IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

PAT A. HATFIELD, Appellant,	)	
v.	)	Docket No. 21-5125
DENIS MCDONOUGH, Secretary of Veterans Affairs, Appellee.	)	

APPELLANT'S MOTION FOR RECONSIDERATION

Pursuant to U.S. Vet. App. R. 35(a)(1), Appellant respectfully moves for reconsideration by the panel of the Court's March 28, 2023, decision. As grounds therefore, Appellant asserts the following points of law or fact:

A. The panel misinterprets the interplay between 38 U.S.C. § 351 and other statutes like 38 U.S.C. § 4131.

The panel first found that nothing in the plain language of section 351 referenced negligence or could be construed as encompassing informed consent. Dec. 13. As such, the panel turned to the legislative history of the statute and noted that the intent of what would become section 351 was "to afford veterans some measure of compensation in those cases in which the disability arises through accident, careless, negligence, lack of proper skill, error in judgment, etc. on the part of any person charged with a duty respecting the hospitalization, or medical or surgical treatment." Dec. at 14-15. Indeed, this intent is echoed in VA's interpretation of section 351 found in 38 C.F.R. § 3.358. *See Jordan v. Nicholson*, 401 F.3d 1296, 1298 (Fed. Cir. 2005) (noting that VA's regulation implementing a statute constituted its "initial interpretation" of that statute). However, the

panel concluded that "[n]othing in the legislative history suggests that Congress contemplated a failure to obtain a patient's informed consent before treatment as a basis upon which to award compensation" Dec. at 14-15. The panel further found that in 1976, sections 351 and 4131 were completely separate because there was nothing in their statutory language or legislative histories connecting the lack of informed consent with the provision of disability compensation. *Id*.

Ms. Hatfield respectfully asserts that the panel misunderstands the interplay between sections 351 and 4131. As noted by the panel, the Congressional intent behind section 351 was to compensate veterans for disability that arises through "accident, carelessness, negligence, lack of proper skill, error in judgment, etc. on the part of any person charged with a duty respecting the hospitalization, or medical or surgical treatment." Dec. at 14-15; *see also* Comptroller General Decision No. A-31895, 9 Comp.Gen. 515 (1930) ("the plain intent of section 213 of the World War Veterans' Act, 1924, as amended, was to afford veterans some measure of compensation in those cases in which the disability arises through accident, carelessness, negligence, lack of proper skill, error in judgment, etc. ..."); 78 Cong. Rec. 3289-90 (Feb. 27, 1934) ("[W]hat we are trying to do is to protect the men who suffer from malpractice at the hands of Veterans' Administration physicians." "Where a veteran is injured because of malpractice, he shall receive compensation […] where, in a veterans' hospital, a veteran is disabled by reason of mistreatment on the part of a Government agent, […] the veteran shall be compensated in the same way.").

Section 351 does not define what constitutes negligence, carelessness, error in judgment, etc. *See* 38 U.S.C. § 351. Nor does it state what duties are placed on VA personnel that, if breached, could result in disability compensation. *Id*. Rather, it is merely the statute that authorizes compensation for violation of such duties. Stated differently, it simply requires causation between VA medical care and the resulting disability or death to trigger the payment of compensation. The duties imposed on VA personnel that, if violated, could lead to disability compensation are found in other statutes and regulations. For example, the duty for VA medical personnel to obtain informed consent prior to rendering medical care is found in section 4131. *See* Dec. at 16 (acknowledging that section 4131 was directed to VA healthcare and the duties of medical professionals).

The panel's decision incorrectly requires section 351 to expressly discuss or reference the duty to obtain informed consent prior to rendering medical treatment despite the fact that section 351 does not reference or discuss any other duty placed on VA that could result in negligence or medical malpractice. As held by the Supreme Court, Courts must read statutes in their context and with a view to their place "in the overall statutory scheme and not as a series of unrelated and isolated provisions." *King v. Burwell*, 135 S. Ct. 2480, 2489, 192 L. Ed. 2d 483 (2015); *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 570, 115 S. Ct. 1061, 131 L. Ed. 2d 1 (1995). The duty to obtain informed consent from a patient, like other duties placed on VA medical personnel, are created by other statutes and regulations. Section 351, the compensation/causation statute, makes these other statutes and regulations (such as section 4131) enforceable by creating consequences for breach of the duties they impose on VA healthcare personnel. There is simply no need for section

351 to reference or expressly discuss informed consent when it does not reference or discuss any other duty placed on VA personnel.

To illustrate, consider that the 1980 Board was focused on whether the veteran's radiation dosage was excessive. R-1664-67, 1669-70. In fact, it requested a medical opinion on the issue. R-1664-67. Had the medical examiner opined that the veteran's radiation dosage exceeded acceptable medical standards, the Board would have granted Ms. Hatfield's claim under section 351. However, like informed consent, neither section 351 nor 38 C.F.R. § 3.358 reference excessive radiation as grounds for compensation. Additionally, as with informed consent, the legislative history of section 351 from 1924 or 1930 does not discuss radiation therapy or what amount of radiation constitutes a breach of the standard of care. Why then, did the 1980 Board bother requesting a medical opinion about the veteran's radiation treatment and whether the amount of radiation he was given was appropriate when the statute, regulation, and legislative history were silent on the topic?

The only reasonable answer is that the legal landscape at the time of the 1980 Board decision was understood to authorize compensation under section 351 and 38 C.F.R. §. 3.358 for instances of medical malpractice that were established by other statutes, regulations, and caselaw. But according to the panel's logic, because neither section 351 nor 38 C.F.R. §. 3.358 enumerated excessive radiation as an instance of negligence, Ms. Hatfield could have never received compensation. Clearly the 1980 Board thought otherwise. Ms. Hatfield asserts that it is inconsequential that specific acts of negligence were omitted from section 351; Congress's refrain from listing negligent acts was

deliberate and is more reasonably construed as signifying broad inclusion rather than exclusion (contrary to the Board and the panel's view). *See Aectra Ref. & Mktg. v. United States*, 565 F.3d 1364, 1370 (Fed. Cir. 2009) ("Congress is presumed to enact legislation with knowledge of the law and a newly-enacted statute is presumed to be harmonious with existing law and judicial concepts."). Congress was aware of the existing section 351 and its established desire to compensate veterans who suffer medical malpractice by VA healthcare personnel when it codified the duty for those medical personnel to obtain informed consent. By reading section 351 in isolation from other statutes, particularly from section 4131 in the same Title, and requiring it to expressly reference section 4131 or informed consent to trigger compensation, the panel transforms the mandatory requirements for VA healthcare professionals under section 4131 into discretionary suggestions.

Regarding the common law that existed in or before October 1980, the panel found that nothing in the text or legislative history of section 351 shows that Congress intended to adopt the common law negligence principle of informed consent as a basis for compensation under section 351. Dec. at 17. The panel also found that, in 1924, a lack of consent was a basis for potential recovery as an intentional tort of battery, and not as a part of negligence as it is today. Dec. at 18. True enough, but Ms. Hatfield respectfully asserts that the panel's temporal focus on 1924 is misplaced because the Board decision at issue is from 1980, after enactment of section 4131, which codified the duty on VA medical personnel to obtain informed consent and when failure to obtain informed consent *was* a form of negligence as recognized by the common law. *Gravis v. Physicians & Surgeons*

Hosp., 415 S.W.2d 674, 678-679 (1967) (citing 44 Tex.L.Rev. 799, 801, for the proposition that an action based a physician's failure to make sufficient disclosure for informed consent is a claim of negligence not assault and battery).

As noted by the panel, in 1930 when the Comptroller General detailed the principles underlying what would become section 351, he referred to negligence-based concepts. Dec. at 18. There is no indication at all that Congress sought to limit the negligence-based concepts it sought to compensate or to otherwise define negligence or medical malpractice. This makes sense given the constantly evolving state of medical knowledge where a medical procedure performed in 1924 may be considered reasonable, but in 1980 after decades of advancement in medical knowledge and technology the same procedure would be considered negligent.

For example, from the 1930s to the 1950s lobotomies were a common and acceptable treatment for psychiatric conditions.[1] Yet, after the 1950s they were considered inhumane and ineffective.[2] Obtaining informed consent prior to rendering medical care may not have been commonplace in 1924 when Congress was contemplating the type of negligent actions for which compensation would be paid under section 351, but Ms. Hatfield's CUE claim is based on the law as it was understood at the time of the 1980 Board decision, not in 1924. As it did with the lobotomy, the medical and legal community's position regarding informed consent shifted between 1924 and 1980.

[1] https://nihrecord.nih.gov/2019/11/01/when-faces-made-case-lobotomy (Last visited May 11, 2023)

[2] *Id*.

Congress recognized this shift in the medical and legal community when it enacted section 4131 in 1976 requiring informed consent prior to providing medical treatment and by 1980 and the common law recognized that failure to obtain informed consent constituted negligence because it was a breach of the duty to provide comprehensive disclosure to patients to facilitate informed decision making about their medical care. The panel's focus on whether Congress considered failure to obtain informed consent negligent in 1924 ignores the advancements in the medical community and in the law for actionable patient protection that were present at the time of the October 1980 Board decision.

Finally, in this context, Ms. Hatfield notes that the panel concluded that the 1978 VA general counsel opinion did not support her argument because it said nothing about informed consent or how that concept relates to negligence. Dec. at 21. Ms. Hatfield respectfully asserts that the panel misunderstands her argument. She is not asserting that the general counsel opinion supports her argument because it expressly references informed consent, but rather that when interpreting section 351 and 38 C.F.R. § 3.358, the general counsel concluded that Congress intended recovery for a disability deriving from *some form of negligence*. U.S. Dep't of Veterans Affairs, Op. Gen. Counsel 2-78 (Oct. 25, 1978). In 1980 failure to obtain informed consent was a recognized a form of negligence and was a violation of the duty Congress placed on VA healthcare personnel under section 4131. Thus, the 1978 general counsel opinion supports Ms. Hatfield's argument by confirming that Congress intended section 351 to compensate veterans for negligence, i.e. breach of duties imposed by law, they suffer at the hands of VA personnel.

B. The panel misunderstands or overlooks favorable relevant precedent and legislative history that it deemed critical to understanding the law in 1980.

The panel found it highly significant that the current regulation 38 C.F.R. § 3.361 expressly mentions informed consent and provides a connection between the informed consent requirement and the provision of disability compensation because that was missing from 38 C.F.R. § 3.358. Dec at 20. The panel found that the first time the idea of consent shows up in the history of section 1151 was in 1995 when VA amended section 3.358 in response to the Supreme Court's decision in *Gardner v. Brown* and that the post-*Gardner* language represented a departure from the way section 1151 compensation had previously been considered because the VA specifically referred to the changes as "revising" the regulation from the way section 1151 (and section 351) compensation operated previously. Dec. at 22.

Ms. Hatfield respectfully asserts that the panel has first overlooked the legislative history of the section 4131, in which the Committee on Veterans' Affairs noted that the interface between law and medicine in informed consent "is an extremely difficult and provocative problem" and involves legal and medical issues such as what constitutes "consent" and how "informed" consent must be. Veterans' Omnibus Health Care Act of 1976: Report of the Committee on Veterans' Affairs, U.S. Senate, S.2908 pg. 115 (Sept. 3. 1976).[3] It further stated that the purpose of section 4131 is to provide "a statutory basis for regulation governing informed consent procedures and subsequent Congressional

[3] Available at https://ia801601.us.archive.org/25/items/veteransomnibush00unit/veteransomnibush00unit.pdf (Last visited May 16, 2023).

oversight activities." *Id*. at pg. 116. Ms. Hatfield asserts that accepting the panel's holding that section 4131 is entirely separate from section 351, renders Congress's desire for oversight of the informed consent procedures in VA healthcare illusory by stripping away any accountability for violations of section 4131.

The Committee on Veterans' Affairs further stated that

> The purpose of the informed consent requirement in the Committee bill is to ensure that the VA, in consultation with appropriate medical and legal sources, develops regulations to protect the patient's right to decide, voluntarily, what is in his or her best "health" interest, weighing the risks involved against the potential gains. [and that]
>
> It is not altogether clear that generally applicable regulations or forms currently guide the VA in the extremely delicate area of obtaining the informed consent of patients and research subjects prior to the provision of medical care. Although VA regulations (M-2, part XIV, chapter 1, § 1.02 ("Requirements for Surgery")) require that patients consent to the performance of surgical procedures, it is not clear on the face of the regulation how broadly its protections apply: for example, a circular of the Department of Medicine and Surgery dated January 6, 1976, containing guidelines for informed consent procedures in cardiac catheterization laboratories suggests that there were not sufficiently detailed guidelines prior to that date, despite the obvious risks and high relative morbidity rate for the cardiac catheterization procedure. The Committee is concerned that there may be other such situations.

Id. at pg. 115-16. The failure to obtain Mr. Hatfield's informed consent is one of those "other" situations with which the Committee was concerned.

Additionally, Ms. Hatfield notes that in response to the proposal to add section 4131 in 1976, the VA Office of the Administration of Veterans' Affairs stated that it was unopposed to adding section 4131 but thought it was unnecessary because "it would result

in no basic change in our practice" *Id*. at pg. 195. All this to say that if Congress was already aware that VA's failure to obtain informed consent was a provocative legal and medical problem and the VA already had an established practice of ensuring informed consent was obtained prior to rendering any medical care, then the panel's conclusion that the idea of informed consent was not a contemplated form of negligence in 1980 is incorrect. Dec. at 21-22.

Ms. Hatfield also respectfully asserts that the panel has overlooked the December 1994 VA general counsel opinion which noted the Supreme Court's decision in *Gardner v. Brown*, but nevertheless stated that:

> [C]ompensation is payable if an injury resulting from VA treatment causes additional disability or death and the injury is not a risk of which the veteran was informed before consenting to undergo treatment. For example: A veteran is informed of three of the known risks of a certain surgical procedure before consenting to it. As a result of the surgery, the veteran suffers a further and different type of complication which he had not been informed was a risk of the procedure. Compensation would be payable for resulting disability or death.

U.S. Dep't of Veterans Affairs, Op. Gen. Counsel 23-94 (Dec. 27, 1994). This acknowledgment by the VA that a lack of informed consent was the type of negligence that could serve as the basis for compensation under section 351 and the original version of 38 C.F.R. § 3.358(c)(3) is telling because it occurred before the "first mention of consent" in 1995 and before any revisions to section 3.358 that were proposed in 1996 as stated by the panel. *See* Dec. at 21-22.

Ms. Hatfield asserts that the 1994 general counsel opinion directly contradicts the panel's determination that VA's purported derivation of the informed consent provisions

of section 3.361(d)(1)(ii) from 3.358(c)(3) in 1996 signaled a "change" when informed consent was discussed by the VA as its established practice in 1976 and reaffirmed in the 1994 general counsel opinion.

Finally, while not precedential, Ms. Hatfield notes that, while the 1978 version of 38 C.F.R. § 3.358 was in effect, prior to the Supreme Court's decision in *Gardner v. Brown*, and prior to any regulatory changes relied on by the 2021 Board, the Secretary took the position in a May 30, 1991 joint motion for remand (JMR), which was granted by this Court, that remand to the VA Regional Office was warranted to address whether the absence of informed consent establishes a basis of negligence for a grant of benefits under 38 U.S.C. § 1151. *See* BVA Decision 92-18866, Dkt. No. 89-22 350 available at https://www.va.gov/vetapp92/files2/9218866.txt (Last visited May 17, 2023).

The Court found Board decisions like this to be relevant when interpreting the law in 1980. *See* Oral Argument at 7:10-8:2, https://www.youtube.com/watch?v=yn7uEoS0N7Y. Indeed, the Board's decision shows that the Secretary believed that a lack of informed consent could constitute compensable negligence such that it was included in the JMR. That being said, Ms. Hatfield maintains that her access to previous Board and Regional Office decisions is extremely limited due to privacy issues but asserts that the VA has access to its own repository and as such is in the best position to locate and discuss this relevant "evidence" as part of its adequate statement of reasons or bases.

C. The panel's decision affirming the Board's reliance on the post October 1980 regulatory changes conflates the two separate but equally important determinations that must be made by the VA in CUE allegations involving a misapplication of law that existed at the time of the decision being attacked.

The panel accepted the Board's reliance on the post-1980 regulatory changes to interpret what the law said at the time of the 1980 Board decision. Dec at 19. The panel determined that the regulatory changes provide context for how section 351 was understood in 1980 and that by looking at what was added to the legal landscape later, it can see what was missing at the relevant time. *Id*. However, Ms. Hatfield respectively asserts that the panel has conflated the two-pronged analytical framework created by this Court and the Federal Circuit that must be conducted when relying on changes in the legal landscape that occurred after the decision being attacked. Specifically, the panel's acceptance of the post-1980 legal landscape to interpret what the law *said* in 1980 cannot also serve to show how the law was understood in 1980 because that determination must be based only on the authority that existed at the time of the 1980 Board decision.

It is evident from this Court's decision in *George v. Wilkie*, and the Federal Circuit's decision in *George* v. *McDonough*, that there are two separate but equally important determinations that the VA has to make in a CUE allegation involving a misapplication of law that existed at the time of the decision being attacked: 1) what the law said or meant at the time of the original decision; and 2) how the law was understood at that time. *George v. Wilkie*, 30 Vet. App. 364, 373-74 (2019) (noting that the Federal Circuit's 2004 clarification of what the law has always meant is not an interpretation or understanding of how the law was understood before the Court's decision); *George v. McDonough*, 991

F.3d. 1227, 1234 (Fed. Cir. 2021) ("CUE must be analyzed based on the law as it was *understood at the time* of the original decision")(emphasis in original). In *George v, Wilkie*, this Court noted that the Federal Circuit's 2004 decision in *Wagner* clarified what the presumption of soundness always meant but in an enforced-blindness-type analysis foreclosed consideration of what the law always meant in favor of how the law was understood at the time of the 1971 decision being attacked based only on the authority available at that time. *George*, 30 Vet. App. at 373-75 (holding that the Federal Circuit's interpretation of what the law always meant in *Wagner* was separate from how the law was understood prior to the *Wagner* decision).

Under the first prong of the *George* analysis the panel agreed with the Board that it can rely on post-1980 regulatory changes to interpret what the law *said* in 1980. Dec. at 19. However, that is not the end of the analysis because what the law said and how it was understood are two separate issues. *George*, 30 Vet. App. at 373-75. Under the second prong of the *George* analysis, which was not performed by the Board, only the authority that existed at the time of the 1980 Board decision may be considered. *Id*; *see also George*, 991 F.3d. at 1234. In this context, this Court recognized in *George* that "faithful application of the rules as they existed at the time of the [agency] decision" is tantamount and it would be "nonsensical" and "antithetical" for a later change in the legal landscape "to foreclose accountability for undebatable error in previously applying them." *See Id*. at 37.

This in consistent with this panel's concurrence in the judgment in *Perciavalle v. McDonough*, 35 Vet. App. 11, 52 (2021), in which the panel supported the alleged doctrine of enforced blindness regarding how the law was understood at the time of the decision

subject to the CUE motion stating that in order to state and consider a CUE motion based on the incorrect application of law

> a claimant and the Board must pretend that they exist in the time the decision allegedly containing CUE was rendered, *without the benefit of any later law or interpretation*. That is the context in which a claimant must allege how, and the Board must decide whether, the Agency decisionmaker made a clear and unmistakable error. To reason in such a mindset is difficult, to be sure; *it is all too easy to draw on later, "clarify[ing]" law or interpretations*. *But to stay faithful to the nature of CUE, one must fight the urge*. And it is certainly not impossible. In fact, trial judges do something similar all the time, when they hold bench trials. In bench trials, judges hear objections, exclude evidence, and must make decisions based on admissible evidence only, pretending they never heard or saw the inadmissible evidence.

Id. (emphasis added).

Additionally, by conflating the reliance on the post-1980 legal landscape to interpret what the law said *and* how it was understood at the time of the original decision, the panel is imbuing inconsistency in the adjudication of CUE pleadings filed at different times. To illustrate, assume Ms. Hatfield filed her same CUE pleading in 1982, the Board would not have the same body of subsequent law on which to base its interpretation of what the law said at the time of the 1980 Board decision or how it was understood back then because the body of law relied on by the 2021 Board was promulgated in 2002. Dec. at 22-23. Thus, identical CUE filings in 1982 and 2020 would be impacted by different bodies of subsequent law, which could result in different outcomes for the CUE motions filed at different times. However, under the correct application of the *George* analysis there would

be consistency in how the law was understood in 1980 because the legal landscape that existed at that time what would not change.

Here, the panel affirmed the Board's finding as to what the law said in 1980 and its reliance on post-1980 regulatory changes and caselaw to support that determination. Dec. at 19. However, the panel overlooks the fact that the Board never determined the second prong of the *George* analysis, i.e. how the law was *understood* in 1980, based *only* on the legal landscape that existed at that time. The failure to perform that analysis and make the necessary factual findings in the first instance renders the Board's statement of reasons or bases inadequate, requiring remand.

WHEREFORE, due to the foregoing points of law and fact, Appellant requests reconsideration by the panel of the Court's March 28, 2023 decision.

Respectfully Submitted on this 18th day of May 2023.

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CERTIFICATE OF SERVICE

On May 18, 2023, a copy of the foregoing Motion for Reconsideration 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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