IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-5290

LARRY S. HELMICK,

Appellant,

v.

ROBERT L. WILKIE,

Secretary of Veterans Affairs,

Appellee.

APPELLANT'S REPLY BRIEF

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ARGUMENT

I. Appellant has demonstrated prejudice in the Board's finding because it failed to address the nature of Appellant's loan to the decedent, and neither of the documents to which the Secretary cites undermines Appellant's argument.

As an initial matter, the Secretary's argument that the Board's findings have a "plausible basis" in the record, Secretary's Brief ("Sec. Br.") at 10, is inapposite because the plausible basis standard applies to rebutting an argument for reversal of the Board's findings by showing an absence of clear error, and Appellant did not ask the Court to reverse anything. Appellant's Brief ("App. Br.") at 6-11. A showing of a plausible basis does not establish the adequacy of the Board's reasons or bases. Additionally, the Secretary's assertion that the Board's finding that Appellant did not "personally incur[] expenses in connection with the decedent's last sickness" has a plausible basis in the record does not withstand scrutiny because the Court ordered the Board to provide an adequate statement of reasons or bases on that issue in granting the Joint Motion for Remand ("JMR"), **R. 24-30**, and the Board simply refused to comply with that order. **R. 10 (4-11)**.

The Secretary argues that the evidence demonstrates that "the decedent, and not Appellant, personally incurred the unreimbursed medical expenses, [so] Appellant's claim that his loan is sufficient to demonstrate that he personally incurred expenses in connection with the decedent's last sickness fails as a matter of law." Sec. Br. at 12. As argued in Appellant's brief, however, both the evidence of record and VA's own regulation reasonably demonstrate that Appellant *did* incur such expenses. *See* App. Br. at 7-10. The Secretary, however, simply reproduces the content of the Board's decision without providing any explanation as to *why* this finding constitutes adequate reasons or bases

despite the fact that the Medical Expense Report and 38 C.F.R. § 3.272(b) support the fact that Appellant incurred unreimbursed expenses for the decedent's last sickness in the form of assisted living costs. *See* Sec. Br. at 10-12. The Secretary's conclusory recitation rebuts no part of Appellant's arguments.

The Secretary responds to Appellant's argument concerning the Board's reasons or bases addressing the Medical Expense Report, App. Br. at 7-9, by arguing that "Appellant fails to acknowledge that while the medical expense report indeed indicates *actual* medical expenses incurred in 2010, it also demonstrates *estimated* medical expenses that would be incurred in 2011." Sec. Br. at 13 (emphasis in original).

While the report does contain an attachment outlining the estimated medical expenses for the decedent in 2011, **R. 179 (176-79)**, it does not undermine Appellant's argument in any way. The list of estimated 2011 expenses is simply an attachment to the actual Medical Expense Report which only contains a list of the itemized medical expenses incurred by the decedent in 2010. *Id*. at **R. 176**. VA did not request this attachment, nor did the Board even acknowledge it when it found that "the medical expenses that the appellant states that he loaned $15,000 for … are the same expenses claimed by [the decedent."] **R. 9 (4-11)**. The Board relied solely on the decedent's certification by signing the form that she had paid the *2010* expenses. *Id.* It is not clear how an attachment concerning estimated 2011 expenses that had not yet been paid undermines Appellant's argument that a certification by the decedent about paid 2010 expenses does not relate to whether he loaned the decedent money to pay for 2011 medical expenses. It is clear from the face of the Board's decision that it only considered "[t]he amount reported on a Medical Expense

Report as paid by the widow for recurring home health care from January 1, **2010** to December 31, **2010**" in making the broad determination that "the medical expenses that appellant states that he loaned [to the decedent]", not just the 2010 medical expenses, "are the same expenses that were claimed by [the decedent.]" **R. 9 (4-11)** (emphasis added). Therefore, the Board's failure to recognize and account for the fact that there is only a certified Medical Expense Report for 2010 in denying the claim is prejudicial because it frustrates judicial review of Appellant's entitlement to accrued benefits, and the Secretary's response fails to demonstrate otherwise.

The Secretary's response should also be rejected as an impermissible *post hoc* rationalization, because, as noted, the Board did not rely on any estimated 2011 expenses to find that the decedent had paid all monies for which Appellant is now seeking reimbursement. *See In re Lee*, 277 F.3d 1338, 1345-46 (Fed. Cir. 2002) ("'courts may not accept appellate counsel's post hoc rationalization for agency action.'") (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)); *Evans v. Shinseki*, 25 Vet. App. 7, 16 (2011) ("[. . .] it is the Board that is required to provide a complete statement of reasons or bases, and the Secretary cannot make up for its failure to do so."); *Smith v. Nicholson*, 19 Vet. App. 63, 73 (2005) ("it is not the task of the Secretary to rewrite the Board's decision through his pleadings filed in this Court."); **R. 9 (4-11)**. *See also Frost v. Shulkin*, 29 Vet. App. 131, 140 (2017) (quoting *In re Lee* and *Evans*).

The Secretary additionally points to the Pension Management Center's (PMC) reliance on the estimated 2011 expenses in calculating the award of improved death pension benefits as evidence that "supports, rather than undermines, the Board's reasoning

that 'the medical expenses that appellant states that he loaned $15,000 for […] are the same expenses claimed by [the decedent].'" Sec. Br. at 13-14 (citing to **R. 127 (111-29), 147 (147-48), 150-51**). The Secretary again presents a *post hoc* rationalization, because, as noted, the Board did not invoke estimated 2011 expenses at all in the finding at issue. It relied solely on the 2010 expenses calculated in the Medical Expense Report and the significance of the decedent signing that form as to payment of those expenses to reject Appellant's statements. **R. 9 (4-11)**. *See also In re Lee*, *Evans*, and *Smith*, all *supra*. Moreover, PMC accounting for the estimated 2011 expenses in its calculations does not undermine Appellant's statements that he loaned the decedent money to pay 2011 expenses, the Board's rejection of which is the matter at issue in this argument. *See* App. Br. at 7-9; **R. 9 (4-11)**. Thus, the documents to which the Secretary cites neither undermine Appellant's argument, nor support the Board's finding regarding the Medical Expense Report.

Appellant further argued that the Board's reasons or bases are inadequate because it overlooked the fact that the decedent's attestation that she had paid the expenses herself is not inconsistent with Appellant's statement that he had loaned the money to the decedent, and that by repaying the loan the decedent was in fact paying the medical expenses herself. App. Br. at 8-9 (citing to Appellant's statement at **R. 89 (89-100)**).

The Secretary does not dispute that one can attest to paying an expense themselves even if they borrowed the money to pay it. *See* Sec. Br. at 14; App. Br. at 8-9. The Secretary contends that Appellant's argument is flawed because "the Board found his assertion that he loaned the decedent the money to be *consistent* with the decedent's certification in the

Medical Expense Report. Indeed, the Board's denial of additional accrued benefits is predicated on its acceptance of the fact that Appellant loaned the money to the decedent[.]" Sec. Br. at 14 (emphasis in original). However, when reading the Board's finding regarding the decedent's attestation as a whole, it is clear that the Board *did* dispute the loan because it first states that Appellant's claim is "based on the argument that he lent his mother (L.H.) money to cover medical expenses in 2010 and 2011, and that L.H. agreed to reimburse him for those expenses", but then finds that "[h]owever, the medical expenses that the appellant states that he loaned L.H. $15,000 for, and for which he should receive reimbursement, are the same expenses that were claimed by L.H. as being paid by her to support her claim for pension benefits." **R. 9 (4-11)**. The Board's use of the word "however" clearly indicates that it determined Appellant's statement and the decedent's attestation to be inconsistent with one another. Thus, the Secretary's reliance on the Board's finding as to whether Appellant provided a loan as evidence to undermine Appellant's arguments is flawed.

The Secretary next argues that the Board's reasons or bases are nevertheless adequate and that any inconsistency between the Board's finding and Appellant's statement is "illusory" because the Board's discussion "does not suggest that the Board found Appellant's asserted loan to be inconsistent with the evidence. Rather, the statement reflects the Board's rejection of the theory that the loan could indirectly establish that Appellant paid for the medical expenses himself despite the decedent's certification to the contrary." Sec. Br. at 14-15. The Board found that Appellant "cannot seek reimbursement by *now contending* that he *actually paid* the expenses that were certified as paid for by [the decedent.]" **R. 9 (4-11)** (emphasis added). In support of this finding, it cited the fact that

the decedent certified that she had paid her medical expenses. *Id*. Accordingly, it is evident from the face of the Board's decision that it found Appellant's statement that "he actually paid the expenses" to be inconsistent with the decedent's statement that she had paid the medical expenses. However, as argued in Appellant's brief, Appellant never stated that he *paid* the expenses, but that he loaned the decedent money so that she could pay for the expenses herself with the expectation that she would later repay this loan. Thus, it is not clear how the inconsistency is "illusory" when it is clearly reflected on the face of the Board's decision, and in light of the arguments in Appellant's brief it is evident that the Board's reliance on this attestation was in error.

Beyond these mischaracterizations of Appellant's argument and the Board's findings, the Secretary fails to provide a specific response to Appellant's argument that the very nature of a loan means that the decedent's use of a loan from Appellant to pay her medical expenses is tantamount to her actually paying the medical expenses, such that "the decedent's certification to the contrary" would not, in fact, necessarily contradict Appellant's statement, since she paid the expenses herself, but obtained the funds to do so through Appellant. App. Br. at 8-9. Accordingly, remand is warranted for the Board to provide an adequate statement of reasons or bases regarding the Medical Expense Report and whether it establishes entitlement to accrued benefits.

II. The applicability of 38 C.F.R. § 3.272(b) was reasonably raised by the record.

Regarding Appellant's argument that the Board erred by failing to address 38 C.F.R. § 3.272(b) and whether the money the decedent received from Appellant's loan should

have been an exclusion from income, App. Br. at 9-11, the Secretary first responds by asserting that Appellant purportedly ignores "two uncontested facts":

> [F]irst, that the grant of improved death pension benefits here was premised on the decedent's reporting her assisted living expenses, *inter alia*, as unreimbursed medical expenses for the purpose of calculating income; and second, that VA's awarding improved death pension benefits was based on the decedent's certification that such unreimbursed medical expenses were incurred by her and thus should be deducted when calculating her income.

Sec. Br. at 16. It is not apparent why these facts permitted the Board to disregard section 3.272(b). Although its potential applicability may not have been apparent while the decedent was pursuing her pension during her lifetime, it is *Appellant's* entitlement to benefits that was before the Board, and his statements that he loaned the decedent money to pay medical expenses reasonably raised its applicability in deciding *his* entitlement.

The Secretary similarly notes that "VA did not become aware of the existence of this $15,000 loan during the lifetime of the decedent" and that "given that the grant of improved death pension benefits was not on appeal before the Board, it is unclear why the Board would have been expected to discuss alternative theories for calculating the decedent's income for the purpose of establishing entitlement to improved death pension benefits." Sec. Br. at 16. Whether VA was aware of this loan during the "lifetime of the decedent" is not relevant because the evidence concerning this loan was of record when the decision on appeal as to *Appellant's* entitlement was issued, and the Board itself repeatedly discussed this loan in adjudicating his entitlement. **R. 4-11**.

Additionally, that the specific issue of improved death pension benefits was not on appeal does not abrogate the Board's statutory obligation to base its decision on all

applicable regulations and provide reasons or bases addressing all material issues of fact and law presented on the record. *See* 38 U.S.C. §§ 7104(a), (d)(1). As discussed in Appellant's brief, the applicability of section 3.272(b) is reasonably raised because the Board rejected the claim on the basis that "continuing medical expenses for assisted living cannot be counted both as an unreimbursed expense paid by [the decedent] to establish entitlement to pension benefits, and then be again counted as payments made by the appellant from his own funds for purposes of establishing entitlement to accrued benefits." **R. 9-10 (4-11)**. Given that section 3.272(b) pertains to the types of exclusions from income for determining improved pension benefits, it directly bears on whether the Board properly found that the $15,000 loan used by the decedent to pay for her medical expenses was "counted [] as an unreimbursed expense paid by [the decedent] to establish entitlement to pension benefits[.]" *Id*. Section 3.272(b) indicates that this loan should have been excluded in calculating the pension benefits, which directly undermines the Board's unsupported finding against dual-counting because it establishes that the loan was only counted as a payment by the Appellant for accrued benefits purposes, and should not have been factored into the decedent's award of pension benefits. Thus, even though section 3.272(b) pertains to improved death pension benefits, it significantly bears on the outcome of the claim on appeal, such that the Board was required to address it. *See* 38 U.S.C. §§ 7104(a), (d)(1).

Lastly, the Secretary asserts that "discussion of § 3.272(b) was not warranted because … the Board otherwise lacked the authority to retroactively recategorize such expenses as 'maintenance.'" Sec. Br. at 17. However, there would be no retroactive calculation in this situation because a live issue in a claim for accrued benefits is whether

there were any benefits due and unpaid when the decedent died, and the evidence of record supports this possibility given Appellant's loan to the decedent for her medical expenses. Moreover, as the Board itself recognized, VA already awarded accrued benefits based on this application, **R. 8 (4-11)** ("In March 2012, the RO granted the claim, to the extent that it awarded $1,496.89 in accrued benefits.") (citing to **R. 147 (147-48)**), and the Board *sua sponte* raised the issue of Appellant's status as a payor despite resolving that matter in his favor in its December 2017 decision. **R. 37-38 (33-40)**. Therefore, the Secretary's argument concerning retroactive recategorization of expenses does not undermine Appellant's arguments, and the Board was required to address whether Appellant is entitled to additional accrued benefits based on his arguments.

III. The Board failed to ensure compliance with its August 2018 remand instructions.

Appellant argued that the Board failed to ensure compliance with the August 2018 joint motion for remand (JMR) because it explicitly found that it did not need to comply in light of a "separate and independent basis" for denying the claim, but failed to provide adequate reasons or bases explaining this basis. App. Br. at 11-12.

The Secretary's response is entirely grounded on the Board's findings as to whether Appellant made any payments of the decedent's medical expenses. Sec. Br. at 17-19. If the Court holds that the Board erred in making those adverse findings, the Secretary's argument presents no basis for the Court to not hold that the Board erred by ignoring the JMR instructions.

Furthermore, the Secretary provides no response to Appellant's alternative argument that the Board erred by not providing adequate reasons or bases for its

determination that it could ignore the Court's order granting the JMR. App. Br. at 12. To the extent that the Secretary attempts to provide the reasons in the Board's stead, his contentions should be disregarded as *post hoc* rationalizations given that they were not part of the Board's conclusory determination. **R. 10 (4-11)**.

IV. Appellant's reliance on *Bernard* is supported by the evidence of record, and the Secretary's reliance on prior agency decisions fails to demonstrate that Appellant was not afforded fair process, or that the Board provided adequate reasons or bases addressing whether Appellant was afforded fair process.

Appellant finally argued that the Board failed to ensure that he was afforded fair process because it made the express finding in its December 2017 decision that he had paid the expenses, but then made a contrary finding in the decision on appeal without any advance notice that his status as a payor is at issue. App. Br. at 12-13 (citing *Smith v. Wilkie*, 32 Vet. App. 332, 337-38 (2020), and *Bernard v. Brown*, 4 Vet. App. 384, 394 (1993)); *compare* **R. 37-38 (33-40)** *with* **R. 9 (4-11)**.

In response, the Secretary first argues that "the December 2017 Board decision that Appellant relies on is ambiguous at best and when read in the context of the Board's decision should not be read as an affirmative finding that Appellant bore the expenses of last sickness pursuant to 38 C.F.R. § 3.1000 (a)(5)." Sec. Br. at 19-20. The Secretary fails to explain how "the context of the Board's decision" supports a finding that the Board's decision is "ambiguous at best". The Secretary's interpretation also does not square with the face of the decision, where the Board unequivocally recognized "expenses paid by [Appellant]" and did so in the context of discussing assisted living expenses and the issue of entitlement to accrued benefits. **R. 37-38 (33-40)**. The content of the December 2017

decision reasonably indicates that the Board accepted the fact that the assisted living expenses were paid for by the Appellant, so its later finding that questions his status as a payor, and which was made without any notice or opportunity to submit evidence and argument, constitutes a failure to afford fair process. *See Smith*, *supra*, at 339 (holding that the Board's reversal of a favorable finding in a prior decision requires that the Appellant be "notified of this reversal or provided an opportunity to respond with argument or evidence.").

The Secretary next asserts that Appellant's reliance on *Bernard* is "misplaced" because the PMC "made specific findings" in the March 2015 SOC and August 2016 SSOC that "Appellant had not asserted he paid for the decedent's last illness" and that "they would not be allowable expenses for accrued benefits purposes." Sec. Br. at 20. To the extent that the Secretary is relying on these records as evidence that VA had previously addressed the issue of Appellant's status as a payor, such that *Bernard* would be inapposite, the August 2016 SSOC simply recognized that Appellant loaned money to the decedent for medical expenses and denied entitlement to accrued benefits because it found that expenses for caregiver fees do not constitute last illness expenses, **R. 62 (58-63)**, while the March 2015 SOC only made a finding that Appellant had not made payments for specific costs relating to "last illness", which is distinct from the broader issue of Appellant's status as a payor, and the RO in fact acknowledged that Appellant did pay medical expenses related to assisted living and caregiver fees. **R. 129 (111-29)**. Therefore, neither of these documents indicates that the RO adjudicated the issue of Appellant's status as a payor for assisted living expenses, which is the precise issue underlying Appellant's fair process argument

and which the Board relied upon in denying the claim on appeal. **R. 9 (4-13)**; App. Br. at 12-13.

The Secretary further contends that "Appellant argues that the Board called into question the credibility of his assertion that he loaned the decedent $15,000 for her to cover her medical expenses[.]" Sec. Br. at 20. Appellant did not make this argument in his brief, and it is not clear why the Secretary believes that Appellant is attempting to dispute the Board's findings as to whether Appellant loaned the decedent money, especially given that Appellant has cited to this fact to support his argument throughout his brief. *See* App. Br. at 7-11.

Finally, the Secretary argues that "the facts accepted and relied upon by the Board in deciding the claim here are not new and are consistent with Appellant's own assertion – before the [PMC] and here on appeal – that he loaned money to the decedent and his acknowledgement that the decedent paid for the expenses herself." Sec. Br. at 21. Yet, the Board accepted and acknowledged the same set of facts in both the December 2017 decision and the decision on appeal but came to differing conclusions as to Appellant's status as a payor without any notice prior to the decision on appeal as to why this is now an issue. Moreover, as discussed above, the RO did not address the specific issue of Appellant's status as a payor in its March 2015 SOC or August 2016 SSOC. Therefore, the evidence of record indicates that in the decision on appeal the Board addressed a question that had not been addressed by the RO and which had been resolved in Appellant's favor in its December 2017 decision.

Appellant was not afforded fair process with respect to the issue of his status as a payor, and the Secretary's flawed interpretation of the Board's decision and reliance on records not directly pertinent to the issue underlying the fair process violation fail to demonstrate otherwise. Thus, remand is warranted for the Board to afford Appellant an opportunity to submit evidence and argument concerning his status as a payor. *See Smith*, 32 Vet. App. at 339.

The Secretary did not respond to Appellant's alternative argument that the Board failed to provide any reasons or bases permitting judicial review of whether Appellant received the requisite fair process. *See* App. Br. at 14. Thus, if the Court determines that it is unable to determine whether the Board erred by denying Appellant fair process, it should remand the matter for the Board to provide adequate reasons or bases.

CONCLUSION

For the reasons articulated above and in his principal brief, Appellant respectfully requests that the Court vacate the Board's decision of April 9, 2019, and remand this matter for readjudication consistent with the points discussed in his briefs.

Respectfully submitted,

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November 9, 2020

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