REPLY BRIEF OF APPELLANT

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

19-416

DONALD F. CALDWELL,

Appellant

v.

ROBERT L. WILKIE
SECRETARY OF VETERANS AFFAIRS,

Appellee.

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APPELLANT'S REPLY ARGUMENTS

I. Like the Board, the Secretary overlooks that Mr. Caldwell's competent and credible report of increased left knee symptoms occurring when the service-connected right knee gives way is more than a "conclusory statement" that his left knee disability is aggravated by the right knee.

During his August 2014 VA examination, Mr. Caldwell described increased left knee pain and weakness when his service-connected right knee gives way, which he said, occurs almost once a month. R-238. The August 2014 VA examiner's observation that the Veteran suffered from weakened movement and disturbance of locomotion in the right knee, and that he required constant use of knee braces, supports Mr. Caldwell's report of the right knee giving way. R-241; R-243. Therefore, as argued in Mr. Caldwell's initial brief, this evidence is material because it (1) relates to the previously unestablished nexus element, and (2) raises a reasonable possibility of substantiating the claim. Appellant's Br. at 7-10.

This evidence is more than just a "conclusory statement" that "his left knee disability is secondary to his service-connected right knee disability," as the Secretary suggests. Secretary's Br. at 7. It is a competent and credible description of the increased symptoms that he experiences in the left knee when the right knee undergoes a flare-up; medical corroboration of the right knee symptoms that, according to Mr. Caldwell's description, lead to increased left knee symptoms; and a description of the frequency with which the left knee increased symptoms occur. *See* R-238.

The Board agreed that this evidence was new. *See* R-8. It also relates to the previously-unestablished element of nexus, as it shows that Mr. Caldwell has increased left knee symptoms when his service-connected right knee gives way. *See* R-1016. As such, it raises the question of whether the right knee aggravates the left knee by causing increased impairment. *See* 38 C.F.R. § 3.310(b) (2019); *Ward v. Wilkie*, 31 Vet.App. 233, 241 (2019). It is, therefore, material under 38 C.F.R. § 3.156(a) (2018); *Shade v. Shinseki*, 24 Vet.App. 110 (2010).

Although this new evidence alone may be insufficient to prove aggravation, it need not be in order to be material under 38 C.F.R. § 3.156(a) (2018). Rather, "material" evidence is that which, when combined with VA assistance, raises a reasonable possibility of substantiating the claim. *Shade,* 24 Vet.App. at 117. And a Veteran can prove entitlement to VA assistance if the claim is reopened with an "indication" that the claimed disability "may be" related to service. *See McLendon v. Nicholson*, 20 Vet.App. 79, 83-84 (2006). Therefore, the "reasonable possibility" test under 38 C.F.R. § 3.156(a) is met if there is an indication that the condition could be related to service. *See Shade*, 24 Vet.App. at 121 ("'[R]easonable possibility of substantiating the claim' results in a pro-veteran standard for reopening—one that contemplates . . . the likely entitlement to a nexus medical examination if the claim is reopened.").

As a result, the pertinent inquiry here is, does Mr. Caldwell's competent and credible description of increased left knee symptoms that occur during right knee

flare-ups, and the VA examiner's observations of the right knee symptoms, "indicate" that his service-connected knee aggravates the left? *See Shade*, 24 Vet.App. at 117; *see also Justus v. Principi*, 3 Vet.App. 510, 513 (1992) (new evidence is presumed credible). And the answer to that question is "yes."

An "indication" that a disability "may be" related to service (here, that the left knee disability may be related to the service-connected right knee) may be satisfied with competent and credible lay evidence. *McLendon*, 20 Vet.App. at 83. This is a low threshold. *Id.* There is no dispute that Mr. Caldwell is competent to describe that his increased left knee symptoms occur when the service-connected right knee gives way, and his descriptions must be presumed credible; there cannot be a legitimate dispute that this satisfies the low threshold of *McLendon*. *See id.*; *Justus*, 3 Vet.App. at 513.

Further, the Veteran's statement need not be specific enough to establish service connection to provide the needed "indication." *See McLendon*, 20 Vet.App. at 83. Rather, evidence that is "equivocal" or "lacking in specificity" may be sufficient. *Id.* As a result, to the extent that the Secretary argues that the statement cannot constitute material evidence because it is vague, the Secretary's argument should be rejected. *See* Secretary's Br. at 7.

The new evidence shows that Mr. Caldwell has increased left knee symptoms when his service-connected right knee gives way and raises the question of whether the right knee aggravates the left knee by causing increased impairment. *See* 38 C.F.R. § 3.310(b); *Ward*, 31 Vet.App. at 241. It is, therefore, material, and the Court should

reverse the Board's finding that new and material evidence sufficient to reopen the left knee claim had not been received. *See* R-9; *Shade*, 24 Vet.App. at 122-23 (reversing the Board's finding that new and material evidence had not been received). At the very least, the Court should vacate the Board's decision for it to provide an adequate statement of reasons or bases as to why the Veteran's competent and credible report of increased left knee symptoms during right knee flare-ups is not material. *See* 38 U.S.C. § 7104(d)(1).

II. The Secretary's argument that the Board was not required to offer Mr. Caldwell a hearing closer to his home is inconsistent with the record and the law.

As argued in the Veteran's initial brief, the Board is statutorily mandated to afford a claimant a hearing at a new location if the claimant so requests. *See* Appellant's Br. at 12-13; 38 U.S.C. § 7107(d)(1)(B)(iii) (2018).[1] Congress did not leave VA with any discretion on this matter. *See* 38 U.S.C. § 7107(d)(1)(B)(iii) (2018). Rather, when the appellant "request[s] a different location or type of hearing," "the Board *shall* grant such request and ensure that the hearing is scheduled at the earliest possible date without any undue delay or other prejudice to the appellant." *Id.* (emphasis added).

[1] Congress amended section 7107 in August 2017, but the amended version does not apply to Mr. Caldwell's claim because it was not denied by the RO after February 14, 2019. Veterans Appeals Improvement and Modernization Act of 2017, Pub. Law No. 115-55, 131 Stat. 1105 at 1115 (Aug. 23, 2017).

The Secretary acknowledges that Mr. Caldwell called VA to reschedule the May 2018 hearing, and the VA employee who recorded the communication noted that the "Huntington Regional Office is very far from [his] residence." R-35; Secretary's Br. at 11. And he does not contest that the Huntington RO is a five-and-a-half-hour drive from Mr. Caldwell's home. *See* Appellant's Br. at 3. He also concedes that once a claimant requests a new hearing location, "the Board 'shall grant such request.'" Secretary's Br. at 9 (quoting 38 U.S.C. § 7107(d)(1)(B)(iii)). Nonetheless, he argues that the Board had no obligation to offer Mr. Caldwell a hearing closer to his home, to include at the Board's offices in Washington, DC, which are merely 70 miles from his home. *See* Secretary's Br. 9-12; Appellant's Br. 15, fn. 3. The Court should reject the Secretary's argument.

First, to the extent that he argues that Mr. Caldwell did not request a new hearing at a new location, the argument should be rejected. *See* Secretary's Br. at 9-10. The Secretary does not explain how the report of contact in which the VA employee explicitly noted Mr. Caldwell's concerns about the distance between his home and the Huntington RO could be read as anything other than a request for a new hearing location. *See id.* Rather, he contends any such suggestion is "plainly impermissible [sic] post-hoc rationalization" and "purely speculative and based on nothing in the record." Secretary's Br. at 11. He is unable to articulate any reason why the report can be construed as anything other than a request for a new hearing location because there are none. The report of contact reveals that, contrary to the Board's finding,

Mr. Caldwell requested to reschedule the May 2018 hearing, including a new location. *See* R-2; R-35. The Court should, therefore, reverse the Board's clearly erroneous finding that he did not seek to reschedule the hearing at a location closer to his home. *See Gilbert v. Derwinski*, 1 Vet.App. 49, 53 (1990).

Next, the Secretary argues that Mr. Caldwell's absence from the September 2018 hearing at the Huntington RO excused the Board of any obligation to reschedule the May 2018 hearing at a different location. *See* Secretary's Br. at 10. Relying on 38 C.F.R. § 20.704(d) (2018), the Secretary argues that because VA rescheduled the *date* of the May 2018 hearing and Mr. Caldwell did not attend the rescheduled hearing or file a written motion for a new hearing within 15 days of the May 2018 hearing, "the Court should find no error in the Board's decision to issue its decision without a hearing." Secretary's Br. at 10.

The Secretary's argument, if accepted, would render superfluous Congress's directive that VA honor veterans' requests for a new hearing location. *See* 38 U.S.C. § 7107(d)(1)(B)(iii) (2018). Before Mr. Caldwell's absence can be deemed a withdrawal of the hearing request, the Board must actually honor his rescheduling request. *See id.* The Secretary has not and cannot show that the Board ever responded to Mr. Caldwell's request to reschedule the hearing for a new location, much less *honored* that request. But Congress was clear. When the claimant requests a new location, "the Board *shall* grant such request *and* ensure that the hearing is scheduled at the earliest possible date without any undue delay or other prejudice to the appellant." *Id.*

(emphasis added). Here, Mr. Caldwell made such a request, and the Board did not grant it. That is the end of the analysis under § 7107, and the Court should therefore vacate the Board's decision and remand the matter for it to afford Mr. Caldwell a hearing closer to his home.

The Secretary would have this Court hold that even though the Veteran fulfilled his only obligation under 38 U.S.C. § 7107(d)(1)(B)—to request a new hearing location—he was still required to travel eleven hours round-trip to attend the hearing on the rescheduled date, or to submit yet another request for a new location that could also go ignored. *See* Secretary's Br. at 10. The Court should decline to thwart Congress's clear intent that once the Board received a request for a new hearing location, the Board would not cause "any undue delay *or other prejudice* to the appellant." 38 U.S.C. § 7107(d)(1)(B)(iii) (2018) (emphasis added). As argued in Mr. Caldwell's initial brief, requiring him to travel 372 miles from his home or forfeit his right to a hearing certainly prejudiced him. *See* Appellant's Br. at 13. And allowing the Board to reschedule the hearing for the same location and requiring him to restate his objection would result in the "undue delay" that Congress explicitly prohibited. *See* 38 U.S.C. § 7107(d)(1)(B)(iii) (2018).

The Secretary does not appreciate the well-settled principle that an agency's regulations cannot trump Congress's clear directives. *See e.g.*, *Crumlich v. Wilkie*, 31 Vet.App. 194, 203 (2019); *Staab v. McDonald*, 28 Vet.App. 50, 55 (2016). As a result, the Board may not avoid its obligation under 38 U.S.C. § 7107(d)(1)(B)(iii) (2018) to

reschedule a hearing for a new location by invoking 38 C.F.R. § 20.704 (2018) when the claimant does not appear at a hearing that is rescheduled for the *same* location. Before the Board can penalize a claimant in accordance with its regulations, it must fulfill its duties under the statute. And it the Secretary does not dispute that the Board failed to do so here. His reliance on his own regulations to excuse the Board's failure to comply with the statute should therefore be rejected.

Finally, the Secretary urges the Court to hold that since the Veteran did not choose a BVA hearing when he submitted his substantive appeal in 2015, the Board was not required to offer him a hearing at its offices in 2018, after he informed the agency that the location VA chose for his hearing was over five hours from his home. Secretary's Br. at 11-12; R-35; R-158. But at the time he submitted the substantive appeal, Mr. Caldwell had no reason to understand that VA would schedule the hearing at the Huntington RO. Nothing on the Form 9 advised him of this fact, or that the hearing would be scheduled at *any* RO. *See* R-158. And even if it had, Mr. Caldwell had the statutory right to request a new location once he learned that it was scheduled to be held so far from his home. *See* 38 U.S.C. § 7107(d)(1)(B)(ii) (2018). The Court should reject the Secretary's argument that Mr. Caldwell was not entitled to a hearing at a location closer to his home simply because he did not know in 2015 that VA would require him to drive five and a half hours from his home in order to exercise his right to that hearing.

Accordingly, the Court should reverse the Board's clearly erroneous finding that Mr. Caldwell did not request to reschedule the hearing, and remand the matter for the Board to offer him a hearing at a location closer to his home. R-5; *Gilbert*, 1 Vet.App. at 52. At the very least, vacatur and remand are required for the Board to address the report of Mr. Caldwell's May 2018 telephone call in the first instance, and determine whether VA was required to schedule a hearing at a new location. *See* 38 U.S.C. § 7104(d)(1); 38 U.S.C. § 7017(d)(1)(B)(iii) (2018).

CONCLUSION

Mr. Caldwell has competently and credibly reported an increase in his left leg disability when his service-connected right knee gives way. This evidence raises the question of whether the service-connected right knee aggravates his left knee. As such, it relates to the previously unestablished element of nexus and raises a reasonable possibility of substantiating the claim. The Board's finding that the evidence is new but not material is, therefore, clearly erroneous, and accordingly, the Court should reverse it.

The Court should also hold that the Board erred in failing to offer Mr. Caldwell a new hearing at a location that is closer than five and a half hours from his home. The Veteran fulfilled his obligations under the statute when he requested a new hearing location. The Board, however, failed to comply with its duty to honor that request. Mr. Caldwell was not required to attend the new hearing scheduled at the same location, or to make repeated requests for a new location in order to exercise his

statutory right to a fair hearing. The Board, therefore, erred in deciding his claim without offering him a hearing at a new location, and the Court should vacate its decision and remand the matter for the Board to comply with its statutory obligation.

Respectfully submitted,

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