

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

Vet. App. No. 18-6044

ERIC C. ELDER

Appellant

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs

Appellee

On Appeal From the Board of Veterans' Appeals

Reply Brief of the Appellant Eric C. Elder

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Pursuant to U. S. Court of Appeals for Veterans Claims Rule 28(c), Eric C. Elder (“Appellant” or “the Veteran”) hereby replies to the Secretary’s Brief (SB).

STATEMENT OF FACTS

The Appellant incorporates by reference the Factual Background in his Brief filed on August 19, 2019. Appellant’s Brief (AB) at 2-7.

ARGUMENT

I. THE BOARD’S DECISION WAS MADE WITHOUT OBSERVANCE OF PROCEDURES REQUIRED BY LAW

The Secretary argues that the Board’s decision should be upheld because there was an adequate basis for the decision. SB at 11. Under the “clearly erroneous” standard of review, “if there is a ‘plausible’ basis in the record for the factual determinations of the BVA, even if this Court might not have reached the same factual determinations, [the Court] cannot overturn them.” *Gilbert v. Derwinski*, 1 Vet. App. 49, 52 (1990) (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985)). However, “plausible basis” is the standard for evaluating a factual finding by the Board. *Id.* It is not a substitute for an evaluation of whether the VA has complied with legal requirements. The Court is to set aside decisions that are made without observance of procedures required by law. 38 U.S.C. § 7261(a)(3)(D). Therefore, before reaching the question of whether there is a plausible basis for the Board’s decision, the Court must determine that the Board complied with all procedures required by law.

The Board is required to provide a written statement of the reasons and bases for its decision under 38 U.S.C. §7104(d)(1), and compliance with the statute must be considered,

regardless of whether there is a plausible basis for the Board's decision. The initial inquiry must be whether the BVA provided an adequate statement of the reasons or bases for its decision. If the BVA has failed to do so, the Secretary cannot assert after the fact that there was a plausible basis for the BVA's decision. *See Doty v. U.S.*, 53 F.3d. 1244, 1251 (Fed. Cir. 1995), *citing Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50, 103 S. Ct. 2856, 2870, 77 L. Ed. 2d 443 (1983). ("[C]ourts 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."). The Secretary has failed to fully respond to Appellant's arguments regarding the Board's failure to observe procedures required by law. The Court must deem any arguments not raised by a part as abandoned. *See Pieczenik v. Dyax Corp.*, 265 F.3d 1329, 1332-33 (Fed. Cir. 2001); *Norvell v. Peake*, 22 Vet.App. 194, 201 (2008); *Woehlaert v. Nicholson*, 21 Vet.App. 456, 463 (2007). In Appellant's Brief, the Veteran has demonstrated several errors made by the Board. Because of these errors, the Veteran was not afforded the benefit of the law, and the outcome of those errors is a denial of the Veteran's claim. As such, these errors affect the essential fairness of the adjudication, and the Veteran is prejudiced as a result. *Overton v. Nicholson*, 20 Vet.App. 427, 435 (2006).

The Secretary does not fully grasp the entirety of Appellant's argument regarding the failure to provide adequate reasons or bases for its denial of the Appellant's CUE for his claims of service connection for viral meningoencephalitis or residuals of the condition. The Secretary essentially admits this when noting that Appellant's argument is unclear and that the records do not show evidence of residuals of viral meningoencephalitis. SB at 8.

However, the Secretary cited the very nature of the argument that the Appellant made, which was that the last examination (referring to the December 1975 military discharge exam) failed to show viral meningoencephalitis and indicated that the Appellant had recovered from the condition at the time of his 1972 hospital discharge. R. at 7026 (7025-7026), 3304. This argument was made without acknowledging that achieving recovery from the condition at that time would have been contrary to the discharging physician's recommendations for ongoing care and limited activity. R. at 7017 (6997-7017). The 1975 examiner concluded that residuals of the condition were not present without providing an adequate rationale to support that finding. R. at 7025 (7025-7026). The Appellant's assertion that this conclusion is a misstatement of fact is not about his dissatisfaction with how the RO interpreted the treatment record (SB at 9), as the Secretary claimed, but with the clear discrepancy between that interpretation and what is actually stated in the medical record with regard to recommendations for ongoing post-discharge care. R. at 7017 (6997-7017). Further, the Secretary interpreted the record himself when stating that "the 1976 rating decision correctly noted that no viral meningoencephalitis or residuals were detected at Appellant's separation examination" and concluding that, even if it had not fully resolved at the time of the Appellant's hospital discharge in 1972, "it had resolved by the time of his separation." SB at 10.

The VA claims adjudication process is not adversarial, but the Board's statutory obligations under 38 U.S.C. §7104(d)(1) to state "the reasons or bases for [its] findings and conclusions" serves a function similar to that of cross-examination in adversarial litigation. *Gabrielson v. Brown*, 7 Vet.App. 36, 40 (1994). The Board failed to provide adequate

reasons and bases for its decision. The Board did not analyze the credibility and probative value of the evidence, account for the evidence it finds persuasive or unpersuasive, and provide reasons and bases for its rejection of evidence favorable to the claimant's position. Because of these errors, the Veteran was not afforded the benefit of the law. Therefore, the Board's decision should be vacated and remanded.

II. CONCLUSION

WHEREFORE, for the reasons stated herein, the Appellant respectfully requests this Court to vacate and remand the Board's September 7, 2017 decision, and to grant all remedies available to him at law, including reversal if this Honorable Court deems fit.

Respectfully submitted,

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Dated: January 30, 2020

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