

**APPELLANT'S REPLY BRIEF**

**UNITED STATES COURT OF APPEALS  
FOR VETERANS CLAIMS**

**No. 18-6827**

**THOMAS C. GRAHAM,  
Appellant,**

**v.**

**ROBERT L. WILKIE,  
SECRETARY OF  
VETERANS AFFAIRS,  
Appellee.**

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**IN THE UNITED STATES COURT OF APPEALS  
FOR VETERANS CLAIMS**

THOMAS C. GRAHAM,	)	
	)	
Appellant,	)	
	)	
v.	)	Vet. App. No. 18-6827
	)	
ROBERT L. WILKIE,	)	
Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

**REPLY BRIEF OF THE APPELLANT**

Pursuant to U.S. Vet. App. R. 28(c), Thomas C. Graham (Veteran, Appellant or Claimant), respectfully submits to the United States Court of Appeals for Veterans Claims (Court), his Reply Brief in response to the Appellee's (Secretary's) Brief (Sec. Br.), and continues to assert that there are errors of law contained within the Department of Veterans Affairs (VA) decision of August 16, 2018 in which the Board of Veterans' Appeals (Board or BVA) denied the Appellant's claims of entitlement to service connection for a lumbar spine disability, cataracts, a cardiovascular disability and prostate gland hypertrophy.

## STATEMENT OF THE ISSUES

- I: WHETHER THE BOARD CLEARLY ERRED IN FAILING TO ENSURE VA FULFILLED ITS STATUTORY DUTY TO ASSIST.**
- II: WHETHER THE BOARD FAILED TO SUPPORT ITS DECISION WITH ADEQUATE REASONS OR BASES.**

## ARGUMENT

The Appellant continues to assert that the Board's decision of August 16, 2018 was in error. *See* R. at 2-16. The Appellant incorporates by reference his arguments presented in his Brief and makes reply to the Brief of the Appellee in the interest of further clarity.

The Secretary avers that "[t]he Board properly provided adequate reasons or bases for its finding that VA satisfied its duty to assist under 38 C.F.R. § 3.311 and for its finding that Appellant was not entitled to service connection for a lumbar spine disability, cataracts, a cardiovascular disability, and prostate gland hypertrophy, all claimed as due to radiation exposure." R. at 8. Appellant disagrees and continues to assert that the Board's decision on appeal contains errors sufficient to warrant remand.

The Secretary claims that "Appellant relies on the November 2016 EHP opinion and not the December 2016 USB opinion, which is the record relevant to the procedure set forth in 38 C.F.R. § 3.311." Sec. Br. at 10-11. However, contrary to the Secretary's claim, Appellant addressed the November opinion because the Board itself stated that it relied upon the November 2016 opinion and found it highly probative. *See* R. at 12 ("the Board places great weight of probative value on and finds persuasive the November 2016 dose estimate and opinion of the Director .... Regarding the likelihood of the Veteran's conditions being the result of his exposure to radiation while he was in active service").

The Secretary wholly ignored the Board's decision insofar as the evidence it relied upon and decided in his appeal to address only evidence it found favorable to its position. Thus, the Secretary failed to defend the Board's decision and position or address the relevant arguments raised by Appellant. In such instance, this Court has clarified that "[w]here appellant has presented a legally plausible position in the form of a 'relevant, fair and reasonably comprehensive brief, with appropriate record references ... and the Secretary has failed to respond appropriately, the Court deems itself free to assume, and does conclude, the points raised by appellant, and ignored by the General Counsel, to be conceded. *Macwhorter v. Derwinski*, 2 Vet. App. 133, 136 (1992) citing *Alameda v. Secretary of Health, Education and Welfare*, 622 F.2d 1044, 1049 (Fed. Cir. 1980).

Appellant continues to assert that the Board did not meet its heightened duty to provide adequate reasons or bases given that the Veteran's records were destroyed by fire. *See Pruitt v. Derwinski*, 2 Vet. App. 83, 85 (1992) (in cases where the veteran's records were likely destroyed in the 1973 NPRC fire, the Board has a "heightened" duty to explain the reasons or bases for its decision). The Board relied on an opinion which lacked sufficient information for it to fulfill its heightened duty. There was no adequate explanation provided as to how the dose estimate was reached. Further, while the Director's opinion mentioned that the Veteran "worked as a missile crewman", it failed to discuss the nature or extent of the Veteran's radiation exposure. *See R.* at 131. During a January 2011 VA examination, the Veteran explained that, "on a daily basis, he would maintain radar, including standing in front of the beam and holding up a testing tube" and "he would carry in pants pockets of his jumpsuit radioactive material for four to five days at a time." *R.* at

673 (673-684). The examiner noted that, upon physical examination, it was revealed that the Veteran has "... a rather severe actinic keratosis of sun-exposed areas and some actinic keratoses and seborrheic keratoses in normally sun-exposed areas, such as the thighs. This corroborates the veteran's statement that he was exposed to microwave radiation in the military." R. at 676. This evidence was not considered nor was it explained what impact this type of exposure would have on a dose estimate.

Lastly, the Secretary alleges that "[t]he Board considered all reasonably raised theories of entitlement." Sec. Br. at 15. This is simply not true. The Veteran raised an alternate theory of entitlement which the Board wholly neglected to consider. *See* R. at 1274 (1257-1305) ("I'd like to pose an alternate theory..."). Specifically, in his hearing testimony, the Veteran suggested, as an alternate theory, that his claimed disabilities were caused by exposure to toxic fuel chemicals while in service. *See* R. at 1274-1278. The Veteran provided specific details into the nature and type of exposure related to the missiles he worked on. *See Id.* He provided the names of specific toxic chemicals he was exposed to (R. at 1275) and explained that there were times he "... handled the fuel and oxidizers" without protective clothing. *See* R. at 1276. The Board erred in failing to consider this theory of entitlement. Accordingly, remand is warranted.

Therefore, Appellant continues to assert that the Board's decision on appeal contains errors sufficient to warrant remand.

## **CONCLUSION**

For the foregoing reasons, Appellant respectfully requests that the August 16, 2018 Board decision be vacated and the case remanded for further adjudication consistent with this Court's decision and applicable law.

Respectfully submitted,

December 23, 2019

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