UNITED STATES COURT OF APPEAL FOR VETERANS CLAIMS

No. 21-5125

PAT A. HATFIELD,

Appellant

v.

DENIS MCDONOUGH,
Secretary of Veterans Affairs,

Appellee.

REPLY BRIEF OF THE APPELLANT

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ARGUMENTS

1. **The Board's determination that there was no CUE in its October 1980 decision was arbitrary, capricious, an abuse of discretion, and not in accordance with the law, and not supported by an adequate statement of reasons or bases.**

In her opening brief, Ms. Hatfield argued that the law extant at the time of the Board's 1980 decision required compensation for VA medical care that was performed negligently and it was well established through caselaw and the law in effect at the time that failure to obtain informed consent prior to rendering medical care constitutes negligence. App. Br. at 10-11. She also argued that there was no substantial change in the law that existed from the time of the Board's 1980 decision to the present. App. Br. at 7-8. Specifically, she argued that there is no meaningful difference between the plain language of the former 38 U.S.C. § 351 and the current 38 U.S.C. § 1151 or the former 38 C.F.R. § 17.34 and the current 38 C.F.R. § 17.32. *Id*.

The Secretary responds that the Board never attempted to show any meaningful difference between sections 351 and 1151 or sections 17.34 and 17.32 but instead relied on the meaningful difference between the current 38 C.F.R. § 3.361 and the 1980 version of 38 C.F.R. § 3.358. Sec. Br. at 12-13.

While the Secretary is correct that the Board "never attempted to show any meaningful difference" between 38 U.S.C. §§ 351 and 1151 or 38 C.F.R. §§ 17.34 and 17.32, the Secretary is incorrect that the Board only relied on the meaningful difference between the former 38 C.F.R. § 3.358 and the current 38 C.F.R. § 3.361. The Board expressly determined that "The *statutes and regulations* that now govern benefits under the section now codified at 38 U.S.C. § 1151 have *substantially changed* since the time of

the Board's decision in October 1980." R-10 (emphasis added). The Board went on to discuss the requirements of 38 U.S.C. §§ 351 and 1151 as well as their respective implementing regulations 38 C.F.R. §§ 3.358 and 3.361. R-10-11. By acknowledging that the Board never attempted to show the meaningful difference between 38 U.S.C. §§ 351 and 1151 or 38 C.F.R. §§ 17.34 and 17.32, the Secretary's position actually supports the conclusion that the Board's statement of reasons or bases is inadequate.

Nevertheless, Hatfield notes that she also argued that there was no substantial change from the former 38 C.F.R. § 3.358 and the current 38 C.F.R. § 3.361 because section 3.361 does not contain any bright-line rule mandating compensation in the absence of informed consent but instead simply lists the absence of informed consent as an example of an instance where proximate cause between medical care and death can be shown, consistent with the VA's intention "*merely to restate*, more simply and clearly, the standards governing determinations of *negligence*." App. Br. at 8-9. She argued that the former section 3.358 provided that compensation was provided for negligence committed by the VA and that the current section 3.361 is congruous with former section 3.358 because it merely restated for clarity that a lack of informed consent is negligence for which compensation is payable. *Id*.

The Secretary responds that the "critical difference" is that the current plain language of 38 C.F.R. § 3.361 shows that proximate causation is established when VA fails to obtain the veteran's informed consent while, in 1980, 38 C.F.R. § 3.358 only provided for compensation when there is a showing that the disability proximately resulted through

carelessness, accident, negligence, lack of proper skill, error in judgment, or similar instances of indicated fault on the part of the VA. Sec. Br. at 12.

The Secretary's distinction is without a difference. The Secretary seems to take the position that because section 3.361 expressly states that proximate causation of carelessness, negligence, lack of proper skill, error in judgment, or similar instance of fault on VA's part can be established by showing that the medical care that caused the veteran's death was furnished without the veteran's informed consent, then section 3.358 did not contemplate failure to obtain informed consent as carelessness, negligence, lack of proper skill, error in judgment, or similar instance of fault on VA's part for compensation purposes. Sec. Br. at 12. However, in proposing 38 C.F.R. § 3.361 the VA specifically stated that the proposed section 3.361(d)(1)(ii), concerning consent to care, treatment, or examination, *is derived from current section 3.358(c)(3)*. 67 Fed. Reg. 76323, Dec. 12, 2002 (Proposed rule).

Additionally, as stated above, the VA specifically noted that the plain language of section 3.361 was intended merely to restate, more simply and clearly, the standards governing determinations of negligence. 69 Fed. Reg. 46433, August 3, 2004 (Final Rule). Thus, in promulgating section 3.361, the VA was merely restating the negligence standards as they were understood in the former section 3.358. It was not *redefining* them, or more specifically, as the Board and the Secretary suggest, *expanding* them.

The Secretary's position is further contradicted by *McNair v. Shinseki*, in which this Court acknowledged that VA adopted "the common law standards governing determinations of negligence" for claims for compensation under 38 U.S.C. § 1151

(formerly 38 U.S.C. § 351). 25 Vet. App. 98, 106 (2011). This is consistent with the VA's position that the terms "carelessness", "negligence", "lack of proper skill", and "similar instances of fault", all unambiguously refer to circumstances where VA medical providers have failed to exercise due care in providing medical services; and "Congress intended to establish is tort-variety negligence." 67 Fed. Reg. 76323, Dec. 12, 2002 (Proposed rule). Moreover, the legislative history of 38 U.S.C. § 351 shows that the intent behind the statute was to cover cases of medical malpractice on the part of VA physicians. 78 Cong. Rec. 3289-90 (Feb. 27, 1934) ("what we are trying to do is to protect the men who suffer from malpractice at the hands of Veterans' Administration physicians").

As noted in Ms. Hatfield's opening brief, common law that existed at the time of the Board's 1980 decision recognized, just as it does today, that rendering medical care without informed consent constitutes negligence. *See* App. Br. at 10-11 (citing *e.g. Canterbury v. Spence*, 464 F.2d 772, 782-83 (D.C. Cir 1972); *Natanson v. Kline*, 350 P.2d 1093, 1106 (1960); *Scott v. Wilson*, 396 S.W.2d 532, 533 (1965); *Wilson v. Scott*, 412 S.W.2d 299 (1967)); *see also Murrey v. United States*, 73 F.3d 1448, 1451 (7th Cir. 1996) ("Failing to advise . . . of the risks of a medical procedure . . . is classified as a tort of negligence . . . ."); *Keir v. United States*, 853 F.2d 398, 411 (6th Cir. 1988) (stating that claim of absence of informed consent is a negligence claim).

The Secretary further argues that there was a change in the law after the 1980 Board decision because 38 C.F.R. § 3.358(c)(3) was struck down by the U.S. Supreme Court as inconsistent with 38 U.S.C. § 1151 in *Brown v. Gardner*, 513 U.S. 115 (1994). Sec. Br. at

12. However, the Secretary's reliance on *Brown* to show a substantial change in the law is misplaced.

As noted by the VA, prior to *Brown*, it had long interpreted 38 U.S.C. § 1151,[1] through 38 C.F.R. § 3.358(c)(3), as requiring a showing of fault on VA's part. 60 Fed. Reg. 14222, March 16, 1995 (Interim Final Rule). The *Brown* Court invalidated section 3.358(c)(3) as inconsistent with 38 U.S.C. § 1151 because the statute does not require the fault or accident requirement set out in section 3.358(c)(3). *Brown*, 513 U.S. at 117. Thus, any "change" in the regulation interpreting 38 U.S.C. §§ 351 or 1151 that stemmed from *Brown* was immaterial because Ms. Hatfield's claim is based on VA's failure to obtain the veteran's informed consent prior to rendering the medical care that caused his death which constitutes an instance of fault on the VA's part. VA's fault for failing to obtain informed consent is consistent with section 3.358(c)(3) as it was understood prior to being invalidated by the Supreme Court. *Id*; *see also George v. McDonough*, 991 F.3d 1227, 1234 (Fed. Cir. 2021).

As noted above, Ms. Hatfield also argued that law at the time of the Board's 1980 decision required the VA to obtain informed consent and recognized that the provision of medical care without obtaining the patient's informed consent was a form of negligence. App. Br. at 10-11.

The Secretary responds that "the pertinent inquiry is not whether a physician had a duty to obtain informed consent" but rather "the pertinent inquiry is whether the lack of

[1] Ms. Hatfield reiterates the Secretary's position that the Board "never attempted to show any meaningful difference" between 38 U.S.C. §§ 351 and 1151. Sec. Br. at 12-13.

informed consent qualified as proximate causation pursuant to VA regulations for the purposes of entitlement to benefits under 38 U.S.C. § 351. Sec. Br. at 13-14.

However, the Secretary fails to appreciate that his purported "pertinent inquiry" was not actually answered by the Board. Instead, the Board conceded that 38 U.S.C. § 4131 and 38 C.F.R. § 17.34 existed at the time of the Board's 1980 decision and required VA to obtain informed consent prior to administering medical treatment. R-9. Thus, section 38 U.S.C. § 4131 and 38 C.F.R. § 17.34 established the standard to protect veterans against unreasonable risk of harm. *See* Restatement (Second) of Torts § 282 (1965) ("negligence is conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm"); BLACK'S LAW DICTIONARY, 204, 1056 (7th ed. 1999) (defining "negligence" as the "failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation"); 67 Fed. Reg. 76323, Dec. 12, 2002 ("Congress intended to establish is tort-variety negligence."); 78 Cong. Rec. 3289-90 (Feb. 27, 1934) ("what we are trying to do is to protect the men who suffer from malpractice at the hands of Veterans' Administration physicians").

The Board did not dispute that no informed consent was obtained. R-6. In fact, this Court confirmed that there is no documentation of any consent. *Hatfield v. McDonough*, 33 Vet. App. 327, 339-40 (2021). Rather, the Board denied revision of its 1980 decision concluding that the law in effect at the time did not allow for compensation when VA administers medical treatment without obtaining the veteran's informed consent and that the statutes and regulations that governed benefits under 38 U.S.C. § 351 have

"substantially changed" since its 1980 decision to allow for compensation in such circumstances. R-10-11.

However, the Board's position requires the Court to accept that Congress enacted 38 U.S.C. § 4131 requiring VA healthcare providers to obtain informed consent prior to rendering medical care and that VA promulgated 38 C.F.R. § 17.34 listing specific requirements to satisfy informed consent, yet despite being aware of 38 U.S.C. § 351 and 38 C.F.R. § 3.358 compensating veterans for negligence committed by VA healthcare providers, neither Congress nor the VA contemplated what would happen if VA healthcare providers failed to obtain informed consent for medical treatment. There is simply no support for such a position.

CONCLUSION

In sum neither the Board nor the Secretary has shown a substantial change in the law from 1980 to the present. The law has always been understood to provide compensation for veterans who suffered additional disability or death due to medical malpractice/tort variety negligence which includes has always included rendering medical care without the veteran's informed consent. Because the Board erred so finding, its 2021 decision must be set aside and remanded for readjudication under the proper legal framework.

Respectfully submitted on June 15, 2022 by:

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CERTIFICATE OF SERVICE

On June 15, 2022, a copy of the foregoing Reply Brief for Appellant was filed and served via electronic filing for the United States Court of Appeals for Veterans Claims on: Attorney Mark Hamel, counsel for Appellee, Secretary of Veterans Affairs at Mark.Hamel@va.gov. I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

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