

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

JO L. HAUGH	)	
	)	
Appellant,	)	
	)	
v.	)	
	)	
	)	Vet.App. No. 18-5433
ROBERT L. WILKIE,	)	
Secretary of Veterans Affairs,	)	
Appellee.	)	

**APPELLANT’S MOTION FOR RECONSIDERATION**

Pursuant to U.S. Vet.App. Rules 35(a) and 35(b), Appellant, Jo L. Haugh, respectfully moves this Court for reconsideration of the May 4, 2020 Memorandum Decision (“Decision”). That Decision affirmed the Board of Veterans’ Appeals (“Board”) June 4, 2018 decision denying service connection for her post-service hysterectomy. For the reasons set forth below, Appellant asks that the single judge reconsider the May 4, 2020 Decision and vacate and remand the Board’s decision.

**ARGUMENT**

Pursuant to Rule 35(e)(1), Appellant addresses the points of law or fact that she believes the Court may have overlooked or failed to resolve in its Decision.

**I. THE COURT OVERLOOKED THE BOARD’S INSTRUCTIONS TO THE MEDICAL EXAMINER AND ITS STATED OBJECTIVES FOR THE ADVISORY MEDICAL OPINION.**

The Memorandum Decision states “that the Board didn’t ask for a discussion or analysis of all the gynecological conditions, symptoms or

treatments.” (Mem. D. 2-3) Appellant contends the Court seems to overlook the citations to the record where she detailed how “the Board’s engagement letter stated the essential objectives as to clarify whether the [Appellant’s] 2006 hysterectomy was related to service...” and in the very next numerated paragraph the engagement letter “...pose[d] specific medical questions for the examiner to answer, to wit: whether Appellant’s hysterectomy **was due to or the result of an in-service gynecological condition(s) and/or treatment...**”(App. Br. 7-8; App. R. Br. 2; R. 173, *emphasis added*) In her reply brief, Appellant expounded that “the Board deemed it necessary for the examiner to “review the entire record, to include [Appellant’s] service treatment records, her post service treatment records and furnish an opinion with supporting rationale as to whether it is as least as likely as not that (1) the veteran’s **hysterectomy was due to or the result of an in-service gynecological condition and/or treatment...**” (App. R. Br. 2, *emphasis added*) Thus, the express and implicit objective of the advisory medical opinion was to determine if any one or combination of Appellant’s in-service gynecological conditions and/or treatments contributed to the need for her post-service hysterectomy. Furthermore, to determine if any one or a combination of in-service gynecological conditions and/or treatments contributed to the need for the post-service hysterectomy required the process of elimination after consideration of each condition individually and collectively. Thus all in-service and post service gynecological conditions and/or treatments were deserving of the examiner’s consideration, analysis and opinion. Appellant

cited to no less than nine (9) in-service<sup>1</sup> and five (5) post-service<sup>2</sup> gynecological conditions and/or treatments, some with multiple recurrences over her period of service which the examiner simply did not discuss nor offered any rationale as to why a discussion was unwarranted. (App. Br. 9; App. R. Br. 3-4) In the absence of the examiner addressing all documented in-service and post-service gynecological conditions, the express and implied essential objectives in the Board's engagement letter seeking an advisory medical opinion were not met.

**II. THE COURT FAILED TO RESOLVE APPELLANT'S ARGUMENT THAT THE BOARD FAILED TO ENSURE THE ADVISORY MEDICAL OPINION SUBSTANTIALLY COMPLIED WITH THE TERMS OF ITS ENGAGEMENT LETTER.**

The error asserted and maintained by Appellant is that the Board failed to ensure substantial compliance with its stated goal "to clarify whether the 2006 hysterectomy was related to service..." and more specifically the Board's stated

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<sup>1</sup> "Specifically, the examiner's opinion fails to offer any discussion, assessment, analysis or opinion regarding the following gynecological conditions and treatment of record: pap smear showing acute inflammation (R. 692); miscarriage (R. 1003); labial varicose veins (R. 1002); vaginal mucus tear (R. 427-438); bilateral tubal ligation (R. 562); recurrent urinary tract infections (R. 421, 400, 434, 398, 396, 388-389, 373, 372, 370-371, 369 and 440); urinary incontinence (R. 336, 675); urethral symptoms (R. 418); gyn cytology reflecting inflammation with cellular changes (R. 464)." (App. Br. 9; App. R. Br. 3)

<sup>2</sup> "As for Appellant's post-service gynecological conditions and treatment, the VA examiner likewise failed to offer any discussion or analysis of the following conditions: fibroids (R. 1562, 1559); menstrual bleeding for six months to a year with bulge symptoms (R. 1121-1122); protrusion of Appellant's bladder into her vaginal wall (cystocele secondary to traction from her uterine prolapse) (R. 1121-1122); adenomyosis, benign leiomyomata (fibroid) and anterior fibroid within the endometrium (R. 1323)." (App. Br. 9; App. R. Br. 3-4)

objective in determining “whether the post-service hysterectomy was related to an in-service gynecological condition and/or treatment.” (App. Br. 7-8; App. R. Br. 2; R. 173) The Court’s analysis seems to follow the analysis when an error is lodged against the Board for relying on an inadequate medical examination as evidenced by its citation to *Roberson v. Shineseki*, 22 Vet. App. 358, 366 (2009) where the question presented was the adequacy of medical opinion. However, the adequacy of the advisory medical opinion was not the error advanced by Appellant in this appeal. Rather, her argument was and continues to be that the advisory medical opinion upon which the Board relied failed to substantially comply with the Board’s request for such. To state it differently, the question presented on appeal is not whether the advisory medical opinion is adequate but rather if it substantially complied with the Board’s explicit instructions in its engagement letter. The Memorandum Decision does not resolve this argument.

In Appellant’s initial brief, she cited to Judge Hagel’s concurring opinion in *D’Aries v. Peake* 22 Vet. App. 97 (2008) since the *D’Aries* court did not squarely address the question of substantial compliance of an advisory medical opinion in its decision. Judge Hagel’s concurrence is instructive as to whether *Stegall* controls the Board’s request for an advisory medical opinion. (App. Br. 6-7) In *D’Aries*, Judge Hagel wrote separately to express that “there is, in practical terms, no difference between a remand decision by the board directing that a medical examination or opinion be performed or obtained and an engagement letter issued by the Board requesting the same and therefore, *Stegall* controls...”

(App. Br. 6 *citing D'Aries* at 109) Accordingly, Judge Hagel's concurrence saw no basis to distinguish an instruction in a remand decision from an instruction in an engagement letter and as such, he "would hold that an engagement letter from the Board to a VA medical facility requesting a medical examination or opinion confers on a claimant the right to compliance with the terms of that request. (App. Br. 7 *citing D'Aries* at 110) Thus, the standard by which the advisory medical opinion should be assessed by this Court is whether it substantially complied with the Board's request for it. The Memorandum Decision fails to resolve this question even though the issue of substantial compliance, or the lack thereof, was advanced by Appellant in her initial and reply briefs. (see App. Br. 5-10; App. R. Br. 3-4)

Appellant does not dispute that substantial compliance does not mean absolute compliance. Yet, the "general legal concept [is] that substantial compliance means **actual** compliance with essential objectives. (App. R. Br. 2 *citing Missouri Veterans Comm'n v. Peake*, 22 Vet.App. 123, 127 (2008), *emphasis added*. As outlined above, the Board's stated objective was to determine if Appellant's 2006 hysterectomy was related to an in-service gynecological condition and/or treatment. (App. Br. 2; App. R. Br. 7-8; R. 173) Satisfying this objective required the medical expert to discuss each in-service and post-service medical condition and offer an opinion as to whether any one and/or combination thereof contributed to the need for Appellant's post-service hysterectomy. Appellant reiterates that she cited to no less than nine (9) in-

service and five (5) post-service gynecological conditions and/or treatments, some with multiple recurrences over a period of time which the examiner simply did not discuss nor offered any rationale as to why a discussion of the condition and/or treatment was unwarranted. (App. Br. 9; App. R. Br. 3-4) In the absence of the examiner addressing these documented in-service and post-service gynecological conditions and treatments, the express and implied essential objectives in the Board's engagement letter seeking an advisory medical opinion were not met. Thus, the Board's reliance on an advisory medical opinion that lacks substantial compliance with the express terms of its request undermines the reasons and bases of its decision. Thus, vacatur and remand are warranted.

### **CONCLUSION**

For the foregoing reasons, and for the reasons set forth in Appellant's initial and reply briefs, the Court should reconsider its Decision of May 4, 2020, and vacate and remand the Board's decision denying Appellant service connection for her post-service hysterectomy.

May 26, 2020

Respectfully submitted,

FOR THE APPELLANT

/s/ Tamesha N. Larbi

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