UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

Vet. App. No. 21-7694

GILBERT ARNOLD BELL,
Appellant,

v.

DENIS MCDONOUGH,
Secretary of Veterans Affairs,
Appellee.

APPELLANT'S BRIEF

Spencer Jolicoeur, Attorney
VA Disability Group PLLC
7837 S Sprinkle Rd,
Portage, MI 49002
Phone: (844) 838-5297
Email: spencer@vadisabilitygroup.com

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1) The VA failed its duty to assist the claimant[1]. The VA failed to retrieve records in the custody of a federal department or agency which were necessary to assist the claimant. The VA failed to retrieve the relevant regulations, which controlled radiation exposure limits and monitoring requirements during the Veteran's period of service (1968-1970). 38 CFR § 21.1032 states that the "VA will make as many requests as necessary to obtain relevant records form a federal department or agency." The VA made no requests or attempts to retrieve these federal records.
2) The Board failed to ensure that the "probable dose" estimates received by the VA constituted "sound scientific and medical evidence" as required by 38 CFR §3.311. The Board is required to assess whether a dose estimate and resulting advisory medical opinion are based on "sound scientific evidence."[2]
3) The Board failed to explain how or why it found the Under Secretary of Health's dose estimate to be "sound evidence." The Board "must provide more in explaining how and why it found the… dose estimate sound evidence if the Board relies on that evidence to deny appellant's claim."[3]

[1] 38 CFR § 21.1032.
[2] *Skaar v. Wilkie*, 33 Vet. App. 127 (2020).
[3] *Id*. at 142.

4) The Board failed to explain the reasons or bases for its determination, adequate to enable an appellant to understand the precise basis for the Board's decision, as well as to facilitate review in the Court.[4]

5) The Under Secretary of Health's dose reconstruction was materially flawed.

STATEMENT OF THE CASE

Gilbert Bell served honorably in the United States Army from May 14, 1968, to May 8, 1970 (R-894). The Veteran's service records confirm that he served in a Nuclear Duty Position and was a part of the Special Weapons Branch Unit and the 125th Ordinance Company Unit (R-901). The Veteran contends that he was exposed to ionizing radiation while working with nuclear weapons at Fort Shafter, Hawaii, and that his later diagnosed renal cell carcinoma is a result of that exposure (R-5364).

The Veteran, Gilbert Bell, filed an informal claim for the loss of a kidney as a result of being exposed to ionizing radiation in service on June 2, 2009 (R-5364). The regional office (RO) issued a decision on November 24, 2009, denying service connection for a nephrectomy, secondary to kidney cancer (R-5329). The appeal period then lapsed.

The Veteran filed a VA 21-526EZ on March 25, 2014, claiming a nephrectomy secondary to kidney cancer (R-5228). The regional office (RO) issued a decision on August 1, 2014, which denied the Veteran's claim for service connection for a

[4] 38 U.S.C. § 7104(d)(1); Allday v. Brown, 7 Vet. App. 517, 527 (1995); Gilbert v. Derwinski, 1 Vet. App. 49, 56-57 (1990).

nephrectomy, secondary to kidney cancer caused by ionizing radiation (R-4523). The Veteran submitted a notice of disagreement on August 18, 2014, the area of disagreement was service connection (R-4504). The VA issued a Statement of Case on June 16, 2015 (R-4464). The Veteran filed a timely VA form 9 on July 9, 2015, selecting a hearing by live videoconference (R-4460). The Board hearing was held on November 5, 2018 (R-4407).

The Board issued a decision on April 4, 2019, remanding the issue of entitlement to service connection for nephrectomy secondary to renal cancer (R-4383). The Board factual findings were as follows: "1) A November 2009 rating decision denied entitlement to service connection for nephrectomy secondary to renal cancer but was not timely appealed by the Veteran and became final. 2) The Veteran submitted new and material medical evidence addressing a nexus between the Veteran's diagnosed renal cancer and his time in service" (R-4383). The Board's remand terms were as follows: "1) Attempt to associate with the claims file any relevant outstanding VA or non-VA medical treatment records, including treatment at the Ann Arbor VA Hospital since June 2014. 2) Forward the Veteran's service medical records, his written statements regarding radiation exposure, his September 2009 Radiation Risk Activity Worksheet, his service personnel records, and any other records which may contain information pertaining to the Veteran's radiation dose in service to the Under Secretary for Health for preparation of a dose estimate. 3) If it is determined that the Veteran was exposed to ionizing radiation in service, forward the veteran's case to the VA Under Secretary for Benefits for appropriate action under 38 C.F.R. § 3.311(c), to include an opinion from the VA Under

Secretary for Health as to whether it is at least as likely as not that the veteran's kidney cancer was caused by radiation exposure in service, if appropriate" (R-4386).

The VA issued a supplemental statement of case on June 8, 2021, and the remanded appeal was returned to the Board (R-711). The Board issued a decision on September 1, 2021, stating that the preponderance of the evidence is against finding that the Veteran's nephrectomy secondary to renal cell carcinoma is related to exposure to ionizing radiation in service (R-5).

SUMMARY OF THE ARGUMENT

The VA failed its duty to assist the claimant. The VA failed obtain the relevant federal records that would have assisted the claimant. The VA failed to obtain retrieve the relevant regulations controlling radiation exposure and monitoring for the Veteran's period of service (1968-1970).

The Board failed to ensure the "probable dose" estimates received by the VA constituted "sound scientific evidence" as required by 38 CFR §3.311. The Board arbitrarily accepted the Under Secretary of Health's dose estimate, despite the Under Secretary of Health's reliance on modern regulations that were not in effect during the Veteran's period of service. The Board also failed to explain how or why it found the Under Secretary of Health's dose estimate to be "sound evidence."

The Board failed to explain the reasons or bases for its determination adequate to enable an appellant to understand the precise basis for the Board's decision, as well as to

facilitate review in the Court. The Board provided no explanation for the Under Secretary of Health's reliance on modern Nuclear Regulatory Commission (NRC) regulations. The Boad failed its duty owed to the appellant by not providing him with an adequate explanation which would enable him to understand the precise basis for the Board's decision. The appellant, Gilbert Bell, is perplexed as to how a modern NRC regulation implemented in 1991 can be used to estimate the ionizing radiation, he was exposed to from 1968 to 1970.

Lastly, the Under Secretary of Health's dose reconstruction was based on an incorrect factual premise, and it was materially flawed. If the Under Secretary of Health used the appropriate regulations that were in effect during the Veteran's period of service (1968-1970), the result would have been substantially different. If the Under Secretary of Health used the same reconstruction methodology and the appropriate regulations (regulations that were in effect from 1968-1970), the Under Secretary's opinion would have opined that the Veteran was exposed to significantly more ionizing radiation than 1.5 rems.

STANDARD OF REVIEW

The Court reviews findings of fact by the Board under the clearly erroneous standard. Service connection determinations are issues of fact.[5]

This Court also reviews claimed legal errors by the Board under the de novo standard, where the previous Board decision is not entitled deference.[6] This Court also reviews de novo whether an applicable law or regulation was correctly applied.[7] The Court will set aside a conclusion of law made by the Board when that conclusion is determined to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[8] The Court should determine whether the Board's decision is in accordance with the law.

[5] *Futch v. Derwinski*, 2 Vet.App. 204, 206 (1992).
[6] 38 U.S.C. § 7261(a)(1); see *Butts v. Brown*, 5 Vet.App. 532 (1993) (en banc).
[7] *Joyce v. Nicholson*, 19 Vet.App. 36, 42-46 (2005).
[8] *Butts*, 5 Vet.App. at 538.

ARGUMENT

I) The VA failed its duty to assist the claimant.

38 CFR § 21.1032(c) states that the "VA will make as many requests as necessary to obtain relevant records form a federal department or agency." In the case at hand the VA made no attempts to obtain the relevant federal records, even though these federal records would have assisted the claimant and the Under Secretary of Health. In the case at hand, the VA failed to retrieve the relevant regulations controlling radiation exposure and monitoring for the Veteran's period of service (1968-1970).

Due to this failure, the Under Secretary of Health's dose reconstruction methodology was materially flawed. The Under Secretary of Health relied on modern NRC regulations[9] when it prepared the dose estimate for the VA (R-718). The Under Secretary of Health relied on regulations that were implemented in 1991[10], by a governmental agency that was founded in 1974[11], when preparing a dose estimate for a Veteran who served from 1968-1970.

[9] US Nuclear Regulatory Commission. 10 CFR 20.1201 (a). Occupational Dose Limits for Adults. (56 FR 23396). US Nuclear Regulatory Commission. 10 CFR 20.1502 Conditions requiring the individual monitoring of external or internal occupational dose (56 FR 23398).

[10] *Id.*

[11] *About NRC | nrc.gov - NRC web*. Nuclear Regulatory Commission. (n.d.). Retrieved April 27, 2022, from https://www.nrc.gov/about-nrc.html

II) The Board failed to ensure that the "probable dose" estimates received by the VA constituted "sound scientific and medical evidence" as required by 38 CFR §3.311.

The Board is required to assess whether a dose estimate and resulting advisory medical opinion are based on "sound scientific evidence."[12] The Under Secretary of Health's opinion stated the following:

> Where presumption does not exist[13], the dose must be determined through direct measurement or reconstruction methodology... Since there is no record of measured dose, we will assign a radiation dose (the Veteran claims he was exposed to radiation) based on the nature and location of the Veteran's service as described in the claim file. When an occupationally exposed worker is not expected to receive a radiation dose exceeding 1/10 of the annual limit of 5 rem per year (0.5 rem), monitoring is not required[14]. We will assign a dose of 1.5 rem (total effective dose equivalent) to the Veteran, which is calculated as 0.5 rem per year x 3 calendar years of service (1968 through 1970). This assigned dose gives benefit of doubt to the Veteran versus the US Army's lack of dose monitoring records. (R-718).

The Under Secretary of Health's opinion states that because presumption does not exist, the dose must be determined through reconstruction methodology. The Under Secretary of Health then stated that because there was no measured dose, they will assign a radiation dose based on the nature and location of the Veteran's service (R-718). The Under Secretary of Health then states the following "When an occupationally exposed worker is not expected to receive a radiation dose exceeding 1/10 of the annual limit of 5 rem per year (0.5 rem), monitoring is not required" and the Under Secretary of Health

[12] *Skaar v. Wilkie*, 33 Vet. App. 127 (2020).
[13] 38 CFR 3.309(d).
[14] US Nuclear Regulatory Commission. 10 CFR 20.1201 (a). Occupational Dose Limits for Adults. (56 FR 23396).

cites a NRC regulation (R-718).[15] The issue here is that regulation cited by the Under Secretary of Health was implemented in 1991[16], by a governmental agency that was created in 1974.[17] The regulations cited by the Under Secretary of Health were not in effect when the Veteran served in the Army (1968 to 1970), therefore, the "probable dose" estimate is not "sound scientific evidence."

Furthermore, the Under Secretary of Health provided no evidence that the annual limit during the Veteran's period of service was 5 rems, and the Under Secretary of Health provided no evidence that radiation monitoring was ever required during the Veteran's period of service (regardless of the amount of occupational exposure).

III) The Board failed explain how or why it found the Under Secretary of Health's dose estimate to be "sound evidence."

The Board stated the following in its decision:

> The Board finds that the dose estimate, and opinion were based on sound scientific evidence in this case.
>
> The dose estimate methodology used in the May 2021 memorandum was intended to assign the highest possible exposure for a veteran who was not required to be monitored. Because neither the Veteran nor the U.S. Army Dosimetry Center has produced any dosimetry information, it is reasonable to conclude that the Veteran was not required to be monitored because his expected annual exposure was 0.5 rem per year or less. (R-7).

[15] US Nuclear Regulatory Commission. 10 CFR 20.1201 (a). Occupational Dose Limits for Adults. (56 FR 23396).
[16] *Id*.
[17] *About NRC | nrc.gov - NRC web*. Nuclear Regulatory Commission. (n.d.). Retrieved April 27, 2022, from https://www.nrc.gov/about-nrc.html

The Board "must provide more in explaining how and why it found the… dose estimate sound evidence if the Board relies on that evidence to deny appellant's claim."[18] The Board stated that "dose estimate, and opinion were based on sound scientific evidence in this case," however, the Board failed to explain how or why the Under Secretary's use a modern regulation is appropriate. The specific NRC regulations the Under Secretary of Health's medical opinion relied on, were not in effect when the Veteran served in the Army, yet the Board still used the Under Secretary of Health's opinion to deny the appellant's claim. The Under Secretary of Health and the Board made no attempt to explain how or why a modern regulation is applicable to a Veteran who served in the Army from 1968 to 1970. The Under Secretary of Health and the Board both failed to explain why a modern regulation would be a "statistically valid"[19] way to approximate the ionizing radiation the Veteran was exposed to from 1968-1970.

The Board in its decision stated that the dose estimate was "sound evidence." This would be a reasonable conclusion, if the Under Secretary of Health or the Board provided any evidence that radiation monitors were required when an individual was exposed to more then 0.5 rems per year (from 1968 to 1970). Neither the Board nor the Under Secretary of Health provided any evidence that radiation monitors were required when a worker was exposed to more than 0.5 rems of radiation, from 1968-1970. Furthermore, neither party provided any evidence that 5 rems was the annual exposure limit during the Veteran's period of service.

[18] *Skaar v. Wilkie*, 33 Vet. App. 127, 142 (U.S. 2020).
[19] *Id. at 168.*

The Board's conclusion that the dose estimate was "sound evidence" was arbitrary. The Board simply regurgitated the Under Secretary of Health's justification for the dose estimate. There was no critical thinking or analysis displayed in the Board decision. The Court of Appeals for Veterans Claims has previously held that the Board must provide more in explaining how or why the dose estimate is "sound evidence." It cannot simply be sound "on its face."[20]

IV) The Board failed to explain the reasons or bases for its determination, adequate to enable an appellant to understand the precise basis for its decision.

Even if the Board's conclusion that the dose estimate was "sound evidence," is somehow justifiable, the Board must explain the precise basis for its determination. In this case, the Board failed its duty to explain the reasons or bases for its determination adequate to enable an appellant to understand the precise basis for the Board's decision, as well as to facilitate review in the Court.[21] The Board arbitrarily concluded that the Under Secretary of Health's dose reconstruction was "sound evidence." The Board did not even mention that the regulations the Under Secretary of Health 's opinion relied on were implemented in 1991[22] by a governmental agency that was not in existence when the Veteran served in the Army (1968-1970).

[20] *Id.* at 202.
[21] 38 U.S.C. § 7104(d)(1); Allday v. Brown, 7 Vet. App. 517, 527 (1995); Gilbert v. Derwinski, 1 Vet. App. 49, 56-57 (1990)
[22] US Nuclear Regulatory Commission. 10 CFR 20.1201 (a). Occupational Dose Limits for Adults. (56 FR 23396).

The Board must explain to the appellant, the precise reasons why the Under Secretary of Health's opinion is "sound evidence" (i.e., an accurate representation of the ionizing radiation the Veteran was exposed to in service). This is especially true, when the Board uses the Under Secretary's opinion to discredit material evidence favorable to the appellant. The Board used the Under Secretary's opinion to discredit the favorable private medical opinions submitted by the Veteran (R-16, R-789).

The Board used the Under Secretary of Health's opinion to reject material evidence favorable to the appellant (R-16, R-789), despite the fact that the Under Secretary of Health's opinion has arguably the same deficiencies as the private opinions. While the private opinions did not "discuss the Veteran's actual radiation" dose, the Under Secretary of Health's opinion arbitrarily picked a radiation dose without any justification. The Under Secretary of Health chose 0.5 rems as the radiation dose, without providing any statutory or regulatory evidence to justify this decision. The only regulations cited by the Under Secretary of Health were not in effect during the Veteran's period of service. A radiation dose estimate without adequate justification is simply an arbitrary number. Therefore, no probative value should be assigned to the resulting medical opinion. No logical person can conclude that a medical opinion based on an arbitrary number is more probative than a medical opinion without a dose estimate.

V) The Under Secretary of Health's medical opinion is materially flawed.

The Under Secretary of Health's opinion stated the following:

> Where presumption does not exist[23], the dose must be determined through direct measurement or reconstruction methodology... Since there is no record of measured dose, we will assign a radiation dose (the Veteran claims he was exposed to radiation) based on the nature and location of the Veteran's service as described in the claim file. When an occupationally exposed worker is not expected to receive a radiation dose exceeding 1/10 of the annual limit of 5 rem per year (0.5 rem), monitoring is not required[24]. We will assign a dose of 1.5 rem (total effective dose equivalent) to the Veteran, which is calculated as 0.5 rem per year x 3 calendar years of service (1968 through 1970). This assigned dose gives benefit of doubt to the Veteran versus the US Army's lack of dose monitoring records. (R-718).

The Under Secretary of Health's medical opinion relies on an incorrect factual premise and is materially flawed. The Under Secretary of Health's opinion cited modern NRC regulations[25] when estimating the ionizing radiation, the Veteran was exposed to from 1968-1970. This is clearly an error because, prior to 1974, there was no NRC. Prior to 1974, the Federal Radiation Council (FRC) was the federal agency tasked with making recommendations for occupational radiation exposure[26]. The FRC was established in 1959 by President Eisenhower and the FRC's function was to make recommendations to the President regarding radiation protection[27]. In 1960, the FRC recommended the first federal guidance for occupational exposure to ionizing radiation[28]. The Federal Radiaiton

[23] 38 CFR 3.309(d)
[24] US Nuclear Regulatory Commission. 10 CFR 20.1201 (a). Occupational Dose Limits for Adults. (56 FR 23396).
[25] *Id*.
[26] *NRC: ML050400427 - Nuclear Regulatory Commission*. Nuclear Regulatory Commission. (2005, February). Retrieved April 27, 2022, from https://www.nrc.gov/docs/ML0504/ML050400427.pdf
[27] *Id* at 7.
[28] *Id* at 8.

Protection Guidance specified the numerical doses or exposures which the Federal agencies should not normally allow to be exceeded[29]. These were called the Radiation Protection Guides (RPGs). The RPG for occupational exposure of the whole body permits 3 rems per quarter (or 12 rems per year) with an overall cumulative limit of 5 (N-18) rems, where N is the age of the worker.[30]

The Federal Radiation Protection Guidance[31]was the controlling federal document during the Veteran's period of service. It is worth noting, that the Federal Radiation Protection Guidance annual exposure limit was 12 rems per year and the Federal Radiation Protection Guidance did not specify the amount of radiation exposure that would require workers to be monitored. Applying the above facts to the Under Secretary of Health's dose reconstruction method, we get the following: Radiaiton monitors were not required during the Veteran's service, therefore, we will assign a radiation dose equivalent to the annual limit which is 12 rems per year times 3 calendar years (giving the Veteran the benefit of the doubt). The Veteran would be assigned an overall dose of 36 rems of ionizing radiation for his three years of service. 36 rems of ionizing radiation is statistically significant and 24 times than previously estimated by the Under Secretary of Health.

[29] *Id.*
[30] 25 FR 4402; May 18, 1960.
[31] *Id*.

CONCLUSION

For the above-referenced reasons, the Court should vacate the Board's Decision dated September 1, 2021, and remand this matter for further adjudication and case development.

Respectfully Submitted,
FOR THE APPELLANT
VA Disability Group PLLC
/s/ Spencer Jolicoeur
Spencer Jolicoeur, Attorney
7837 S Sprinkle Rd,
Portage, MI 49002
Phone: (844) 838-5297
Email: spencer@vadisabilitygroup.com