IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

CHRISTOPHER L. FULKS,	)	
	)	
Appellant,	)	
	)	
v.	)	Vet.App. No. 18-6232
	)	
ROBERT L. WILKIE,	)	
Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

APPELLEE'S RESPONSE TO
APPELLANT'S MOTION TO STRIKE

Pursuant to U.S. Vet.App. Rule 27(b), Appellee, Robert L. Wilkie, Secretary of Veterans Affairs, respectfully opposes Appellant's motion to strike the records appended to the Secretary's brief, as well as references to its contents in the Secretary's brief, filed on December 19, 2019.

A. Appellant's privacy concerns are not a basis for striking the appended records

Consistent with the Court's rules, undersigned counsel redacted personal identifying information before appending Appellant's records and filing them with the Court on October 21, 2019. *See* Vet.App. Rule 6(a). In his motion to strike, Appellant indicates that his date of birth was not redacted from Exhibit 1 of the Secretary's Brief. Upon review of the document, undersigned counsel acknowledges that this information was not properly redacted when it was filed with the Court. However, this is not a basis to strike the document.

Prior to filing his motion to strike, Appellant did not notify either undersigned counsel or file a motion with the Court pursuant to Vet.App. Rule 6(c) as to this error in redaction. On December 18, 2019, the day before Appellant filed the motion to strike, counsel for Appellant notified undersigned counsel of her general privacy concerns regarding the appended records—she did not identify any error in redaction. That day, undersigned counsel requested the Court lock the Secretary's brief and the appended records based on the report of a general privacy concern. Counsel for the Secretary endeavored to ensure all personal identifying information was redacted prior to filing the appended medical records and, when counsel for Appellant raised privacy concerns—in general terms—acted to have the Court lock the documents due to an abundance of caution.

As Appellant notes, Vet.App. Rule 6(c) directs parties to file a motion challenging a redaction within 15 days of the redacted document's filing. The Secretary's brief and the appended records were filed on October 21, 2019, and Appellant's motion to strike was filed on December 19, 2019—not within 15 days of the filing of the Secretary's brief and the appended records. To the extent Vet.App. Rule 6(c) does not contemplate redaction errors of the type at issue here, the Secretary notes that Appellant first raised this issue to counsel for the Secretary on December 18, 2019, and first filed a motion concerning this matter with the Court on December 19, 2019. Appellant did not raise this matter when he

first reviewed the Secretary's brief in preparation for filing the motion to strike or Appellant's reply brief filed the same day.

Regardless of the timeliness of a motion challenging the error in redaction, the proper remedy is not to strike the appended medical records but to ensure the documents are properly redacted or to have the documents locked. The Court's Rules contemplate the need to file documents with personal identifying information and directs parties to redact such information. Vet.App. R. 6(a). The Rules also contemplate locking documents with such information. *Id.* Prior to filing the appended medical records, counsel for the Secretary endeavored to redact all personal identifying information. And, the day counsel for Appellant raised general privacy concerns, undersigned counsel had the documents locked. The Secretary respectfully submits that under the Court's Rules the proper remedy to the redaction error is for either counsel for the Secretary to re-submit correctly redacted documents or to have the documents locked—which has already been accomplished in this case.

B. <u>The appended documents were constructively before the Board</u>

Appellant's motion to strike rests on a misapprehension of the law and, moreover, espouses an impractical approach to veterans' law that would work to the detriment of the Secretary, the Court, and, indeed, veterans themselves. First, the law. Appellant does not dispute the longstanding principle that records, such as the two appended to the Secretary's Brief, which predate the Board decision

and are contained within VA treatment records, must be considered as constructively before the agency at the time of the Board's decision. Motion to Strike (Mot.) at 3-4; *Bell v. Derwinski*, 2 Vet.App. 611, 613 (1992).

Appellant fails to grapple the corollary principle, articulated in *Bell* and confirmed in cases since, that on appeal the Court must determine whether such a record, constructively but not actually before the Board, "could be determinative of the claim." *Id.* If so, remand to obtain the record is in order. *Id.*; *Dunn v. West*, 11 Vet.App. 462, 466 (1998) (applying *Bell* and remanding to obtain missing records for which relevance was apparent); *Sims v. West*, 11 Vet.App. 237, 239 (1998) (noting that *Bell* requires remand only "*if* [the records] are determinative of the claim") (emphasis in original). The Court cannot answer this question without some indication of what the missing record contains. There being no information in the record that illuminates the contents of the two scanned records or hints at their relevance to the claims on appeal—service connection for a migraine/tension headache disability and hiatal hernia/gastroesophageal reflux disease (GERD)—the Secretary supplied it.

It is important to remember that the relevance requirement of *Bell* is no aberration. Rather, it rests comfortably on the well-settled rules that an appellant before this Court bears the burden to prove agency error, *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000), and, concurrently, the burden to prove that he was prejudiced by that error,

38 U.S.C. § 7261(b)(2); *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) (the appellant bears the burden to show "whether the result would have been different had the [Board's] error not occurred"); *Winters v. West*, 12 Vet.App. 203, 207 (1999) (even when an error has been committed, the Court "need not—indeed must not—vacate or reverse the BVA decision if it is clear that the claimant would have been unsuccessful irrespective of the error"), *rev'd on other grounds*, 219 F.3d 1375 (Fed. Cir. 2000). Even were this not so, however, the Secretary is not at liberty to ignore the Court's instruction in *Bell* that remand is warranted only if a missing record "could be determinative of the claim." *Bell*, 2 Vet.App. at 613.

Appellant's approach takes *Bell* out of the picture. First, says Appellant, the Court must decide the determinative nature of a missing record without any clue as to its contents, using some method that Appellant does not explain, simply because the Court's review is ordinarily limited to the record actually before the agency. Mot. at 5 (citing *Kyhn v. Shinseki*, 716 F.3d 572, 575 (Fed. Cir. 2013)). The constructive-notice rule answers this contention: the scanned documents were, in a legal sense, before the Board. Thus, the documents are not "extra-record evidence," Mot. at 6, and 38 U.S.C. § 7261(c) is not offended, *see Lynch v. Gober*, 11 Vet.App. 22, 26 (1997) (explaining that documents subject to the constructive-notice doctrine of *Bell* "are thus *constructively* part of the record before the Secretary and Board even where they were not *actually* before the adjudicating body") (emphasis in original).

Moreover, the absence of these documents from the record before the Court can be laid only at Appellant's feet. If Appellant wished this document, constructively before the agency, to be in the record now before the Court, he could have raised a dispute during assembly of the Record Before the Agency (RBA) pursuant to Vet.App. Rule 10. This procedure is routinely utilized when the parties agree that a newly discovered record could be outcome-determinative and need to add the document to the record to support a joint motion for remand under *Bell*. On the contrary, in this case, Appellant filed a motion accepting the contents of the RBA on March 7, 2019, and has never contested the contents of the RBA.

Even in cases where the parties do not agree on the relevance of the document, Appellant could have sought its inclusion in the RBA under Vet.App. Rule 10. Had he done so, the Court could have directed the Secretary to add the document to the RBA. *See Blount v. West*, 11 Vet.App. 32, 33 (1998) (per curiam) (directing the Secretary to supplement the record with relevant documents constructively before the agency under *Bell*); *Simington v. Brown*, 9 Vet.App. 334, 335 (1996) (per curiam) (holding that if certain relevant documents were submitted to VA during administrative proceedings, they should be considered part of the record on appeal to the Court, citing *Bell*). Contrary to Appellant's argument, the Court indeed permits records to be added to the RBA when they meet the *Bell* criteria. Indeed, the *Blount* Court considered such supplemental documents at oral argument and in its ultimate order in the case—although in that appeal the Court

resolved the matter by directing the parties to discuss a joint resolution in light of the veteran's poor health. *See Blount*, 11 Vet.App. at 35–37. Thus, there is no merit in Appellant's suggestion that the Court may never look at documents constructively, although not actually, before the Board.

Second, Appellant posits that the Court's relevance inquiry would amount to factual findings that the Court cannot make in the first instance. Mot. at 6. Not so. "[The] prohibition against plenary review of the underlying facts does not apply at the stage where [the Court] shoulder[s] [its] statutory obligation to examine for prejudicial error." *Simmons v. Wilkie*, 30 Vet.App. 267, 284 (2018). To determine whether an error meaningfully harmed the appellant, the Court's review is "exceedingly broad," affording the Court wide latitude to apply Congress's instruction to take due account of the rule of prejudicial error. *Id.*; *Vogan v. Shinseki*, 24 Vet.App. 159, 164 (2010) ("If the Court's review were restricted to findings made by the Board, the usefulness of Congress's direction that we examine an error for prejudice would be marginalized as a tool for avoidance of remands that entail no realistic prospect of an outcome more favorable to a veteran."); *Vazquez-Flores v. Shinseki*, 24 Vet.App. 94, 107 (2010) ("[P]rejudice is not assessed in a vacuum; rather it is based on the facts and circumstances presented in the entire record."). Deciding whether a missing record is in fact relevant to the claim on appeal is just such an inquiry. In arriving at its conclusion, the Court may take account of the pertinent information the Secretary supplied.

Finally, Appellant's reliance on *Murincsak v. Derwinski*, 2 Vet.App. 363 (1992), is misplaced, and it helps explain the weakness in Appellant's position. In that case, the appellant appealed the rating assigned for his mental disorder as well as the denial of a total disability rating based on individual unemployability. *Id.* at 366. The Court remanded the matter for the Board to obtain mental health treatment records from a VA medical center which had not previously been associated with the claims file. *Id.* at 372–73. The Court held that "[w]hen the VA is put on notice prior to the issuance of a final decision of the possible existence of certain records *and their relevance*," the Board must seek out those records before adjudicating the claim. *Id.* at 373 (emphasis added).

In *Murincsak* itself, the relevance of mental health treatment records to a psychiatric disorder claim could not reasonably be questioned, and the existence and nature of the records were even discussed during a VA examination. *See id.* Here, by contrast, as the Secretary demonstrated in his brief, Appellant has made no attempt to demonstrate the appended documents—related to a left shoulder MRI and discharge instructions following a vasectomy—are related to a migraine/tension headaches disability or hiatal hernia/GERD. *See* Appellant's Brief at 13-14; Appellant's Reply Brief at 4-10. Appellant's assertion of error and prejudice deserves some satisfactory explication, which Appellant still has not provided. *See Ussery v. Brown*, 10 Vet.App. 51, 54 (a "bold yet bald statement . . . is of no practical assistance to the Court").

This gap in his argument strikes at the core of Appellant's approach: he contends that remand is required when "the Board [is] provided actual notice of [the] existence" of a record, Mot. at 5, but that statement omits the crucial limitation of relevance imposed by *Bell*. Put simply, actual notice of the existence of a record is not enough to obtain remand when a claimant comes before the Court. In the posture of an appeal in this forum, relevance is layered atop notice.

Appellant cannot have it both ways: he cannot, on the one hand, cry foul for the Board's failure to obtain a certain document and, on the other, maintain that the parties and the Court must put on blinders and may not realistically determine whether he was prejudiced by the omission. Veterans' law is practical, and with good reason: it protects the agency, the Court, and veterans themselves from the unnecessary delay and expense occasioned by useless remands. *Soyini v. Derwinski*, 1 Vet.App. 540, 546 (1991) (concluding that remand was unnecessary where it "would result in this Court's unnecessarily imposing additional burdens on the [Board and the Secretary] with no benefit flowing to the veteran."). Indeed, the *Bell* rule inures as much to the benefit of claimants as much as anyone else, since it ensures that the overburdened agency adjudicative machinery is used toward reasonable ends. *Cf. Turner v. Shulkin*, 29 Vet.App. 207, 217 (2018) (noting that, in the context of the constructive-receipt rule, "the practical impact of a legal rule can certainly frame how that legal rule is applied").

Appellant's myopic view of the law is both incorrect and impractical. The Secretary provided records related to a left shoulder MRI and discharge instructions following a vasectomy to ensure that the Court is prepared to render a fully informed and considered decision on Appellant's claim for relief. The motion to strike should, therefore, be denied.

WHEREFORE, the Secretary respectfully requests that the Court deny Appellant's motion to strike.

Respectfully submitted,

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