Submission of Documents to Department Of Veterans Affairs

Board Of Veterans Appeals
Litigation & Support Division
P.O. Box 27063
Washington, D.C 20038

FAX: (844) 678-8979

Please index this submission as one .pdf

Veteran: [redacted]	**VSC:** VBASEA346
C-File or SSN: [redacted]	
Street Address: [redacted]	
City, State, Zip:	

Date: April 22, 2022	**ATTN:** Litigation and Support Group. Attn: VLJ Michael Skaltsounis

From:	**Gordon A. Graham** **Exclusive Contact Requested**
	Title: Nonattorney Practitioner VA #39029 POA Code E1P
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Type of Document Submitted:

- ☐ Request for Board Hearing at VA Central Office in D.C.
- ☐ Request for Advancement of the Docket (Rule 900)
- ☐ Request for Copy of Hearing Transcript
- ☐ Submission of New and Relevant Evidence associated with the instant Appeal
- ☒ VAF 10182 NOTICE OF DISAGREEMENT (BVA Review)
- ☐ Motion for Reconsideration (MFR)
- ☐ Other

Number of Pages Submitted (NOT including this cover sheet): Twenty three (23) Pages

VA Directive 6609, NOVEMBER 9, 2007: NOTICE! Access to Veterans records is limited to Authorized Personnel Only. Information may not be disclosed unless permitted pursuant to 38 CFR 1.500-1.599. The Privacy Act contains provisions for criminal penalties for knowingly and willingly disclosing information from the file unless properly author

OMB Approved No. 2900-0674
Respondent Burden: 30 Minutes
Expiration Date: Feb. 28, 2022

Department of Veterans Affairs

DECISION REVIEW REQUEST: BOARD APPEAL (NOTICE OF DISAGREEMENT)

PART I - PERSONAL INFORMATION

1. VETERAN'S NAME *(First, middle initial, last)* [redacted]

2. VETERAN'S SOCIAL SECURITY NUMBER	3. VETERAN'S VA FILE NUMBER *(if different than their SSN)*	4. VETERAN'S DATE OF BIRTH
[redacted]	C/CSS - [redacted]	[redacted]

5. IF I AM NOT THE VETERAN, MY NAME IS *(First, middle initial, last)*	6. MY DATE OF BIRTH *(If I am not the Veteran)*
[redacted]	[redacted]

7. MY PREFERRED MAILING ADDRESS *(Number and street or rural route, P.O. Box. City, State, ZIP Code and Country)* ☐ I AM HOMELESS

[redacted]

8. MY PREFERRED TELEPHONE NUMBER *(Include Area Code)*	9. MY PREFERRED E-MAIL ADDRESS	10. MY REPRESENTATIVE'S NAME
(253) 313-5377	gagraham51@gmail.com	Gordon A. Graham VA #39029

PART II - BOARD REVIEW OPTION *(Check only one)*

11. A Veterans Law Judge will consider your appeal in the order in which it is received, depending on which of the following review options you select. *(For additional explanation of your options, please see the attached information and instructions.)*

☒ 11A. Direct Review by a Veterans Law Judge: I do not want a Board hearing, and will not submit any additional evidence in support of my appeal. *(Choosing this option often results in the Board issuing its decision most quickly.)*

☐ 11B. Evidence Submission Reviewed by a Veterans Law Judge: I have additional evidence in support of my appeal that I will provide within the next 90 days, but I do not want a Board hearing. *(Choosing this option may add delay to issuance of a Board decision.)*

☐ 11C. Hearing with a Veterans Law Judge: I want a Board hearing and the opportunity to submit additional evidence in support of my appeal that I will provide within 90 days after my hearing. *(Choosing this option may add delay to issuance of a Board decision.)*

PART III - SPECIFIC ISSUE(S) TO BE APPEALED TO A VETERANS LAW JUDGE AT THE BOARD

12. Please list each issue decided by VA that you would like to appeal. Please refer to your decision notice(s) for a list of adjudicated issues. For each issue, please identify the date of VA's decision and the area of disagreement.

☒ Check here if you attached additional sheets. Include the Veteran's last name and last 4-digits of the Social Security number. 22 pages

Check the SOC/SSOC Opt in box if any issue listed below is being withdrawn from the legacy appeals process. ☐ **Opt In from SOC/SSOC**

A. Specific Issue(s)	B. Date of Decision
Entitlement to higher/correct rating procedure for subjective residuals of s/p encephalopathy under §4.124a DC 8000 note; §4.25b	2/18/2022

PART IV - CERTIFICATION AND SIGNATURE

I CERTIFY THAT THE STATEMENTS ON THIS FORM ARE TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF.

13. SIGNATURE *(Appellant or appointed representative) (Ink signature)*	14. DATE SIGNED
Gordon A. Graham VA #39029 POA Code E1P	4/22/2022

VA FORM FEB 2019 **10182**

PENALTY: THE LAW PROVIDES SEVERE PENALTIES WHICH INCLUDE A FINE, IMPRISONMENT, OR BOTH, FOR THE WILLFUL SUBMISSION OF ANY STATEMENT OR EVIDENCE OF A MATERIAL FACT, KNOWING IT TO BE FALSE.

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Dept. Of Veterans Affairs
Board of Veterans Appeals
Litigation and Support Group
P.O. Box 27063
Washington DC 20038

April 22, 2022

Re: [redacted] XC 17 [redacted]

In regard to: February 18, 2022, Supplemental Claim Rating Decision

Extra Pages for VA Form 10182 Notice of Disagreement

Surviving spouse of the Veteran, through counsel, now files her AMA Notice of Disagreement (NOD) with the denial of what was ostensibly supposed to be a higher initial rating under §4.124a DC 8000 and compliance with the December 8, 2021, BVA remand decision (Docket #210521-162374). Briefly, the BVA remand clearly instructed the Agency of Original Jurisdiction (AOJ) to determine which subjective sequalae of his status post (s/p) encephalitis were service connected, determine the frequency and degree of disability of his subjective symptomatology and rate same using the note under DC 8025-if applicable. Inexplicably, both the February 9, 2021, and February 18, 2022, rating decisions (RD) purport to deny any entitlement whatsoever to any *rating* for encephalitis -acute or s/p. The surviving spouse disagrees and insists she seeks only a higher, correct rating than the 10% for minimum residuals awarded on

July 30, 2016 that can be supported by law. See ***AB v. Brown***, 6 Vet. App. 35, 38 (1993) [applicable law mandates that when a veteran seeks an original or increased rating, it will generally be presumed that the maximum benefit allowed by law and regulation is sought, and it follows that such a claim remains in controversy where less than the maximum benefit available is awarded]; see also **Tatum v. Shinseki**, 23 Vet.App. 152, 157 (2009). This duty is rooted in 38 C.F.R. § 3.103(a), which requires VA to "render a decision which grants every benefit that can be supported in law while protecting the interests of the Government."

As an aid to the Board chairman, the latest adjudicatory summary of facts is provided to understand the complex history of the claim and the numerous BVA remands which the Secretary has yet to comply with. This original claim has been in contention now for almost five and one half years.

Relevant Recent History

11/18/1953--Veteran files original claim, inter alia, for status post (s/p) encephalitis. Claims file lost or destroyed.

8/18/1965—Veteran reopens lost claim for s/p encephalitis.

12/29/1965—Rating Decision (RD) grants service connection (SC) for §4.124a DC 8000 encephalitis at 0% from 8/18/1965.

6/21/2016—BVA Docket No. 15-19-787 grants Motion to revise the effective date for s/p encephalitis to 11/16/1953 (CUE).

7/30/2016—RD awards initial compensable rating of 10% under DC 8000 for minimal residuals of headaches, balance issues and short-term memory problems s/p encephalitis effective 11/16/1953.

5/08/2017—Appellant's VSO, using a VAF 21-526, timely files Notice of Disagreement contesting his award of 10% for "minimal residuals" of s/p encephalitis.

[redacted]

12/04/2018—RD confirms and continues an award of 10% and denies an earlier effective date for 100% for DC 8000 acute encephalitis than 11/16/1953. Rating decision does not address applicability of the note below DC 8025 contained in §4.124a re rating of subjective symptomatology. Appellant appeals.

8/20/2020—BVA Docket No. 191121-49097 remands denial of an initial evaluation in excess of 10% for SC s/p encephalitis from November 1953 to January 1955 and from March 1956 to September 2009 to determine and rate subjective residuals s/p encephalitis using the proper diagnostic codes as directed in the note below DC 8025.

2/09/2021—RD confirms and continues evaluation of 100% and denies earlier effective date for 100% active acute encephalitis under DC 8000. RD again does not address application of note below DC 8025. VA's neurologist opinion finds Veteran's encephalitis resolved with no sequelae after being discharged from the Tokyo neuropsychiatric hospital in July 1951.

5/21/2021—Appellant timely files his VAF 10182 under evidence submission venue and provides private, subject matter expert Independent Medical Opinion (IMO) connecting, inter alia, insomnia, memory impairment, anxiety, agitation, headaches, and dizziness to his service connected s/p encephalitis.

7/28/2021—Appellant passes away during pendency of appeal and surviving spouse is substituted in his stead.

12/08/2021--- BVA Decision 210521-16234 *again* remands for compliance with the same requests as the August 20, 2020, BVA remand.

1/19/2022—VA c&p exam again finds there have never been *any* subjective residuals s/p encephalopathy and confirms and continues the prior discredited November 2020 c&p findings.

2/18/2022---RD again denies earlier effective date for 100% rating for either acute or s/p encephalitis and any and all claimed residuals of s/p encephalitis to include numbness of lower lip, headaches, fatigue,

dyspnea, memory impairment, sleep impairment to include insomnia, anxiety, agitation, dizziness and slurred speech.

Legal Standard of Review

Applicability of 38 U.S.C. 1154(b); 38 CFR 3.304(b)

The Appellant, a recognized combat Veteran, fell ill while in combat in Korea on or about April 12, 1951-ergo his account of his injuries is entitled to the presumptive protection of 38 U.S.C. §1154(b). His lay testimony, from the events at the Chosin Reservoir massacre in December 1950 to his collapse into a coma on the battlefield four months later on April 12, 1951, must be accorded this consideration. See also §3.304(d)(2021). The Secretary has had over fifty five years to present clear and convincing evidence to the contrary rebutting the Veteran's testimony as to his subjective s/p encephalitis residuals. This he has declined to do. See ***McWhorter v. Derwinski***, 2 Vet.App. 133, 136 (1991). "Yet,[w]here [an] appellant has presented a legally plausible position . . . and the Secretary has failed to respond appropriately, the Court deems itself free to assume . . . the points raised by [the] appellant, and ignored by [VA], to be conceded."

Applicability of 38 U.S.C. §5103A

38 U.S.C. §5103A(b)(3)(A)(B) states:

(A)This section shall not apply if the evidence of record allows for the Secretary to award the maximum benefit in accordance with this title based on the evidence of record.

(B)For purposes of this paragraph, the term "maximum benefit" means the highest evaluation assignable in accordance with the evidence of record, as long as such evidence is adequate for rating purposes and sufficient to grant the earliest possible effective date in accordance with section 5110 of this title.

38 U.S.C. §5103A(f) states:

(1)If, during review of the agency of original jurisdiction decision under section 5104B of this title, the higher-level adjudicator identifies or learns of an error on the part of the agency of original jurisdiction to satisfy its duties under this section, and that error occurred prior to the agency of original jurisdiction decision being reviewed, **unless the Secretary may award the maximum benefit in accordance with this title based on the evidence of record**, the higher-level adjudicator shall return the claim for correction of such error and readjudication.

(2)(A)If the Board of Veterans' Appeals, during review on appeal of an agency of original jurisdiction decision, identifies or learns of an error on the part of the agency of original jurisdiction to satisfy its duties under this section, and that error occurred prior to the agency of original jurisdiction decision on appeal, unless the Secretary may award the maximum benefit in accordance with this title based on the evidence of record, the Board shall remand the claim to the agency of original jurisdiction for correction of such error and readjudication.

(B)Remand for correction of such error may include directing the agency of original jurisdiction to obtain an advisory medical opinion under section 5109 of this title.

(3)**Nothing in this subsection shall be construed to imply that the Secretary, during the consideration of a claim, does not have a duty to correct an error described in paragraph (1)** or (2) **that was erroneously not identified during higher-level review** or during review on appeal with respect to the claim.

38 U.S.C. §5103A)i) states:

(i)Other Assistance Not Precluded.—

Nothing in this section shall be construed as precluding the Secretary from providing such other assistance under subsection (a) to a claimant in substantiating a claim as the Secretary considers appropriate.

Lost records

On March 14, 2013, the Secretary acknowledged in a formal finding of fact that the Veteran's VA treatment records dated prior to September 2008 were lost or destroyed. Where, as here, when the Veteran's service records are lost or destroyed, there is a heightened obligation on the part of VA to explain findings and conclusions and to consider carefully whether reasonable doubt exists to resolve in favor of the Veteran. See ***Cuevas v. Principi,*** 3 Vet. App. 542 (1992); ***O'Hare v. Derwinski***, 1 Vet. App. 365 (1991). Because those records remain absent from the file, the Board's analysis should be undertaken with that heightened obligation in mind. The above case law does not lower the legal standard for proving a claim for service connection, but rather increases the Board's obligation to evaluate and discuss in a decision all evidence that may be favorable to the claimant. See also ***Russo v. Brown,*** 9 Vet. App. 46 (1996).

When rating the Veteran's service-connected disability, the entire medical history must be borne in mind. See ***Schafrath v. Derwinski***, 1 Vet. App. 589, 594(1991). Separate higher or lower compensable evaluations may be assigned for separate periods of time if such distinct periods are shown by the competent evidence of record during the appeal, a practice known as "staged" ratings. See ***Fenderson v. West***, 12 Vet. App. 119, 126 (1999) and affirmed more recently in ***Hart v. Mansfield***, 21 Vet. App. 505 (2007).

§3.103(c)(2)(ii) states:

(ii) Board and higher-level review returns. A claim is pending readjudication after identification of a duty to assist error (which includes an error resulting from constructive receipt of evidence prior to the notice of decision), during a higher-level review or appeal to the Board of Veterans' Appeals. Those events reopen the record and any evidence previously submitted to the agency of original jurisdiction or associated with the claims file while the record was closed will become part of the evidentiary record to be considered upon readjudication. 38 CFR 3.103(c)(2)(ii) (2022).

§3.304(c) states:

(c) Development. The development of evidence in connection with claims for service connection will be accomplished when deemed necessary **but it should not be undertaken when evidence present is sufficient for this determination.** In initially rating disability of record at the time of discharge, the records of the service department, including the reports of examination at enlistment and the clinical records during service, will ordinarily suffice. Rating of combat injuries or other conditions which obviously had their inception in service may be accomplished pending receipt of copy of the examination at enlistment and all other service records. (emphasis added).

§4.2 states:

Different examiners, at different times, will not describe the same disability in the same language. Features of the disability which must have persisted unchanged may be overlooked or a change for the better or worse may not be accurately appreciated or described. **It is the responsibility of the rating specialist to interpret reports of examination in the light of the whole recorded history,** reconciling the various reports into a consistent picture so that the current rating may accurately reflect the elements of disability present. (emphasis added).

§ 4.3 Resolution of reasonable doubt states:

It is the defined and consistently applied policy of the Department of Veterans Affairs to administer the law under a broad interpretation, consistent, however, with the facts shown in every case. When after careful consideration **of all procurable and assembled data**, a reasonable doubt arises regarding the degree of disability such doubt will be resolved in favor of the claimant. (emphasis added).

§4.25(b) states:

(b) Except as otherwise provided in this schedule, the disabilities arising from a single disease entity, e.g., arthritis, multiple sclerosis, **cerebrovascular accident,** etc., **are to be rated separately** as are all other disabling conditions, if any. (emphasis added).

Except as otherwise provided by law, a claimant has the responsibility to present and support a claim for benefits under the laws administered by VA. VA shall consider all information and medical and lay evidence of record. Where there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, VA shall give the benefit of the doubt to the claimant. 38 U.S.C. §5107; 38 C.F.R. §3.102; see also ***Gilbert v. Derwinski***, 1 Vet. App. 49, 53 (1990).

VA is required to give due consideration to all pertinent medical and lay evidence in evaluating a claim for disability benefits. 38 U.S.C. § 1154(a). Lay evidence can be competent and sufficient to establish a diagnosis of a condition when (1) a layperson is competent to identify the medical condition, (2) the layperson is reporting a contemporaneous medical diagnosis, or (3) lay testimony describing symptoms at the time supports a later diagnosis by a medical professional. ***Jandreau v. Nicholson***, 492 F.3d 1372, 1377 (Fed. Cir. 2007).

In the instant appeal, it should be noted that the original claim filed in 1953 is now being evaluated for the proper, correct *initial* rating. This would, under normal circumstances, be done utilizing a staged rating procedure described in ***Fenderson*** *supra*. However, with the finding of fact that the medical evidence pertinent to the instant issue on appeal has been lost or destroyed, a different legal standard of review is for application. ***Cuevas*** *supra*. ***O'Hare*** *supra*. ***Russo*** *supra*. §1154(b).

The Veteran's s/p encephalitis is evaluated under 38 C.F.R. §4.124a, Diagnostic Code 8000, which remains unchanged since November 1953 and

provides that epidemic and chronic encephalitis is rated at the 10 percent rate for minimum residuals and 100 percent for an active febrile disease. The regulation also instructs that, aside from the exceptions noted, disability from organic diseases of the central nervous system and their residuals may be rated from 10 percent to 100 percent in proportion to the impairment of motor, sensory, or mental function. In doing so, the rater must consider psychotic manifestations, complete or partial loss of use of one or more extremities, speech disturbances, impairment of vision, disturbances of gait, tremors, visceral manifestations, etc., referring to the appropriate bodily system of the schedule. With partial loss of use of one or more extremities from neurological lesions, rate by comparison with the mild, moderate, severe, or complete paralysis of peripheral nerves. 38 C.F.R. §4.124a.

Most important to appellant's appeal, the note after DCs 8000- 8025 instructs that for the minimum ratings for residuals there must be "ascertainable" residuals. Notably, determinations as to the presence of residuals not capable of objective verification, i.e., headaches, dizziness, fatigability, must be approached on the basis of the diagnosis recorded; subjective residuals will be accepted when consistent with the disease and not more likely attributable to other disease or no disease. It is of exceptional importance that when ratings in excess of the prescribed minimum ratings are assigned, the diagnostic codes utilized as bases of evaluation be cited, in addition to the codes identifying the diagnoses. 38 C.F.R. § 4.124a, Note (after Diagnostic Code 8025).

Post-remand development by the Agency of Jurisdiction must comply with the dictates of the Board's remand instructions. See ***Correia v. McDonald***, 28 Vet. App. 158 (2016); ***Sharp v. Shulkin***, 29 Vet. App. 26 (2017). Failure, as here, to follow such a practice hinders the decision-making process and raises the undesirable specter of piecemeal litigation. See ***Fugere v. Derwinski***, 1 Vet. App. 103, 105 (1990), aff'd 972 F.2d 331 (Fed. Cir. 1992).

The credibility and weight to be attached to medical opinions is within the providence of the Board as adjudicators. ***Guerrieri v. Brown***, 4 Vet. App. 467, 470-71 (1993). Greater weight may be placed on one physician's opinion over

another depending on factors such as reasoning employed by the physicians and the extent to which they reviewed prior clinical records and other evidence. ***Gabrielson v. Brown***, 7 Vet. App. 36, 40 (1994).

In ***Monzingo v. Shinseki***, 26 Vet. App. 97,105 (2012). , the Court held : "Although "[t]here is no requirement that a medical examiner comment on every favorable piece of evidence in a claims file" to render an adequate opinion, a medical examination report or opinion must "sufficiently inform the Board of a medical expert's judgment on a medical question and the essential rationale for that opinion." ***Monzingo*** further held "it is not the job of the clinician to apply 38 C.F.R. § 3.310[;] that is the job of the VA Examiner," . ***Id.*** at 105.

In ***Nieves-Rodriguez v. Peake***, 22 Vet. App. 295, 301 (2008), the Court held: "It should now be obvious that a review of the claims file cannot compensate for lack of the reasoned analysis required in a medical opinion. It is the factually accurate, fully articulated, sound reasoning for the conclusion, not the mere fact that the claims file was reviewed, that contributes probative value to a medical opinion."; "In other words, the examiner must provide not only clear conclusions with supporting data, but also a reasoned medical explanation connecting the two." ***Id.*** at 301.

Undoubtedly, further medical inquiry can be undertaken with a view towards further developing the claim. However, in this regard, the Court has cautioned VA against seeking an additional medical opinion where favorable evidence in the record is unrefuted and indicated that it would not be permissible to undertake further development if the sole purpose was to obtain evidence against an appellant's claim. See ***Mariano v. Principi***, 17 Vet. App. 305, 312 (2003). See also ***Kahana v. Shinseki***, 24 Vet. App. 428 (2011); ***McLendon v. Nicholson***, 20 Vet. App. 79, 85 (2006) (In any event, the lack of medical evidence in service does not constitute substantive negative evidence).

Relief Sought

1. Entitlement to a higher initial compensable rating under DC 8000 (1953) for cognitive impairments of memory, attention, concentration and executive functions, moderately severe impaired judgement and fatigability from November 16, 1953.

2. Entitlement to service connection for migraine headaches (DC 8000-8100) (1953) under §3.310(a) based on very frequent completely prostrating and prolonged attacks productive of severe economic inadaptability from November 16, 1953.

3. Entitlement to service connection for chronic dizziness (§4.84b DC 8000-6204) (1953) under §3.310(a) for chronic dizziness from November 16, 1953.

4. Entitlement to service connection to §4.130 DC 8000-9302 (1953) under §3.310(a) for chronic brain syndrome associated with intracranial infections other than syphilis (e.g., s/p encephalitis) with definite impairment of social and industrial adaptability from November 16, 1953.

5. Entitlement to service connection for lower lip numbness under DC 8205 under §3.310(a) (fifth cranial nerve impairment) from November 16, 1953.

6. Entitlement to service connection for slurred speech (§4.97 DC 6516) under §3.310(a) by analogy from November 16, 1953.

7. Entitlement to service connection for loss of sense of smell (§4.124a DC 8209) under §3.310(a) from November 16, 1953.

8. Entitlement to service connection for Tinnitus under §4.84b DC 8000-6260 (via DC 8045)(1953) under §3.310(a) from November 16, 1953.

Discussion

Appellant submitted evidence to the Board of Appeals under the Evidence submission venue with his May 21,2021, NOD submission. These

documents remain in the evidence of record. Failure to review them as new and relevant evidence is error. §3.103(c)(2)(ii) is the Secretary's own regulation and controls.

The July 2016 award of 10% for minimum residuals of encephalitis is a favorable finding of fact and protected as a matter of law under §3.344(c). See ***Medrano v. Nicholson***, 21 Vet. App. 165, 170 (2007) (The Court is not permitted to reverse findings of fact favorable to a claimant made by the Board pursuant to its statutory authority). See also §§3.104(a); 3.951(b). Nevertheless, as an original claim, the matter of a correct rating remains in contention. ***AB*** *supra*. ***Fenderson*** *supra*.

As can be ascertained from the July 30, 2016, rating decision, the Secretary freely concedes Appellant had residuals of s/p encephalitis. Absent an act of omission or commission by the Appellant, the September 2009 100% award of entitlement for s/p encephalitis was, and is, protected as a matter of law. §3.344. Additionally, the 10% awarded on July 30, 2016, is accorded protection under §3.951(b). But that is not the end of the matter. As this is an original claim, the appellant seeks every benefit that can be supported in law while protecting the interests of the Government-including the appropriate effective date. §3.103. ***AB*** *supra*

The July 30, 2016, Decision Review Officer rating decision conceded the Movant had subjective, compensable residuals as early as the date of separation in 1953. The Secretary elected to rate him under the objective criteria under DC 8000-i.e., ascertainable residuals to include the impairment of motor, sensory, or mental functions. A minimum rating of 10% was assigned. The VA examiner opined further on subjective symptoms and cited to an internet article as a peer-reviewed citation - https://www.encephalitis.info/images/iPdf/Research2/CONSEQUENCEs1.pdf. The link now appears to be inoperative but the VA examiner conceded a nonexhaustive list of residuals of s/p encephalitis to include, inter alia, problems such as headaches, balance issues and short-term memory problems were recognized symptomatology. As the link now appears inoperative, it remains

unknown what other subjective symptomatology might have been for application. However, the same website has a newer presentation discussing the same subject: https://www.encephalitis.info/Pages/Category/after-effects-of-encephalitis (last visited 4/17/2022). Toward that end, Appellant sought a private, independent medical opinion to provide the third Shedden element needed to supplement the record independently.

Of Immense import, the July 2016 rating decision conceded the Appellant's lay testimony was credible. He provided evidence of subjective residuals during and after the first period of service, during and after his second period of service through the intercurrent period prior to his September 2009 award of 100%. The rating decision also confirmed and continued the 100% rating entitlement from 2009 to the present (2016) as being correct. This is a positive finding of fact that can only be reversed or rescinded by a showing of an act of omission or commission on the Appellant's part-i.e., fraud. See ***Miller v. Wilkie***, 32 Vet.App. 249, 260 (2020) holding " because a determination about credibility is a finding of fact, we should treat it like other findings of fact."

Competence to testify precedes a finding of credibility and Appellant's spouse contends her deceased husband's competency has more than been conceded. §1154(b).

The November 2020 and more recent January 2022 c&p examinations have held the Veteran's lay testimony is no longer credible-or, if it is, he lacks the medical knowledge to opine on his disease. This is error. ***Monzingo, Jandreau, Layno*** *supra*. His testimony in 2016 was considered credible and indeed, resulted in a compensable entitlement to, inter alia service connection retroactive to November 1953 for the very same subjective residuals he now seeks. Again, as this is res judicata, it would be error to declare six years later that his lay testimony is subsequently incredible and therefore inadmissible. See ***Barr v. Nicholson***, 21 Vet.App. 303, 311 (2007) holding "a medical examination that ignores lay assertions regarding continued symptomatology is inadequate because it fails to take into account the veteran's prior medical history."

Miller *supra* further held "If an examiner explains that the veteran's assertions are generally inconsistent with medical knowledge or implausible, the Board can weigh that when addressing the veteran's credibility. Or an examiner may explain that the veteran's reports about symptoms or an in-service injury align with how the disease or disability is known to develop. Any way you look at it, the Board may benefit from this information in making its credibility determinations." ***Id.*** at 260-261.

Application of §4.124a DC 8000 Note under DC 8025

By operation of law, it would be clearly and unmistakably erroneous to rate the appellant under DC 8000 at 10% for "residuals, minimum" that might pyramid subjective residuals. §§4.14; 4.25(b); 4.124a; 3.103. §4.25 is explicit in its instructions on how to rate disabilities arising from a single disease entity- e.g., a cerebrovascular accident such as encephalitis. The regulation instructs, as does the Note in §4.124a beneath DC 8025, to rate these other subjective disabling conditions separately under the proper diagnostic codes applicable. See ***Mitchell v. McDonald,*** 27 Vet App. 431,440 (2015) (Cases "must be decided on the law as we find it, not on the law as we would devise it").

Thus, by operation of law, Appellant's described subjective residuals of s/p encephalitis, supported by the rationale of a subject matter expert, must be rated on the basis of the diagnosis(es) recorded. In addition, they must be rated according to the diagnostic codes applicable. See §§4.20; 4.21; 4.27; 4.124a DC 8100. DC 8000's note explicitly instructs that when ratings in excess of the prescribed minimum ratings are assigned, the diagnostic codes utilized as bases of evaluation be cited, in addition to the codes identifying the diagnoses. This requires the assignment of a "built up" rating code number employing the tenets of §4.27- e.g., DC 8000-8100 for headaches or DC 8000-6204 for Labyrinthitis, chronic (dizziness). DC 8000-9302 (1953) would be applicable to rate mental disorders associated with intracranial infections other than syphilis - e.g., s/p encephalitis. In the same vein, sensory impairment such as DC 8000-8209 loss of smell in cranial nerve IX (glossopharyngeal) would also be a subjective residual.

The Board's August 2020 remand, and the most recent December 2021 remand, directed the Veteran be provided a VA examination to address the matter of subjective residuals. Unfortunately, The VA examiner neglected to obtain a detailed in-person history from the Veteran prior to his demise and chose instead to conduct an acceptable clinical evaluation (ACE) based on a review of the evidence of record which has already been determined to be missing. The VA neurologist opined that every subjective symptom described was less likely than not a subjective residual of s/p encephalitis. Interestingly though, the neurologist failed to mention any condition or symptom that might be a common subjective residual.

The Secretary insists on perpetuating the same error in the most recent February 2022 RD to the extent that he elected to use the same VA neurologist who has now "doubled down" and stands firmly behind his original November 2020 medical opinion. On page 33 of 42 of his January 2022 c&p examination, the Neurologist baldly states:

"The undersigned's expert neurological opinions rendered in 11/2020 and again now in this 1/19/2022 C&P report STAND." (emphasis in original).

Missing IMO and Veteran's Last Statement in Support of Claim

On December 27, 2021, upon review of the VA Form 21-2507a, dated December 12, 2021 (in VBMS), this representative notified the VA examiner that the list of evidence soon to be reviewed by the VA IMO neurologist failed to include two probative documents, to wit: the May 21, 2021 VA Form 21-4138 Statement of Claim by Appellant and the May 21, 2021 Independent Medical Opinion which were, by law, a matter of record and remanded back with the claim to the Agency of Original Jurisdiction for consideration in the first instance. These documents were previously submitted in the evidence venue of the VAF 10182 NOD filed on May 21, 2021- i.e. BVA Docket No. 210521-16234. These very same documents were subsequently appended to the revised VAF 21-2507a dated in VBMS January 12, 2022. (See page 4, VAF 21-2507a Bookmark Tab C, D) in VBMS dated January 12, 2022.)

The clinician providing the VA IMO, James I. Joubert, M.D., on page 8 of 42 of his January 2022 c&p exam, questions the "physician-patient relationship" between the Veteran and Dr. Pollack. This is proof the medical opinion was a matter of record. Dr. Joubert stated further that"

"Dr. Pollocks[sic] rendered medical opinion is not supported by the evidence of record or the weight of medical literature."

Further, on page 40 of 42, Dr. Joubert concludes, *in haec verba*,

"A Veteran-submitted non-VA/non-DoD neurologic opinion in support of the Veteran's claim does not constitute a medical treatment record."

Dr. Joubert neglected to offer a cite to statute or regulation which might purport to show why obtaining private medical opinions is no longer permitted by operation of law. See ***Shedden v. Principi,*** 381 F.3d 1163, 1166 -67 (Fed. Cir. 2004). To this representative's recollection, ***Shedden*** and its progeny such as Caluza, Hickson, remain precedential. The VA clinician also inveighs on the Veteran's VA Form 21-4138 dismissing its credibility and that symptoms do not "wax and wane". This, too, shows the lay testimony was a matter of record and held to be self-serving.

Consequently, nowhere in the four corners of the February 18, 2022, rating decision confirming and continuing the denial of any higher initial rating (at *any* percentage), as well as a follow-on Higher Level of Review (HLR) on April 15, 2022, can there be found any mention of these highly probative documents. This is error and violates the newer AMA dicta in §3.103(c)(2)(ii). Ditto as to any favorable findings of fact as required by 38 USC §5104(b).

Appellant is willing to concede harmless error to both and waive review of the new and relevant evidence below. This would permit the Trier of fact to make the decision in the first instance in order to conserve scarce judicial resources. In light of the history of this appeal, attempting to conserve scarce judicial resources may seem facetious on its face given its five decades. Authority to grant the '***maximum benefit***' is described in 38 U.S.C.

§5103A(f)(2)(A) and directs that If the Board of Veterans' Appeals, during review on appeal of an agency of original jurisdiction decision, identifies or learns of an error on the part of the agency of original jurisdiction to satisfy its duties under this section, and that error occurred prior to the agency of original jurisdiction decision on appeal, ***unless the Secretary may award the maximum benefit*** in accordance with this title based on the evidence of record, the Board shall remand the claim to the agency of original jurisdiction for correction of such error and readjudication. With the introduction of Appellant's private opinion the Board has sufficient evidence to reach a decision.

Appellant submits that a grant of service connection for the documented disabilities identified in the private, independent medical opinion constitutes the maximum benefit that can be supported in law while protecting the interests of the Government. § 3.103. Thus, the Trier of fact has the authority under statute to conclude this charade. The matter of determining the appropriate ratings percentage would still require remand but that is a downstream issue.

Appellant's prior, credible lay testimony concerning the presence of numerous, chronic subjective symptoms are covered under the combat presumption in §1154(b). To date, the Secretary has yet to present clear and convincing evidence to rebut the Appellant's lay testimony regarding his combat injuries. ***McWhorter*** *supra*. Irrespective of a nouveaux 'conclusion of law' by a clinician that the now-deceased Appellant and his surviving spouse' lay testimony is suspect or inadmissible due to their lack of medical expertise, a Veteran is competent to report on that of which he or she has personal knowledge. See ***Layno v. Brown***, 6 Vet. App. 465, 470 (1994). The clinician confuses medical expertise to diagnose a complex disease with that which comes to a person via his five senses. To posthumously attack the undisputed credibility of a decorated combat Veteran is decidedly adversarial and not a Veteran friendly environment in which to adjudicate a claim.

It is presumed the Secretary knows how to write his regulations. Regardless, Appellant concedes Chevron deference is for application. Thus, if the Secretary chose to include a nonexhaustive list of examples of subjective residuals in his

medical note under DC 8025, logic dictates that these examples would invariably represent common subjective residuals frequently encountered with the cerebrovascular disease diagnostic codes in question.

Notwithstanding the six pages of explicit remand instructions provided by the prior Board chairman, there appears to have been something lost in the December 2021 BVA remand transmittal yet again. The numerous findings of fact and subsequent diagnoses of residuals in prior c&p examinations escape the c&p clinician. See ***Sickels v. Shinseki***, 643 F.3d, 1362, 1365-66 (Fed. Cir. 2011) (holding that the Board is "entitled to assume" the competency of a VA examiner and the adequacy of a VA opinion without "demonstrating why the medical examiners' reports were competent and sufficiently informed"). The Secretary has conceded residuals of s/p encephalitis and granted compensable service connection-albeit incorrectly. Ergo, that ship has sailed. §3.104.

The VA clinician fails to comprehend service connection has already been granted in his January 2022 medical opinion. The VA clinician states incessantly that the "weight of accepted medical opinion" and the "evidence of record" support his opinion but nowhere has he proffered a single peer-reviewed cite to medical literature that might support his data and conclusions. Worse, this error strongly confirms the clinician has not reviewed the evidence. Considering the fact that the record is woefully incomplete due to the VA's conceded loss of the medical records, it is unclear how absence of evidence can now represent negative evidence in the instant appeal. ***Cuevas*** *supra.* ***McLendon*** *supra.*

The VA's neurologist, in his most recent January 2022 independent medical opinion, essentially argues granting service connection for encephalitis would clearly and unmistakably erroneous. He opined further that service connection for s/p residuals, including Appellant's lay testimony of subjective symptomatology in the intercurrent period following separation in 1953, were either incredible or that the Appellant lacked the medical expertise to diagnose himself. ***Layno*** *supra.* Appellant's surviving spouse avers he has never purported

to diagnose the subjective residuals; that he merely recounted his symptomatology over the intervening years which remained after his acute infection resolved. See ***Clemons v. Shinseki,*** 23 Vet. App. 1, 5 (2009) A claimant "[does] not file a claim to receive benefits only for a particular diagnosis, but for the affliction his . . . condition, whatever that is, causes him." Consequently, VA "should construe a claim based on the reasonable expectations of the non-expert, self-represented claimant and the evidence developed in processing that claim," taking into consideration "the claimant's description of the claim; the symptoms the claimant describes; and the information the claimant submits or that the Secretary obtains in support of the claim." Id. VA commits error "when it fail[s] to weigh and assess the nature of the current condition the appellant suffer[s] when determining the breadth of the claim before it." ***Id.*** at 6. The Appellant has endorsed memory problems for over sixty years such that it is possible he failed to recount a complete inventory of his conditions at each c&p exam. That is not fatal to his claims, however. The Secretary should not now use this against the appellant to deny service connection.

Summary

Nieves-Rodriguez *supra* held a medical examination report must contain not only clear conclusions with supporting data, but also a reasoned medical explanation connecting the two); see also ***Stefl v. Nicholson,*** 21 Vet. App. 120, 124 (2007) (stating that a medical opinion must support its conclusion with an analysis that the Board can consider and weigh against contrary opinions). Appellant's private IMO fulfills this requirement.

The January 2022 VA clinician attributes the Veteran's extensive history of headaches going back three score years to more recent "occipital neuralgia" diagnosed on July 14, 2014; this medical epiphany in spite of the paradox of the Secretary's concession otherwise. Both in the 2010 rating decision granting a 100% rating for the condition, as well as a subsequent concession in 2016 of clear and unmistakable error, the Secretary has conceded headaches. See ***Evans v. Shinseki,*** 25 Vet. App. 7, 16 (2011) (explaining that "it is the Board that is required to provide a complete statement of reasons or bases" for its decision

and "the Secretary cannot make up for [the Board's] failure to do so" by providing his own reasons or bases on appeal).

Incredibly, the VA neurologist dons the mantle of judge, jury and executioner on page 33 of 42 regarding his rationale:

"The decision to grant VA C&P disability service connection for any claimed condition is a LEGAL decision and not a MEDICAL decision and that decision must be made by the appropriate VBA staff. Not by a VHA C&P clinical examiner. The undersigned's board-certified neurology expertise, the weight of the medical literature, and the evidence of record support that the Veteran's service-connected encephalitis is resolved without residuals and the Veteran's claim for any residuals of his service-connected encephalitis condition is without merit." (emphasis in the original).

Quite simply, an error either exists with Dr. Joubert's medical opinions or the Secretary clearly and unmistakably erred in awarding not only a permanent and total disability rating of 100% for DC 8000 in 2009, but the additional retroactive award of 10% retroactively to November 1953 in the July 2016 RD. The Secretary cannot have his *res judicata* cake and eat it too. See ***Russell v. Derwinski***, 3 Vet. App. 310, 313-14 (1992) ("an error either undebatably exists or there was no error within the meaning of §3.105). ***Monzingo*** *supra*. See also ***Moore v. Nicholson***, 21 Vet.App. 211, 218 (2007) (contrasting the roles of medical examiners and VA adjudicators because the examiner made prohibited factual determinations, engaging in fact finding that is the province of VA adjudicators and the Board, the Board erred when it relied on that examination to conclude that the veteran does not have residuals of an in-service head injury, to include TBI.)

While he was alive, Appellant attended five c&p exams spanning six decades-none of which ever entirely captured all the symptomatology or etiology of the subjective residuals of his s/p encephalitis. His memory problems precluded it. Appellant has had a dizzying array of medical opinions, some pro but mostly con, regarding his disease. Now, following a concession of error and

award of initial compensable entitlement to s/p encephalitis retroactive to his lost 1953 filing, the Secretary proffers yet a second, virtually identical post hoc rationalization camouflaged as a c&p examination, which completely contradicts the evidence of record. The Veteran's prior favorable findings of fact are an entitlement that is protected as a matter of law. ***Medrano, Moore, Monzingo, Sickels*** *supra*.

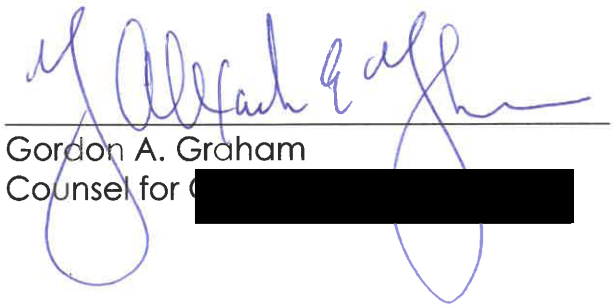
There can only be one view of the evidence. The surviving spouse seeks finality as envisioned in ***Mariano*** *supra*. 38 CFR § 3.304(c). There is only one viable independent medical opinion of record which answers the question after three BVA remands(2016, 2020, 2021). Appellant feels an approximate balance of positive and negative evidence regarding any issue material to the determination of this matter exists. The benefit of the doubt must, by any legal standard of review, now at long last accrue to the Veteran's surviving spouse. ***Fugere*** *supra*.

The pro-Veteran canon instructs that provisions providing benefits to veterans should be liberally construed in the veterans' favor, with any interpretative doubt resolved to their benefit. See, e.g., ***King v. St. Vincent's Hosp.***, 502 U.S. 215, 220 (1991). Appellant, and now his surviving spouse, seem incapable of meeting the Secretary's high legal bar of providing credible testimony. They have been equally disenfranchised from obtaining review of probative medical evidence at the Agency level which suffices to substantiate his claim. Congress promised Veterans one review on appeal based on the entire record in the proceeding **and upon consideration of all evidence and material of record** and applicable provisions of law and regulation. §7104a. This statute presumably extends to his surviving spouse. That promised review is still pending. Judicial Review is being unfairly frustrated.

"[T]he veterans benefit system is designed to award entitlements to a special class of citizens, those who risked harm to serve and defend their country. This entire scheme is imbued with special beneficence from a grateful sovereign." ***Barrett v. Principi***, 363 F.3d 1316, 1320 (Fed. Cir. 2004).

Wherefore, Appellant's surviving spouse implores the Trier of Fact to grant the maximum benefit of service connection for any and all of those aforementioned subjective symptoms that can be supported by the evidence of record. His widow asks for no more but certainly no less.

Respectfully submitted,



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