IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

Vet.App. No. 18-6735

CLARK MCCARTNEY, III,

Appellant,

v.

ROBERT L. WILKIE,

Secretary of Veterans Affairs, Appellee.

APPELLANT'S REPLY BRIEF

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The Court should vacate the August 1, 2018, Board decision that denied Mr. McCartney's claim. It is undisputed that the July 2017 remand sought an opinion from a radiologist or other specialist qualified to discuss the effects of radiation on the human body. (R. 292-298). It is also undisputed that the Board accepted an opinion from a cardiologist and provided no explanation regarding whether there was substantial compliance with the remand order. The Board's reliance on the November 2017 opinion that did not comply with the Board's previous remand order was improper and prejudiced Mr. McCartney. There is no way to know what a radiologist or other qualified specialist trained on the effects of radiation on the human body would have concluded about the relationship between Mr. McCartney's radiation exposure and his current cardiac disability. For these reasons, as well as the arguments presented in the initial brief, that the August 1, 2018, Board decision should be vacated.

I. The Board Violated *Stegall v. West* When It Failed To Ensure Substantial Compliance With Its Previous Remand Order of July 25, 2017.

The Secretary argues that "[t]he Board substantially complied with the previous remand order pursuant to *Stegall* when it obtained a

medical opinion from a qualified specialist." (Sec. Br. 10). The Secretary asserted that because the opinion was offered by a cardiologist, substantial compliance was achieved. The Secretary's argument must fail.

The Board's July 2017 remand expressly sought an opinion from a "radiologist--or any other specialist qualified to discuss the effects of radiation on the human body." (R. 296). As the Secretary concedes, the examiner who provided the opinion was a cardiologist, not a radiologist or other specialist qualified to discuss the effects of radiation on the human body. (Sec. Br. 11). The Secretary noted in his brief that "[a] cardiologist is a physician skilled in the prevention, diagnosis, and treatment of heart disease" *Id.* By the Secretary's own admission a cardiologist is not qualified to discuss the effects of radiation on the human body as nothing in the medical dictionary the Secretary cited states or implies any qualification with regard to radiation and the effects on the human body.

If the Board would have been satisfied with an opinion from a cardiologist, the Board would have asked for an opinion by a cardiologist and would not have specified that the opinion needed to come from a radiologist or other specialist qualified to discuss the effects of radiation on the human body. Due to the nature of Mr.

McCartney's claim an opinion from a cardiologist was not the kind of opinion the Board deemed necessary to determine whether Mr. McCartney's radiation exposure caused his cardiac disability.

The Secretary urges the Court to affirm the Board decision on appeal because "Appellant has not shown that VA erred when it relied on a cardiologist's opinion to decide a claim of service connection for IHD" and cites to *Francway v. Wilkie* 940 F. 3d 1034 (2019) and *Donnellan v. Shinseki*, 24 Vet. App. 167 to support his position.

In *Donnellan*, the issue of substantial compliance with a previous remand order was raised and the Court ultimately found that an independent medical evaluation was inadequate as it failed to comply with the Board's original remand instructions from December 2004. The Court advised that the private physician's response that she was confused by the questions should have signaled to the Board that her response was inadequate to address the questions posed to her. The Court remanded the Board's March 2007 decision with instructions that the Board ensure compliance with the original remand order and obtain a medical opinion that addresses the Board's 2004 remand order. *See Donnellan v. Shinseki*, 24 Vet. App. 167 (2010). In *Donnellan*, the Court reiterated that "[i]t is substantial compliance, not absolute compliance, that is required. *See Dyment v. West*, 13 Vet.App.

141, 146-47 (1999)." *Id*, at 176. Similar to the veteran in Donnellan, Mr. McCartney seeks substantial compliance with the Board's previous remand order.

The Secretary seems to be arguing that Mr. McCartney is seeking absolute compliance of the July 2017 remand when only substantial compliance is required. That is not the case. Mr. McCartney is seeking substantial compliance and obtaining an opinion from a cardiologist does not substantially comply with the Board's remand instructions. It is unclear from the Board's decision how an opinion from a cardiologist who has no apparent special training to make him qualified to discuss the effects of radiation on the human body substantially complies with the Board's remand order.

II. The Board Violated 38 U.S.C. § 7104(d)(1) When It Failed To Provide An Adequate Statement of Reasons or Bases Explaining How There Was Substantial Compliance With The July 25, 2017, Board Remand.

The Secretary never addressed Mr. McCartney's argument that the Board violated 38 U.S.C. § 7104(d)(1) when it failed to provide an adequate statement of reasons or bases explaining how there was substantial compliance with the July 25, 2017, Board remand. Instead, the Secretary argues that "the Board was not required to explain the

competence of the cardiologist because this was not an issue Appellant raised until the instant appeal." (Sec. Br. 16).

The Secretary's argument must fail. The VA was not relieved of its statutory duty to provide an adequate statement of reasons or bases for its decision and to explain how there was substantial compliance with the July 2017 remand.

As with any material issue of fact or law, the Board must provide a statement of the reasons or bases for its determination "adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court." *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *see* 38 U.S.C. § 7104(d)(1); *Gilbert,* 1 Vet.App. at 56-57.

The Secretary asserts, for the first time, that a cardiologist is a specialist qualified to discuss the effects of radiation on the human body. However, this attempt by the Secretary to explain how an opinion from a cardiologist substantially complies with the Board's July 2017 remand should fail because it is an attempt to rationalize the Board accepting an opinion from an examiner outside of the explicit request of the Board in the first instance. It is well settled that agency's counsels' positions adopted in response to litigation, or those adopted as a "'*post hoc* rationalization' advanced by an agency seeking to defend

past agency action against attack", are not entitled to deference from the Court. *Auer v. Robbins*, 519 U.S. 452, 462 (1997) (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988)); *Martin v. Occupational, 23 Safety & Health Review Comm'n*, 499 U.S. 144, 156 (1991) ("'[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."), *see also* 38 U.S.C. § 7252(a) (providing for Court review of Board decisions). Counsel may explain why an error by the Board is not prejudicial; however, appellate counsel is not authorized to conduct necessary fact-finding in the first instance. *Id*. Such "convenient litigating positions" are a sign the agency's interpretation "does not reflect the agency's fair and considered judgment on the matter in question." *Christopher v. SmithKline Beecham Corp.,* 132 S.Ct. 2156, 2166 (2012) (quoting *Auer*, at 462 (1997). Here, the Secretary attempts to make a finding, in the first instance, that the November 2017 opinion from a cardiologist substantially complied with the July 2017 Board remand.

There is a complete absence of any attempt on the part of the Board to reconcile the opinion it sought in the July 2017 remand with the opinion it received. For this reason, the Court should find that the Board provided inadequate reasons or bases to support its decision. *See*

38 U.S.C. § 7104(d)(1); *Allday*, 7 Vet.App. at 527; *Gilbert*, 1 Vet.App. at 56-57. Because this frustrates judicial review, remand is necessary.

With regard to the Secretary's argument that the Board was not required to explain the competence of the cardiologist because "this was not an issue Appellant raised until the instant appeal," the Secretary confuses the Board's statutory obligation to ensure substantial compliance and provide an adequate statement of reasons or bases to support its findings with the existing legal landscape for challenging the competency of an examiner. Under the Secretary's logic if the Board remands for an examination and asks for a particularly skilled examiner and an opinion is returned and relied on by the Board to deny the claim from an examiner whose qualifications facially do not qualify them, there is a presumption that substantial compliance has been achieved because the examiner is presumed competent and the Board is not required to ensure substantial compliance or explain how substantial compliance was achieved. Such an approach runs afoul to the claimant's right to be able to rely on the Board's remand orders and would allow VA to circumvent complying with remand instructions.

In support of his argument, the Secretary points to the fact that Mr. McCartney did not raise the issue of the November 2017 cardiologist's competency after he was provided with the Supplemental

Statement of the Case. (Sec. Br. 12). The Secretary seems to be arguing that since Mr. McCartney did not raise the issue of substantial compliance with the Board when the claim was returned, that he waived his right to substantial compliance with the July 2017 Remand. The Secretary argues that the Supplemental Statement of the Case alerted Mr. McCartney to the specifics of his VA examiner and therefore he should have raised the issue before the Board. However, a review of the Supplemental Statement of the Case shows that the examiner was never identified by his specialty, rather, the SSOC simply states "[a]s required by the BVA remand, we requested a VA examiner's professional medical opinion regarding your claim for IHD due to ionizing radiation exposure." (R. 37).

The Secretary relies on *Francway v. Wilkie*, 940 F. 3d 1034 (2019) to support his position. It is well settled that if a veteran wants to challenge the competency of an examiner he or she is required to object to an examiner's qualifications before doing so in this Court. *See Parks*, 716 F.3d at 585. On the other, the Board cannot ignore facially obvious issues of competence. *See Wise v. Shinseki*, 26 Vet. App.517, 525. Here, it is facially obvious that a cardiologist is not a radiologist and is not a specialist qualified to discuss the effects of radiation on the human body. Thus, even accepting the Secretary's characterization of

Mr. McCartney's argument that this is a challenge to the competency of the examiner, the Board still erred because it had a duty to address whether the examiner was competent to opine as to the complicated medical matter regarding Mr. McCartney's heart disability given the facially obvious issue of competence.

CONCLUSION

For the foregoing reasons, the Court should vacate the Board's decision and remand this matter. "Generally, where the Board has incorrectly applied the law, failed to provide an adequate statement of reasons or bases for its determinations, or where the record is otherwise inadequate, a remand is the appropriate remedy." *Tucker v. West*, 11 Vet. App. 369, 374 (1998).

Dated this Sixteenth day of January, 2020.

Submitted,

/s/ Katie K. Molter

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