

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

No. 19-2033

JOHN R. SHEFFIELD,

Appellant,

v.

ROBERT L. WILKIE,

Secretary of Veterans Affairs,

Appellee.

Appellant's Reply Brief

Glenn R. Bergmann, Esq.
Steven J. Cook, Esq.
Bergmann & Moore, LLC
7920 Norfolk Ave., Suite 700
Bethesda, MD 20814
(301) 290-3191

Counsel for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	iii
TABLE OF CITATIONS TO THE RECORD BEFORE THE AGENCY.....	iii
ARGUMENT.....	1
I. The Secretary concedes that the Board failed to ensure the duty to assist was satisfied and that the Board failed to provide an adequate statement of reasons or bases for its finding that the presumption of soundness was rebutted.	1
II. The Secretary misstates the applicable standard of review and overlooks that Appellant did not have the burden to prove that the presumption of soundness was not rebutted.	1
III. Mr. Sheffield is not merely disagreeing with the Board’s weighing of the evidence.	3
CONCLUSION	5

TABLE OF AUTHORITIES

CASES

<i>Buchanan v. Nicholson</i> , 451 F.3d 1331, 1336 n.1 (Fed. Cir. 2006).....	2
<i>Horn v. Shinseki</i> , 25 Vet. App. 231, 236 (2012).....	2, 3, 4
<i>Kent v. Principi</i> , 389 F.3d 1380, 1383 (Fed. Cir. 2004)	2
<i>Wagner v. Principi</i> , 370 F.3d 1089, 1096 (Fed. Cir. 2004)	4
<i>Miller v. Wilkie</i> , No. 18-2796, 2020 U.S. App. Vet. Claims LEXIS 64 (Vet. App. Jan. 16, 2020)	4

STATUTES

38 U.S.C. § 5103A(a)(1)	3
-------------------------------	---

TABLE OF CITATIONS TO THE RECORD BEFORE THE AGENCY

R. at 13 (5-14) (2019 Board Decision)	5
19 (Dr. Jewison's 2018 Opinion)	2
20 (2018 X-ray report for lumbar spine).....	5

Argument

I. The Secretary concedes that the Board failed to ensure the duty to assist was satisfied and that the Board failed to provide an adequate statement of reasons or bases for its finding that the presumption of soundness was rebutted.

Mr. Sheffield appreciates the Secretary's candor in conceding that the Board erred in finding that the duty to assist was satisfied, *see* Secretary's Brief (Sec. Br.) at 4-6; Appellant's Brief (App. Br.) at 8-10, and by providing inadequate reasons or bases for finding that the presumption of soundness was rebutted by clear and unmistakable evidence. *See* Sec. Br. at 6-8, App. Br. at 11-12. Based on the parties' agreement on these issues, the Court should vacate the Board's decision and remand for readjudication even if it does not agree that greater relief is warranted for the reasons discussed in Appellant's principal brief and below.

II. The Secretary misstates the applicable standard of review and overlooks that Appellant did not have the burden to prove that the presumption of soundness was not rebutted.

The Secretary argues that reversal of the Board's conclusion that the presumption of soundness was not rebutted is not warranted because the Board's view of the evidence is permissible, and that reversal is not appropriate. *See* Sec. Br. at 8-12. The Secretary asserts that "the Board properly discussed Appellant's lumbosacral spine strain," and that "Appellant's allegation that the only medical opinion of record regarding his lumbosacral spine was the 2018 private opinion is incorrect." *See* Sec. Br. at 9-10. The Secretary's contentions do not undermine reversal of the Board's conclusion that the presumption was rebutted.

First, the Secretary's argument is premised on the wrong standard of review. The Secretary recites the requirement for finding a Board factual finding clearly erroneous as governing the disposition of this question, invoking "the only permissible view of the evidence" and a "plausible basis[.]" Sec. Br. at 9-10, to assert that Appellant "has not met his burden *in demonstrating clear error* in the Board decision[.]" Sec. Br. at 10 (emphasis added). Board conclusions that the presumption of soundness was rebutted are not factual findings reviewed for clear error, but questions of law reviewed *de novo*. See *Kent v. Principi*, 389 F.3d 1380, 1383 (Fed. Cir. 2004); *Horn v. Shinseki*, 25 Vet. App. 231, 236 (2012); *Quirin v. Shinseki*, 22 Vet. App. 390, 396 (2009). The Secretary simply recites evidence and avers that it establishes that Appellant has not shown clear error, a contention that in no way identifies why the Court should not hold on *de novo* review that the Board erred by concluding that the presumption was rebutted. Sec. Br. at 9-10.

As for Dr. Jewison's 2018 opinion, the Secretary misstates Appellant's argument. Contrary to his assertion, Appellant did not argue that Dr. Jewison's opinion is the only medical opinion referencing Mr. Sheffield's lumbosacral spine. See Sec. Br. at 9. His argument, which the Secretary does not directly rebut, is that Dr. Jewison's opinion is the only one addressing the specific lumbosacral diagnosis of degenerative changes. App. Br. at 6-7; **R. at 19**. As such, the only medical evidence in the record addressing the specific diagnosis of degenerative joint disease of the lumbosacral spine is favorable and indicates a nexus between service and the condition.

The Secretary also argues that reversal of the Board's rebuttal conclusion is not appropriate because the Board must obtain the missing service treatment records from Mr.

Sheffield's time at the Landstuhl Army Hospital and provide adequate reasons or bases with respect to the May 2015 VA examiner's opinion. Sec. Br. at 10-11. He overlooks that the Board bore the burden of proof with respect to whether the presumption of soundness was rebutted, not Appellant. If the record before the Board was not sufficient to constitute the requisite clear and unmistakable evidence to rebut the presumption, the Board did not meet its burden and the Court should reverse its conclusion. The duty to assist is to aid the claimant in substantiating the claim, 38 U.S.C. § 5103A(a)(1), and such assistance is not necessary with respect to the presumption of soundness when the record as it exists does not enable the Board to meet its burden to rebut the presumption. *See Horn*, 25 Vet. App. at 243-44 (holding that it is improper to remand a case where the medical evidence is plainly insufficient to rebut the presumption of soundness).

III. Mr. Sheffield is not merely disagreeing with the Board's weighing of the evidence.

In the principal brief Mr. Sheffield argued that the Board cannot possibly sustain a conclusion of clear and unmistakable evidence of no aggravation. *See App. Br. at 7-8*. The Secretary argues that Mr. Sheffield's argument is merely a disagreement with the Board's weighing of the evidence, stating that "Appellant's argument has no merit because he is merely disagreeing with how the Board weighed the evidence." Sec Br. at 11. However, Mr. Sheffield's argument is not about a mere disagreement with the Board's weighing of the evidence, it is that the evidence is such that a conclusion of clear and unmistakable evidence of no aggravation cannot be sustained. *See App. Br. at 7-8*. When the presumption of soundness is at issue, it is the Board that has the duty to prove that the veteran's condition

pre-existed service and was not aggravated by service, both of which must be proven by clear and unmistakable evidence. *See Wagner v. Principi*, 370 F.3d 1089, 1096 (Fed. Cir. 2004); *Horn*, 25 Vet. App. at 234. Appellant can mostly certainly argue as to how the evidence did not rise to that level.

Further, in the principal brief Mr. Sheffield argued that his statements about not having back pain prior to service precluded the Board from finding clear and unmistakable evidence against aggravation. App. Br. at 8. Subsequent to the filing of the principal brief, the Court decided *Miller v. Wilkie*, No. 18-2796, 2020 U.S. App. Vet. Claims LEXIS 64 (Vet. App. Jan. 16, 2020), which establishes that when the Board does not address credibility and does not find the claimant not competent with respect to the purpose for which the statements are made, it implicitly found that the statements are credible. *Miller*, 2020 U.S. App. Vet. Claims LEXIS 64, at *20-21. Since *Miller* dictates that the Board found Mr. Sheffield to be credible, his argument that his statements undermined a finding of *clear and unmistakable* evidence is bolstered. Credible and competent lay evidence that Mr. Sheffield's pain in his back did not begin until after his accident is certainly evidence that goes contrary to a finding that the evidence was *clear and unmistakable* that his condition was not aggravated by his in-service accident. *See Wagner, supra*.

IV. The Secretary incorrectly states that the Board addressed the July 2018 private examiner's opinion on degenerative disc disease of the lumbosacral spine.

In the principal brief Mr. Sheffield argued that the Board had failed to provide an adequate statement of reasons or bases because it failed to address all of Mr. Sheffield's

diagnosed back conditions. *See* App. Br. at 14. The Secretary again misstates the nature of Mr. Sheffield's argument, and argues that he asserted the examination failed to address the July 2018 opinion on the whole. *See* Sec. Br. at 12. While the Secretary states that the Board explicitly considered the July 2018 private opinion, it only did so in the context of discussing Mr. Sheffield's scoliosis, facet arthropathy, and degenerative joint disease of the sacroiliac joints. **R. 13 (5-14)**. It was not Mr. Sheffield's argument that the Board never addressed the opinion, but rather than that the Board did not specifically address his condition of degenerative joint disease of the lumbosacral spine. *See* App. Br. at 14. Further, while the Secretary asserts that the Board addressed the July 2018 x-rays, the Secretary's argument is not persuasive. *See* Sec. Br. at 13. The x-rays that Mr. Sheffield referenced in his brief were specifically those that concerned to his diagnosis of degenerative joint disease of the lumbosacral spine. **R. at 20**. As the Board did not address Mr. Sheffield's degenerative joint disease of the lumbosacral spine at all, it is clear that it did not address the x-rays from 2018 that specifically concerned the condition.

CONCLUSION

For the reasons articulated in his principal brief and herein, Mr. Sheffield respectfully requests that the January 9, 2019, Board decision be reversed in part and otherwise vacated, and that this matter be remanded for readjudication.

Respectfully submitted,

/s/ Glenn R. Bergmann
GLENN R. BERGMANN

/s/ Steven J. Cook
STEVEN J. COOK
Bergmann & Moore, LLC
7920 Norfolk Ave., Suite 700
Bethesda, MD 20814
(301) 290-3191

Counsel for Appellant