



DEPARTMENT OF VETERANS AFFAIRS
Board of Veterans' Appeals
425 I Street North West
Washington DC 20001

3 August 2015

In Reply Refer To:
JR/AC15-243
[REDACTED]

[REDACTED]

Dear Mr. Graham:

As requested, enclosed is a copy of your Travel Board Hearing transcript before the Board of Veterans' Appeals (Board) in Seattle, WA on 29 April 2015. The transcript of the hearing has been associated with the claims folder and will be considered evidence by the Board.

Please note that the Board's regulations gives you the opportunity to file a motion to correct the transcript if you believe it does not accurately reflect what was said at the hearing. Such a motion must be filed within 30 days of the date of this letter. The motion must be in writing and must specify error(s) in the transcript as well as correct wording to be submitted, 38 C.F.R. § 20.716.

A motion should be forwarded to: Board of Veterans' Appeals (0141F), 425 I St, NW., Washington, DC 20001. If a motion is filed, you will be notified in writing as to any decision made with respect to the motion. If there are any additional questions please feel free to contact our office at (202) 632-4610 between the hours of 8:00 am to 3:00 pm Monday through Friday.

Respectfully,

A handwritten signature in cursive script, appearing to read "S. Brick", is written above the typed name.

Suzanne Brick
Chief, Hearing Branch
Office of Management, Planning
And Analysis

cc:

TRANSCRIPT OF HEARING

BEFORE

BOARD OF VETERANS' APPEALS

WASHINGTON, D.C. 20420

Sitting in Seattle, Washington

IN THE APPEAL OF : Graham, Gordon



DATE : April 29, 2015

REPRESENTED BY : Attorney

MEMBER OF BOARD : Vito Clementi, Judge

WITNESS :

JUDGE: This is Vito Clementi. I'm holding a hearing of the Board of Veterans' Appeals in Seattle, Washington. This is the claim of the veteran Gordon Graham, file number [REDACTED] Mr. Graham is present in the hearing room with his attorney, Mr. Robert Walsh (phonetic). At this time, I'll administer the oath to Mr. Graham.

(OATH ADMINISTERED)

JUDGE: Thank you. Mr. Walsh, uh, and I had a -- a prehearing conference with, uh, with Mr. Graham. There are two fundamental issues, uh, to the, uh, claim today, both involving, um, the increased rating for, uh, for a (inaudible) contained in his heart, otherwise known as PCT.

Uh, the veteran is, um, arguing for an alternative diagnostic code. He specifically points to the, uh, diagnostic code for anemia and you have recurrent phlebotomy, correct?

MR. WALSH: Correct.

JUDGE: Okay, and also, uh, a separate manifestation -- separate and compensable evaluation for skin manifestations. I've also been asked to consider a special monthly compensation increase. So with that, I'm -- I'm going to turn it over to Mr. Walsh. Sir, you may -- you may go ahead.

MR. WALSH: Thank you, Your Honor. Uh, let me put my appearance on the record. I'm Robert P. Walsh. My address is 2 Michigan Avenue West, Suite 301, Battle Creek, Michigan, 49017, and my telephone number is 269-962-9693.

Mr. Graham, would you state your -- and spell your name for the record, please?

VETERAN: Gordon Alexander Graham, last name is G-R-A-H-A-M, first name, G-O-R-D-O-N.

MR. WALSH: And what's your address?

VETERAN: 14910 125th Street KP N, Gig Harbor, Washington, 98329.

MR. WALSH: And did you file the, uh, pro se petition for a writ of mandamus with the Veteran's Court back in January, didn't you?

VETERAN: Yes, I did.

MR. WALSH: And that was assigned docket number 15-112.

VETERAN: That's correct.

MR. WALSH: And there were seven issues in, uh, in your prayer for relief, and we're here today, and -- and basically, there's only two -- two of those, which is the VR&E dispute over the greenhouse and some other VR&E issues, and then there's the -- the problems here where we're trying to establish the -- the proper, um, diagnostic code and - and rating percentage for PCT.

VETERAN: With one addition possibly, and that is because they returned my 10 percent skin rating when they discovered CUE, when they rerated me on February 27, 2015, they gave me my claw (phonetic) back on the 10 percent for skin.

I have been awaiting that now for -- since I was denied equitable relief back in 2010, and I have a separate IMO from a private ARPN showing that I do have more than 20 percent of my skin involved, which is worth a 30 percent rating, if they're using the 1994 schedule of VA (inaudible).

MR. WALSH: And -- and they -- and they did, and -- and as reflected in the appendix to our brief we filed today, um, they did give you a 40 percent rating for fibromyalgia. That was one of the -- one of your reliefs you sought, and they, um --

VETERAN: That's correct, finally.

MR. WALSH: -- and -- and they -- they -- they still haven't converted your file to digital, to VBMS, but they -- they promised us that, with all deliberate speed, they're going to get it backed up.

VETERAN: They said it wasn't right for reproduction.

MR. WALSH: Basically telling Judge Davis to go out and play in -- in this -- in -- in -- in traffic or something. Um, exhibit A is -- is a, uh, to -- to our brief today is the, uh, uh, is the VA-9 that you prepared dated 10/25/2014, and then you appended to that a memorandum of law. Did you prepare that, Mr. Graham? Can you -- do you remember that?

VETERAN: If it occurred before January 17th, it was pro se, then I probably did.

MR. WALSH: Yes, and then you also prepared, um, a document that you called a rebuttal to the May 7, 2014 VR&E SSOC, and there was some discussion that -- that that

document wasn't in the record, but -- but you found your return XXXTRACK 2XXX receipts.

VETERAN: I have my return receipt. They insisted I did not file any rebuttal to the May 7, 2014 SSOC that was issued to me. When I contacted the VR&E officer, his name is David Boyd (phonetic), and he was in this building, he said to make sure that, uh, any rebuttal that I had to put in my rebuttal and send it. So I did --

MR. WALSH: So we'll offer --

VETERAN: -- and they never answered the SSOC.

MR. WALSH: This is an extra copy so we can --

VETERAN: Yeah, he can have it.

JUDGE: Thank you.

MR. WALSH: We can offer that.

JUDGE: The -- the veteran and his counsel have shown me that, a separate copy of the, uh --

MR. WALSH: You got the other -- the other page of this?

JUDGE: -- rebuttal to the, uh, May 7, 2014 VR&E SSOC. Go ahead, Mr. Walsh.

MR. WALSH: Um, one of the things that's a little concerning in -- in all of this today is, um, um, uh, Mr. Graham has done a, uh, a survey, and -- and Mr. Graham's nom de plum is Ask Not, and -- and I don't know if you're aware that he -- he runs a blog, and he -- he tries to help the other veterans who are having issues with hepatitis C. That's the focus of that.

Um, he's -- he's, um, I think, an authority on the air gun and transmission of infections by air gun, and -- and he really, um, uh, has -- has taken a very academic and -- and thorough, uh, approach to -- to hepatitis C.

And he -- he says that's reflected in -- in a lot of favorable and, uh, much more informed decisions from the Board and the Regional Offices now in that area because he's helped a lot of people.

VETERAN: Bob, I believe I gave that to you.

MR. WALSH: Okay, maybe it's sitting around here, but in any event there's a -- a --

JUDGE: Again, I'm going to be taking notes (inaudible) as you (inaudible) --

MR. WALSH: Sure, that's (inaudible).

VETERAN: Here it is. There you go.

MR. WALSH: Okay, so, um, one of -- one of the problems that Mr. Graham has, and it's a concern I share and, I think, some members of Congress and some of the VSOs share, is

that, uh, VR&E went into a very nascent stage, um, prior to certainly the 1990 Gulf War. They never really recovered from it.

Uh, Congress, uh, and the VA have thrown some money at VR&E, but, um, Mr. Graham has done a statistical analysis of VR&E --

VETERAN: Using VR&E's own published record.

MR. WALSH: -- and he -- he finds it interesting that, um, in Washington state, there are, uh, 19,779 veterans that are totally disabled, either scheduler 100 percent or getting TDIU, and only 16 last year got -- got any VR&E benefits.

VETERAN: That's right. It's been going downhill ever since.

MR. WALSH: And -- and -- and he -- he finds that, uh, when you run these statistics, and then nationwide, he ran them in all the offices, uh, they're pretty compelling that -- that this outfit just takes up office space and gets -- and -- and paying benefits and --

VETERAN: Wyoming has never seen an ILP granted since 2004.

JUDGE: Let me -- let me stop you a minute. And the VR -- VR&E benefits specifically that you are looking for --

MR. WALSH: Is a greenhouse.

JUDGE: Greenhouse?

VETERAN: Under the -- under 3120, uh, 38USC3120, it says severely disabled veterans.

MR. WALSH: And --

JUDGE: And what -- and -- and what does -- what does that greenhouse, for the record, indicate?

VETERAN: It protects me from the sun and, uh, temperature, low temperatures because of my cryoglobulinemia and my porphyria. It allows me access to the outside.

MR. WALSH: Show your finger. Let the record reflect that --

VETERAN: (inaudible) number one for the summer coming up right now.

MR. WALSH: -- to his right knuckle, there's a, um, protrusion --

VETERAN: White spot.

MR. WALSH: -- a white spot.

VETERAN: And I'm going to have hundreds of those before the end of the summer.

JUDGE: And so the argument is that what you're seeking -- what you're seeking right now would include my jurisdiction of that greenhouse benefit given to you, right?

MR. WALSH: Right. It -- it's, uh, there's a -- there were two, um, VA-8s to -- in -- in the prayer for relief in mandamus, um, the 100 percent PCT issue was there, as well as the effective date. Now, they corrected the effective date. They've granted that.

And then the, um, VR&E issue -- let -- let's get the photographs over here, Alex, and we'll offer those, too. Here are, um, and -- and this -- this little tiny greenhouse is your mother-in-law's, right?

VETERAN: That is correct.

MR. WALSH: Your mother-in-law --

VETERAN: They contend otherwise.

MR. WALSH: But your mother-in-law owns this little greenhouse, and you -- you're allowed to use it, but, um, this exhibit depicts a standard size wheelchair --

VETERAN: VA issue. XXXTRACK 3XXX

MR. WALSH: -- which -- which cannot --

JUDGE: These are in the record already?

MR. WALSH: No, those -- this is -- this is a new exhibit.

JUDGE: Okay.

MR. WALSH: Which cannot get through the --

JUDGE: I see.

MR. WALSH: -- cannot get through the door of the -- of the greenhouse.

VETERAN: I have repeatedly asked, uh, uh, VR&E officials to address that in my original request, in my denial, in my SOC, and then the SSOC, and I have yet to have them addressed.

JUDGE: So there's -- has been there any -- has there been any -- there's been a -- a rating decision that denied you that, and --

MR. WALSH: A statement of the case and a VA-9.

JUDGE: -- a -- and a statement of the case, and that has not been adjudicated by (inaudible).

VETERAN: They issued a supplemental statement of the case. I rebutted that with new evidence.

JUDGE: Right.

VETERAN: They accused me of having three greenhouses. There's one of my greenhouses right there.

MR. WALSH: But they told the court -- now, we -- we must stand on -- on General Counsel's, um --

VETERAN: That's what they told the court.

MR. WALSH: -- documentation to the court that they had -- that they had issued a -- a -- a VA-8 and certified this appeal. So we're -- we're taking it on faith that this VR&E issue is, in fact, in the system.

JUDGE: I see, so that (inaudible) -- so the -- so the assertion is that this is before me right now.

MR. WALSH: Yes.

JUDGE: Okay.

VETERAN: Because they never addressed the SSOC at the -- on another level.

MR. WALSH: Here's a -- here's another exhibit --

JUDGE: Gentlemen, you're -- you're --

VETERAN: I'm sorry.

JUDGE: Uh, one at a time.

VETERAN: I -- I'll shut up.

JUDGE: I -- I got to listen to this. I got to make sure. Go ahead, Mr. Walsh.

MR. WALSH: So -- so jurisdictionarily (phonetic), we're -- we're -- we're on all fours that you have jurisdiction over this VR&E greenhouse issue, and, in fact, um, it's -- it's, um, we think it's -- it's going to be easy to lay the dust on it. We think it's a walkover. It's well briefed in the -- in the documents that you're getting.

JUDGE: And, uh, explain to me about greenhouses. What -- what VA does -- what VR&E will do is they'll build -- they'll build a larger greenhouse?

VETERAN: Yeah.

JUDGE: Okay.

VETERAN: And they'll have raised tables, and they'll have rubber mats on the floors so my wheelchair will roll over or if I fall over, I won't get a brain concussion on a concrete slab but --

MR. WALSH: Right, and you'll see in the briefing that -- and this -- this goes back to Carol Scott's (phonetic) mantra about the lack of training of VA adjudicators, that they're saying, well, it's recreational, and you don't need it. That's the way all these things are being denied.

VETERAN: They told me it was avocational. There was no provision for avocational.

MR. WALSH: That's not in the regulation, and that's not in the statute. That's just made up M-28 stuff that they've sort of self-hypnotized themselves into, as you so often see, but here's another, um, another exhibit, another photograph, that depicts, um, um, the walker, and the walker can fit through the door of the existing small greenhouse.

VETERAN: But there's no place for me to turn around and sit down in it.

MR. WALSH: Right, but what -- what Mr. Graham wants is a little small ADA-compliant greenhouse. Now, what does the greenhouse accomplish? It screens him from ultraviolet, which causes these protrusions on his skin, his skin eruptions.

VETERAN: And if it's heated, I can stay out there without having this cryoglobulinemia, which is like blood mud. My blood starts to solidify, uh, below 40 degrees, coagulate inside my extremities, like my ears, my hand, my nose, my feet.

JUDGE: And so this -- and so the objection on the part of VR&E, as I understand it, is that -- that this is a recreational endeavor --

VETERAN: And it's prohibited.

JUDGE: -- and under -- and under the law that you cite, under 383120, I'm -- I'm empowered to grant this benefit based upon enumerated criteria, right?

MR. WALSH: Yes.

JUDGE: Okay, all right. Can -- anything else on the greenhouse? I'd like to move on to (inaudible).

MR. WALSH: Just the -- just the photographs. We're going to -- and --

JUDGE: And these are all going to come into the record?

MR. WALSH: Sure, yeah. And -- and here's another one that depicts, um, some, um, some screen door, some -- some, uh, some storm windows, and Mr. Graham has made sort of a field expedient greenhouse out of them.

The problem is --

VETERAN: VA classified it as a greenhouse.

MR. WALSH: Um, the problem with it is that these things weigh about 40 pounds each, and Mr. Graham has a clinically-determined weight restriction of 10 pounds.

JUDGE: Have you -- have you marked these already, Mr. -- Mr. Walsh?

MR. WALSH: I haven't marked them. I -- I'll -- I'll let you -- I'll let you mark them.

JUDGE: (inaudible).

MR. WALSH: And -- and, um, and here's, uh, here's one, uh, there's -- there's two here with, um, uh --

VETERAN: That's (inaudible).

MR. WALSH: -- with the Stanley tape, uh, showing that the -- that the opening is only 28 inches in the existing, um, greenhouse of his mother-in-law, but his mother-in-law is kind of enough to let him use, and, you know, it's there, but XXXTRACK 4XXX that's not the point. The point is he wants an ADA-compliant greenhouse that he can set up that he can -- he can really work in, um.

VETERAN: I do a lot for veterans with my greenhouse activities. I get plant starts, and I give them to veterans in my community and allow them to have free tomatoes, get them all growing for them.

MR. WALSH: And he -- he --

VETERAN: I don't have enough room.

MR. WALSH: He -- he even sends berries to my secretary, who doesn't share them with me.

VETERAN: I grew the berries.

MR. WALSH: That's a -- that's a local administrative problem, not his, but I do want to point out that I never got the benefit of those berries.

JUDGE: Let me, uh, let me describe this. Uh, Exhibit 1 photograph is a, um, is a photograph of the, uh, the front of a -- of a greenhouse. It's got a wheelchair in the -- the door. The wheelchair -- on the back of the wheelchair is breezies (phonetic). Left of the wheelchair, uh, is a trashcan. That's Exhibit 1.

Exhibit 2 is a kneeling walker, also in the door of the greenhouse. Marked Exhibit 3 is a window panel of --

MR. WALSH: It's a storm -- like a storm (inaudible).

VETERAN: Shower doors, actually, I believe is what they were.

JUDGE: (inaudible) laid out on, uh, wooden slats over --

VETERAN: The raised planar.

JUDGE: -- (inaudible). Exhibit 4 is another raised shower door over what appears to be lettuce.

MR. WALSH: Lettuce.

JUDGE: Exhibit 5 is a, um, is a measurement from, uh, probably 17.5 inches to 33 inches. What is -- what is this photograph (inaudible)?

MR. WALSH: That's --

VETERAN: That is a tape measure of -- of the opening of the door where the -- the wheelchair was trying to go in at. So it shows it's 28 inches.

JUDGE: Oh, that's -- that's --

MR. WALSH: It's not --

VETERAN: It's not ADA-compliant.

JUDGE: And Exhibit 6 is the same?

VETERAN: That's an interior shelf measurement that shows you how wide a room I have to work inside the existing greenhouse.

JUDGE: I see, okay. Anything else on the greenhouse?

MR. WALSH: I think that covers it very well.

JUDGE: Okay.

VETERAN: Did you -- have you admitted, uh, VA, uh, OGC Precedent 2498?

MR. WALSH: Right.

JUDGE: Yes, we have that here.

MR. WALSH: Right, you can -- 2498?

JUDGE: 3497, we have 3497, but just elude to it. I'll look it up. What's the, uh, what's the number on it?

VETERAN: Uh -- uh -- 34-1997, and the second one is, uh, 6-2001. 6-2001 deals with having access to outside so that you have sunlight in the outdoors, so to speak, but --

JUDGE: In the context of that PCT.

VETERAN: Right.

MR. WALSH: In -- in the context of the greenhouse.

VETERAN: In a protected context so that it -- I'm not harmed by that. 3497 purports to refute the avocational versus vocational argument.

JUDGE: Okay.

MR. WALSH: It says it's meritless.

JUDGE: Okay, let's talk about the, um, tell me about the alternative diagnostic code. Do you have --

VETERAN: 4.15 -- 115a is the one for, uh, dialysis. Dialysis takes the blood out, cleanses it, and returns it to the body. My analogy for porphyria is that it takes one pint of blood out, of which you have ten in your body, and throws it in the trash can, never to be returned to the body, but by the same token, it reduces the amount of iron or heme, H-E-M-E, in the blood.

So if you get one every month, eventually, you start running on empty, and the little red light that says check engine comes on, and I have to, uh, quit taking phlebotomies for a couple of months until I can, uh, get back on the other side of that line.

JUDGE: When -- when you have to stop for a couple of months, how -- how long do you have to stop doing the phlebotomies?

VETERAN: Probably two to three months maximum.

JUDGE: And --

VETERAN: So generally, I get nine phlebotomies a year.

JUDGE: What -- is there any replacement for the -- for the, uh, you -- you're shaking your head no.

VETERAN: None whatsoever. You just take it out, and it reduces the heme so it doesn't damage the liver.

MR. WALSH: And then the blood is regenerated again, replenishing that volume.

VETERAN: American Red Cross states --

JUDGE: (inaudible).

VETERAN: Okay, I'm sorry.

JUDGE: You, um, when you do these phlebotomies, and you have to -- there's a period of time, is there any kind of cycle to it that you have a phlebotomy, you have to wait a certain amount -- you have to wait three months? I mean, tell me about -- tell me about what a 12-month cycle would look like?

VETERAN: A 12-month cycle would be starting January 1st, I get a phlebotomy. I get a phlebotomy February 1st, March 1st, April, May, June, July. About September, they inform me that my hematocrit level has sunk below 37 percent, which forbids me to have any more phlebotomies.

In the meantime, I'm XXXTRACK 5XXX horribly anemic that whole time. I'm dizzy. Um, I don't lose my mental acuity, but I'm fuzzy.

MR. WALSH: Let -- let the record reflect that the hematocrit is the ability of the body to clot and heal. So you're turning him into a, um, (inaudible) and --

VETERAN: Hematocrit has iron, a -- a measurement of iron and -- and blood cells in the blood, and so if I get too low, I get -- I run -- I'm in danger of a heart attack.

JUDGE: So you have to run. You run basically from one to, say, seven months, and then you have a -- you have basically a layup period where you have no phlebotomies, but you're -- you're -- you're just totally, um, incapacitated, you know, as a result of -- of no iron, no, uh, no blood flow.

MR. WALSH: Right, (inaudible).

VETERAN: I -- I'm incapacitated for two weeks after a phlebotomy due to the dizziness and, uh, just I -- the fibromyalgia makes it difficult for me to walk, you know.

JUDGE: I see.

MR. WALSH: Yeah, and that was the -- that was kind of my -- that was my question, my point, was there's a cycle within the cycle. The 30-day cycle has some pretty draconian, uh, side effects and consequences as well.

JUDGE: Yeah.

VETERAN: And so for all intents and purposes, I'm functionally disabled, uh, all year long. I can't hold a job down. That's, I know, immaterial when you put it in a context that I do have another 100 percent scheduler rating for hepatitis C, but as we discussed, we're not focusing on how many 100 percent ratings I can get.

JUDGE: Right. So that if you get -- so that if I grant an alternative rating as to your anemia, what then does that lead to for you?

VETERAN: In the future, when I hit the wall and, uh, no longer have use of my legs and I'm in a wheelchair, I'll be, uh, eligible for SMCL. The 100 percent rating for the porphyria merely grants me a bump from SMCL to SMCM. That's not something I can take advantage of now. It -- it would hinge on when I finally become that disabled.

Having fought the Veteran's Administration over 26 years, I've learned how to pre-plan and plan in advance.

JUDGE: Just out of curiosity, has -- have your physicians given you any indication of when you'd have to move to a wheelchair?

VETERAN: They told me that that's going to happen by 2018. I'll still be mobile, uh, but I -- I will tell you this right now, Your Honor. They have a new drug out called Sovali, I believe it's called, and it's going to cure hepatitis.

So if I am cured, then I'm going to live longer. I'll never be able to get rid of the porphyria. I suspect strongly it's related to Agent Orange, but nobody will give me the combat exemption, (Laughs) and let me talk about what happened in Vietnam. I was there for two years. I had quite an exposure to Agent Orange and Agent Blue.

JUDGE: Yeah, okay. So your -- your wheelchair is likely by 2018.

VETERAN: They're saying. It -- it could be 2020 if I just eat right, and if I'm cured with the hepatitis C, uh, chances are I probably won't go into a wheelchair until 2025.

JUDGE: You mentioned that, um, we were discussing in the pre-hearing that there's a -- you now -- you now have a life expectancy, uh, from one of your disorders. Tell me about that.

VETERAN: They told me in 2007 there was no cure for hepatitis and said that I would probably be decompensated by 2018 and die shortly thereafter. I've changed my whole life around. I don't drink. I don't -- don't drink, don't smoke, and don't do anything nasty to my body and, uh, defied their logic right now. I'm not in a wheelchair. I haven't become decompensated yet.

I'm supposed to get on this new drug or asked them to put me on the new drug. I haven't been triaged on it officially yet, but when I do get the drug, there's a high probability that I'll live to my old age, and that's what I'm hoping for.

MR. WALSH: But -- but you have -- you do have this history. You had a very extended hospitalization a few years ago. Tell about that.

VETERAN: In 2009, I came down with what they suspected was Crohn's disease, and I had four operations in the hospital, and I would love to show you what's on my belly here, but basically, it's the largest piece of cadaver skin you've ever seen in your life. If you'd like to see it, I'd be more than happy to show it to you.

JUDGE: No, that's all right, (inaudible).

VETERAN: That's all right. It's not that ugly. It's just weird. Anyway, it -- that's reduced my lifting ability to zilch, 5, 10, 15 pounds.

Uh, I've got four ventral hernias coming through it because they used a vacuum wound pump on it against XXXTRACK 6XXX all the strictures for AlloDerm, and, uh, I'm not going to go after an 1151 claim, Your Honor. I -- I want to finish my adjudications and just go home.

JUDGE: Tell me about -- tell me about the -- the separate compensable evaluation. The, um, the statement of the case indicates the PCT granted March '94, the, uh, the RO found that you -- that it's largely limited to your hands, uh, higher evaluation, you now have a 10 percent.

A higher evaluation (inaudible) is not warranted under the, uh, previous criteria, unless you have constant exudation or itching. Um, 30 percent is not warranted a new criteria

unless the record shows dermatitis or eczema involving 20 to 40 percent of the entire body.

VETERAN: And that's why I'm submitting a new IMO to -- showing you that it should be 30 percent.

JUDGE: Okay.

MR. WALSH: And this is an IMO by Jules R. Fleischner (phonetic), um, a physician's assistant dated --

VETERAN: Watch out, the (inaudible) -- it just -- it came unstable.

MR. WALSH: -- dated -- dated May 14, uh, 2004.

JUDGE: Who was -- was who the, uh, examiner (inaudible) -- examiner again?

MR. WALSH: Jules, J-U-L-E-S, middle initial R, Fleischner, F-L-E-I-S-C-H-N-E-R, a physician's assistant from Swedesboro, New Jersey, and the curriculum vitae dated July 2010 for Jules Fleischner.

JUDGE: Okay. Can you just describe, uh, what the -- (inaudible)?

MR. WALSH: Where these -- oh, these photographs are -- okay. So there are, um, a number of photographs that are photographic exhibits to that showing the -- the skin conditions that --

VETERAN: That support the 30 percent rating.

JUDGE: Let me just -- let me describe that. We have, um, well, there's the first photo.

VETERAN: I had to scramble to get this together, and I apologize that it's a little --

JUDGE: No, it's fine. It's fine.

VETERAN: -- a little disjointed.

JUDGE: And the photographs -- the separate photographs you've just handed me, are -- are they (inaudible)?

MR. WALSH: Yes, they've -- they've come -- come --

JUDGE: Oh, they are, okay. Let me -- let me return these photographs (inaudible).

VETERAN: They have never been entered into the record.

JUDGE: Oh, okay.

VETERAN: No, you keep all that.

MR. WALSH: They -- they were exhibits to Fleischner's report.

JUDGE: All right, well, what I'm going to do is I'm going to take a moment, and I'm going to make sure we have these, describe them.

Mr. Walsh has handed me a, um, a letter from, um, from Mr. Fleischner, the, uh, physician's assistant, dated, uh, May 14, 2014. Two pages of opinion, a third page on medical literature cited, followed by a curriculum vitae of one, two, three pages, followed by a photograph, uh, numbered number one of the left dorsal forearm, followed by, uh, a photograph of the left dorsal hand, followed by the left dorsal forearm, followed by left dorsal and interior forearm.

And in a separate series of photographs, I have a, uh, photograph, which I'll -- I'll note as, um, number, um, or letter A.

MR. WALSH: Oh, here's some more numbers, so.

JUDGE: Okay. I'll note it as letter A, left upper back with a measurement of approximately, I would say, 15 inches when you examine the paper ruler.

VETERAN: Those are centimeters.

JUDGE: Centimeters? Okay, centimeters, thank you, sir.

VETERAN: Right.

JUDGE: And then, uh, B would be the, uh, upper middle back, C would be the right upper back, D would be the left dorsal hand, E would be the chest, and then I have another series of photographs. F would be the right upper arm dorsal, G would be the right interior forearm, H would be the right dorsal hand, XXXTRACK 7XXX I would be

another photograph of the right dorsal hand showing the, uh, veteran making a fist, J would be the right dorsal forearm, that would be J, so I'll include all those in the record.

And so basically the contention is is that it's a lot more widespread, the skin disorder, than is reflected by the current rating, correct?

VETERAN: The -- Yes, sir. The July 18, 2008 examination by, uh, the, uh, Dr. Morgan (phonetic) and the, uh, what was it? What's the name of that place -- the -- that medical exam was?

MR. WALSH: QTC, yeah.

VETERAN: QTC, uh, was a very, very preemptory five minute thing. I walked in, and he says where does it affect you? And I said, well, my hands and my forearms, and he said, well, it looks like it's in remission. And I said, yes, I have the phlebotomy, and he says, well, I don't need to take any pictures of this, very good.

And that's when he recited, yeah, you're doing the phlebotomies. Stay out of the sun, no heavy lifting, no mechanical trauma because even the softest edge of wood, if I bang my hand against it when my hematocrit is high creates a laceration, opens my hands right up or whatever I hit, legs, forearms.

JUDGE: And so obviously, this -- this skin disability worsens in time of upgraded sunlight, correct?

VETERAN: Yes, sir.

JUDGE: Yeah, they do, and you had -- do you have lesions when these things come up?
I mean, the skin pops open and --

VETERAN: Yeah, they look like a little white zit.

JUDGE: Yeah, yeah.

MR. WALSH: That's going to open up.

VETERAN: That's going to open up and seberate (phonetic) or whatever. Some fluid will come out of it.

JUDGE: (inaudible) your point -- your point is (inaudible) the blistering on the right hand.

VETERAN: That just started, but it's going to get worse during the summer.

JUDGE: Do you know if Mr. Fleischner has measured -- measured a percentage chronic incurable disease? It -- it indicates (inaudible) chronic incurable disease evident on 20 percent -- on greater than 20 percent of his surface, okay.

MR. WALSH: Now --

VETERAN: 7815 says more than 5 but less than 20 for 10 percent, and then more than 20 percent, then you go jump to 30 percent, so.

JUDGE: So you're looking -- you're looking for a higher -- you're looking for a 30 percent?

VETERAN: I'm looking for the 30 percent because it's progressively gotten worse from 1994, let alone 2008.

JUDGE: Okay.

MR. WALSH: Now, there's another aspect to this, too, Judge, and -- and that is that, remember, the phlebotomy draws. So there's a constant every 30 days, there's a -- there's a phlebotomy site where he's -- they're drawing blood.

So he's always getting dinged, and those don't always heal up real quick, do they?

VETERAN: Yeah. No, and the other problem is because, uh, of a heart attack while I was in the hospital, the VA hospital in 2009, I have to take, uh, warfarin. It's a -- a -- a blood thinner. It's called Coumadin, I believe, also, and that exacerbates another problem.

I would be content, Your Honor, to take the skin rating, and we'll just set it to the side and call it 100 percent for the porphyria and walk away from it. That's the easiest adjudication because porphyria does incorporate the skin as well as the hemic system. Uh, VA -- they try to chase two dogs.

MR. WALSH: But -- but the point is -- right, but -- but -- but -- right, but the finer point here is that this is not pyramiding but --

VETERAN: No, it's not. That's why they gave me the 10 percent back on the skin because it's skin, 4.118, as opposed to 4.11 -- what's hemic? 4.117?

MR. WALSH: There's the 7 and the 15a, right. The -- the 3 -- the 3 of interest is the 4.155a, the 4.117, and the 4.118.

VETERAN: I'm trying to simplify this. VA seems to want to complicate it beyond the necessarily --

MR. WALSH: And 115a is the equivalent on the -- on the renal dysfunction things, the dialysis analogy.

JUDGE: (inaudible), are there any codes, well, to your knowledge or Mr. Graham's, you're -- you're obviously educated on this. Are there any codes other than the PCT that will get you 100 percent straight up?

I know you're talking about the anemia, but, you know, obviously, and please understand, this is the first time I've looked at it. Well, yesterday was the first time I've looked at it. Are there any codes, based upon what you know, other than the PCT that can you to 100 percent that I can apply under the (inaudible) case?

VETERAN: In the, uh, in the application of anemia in the 1994 language and (inaudible), you could give me 100 percent for it because it's near constant, debilitating, and ad nauseum. They chose 70 percent -- or 60 percent, I -- I apologize --

JUDGE: That's fine.

VETERAN: -- because they called it XXXTRACK 8XXX every acute symptoms of a chronic situation. Well, the acute symptoms are every month. They're not acute.

MR. WALSH: Which is -- which is chronic.

VETERAN: That's chronic. Uh, the -- the -- the acute word shouldn't enter into this, and there is a 100 percent rating for anemia, but they did not apply that. They gave me the 10 percent back for the skin, but you can't rate the skin to 100 percent. There is no provision for it.

MR. WALSH: And I think the skin stands there just on the monthly pokes and healing process. It's just a constant --

VETERAN: Well, my attitude about it is going with 4.20 and just strictly using analogous rating, the only thing that even applies is dialysis because it involves cleansing of the blood or taking the blood out and throwing it away rather than cleansing it.

JUDGE: (inaudible) process, right.

VETERAN: Correct, and that is -- that's analogous to cleansing the blood because the blood -- the body replaces the blood with liquid water. You just drink a lot of water, and it replaces it.

After 56 days, the body regenerates the pint of blood. If you -- that's every 56 days, according to the American Red Cross. If you wanted to go out and donate blood during an emergency, they'd only allow you to donate it every 56 days. I donate it every 30 days until I become horribly anemic after 8 of these episodes, and then I have to take a

breather for about three or four months maximum, and then immediately jump right back into it again for fear that it's going to damage my liver further. I consider that analogous to dialysis, in essence.

MR. WALSH: And, of course, there's this life limiting, you know, uh, activities of daily, uh, living, vocational and occupational, is that you've got these dietary restrictions, but also, um, Mr. Graham is on a really short tether, you know. He can't be -- be more than 30 days away from a hospital.

JUDGE: You mentioned something earlier, Mr. Walsh, about this is not pyramid, and I -- I was looking at the rating schedule. Tell me -- tell me your point again.

MR. WALSH: Well, my -- my point is that the skin stands on its own because he gets -- he gets banged up by this phlebotomy process every month, and I think that -- that -- that puncturing and healing of the skin, which is fryable (phonetic) and -- and, you know, is not in good shape. I mean, you've got -- he's got the skin of a 90-year-old man.

VETERAN: VA, when they issued my first DRO decision on March 29, 2010 stated they were taking the skin rating of 10 percent back because that was pyramiding and substituting 40 percent for phlebotomies but never, ever incorporated the findings of Dr. Morgan's July 18, 2008 finding that I was 100 percent disabled totally.

JUDGE: And -- and he mentioned P&T, permanently and totally --

VETERAN: Well, he didn't say permanent and totally. He just said he's totally disabled --

JUDGE: But he (inaudible) -- right.

VETERAN: -- analogous to 4.15.

MR. WALSH: And stay out of the sun (inaudible).

VETERAN: Stay out of the sun, no heavy lifting, no mechanical trauma.

MR. WALSH: No contusions.

VETERAN: VA -- VA's response to that was 10 percent, and then 40 percent with the 10 percent taken back because they --

MR. WALSH: You can incorporate those in the record, Your Honor.

VETERAN: Please do.

JUDGE: Okay, all right, anything else?

VETERAN: I wish -- would you ask them to please enter in -- change the combat code on my rating sheet because I do have --

MR. WALSH: Show him your -- show him your (inaudible).

VETERAN: Oh yeah, there you go. Three combat Vs.

JUDGE: Yeah.

VETERAN: You don't issue these things. That doesn't -- I came, I saw, and I conquered.

MR. WALSH: That's a distinguished flying cross, right? That's (inaudible) --

VETERAN: No, that's an outstanding unit citation, but here, I mean, I -- I can't get them to do anything with it. (Inaudible) the record, it states that (inaudible) --

MR. WALSH: You could (inaudible).

VETERAN: That's my revision, revised 2215 -- 215 --

MR. WALSH: You could -- you could (inaudible). And -- and tell -- tell -- tell the judge why you don't have a purple heart.

VETERAN: Oh, I was flying for Air America that day. (Laughs)

JUDGE: Okay.

VETERAN: And I didn't get an air medal out of there, but that's okay.

MR. WALSH: Damn near killed him, but --

VETERAN: And I'll tell you all about it in 2020 when the -- the statute of limitations runs out.

JUDGE: I understand. I understand, okay, all right. Anything else? I'll see what -- I'll see what I can do about it.

VETERAN: Hey, that's all you can do, Your Honor.

JUDGE: (inaudible).

VETERAN: You -- I might have tasked you with an impossibility, but I don't believe I did.

MR. WALSH: But, uh, uh, again, uh, I think Mr. Graham wrote an excellent memorandum of law that was appended to the, uh, October 25, 2014 VA-9. They may have separated it in VBMS, but we've given it to you as an exhibit, Exhibit K, so that you can, uh, the, uh, staff attorney can look at all of those.

JUDGE: All right, gentlemen, um, I think we've got marching orders. So if there's nothing further, I'll close the record.

MR. WALSH: Thanks so much for, uh, uh, having XXXTRACK 9XXX us in today on - on such short turnaround, and, um, this, um, uh, complies with -- with all the prayers for relief in the -- in the mandamus, uh, you know, uh, by getting us up to bat on these issues.

I know Mr. Graham would like to put all this in the rearview mirror and have this behind him if you could make findings of fact and rulings of law and -- and issue an order in this and -- and --

VETERAN: I want to grow tomatoes in the winter.

MR. WALSH: Okay. Thank you so much.

JUDGE: All right, the hearing is closed, thank you, gentlemen. Oh, oh, one more thing. I'm going to AOD this just to make sure that we have that on the record. This will be advanced on the docket.

MR. WALSH: Okay.

JUDGE: Okay, the hearing is closed.

(HEARING ADJOURNED)

