

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

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No. 19-570

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**Floyd B. Sullivan,**

Appellant,

v.

**Robert L. Wilkie,**

Secretary of Veterans Affairs,

Appellee.

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**Appellant's Reply Brief**

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## Argument

### **I. The Secretary concedes that remand is warranted because the October 2017 examiner misstated a material fact.**

In the principal brief, Mr. Sullivan argued that the October 2017 VA medical opinion is inadequate for a number of reasons, including that the examiner had incorrectly stated that there was no objective documentation of low back complaints while on active duty and subsequent to service. *See* Appellant's Brief (App. Br.) at 11-12. The Secretary concedes that remand is warranted, and that the October 2017 medical opinion is inadequate specifically because of the mischaracterization of the content of lay statements Mr. Sullivan submitted. *See* Secretary's Brief (Sec. Br.) at 14-15. Mr. Sullivan appreciates the Secretary's candor in conceding that the examination is inadequate and respectfully asks that the Court remand on this basis due to the agreement of the parties even if it does not find further relief warranted as discussed in his principal brief and below.

Mr. Sullivan also notes that, as he discussed in the principal brief, the examiner stated that "[h]is buddy statements do not support a low back disability during the years in between active duty and 1996 and instead indicate that the Veteran was able to golf, hunt, travel and play ball." **R. at 67 (64-67)**. This statement is contradicted by evidence from multiple lay statements, including those of Mr. Sullivan's wife, daughter, and three friends who all reported that Mr. Sullivan has been displaying symptoms of back problems for over 40 years. *See* App. Br. at 8-9; **R. at 1157-65**. The Secretary only directly concedes that the examiner misstated a material fact because Mr. Sullivan's wife "states that

“[Appellant] has suffered from back pain ever since he was released from active duty. He has been limited to what he has been able to lift and also the activities in which he participates.” *See* Sec. Br. at 14-15, **R. at 1165**. The Secretary does not address Mr. Sullivan’s argument pertaining to the content of the other lay statements that also indicate Mr. Sullivan’s back disability was present in the years between active duty and 1996. *See* Sec. Br. at 14-15. Thus, the Court should find that the Secretary implicitly concedes that the examiner not only misstated the material fact regarding Mr. Sullivan’s condition because of his wife’s testimony, but also because of the testimony of his long-time friends and adult daughter. *See* App. Br. at 8-9; *MacWhorter v. Derwinski*, 2 Vet. App. 655, 657 (1992) (warning Secretary that “failure [to address issues raised in appellant’s brief] . . . in other cases may result in the Court interpreting such failure to respond as a concession of error”), *appeal dismissed as moot*, 3 Vet. App. 223 (1992) (*per curiam* order).

## **II. The Secretary mistakes instructions to an examiner with legal presumptions imposed upon adjudicators.**

In his principal brief, Mr. Sullivan argued that the Board failed to ensure compliance with its September 2017 remand instruction that the VA examiner must presume that he is a reliable historian. *See* App. Br. at 5-9 (discussing **R. at 175 (172-76)**). The Secretary argues that the examiner complied with the Board’s remand instructions because the Board’s instruction that the examiner must presume Mr. Sullivan to be a reliable historian created a rebuttable presumption which the examiner properly found rebutted. *See* Sec. Br. at 8-14.

The Secretary's argument lacks merit, because he conflates explicit instructions to an examiner with a type of legal presumption that is imposed upon adjudicators. The Board did not instruct the October 2017 examiner that a presumption had been created that she could find rebutted, rather that she was to presume a specific fact—Mr. Sullivan's reliability—to be true in forming her opinion. **R. at 175 (172-76)**. The Secretary provides a definition of presume as "to suppose to be true without proof." *See* Sec. Br. at 11. This is the meaning of presume in the common parlance, and as the examiner is not a legal professional tasked with applying rebuttable presumptions, the Board intended the word to simply have its common meaning. *Moore v. Nicholson*, 21 Vet. App. 211, 218 (2007) (holding that examiner's and adjudicators have different functions); *Kahana v. Shinseki*, 24 Vet. App. 428, 442 (2011) (highlighting the differences in duties for adjudicators and examiners). There is no indication in the Board's remand instructions that the Board intended to create something analogous to a legal presumption that could be rebutted by the examiner, as evinced by the Board never actually using the term "presumption" in the instructions or identifying any way it could be rebutted. *See R. at 172-76*; Merriam-Webster Online Dictionary (2020), <https://www.merriam-webster.com/dictionary/presumption> (last accessed March 26, 2020).

In addition, even if there were some way to construe the Board's instruction to create a presumption akin to those imposed on adjudicators, the Secretary's assertion is undermined by a flawed premise that all presumptions can be rebutted. The Secretary states that a "presumption is merely a starting point that lasts until the presumed fact is rebutted by other evidence." *See* Sec. Br. at 11. The Secretary overlooks that not all presumptions

are rebuttable. *See Jensen v. Brown*, 19 F.3d 1413, 1416 (Fed. Cir. 1994) (noting the existence of irrebuttable presumptions). He does not explain why, even if the Board was creating a presumption, it was not an irrebuttable one.

The Secretary's reliance on the Board's instruction that, "[i]f the examiner rejects the lay assertions concerning continuity of symptomatology, the examiner should explicitly state the reasoning as to why they are being rejected and why those statements are medically consistent or inconsistent with the findings of the examination[,]" does not salvage his argument. *See* Sec. Br. at 11-12. The language that the Secretary cites is an instruction on what the examiner should do if he were to reject the lay assertions as medically establishing continuity of symptomatology, not an inference that he could outright reject the content of the statements on the basis of unreliability. Had it been meant to indicate that the examiner could reject the lay statements on the whole for unreliability it would have said so, instead of being limited to the issue of continuity of symptomatology. *See R. at 175 (172-76)*. The instruction states that the "examiner **MUST** presume that the Veteran is a reliable historian with regard to his reports of the onset of his back pain, the continuity of his symptoms since separation from active service, and his assertions regarding heavy lifting during active service." **R. at 175 (172-76)** (emphasis in original). The provision in the instructions that the Secretary cites to only mentions rejecting "the lay assertions concerning continuity of symptomatology" and not those relating to the onset of his back pain or his assertions regarding heavy lifting during service. **R. at 175 (172-76)**. The examiner however rejects all three,

The VBA, per review of remand/2507 has determined that the veteran is a reliable historian with regard to reports of the onset of his back pain, continuity of his symptoms since separation and his assertions regarding heavy lifting during active service. Though these reports by the Veteran were reviewed and considered the examiner notes that the presumption made by the VBA of reliability is consistent with administrative legal issue but is not consistent with the objective medical documentation available in this case.

**R. at 65 (64-67).** As even the most liberal reading of the Board's instructions would not allow the examiner to reject all three of the things the Board had explicitly instructed the examiner to presume when only one of them was referenced in the context of rejection, the Secretary's argument must fail.

### **III. The Secretary's reliance on *Miller* is misplaced.**

In the principal brief Mr. Sullivan argued that the Board's language in the 2017 remand order indicated that it had found Mr. Sullivan to be competent and credible in his ability to report the onset of his back pain, the continuity of his symptoms since separation from service, and his assertions regarding heavy lifting during service. *See App. Br. at 12.* In advancing his presumption argument, the Secretary argues that "such presumptions serve a practical function for the Board and do not signal that the Board has already made favorable credibility determinations." *Sec. Br. at 12 (citing Miller v. Wilkie, No. 18-2796, 2020 U.S. App. Vet. Claims LEXIS 64, at \*21 (Vet. App. Jan. 16, 2020))*. Even if that were accurate, his argument is undermined by the application of *Miller to the decision on appeal*. The Board decision contains no language that impinges upon Mr. Sullivan's credibility. **R. at 4-11.** Thus, the Board implicitly found that Mr. Sullivan is credible. *Miller, 2020 U.S. App. Vet. Claims LEXIS 64, at \*21 (holding that in the absence of negative credibility findings, the Board implicitly finds the Veteran to be credible)*. As such, regardless of



whether the Board's language in the 2017 remand order indicated a credibility finding, the Board's decision confirms Mr. Sullivan's credibility. *See id.*

**IV. The Secretary's argument that the examiner did not act as an adjudicator is not persuasive.**

In the principal brief, Mr. Sullivan argued that the Board erred by not remanding for an adequate VA examination because the 2017 examiner impermissibly assumed the role of adjudicator in making credibility findings, rendering the opinion inadequate. *See App. Br. at 11-12.* The Secretary argues that the examiner was "merely noting that Appellant's lay statements were not consistent with the objective medical documentation []" and that this was entirely proper for the examiner to do. *See Sec. Br. at 14.* In contrast to the Secretary's assertion, which notably does not directly draw upon any of the examiner's language, the examiner did act as an adjudicator and made a credibility finding, **R. at 65 (64-67)**, one that is contrary to the Board's. *See Miller, supra.*

**CONCLUSION**

For the reasons articulated in his principal brief and herein, Mr. Sullivan respectfully requests that the October 19, 2018, Board decision be reversed in part and otherwise vacated, and that this matter be remanded for readjudication.

Respectfully submitted,

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