

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

| | | |
|--------------------------------|---|-----------------------|
| THOMAS J. BUERGER, |) | |
| |) | |
| <i>Appellant,</i> |) | |
| |) | |
| v. |) | Vet. App. No. 18-6733 |
| |) | |
| ROBERT L. WILKIE, |) | |
| Secretary of Veterans Affairs, |) | |
| |) | |
| <u><i>Appellee.</i></u> |) | |

APPELLEE’S REPLY BRIEF

Respectfully submitted,
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I. Introduction

First, as a matter of course, this Brief adopts and incorporates his July 17, 2019, opening brief. The crux of the argument before this Court is the sufficiency of the record before it. Appellee argues that based on the current record before it, there is no indicia that Appellant set foot in Vietnam in the course of a secret mission or that he served as a radar technician for a secret project. Therefore, it concludes that without a stressor, there cannot be a service-connected medical condition compensable by the VA. But, based on some significant inconsistencies in the record, the Secretary has not fully developed the Veteran's claim.

II. Rebuttal Argument

The Secretary asserts that Mr. Burger is not a reliable *historian*. See Appellee's Brief at 11 ref R. at 781 (775-84). For the limited purpose of this Reply, Appellant will not dispute this. Indeed, many of the records currently in the

Secretary's possession do not support Appellant's claims. But, there are some simple facts before Appellee, inconsistent with its denial of possible service-connected stressors to support Appellant's claim, that the VA simply failed to explain to Appellant.

Appellant has claimed that he worked on secret projects while in service. The first was a short tour in Vietnam during the Vietnam War. Appellee's Brief at 6 ref R. at 1616, 1618 (1615-1623). The second is a Russian sonar project in Massachusetts. *Id.* The Secretary concluded that, based on the records before him that these events likely did not occur. But, what the Secretary did not square away was if Appellant was simply finishing his "tour of normal shore duty"¹ When his mental health exam occurred, then why was he then no longer able to maintain a "secret" clearance.² In other words, why did he have a "secret" clearance at all?

The fact that Appellant had a "Secret" clearance should have triggered the Secretary into contacting the Joint Services Records Research Center (JSRRC) to research the case for a Marine Corps record to see what "secret" projects, if any, Appellant had been assigned; especially those claimed by Appellant. Indeed, if Appellant is such an unreliable historian, then the simple task is to ask JSRRC was Appellant assigned to *any* "secret" duties that may have served as a stressor for any

1 Appellee's Brief at 3 referencing R. at 1652 (1651-56); 1660 (1658-60).

2 Appellee's Brief at 4 ref R. at 1652 (1651-56) and 2899 (2898-99).

of Appellant's purported service-connected conditions – mental health, e.g., PTSD, or ischemic heart disease. In the alternative, if the records do not list (or have been erased of³) Appellant as a participant to these activities, then the question must be asked do any of the secret missions correspond to Appellant's recollection of purported missions.

Appellant adopts and incorporates Appellee's articulated "clearly erroneous" standard of review. See Appellee's Brief 16-17. Appellee's written statement of its findings and conclusion cannot be adequate when it did not consider (and explain away) all of the evidence. Recall, Appellee acknowledged that **after** both of Mr. Buerger's self-reported "secret" missions were conducted and his mental health issue in Massachusetts, **then** he lost his "secret" clearance. Appellee's Brief at 4 ref R. at 1652 (1651-56) and 2899 (2898-99). If Mr. Buerger was not on these "secret" missions, then why did he have a "secret" clearance. This could have been easily clarified by contacting the JSRRC (which the Secretary declined to do more than once).

Further, given the security nature of this matter (the premise of which occurred during a period of war) and Appellant's purported *unreliability*, the Secretary should have given higher scrutiny to this *simple* inquiry. Without this

3 Appellee's Brief at 24 ref R. at 9 (4-18); see R. at 552 (541-90).

simple clarification of what constituted his “secret” clearance, the reasons or bases for the Secretary’s findings and conclusions, **have been not based** on all material issues of fact and law presented on the record as required by 38 U.S.C. § 7104(d)(1).

III. Conclusion

The nexus and conditions have been discussed in Appellant's Opening Brief. This matter rests on identifying the Veteran's claimed stressors. The Secretary has failed to review all of the evidence in the record. In particular, why did Appellee have a “secret” security clearance if not for the “secret” missions he claimed to have participated: These are records the Secretary could easily obtain but failed in his duties to do so.

Respectfully submitted,
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On December 30, 2019, the undersigned filed this document and all parties were served via the Court's e-file.

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