

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

DAVID A. ANDREWS,

Appellant,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,

Appellee.

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No. 19-352

MOTION GRANTED

For the Panel

November 2, 2020

Joseph L. Toth
Judge

APPELLANT'S MOTION FOR ORAL ARGUMENT

Pursuant to U.S. Vet. App. Rules 27 and 34, Appellant hereby moves the Court for an order granting oral argument. This case presents novel and important issues relating to (1) what constitutes sufficient proof to establish service connection for hepatitis C; and (2) how the Court conducts clear-error review to determine whether to reverse a Board decision and award service connection.

Mr. Andrews is seeking service connection for hepatitis C and related disabilities. Paragraph (e) of the applicable provision of VA Adjudication Procedures Manual M21-1, which was explicitly relied upon by the Board in its decision (R. at 6) states:

The table below describes the medically recognized risk factors for HBV and HCV infection, provides transmission information concerning those risk factors, and includes tips for confirming the risk factors.

Note: Resolve reasonable doubt under 38 C.F.R. [§] 3.102 in favor of the Veteran when the evidence favoring risk factor(s) in service is equal to the evidence favoring risk factor(s) before or after service.

M21-1, pt. III, sbpt. iv, ch. 4, sec. H.2.e (change date Jan. 11, 2018; last visited Jan. 16, 2019) (italicized emphasis added). The currently available evidence supports the

conclusion that Mr. Andrews was exposed to three of the M21-1 identified risk factors in service. Appellant's Brief (Br.) at 2-5. There is no evidence whatsoever of any post-service risk factors (R. at 588) and Mr. Andrews's credibility was not questioned by the Board. Nonetheless, Mr. Andrews's claims were denied based upon VA medical opinions addressing irrelevant issues. App. Br. at 9-13. Based upon the current record, Mr. Andrews has argued that reversal is appropriate because the evidence leads to a definite and firm conviction that the benefit-of-the-doubt standard has been reached in proving the merits of his claims. App. Br. at 13-20. In contrast, the Secretary argues that Mr. Andrews's claims cannot be granted without a favorable medical nexus opinion of record even if he has proven his in-service risk factors and there is no evidence of post-service risk factors. Secretary's Br. at 17-18. Accordingly, this case presents the issues of (1) whether a favorable medical nexus opinion is an absolute requirement if the veteran has proven recognized in-service risk factors and there is no suggestion of non-service risk factors and (2) how the Court should approach the issue of reversing a denial of service connection for clear error.

Appellant is unaware of any precedential cases on the facts presented here. The Court's decision on this issue will provide guidance to the Board and the ROs as to when claims for service connection for hepatitis C should be granted. The decision could also provide valuable guidance to practitioners as to when reversal of a factual finding is appropriate and how the issue should be framed for proper consideration by the Court. Appellant has presented a novel approach to this Court's clear-error review analysis that he believes warrants further exploration via oral argument, which will assist in informing

the Court of the parties' positions and allow the Court to solicit argument and explore any outstanding or unclear issues presented in the briefs as well as thoroughly discuss any issues on which the Court may order supplemental briefing.

The Secretary has advised the undersigned that he opposes this motion and intends to file a written response.

WHEREFORE, Appellant respectfully moves the Court to schedule this case for oral argument.

Respectfully submitted,

/s/ Glenn R. Bergmann
GLENN R. BERGMANN

January 16, 2020

/s/ James D. Ridgway
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