

**APPELLANT'S REPLY BRIEF**

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

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**18-6537**

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**JOSEPH A. SCHULLER, JR.,**

**Appellant,**

**v.**

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

**Appellee.**

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Secretary of Veterans Affairs,**

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**APPELLANT’S REPLY BRIEF**

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**REPLY ARGUMENT**

**A. The Court should find the Secretary’s arguments to be unpersuasive because the Board did not set forth any such rationale for finding that the duty to assist had been satisfied, and the Secretary is precluded from correcting an inadequate statement of reasons or bases.**

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Mr. Schuller argued that the Board failed to insure compliance with the duty to assist in his appeal for an earlier effective date for service-connected post-traumatic stress disorder (“PTSD”). Appellant’s Brief (App.Br.) at 9-17. In particular, the Board erred when it failed to insure that the Secretary had requested his service personnel records and unit histories relevant to his claim for entitlement to service connection for PTSD. *Id.* Irrespective of the fact that Mr. Schuller’s PTSD claim was eventually granted, the Secretary was still obligated to request Mr. Schuller’s service personnel records and unit histories from Vietnam in order to assist Mr. Schuller in his appeal for an earlier effective date based upon the receipt of

additional service records not previously reviewed by VA. Further, Mr. Schuller argued that the Board's failure to make and support a finding that the Secretary had met his statutory duty to assist warranted vacatur and remand. App.Br. at 18-19.

In response, the Secretary argued that while this matter was before the regional office and the Board, the Secretary did not have a duty to assist Mr. Schuller by requesting either his service personnel records or relevant unit histories from Vietnam. Secretary's Brief (Sec.Br.) at 5-15. In short, the Secretary argued that there was no duty to assist Mr. Schuller in obtaining his service personnel records and relevant unit histories from Vietnam because such records were not relevant to Mr. Schuller's appeal for an earlier effective date. Sec.Br. at 5-15. In particular, the Secretary argued that because Mr. Schuller's prior claims had been previously and finally disallowed based on the lack of a diagnosis of PTSD, service personnel records and relevant unit histories from Vietnam were not relevant to his appeal for an earlier effective date for PTSD, and thus, there was no duty to request these records. Sec.Br. at 5-14. Alternatively, the Secretary argued that even if he had obtained Mr. Schuller's service personnel records or relevant unit histories from Vietnam, those records would not have resulted in an earlier effective date because those records would not have shown a diagnosis of PTSD while Mr. Schuller served on active duty from August 1966 to August 1968.<sup>1</sup> Sec.Br. at 13-15.

The Court should find the Secretary's arguments to be unpersuasive. First, the Secretary's argument is not based upon the Board's findings or rationale; the Board did not

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<sup>1</sup> In 1980, the American Psychiatric Association (APA) added PTSD to the third edition of its Diagnostic and Statistical Manual of Mental Disorders (DSM-III). [https://www.ptsd.va.gov/professional/treat/essentials/history\\_ptsd.asp](https://www.ptsd.va.gov/professional/treat/essentials/history_ptsd.asp)

set forth any such rationale for finding that the duty to assist had been satisfied, and the Secretary is precluded from correcting an inadequate statement of reasons or bases. Further, the Secretary did not concede that the Board did not provide adequate reasons or bases, nor did the Secretary argue that the Board's failure to provide adequate reasons or bases was harmless error. The Board's failure to provide adequate statement of reasons or bases prevents Mr. Schuller from understanding the precise basis for the Board's denial and precludes effective judicial review.

Further, the Secretary's arguments are contrary to controlling authority. When Mr. Schuller filed a motion to reopen his previously and finally disallowed claim for entitlement to service connection for PTSD, the Secretary was obligated to assist him by obtaining his service personnel records and relevant unit histories from Vietnam because they were relevant to his appeal for benefits. After his claim had been granted on the basis of **38 C.F.R. § 3.304(f)(3)**, the Secretary was still obligated to assist Mr. Schuller by obtaining his service personnel records and relevant unit histories from Vietnam because they were very relevant to his appeal for benefits. *See Vigil v. Peake*, 22 Vet.App. 63, 65-67 (2008). Mr. Schuller's service personnel records and relevant unit histories from Vietnam were relevant to his appeal for entitlement to an earlier effective date for benefits regardless of the lack of a PTSD diagnosis in those records. First, the Secretary is aware that PTSD was not accepted as a valid psychiatric diagnosis until it was added to the DSM-III in 1980, and this Court's controlling authority makes it abundantly clear that the lack of a diagnosis at the time a PTSD claim is initially denied cannot serve as a basis for denying an earlier effective date for PTSD pursuant to **38 C.F.R. §3.156(c)**. *Vigil* at 67.

In his initial brief, Mr. Schuller argued that the Board had not insured that the Secretary had complied with the duty to assist because the Secretary had not requested, obtained, or associated his service personnel records or relevant unit histories from Vietnam with his VA claims file. App.Br. at 9-17.

In his brief, the Secretary conceded that Mr. Schuller's service personnel records and unit histories from Vietnam were not associated with his VA claims file. Sec.Br. at 5. Here, the Secretary wrote, in pertinent part:

Appellant's personnel records and unit histories are not associated with his claims file because his personnel records and unit histories are not relevant to his earlier effective date claim as they would not demonstrate a diagnosis of PTSD.

Sec.Br. at 5. Appellant accepts the Secretary's concession that his personnel records and unit histories from Vietnam were never associated with his VA claims file.

As argued previously, the Secretary's failure to request these records was a breach of his duty to assist. Although the Secretary does not concede that the failure to obtain these records was error, the Board did not discuss whether the duty to assist had been satisfied; whether the duty to assist required that the Secretary request these records; whether these records were relevant to Mr. Schuller's appeal for entitlement to an earlier effective date, or even whether the failure to request these records was harmless error.

Mr. Schuller argued that the Board had not found that the Secretary had satisfied the duty to assist. App.Br. at 18-19. Such a finding is vital to understanding the precise basis for the Board's decision as well as to facilitate judicial review by this Court. When the Board does not make a necessary finding, it logically follows that it has not provided the statutorily

required written statement of reasons or bases for the missing finding. Whether the duty to assist had been satisfied is a vital finding at the heart of the disagreement between the parties.

The Secretary did not respond to this argument. In lieu of a response to Mr. Schuller's argument, the Secretary argued that the Mr. Schuller's service personnel records and relevant unit histories from Vietnam were not relevant to his appeal for an earlier effective date and therefore, the Secretary was not obligated to request these service records. Sec.Br. at 5-15. The Secretary summarized his entire argument by writing, in pertinent part:

VA had no duty to obtain these records and, even if those records were obtained, they would not be relevant to the previous denials in this case.

Sec.Br. at 5.

When General Counsel fails to brief the Secretary's position on an argument raised in appellant's brief, such failure would be deemed to have conceded validity of the appellant's legally plausible position. ***MacWhorter v. Derwinski***, 2 Vet.App. 133 (1992) In ***MacWhorter***, this Court held, in pertinent part:

Where 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*** at 136.

Further, the Secretary is precluded from correcting an inadequate statement of reasons or bases. ***Smith v. Nicholson***, 19 Vet.App. 63, 73 (2005)(rejecting the Secretary's rationale for decision because "the Board did not set forth any such rationale; it is not the



task of the Secretary to rewrite the Board's decision through his pleadings filed in this Court."); *Wanless v. Principi*, 18 Vet.App. 337, 343 (2004)(Steinberg, J. concurring)(noting that "Court's role is to review whether the Board in its decision, rather than the Secretary in his brief, provided an adequate statement of reasons or bases").*See Martin v. Occupational 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.').

Mr. Schuller asks that the Court hold that appellant presented a legally plausible position; that the Secretary failed to brief the Secretary's position raised in appellant's legal brief; and that the Court assume that the points raised by appellant and ignored by the General Counsel to be conceded. On this basis, vacatur and remand are warranted.

In the alternative, the Secretary's arguments are clearly contrary to controlling authority. When Mr. Shuller filed a motion to reopen his previously and finally disallowed claim for entitlement to service connection for PTSD, the Secretary was obligated to assist him by obtaining his service personnel records and relevant unit histories from Vietnam because they were relevant to his appeal for benefits. This is not an argument over whether the duty to assist applies to a motion to reopen a previously and finally disallowed claim because after he filed his motion to reopen, the claim was reopened and granted in a May 2014 rating decision. R. 6612 (6605-17). In other words, the duty to assist clearly applied to Mr. Schuller's reopened claim for benefits, and the Secretary does not dispute this.

After his claim had been granted on the basis of **38 C.F.R. § 3.304(f)(3)**, the Secretary was still obligated to assist Mr. Schuller by obtaining his service personnel records

and relevant unit histories from Vietnam because they were very relevant to his appeal for benefits. *See Vigil v. Peake*, 22 Vet.App. 63, 65-67 (2008); *Emerson v. McDonald*, 28 Vet.App. 200 (2016).

Further, and contrary to the Secretary's argument, Mr. Schuller's service personnel records and relevant unit histories from Vietnam were relevant to his appeal for entitlement to an earlier effective date for benefits regardless of the lack of a PTSD diagnosis in those records. First, the Secretary is aware that PTSD was not accepted as a valid psychiatric diagnosis until it was added to the DSM-III in 1980, and this Court's controlling authority makes it abundantly clear that the lack of a diagnosis at the time a PTSD claim is initially denied cannot serve as a basis for denying an earlier effective date for PTSD pursuant to **38 C.F.R. §3.156(c)**. This issue was specifically addressed when the Court wrote, in pertinent part:

Thus, depending on the facts, Mr. Vigil could be assigned an effective date as far back as his original claim or the date on which entitlement arose, whichever is later, if § 3.156(c) ultimately is deemed to be applicable in this case. For this reason, the Secretary's argument that the Board decision should be affirmed because there is a plausible basis for its factual finding that Mr. Vigil was not diagnosed with PTSD prior to 1989 is inapposite. Although the Board found that the Secretary had fulfilled his duty to assist and that no further medical examination was warranted, this finding was predicated, at least in part, on the Board's conclusion that § 3.156(c) was not for application in this case .... If § 3.156(c) ultimately is deemed applicable, the duty to assist would require not only the development of evidence regarding the degree of disability associated with Mr. Vigil's PTSD, but also the development of evidence regarding when Mr. Vigil first suffered from PTSD or the extent to which he suffered from PTSD prior to the date of his claim to reopen.

*Vigil* at 67. In short, there is no controlling authority for the Secretary's position to the contrary.

## **CONCLUSION AND PRAYER FOR RELIEF**

Appellant prays that the Court set aside the Board's decision.

**Respectfully submitted.**

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