IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-0320

DONALD R. FULTON,

Appellant,

v.

ROBERT L. WILKIE,

Secretary of Veterans Affairs,

Appellee.

APPELLANT'S REPLY BRIEF

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ARGUMENT

I. The Secretary's argument that the Board did not fail to address a reasonably raised theory is not meritorious.

Appellant asserted that the Board of Veterans' Appeals (Board) failed to address that his service connection claim for a cardiac disorder reasonably encompassed a claim for hypertension. **Appellant's Brief ("App. Br.") at 7-15**. The Secretary, however, argued that a hypertension claim was not reasonably encompassed by a reasonable reading of the record. **Secretary's Brief ("Sec. Br.") at 7-12**.

In this regard, Appellant argued that the holding of *DeLisio v. Shinseki*, 25 Vet. App 45, 54 (2011), applies to Appellant's claim as the December 2015 VA medical examiner opined that the most likely cause of atrial fibrillation was due to hypertension. **App. Br. at 8-11**; *see* **R. 888 (887-889)** ("the high frequency of hypertension in the general population results in hypertensive heart disease being the most common underlying disorder in patients with [atrial fibrillation]."). The Secretary, however, argued that Appellant's service connection to hypertension claim was not reasonably raised by the record, relying on the holdings in *Brannon v. West*, 12 Vet. App. 32, 35 (1998) and *Sondel v. Brown*, 6 Vet. App. 218, 220 (1994), as support. **Sec. Br. at 7**.

On this note, the Secretary is placing the proverbial cart before the horse, i.e. he is responding to the substantive merits of Appellant's case, whereas Appellant's arguments are predicated on inadequate recognition and development of an underlying cause for his atrial fibrillation, which is in this case, hypertension. The Secretary fails to apply the proper legal standard from *DeLisio*, at 54, which requires that the information obtained during the

processing of the claim only has to "*reasonably indicate*[]*"* that the cause of the condition is a disease that may be associated with service prior to investigating such causal disease. **App. Br. at 8-15**. The December 2015 medical opinion reasonably raises that Appellant's atrial fibrillation is caused by hypertension, and in turn, requires additional development before VA may deny the claim.

The Secretary's reliance on the citations in *Brannon* and *Sondel* are unpersuasive as the low threshold in *DeLisio* and *McLendon v. Nicholson*, 20 Vet. App. 79 (2006) applies. *See Tucker v. West*, 11 Vet. App. 369, 374 (1998) (holding that remand is appropriate where the Board has incorrectly applied the law). Once again, the evidence need only show an indication that atrial fibrillation is related to hypertension, which in turn may be associated service, but the Secretary's argument requires Appellant to establish a causal relationship on the merits sufficient to award service-connection. *See DeLisio*, at 54 (citing *McLendon*, at 83 ("noting that the duty to assist is triggered when 'evidence 'indicates' that a disability… 'may be associated' with . . . service' (quoting 38 U.S.C. § 5103A(d)(2)(B))); *see also McLendon*, at 83 (holding that "may be associated" is a low threshold).

The Secretary further argued that each of the substantive arguments advanced by Appellant was non-meritorious. **Sec. Br. at 8-11**. Each of the Secretary's arguments shall be addressed in turn:

A. Medical Authorities Not Part of the Record

Appellant cited to THE MERCK MANUAL noting medical blood pressure readings for hypertension. **App. Br. at 10-14**. Additionally, Appellant argued that the 2014 version of the National Academy of Sciences (NAS), Institute of Medicine's (IOM's) Veterans and

Agent Orange Consensus Study Report was a medical authority that was constructively before the Board. **App. Br. at 11-13**. The Secretary argued that following the Court's decision in *Euzebio v. Wilkie*, 31 Vet. App. 394 (2019), these documents were not constructively before the Board, and therefore, not permitted to be presented to the Court. *Euzebio* was decided after the filing of Appellant's Preliminary Brief. As to constructive possession, Appellant concedes that the holding in *Euzebio* was that the 2014 Update was not constructively part of the record before the Board and the Court steadfastly upheld that the Court's jurisdictional obligation is to base its review on the record of proceedings before the Board. 31 Vet. App. at 402.

However, Appellant still asks the Court to take judicial notice of the NAS report and THE MERCK MANUAL. The earlier doctrine of judicial notice was relatively restricted noting that, "[t]he Court may take judicial notice of facts of universal notoriety that are not subject to reasonable dispute." *See Monzingo v. Shinseki*, 26 Vet. App. 97, 103 (2012). This doctrine of judicial notice was expanded in *Tagupa v. McDonald*, 27 Vet. App. 95 (2014). Here, the Court held, "Generally, the Court is precluded from considering evidentiary material that is not contained in the record on appeal… however, the Court may take judicial notice of facts not subject to reasonable dispute if such facts are generally known ***or*** are 'capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.' Fed. R. Evid. 201(b)." *Tagupa*, at 100 (internal citations omitted, ***emphasis added***). The *Tagupa* Court opened the door on judicial notice according to a less restrictive, two-prong approach. *See Tagupa*, at 100.

First, Appellant respectfully requests the Court to take judicial notice of the citations to THE MERCK MANUAL regarding blood pressure levels. These citations to THE MERCK MANUAL satisfy the requirement that "facts not subject to reasonable dispute if such facts are generally known." *See Monzingo*, at 103; *Tagupa*, at 100. Blood pressure readings according to a respected medical treatise such as THE MERCK MANUAL are not subject to reasonable dispute. *See Smith v. Derwinski*, 1 Vet. App. 235, 238 (1991) ("Courts may take judicial notice of facts not subject to reasonable dispute."). The Court has frequently relied on THE MERCK MANUAL for ordinary medical information and Appellant submits that its accuracy on general medical definitions and information cannot reasonably be questioned. S*ee, e.g., Brokowski v. Shinseki*, 23 Vet. App. 79, 82 n.6 (2009) (citing to THE MERCK MANUAL for a medical definition); *Barr v. Nicholson*, 21 Vet. App. 303, 308-09, 312 (2007) (relying extensively on THE MERCK MANUAL for information about varicose veins); *Hennessey v. Brown*, 7 Vet. App. 143, 150 n.1 (1994) (citing THE MERCK MANUAL); *Bierman v. Brown*, 6 Vet. App. 125, 126 (1994) (same); *Laposky v. Brown*, 4 Vet. App. 331, 333 (1993) (same).

Second, Appellant respectfully requests the Court to take judicial notice of the 2014 Update to NAS Agent Orange. When the NAS upgraded hypertension to the "Limited or Suggestive Evidence of an Associaiton" category, the study should satisfy the second *Tagupa* prong concerning judicial notice, that the 2014 NAS study is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." 27 Vet. App. at 100. On this account, the 2014 NAS study should also satisfy the regulatory definition of competent medical evidence of 38 C.F.R. § 3.159(a)(1)

("Competent medical evidence may also mean statements conveying sound medical principles found in medical treatises. It would also include statements contained in authoritative writings such as medical and scientific articles and research reports or analyses."); *see also McCray v. Wilkie*, 31 Vet. App. 243, 255 (2019) (reciting the progeny of case that medical treatises "must do more than provide speculative generic statements about a disability or the relationship between a disability and purported causal factors."). Notably, the 2014 Update no longer speculates on the association between Agent Orange and hypertension, but rather provides that there is limited or suggestive evidence of an association between Agent Orange exposure and hypertension. This should satisfy the low threshold of *DeLisio* and *McLendon*. Thus, the Court is respectfully requested to take judicial notice of the sufficiency of the 2014 update under the second *Tagupa* prong.

B. Contrary to the Record Evidence

Appellant argued that record evidence suggests that hypertension could be related to service based upon three theories of service-connection, 1) direct, 2) presumptive, and 3) through continuity. **App. Br. at 11-14**. The Secretary argued that record evidence supports that none of these theories are satisfied. **Sec. Br. at 9-10**. Here, the Secretary cited to Appellant's July 1964 entrance examination (**R. 2631 (2630-31**), June 1967 separation examination (**R. 2628 (2628-29)**), 2004 private medical record (**R. 2332 (2332-33)**), and September 2008 VA treatment record noting onset of hypertension in 2004 (**R. 2433 (2432-34)**) in so far as the hypertension service connection claim was not reasonably raised by the record.

The Secretary here is committing a *post hoc* rationalization error because the Board decision does not address a service-connection claim to hypertension. **R. 4-14**. *See Doty v. United States*, 53 F.3d 1244, 1251 (Fed. Cir. 1995) (holding that "'Courts may not accept appellate counsel's *post hoc* rationalizations for agency action. It is well established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself.'" (quoting *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983))); *Evans v. Shinseki*, 25 Vet. App. 7, 16-17 (2011) ("[I]t is the Board that is required to provide a complete statement of reasons or bases, and the Secretary cannot make up for its failure to do so."). Moreover, in footnote 15 of *Atencio v. O'Rourke*, 30 Vet. App. 74, 91 (2018), the Court cited to *Martin v. OSHRC*, 499 U.S. 144, 156, 111 S. Ct. 1171, 113 L. Ed. 2d 117 (1991) (holding that "'[L]itigating positions' are not entitled to deference when they are merely appellate counsel's '*post hoc* rationalizations' for agency action, advanced for the first time in the reviewing court.").

Here, the Secretary is arguing, in place of a Board decision, that Appellant should be denied service-connection to hypertension. Such a practice is not meritorious. It is the Board of Veterans' Appeals which is tasked with undertaking such decisions. *See* 38 U.S.C. § 7104(a). Remand is, therefore, the appropriate remedy. *See Tucker*, *supra*, at 374.

C. Clinically Significant Evidence

Appellant argued that the differences between Appellant's blood pressure at separation when compared to entry to service is significant evidence which the Board failed to discuss in order to show an indication that hypertension is related to service. **App. Br.**

at 11-13. The Secretary argued that Appellant's June 1967 heart and vascular system were clinically normal and that onset of hypertension occurred in 2004, thirty-seven years after service. **Sec. Br. at 10-11**.

Here, the Secretary's argument is not persuasive as it attempts to circumvent the threshold issue, that Appellant's claim of service-connection to hypertension was reasonably raised by the record. *See DeLisio*, at 53, 54. Inasmuch, the Secretary's reliance on the thirty-seven- year gap between exit from service and onset of hypertension, while within the purview of the Board, does not satisfy the Board's statutory requirement to consider all of the evidence to adjudicate Appellant's claim. *See Maxson v. Gober*, 230 F.3d 1330, 1333 (Fed. Cir. 2000) (holding that "evidence of a prolonged period without medical complaint can be considered… [but] [t]he trier of fact should consider all of the evidence including the availability of medical records, the nature and course of the disease or disability, the amount of time that elapsed since military service, *and any other relevant facts*.") (emphasis added); *see also Smith v. Derwinski*, 2 Vet. App. 137, 141 (1992) (holding that the Board cannot rely only upon the evidence it considers favorable to its position, but must review and base its decision upon all the evidence of record).

The Secretary additionally argued that Appellant's hypertension had a later onset and was not related to service, regardless of the onset of atrial fibrillation. **Sec. Br. at 9-10**. Per 38 C.F.R. § 3.303(d), an initial diagnosis of a disorder may be made when all the evidence establishes that a disorder was incurred in service. On this note, the claims filed introduced evidence of pre-hypertension readings as having incurred due to service. **App. Br. at 11**; **R. 2628 (2628-29)**. Additionally, there is no requirement that Appellant's heart

disorder is limited to a service-connection as based on the presumption of exposure to herbicides. *See DeLisio*, at 53 (holding that "even if a claimant believes that his condition is related to service in a particular way, his claim is not limited solely to one theory of service connection.").

D. A "Conjuring" Magician

The Secretary argues that the Board is not required to analyze all medical tests in the record to conjure up issues that were not raised by Appellant. **Sec. Br. at 11**. Rather, Appellant argues that the record reasonably raises that the December 2015 VA medical examiner's opinion that hypertension is the most likely cause of Appellant's atrial fibrillation satisfies the low threshold to obligate the duty to assist in developing Appellant's atrial fibrillation service connection claim to include as secondary to hypertension. *See DeLisio*, at 53-54; *see also Schroeder v. West*, 212 F.3d 1265, 1271 (Fed. Cir. 2000) (holding the Secretary generally must investigate the reasonably apparent and potential causes of the veteran's condition and theories of service connection that are reasonably raised by the record or raised by a sympathetic reading of the claimant's filing). Furthermore, Appellant's blood pressure readings between entry into service in July 1964 and separation in June 1967 reflects continuity from Appellant's time in-service into 2004 and beyond which establishes that hypertension is related to service under 38 C.F.R. §§ 3.303(b); 3.309(a). *See* **App. Br. at 13-15**.

CONCLUSION

For the reasons articulated above and in his August 5, 2019 principal brief, Appellant respectfully requests that the Court set aside the Board's decision of November

8, 2018, and remand this matter for readjudication consistent with the authorities discussed in his submitted briefs.

Respectfully submitted,

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January 16, 2020

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