

APPELLANT’S REPLY BRIEF

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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-1493

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ROBERT P. WILLIAMSON

Appellant,

v.

ROBERT L. WILKIE,

SECRETARY OF VETERANS AFFAIRS,

Appellee.

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## **PRELIMINARY STATEMENT**

The Appellant, Robert P. Williamson (“Appellant”), appeals the November 28, 2019, decision by the Board of Veterans Appeals (“Board”) that denied his entitlement to service connection for a cervical and a thoracolumbar spine disability, which the Board conceded encompassed portions of the spine besides the cervical spine. Appellant filed his initial brief on September 17, 2019 and an amended initial brief on September 19, 2019 (“App. Br.”). The Secretary of Veterans Affairs (“Secretary”) filed his responsive brief on January 2, 2020 (“Sec. Br.”). Pursuant to U.S. Vet. App. 28(c), Appellant files this reply brief.

For the reasons detailed below and within Appellant’s opening brief, the Court should reject the Secretary’s arguments for affirmance and should issue an order vacating the Board’s decision that denied Appellant’s service connection claims for a cervical spine and thoracolumbar spine disability, based on a theory of continuity of symptomatology, or in the alternative, remand his claims for an adequate VA examination and an adequate statement of reasons or bases.

## **ARGUMENT**

### **I. APPELLANT IS ENTITLED TO SERVICE CONNECTION FOR A CERVICAL SPINE DISABILITY AND THORACOLUMBAR SPINE DISABILITY BASED UPON THE THEORY OF CONTINUITY OF SYMPTOMOLOGY.**

As explained in his initial brief, the Board erred by not granting Appellant’s claims for a cervical spine and thoracolumbar spine disorder based on continuity of symptomatology. (App. Br. at 9-15).

In his response brief, the Secretary challenges Appellant's argument that he was entitled to service connection for cervical degenerative disc disease (DDD) or degenerative joint disease (DJD) of the thoracolumbar spine, to include the lumbar spine, based on continuity of symptomology, because Appellant failed to demonstrate continuity of symptomology of a chronic condition. (Sec. Br. at 7).

Contrary to the Secretary's assertion, the record before the Board substantiates Appellant's argument that his in-service cervical and lumbar pain, diagnosed post-service as degenerative diseases have continuously manifested since Appellant served on active duty. (R. 62-65, 3404-06, 3720-21, 3936-37, 3971, 3366).

Veterans suffering from chronic conditions listed in 38 C.F.R. § 3.309(a) are entitled to service connection based on continuity of symptomatology when a chronic condition is noted during service, but may not be adequately supported. *See* 38 C.F.R. § 3.303(b). If chronicity in service is not fully supported by the facts *then* a showing of continuity of symptomology after discharge is required. *See id.* (emphasis added). As outlined within Appellant's brief, the record contained evidence of in-service complaints and treatment for neck and back pain that continued to exist during the 30 years since Appellant separated from active duty. (App. Br. at 12-15) (R. at 62-65, 3404-06, 3720-21, 3936-37, 3971, 3366). Additionally, after reviewing an August 2012 x-ray of the cervical spine, Appellant's treating VA doctor diagnosed his cervical pain as traumatic arthritis. (R. at 3720-21); *see* 38 U.S.C. § 5103A(d)(2)(B); *McLendon v. Nicholson*, 20 Vet. App. 79, 83-84 (2006) (observing that the third prong of § 3.159(c)(4)(i)(C), requires that evidence of record indicate that the claimed disability or symptoms *may be* associated with established

event, injury or disease, “establishes a low threshold.”) (emphasis added); *Locklear v. Nicholson*, 20 Vet. App. 410, 419 (2006); *see also Savage v. Gober*, 10 Vet. App. 488, 495 (1997). For these reasons, the Secretary’s argument that Appellant neglected to mention any of the “crucial” elements needed to establish service connection through § 3.303(b) fails. (Sec. Br. at 7, 11).

As the Court pointed out in *Walker v. Shinseki*, “[t]he correct understanding of the ‘condition noted during service’”, as demonstrated by the regulatory history contained in language of § 3.303(d) is “that the condition is one that is *indicative* of but *not* dispositive of a chronic disease.” *See* 708 F.3d. 1331, 1340 (2013) (emphasis added).<sup>1</sup> As explained within Appellant’s initial brief, the pain he experienced while on active duty was indicative of arthritis.<sup>2</sup> Because of which, the Secretary’s contention that Appellant in-service spinal pain was not dispositive of a chronic disease, fails. *See id.* (Sec. Br. at 6-7) (R. at 3405-06, 3668).

Next, the Secretary argues that Appellant failed to demonstrate he experienced ongoing continuity of DDD or DJD because the chain of continuity was broken and therefore, extinguished because in June 1985, Appellant’s treatment record did not show

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<sup>1</sup> MERRIAM-WEBSTER, *Indicative*, <https://www.merriam-webster.com/dictionary/indicative> (“serving to indicate”) (last visited Jan. 25, 2020); MERRIAM-WEBSTER, *Dispositive*, <https://www.merriam-webster.com/dictionary/dispositive> (“directed toward or effecting disposition (as of a case)”) (last visited Jan. 25, 2020).

<sup>3</sup> MAYO CLINIC, *Arthritis*, <https://www.mayoclinic.org/diseases-conditions/arthritis/symptoms-causes/syc-20350772> (suggesting that the most common signs and symptoms of arthritis include “pain, stiffness, [and] swelling . . . .”) (last visited Jan. 25, 2020).

the presence of arthritis, joint deformity, and recurrent back pain. (Sec. Br. at 8) (R. at 3673-74). However, this is because central/lower back pain was not present until November 1986. (R. at 3405-06). Regardless, when a chronic condition, shown as such in service, with “subsequent manifestations of the same chronic disease at any later date, however remote, are service connected, unless clearly attributable to intercurrent causes . . . .” *Wilson v. Derwinski*, 2 Vet. App. 16, 19 (1991).

Next, the Secretary argues that Appellant is not entitled to service connection under a theory of continuity of symptomology, because Appellant did not complain of neck or back pain within a year of his separating from service. (Sec. Br. at 8). The Secretary supports his argument by pointing to the September 2013 VA examination, wherein the examiner reported that Appellant allegedly stated, “[h]e is not complaining of chronic lumbar or thoracic pain.” (Sec. Br. at 8) (R. at 3590). As Appellant previously explained, he notified the VA and complained that the he felt the examiner’s evaluation was “unprofessional”, because the examiner “did not seem to care” about what he told him during the examination. (App. Br. at 4) (R. at 3537-58). Contrary to the Secretary’s assertion, Appellant complained to VA in March 2014, four years prior to the Board’s issuance of its November 2019 decision. (R. at 3537-38). In light of this, the Secretary is mistaken in his contention that Appellant only cried foul after receiving the Board’s denial. (App. Br. at 4) (Sec. Br. 8, 14).

Next, the Secretary argues that the reasons or bases provided by the Board concerning § 3.303(b) were adequate to enable judicial review. (Sec. Br. at 9). However, as discussed above, the Secretary’s argument fails because the Board should have focused



on the manifestation of symptoms corroborated by the records of events in service, not on the lack of diagnosis during the presumptive period, when adjudicating Appellant's claims. (App. Br. at 10); *Greyzck v. West*, 12 Vet. App. 288, 291, *dismissed*, 217 F.3d 853 (Fed. Cir. 1999). Because of which, the Secretary cannot defend the Board's analysis, because when establishing continuity of symptomatology, the in-service and post-service diagnoses of the chronic condition at issue do not have to be identical. *See Hodges v. West*, 13 Vet. App. 287, 292 (2000) *Greyzck v. West*, 12 Vet. App. 288, 291, *dismissed*, 217 F.3d 853 (Fed. Cir. 1999). Again, the Board's denial of Appellant's claims demonstrated its own misunderstanding of the law, when applying continuity of symptomology. (R. at 6-8). Moreover, the regulation only requires continuity of symptomology and not continuity of treatment. (Sec. Br. at 8); *see Wilson v. Derwinski*, 2 Vet. App. at 19 (Sec. Br. at 8). Thus, the neck and back pain experienced by Appellant during active military service and post service, later diagnosed a degenerative diseases of the cervical and lumbar spine met the evidentiary requirement to establish continuity of symptomology of a chronic disease. *See id.*; *see also* 38 C.F.R. § 3.303(b) (providing for a grant of service connection for conditions that are diagnosed after separation of service); *Combee v. Brown*, 34 F.3d 1039, 1042 (Fed. Cir. 1994) ("[p]roof if direct service connection thus entails proof that exposure during service caused the malady that appears many years later"); *Cosman v. Principi*, 3 Vet. App. 503, 506 (1990) ("even though a veteran may not have had a particular condition diagnosed in service, or for many years afterwards, service connection can still be established").

## **II. THE SECRETARY HAS FAILED TO DEMONSTRATE THAT THE BOARD HAS PROVIDED AN ADEQUATE MEDICAL OPINION TO EVALUATE APPELLANT'S CLAIMS.**

In his response brief, the Secretary challenges Appellant's contention that the September 2013 and February 2016 VA examinations were inadequate; however, as explained in his initial brief, the Board erred when it relied upon the September 2013 and February 2016 VA medical opinions to form the basis of its opinion, because both opinions were inadequate. (App. Br. at 17-18, 23-27); *see Barr v. Nicholson*, 21 Vet. App. 303, 311 (2007).

Contrary to the Secretary's argument, neither the September 2013 or February 2016 VA examiner thoroughly reported on Appellant's cervical or thoracolumbar spine disabilities, nor did they clearly reference relevant elements of Appellant's medical history. (Sec. Br. at 16) (App. Br. at 17-18, 24-27); *see Nieves-Rodriguez*, 22 Vet. App. 295, 304 (2008) (emphasizing that inadequate medical examinations include examinations that contain only data and conclusions, do not provide an etiological opinion, are not based upon a review of medical records, or provide unsupported conclusions); *Stefl v. Nicholson*, 21 Vet. App. 120, 124 (2007).

The Secretary cannot defend his argument that the Board's stated reasons and bases regarding the evidence of record sufficiently facilitated judicial review, because as explained in Appellant's brief, the Board's reliance upon these two unfavorable medical opinions without identifying or discussing any of the positive evidence previously identified by Appellant was not "clear enough to permit effective judicial review", nor in compliance with the statutory requirements. (Sec. Br. at 13) (App. Br. at 19-21) (R. at 6-

8); *see* 38 U.S.C. § 7104(d)(1); *Gilbert v. Derwinski*, 1 Vet. App. 49, 56-57 (1990). Thus, the Secretary's argument that the Board's discussion regarding its determination that the preponderance of the evidence did not support Appellant's entitlement to service connection for a cervical spine and a thoracolumbar spine disability fails.

### **CONCLUSION AND STATEMENT OF RELIEF**

For the foregoing reasons, and those reasons explained in Appellant's amended initial brief, Appellant respectfully requests this Court issue an Order that vacates and remands the Board's November 28, 2019 decision that denied his claims for entitlement to service connection for a cervical spine and thoracolumbar spine disability, to provide (1) an adequate statement of reasons or bases, and (2) a new, adequate examination report, obtained by a fair process and is adequate at law.

Respectfully Submitted,

Dated: January 30, 2020

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