IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

DAVID A. ANDREWS,	)	
	)	
Appellant,	)	
	)	
v.	)	Vet.App. No. 19-352
	)	
ROBERT L. WILKIE,	)	
Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

APPELLEE'S RESPONSE IN OPPOSITION TO THE JANUARY 16, 2020, MOTION OF APPELLANT FOR ORAL ARGUMENT

Pursuant to U.S. Vet.App. R. 27(b), Appellee, Robert L. Wilkie, Secretary of Veterans Affairs, submits this response in opposition to Appellant's January 16, 2020, Motion for Oral Argument (Motion). The Secretary asserts that the Court should deny Appellant's Motion because Appellant has not demonstrated that oral argument before the Court will materially assist in the disposition of this appeal. Appellant has also failed to demonstrate, or even assert, that single judge disposition would be inappropriate in this case.

This Court has held that oral argument will be allowed only at the order and discretion of the Court, where it "believes that oral argument will materially assist in the disposition of [an] appeal." *Hackett v. Principi*, 18 Vet.App. 477, 478 (2004) (per curiam); *see Janssen v. Principi*, 15 Vet.App. 370, 379 (2001) (holding that oral argument must "materially assist in the disposition of this appeal."); *Winslow*

v. Brown, 8 Vet.App. 469, 471 (1996) (denying motion for oral argument where Court does not believe it will materially assist the disposition of the appeal). Contrary to Appellant's Motion, oral arguments are, generally, not granted where single judge disposition is appropriate. U.S. Vet.App. R. 34(b). Single judge disposition is appropriate when a case on appeal is of relative simplicity and the case (1) does not establish a new rule of law; (2) does not alter, modify, criticize, or clarify an existing rule of law; (3) does not apply an established rule of law to a novel fact situation; (4) does not constitute the only recent binding precedent on a particular point of law; (5) does not include a legal issue of continuing public interest; and (6) the outcome is not reasonably debatable. *Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990).

Oral argument to address whether provisions of the M21-1 are binding on the Board as to claims for service connection for hepatitis C would not materially assist the Court in the disposition of this appeal. Appellant seeks service connection for hepatitis C and relies on provisions of the M21-1, the VA Adjudication Procedure Manual. Motion at 1-2. First, the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) has held that "[t]he M21-1 Manual is binding on neither the agency nor tribunals." *DAV v. Sec'y of Veterans Affairs*, 859 F.3d 1072, 1077 (Fed. Cir. 2017). Therefore, the Board does not commit legal error by not following the provisions of the M21-1, as interpreted by Appellant. Second, as argued in the Secretary's Brief, even if the M21-1 were binding on the Board—and given the Board referenced the relevant provisions of the M21-1—the M21-1

directs VA to obtain medical evidence as to nexus between in-service risk factors and the current diagnosis of hepatitis C, consistent with well-established law. Secretary's Brief at 13-17; *McLendon v. Nicholson*, 20 Vet.App. 79, 85 (2006) ("when a nexus between a current disability and an in-service event is 'indicated,' there must be a medical opinion that provides some nonspeculative determination as to the degree of likelihood that a disability was caused by an in-service disease or incident to constitute sufficient medical evidence on which the Board can render a decision with regard to nexus"); *Colvin v. Derwinski*, 1 Vet.App. 171, 175 (1991) ("BVA panels may consider only independent medical evidence to support their findings."); *see Douglas v. Shinseki*, 23 Vet.App. 19, 23-24 (2009) (holding VA's duty to develop evidence in connection with a claim for service connection includes "the authority to schedule a veteran for a medical examination"); *Hyder v. Derwinski*, 1 Vet.App. 221, 225 (1991) ("Lay hypothesizing, particularly in the absence of any supporting medical authority, serves no constructive purpose and cannot be considered by this Court."). As outlined in the Secretary's Brief, the Secretary acknowledges that remand is warranted for a new VA medical opinion because the September 2017 VA nexus opinion of record is inadequate. Secretary's Brief at 8-11. Pursuant to well-settled law, the proper remedy for an examination that is inadequate for rating purposes is for VA to provide Appellant with a new, adequate examination. *Barr v. Nicholson*, 21 Vet.App. 303, 311 (2007) ("once the Secretary undertakes the effort to provide an examination when developing a service-connection claim, even if not statutorily obligated to do so, he

must provide an adequate one or, at a minimum, notify the claimant why one will not or cannot be provided"), *abrogated on other grounds by Walker v. Shinseki*, 708 F.3d 1331 (Fed. Cir. 2013); *see McLendon*, 20 Vet.App. at 81 (holding the duty to assist requires VA provide an examination if there is "insufficient competent medical evidence on file for the Secretary to make a decision on the claim"). As the parties agree that the September 2017 VA examination is inadequate for rating purposes, well-established precedence dictates that remand for a new examination is the proper remedy. *Coburn v. Nicholson*, 19 Vet.App. 427, 43 (2006) ("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"). Oral argument would not materially assist the Court in the disposition of this appeal because the current law already establishes (1) the M21-1 is not binding on the Board, (2) VA has the authority to order an examination as part of its duty to develop a claim for benefits, and (3) VA is obligated to provide a new examination if it provides an examination that is inadequate for rating purposes. As the applicable law is clear and the only dispute is factual findings by the Board, single judge disposition is appropriate in this case. *See* U.S. Vet.App. R. 34(b); *Frankel*, 1 Vet.App. at 25-26.

Furthermore, oral argument to address the standard for reversal would not materially assist the Court in the disposition of this appeal. The governing statute establishes that the Court may only reverse a material finding of fact "if the finding

is clearly erroneous." 38 U.S.C. § 7261(a)(4) (2020). Established precedence defines when a finding is "clearly erroneous." *Bowling v. Principi*, 15 Vet.App. 1, 6 (2001) ("A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed . . . In determining whether a finding is clearly erroneous and should be overturned, 'this Court is not permitted to substitute its judgment for that of the BVA on issues of material fact; if there is a 'plausible' basis in the record for the factual determinations of the BVA . . .,[the Court] cannot overturn them.'") (internal citations omitted). As the law is clear as to the standard for reversal, oral argument would not materially assist the Court in the disposition of this appeal.

For the foregoing reasons, Appellant has failed to demonstrate that oral argument is warranted in this case.

WHEREFORE, counsel for Appellee, Robert L. Wilkie, the Secretary of Veterans Affairs, respectfully requests that the Court deny Appellant's Motion for Oral Argument.

Respectfully submitted,

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