

US COURT OF APPEALS  
FOR VETERANS CLAIMS

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Net. App. 19-4777

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THE UNITED STATES COURT OF APPEALS  
FOR VETERANS CLAIMS  
625 INDIANA AVENUE, N.W. SUITE 900  
WASHINGTON, D.C. 20004-2950

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CARY E. SMITH  
Appellant,

v.

ROBERT L. WILKIE  
Secretary, Veterans Affairs,  
Appellee.

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APPELLANT REPLY IN RESPONSE TO APPELLEE BREIF

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CARY E. SMITH  
2509 HUNTWICK ST.  
GRAND PRAIRIE, TEXAS 75050

**THE UNITED STATES COURT OF APPEALS  
FOR VETERANS CLAIMS  
625 INDIANA AVENUE, N.W. SUITE 900  
WASHINGTON, D.C. 20004-2950**

**CARY E. SMITH**

**Appellant,**

**v.**

**Vet. App. 19-4777**

**ROBERT L. WILKIE**

**Secretary, Veterans Affairs,**

**Appellee.**

**APPELLANT REPLY IN RESPONSE TO APPELLEE BRIEF  
DATE APRIL 6, 2018 PURSUANT TO RULE 28 ( C )**

Appellant (Cary E. Smith) pursuant to Rule of Practice and  
Procedures file the following reply in response to Appellee brief dated  
February 10, 2020 in accordance with Rule 28 ( c ).

Appellee [Br.at pg. 5] Summary of the Arguments request the  
Court to affirm the June 19, 2019 Board decision that denied veteran  
\*entitlement to an effective date earlier than September 8, 2015 for  
assigned 10% percent disability rating for "Right knee, patellofemoral  
syndrome; \*entitlement to an effective date earlier than September 8,  
2015 for assigned 10% percent disability rating for "Left knee,

patellofemoral syndrome; \*entitlement to service connection for: 38 CFR section 3.317 Undiagnosed illnesses or Medically unexplained chronic multisymptom illness associated with borderline to abnormal laboratory results microalbuminemia; enlarged occipital horn of lateral ventricles with mildly thickened TH optic nerves; increased risk for kidney disease & diabetes due to Gulf War exposure; WHERE Appellee allegedly conclude: "because the Board provided adequate reasons and bases for its determination, plausibly based its determination of the facts and the law; and concluded; Appellant has not demonstrate the Board decision is clearly erroneous or the result of prejudicial error; WHERE Appellee [Br.at pg.3] Statement of Relevant facts; failed to accurately weigh a complete "determination of the facts" as noted in the following Appellant March, 2018 Statement of the Case [SOC] issues; as follow:

- [I]. Director {EIC} 03/12/2018 [SOC] decision erred in it reasons and bases that {VA examination revealed slight LOM; and July 1998 rating decision failed to note pain or limited motion in either knee} resulting in the following reasons and bases below; is determined contrary to *Kahana v. Shinseki*, 24 Vet. App. 428, 435 (2011) (holding that the Board or RO errs when it makes an inference that results in a medical determination without citing an independent medical basis for that inference); *Colvin v. Derwinski*, 1 Vet. App.

171, 175 (1991) (holding that the Board or RO errs in relying on its own unsubstantiated medical conclusions to deny a claim);  
WHERE Director (EIC) concluded:

“We must confirm our previous decision in which evaluations of 10% percent were assigned for bilateral patellofemoral pain syndrome; in absence of appreciable limitation of motion, based on objective painful motion;

AND;

“Entitlement to {no more than} 10% percent rating and; {no earlier} than assigned effective date of 09/08/2015 for: “bilateral patellofemoral pain syndrome; (date of receipt of informal claim); ***incorrectly applied*** 38 CFR section 3.400(o)(2) {earliest date, of which it is ascertainable that an increase in disability occurred}; contradictory to RO July 30, 1998 rating decision that denied rating in excess of 0% (zero) percent; contrary to regulatory provisions of 38 CFR section 3.400(o)(1) {effective date for an award of increased compensation will be the date of receipt of claim or the date entitlement arose, whichever is later; AND

contrary to Veteran July 25, 2016 [NOD] disagreeing with RO denial of rating in excess of 10% percent & earlier effective date than September 8, 2015 for:

“Right patellofemoral pain syndrome” evaluated by rating specialist under (DC-5257) for painful motion of the knees;”

AND denying veteran rating in excess of 10% percent for: "Left patellofemoral pain syndrome" now evaluated by rating specialist under (DC-5260) based on painful motion of the knees" AND additionally concluded "No Revision Warranted" in R.O. original 07/30/98 rating decision that initially:

denied Veteran higher evaluation than 0% percent {noncompensable} for: "Bilateral Patellofemoral Pain Syndrome" because rating specialist at the time of original decision determined absence of recurrent subluxation or lateral instability symptoms {but failed to weigh incapacitating episodes having a total duration of 6 weeks during the past 12 months}; then concluded record justified denial of higher rating for assigned veteran service connected: Bilateral Patellofemoral Pain Syndrome"

in contradiction with schedule for rating musculoskeletal system overlooked 38 CFR Part 4 section 4.71a (DC 5256) Knee, ankyloses of due to {extremely unfavorable flexion}; also failed to note absence of (DC-5257) Knee, other impairment of {Recurrent subluxation or lateral instability}) where *Barron's Dictionary of Medical Terms* defined "*patellofemoral syndrome*" as a condition that involve the hip, thigh, knee, and main nerve of the anterior part of the thigh; establishing Veteran required evaluation under *Diagnostic code 5250* {Hip, ankyloses of} favorable in flexion, at an angle between 20 degrees and 40 degrees and slight adduction or abduction warranting 60% percent rating.

In addition, Director {EIC} April 18, 2016 decision letter failed to comply with 38 CFR section 3.159( c )(4)(i){provide required medical opinion, & x-ray examination test results}; for comparison with RO 07/30/98 rating specialist decision challenged by veteran as [CUE] clear and unmistakable error where RO admitted in the record the following statement determined a contradiction with 38 CFR section 3.159( c )(4) conceded that VA did not provide a {medical examination or obtain required medical opinion} stated:

“we have no recent medical treatment records, reasonable doubt has been resolved in favor of the claimant,” and additionally stated:

“Veteran received treatment for his bilateral knee condition within 3 months of release from active duty, and there is no indication that the condition had resolved; AND

then conceded Veteran condition had worsened in severity within months since Veteran March 6, 1993 separation from service, where VA July 20, 1998 rating decision assigned a January 23, 1998 effective date for now diagnosed condition: “Bilateral Patellofemoral Pain Syndrome” originally claimed as {bilateral knee condition}, warranted higher evaluation rating of 60% percent rating based on a more complete medical description of “Bilateral Patellofemoral Pain Syndrome,” in comparison with symptoms described solely for a “Knee condition.”

RO initial rating decision dated (August 10, 1998) conceded at the that time, that the service records “on hand” showed that the Veteran was seen and treated for “Bilateral patellofemoral pain syndrome” from September 19, 1992 to December 8, 1992

RO 07/30/98 rating specialist conceded in contradiction with 38 CFR section 3.159( c )(4) that VA **did not** provide a medical examination or obtain required medical opinion}; and stated:

“we have no recent medical treatment records, reasonable doubt has been resolved in favor of the claimant,” and additionally stated:

“Veteran received treatment for his bilateral knee condition within 3 months of release from active duty, and there is no indication that the condition had resolved; AND

indirectly conceded Veteran condition had worsened in severity within months since Veteran March 6, 1993 separation from service, where VA July 20, 1998 rating decision assigned a January 23, 1998 effective date for now diagnosed condition:

“Bilateral Patellofemoral Pain Syndrome” originally claimed as {bilateral knee condition}, warranted higher Bilateral 60% percent rating based on a complete medical description of Patellofemoral Pain Syndrome,” in comparison with description of a “Knee condition.”

- [II]. Director [SOC] conceded: Appellant served on active military duty from March 1989 to March, 1993. [*Appellee Br. pg.3*] Where the following facts support blood disorders noted during service:

A “September 19, 2017 examination advised that examinations of the “central nervous system” revealed no abnormalities on MRI; examination of the “endocrine system” revealed no diagnosis of diabetes or other endocrine conditions; there were no findings of a chronic kidney condition; **OTHER than** microalbuminuria likely due to hypertension;” AND concluded Veteran did not have

“chronic illnesses” or “conditions due to or caused by environmental exposure in SW Asia; WHILE arguable conceded on lack of knowledge of disease’s caused by SW Asia environmental exposure; laboratory test concede {veteran claimed conditions} cannot attribute to any clinical diagnosis, meet the following 38 CFR section 3.317 regulatory provision requirement:

Veteran who exhibits objective indications of chronic disability resulting from an illness or combination of illnesses manifested by one or more signs or symptoms such as those listed in paragraph (b) of this section, provided that such disability: [i] became manifested during military service in the SW Asia theater of operations during the Persian Gulf War; [ii] by history, physical examination, and laboratory test cannot be attributed to any known clinical diagnosis; [iii] existed for 6 months or more, exhibited intermittent episodes of improvement and worsening over a 6-month period will be considered chronic; and rated under Part 4 of this chapter’;

clearly failed to explain unknown etiology or cause of abnormal lab results as follow, defined as an indication of undiagnosed illness:

Health Risk Appraisal Profile dated October 24, 1991 note Veteran [Blood Pressure 130/96] hypertension mildly high; VA December 16, 1997 Lab Results Chem Profile [laboratory test] reported: CO2 [30.9-Hi] ; WBC – 9.3 [Top of range]; MCHC – 33.2 [Bottom of range]; Glucose – 76 [Bottom of range]; Creatinine 1.1 [Top of range];



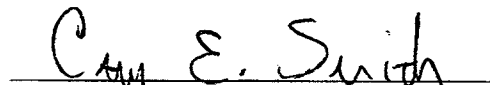
COMPARED TO – LabCorp 6/1/2011 Lab Results reporting:  
Glucose [OK]; BUN 9 [Bottom of range]; Creatinine 1.06  
[Top of range]; BUN/Creatinine Ratio 8 Lo [Abnormal bottom  
of range]; *increase risk for kidney disease*; Sodium – 144  
[Borderline Abnormal Top of range]; Protein, total 6.5  
[Abnormal Bottom of range]; A/G Ratio 1.7 [Bottom of range];  
Bilirubin, total & direct [Bottom of range]; Iron – 59 [Bottom of  
range]; Triglycerides – 48 [Bottom of range]; WBC 10.8  
[Abnormal Top of range]; MCV – 93 [Top of range]; MCHC –  
32.8 [Bottom of range]; Platelets – 196 [Bottom of range]; Basos  
0 [Borderline Bottom of range]; Neutrophils (Absolute) 7.2 [Top  
of range]; Hemoglobin A1c – 5.5 [Borderline Abnormal Top of  
range] *increase risk for diabetes*

Secretary and Board decision(s) are required to explain in detail  
why examiner diagnosis of Veteran claimed condition(s) that conceded  
“unknown etiology” and “associated with another condition” such as in  
service {hypertension} failed to meet requirements of Section 202 of the  
“Veterans Education and Benefits Act of 2001” expanded the definition  
of “qualifying chronic disability” to include: (1) a medically unexplained  
chronic multi-symptom illness (such as chronic fatigue syndrome,  
fibromyalgia, and irritable bowel syndrome) that is defined by a cluster  
of signs or symptoms; and (2) any diagnosed illness that the Secretary of

the VA determines in regulations warrants a presumption of service connection.

WHEREFORE Appellee failed to properly weigh the evidence of record verifying Veteran in service October 24, 1991 [Blood Pressure 130/96] *hypertension* mildly high; & where an examiner opinion that Appellant's Microalbuminemia is likely due to non-service connected hypertension; and where Appellee erroneously argue that "there is no evidence that Appellant had any of these disorders during service;" failed to admit that Appellant DID established a benefits of the doubt doctrine was applicable, and required Appellee resolve any doubt in favor of the claimant.

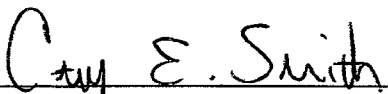
Respectfully Submitted

  
Cary E. Smith  
2509 Huntwick Street  
Grand Prairie, TX. 75050

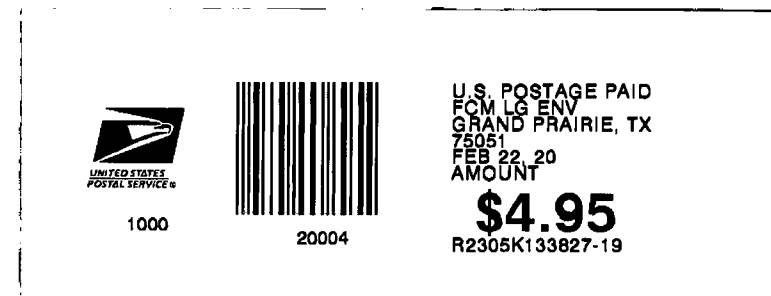
## CERTIFICATE OF SERVICE

I certify that on this 22 day of February 2020 Appellant file the following reply in response to Appellee brief with the U.S. Court of Appeals for Veterans Claims, 625 Indiana Avenue, NW Suite 900, Washington, D.C. 20004 with copy to the Office of the General Counsel, 810 Vermont Avenue, NW., Washington, D.C. 20420 sent by certified mail.

Respectfully Submitted

  
Cary E. Smith  
2509 Huntwick Street  
Grand Prairie, TX. 75050

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2509 HUNTWICK ST.  
GRAND PRAIRIE, TX.  
75050



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