterans Center records" and remanding for the Board to obtain and consider them).

The Court confirmed this in *Murincsak v. Derwinski*, 2 Vet. App. 363 (1992), three months before deciding *Bell*:

> In this case, the BVA had ample notice that the veteran had been attending continuous weekly treatment and counseling as an outpatient at the Long Beach VAMC for many years. For example, although the veteran had apparently referenced ongoing treatment at the Long Beach VAMC during a February 13, 1989, VA examination, . . . and testified about the ongoing treatment at his May 16, 1989, hearing, . . . the most recent Long Beach VAMC report in the record before the BVA is the February 1989 report of examination, nearly ten months before the issuance of the BVA decision on December 9, 1989. *Having concluded that the BVA had actual notice of the possible existence and relevance of the veteran's ongoing treatment at the Long Beach VAMC sufficient to trigger the duty to assist the veteran by acquiring and considering such records before adjudicating appellant's claim, the Court need not reach the issue of whether the BVA should be charged with constructive notice of all medical records in the possession of the VA under all circumstances*.

Murincsak, 2 Vet. App. at 373 (emphasis added). This language confirms that the reason *Murincsak* did not announce the constructive notice rule created by *Bell* three months later is that in *Murincsak* the record placed the Board on actual notice of the unobtained VA medical records, triggering its duty-to-assist obligation to obtain them. *See id.* In *Bell*, however, the Court was required to address constructive notice during the Rule 10 stage where the appellant herself proffered the four documents that the Secretary stated he could not find, confirmed by an affidavit and after search efforts; the duty to assist, therefore, would not have been implicated in that instance. *See Bell*, 2 Vet. App. at 612-13 (reflecting uncertainty as to whether the Board had actual knowledge of the proffered records).

The Secretary's reliance on *Bell*, therefore, is misplaced. *Bell* does not enable this Court to obtain records from the Secretary, of which the Board and VA were on actual notice, and determine in the first instance whether they warrant a change in the outcome of an appeal without the Board ever having reviewed them and in contravention of the duty to assist.

The Federal Circuit's decision in *Kyhn v. Shinseki*, 716 F.3d 572, 575 (Fed. Cir. 2013), and this Court's subsequent jurisprudence also counsel against interpreting *Bell* in the way that the Secretary proposes. As the Federal Circuit has explained, this Court "reviews each case that comes before it on a record that is limited to the record developed before the RO and the Board." *Kyhn*, *supra*

(quoting *Henderson v. Shinseki*, 589 F.3d 1201, 1212 (Fed. Cir. 2009), *rev'd and remanded on other grounds sub nom. Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428 (2011)). This Court's reliance on extra-record evidence would violate 38 U.S.C. § 7261(c), which makes clear that findings of fact made by the Secretary or the Board may never be subject to trial de novo by this Court. This subsection "'prohibits the Veterans Court from making factual findings in the first instance.'" *Kyhn* at 575 (quoting *Andre v. Principi*, 301 F.3d 1354, 1362 (Fed. Cir. 2002)).

This is a bright-line rule that admits no exceptions for records possessed by the agency that the Board never saw. This Court has repeatedly acknowledged the rule of *Kyhn*. *See Euzebio v. Wilkie*, No. 17-2879, 2019 U.S. App. Vet. Claims LEXIS 1476, *9 (August 22, 2019) (citing *Kyhn*, "holding that the Court contravenes the jurisdictional requirements of section 7252(b) by considering extrarecord evidence"); *Zeglin v. Wilkie*, 30 Vet. App. 121, 126 n.6 (2018) (citing *Kyhn* at 578 for proposition that "the Court is prohibited from considering evidence not in the record before the Board"); *Harvey v. Shulkin*, 30 Vet. App. 10, 15 n.4 (2018) (citing *Kyhn*; "the Court is prohibited from considering evidence not in the records before the Board"); *Hudgens v. Gibson*, 26 Vet. App. 558, 563 (2014) (citing *Kyhn*; "this Court is prohibited from considering evidence that was not in the record before the Board and engaging in factfinding in the first instance").

Citation to *Kyhn* is conspicuously absent from the Secretary's brief, but, Appellant maintains that, whatever *Bell* means, at least after *Kyhn*, it cannot mean

that the Secretary can cure the Board's failure to satisfy its statutory duty to assist by presenting the Court extra-record evidence to aver that the Board could disregard its duty. The Court should thus strike the material appended to the Secretary's brief in an effort to circumvent his duty to assist Mr. Fulks in developing the record to its optimum *prior* to issuance of a final Board decision.

The Secretary's counsel has been contacted regarding this motion, and he has informed Appellant's counsel that he opposes this motion and will file a written response.

WHEREFORE, Appellant respectfully moves the Court to issue an order striking the exhibits containing the missing VistA records from Appellee's brief and for any further relief that may be required to effectuate such an Order.

Respectfully submitted,

/s/ Glenn R. Bergmann
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/s/ Tiffany Guglielmetti
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