IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

JOHN I. RUTCHICK, Appellant, v. ROBERT L. WILKIE, Secretary of Veterans Affairs, Appellee.	)	Vet.App. No. 19-3155

APPELLANT'S MOTION FOR RECONSIDERATION; OR IN THE EVENT THAT THE COURT DENIES THE MOTION, APPELLANT'S MOTION FOR A PANEL DECISION

Pursuant to U.S. VET.APP. R. 35, the Appellant, John I. Rutchick, respectfully requests that the Court grant this Motion for Reconsideration, or in the event that the Court denies the request, that the Court grant this Motion for a Panel Decision.

I. MR. RUTCHICK BELIEVES THAT RECONSIDERATION IS WARRANTED HERE.

Rule 35 provides a party with the opportunity to request reconsideration when the party "believes the Court has overlooked or misunderstood" a point of law or fact. U.S. VET.APP. R. 35 (e)(1). Here, Mr. Rutchick believes reconsideration is warranted, as he believes the Court "has overlooked" that it has the authority to reverse a finding of fact when the Board's finding is clearly

erroneous, and that it is not necessary to understand *why* the Board made the finding that it did. Mr. Rutchick also believes the Court misunderstood that he raised a question of "fair play" with regard to VA's treatment of Dr. Rajnay's opinions, which the Court reviews *de novo*.

A. The Court Overlooked Its Authority to Reverse Findings of Fact that Are Clearly Erroneous.

On March 4, 2010, Mr. Rutchick went to a VA dental office to be fitted for new dentures. R. 1300 (R. 1300-1301). Less than three weeks later, on March 26, 2010, Mr. Rutchick began losing feeling in his legs and was taken to the ER. R. 358-71. He was discharged on April 16, 2010, with a diagnosis of "spinal epidural abscess involving thoracic and lumbar spines." R. 368 (R. 358-71). He has been diagnosed a quadriplegic, due to the spinal epidural abscess, since at least October 2010. *See* R. 33.

In June 2010, Mr. Rutchick filed a claim for § 1151 benefits, on the theory that the dentist was negligent when he did not provide Mr. Rutchick with antibiotics prior to his procedure. R. 1300-1301. Mr. Rutchick also submitted a statement from Dr. Patrick F. Doherty, the doctor who treated him at the hospital, who opined that he could "state within a reasonable degree of medical certainty that the dental procedure performed on March 4, 2010 led to the introduction of the Streptococcus viridans, which caused the life & function threatening holospinal abscess. This is further substantiated by the timeline and the severity of the

infection." R. 668-69. Dr. Doherty concluded that "[a]s a result of the combined deficits, as a direct sequela of the holospinal abscess, [Mr. Rutchick's] degree of permanent disability is 100%." *Id.*

Although Mr. Rutchick's evidence from Dr. Doherty clearly connected the dental procedure and the disabling holospinal abscess, the VA requested several medical opinions. Dr. Franklin E. McPhail, Chief of the Dental Department at the Augusta VA Medical Center, provided an opinion on December 7, 2011. R. 579. He explained that current medical practices did not require prophylactic antibiotics for this type of procedure, as it was non-invasive. He further explained the procedure was "no more likely to cause systemic infection than normal daily routine including brushing, flossing, and eating." *Id.* Dr. Joseph Korwin, Medical Support Supervisor, concurred in Dr. McPhail's opinion, R. 580, and later explained "the veteran's [SEA] is considered a rare incident." R. 518.

The Board then held that Mr. Rutchick's residuals of an extended SEA were not actually or proximately caused by VA treatment. R. 4-21. To reach this conclusion, the Board noted the "December 2011 VA opinion of Dr. [McPhail was] persuasive that the treatment provided was non-invasive and did not likely cause the infection that led to a spinal abscess." R. 15-16 (R. 4-21). On appeal, Mr. Rutchick argued that the Board had misstated Dr. McPhail's conclusion, that the actual language Dr. McPhail was favorable evidence of causation, and that the

Board's finding otherwise should be reversed. Appellant's Brief (Br.) at 16.

In response to Mr. Rutchick's argument that Dr. McPhail's conclusion was "it was '*no more likely* the [dental] treatment caused systemic infection than the normal daily routines including brushing, flossing and eating,' " **not** that "the dental procedure 'did not likely cause' the SEA," *id*; the Court held that the "Board [had] not explain[ed] *why* it interpreted Dr. McPhail's statement that way and therefore had not provided adequate reasons or bases for its decision. Mem. Dec. at 8. Mr. Rutchick believes that this conclusion overlooks the Court's authority to reverse findings of fact when they are clearly erroneous and that it is not necessary to remand the case to obtain the Board's reasoning for making this glaring error. 38 U.S.C.A. § 7261(a)(4).

First, the Court has already implicitly found that the Board's finding that Dr. McPhail opined "the dental procedure 'did not likely cause' the SEA" is clearly erroneous. Mem. Dec. at 8. That is, by remanding for the Board to explain "why it *interpreted*" Dr. McPhail's statement that "it was '*no more likely* the [dental] treatment caused systemic infection than the normal daily routines including brushing, flossing and eating,' " to mean "the dental procedure 'did not likely cause' the SEA," the Court is implicitly stating that the two statements are not equivalent, and that Dr. McPhail did not state that "the dental procedure 'did not likely cause' the SEA." This is the very definition of a "clearly erroneous"

finding, *see Gilbert v. Derwinski*, 1 Vet.App. 49, 52-53 (1990), and the Court appears to have overlooked that it does not need to understand why the Board did this, but has the authority to just say the Board was wrong to do so. *See Soyini v. Derwinski*, 1 Vet.App. 540, 546 (1991) (explaining that strict adherence to the reasons or bases requirement is not required when "such adherence would result in this Court's unnecessarily imposing additional burdens on the BVA and DVA with no benefit flowing to the veteran"); *but cf. Smiddy v. Wilkie*, CAVC Docket No. 16-2333, at 11.

Second, the Court also appears to have overlooked that it has the authority to reverse the Board's inherent finding that Dr. McPhail's *straightforward* opinion even needed to be interpreted. 38 U.S.C.A. § 7261(a)(4). It did not, and the Board had no authority to "interpret" it and change the meaning.

The Board's authority to "interpret" medical information is limited to certain circumstances. Section 4.2 explains that it is "the responsibility of the rating specialist to interpret reports of examination . . . *so that the current rating may accurately reflect the elements of disability present*." 38 C.F.R. § 4.2 (2018) (emphasis added). Thus, it is the Board's responsibility to "interpret" the medical evidence in the rating context, as evidenced by the directive's language and its placement in the subsection dealing with general policy in ratings. *See*, *e.g. Buczynski v. Shinseki*, 24 Vet.App. 221, 225-26 (2011).

This, however, does not give the Board the authority to find ambiguity – and thus room for interpretation – where none exists. The Board did not make an "inference based on the evidence." *Cf. Kahana v. Shinseki*, 24 Vet.App. 428, 435 (2011). The Board falsely presented Dr. McPhail's opinion, and then rendered a decision based on this false information. This is clearly erroneous and requires reversal. 38 U.S.C.A. § 7261(a)(4).

Based on the foregoing, Mr. Rutchick believes that reconsideration is warranted. Mr. Rutchick asks the Court to reverse the Board's finding that there was no actual causation, as Dr. McPhail's opinion – when read on its own and without any "interpretation" by the Board – puts the issue in equipose. 38 U.S.C.A. § 5107(b). Moreover, in reversing this finding, Mr. Rutchick asks the Court to then grant Mr. Rutchick his § 1151 benefits, as all of the other elements of the claim have been established. *See infra* Arg. I(C).

B. The Court Overlooked that the Issue of Whether the Secretary Has Abided by Basic Fair Play Is Reviewed *De Novo*.

On July 10, 2014, Dr. Z.W. Rajnay, Chief of Dental Services at the Dublin VA Medical Center, opined that it would be "mere speculation" to say the "extraction of the molar tooth #19 or cleaning caused the spinal abscess."[1] R. 331-32; *see also* R. 240-44.

[1] To be clear, the extraction of the molar tooth #18, not #19, took place *after* Mr. Rutchick had been hospitalized for an SEA. The occlusal adjustment that he claims led to his infection was of tooth #31. *Compare* R. 510, R. 579 *with* R. 478.

Several months later, Mr. Rutchick participated in a personal hearing, wherein he argued that he was entitled to § 1151 benefits based on the fact that the events were not reasonably foreseeable. R. 256-89. After the hearing, the RO specifically asked Dr. Rajnay to opine on the issue of reasonable foreseeability and *not* the issue of negligence. R. 250-52. In response, Dr. Rajnay forwarded a copy of his July 2014 opinion. R. 247-48. The requester followed up with Dr. Rajnay again via email, specifically asking him to opine on whether the residuals would have been reasonably foreseeable. R. 241 (R. 240-44). In an April 2015 email, Dr. Rajnay replied that the spinal abscess was "an event not reasonably foreseeable." *Id.* (emphasis in original).

The requester followed up again with Dr. Rajnay, explaining that if the doctor was answering the second part of the § 1151 causation analysis in the affirmative, that he was also stating that it was "at least as likely as not" that the procedure led to the development of the spinal abscess. R. 240 (R. 240-44). In response, Dr. Rajnay stated "***I think I see what you mean***." *Id.* (emphasis added). He continued "the development of the abscess was an unforeseeable event that may or may not have any ties to the tooth extraction. . . . I would say that the spinal abscess IS LESS LIKELY AS NOT (LESS THAN A 50/50 PROBABILITY) CAUSED BY OR A RESULT OF the extraction or dental cleaning." *Id.* (emphasis in original).

On appeal to the Court, Mr. Rutchick made several arguments that Dr. Rajnay's April 2015 opinion on actual causation never should have been obtained and essentially should be ignored. Appellant's Br. at 18-22. In response to these arguments, the Court found that its "review [was] frustrated by the Board's failure to make the necessary factual findings in the first instance," such as "whether the record contained sufficient evidence regarding actual causation at the time the RO requested the addendum opinion and whether Dr. Rajnay understood the questions posed to him by the RO." Mem. Dec. at 8.

Mr. Rutchick believes that reconsideration of the issue of whether Dr. Rajnay's April 2015 opinion on actual causation should be discarded or ignored is warranted, as the Court appears to have overlooked that an issue of "fair play" is reviewed *de novo*. *See generally Thurber v. Brown*, 5 Vet.App. 119 (1993) . In other words, it is not necessary for the Court to reach the factual issues addressed in the decision if it determines that the Secretary's April 2015 action asking Dr. Rajnay to opine on actual causation, after already asking him about proximate causation, was not fair to Mr. Rutchick.

In *Douglas*, the Court explained that *Mariano* stands for the proposition that "the duty to gather evidence sufficient to render a decision is not a license to continue gathering evidence in the hopes of finding evidence against the claim." *Douglas v. Shinseki*, 23 Vet.App. 19, 26 (2009). Therefore, the Court continued,

the Secretary "has an affirmative duty to gather the evidence necessary to render an informed decision . . . ***provided he does so 'in an impartial, unbiased, and neutral manner***.' *Austin* [*v. Brown*], 6 Vet.App. [547, 552 (1994)]." *Id.* This goes to the very heart of whether the VA's actions in developing the evidence are "fair." *Austin v. Brown*, 6 Vet.App. 547, 551-52 (1994).

At the core of Mr. Rutchick's arguments regarding Dr. Rajnay's April 2015 opinions was the idea that the process that the VA used – asking Dr. Rajnay to opine on the issue of actual causation *after* asking him to opine on proximate causation – was not fair, because the way that the questions were posed were not "impartial" or "unbiased." *See Douglas*, 23 Vet.App. at 26.

That is, under the guise of "gather[ing] the evidence necessary to render an informed decision," the Secretary appears to ask a question that he ***had*** to have already answered in the affirmative – whether there was actual causation – in order to ask Dr. Rajnay about "proximate causation" in the first place. *See Paroline v. United States*, 572 U.S. 434, 444 (2014).

In *Paroline*, the Supreme Court explained that as

> a general matter, to say one event proximately caused another is a way of making two separate but related assertions. First, it means the former event caused the latter. This is known as actual cause or cause in fact. The concept of actual cause "is not a metaphysical one but an ordinary, matter-of-fact inquiry into the existence . . . of a causal relation as laypeople would view it." 4 F. Harper, F. James, & O. Gray, Torts § 20.2, p. 100 (3d ed.

> 2007).
>
> Every event has many causes[,] see *ibid.*, and only some of them are proximate, as the law uses that term. So to say that one event was a proximate cause of another means that it was not just any cause, but one with a sufficient connection to the result.
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> ***
>
> As noted above, proximate cause forecloses liability in situations where the causal link between conduct and result is so attenuated that the so-called consequence is more akin to mere fortuity.

Paroline, 572 U.S. at 444-48.

As such, the Court does not need to reach the factual questions of whether there was sufficient favorable evidence in the record to ask for the opinion or whether Dr. Rajnay understood the question posed. *Cf.* Mem. Dec. at 8. Mr. Rutchick asks the Court to simply consider whether it was fair to even ask the follow up question of "actual causation," in light of the relationship between actual causation and proximate causation, and that the RO had originally asked Dr. Rajnay to only opine on reasonable foreseeability. *See Douglas*, 23 Vet.App. at 26; *see also Paroline*, 572 U.S. at 444-48.

In the event that the Court determines that the Secretary's action was not fair, then the Court should disregard Dr. Rajnay's opinion on actual causation, and grant Mr. Rutchick § 1151 benefits. *See Cushman v. Shinseki*, 576 F.3d 1290, 1300 (Fed. Cir. 2009) (explaining when the Secretary's process violates due

process, the document should not be considered); *see infra* Arg. I(C).

C. The Court Should Grant Mr. Rutchick § 1151 Benefits.

If the Court agrees that reconsideration is warranted for the reasons addressed above, the Court should find that Mr. Rutchick is entitled to § 1151 benefits. *See Gutierrez v. Principi*, 19 Vet.App. 1, 10 (2004).

There is no question that Mr. Rutchick suffers from a "qualifying additional disability" – he was not a quadriplegic prior to the VA dental procedure and he became one shortly thereafter. R. 31, R. 33. There is also no question that Mr. Rutchick received VA care prior to contracting the "qualifying additional disability." R. 510.

Dr. McPhail's opinion places the issue of actual causation in equipoise – it is as likely as not that VA's treatment led to Mr. Rutchick's disability. 38 U.S.C.A. § 5107(b); *see* R. 579; *see also* R. 688-68.[2] Dr. Korwin's statement that the SEA "was considered to be a rare incident" addresses whether the event was "reasonably foreseeable," and therefore favorably addresses the issue of proximate causation under 38 U.S.C.A. § 1151(a)(1)(B). R. 518. Finally, Dr. Rajnay's opinion on the issue of reasonable foreseeability is also favorable to Mr. Rutchick. R. 241 (R. 240-44).

[2] The Board found that Dr. Doherty's opinion was not probative. R. 18 (R. 4-21). While Mr. Rutchick disagrees, *see* Appellant's Brief at 16-18, Dr. McPhail's opinion is sufficient for the Court to grant Mr. Rutchick his § 1151 benefits.

Thus, Mr. Rutchick received VA treatment that caused an event that was not reasonably foreseeable, and this event has left him with additional disability, which is compensable under § 1151. Had the Court not overlooked its ability to reverse clearly erroneous findings of fact or misunderstood that the problem with Dr. Rajnay's 2015 opinion on actual causation was an issue of "fair play," Mr. Rutchick believes the Court would have reached this conclusion. *See Gutierrez*, 19 Vet.App. at 1.

II. NEITHER THE COURT NOR THE FEDERAL CIRCUIT HAS ADDRESSED THE QUESTION OF WHAT STANDARD SHOULD APPLY TO ESTABLISH CAUSATION.

Rule 35 provides a party with the opportunity to request a panel decision when the party "believes the Court has overlooked or misunderstood" a point of law or fact, U.S. VET.APP. R. 35 (e)(1), *and* when "resolution of an issue before the Court would establish a new rule of law." U.S. VET.APP. R. 35(e)(2). In the event that the Court does not grant Mr. Rutchick's Motion for Reconsideration, Mr. Rutchick believes that a panel decision may be warranted.

Neither this Court nor the Federal Circuit has directly addressed the issue of what standard is applied for determining whether there is a causal relationship between VA's actions and the additional disability. A decision on this issue would therefore "establish a new rule of law," which would be instructive to the Board if the decision is remanded for further consideration. *See Quirin v. Shinseki*, 22

Vet.App. 390, 395-98 (2009) (explaining when it is appropriate from the Court to address additional errors made by the Board).

III. MR. RUTCHICK REQUESTS A CLARIFICATION.

In Appellant's Brief, Mr. Rutchick argued that the Board had not understood that the question of whether an event was reasonably foreseeable went toward establishing proximate causation. Appellant's Br. at 23-24. In the May 13, 2020, decision, the Court did not directly address this argument, but did remand for the Board to conduct further proceedings under 38 U.S.C. § 1151(a)(1)(B).

In the event that the Court denies both motions – or grants either motion, but continues to remand the case for further consideration – Mr. Rutchick requests that the Court clarify whether the it found that Dr. Korwin's statement *did* establish that Mr. Rutchick's SEA was "an event not reasonably foreseeable" after his procedure, and thus whether this aspect of the § 1151 claim is settled. *See generally United States v. Moser*, 266 U.S. 236 (1924) (discussing *res judicata*); *Southern Pac. R. Co. v. United States*, 168 U.S. 1, 48-49 (1897) (same).

CONCLUSION

Based on the foregoing, Mr. Rutchick respectfully requests that the Court grant this Motion to Reconsider the May 13, 2020, decision, grant the Motion for a Panel decision, or clarify its prior decision for the reason noted.

Respectfully submitted,

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June 2, 2020
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