IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 18-6976

DOROTHY C. FOGG,

Appellant,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs

Appellee.

ON APPEAL FROM THE BOARD OF VETERANS APPEALS

REPLY BRIEF FOR APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Record Before the Agency

INTRODUCTION

For more than a decade after returning home from the Vietnam War, Johnny M. Fogg suffered from an unrecognized disorder causing a chain of events that would later claim his life. The late veteran's surviving spouse, Dorothy C. Fogg, seeks a retrospective medical opinion to aid in a cause of death claim.

Remand is required as a matter of law because the Secretary does not dispute—and therefore concedes—that two of the Board's three errors prejudiced Mrs. Fogg. These errors are the Board's (1) clear error in finding that the VA's duty to obtain a medical opinion was not triggered and (2) failure to consider favorable evidence bearing on that duty. *See* App. Br. 16–24; *MacWhorter v. Derwinski*, 2 Vet. App. 133, 136 (holding that this Court is "free to assume . . . the points raised by appellant, and ignored by the General Counsel, to be conceded"), *modified on other grounds*, 2 Vet. App. 655 (1992).

The Secretary's sole argument is that a <u>different</u> error, to say nothing of the other two, was not prejudicial. Sec. Br. at 4–5 (Summary of Argument) (arguing only that, "even if the Board conflated the legal standards for the duty to provide a medical opinion, any error is harmless"). Not only is this argument flawed, it is also immaterial because the two errors the Secretary concedes already require the remand Mrs. Fogg seeks. "[T]here is no need to analyze and discuss all the other claimed errors that would result in a remedy no broader than a remand." *Mahl v. Principi*, 15 Vet. App. 37, 38 (2001).

ARGUMENT

I. The Board Committed Three Errors In Finding that the Duty to Obtain a Medical Opinion Was Not Triggered.

The Secretary concedes—expressly or as a matter of law—each of the three errors Mrs. Fogg identified in her brief. These errors are that the Board (1) clearly erred when it found that the duty to obtain a medical opinion was not triggered, (2) failed to address favorable evidence bearing on that duty, and (3) applied the wrong legal standard for the duty to obtain a medical opinion. *See* App. Br. at 10–24.

Two of the three errors (*i.e.*, clear error and failure to address evidence) are not disputed, which constitutes a concession that the Board committed the errors. *See MacWhorter*, 2 Vet. App. at 136 (holding that this Court is "free to assume . . . the points raised by appellant, and ignored by the General Counsel, to be conceded"). To hold otherwise would require the Court to conjure up "implicit or possible contentions" on behalf of the Secretary. *Id.* at 135. This Court should not "do the work of counsel for the Secretary," which "would be the antithesis of the adversarial judicial appellate process." *Id.*

The third error in applying the wrong legal standard is expressly conceded. In the Secretary's words, "In DIC claims, 38 U.S.C. § 5103A(a), rather than section 5103A(d), applies to VA's duty to assist," and the Board's opinion "suggest[s] that it conflated the standards of section 5103A(d) with those of 5103A(a)." Sec. Br. at 6, 8. The Secretary's failure to provide any contrary argument also amounts to a concession of the Board's third error. *See MacWhorter*, 2 Vet. App. at 136.

II. The Board's Errors Prejudiced Mrs. Fogg's Statutory Right to Fully Develop Her Claim With the VA's Assistance.

Remand for compliance with the duty to obtain a medical opinion is required because the Secretary does not dispute—and therefore concedes—that two of the Board's three errors were prejudicial. *See Antonian v. Brown*, 4 Vet. App. 179, 184 (1993) (prejudicial error "requir[es] remand").

A. The Board's Clear Error In Finding that the Duty to Obtain a Medical Opinion Was Not Triggered Prejudiced Mrs. Fogg.

The Secretary does not dispute and therefore concedes that the Board's clear error prejudiced Mrs. Fogg's statutory right to develop her claim with the VA's assistance. *See* App. Br. 24; *MacWhorter*, 2 Vet. App. at 136 (failure to address an argument may be interpreted as a concession).

The Board's clear error, which the Secretary concedes (*see supra* Part I), prejudiced Mrs. Fogg as a matter of law. The Board clearly erred in making the ultimate finding that Mrs. Fogg appeals: that the VA complied with its duty to assist when it failed to obtain a medical opinion. *See* App. Br. 19–24. In other words, the VA was *required* to provide a medical opinion to aid in substantiating Mrs. Fogg's claim. Such an error "must be considered prejudicial" because it deprived Mrs. Fogg of a "meaningful opportunity to participate effectively in the processing of . . . her claim," which undermines the "essential fairness of the adjudication." *Overton v. Nicholson*, 20 Vet. App. 427, 435 (2006).

Nowhere does the Secretary purport to explain how the Board's clear error could be anything but prejudicial. The Secretary's sole argument is that a <u>different</u> error (*i.e.*, application of the wrong legal standard) was not prejudicial. Sec. Br. at 4–5 (Summary of

Argument) (arguing only that, "even if the Board conflated the legal standards for the duty to provide a medical opinion, any error is harmless"). Although the Secretary does recite Mrs. Fogg's argument that the Board "clearly erred when it found that a medical opinion was not required," Sec. Br. 5, none of the Secretary's authority addresses the prejudicial effect of such an error. *See DeLaRosa v. Peake*, 515 F.3d 1319 (Fed. Cir. 2008) (addressing whether application of the wrong legal standard was prejudicial); *Wood v. Peake*, 520 F.3d 1345, 1350–52 (Fed. Cir. 2008) (same).

Indeed, the two principal cases relied upon by the Secretary could not have addressed challenges to the Board's factual finding that the VA complied with its duty to assist. Both cases were before the Federal Circuit and the Federal Circuit, unlike this Court, is prohibited from reviewing factual findings. *Compare Crediford v. Shulkin*, 877 F.3d 1040, 1044 (Fed. Cir. 2017) ("[U]nless a constitutional issue is presented, the Federal Circuit 'may not review (A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case.'" (quoting 38 U.S.C. § 7292(d)(2))), *with id.* § 7261(a)(4) (Veterans Court shall "set aside or reverse [a factual] finding if the finding is clearly erroneous").

B. The Board's Failure to Address Favorable Medical and Lay Evidence Bearing On the Duty to Obtain a Medical Opinion Prejudiced Mrs. Fogg.

The Secretary similarly does not dispute the prejudicial effect of the Board's failure to address favorable evidence bearing on the duty to obtain a medical opinion. As with the Board's clear error, none of the Secretary's authority addresses the prejudicial effect of the Board's failure to address favorable evidence. *See supra* Part II.A. Accordingly, the

Board's failure to address favorable evidence is an independent basis to remand this matter and direct the VA to comply with its duty to obtain a medical opinion to assist Mrs. Fogg in developing her claim.

C. The Prejudicial Effect of the Board's Application of the Wrong Legal Standard for the Duty to Obtain a Medical Opinion Is Immaterial.

1. The Prejudicial Effect of the Board's Third Error Is Immaterial Because the Secretary Already Concedes Two Prejudicial Errors.

The Secretary's sole argument that the Board's application of the wrong legal standard is not prejudicial is immaterial because the Secretary already concedes two prejudicial errors requiring a remand. *See supra* Part II.A-B. Where "an undoubted error requires that the Court order a remand," as here, "the Court will not address other putative errors . . . that would result in a remedy no broader than a remand." *Mahl v. Principi*, 15 Vet. App. 37, 38 (2001). Accordingly, because a finding that the Board's third error was prejudicial would only result in a remand, "there is no need to analyze and discuss" the error. *Id.* (denying motion for reconsideration to address errors that would also result in a remand).

2. Even If the Prejudicial Effect of the Board's Third Error Were Material, Remand Would Still Be Required.

Even if the Secretary's argument were material, remand would still be required either because: (a) the Court lacks jurisdiction to make the factual findings necessary to determine whether the Board's third error was prejudicial; or (b) the Board's application of the wrong legal standard prejudiced Mrs. Fogg.

a) The Court Lacks Jurisdiction to Make the Factual Findings Necessary to a Determination of Prejudice.

Remand is required because the Court lacks jurisdiction to make factual findings in the first instance, which would be necessary to evaluate the prejudicial effect of the Board's error in applying the wrong legal standard. *See* App. Br. 24–25.

When the Board has "employed the wrong legal standard in evaluating the evidence," as here, "the appropriate remedy is normally for the reviewing court to remand." *Stevens v. Principi*, 289 F.3d 814, 817 (Fed. Cir. 2002) (collecting cases). To instead address the prejudicial effect of the error, the Court would be required "to reassess the evidence under the correct [legal] standard," which it cannot do without exceeding its jurisdiction. *See id.* at 818 (citing *Hensley v. West*, 212 F.3d 1255, 1264 (Fed. Cir. 2000) (explaining why remand is the "proper course")). That is because the statute governing the scope of review "prohibits the court from making factual findings in the first instance." *Deloach v. Shinseki*, 704 F.3d 1370, 1380 (Fed. Cir. 2013) (citing 38 U.S.C. § 7261(c)).

The pair of decisions the Secretary relies on for the contrary proposition support Mrs. Fogg, not the Secretary. *See* Sec. Br. 10 (citing *Wood* and *DeLaRosa*). In *Wood*, as here, the Federal Circuit was confronted with the issue of whether the Board's failure to apply the correct duty-to-assist standard was prejudicial. 520 F.3d at 1348. The Federal Circuit reasoned that it may address the prejudice question "only where the relevant facts are undisputed" because "we are merely accepting the facts as found and as conceded to be correct by all parties." *Id.* at 1351. Because the facts were "genuinely in dispute," the

Federal Circuit held that it could not address the prejudice question without exceeding its jurisdiction and remanded the matter. *Id.*

The Federal Circuit in *Wood* distinguished its decision in *DeLaRosa*, where it "carefully and expressly tied its holding" that the same legal error was not prejudicial "to the uncontroverted facts of that case." *Id.* at 1350. There, unlike here, a surviving spouse did not genuinely dispute the relevant facts underlying her claim: whether the veteran incurred PTSD in service contributing to his death. *See DeLaRosa*, 515 F.3d at 1320. *First*, "the most obvious reasons" for the veteran's death "from a gunshot wound to the head as a result of suicide" were "the bitter dispute with his wife and his killing of his own daughter," not PTSD. *Id.* at 1320–22 (alterations omitted). *Second*, even if PTSD could have contributed to the veteran's suicide, "there was no medical evidence *from the veteran's lifetime* that he had PTSD," where PTSD had been recognized as a disorder for the last 14 years of the veteran's life.[1] *See id.* at 1321–22 (alterations omitted; emphasis added). *Third*, the appellant did not dispute that the medical evidence submitted after the veteran's lifetime (*i.e.*, a physician's letter) was "without probative value." *See id.* at 1321.

[1] Mrs. Fogg requested in her brief that this Court take judicial notice of the fact that PTSD was first introduced in the third edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM–III) published in 1980, App. Br. 3 n.1, which the Secretary apparently opposes, Sec. Br. 1 n.1. In any event, the VA itself did not recognize PTSD until 1980 (after it was first introduced in the DSM–III). *See Singleton v. Shinseki*, 659 F.3d 1332, 1333 (Fed. Cir. 2011) (noting that the VA did not add PTSD to the disabilities rating schedule until 1980).

Wood and *DeLaRosa* simply show that Mrs. Fogg's genuine dispute of the relevant facts requires a remand. *See Wood*, 520 F.3d at 1351. None of the "uncontroverted facts" supporting a contrary finding in *DeLaRosa* are present here. *Id.* at 1350. *First*, the Board did not find that the record contains any "obvious reasons" for Mr. Fogg's death that would rule out PTSD as a contributory cause—much less a reason as compelling as the killing of one's own child. *Second*, PTSD was not even recognized as a disorder for all but one year of Mr. Fogg's life,[2] which precludes any adverse inference due to the lack of medical evidence from the veteran's lifetime. *See Fountain v. McDonald*, 27 Vet. App. 258, 273 (2015) (holding that the Board must explain "why the appellant would reasonably have been expected to report his symptoms to medical providers" before drawing an adverse inference). *Third*, Mrs. Fogg disputes any finding that the medical evidence she submitted has no probative value, *see* App. Br. 21, even assuming the Board made such a finding, which is far from clear. *See* R. 7 (4–9) (finding that the medical evidence had "limited," "very little," and "no" probative value).

Indeed, the Secretary fails to identify a single relevant fact that is not genuinely disputed. Take the fact that the late veteran had PTSD. Mrs. Fogg submitted a physician's letter opining that Mr. Fogg's observable symptoms during his lifetime are consistent with PTSD. The Secretary trumpets the Board's finding that this letter is "not probative evidence *establishing*" PTSD. Sec. Br. 9 (emphasis added). That is not required to form

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[2] *Supra* note 1.

a genuine dispute. The need to establish PTSD is the reason a medical opinion is "necessary to substantiate" Mrs. Fogg's claim in the first place. 38 U.S.C. § 5103A(a)(1). To form a genuine dispute, Mrs. Fogg must simply dispute that the letter, together with other record evidence, holds "sufficient probative value" establishing a reasonable possibility that a medical opinion would establish PTSD. *See Wood*, 520 F.3d at 1351 (holding that remand is required to resolve such a dispute). Mrs. Fogg made this argument in her brief, *see* App. Br. 20–21, and never conceded that the letter carries "no probative weight," Sec. Br. 10 (emphasis omitted), as the Secretary contends. Importantly, not even the stricter standard under *McLendon* requires a *diagnosis* of a medical condition, but rather only requires recurrent or persistent symptoms of a disability. *See McLendon v. Nicholson*, 20 Vet. App. 79, 81–82 (2006).

b) <u>The Board's Application of the Wrong Legal Standard Was Prejudicial.</u>

Remand in this case would also be required because Mrs. Fogg demonstrated that the Board's error was prejudicial. *See* App. Br. 24; *see also* App. Br. 19–24.

The Secretary's limited argument to the contrary is circular in logic. He concedes that § 5103A(a) imposes a default obligation on the VA to obtain a medical opinion unless "no reasonable possibility" exists that such an opinion "would aid in substantiating the claim." 38 U.S.C. § 5103A(a)(2). And he does not dispute the reasonable possibility that a medical opinion would aid in substantiating two links in the chain of events leading to Mr. Fogg's death: (1) the late veteran's PTSD caused his alcoholism and (2) his alcoholism contributed to his death. Instead, the Secretary argues that Mrs. Fogg should paradoxically

be required to submit "competent medical evidence of a PTSD diagnosis" before a medical opinion is provided that may diagnose PTSD. Sec. Br. 5, 11 (describing this proposition as "outcome-determinative").

Demanding proof of a diagnosis before assisting a claimant in obtaining a diagnosis would not only inflict an impossible burden on claimants, it is also wrong as a matter of law. In the words of the Federal Circuit, "to trigger the VA's duty to assist," a claimant "is not required to show that . . . a record would independently prove his or her claim." *Jones v. Wilkie*, 918 F.3d 922, 926 (Fed. Cir. 2019). In fact, it does not even matter that the likelihood of a medical opinion substantiating the claim may be "extremely low." *Id.* (emphasis omitted). That is not the standard. So long as there is a *reasonable possibility* that a medical opinion will *aid* in substantiating Mrs. Fogg's claim, the VA is obligated to provide one. *See* 38 U.S.C. § 5103A(a). Here again, it is worth underscoring that even under the more stringent standard of *McLendon*, a *diagnosis* of a medical condition is not required to trigger a medical examination. *See McLendon*, 20 Vet. App. at 81–82 (noting that the first element to trigger the VA's duty to assist in providing a medical examination only requires recurrent or persistent symptoms of a disability).

Mrs. Fogg has met the low standard to obtain a medical opinion with the VA's assistance, *see* App. Br. 19–24, and the Board's error was therefore prejudicial. The Secretary ultimately asks this Court for permission to brush aside its duty to "fully and sympathetically develop" Mrs. Fogg's claim "to its optimum before deciding it on the merits" in what is a "uniquely pro-claimant" system. *McGee v. Peake*, 511 F.3d 1352,

1357 (Fed. Cir. 2008) (internal quotations and citations omitted). This Court should decline the Secretary's request and remand this matter to the Board.

CONCLUSION

For the foregoing reasons, and as argued in Mrs. Fogg's opening brief, Mrs. Fogg respectfully requests that this Court vacate the Board's decision and remand her claim for the VA to comply with its duty to obtain a medical opinion or, in the alternative, to allow the Board to adequately address whether the duty to obtain a medical opinion was triggered by evaluating all potentially favorable evidence of record under the correct legal standard.

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Respectfully submitted,

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