

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

PATRICIA L. ROMERO,

Appellant,

v.

ROBERT L. WILKIE,

Appellee.

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Vet. App. No. 19-3687

**MOTION FOR PARTIAL RECONSIDERATION
OR FULL COURT REVIEW**

Pursuant to U.S. Vet. App. R. 35, Appellee, Robert L. Wilkie, Secretary of Veterans Affairs (Secretary), respectfully moves this Court to reconsider or review en banc certain portions of its November 20, 2020, decision in this matter.¹ Specifically, he asks the Court to reconsider or review en banc its (1) holding that clear evidence sufficient to rebut the presumption of regularity need not be claimant specific and that the Board erroneously found that the presumption was not rebutted because Appellant had not submitted “any evidence specific to her file or the mailing practices as applicable to the handling of her case” and (2) conclusion that a remand for the Secretary to establish that the Statement of the Case (SOC) was actually mailed as required would be “pointless” given his concession at oral argument that he could not prove actual mailing “conclusively.”

A. The Court should reconsider its holding that claimant-specific evidence is not needed to rebut presumption of regularity and that the Board erred when it concluded that the presumption in this case was not rebutted because Appellant had not submitted “any evidence specific to her file or the mailing practices as applicable to the handling of her case.”

The Court held that the presumption of regularity as to the Secretary’s mailing of a copy of the SOC to Appellant’s counsel was rebutted by clear evidence comprised of the

¹ *Romero v. Wilkie*, 2020 U.S. App. Vet. Claims LEXIS 2104 (Nov. 20, 2020).

Board's favorable factual finding that Appellant had produced "substantial evidence that reflects a widespread problem with VA not mailing correspondence" plus a statement of nonreceipt by his counsel. *Romero* at *16. (alterations removed). It found that the Board "misunderstood the law" when it concluded that the presumption had not been rebutted because Appellant had not submitted "any evidence specific to her file or the mailing practices as applicable to the handling of her case." *Id.* at *24 (alterations removed). Specifically, it found that, in *Ashley v. Derwinski*, 2 Vet.App. 307 (1992) (*Ashley II*), it held that non-claimant-specific evidence could be clear rebuttal evidence and that *Ashley II* thus "instructs us that . . . clear evidence need not be claimant specific." *Id.* It thus reversed the Board's conclusion on the basis of its interpretation of *Ashley II*.

1. The Court misunderstood the decision in *Ashley II* when it held that the case instructs that clear evidence sufficient to rebut the presumption of regularity need not be claimant specific.

In concluding that claimant-specific evidence is not needed to rebut the presumption of regularity, the Court found that, in *Ashley II*, it "afforded the Secretary the presumption of regularity" as to a proffered Board practice of sending all official transmissions to Vietnam Veterans of American (VVA) as a claimant's authorized representative when that organization contracted with the National Veterans Legal Services Project (NVLSP) to provide services, and held that this presumption was rebutted by "five letters from other claimants' cases" that contradicted this practice because they were sent to NVLSP.² *Id.* at 24. There are two problems with the Court's analysis of *Ashley II*.

² The Court also stated that the appellant contended that the Board did not follow its purported practice regularly or in *her* case. *Romano* at *25. But the appellant did not contend that the Board failed to follow its purported practice in *her* case. She challenged its existence. She disputed the Secretary's "characterization of the regular practice" and argued that the letters demonstrated that the Board regularly treated NVLSP as VVA for purposes of serving its papers on VVA. *Ashley II* at 310-11.

First, the Court in *Ashley II* did not afford the Secretary the benefit of the presumption of regularity as to a Board practice of sending its official transmissions to VVA and thus could not have held that the non-claimant-specific letters constituted clear evidence to rebut that presumption. Rather, the Court found that the Board had no such practice.³ Specifically, it found that the letters directly contradicted and thus refuted the Secretary's evidence as to what was, in fact, the regular course of business at the Board.⁴ Given that the Court found that the Secretary failed to establish that the Board, in the normal course of business, would have treated and sent its official transmissions to VVA as the representative of record, the Court could not have presumed that the Board did that in the appellant's case and thus could not have found that such presumption was rebutted by the letters (or any other evidence).

Second, if the Court's reading of *Ashley II* is correct, it means that the Court in *Ashley II* misapplied the law. Specifically, if, as this Court found, the Court in *Ashley II* held that the five letters mailed to NVLSP rebutted the presumption of regularity afforded the Secretary with respect to the Board's practice of sending all official correspondence to VVA, the Court in *Ashley II* would have had to first conclude that the evidentiary record established that such practice existed. But, to do this, the Court would have had to ignore

³ This practice had not previously been established. Moreover, Appellant would not have had to prove that such practice did not exist by clear evidence. Whether the evidence supports the finding of an evidentiary-based regular practice is a question of fact.

⁴ The Court found that the burden "once again" shifted to the Secretary to show that the Board decision was mailed to the appellant's representative "in the regular course of business." The Court's language and its subsequent discussion reflect that the shift in burden was not due to the rebuttal of any presumption of regularity. Rather, it returned to the Secretary to show that the Board decision was mailed to the appellant's representative "in the regular course of business" because his first attempt at showing this was contradicted by the appellant's evidence. He was given the chance to try again and "clarify or at least attempt to explain the apparent contradiction." *Ashley II* at 311.

the evidence submitted by the appellant—evidence it found directly contradicted the Secretary’s evidence and ultimately proved that such practice did not exist—and defer exclusively to the evidence submitted by the Secretary. This would have been improper. In other words, unless the Court in *Ashley II* improperly deferred to the Secretary’s evidence for purposes of determining whether the Board had a regular practice of treating and sending its official transmissions to VVA, as opposed to NVLSP, it could not have found that such practice existed, and thus could not have found that the presumption derived from that practice was rebutted (by the letters or otherwise).

In sum, the Court’s reasoning for concluding that *Ashley II* held and instructs that claimant-specific evidence is not needed to rebut the presumption of regularity is based on a misreading of the case and should be reconsidered.

2. The decision in *Ashley II* supports the Board’s conclusion that evidence specific to a claimant’s file or the mailing practices applicable to claimant’s case is required to rebut the presumption of regularity.

Ashley I and *II* concerned whether the Board mailed a copy of its decision to the appellant’s representative on the date of the decision for purposes of determining whether and when the 120-day statutory period in which to file a notice of appeal began to run. The appellant there was represented by VVA and NVLSP and asserted that the Board failed to mail a copy of its decision to NVLSP. The Court held in *Ashley I* that the Board failed to mail a copy of its decision to NVLSP and that the appellant thus established that it failed to mail a copy of its decision to her representative such that the 120-day period did not begin to run until NVLSP actually received a copy of the decision.⁵

⁵ Specifically, while it presumed that the Board properly discharged its official duties by mailing a copy of its decision to the appellant’s authorized representative on the date of the decision, it held that this presumption was rebutted, and the Secretary (who had also confirmed that there was no record in the claims file of the address or addressee to which the decision was mailed) failed to establish actual mailing to NVLSP.

The Secretary moved for reconsideration and (instead of attempting to show that the Board presumably or in fact mailed a copy of its decision to NVLSP) attempted to establish that it was the Board's practice in cases where VVA contracts with NVLSP to treat VVA, not NVLSP, as the designated representative of record and to send all official transmissions to that organization.⁶ The appellant disputed the existence of this practice and submitted evidence consisting of five letters from other claimants' cases that "directly contradicted" the Secretary's proffered evidence as to what was, in fact, the regular course of business at the Board because they showed that the Board in those cases treated NVLSP as the claimant's representative of record for purposes of mailing official transmissions.⁷

The Secretary provided no further evidence and failed to establish any regular practice from which it could be presumed that the Board, acting in the regular course of business, mailed a copy of its decision to the appellant's representative. Indeed, the Court found not only that the appellant established that it was not the Board's practice to treat VVA as the representative of record for purposes of transmitting its decisions, but also that the appellant had established that the Board had "no practice" whatsoever when it came to handling cases with claimants represented by both VVA and NVLSP or that any practice it did have was, "at best, irregular." *Ashley II* at 311.

⁶ Establishing this practice would have negated the impact of any failure on the part of the Board to mail a copy of its decision to NVLSP, which is what the Court in *Ashley I* found had happened, and because of that failure, it failed to satisfy its duty to mail a copy of its decision to the appellant's representative.

⁷ The litigation and Court's discussion suggests that both parties and the Court agreed that, if the Board had a specific practice in terms of which of the organizations it regularly sent its decisions, it would have satisfied its obligation to mail a copy of its decision to that appellant's authorized representative by mailing it to that organization.

In other words, the evidence established that the Board’s “regular” mailing practice in cases where a claimant was represented by both VVA and NVLSP was that sometimes it mailed its official transmissions to VVA and sometimes it mailed them to NVLSP. This specific mailing practice was the precise mailing practice relevant to the appellant’s case as she was represented by both VVA and NVLSP, and so it necessarily implicated, and permitted inferences to be drawn as to, whether the Board, in her case, could be presumed to have properly discharged its official duties by mailing a copy of its decision to her representative (or, more specifically, NVLSP). Specifically, it allowed the inference that, in her case, the Board might have sent a copy of its decision to NVLSP or it might have sent it to VVA. Thus, it could not be assumed that the Board mailed a copy of its decision to one organization as opposed to the other and, as such, the Board could not be presumed to have mailed a copy of its decision to the appellant’s authorized representative (or, specifically, NVLSP) in discharge of its official duties.⁸

In short, the Secretary was afforded the presumption that he and the Board properly discharged their official duties by mailing a copy of the Board decision to the appellant and her representative on the date the decision was issued. The “clear evidence” that deprived the Secretary of the benefit of this presumption derived from the letters from other claimants’ cases. But it was not the letters alone that denied the Secretary the benefit of the presumption of regularity. It was the facts established by those letters—facts that included the Board’s “irregular mailing practice” in cases where a claimant is represented by VVA and NVLSP and supported inferences that directly implicated the Board’s actions

⁸ Implicitly, albeit significantly, the Court appears to have determined that the Board could not have satisfied its duty to mail a copy of its decision to the appellant’s representative by sending it to either VVA or NVLSP, as even its “irregular” practice would have yielded the presumption that it mailed a copy of its decision to one organization or the other.

with respect to the mailing of its decision in the appellant's specific case. While the evidence that gave rise to these case-specific inferences was itself not claimant-specific, the facts and inferences it created were: They related to the specific mailing practices applicable to the mailing of the Board decision in the appellant's case and directly implicated how the Board proceeded in her case.

Thus, the decision in *Ashley II* does not support the Court's conclusion that claimant specific evidence is not needed to rebut the presumption of regularity. At most, *Ashley II* makes clear that clear evidence needed to rebut the presumption of regularity does not have to derive from a claim-specific document or other evidence specifically generated in connection with a claimant's specific claim. Accordingly, the Court should reconsider its conclusion that claimant-specific evidence is not needed to rebut the presumption of regularity.⁹

3. The Court erroneously concluded that the Board erred when it found that the presumption of regularity was not rebutted on grounds that Appellant had not submitted "any evidence specific to her case file or the mailing practices as applicable to the handling of her case."

The Board concluded that the presumption of regularity was not rebutted in this case because Appellant had not submitted "any evidence specific to her case file or the mailing practices as applicable to the handling of her case." The Court held that the Board erred because it misunderstood the law, relying on *Ashley II* to support the proposition that claimant-specific evidence is not needed to rebut the presumption of regularity. While the Secretary disagrees that *Ashley II* supports that proposition (and that the Court misread

⁹ The Secretary agrees that clear evidence needed to rebut the presumption of regularity need not include or be comprised of a claim-specific *document* or evidence specifically generated in connection with a claimant's individual claim. If that is all the Court meant when it stated that "clear evidence need not be claimant specific," then the Secretary asks that the Court clarify its discussion.

Ashley II to reach its conclusion), even assuming that claimant-specific evidence is not needed, this addresses only the first part of the Board’s rationale for concluding that the presumption of regularity was not rebutted (that the appellant failed to submit any evidence “specific to her case file). It does not address the second, that Appellant failed to submit any evidence “specific to . . . the mailing practices as applicable to the handling of her case.”

In other words, the Board did not find the presumption of regularity was rebutted simply because Appellant failed to submit claim-specific evidence, it found that the presumption of regularity was not rebutted because she failed to provide evidence that was either claim-specific or specific to the mailing practices as applicable to the handling of her case. Thus, regardless of whether Appellant did, or needed to, provide claim (or claimant)-specific evidence, the Board found that she failed to provide evidence that connected the “widespread problems with VA not mailing correspondence” it determined she established to the mailing practices applicable to her case. That is, it found that what Appellant established was factually irrelevant to the mailing practices applicable to her case and thus did not rebut the presumption of regularity. This finding that Appellant failed to provide evidence specific to the mailing practices as applicable to the handling of her case is a factual finding, and the Court did not find that it is clearly erroneous.

Indeed, even if it is an erroneous finding (which it was not), the Court’s conclusion that the Board misunderstood the law should be reconsidered, because it cannot be reasonably debated that, where an appellant attempts to establish a regular (or irregular) practice or tries to show that a particular practice was not followed, there must be a connection between the facts established and the practice actually applicable in the claimant’s case. If Appellant had established that the Secretary regularly mails certain

documents to claimants in manila envelopes, it would clearly have no relevance to whether the Secretary should be presumed to have mailed a copy of the SOC to counsel in the regular course of business. Thus, as the Board specifically found that Appellant failed to show that the “widespread problems with VA not mailing correspondence” implicated the mailing practices as applicable in her case, and as the Court did not hold that this was a legally improper requirement (which it was not) or that the finding was clearly erroneous (which it also was not), the finding is binding, and the Court’s conclusion that the presumption of regularity was rebutted is erroneous and should be reconsidered.

B. The Court overlooked or misunderstood points of law when it found that a remand for the Board to consider whether the SOC was actually mailed would be “pointless.”

The Court should reconsider or clarify this part of its decision because it appears to impose a new and improper standard of proof on the Secretary to demonstrate actual mailing and encourages appellate-level trial litigation of the evidence. As the Court explained, because it found that the presumption of regularity was rebutted, the burden shifted to the Secretary to establish that the SOC was mailed as required or that Appellant’s counsel actually received a copy of it. *Id.* at 26. And, as it further explained, because of this, the Board never shifted the burden and thus never determined whether the Secretary could prove actual mailing or receipt. *Id.* However, the Court went on to find that, while it normally would have remanded the matter for the Secretary to shoulder his burden, doing so in this case would be “pointless” because the Secretary conceded at oral argument that he could not “prove actual mailing conclusively.”¹⁰ *Id.* at 26-27.

¹⁰ The Secretary disagrees that he conceded that actual mailing could not be proved. He agreed that there was no direct evidence of actual mailing but insisted that there were “indicia” and all the “telltale” signs of mailing, and that it would have been “well within reason for the Board to find that [the SOC] was in fact mailed based on all the circumstantial evidence.” OA at 48:00-49:00.

The Court's finding that a remand would be "pointless" because the Secretary conceded that he could not "conclusively" prove that the SOC was actually mailed appears to impose a heightened standard of proof on the Secretary. Whether a document was mailed or received is a question of fact and is proved by a preponderance of the evidence. This means that the fact must only be shown to be more likely than not true. *See Jackson v. Veterans Admin.*, 768 F.2d 1325, 1332 (Fed. Cir. 1985) (defining a "preponderance of the evidence" to mean "more likely than not"). In contrast, a fact is established "conclusively" if it must be accepted and cannot be disputed. Insofar as the Court imposed, or at least appears to impose, on the Secretary a heightened standard of proof to demonstrate actual mailing, the Secretary submits that the relevant portion of its discussion should be reconsidered or, at minimum, clarified.

Moreover, even if the Secretary could not prove at oral argument that the SOC was actually mailed (conclusively or not), this is not to say that such fact (or proof of receipt) could not be established upon development of the issue, and so it is unclear why a remand for the Board to address the issue would be pointless. Finally, insofar as the Court noted that the Secretary "made no effort to carry his burden on appeal in his brief or at oral argument," it also acknowledged that it is the responsibility of the Board to make factual findings in the first instance. *Romero* at 27. It would thus seem to have been inappropriate for the Secretary to attempt to prove in either his brief or at oral argument a fact that the Board had not considered.

WHEREFORE, for the reasons stated above, the Secretary moves the Court to reconsider, or review en banc, the aforementioned portions of its November 20, 2020, decision.

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