No. _____

In The

Supreme Court of the United States

JIMMY R. SPRINKLE,

Petitioner,

v.

ERIC K. SHINSEKI,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Sections 19.31 and 19.38 of 38 C.F.R. require the Department of Veterans Affairs (VA) to provide the veteran and his representative with a Supplemental Statement of the Case (SSOC) following the Board of Veterans' Appeals' (Board or BVA) remand where the VA Regional Office (VARO) develops new evidence during the remand.

The question presented is:

Whether the fair process doctrine requires that the VA provide a copy of the newly developed evidence during the remand to the veteran and his representative although these regulations are silent on the VA's duty.

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PETITION FOR A WRIT OF CERTIORARI

Jimmy R. Sprinkle respectfully petitions this Court to grant a writ of certiorari to review the opinion of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The panel opinion of the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") is reported at 733 F.3d 1180 (App. 1-21). The opinion of the U.S. Court of Appeals for Veterans Claims ("Veterans Court") is reported at 2012 U.S. App. Vet. Claims LEXIS 284 (App. 22-33).

JURISDICTION

The Federal Circuit entered judgment and its opinion on October 24, 2013, and denied rehearing and rehearing en banc on January 22, 2014 (App. 1-21). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

28 U.S.C. § 2111, reproduced at App. 47

38 U.S.C. § 7109, reproduced at App. 47

38 C.F.R. § 19.9, reproduced at App. 48

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

This Court has recognized that the VA has a statutory duty to assist a veteran, such as Mr. Sprinkle, during the course of his non-adversarial administrative process before the VA pursuant to 38 U.S.C. § 5103A, but the Court has not addressed the duty in detail. *Henderson v. Shinseki*, 131 S. Ct. 1197, 1205 (2011) ("[t]he solicitude of Congress for veterans is of long standing . . . And that solicitude is plainly reflected in the [Veterans' Judicial Review Act], as well as in subsequent laws that place a thumb on the scale in the veteran's favor in the course of administrative and judicial review of VA decisions."); *Shinseki v. Sanders*, 556 U.S. 396, 399, 412 (2009) ("The Veterans Claims Assistance Act of 2000 requires the VA to help a veteran develop his or her benefits claim. § 5103A . . . And Congress has made clear that the VA is not an ordinary agency. Rather, the VA has a statutory duty to help the veteran develop his or her benefits claim."); *Id.* at 415 (Souter, J., dissenting)

("The VA differs from virtually every other agency in being itself obliged to help the claimant develop his claim, *see, e.g.*, 38 U.S.C. § 5103A, and a number of other provisions and practices of the VA's administrative and judicial review process reflect a congressional policy to favor the veteran. . . .").

The VA's duty to assist the veteran also includes its duty to obtain a VA medical examination and opinion in connection with the veteran's claim if the record "does not contain sufficient medical evidence for the Secretary to make a decision on the claim." 38 U.S.C. §§ 5103A(d)(1), (2); 38 C.F.R. § 3.159(c)(4); *see also McLendon v. Nicholson*, 20 Vet. App. 79, 81-86 (2006). The VA is required to provide assistance to a veteran unless "no reasonable possibility exists that such assistance would aid in substantiating the claim." 38 U.S.C. § 5103A(a)(2).

The VA's adjudicatory "process is designed to function throughout with a high degree of informality and solicitude for the claimant." *Walters v. National Assn. of Radiation Survivors*, 473 U.S. 305, 311 (1985); *see also Henderson, supra*, at 1206 ("When a claim is filed, proceedings before the VA are informal and nonadversarial.").

B. Facts and Proceeding During Administrative Process

During the Petitioner's administrative claim before the VARO, he sought to reopen his claims to

establish service connection for his myoclonus[1] and mitral valve prolapse.[2] He informed the VA that he "was incorrectly diagnosed in the military with schizophrenia of pseudoneurotic type[ ] [and] was prescribed high doses [of] Thorazine[3] for this condition."

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[1] Myoclonus is "[a] brief, lightning-like contraction of a muscle or group of muscles. . . . Etiology includes metabolic derangements . . . , various degenerative diseases (e.g., Alzheimer's and progressive myoclonus epilepsy), and 'slow virus' diseases (e.g., Jakob-Creutzfeldt disease and subacute sclerosing panencephalitis [SSPE]). Myoclonus arising following closed head trauma or hypoxic-ischemic brain injury may increase with intended movement. . . ." Robert Berkow, M.D., Editor in Chief, The Merck Manual, 16th Ed., 1492 (1992) [hereinafter, "Merck Manual"]. Progressive myoclonus epilepsies are a form of secondary generalized epilepsies. There are at least five different types of progressive myoclonus epilepsies. Each type has different causes and typical ages of onset. Berkovic, Samuel F., et al. "Progressive Myoclonus Epilepsies: Specific Causes and Diagnosis." *N Engl J Med* 1986. 315:296-303. Striano, Pasquale, et al. "Familial benign nonprogressive myoclonic epilepsies." *Epilepsia*. 50(Suppl. 5):37-40, 2009 doi: 10.1111/J.1528-1167.2009.02118.x, Web. 1 May 2012, available at http://onlinelibrary.wiley.com/doi/10.111/j.1528-1167.2009.02118.x/pdf.

[2] Mitral valve prolapse is "[a] bulging of one or both mitral valve leaflets into the left atrium during systole so that a crisp systolic sound or click and late systolic mitral regurgitation (MR) murmur are commonly heard." Merck Manual.

[3] Thorazine (Chlorpromazine) is used to treat the symptoms of schizophrenia (mental illness that causes disturbed or unusual thinking, loss of interest in life, and strong or inappropriate emotions) and other psychotic disorders (conditions that cause difficulty telling the difference between things or ideas that are real and things or ideas that are not real) and to treat the symptoms of mania (frenzied, abnormally excited mood) in people who have bipolar disorder (manic depressive disorder; a condition that causes episodes of mania, episodes of depression,

(Continued on following page)

He further stated, "[t]his drug worsened the mitral valve prolapse which [he] did not know [he] had [and] also caused [his] myoclonus." [Fed.Cir. Joint App. 63].[4] He submitted his treating physician's written opinion in support of his claims. Dr. Kopyta opined that "[d]uring patient's military service he was diagnosed with psychotic like disorder and was treated with high doses of Thorazine 800 mg., once [per] day. Thorazine has severe adverse side effects, including neuro-muscular like reaction; . . . tardive dyskinesia[5] which would likely worsen mitral valve prolapse and myoclonus." [Fed.Cir. Joint App. 64]. In June 1991, the Social Security Administration concluded that he was totally disabled due to his movement disorder and mild depression and therefore entitled to Social Security Disability benefits. [Fed.Cir. Joint App. 53-59].

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and other abnormal moods). "Chlorpromazine." *MedlinePlus*. U.S. National Library of Medicine. Web. 17 Apr 2014, available at www.nlm.nih.gov/medlineplus/druginfo/meds/a682040.html.

[4] *Jimmy R. Sprinkle v. Eric K. Shinseki*, Docket No. 2012-7156, U.S. Court of Appeals for the Federal Circuit, Joint Appendix, filed February 22, 2013.

[5] Tardive dyskinesia "represents the occurrence of involuntary stereotypical movement after prolonged dopamine blockade. . . . TD occurs as a result of up-regulation of dopamine receptors. . . . There is currently no effective treatment for TD. Antipsychotics should, whenever possible, be discontinued, but there is nothing beyond this that has proven effective. The tragedy of TD is that it will not always be reversed with drug discontinuation. There is no reliable means of predicting who will be left with a permanent movement disorder." Merck Manual.

In its July 2009 decision, the Board noted that the VARO had denied the Petitioner's claims based on an August 2002 VA medical opinion which "did not address the effect of the in-service administration of medication on the claimed conditions or the opinion offered by the private physician." [Fed.Cir. Joint App. 65, 75-76]. Although the evidence in the record proved that his conditions had worsened during his military service, the Board concluded that "[a]nother [VA] examination [wa]s required. 38 U.S.C.A. § 5103A(d)(2); 38 C.F.R. § 3.159(c)(4)(i)." [Fed.Cir. Joint App. 76]. The Board recognized the VA's duty to assist him in substantiating his claims, and therefore it ordered a new VA medical examination to be performed. The Board issued its July 2009 decision remanding his claims to the VA Regional Office (VARO), and it explicitly directed the VARO to order new medical examinations "to determine the severity and likely etiology of his claimed cardiovascular and neurological conditions." The Board ordered the examiner to address the specific question, "is it at least as likely as not (50 percent or more probability) that any currently diagnosed cardiovascular or neurological disability is causally linked to or aggravated by any incident of active duty, to include the administration of thorazine during psychiatric treatment in 1974-1975?" [Fed.Cir. Joint App. 76, 74-77].

On October 7, 2009, the VA's physician at the White City, Oregon VA Domiciliary performed an examination and prepared an 11-page opinion (App. 55-66). This physician noted the onset of the Petitioner's

myoclonus in 1975, approximately one to two years after his February 1974 discharge from active duty (App. 56, 61). Nonetheless, this physician concluded that the Petitioner's myoclonus and mitral valve prolapse were not related to his service. The physician concluded that:

> [t]he brief administration of Thorazine in 1974, while the veteran was on active duty, did not cause the appearance of a movement disorder years later, particularly in a patient eventually diagnosed with a FAMILIAL Movement Disorder. Similarly, there is no reason to believe that the brief administration of Thorazine in 1974, would exacerbate a valvular cardiac defect 15-16 years after the fact. It has been suggested that, since the veteran received Thorazine, he might have experienced Tardive Dyskinesia, which could have exacerbated Mitral Valve Prolapse and Familial Movement Disorder. He did not have those diagnoses at that time, and there is no evidence that the veteran suffered tardive dyskinesia, while receiving Thorazine, during active duty, that I can find in the records. When present, this side effect is usually seen in patients who have been on the drug long-term. The Veteran's mo[b]ility disorder is apparently a manifestation of a genetic disorder affecting multiple members of his family, which would have become manifest indepe[n]dent of the administration of any medications, none of which could have caused the disorder. The records show evidence of early manifestations of neuropsychiatric

> disease prior to enlistment, consistent with his diagnosis of familial disease.

(App. 66).

Without providing a copy of this October 7 medical opinion to either Mr. Sprinkle or his attorney, on October 21, 2009, the VARO issued its SSOC which continued its denial of the Petitioner's claims and relied exclusively on this VA medical opinion [Fed.Cir. Joint App. 90, 89-91]. This SSOC stated only, "the examiner concluded that the veteran's mitral valve prolapse [and myoclonus] w[ere] not caused by or a result of the administration of thorazine while he was on active duty military service." [Fed.Cir. Joint App. 90]. The SSOC contained no discussion of the evidence considered by the VA's physician or the reasons and bases for his conclusions. *cf.* 38 C.F.R. § 3.103(f) (" . . . any notice that VA has denied a benefit sought will include a summary of the evidence considered.").

In response to this SSOC, the Petitioner's attorney made three written requests to the VARO in November 2009, February 2010, and March 26, 2010 for a complete copy of this medical opinion and any other new evidence that the VARO had obtained on his claims. [Fed.Cir. Joint App. 92-102]. The VARO neither provided the report nor responded to any written request.

By its cover letter dated Sunday, May 2, 2010, the Board mailed a copy of "all documents added to the Veteran's claims file after December 1, 2004[ ]" to the Petitioner's attorney's office. This set included

approximately 525 pages of documents. [Fed.Cir. Joint App. 103].

On June 3, 2010, the Board issued its final decision denying the Petitioner's claims relying primarily on the October 2009 VA examiner's opinions (App. 34-44).

C. Proceedings in the Veterans Court

The Petitioner sought review of the Board's decision in the Veterans Court pursuant to 38 U.S.C. §§ 7252, 7261. In its February 2012 decision, the Veterans Court denied the Petitioner's appeal of the Board's 2010 decision. The court acknowledged the Petitioner's argument that "the Board failed to afford him fair process, as it did not provide him with a copy of an October 7, 2009, VA medical examination report until fewer than 30 days before the Board's June 2010 decision" (App. 27). The court misinterpreted the VA's duty under the fair process doctrine and concluded that "[t]here is no affirmative duty for VA to provide a copy of the medical examination [report]. . . . Rather, VA is required to provide a copy of the examination if it is requested by the appellant" (App. 30).

The court concluded that the fair process doctrine only applies to evidence developed or obtained after the VA's issuance of the most recent Statement of the Case (SOC) or SSOC with respect to such claim (App. 31). The court further misinterpreted the doctrine in concluding that the Petitioner and his attorney were required to receive only "notice of evidence" (App. 31).

The court concluded that "[e]ven without a copy of the actual examination [report], the appellant and his attorney were put on notice of its existence and conclusion by the SSOC." *Id*.

The court denied the Petitioner's motion for reconsideration and for panel review (App. 45-46).

D. Proceedings in the Federal Circuit

The Petitioner sought review of the Veterans Court's decision in the Federal Circuit pursuant to 38 U.S.C. § 7292. In October 2013, the Federal Circuit issued its plurality decision affirming the Veterans Court's decision (App. 1-21). Judge Taranto dissented (App. 14-21).

The court misinterpreted the fair process doctrine in concluding that the doctrine did not apply where the Board had remanded the veteran's claims to the VARO for new VA medical examinations to be performed and a SSOC was subsequently issued after the examination report was received by the VARO. The court made its own initial finding of fact that the summary contained in the SSOC was adequate to enable Mr. Sprinkle to respond (App. 10-11). The court concluded that "because the Regional Office in this case considered the medical examination initially before summarizing it in a Supplemental Statement of the Case and there is nothing undermining that summary, we conclude that the fair process doctrine is not implicated by this case" (App. 12).

The court's initial finding of fact that "there is nothing undermining that summary" was erroneous. As the dissent recognized, "the Board undisputedly relied on statements in the medical report that were not described in the Supplemental Statement of the Case" (App. 17).

The court's initial finding of fact also informed its other initial factual finding that the Regional Office's SSOC was "complete enough to allow the appellant to present written and/or oral arguments before the [Board]" (App. 7). The court's initial findings of fact exceed the court's jurisdiction (App. 7, 10-11, 12, 17). *See* 38 U.S.C. § 7292(b); *see also Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986) ("If the Court of Appeals believed that the District Court had failed to make findings of fact essential to a proper resolution of the legal question, it should have remanded to the District Court to make those findings . . . But it should not simply have made factual findings on its own.").

Further, the court's legal conclusion that "the fair process doctrine is not implicated by this case" is based on its improper initial findings of fact that "there is nothing undermining that summary" and the VARO's SSOC was "complete enough to allow the appellant to present written and/or oral arguments before the [Board]" (App. 7).

The court conceded that Mr. Sprinkle and his attorney received less than 30 days to review and to respond to the VA's October 7, 2009 medical opinion contained in the 525-page set of documents before the Board made its final June 3, 2010 decision ("it is regrettable that there was less than 30 days between when Mr. Sprinkle's counsel received the medical exam . . . and when the Board issued its decision") (App. 13).

REASONS FOR GRANTING THE PETITION

The doctrine that has come to be called the "fair process" doctrine by the lower courts was created by the Supreme Court of the United States in *Gonzales v. United States*, 348 U.S. 407, 411-12 (1955). In *Gonzales*, the Court held that the appellant had a necessity and a right to receipt of a copy of the Government's recommendation which would be used as evidence against him. The Court concluded that, "we believe it also to be implicit in the Act and Regulations – viewed against our underlying concepts of procedural regularity and basic fair play – that a copy of the recommendation of the Department be furnished to the registrant at the time it is forwarded to the Appeal Board, and that he be afforded an opportunity to reply." 348 U.S. at 412. A meaningful statement would be one "based on all the facts in the file and made with awareness of the recommendations and arguments to be countered." *Gonzales, supra*, 348 U.S. at 415.

The Veterans Court adopted the fair process doctrine in *Thurber v. Brown*, 5 Vet. App. 119, 120-22 (1993), relying on *Gonzales*. The Veterans Court extended the doctrine in *Austin v. Brown*, 6 Vet. App. 547, 551-52 (1994), in *Prickett v. Nicholson*, 20 Vet. App. 370, 380 (2006), and further extended it in *Young v. Shinseki*, 22 Vet. App. 461, 471-72 (2009).

I. THE FEDERAL CIRCUIT'S INTERPRETATION OF THE COURT'S FAIR PROCESS DOCTRINE IS NOT CONSISTENT WITH THIS COURT'S DECISIONS IN *GONZALES v. UNITED STATES* AND *GREENE v. McELROY*.

The Federal Circuit decided an important question of federal law that applies to the nation's veterans benefits system; this specific question has not been, but should be, directly addressed by this Court.

The Federal Circuit interpreted the fair process doctrine to conclude that the VA's adverse expert opinion need not be provided to the Petitioner with a reasonable opportunity for the submission of responsive evidence and argument "because the Regional Office in this case considered the medical examination initially before summarizing it in a Supplemental Statement of the Case and there is nothing undermining that summary, [and therefore] we conclude that the fair process doctrine is not implicated by this case" (App. 12).

The Federal Circuit's interpretation is not consistent with this Court's interpretation of this doctrine in *Gonzales* that the individual who may be adversely affected by the Government's decision based on evidence in its exclusive possession is required to receive a copy of that evidence before the Government makes its decision relying on that evidence. 348 U.S. at 411-12. Nor is the court's interpretation consistent with this Court's decision in *Greene v. McElroy*, 360 U.S. 474, 496 (1959) (" . . . where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue.").

II. THE FEDERAL CIRCUIT'S INTERPRETATION OF THE COURT'S FAIR PROCESS DOCTRINE IS NOT CONSISTENT WITH THE OTHER CIRCUITS AND THE VETERANS COURT WHICH HAVE ADDRESSED THIS DOCTRINe.

The Federal Circuit's interpretation is not consistent with the decisions of the lower courts that have addressed the doctrine. These courts have consistently held or concluded that the fair process doctrine requires that the Government produce an actual copy of all *evidence* it expects to use in the claimant's appeal and provide a reasonable opportunity to respond. *See Moore-McCormack Lines,* 413 F.2d 568, 584-85, 587, 188 Ct. Cl. 644, 671-72, 675 (1969) ("the owner is entitled to notice of the methods

used, individual component parts, and *underlying data* for any estimate, in order to give it an opportunity to present any countervailing evidence or reasoning it may have."); *NOW v. Social Security Administration*, 736 F.2d 727, 739 (D.C. Cir. 1984) (C.J. Robinson, concurring) ("Beyond that, '[a] party is entitled . . . to know the issues on which decision will turn and to be apprised of the factual material on which the agency relies for decision so that he may rebut it.'"); *Young, supra,* at 472 ("The Court thus holds that remand is necessary for VA to provide the appellant an opportunity to respond to the *information contained in the 2004 VA medical examination report* and, after the appellant has been given a 'reasonabl[e] opportunity' for response, to readjudicate his claim for service connection for substance abuse."); *Crotty v. Kelly*, 443 F.2d 214, 217 (1st Cir. 1971) ("We conclude that this case is controlled by *Gonzales* and that persons in petitioner's position have a right to a *copy of all documents* which are forwarded to the Conscientious Objector Review Board, at the time they are forwarded, and the right to an opportunity to reply.") (emphasis added).

III. THE QUESTION PRESENTED IS A RECURRING AND IMPORTANT ONE IN THE VETERANS BENEFITS SYSTEM.

The Federal Circuit's precedential decision in *Sprinkle* will be relied on by that court, the Veterans Court, the Board, and more than 58 VA Regional Offices to decide veterans' claims in one of the

nation's largest and most important benefits programs. Of the 44,300 appeals decided by the Board in fiscal year 2012 over 45% were remanded to the VARO.[6]

The VA's withholding of an adverse medical opinion until less than 30 days before the Board makes its final agency decision does not "help" the veteran develop and prove his claims.

Unfortunately, the VA's action in withholding its 2009 medical report from the Petitioner for over six months is not an aberration. "Veterans not infrequently encounter significant difficulties when attempting to obtain pertinent medical records from the VA." *Dixon v. Shinseki*, 741 F.3d 1367, 1374 (Fed. Cir. 2014) (" . . . the VA did not come forward with the evidence in its possession related to Dixon's claim. . . . The VA refused to send LeBoeuf a copy of the file, and while it allowed a legal assistant from LeBoeuf's firm to review the file for a limited period of time at its Denver regional office, she was not allowed 'enough time to review the documents thoroughly.' "). *Dixon* cited some examples of similar problems. In *Pousson v. Shinseki*, 22 Vet. App. 432 (2009), the Veterans Court found the VA had failed to file the required

[6] Witness Testimony of Ms. Laura Eskenazi, Principal Deputy Vice Chairman Board of Veterans' Appeals, U.S. Department of Veterans Affairs, House Committee on Veterans Affairs, June 18, 2013, Web. 15 Apr 2014, available at https://veterans.house.gov/witness-testimony/ms-laura-eskenazi, pg. 3.

record with the court for over eleven months because it had lost the veteran's claims file.

The reason for the VA's failure to produce its expert medical opinion to the Petitioner during his administrative appeal is not relevant. But the effect of the VA's failure to produce this report in a timely manner was critical because the VA's failure prevented the Petitioner from promptly developing and proving his entitlement to service connection benefits. Proving service connection generally involves consideration of complex medical principles that require expert opinion. *See Stefl v. Nicholson*, 21 Vet. App. 120, 124 (2007) ("Without a medical opinion that clearly addresses the relevant facts and medical science, the Board is left to rely on its own lay opinion, which it is forbidden from doing.").

In order for a veteran to be successful in his claim, he must have access to copies of the actual written reports of the expert medical opinions prepared by the VA's physician and a reasonable opportunity to respond to them. If these opinions are not supportive of his claim, he needs to know the complete opinions, reasoning, facts, etc. relied on by the VA's physician in order to obtain his own expert medical opinion which will prove the elements of his claim and which will also discredit the VA's medical expert opinions. Unfortunately, a summary of the VA's newly obtained evidence does not provide a detailed basis of the VA's opinions. Without the complete copy of the newly obtained evidence, the veteran's own physician or medical expert cannot

understand the basis of the unfavorable evidence and cannot provide an informed professional opinion.

Once the Board made its final agency decision on service connection which is supported by any plausible evidence, then the veteran had no realistic appeal. The Board's finding on the question of service connection is a finding of fact which the Veterans Court reviews for "clear error." 38 U.S.C. § 7261; *Washington v. Nicholson*, 19 Vet. App. 362, 366 (2005). If the Board's finding on the issue of service connection is supported by the withheld VA report's medical conclusions and is plausible in light of the record in its entirety, then the Veterans Court will affirm the Board's finding of fact on the service connection issue. *See Gilbert v. Derwinski*, 1 Vet. App. 49, 52-53 (1990) *citing United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

At that point, the veteran had no appeal of the Board's finding of fact because the Federal Circuit has subject matter jurisdiction to decide only questions of law except in the case of a constitutional issue. *See Sanders, supra*, at 411 ("Statutes limit the Federal Circuit's review to certain kinds of Veterans Court errors, namely, those that concern 'the validity of . . . any statute or regulation . . . or any interpretation thereof.'"); 38 U.S.C. §§ 7292(a), (c), (d)(2).

The Board's finding of fact on service connection effectively dictates the ultimate outcome on the Petitioner's claim for benefits. The Board's weighing of the expert opinions in the administrative record is

outcome determinative and essentially unreviewable. *Cf. Gambill v. Shinseki*, 576 F.3d 1307, 1324 (Fed. Cir. 2009) (J. Moore, concurring) ("As my colleague points out, DVA's decision quite often turns on the content of these medical opinions . . . DVA must decide which opinion to believe, and of course its final weighing of the evidence is essentially unreviewable.").

It was therefore crucial to the Petitioner's administrative appeal that the VA Regional Office be required to provide the Petitioner (and his attorney) with a complete copy of the VA's newly developed evidence that it obtained pursuant to the duty to assist and a reasonable period of time to respond to the VA's new evidence before the VARO's reliance on that new evidence in a new decision and before the Board's final agency decision. *See Young, supra*, at 471-72.

The Federal Circuit's decision provides a confused rule which is not consistent with any of the case authorities. The court's decision is also not consistent with Congress' non-adversarial system for the adjudication of veterans' benefits. The court's interpretation suggests that this administrative system is adversarial in authorizing the Board and the VA to withhold from the veteran unfavorable evidence which the VA had developed pursuant to the duty to assist and therefore potentially hinder the veteran's development of responsive evidence and argument. The Federal Circuit's interpretation turns Congress' duty to assist on its head.

Further, the Federal Circuit's interpretation provides a perverse incentive for the Board and the VA Regional Offices to withhold newly obtained VA opinions from claimants until shortly before the Board issues its final decisions.

IV. THE FEDERAL CIRCUIT'S HYPOTHETICAL HARMLESS ERROR ANALYSIS DOES NOT PROVIDE AN ALTERNATIVE BASIS TO AFFIRM ITS DECISION.

The panel's hypothetical harmless error analysis does not provide an independent basis to affirm Mr. Sprinkle's appeal. The plurality did not find an "error" in the Veterans Court's decision, but it nonetheless performed a hypothetical analysis based on Mr. Sprinkle's return of a VA form entitled SSOC Notice Response to the VA (without providing a copy to his attorney), which form stated that he did not have any more evidence to submit.

Under the court's decision, there was no Veterans Court error, and its harmless error analysis was therefore not appropriate. *See Lockhart v. Fretwell*, 506 U.S. 364, 370 fn.2 (1993) (" . . . today's decision does not involve or require a harmless-error inquiry. Harmless-error analysis is triggered only after the reviewing court discovers that an error has been committed."); *Sneed v. Shinseki*, 737 F.3d 719, 729 fn.1 (Fed. Cir. 2013) (J. Prost, dissenting) ("But 'harmless error' plays no part in this case. 'Harmless error' requires error, which the Veterans Court did not commit.").

The court's harmless error analysis stated,

> Mr. Sprinkle was not prejudiced by any action of the agency. . . . Had Mr. Sprinkle not instructed the Regional Office that he had no additional evidence to submit and not requested that it immediately return his appeal to the Board, his record would have remained with the Regional Office. This would have enabled the Regional Office to timely process his subsequent requests for documents including the medical examiner's opinion rather than having to forward those requests to the Board. Furthermore, Mr. Sprinkle had more than seven months to offer additional evidence from the date the Regional Office issued its Supplemental Statement of the Case to the date when the Board issued its decision. This vastly exceeds the four months required by the regulations. § 19.38 (30 days); § 20.1304(a) (90 days). Yet Mr. Sprinkle chose not to respond to the only requirement of the Regional Office under the regulations: a summary "complete enough to allow the appellant to present written and/or oral arguments before the [Board]." 38 C.F.R. § 19.29. Accordingly, Mr. Sprinkle cannot show prejudice in this case.

(App. 13-14).

The SSOC Notice Response informed the Petitioner,

> SSOC NOTICE RESPONSE
>
> We have provided you with a Supplemental Statement of the Case (SSOC) about the evidence considered in your appeal. You have 30 days from the date of the SSOC within which to submit additional information or evidence. At this time, if you choose to, you may indicate whether you intend to submit additional information or evidence you know about that would help support your appeal.
>
> **Your signature on this response** will not affect whether or not you are entitled to VA benefits. It will not affect the amount of benefits to which you may be entitled. **It will not affect the assistance VA will provide you in obtaining evidence to support your appeal.** It also will not affect the date any benefits will begin if your appeal is granted. Your response will let us know whether to return your case to the Board of Veterans' Appeals without waiting the full 30 days.
>
> RESPONSE
>
> I elect one of the following:
>
> ✓ I have no other information or evidence to submit. Please return my case to the Board of Veterans' Appeals for further appellate consideration as soon as possible. (emphasis added).

[Fed.Cir. Joint App. 14].

Mr. Sprinkle informed the VARO that he did not have any other information or evidence to submit. But contrary to the court's hypothetical analysis, Mr. Sprinkle had not waived any rights in this form. The VA's form explicitly informed him that his signature on the form "will not affect the assistance VA will provide you in obtaining evidence to support your appeal." The court did not address that the VA remained legally obligated under its duty to assist to provide the VA's expert medical opinions that his attorney had requested three times between November 2009 and March 2010. *See Prickett, supra* (" . . . although the Board complied with *Thurber's* requirement of sending the claimant the medical opinion, the letter accompanying the opinion informed the claimant's representative that he could submit additional argument or comment, but failed to inform him that he could submit additional evidence."); *Young*, at 471-72 ("By failing to furnish the appellant a copy of the 2004 medical examination report before the Board considered and relied on it in the April 2006 decision, and after the appellant's multiple requests for a copy of the report, VA violated the fair process principle underlying *Thurber v. Brown*,. . . .").

If this Court grants this petition and decides that the fair process doctrine required the VARO to have provided the new evidence developed to the Petitioner *before* issuing a new VARO decision relying on that evidence, then the Federal Circuit's analysis will have no application. The Federal Circuit addressed only whether the Veterans Court's presumed error was

prejudicial given the Board's decision and Mr. Sprinkle's "waiver" after the SSOC was issued. The court did not address whether the VARO's failure to send a copy of the VA medical reports prior to its October 21, 2009 denial was harmless. If the VARO had mailed the examination reports to the Petitioner (and this attorney) before its new October 21 decision and provided a reasonable opportunity of 60 days to respond, then the Petitioner would have been able to submit new evidence and argument proving his entitlement to the claimed benefits. The VARO may have therefore granted his service connection claims, and the VARO would have issued a favorable rating decision. There would have been no SSOC issued and no appeal to the Board.

The court's implication that Mr. Sprinkle's return of the VA form caused the VARO to move his claims file to the Board which somehow prevented the VA from producing the evidence is baseless. The VA's movement of the claims file does not affect his rights. The Secretary is one entity, and the VARO and the Board are agents of the Secretary. *Cf. DAV v. Secretary*, 327 F.3d 1339, 1346-347 (Fed. Cir. 2003). That the Board ultimately produced the reports in May 2010 demonstrates that the Board is capable of mailing copies of the evidence. The Secretary conceded that "[b]y letter dated December 4, 2009, the Board notified Mr. Sprinkle that it received his claims file and would 'make every effort to decide your

appeal as quickly as possible.' Supp. App. 5." [Sec's brief to Fed. Cir., p. 7;[7] Fed.Cir. Joint. App. 5]. Neither the court, the Veterans Court, nor the Secretary addressed the issue why the Board (or the VARO) could not have mailed the copies of the records in December 2009, but instead withheld the evidence until May 2010. The court cannot conclude that had the VA promptly produced this VA expert's opinion to Mr. Sprinkle in December 2009, there was no possible way that he could have obtained his own medical expert opinion proving his claims by May 2010 and that his "substantial rights" would not have been affected by the VA's error.

If this Court decides that the fair process doctrine required the Board to have provided the newly developed evidence to the Petitioner with a reasonable opportunity for response *before* a final agency decision relying on that evidence, then the Veterans Court will have to make the initial finding of fact on the disputed question of prejudice. Although the evidence is undisputed that "there was less than 30 days between when Mr. Sprinkle's counsel received the medical exam . . . and when the Board issued its decision" (App. 13), the evidence on the issue of whether the Petitioner was prejudiced is disputed.

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[7] *Jimmy R. Sprinkle v. Eric K. Shinseki*, Docket No. 2012-7156, U.S. Court of Appeals for the Federal Circuit, Appellee's Brief, filed November 16, 2012.

The Veterans Court never addressed this factual issue of whether the VA's presumed error during the administrative appeal was prejudicial to Mr. Sprinkle. But that court has concluded that denial of "a meaningful opportunity to participate effectively in the processing of his or her claim . . . must be considered prejudicial." *Overton v. Nicholson*, 20 Vet. App. 427, 435 (2006).

This Court has suggested that the Veterans Court has the more "informed judgment" to make findings on how veterans are harmed by the VA's notice errors.

> Indeed, the Federal Circuit is the wrong court to make such determinations. Statutes limit the Federal Circuit's review to certain kinds of Veterans Court errors, namely, those that concern "the validity of . . . any statute or regulation . . . or any interpretation thereof." 38 U.S.C. § 7292(a). . . . It is the Veterans Court, not the Federal Circuit, that sees sufficient case-specific raw material in veterans' cases to enable it to make empirically based, nonbinding generalizations about 'natural effects.' And the Veterans Court, which has exclusive jurisdiction over these cases, is likely better able than is the Federal Circuit to exercise an informed judgment as to how often veterans are harmed by which kinds of notice errors.

Shinseki v. Sanders, *supra*, 411-12 (2009).

Neither the Board nor the Veterans Court ever addressed the prejudice issue. Assuming that this Court should grant this petition and find an error, the Federal Circuit lacks jurisdiction to decide the issue of harmless error because the evidence on the issue is disputed. *See Wood v. Peake*, 520 F.3d 1345, 1350-51 (Fed. Cir. 2008); *D'Amico v. West*, 209 F.3d 1322, 1327 (Fed. Cir. 2000). If the VARO and the Board had been required to apply the correct legal standard and the Petitioner had been provided a reasonable opportunity to submit his responsive evidence and argument, the courts cannot know whether the Petitioner would have prevailed before the agency. *See Wagner v. United States*, 365 F.3d 1358, 1365 (Fed. Cir. 2004) ("Where the effect of an error on the outcome of a proceeding is unquantifiable . . . we will not speculate as to what the outcome might have been had the error not occurred."). Therefore, the Federal Circuit "cannot conduct a harmless error analysis without exceeding the bounds of [its] jurisdiction, which preclude fact review." *See Wood*, at 1351.

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CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 22, 2014

United States Court of Appeals for the Federal Circuit

JIMMY R. SPRINKLE,
Claimant-Appellant,

v.

ERIC K. SHINSEKI,
Secretary of Veterans Affairs,
Respondent-Appellee.

2012-7156

Appeal from the United States Court of Appeals for Veterans Claims in No. 10-3231, Judge Alan G. Lance Sr.

Decided: Oct. 24, 2013

JOHN F. CAMERON, of Montgomery, Alabama, arguing for claimant-appellant.

VINCENT D. PAUL PHILLIPS, JR., Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, arguing for respondent – appellee. With him on the brief were STUART F. DELERY, Principal Deputy Assistant Attorney General, JEANNE E. DAVIDSON, Director, MARTIN F. HOCKEY, JR., Assistant Director, and CARRIE A. DUNSMORE, Trial Attorney. Of counsel on the brief were DAVID J. BARRANS, Deputy Assistant

General Counsel, and TRACEY PARKER WARREN, Attorney, United States Department of Veterans Affairs, of Washington, DC.

Before RADER, *Chief Judge*, REYNA, and TARANTO, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* REYNA. Dissenting opinion filed by *Circuit Judge* TARANTO.

REYNA, *Circuit Judge*.

Jimmy Sprinkle appeals a decision of the Court of Appeals for Veterans Claims, which denied his claims for entitlement to service connection for mitral valve prolapse and benign familial myoclonus. *See Sprinkle v. Shinseki,* No. 10-3231, 2012 U.S. App. Vet. Claims LEXIS 284 (Vet. App. Feb. 23, 2012). We agree that Mr. Sprinkle was not denied fair process as it related to responding to a medical exam ordered by the Board of Veterans' Appeals ("Board"). Accordingly, we *affirm*.

I. BACKGROUND

Mr. Sprinkle served in the U.S. Army from May 13, 1973 until February 19, 1974. While in the service, Mr. Sprinkle was diagnosed with schizophrenia and prescribed a high dose of Thorazine®. In August 1990, almost seventeen years after separating from the military, Mr. Sprinkle was diagnosed with mitral valve prolapse and chorea, a movement disorder

similar to benign familial myoclonus. After Mr. Sprinkle succeeded in establishing entitlement to disability compensation before the Social Security Administration, the Veteran's Affairs (VA) Regional Office awarded Mr. Sprinkle a nonservice-connected pension on April 14, 1993 effective August 1990. On October 26, 2001, Mr. Sprinkle filed an application with the VA for entitlement to a service connection for mitral valve prolapse and myoclonus. Mr. Sprinkle maintained that he was incorrectly diagnosed with schizophrenia while in the service and that the high doses of Thorazine® he received worsened his mitral valve prolapse and caused his myoclonus.

Following an initial medical exam, the Regional Office concluded that Mr. Sprinkle's conditions were not service-connected due to the seventeen-year gap between service and the onset of his mitral valve prolapse and myoclonus. In a July 27, 2009 decision, the Board remanded to the Regional Office for another medical examination to address a letter from Mr. Sprinkle's private physician that indicated that his conditions were worsened by his inservice ingestion of Thorazine®. Mr. Sprinkle received a second VA examination on October 7, 2009, but the Regional Office continued to deny his entitlement to service connection in a October 21, 2009 Supplemental Statement of the Case. The Supplemental Statement of the Case summarized and relied on the medical opinions derived from the October 7th examination: neither Mr. Sprinkle's mitral valve prolapse nor his familial myoclonus was "caused by or a result of the administration of thorazine while he was on active duty

military service." Joint App'x 90. Furthermore, Mr. Sprinkle was notified that he had a period of time (30 days) to respond with additional comments or evidence before his appeal would be returned to the Board; alternatively, Mr. Sprinkle could request that the Regional Office return his appeal to the Board prior to the expiration of the 30-day period. On November 4, 2009, Mr. Sprinkle pursued the latter course by indicating that he had no other information or evidence to submit and requesting that his case be returned to the Board as soon as possible.

On November 13, 2009, the Regional Office sent Mr. Sprinkle a letter, notifying him that his appeal had been certified to the Board and that the Regional Office was transferring all his records to the Board. The letter also indicated that Mr. Sprinkle had 90 days, or until the Board issued a decision in his case, to send the Board additional evidence concerning his appeal. On November 20, 2009, Mr. Sprinkle, now through counsel, responded to the Regional Office, disagreeing with the conclusions of its Supplemental Statement of the Case and expressing a desire to have his appeal returned to the Board. In doing so, Mr. Sprinkle also requested that "all . . . evidence . . . obtained by the VA after December 1, 2004," be sent to him. Joint App'x 92. This request was broad enough to include the medical examiner's October 7, 2009 opinion. Mr. Sprinkle reiterated his request to the Regional Office in February and March, 2010. Because the record had already been sent to the

Board, however, each request for evidence was forwarded by the Regional Office to the Board. *Sprinkle,* 2012 U.S. App. Vet. Claims LEXIS 284, at *3-4.

On May 6, 2010, Mr. Sprinkle's counsel received 525 pages of documents including the medical examiner's October 7, 2009 opinion.[1] Less than thirty days later, on June 3, 2010, the Board issued its decision denying Mr. Sprinkle's entitlement to service connection for his mitral valve prolapse and benign familial myoclonus. Mr. Sprinkle appealed to the Court of Appeals for Veterans Claims arguing, *inter alia,* that the Board failed to afford him fair process in the adjudication of his claims by not providing him with a copy of the October 7, 2009 medical examiner's opinion until fewer than 30 days before the Board's decision. The appeals court rejected Mr. Sprinkle's fair process arguments and affirmed the Board's decision denying entitlement to service connection. Mr. Sprinkle timely appealed to this court. We have jurisdiction pursuant to 38 U.S.C. § 7292(a), (c).

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[1] Mr. Sprinkle notes that the date of the cover letter accompanying the documents was May 2, 2010, which was a Sunday. Appellant's Br. 9 & n.1. He asks this court to take judicial notice of this fact, ostensibly because mail is not collected on Sundays and "[t]he date the Board furnishes a copy [of an opinion is] presumed to be the same as the date of the letter . . . that accompanies the copy of the opinion for purposes of determining whether a response was timely filed." 38 C.F.R. § 20.903(a). Because we conclude that § 20.903(a) does not apply to this case, we see no reason to consider any other date than May 6, 2010, the date Mr. Sprinkle admittedly received the documents.

II. Standard of Review

According to 38 U.S.C. § 7292(a), this court reviews decisions of the Court of Appeals for Veterans Claims with respect to the validity of a decision on a rule of law or of any statute or regulation or any interpretation thereof that was relied on in making the decision. § 7292(a). Except to the extent an appeal presents a constitutional issue, this court may not review a challenge to a factual determination or a challenge to a law or regulation as applied to the facts of a particular case. § 7292(d)(2). Accordingly, we review questions of statutory and regulatory interpretation *de novo. Moody v. Principi,* 360 F.3d 1306, 1310 (Fed. Cir. 2004).

III. Discussion

A. The Regulations

Claims for veterans' benefits are initially developed and adjudicated by a VA Regional Office. *See* 38 U.S.C. § 7105(b)(1), (d)(1). Decisions of the Regional Office are then reviewed on appeal by the Board. *See* 38 U.S.C. § 7104(a). To ensure that claimants receive the benefit of this two-tiered review within the agency, all evidence relevant to a claim generally must be considered by the Regional Office in the first instance. *Id.* Accordingly, the Regional Office conducts all necessary evidentiary development, including obtaining medical examinations and opinions. 3[8] U.S.C. § 5103A(d). If the Regional Office denies a benefit sought, it must provide the claimant notice of

the decision and include "a summary of the evidence considered by the Secretary." 38 U.S.C. § 5104(b). And if the claimant disagrees with that denial, the Regional Office must then prepare a Statement of the Case that includes "[a] summary of the evidence in the case pertinent to the issue or issues with which disagreement has been expressed." 38 U.S.C. § 7105(d)(1); *see also* 38 C.F.R. § 19.29 (requiring that the Statement of the Case "be complete enough to allow the appellant to present written and/or oral arguments before the Board"). Any additional evidence that the claimant presents there-after must be addressed by the Regional Office in a Supplemental Statement of the Case. 38 C.F.R. §§ 19.31(b), 19.37(a).

Congress created a narrow exception to this first-instance consideration of evidence by the Regional Office, providing that "when, in the judgment of the Board, expert medical opinion . . . is warranted by the medical complexity or controversy involved in an appeal case, the Board may secure an advisory medical opinion from one or more independent medical experts who are not employees of the [VA]." 38 U.S.C. § 7109(a); *see also* 38 C.F.R. § 20.901(a). Additionally, Congress, and the VA through the passage of enabling regulations, created a procedural safeguard to this first-instance evidence gathering by the Board. Specifically, the Board is required to notify the claimant that it is requesting an advisory medical opinion; provide the claimant with a copy of the opinion; and allow the claimant 60 days to respond to the opinion with evidence or argument. § 7109(c); 38 C.F.R.

§ 20.903(a). This case, however, does not implicate this exception. The Board did not obtain an advisory opinion pursuant to § 20.901. *Cf. Gambill v. Shinseki,* 576 F.3d 1307, 1309 (Fed. Cir. 2009). Instead, it remanded the case for a medical examination administered by the Regional Office. *In re Sprinkle,* No. 05-06 785A, slip op. at 2-3 (B.V.A. Jul. 27, 2009).

Under 38 C.F.R. § 19.9, the Board is required to remand a case to the Regional Office specifying the action to be taken "[i]f further evidence, clarification of the evidence, correction of a procedural defect, or any other action is essential for a proper appellate decision." § 19.9. Following any additional development of the evidence, the Regional Office decides whether the record as a whole supports allowance of the benefits sought. 38 C.F.R. § 19.38. If any benefit sought remains denied, the Regional Office must issue a Supplemental Statement of the Case concerning the additional development that informs the claimant of any material changes in, or additions to, the information previously considered by the Regional Office. *Id.*; 38 C.F.R. § 19.31. The claimant is then given 30 days to respond to the Supplemental Statement of the Case before the appeal is returned to the Board. § 19.38. After the appeal is certified to the Board, the claimant has an additional 90 days to submit new evidence to the Regional Office. 38 C.F.R. § 20.1304(a). The question presented by this case is whether fair process requires that the Board allow the claimant an additional 60 days to respond to evidence obtained on remand after the claimant

declines to respond to a summary of that evidence in a Supplemental Statement of the Case.

B. Fair Process

In *Thurber v. Brown,* 5 Vet. App. 119 (1993), the Court of Appeals for Veterans Claims created what became known as the "fair process" doctrine, holding that, before the Board relies on any evidence developed or obtained subsequent to the issuance of the most recent Statement of the Case or Supplemental Statement of the Case, the Board must "provide a claimant with reasonable notice of such evidence . . . and a reasonable opportunity for the claimant to respond to it." *Id.* at 126. The claimant must be permitted to respond with not only argument and comment, but also provide additional evidence. *Austin v. Brown,* 6 Vet. App. 547, 551 (1994).

This court has not explicitly addressed the fair process doctrine. *See Gambill,* 576 F.3d at 1310-11 (discussing the fair process concerns involved in a denial of the claimant's ability to serve interrogatories on a medical examiner, but concluding that the denial was harmless error). When the Court of Appeals for Veteran's Claims created a procedural right in the name of fair process, the court primarily relied on the underlying VA adjudicatory scheme. *Gambill,* 576 F.3d at 1310. At the time, neither this court nor the Supreme Court had ruled on the extent to which applicants for government benefits had a property right in their expectation. *Thurber,* 5 Vet. App. at 123.

Instead, the court premised its holding upon the considerations of fair process announced in *Gonzales v. United States,* 348 U.S. 407 (1955). In *Gonzales,* the Supreme Court held that despite silence in the applicable statute and regulations as to a particular procedural requirement, the requirement was implicit in the statute and regulations when "viewed against our underlying concepts of procedural regularity and basic fair play." *Id.* at 412. Since that time, this court has held the Due Process Clause of the Constitution applies to proceedings in which the VA decides whether claimants are eligible for veterans' benefits. *Cushman v. Shinseki,* 576 F.3d 1290, 1299-1300 (Fed. Cir. 2009). In light of this precedent and *Thurber,* the question becomes whether the fair process doctrine applies in this case. We conclude that it does not.

C. Analysis

By its terms, the fair process doctrine is only triggered when "evidence [is] developed or obtained by [the Board] subsequent to the issuance of the most recent [Statement of the Case] or [Supplemental Statement of the Case] with respect to such claim." *Thurber,* 5 Vet. App. at 126. In this case, while the Regional Office developed evidence on remand through a medical examination, it issued a Supplemental Statement of the Case that provided a "summary of the evidence in the case pertinent to the issue or issues with which disagreement has been expressed," 38 U.S.C. § 7105(d)(1), and that was "complete enough to allow the appellant to present written

and/or oral arguments before the [Board]," 38 C.F.R. § 19.29. Crucially, Mr. Sprinkle has not challenged the adequacy of the summary. *Sprinkle,* 2012 U.S. App. Vet. Claims LEXIS 284, at *4. It follows that the Board did not develop or obtain any evidence subsequent to the issuance of the most recent Supplemental Statement of the Case. Indeed, even though Mr. Sprinkle had 30 days to respond to the Supplemental Statement of the Case, he expressly notified the VA that he had no other information or evidence to submit and requested that his case be returned to the Board as soon as possible. Supp. App'x 14. Because the Regional Office received and considered the evidence before summarizing it in a Supplemental Statement of the Case, this case does not implicate the statutory exception to the prohibition against first-instance Board review of evidence that the fair process doctrine is designed to safeguard.

This case is unlike most other cases that implicate the doctrine where the Board has obtained an advisory medical opinion (or treatise) pursuant to § 7109 (and 38 C.F.R. § 20.901) and fails to allow the claimant to respond with additional evidence or interrogatories. *E.g., Gambill,* 576 F.3d 1307; *Thurber,* 5 Vet. App. 119. Although this case involves a medical examination conducted by the Regional Office on remand, Mr. Sprinkle argues that the fair process doctrine should be extended to cover it. In particular, Mr. Sprinkle argues that, in *Young v. Shinseki,* 22 Vet. App. 461 (2009), the Court of Appeals for Veterans Claims has extended the fair

process doctrine to cases involving Board remands. *Young* is distinguishable from Mr. Sprinkle's case because Mr. Sprinkle was put on notice about the substance of the medical report through the Supplemental Statement of the Case. Also, Mr. Sprinkle did receive a copy of the medical examination almost a month before the Board issued its decision. In *Young,* the veteran did not even receive a copy of the medical opinion until after the Board issued its decision. *Young,* 22 Vet. App. at 471. Thus, because the Regional Office in this case considered the medical examination initially before summarizing it in a Supplemental Statement of the Case and there is nothing undermining that summary, we conclude that the fair process doctrine is not implicated by this case.

Mr. Sprinkle also argues that the fair process doctrine requires the Board to provide him with a copy of the medical examiner's opinion and allow him 60 days to respond. Mr. Sprinkle relies on § 20.903(a) to support his argument for incorporating a 60-day response period into the fair process doctrine. That regulation, however, is inapplicable to this case because it only applies to advisory opinions obtained by the Board pursuant to § 20.901. *See Gambill,* 576 F.3d at 1309. Section 20.901 provides that "[t]he Board may obtain a medical opinion from an appropriate health care professional in the Veterans Health Administration . . . on medical questions involved in the consideration of an appeal when, in its judgment, such medical expertise is needed for equitable disposition of an appeal." § 20.901(a). In this case, the Board remanded to the Regional Office to conduct a

medical examination. *Sprinkle,* slip op. at 2-3. Accordingly, the pertinent regulations controlling actions by the Regional Office were §§ 19.31, 19.37, and 19.38. Consistent with those regulations, the Regional Office issued a Supplemental Statement of the Case summarizing the evidence it obtained on remand and returned the case to the Board after Mr. Sprinkle indicated that he had no additional evidence to submit.

While it is regrettable that there was less than 30 days between when Mr. Sprinkle's counsel received the medical exam he subsequently requested and when the Board issued its decision, Mr. Sprinkle was not prejudiced by any action of the agency. *See Gambill,* 576 F.3d at 1311 ("Harmless error is fully applicable to veterans' claims cases, subject to the same principles that apply generally to harmless error analysis in other civil and administrative cases.") (citing *Shinseki v. Sanders,* 556 U.S. 396, 406 (2009)). Had Mr. Sprinkle not instructed the Regional Office that he had no additional evidence to submit and not requested that it immediately return his appeal to the Board, his record would have remained with the Regional Office. This would have enabled the Regional Office to timely process his subsequent requests for documents including the medical examiner's opinion rather than having to forward those requests to the Board. Furthermore, Mr. Sprinkle had more than seven months to offer additional evidence from the date the Regional Office issued its Supplemental Statement of the Case to the date when the Board issued its decision. This vastly exceeds the four

months required by the regulations. § 19.38 (30 days); § 20.1304(a) (90 days). Yet Mr. Sprinkle chose not to respond to the only requirement of the Regional Office under the regulations: a summary "complete enough to allow the appellant to present written and/or oral arguments before the [Board]." 38 C.F.R. § 19.29. Accordingly, Mr. Sprinkle cannot show prejudice in this case.

IV. CONCLUSION

For the foregoing reasons, we agree with the Court of Appeals for Veterans Claims' determination that Mr. Sprinkle was not denied fair process. We have considered Mr. Sprinkle's other arguments and find nothing in them that upsets our conclusions. Accordingly, we *affirm*.

AFFIRMED

COSTS

Each party shall bear its own costs.

TARANTO, *Circuit Judge*, dissenting.

I would vacate the decision of the Court of Appeals for Veterans Claims and remand the matter for that court to reconsider its ruling on the non-constitutional "fair process" doctrine. The Veterans Court's discussion leaves uncertain how it interpreted the doctrine. On this "rule of law" issue, 38 U.S.C.

§ 7292(a), it is advisable for the Veterans Court to provide clarification in the first instance.

Our jurisdictional grant covering this case, 38 U.S.C. §§ 7292(a), (d)(1), sharply limits what we may decide. Mr. Sprinkle has not presented a constitutional issue. He has presented only an argument based on a Department of Veterans Affairs (VA) regulation, 38 C.F.R. § 20.903(a), and an argument based on the "fair process" doctrine, which the Veterans Court derived from the statutory regime. Without a constitutional challenge before us, we have no jurisdiction to decide any disputed question of how the legal standards invoked by Mr. Sprinkle apply to his particular case. We may decide only whether the Veterans Court relied on an incorrect view of the legal standards Mr. Sprinkle invokes. *See Munro v. Shinseki,* 616 F.3d 1293, 1296 (Fed. Cir. 2010); *Forshey v. Principi,* 284 F.3d 1335, 1351 (Fed. Cir. 2002) (en banc).

The Veterans Court read 38 C.F.R. § 20.903(a) to apply only when the Board of Veterans' Appeals has requested that a medical advisory opinion be furnished directly to it, not when the Board has remanded the case for the Regional Office to develop additional medical evidence, including by providing the claimant a medical examination. I see no error of law in that reading of the regulation, considered in its statutory and regulatory context. With no identified error of law in the interpretation of the regulation, there is no further role for us in reviewing Mr. Sprinkle's regulation-based argument.

With respect to Mr. Sprinkle's invocation of the "fair process" doctrine, the Veterans Court left unclear how it interprets the doctrine. The uncertainties may bear on its resolution of Mr. Sprinkle's case. The following undisputed facts frame the legal question: acting under an order of the Board, the Regional Office gave Mr. Sprinkle a medical examination, which resulted in a medical report (J.A. 86); it provided him with a Supplemental Statement of the Case that partly described the report but did not quote it, and it did not give the report to Mr. Sprinkle (*id.* at 89-91); Mr. Sprinkle said that he had no further evidence to submit but then asked, repeatedly, for a large volume of VA records, a request that included the report (*id.* at 92-95, 96, 99); the VA agreed that he was entitled to the report and furnished it after six months (*id.* at 103); one month later, the Board relied on the report, specifically relying on statements in the report that do not appear in the Supplemental Statement of the Case (*id.* at 23-25); but neither before nor after receiving the requested report did Mr. Sprinkle ask the Board to postpone its ruling until he could both see the report and obtain any needed medical or other consultation to enable him to file an adequate response to it.

The Veterans Court made very limited points about the "fair process" doctrine in rejecting Mr. Sprinkle's argument that the Board violated the doctrine by relying on evidence before he had been given a fair opportunity to respond to that evidence, where he had requested the evidence and the agency

agreed that he was entitled to it. *Sprinkle v. Shinseki,* No. 10-3231, 2012 U.S. App. Vet. Claims LEXIS 284, at *8-10 (Vet. App. Feb. 23, 2012). The Veterans Court said that this case differed from *Thurber v. Brown,* 5 Vet. App. 119 (1993), because here, unlike in *Thurber,* the Regional Office issued a Supplemental Statement of the Case after the evidence at issue was developed. *Id.* at *9. Relatedly, the Veterans Court stated that Mr. Sprinkle "did, in fact, have the opportunity to respond after receiving *notice* of evidence, as he had a total of 120 days after the [Supplemental Statement of the Case] was issued to submit new evidence." *Id.* at *9-10. That statement is not about the opportunity to respond in the month after the VA furnished Mr. Sprinkle the medical report; it is about the opportunity to respond to the Supplemental Statement of the Case that partly described the report. *Id.*

The Veterans Court's analysis is troublingly incomplete about its understanding of the "fair process" doctrine. The analysis does not say that "fair process" is afforded if, but only if, a Supplemental Statement of the Case tells the claimant everything about the evidence that having the evidence would disclose. The Veterans Court may have avoided so limiting its reasoning about "fair process" because such a limited characterization of the doctrine might not decide this case: the Board undisputedly relied on statements in the medical report that were not described in the Supplemental Statement of the Case. *See In re Sprinkle,* No. 5-06 785A, slip op. at 6-7 (B.V.A. Jun. 3, 2010); J.A. 90. Similarly, the Veterans

Court did not limit its description of "fair process" to circumstances in which the evidence itself is turned over in sufficient time for the claimant to prepare an adequate response before the Board relies on the evidence in ruling on a claim. Critically, nowhere did the Veterans Court say that the month Mr. Sprinkle had after receiving the medical report was adequate.

The Veterans Court's brief rationale is broad. It refers simply to the fact that the VA issued a Supplemental Statement of the Case after the medical report was prepared and thus gave Mr. Sprinkle "*notice* of evidence," though not the evidence itself. *Sprinkle,* No. 10-3231, 2012 U.S. App. Vet. Claims LEXIS 284, at *9-10. But I am not prepared to conclude that the Veterans Court truly adopted so weak a view of what constitutes "fair process."

For one thing, the Veterans Court did not discuss the obvious issues raised by such an understanding. In our legal system, where a tribunal relies on evidence in a way that is adverse to a party, it is virtually never sufficient to have told the party in advance that the evidence exists, or even to have provided a description of it; the party is broadly entitled, upon request, to scrutinize the evidence directly and not be forced to rely on the accuracy or completeness of another's description of it. This principle is fundamental to notions of fair process even in the constitutional context. *See, e.g., Greene v. McElroy,* 360 U.S. 474, 496 (1959); *United States v. Abuhamra,* 389 F.3d 309, 322 (2d Cir. 2004); *American-Arab Anti-Discrim. Comm.,* 70 F.3d 1045, 1070 (9th Cir. 1995). It is hard

to see how it could not be fundamental in a claimant-friendly adjudicatory system like the one established for veterans' benefits. Perhaps in some settings an argument might be made for withholding evidence from a party even if the tribunal relies on it. This case involves no such argument: the government acknowledges that Mr. Sprinkle was entitled to be given the evidence upon request.

Uncertainty about the Veterans Court's understanding of "fair process" is compounded by the difficulty of seeing how its ruling here squares with what appears to be the most on-point of its precedents about "fair process," *Young v. Shinseki,* 22 Vet. App. 461 (2009). There, the VA gave Mr. Young a medical examination in November 2004, which resulted in a medical report, but despite multiple requests for the report, the VA did not provide it to Mr. Young before the Board issued its decision in April 2006. The Veterans Court held:

> By failing to furnish the appellant a copy of the 2004 medical examination report before the Board considered and relied on it in the April 2006 decision, and after the appellant's multiple requests for a copy of the report, VA violated the fair process principle underlying *Thurber v. Brown,* 5 Vet. App. 119 (1993).

Young, 22 Vet. App. at 471-72.

The Veterans Court did not discuss *Young* in the present case. In particular, it did not distinguish the non-furnishing of the report before the Board made

its decision in *Young* from the furnishing of the report only one month before the Board made its decision here. The legal principle at issue must focus on an adequate opportunity to prepare a response to evidence before the tribunal relies on it. As noted, the Veterans Court nowhere said that the one-month period here was adequate for a proper response.

It appears, moreover, that in *Young,* just as in this case, the VA issued a Supplemental Statement of the Case after creation of the medical report at issue. *Young* does not say otherwise; the governing regulations required the Regional Office in *Young* to issue a Supplemental Statement of the Case after the medical examination of Mr. Young, 38 C.F.R. §§ 19.31(c), 19.38; and the agency is presumed to have followed its regulations, *Miley v. Principi,* 366 F.3d 1343, 1347 (Fed. Cir. 2004). When asked at oral argument, Mr. Sprinkle's counsel – who also was counsel for Mr. Young – stated that the Regional Office in *Young* in fact issued a Supplemental Statement of the Case after the medical examination at issue. Oral Argument at 6:24-28. And the government has carefully avoided asserting the contrary, saying only that the opinion in *Young* does not address the question. Brief for the Appellee at 26.

Apart from its discussion of the "fair process" doctrine, the Veterans Court included a footnote in its opinion stating that counsel for Mr. Sprinkle misdirected his requests for records to the Regional Office (rather than the Board) and did not ask the Board to postpone a decision while he awaited the medical

report or prepared a response. *Sprinkle,* No. 10-3231, 2012 U.S. App. Vet. Claims LEXIS 284, at *4 n.1. The Veterans Court did not, however, rely on that footnote in its analysis of the "fair process" doctrine, *id.* at *9-10, and the footnote says only that "the Court is troubled by" those facts, *id.* at *4 n.1. The footnote therefore leaves unclear whether the Veterans Court's view of "fair process" incorporates a notion that the claimant not only must request the evidence at issue but, for example, must ask for a postponement of a Board decision until the evidence is in hand for a period adequate for preparation of a response. The Veterans Court did not say that it was adopting such a requirement or discuss the issues relevant to doing so, including what standards would fit with *Young*.

In my view, the Veterans Court's decision about "fair process" leaves too many questions unanswered to know precisely what rule of law it adopted in rejecting Mr. Sprinkle's claim. Its answers to those questions, moreover, may well depend on practical considerations regarding the working of the system for adjudicating veterans' claims for benefits, including how the Board would be likely to treat a postponement request. It is advisable for the Veterans Court to address those matters in the first instance. I would therefore vacate the decision of the Veterans Court and remand the case.

Designated for electronic publication only
NON-PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

No. 10-3231

JIMMY R. SPRINKLE, APPELLANT,

V.

ERIC K. SHINSEKI,

SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before MOORMAN, LANCE, and DAVIS, Judges.

ORDER

Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.

In a single-judge decision dated February 23, 2012, the Court affirmed the June 3, 2010, Board of Veterans' Appeals decision that denied entitlement to service connection for mitral valve prolapse and benign familial myoclonus. On March 15, 2012, the appellant filed a motion for reconsideration by the single judge, and, in the alternative, a motion for panel decision. Reconsideration will be denied by the single judge, and the motion for decision by a panel will be granted.

Based on review of the pleadings and the record on appeal, it is the decision of the panel that the appellant fails to demonstrate that 1) the single-judge memorandum overlooked or misunderstood a fact or point of law prejudicial to the outcome of the appeal,

2) there is any conflict with precedential decisions of the Court, or 3) that the appeal otherwise raises an issue warranting a precedential decision. U.S. VET. APP. R. 35(e); *see also Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990).

Absent further motion by the parties or order by the Court, judgment will enter on the underlying single-judge decision in accordance with Rules 35 and 36 of the Court's Rules of Practice and Procedure.

Upon consideration of the foregoing, it is

ORDERED, by the single judge, that the motion for reconsideration is denied. It is further

ORDERED, by the panel, that the motion for panel decision is granted. It is further

ORDERED, by the panel, that the single-judge memorandum decision remains the decision of the Court.

DATED: May 4, 2012 PER CURIAM

Copies to:
John F. Cameron, Esq.
VA General Counsel (027)

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 10-3231

JIMMY R. SPRINKLE, APPELLANT,

v.

ERIC K. SHINSEKI,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before LANCE, *Judge*.

MEMORANDUM DECISION

Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.

LANCE, *Judge*: The appellant, Jimmy R. Sprinkle, through counsel, appeals a June 3, 2010, Board of Veterans' Appeals (Board) decision that denied his claims for entitlement to service connection for mitral valve prolapse and benign familial myoclonus. Record (R.) at 3-10. Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). This appeal is timely, and the Court has jurisdiction over the case pursuant to 38 U.S.C. §§ 7252(a) and 7266. For the reasons that follow, the Court will affirm the June 3, 2010, decision.

I. FACTS

The appellant served in the U.S. Army from May 31, 1973, to February 19, 1974. R. at 1925. He submitted a claim for entitlement to service connection for mitral valve prolapse and benign familial myoclonus in October 2001. R. at 700. After several years of

development, the Board remanded the appellant's claims to afford him a VA medical examination on July 27, 2009. R. at 66-69. The Board further instructed the Portland, Oregon, VA regional office (RO) to

> [r]eview the record and complete any further development, if necessary. Thereafter, readjudicate the issues on appeal. If any claim remains denied, the RO should issue a supplemental statement of the case and afford the Veteran and his attorney an opportunity to respond. Thereafter, the case should be returned to the Board for appellate review.

R. at 68.

The appellant underwent the requested examination on October 7, 2009, R. at 37-46, and on October 21, 2009, the RO issued a Supplemental Statement of the Case (SSOC) denying the appellant's claims, R. at 34-35. In the SSOC, the RO relied upon the October 7, 2009, examination. R. at 34-35. It stated that

> [o]n October 7, 2009, the [appellant] was examined and his VA claims file was reviewed by a medical doctor. As a result of this VA examination and claims file review, the examiner concluded that the [appellant's] mitral valve prolapse was not caused by or a result of the administration of thorazine while he was in active military service. Based upon this medical opinion, entitlement to service

> connection for mitral valve prolapse continues to be denied.

R. at 34. The RO used substantially identical language in its discussion of the appellant's benign familial myoclonus. R. at 34. Included with the SSOC was a letter to the appellant notifying him that he had 30 days to submit new evidence before his case would be forwarded to the Board. R. at 33.

On November 13, 2009, the RO sent a letter to the appellant notifying him that his appeal had been certified to the Board. R. at 24. The RO advised him that he had "90 days from the date of this letter, or until the Board issues its decision in your case, *whichever comes first*, to . . . [s]end the Board additional evidence concerning [his] appeal." R. at 24. The letter also instructed the appellant to send any new evidence or requests for a hearing or change of representation to the Board, not the RO, as his records had been forwarded to the Board. R. at 24.

On November 20, 2009, counsel for the appellant sent a letter to the RO requesting copies of all records added to the appellant's claims file after December 1, 2004. R. at 18-19. A date stamp on the letter indicates that the RO forwarded the letter to the Board in December 2009. R. at 20. The appellant's attorney sent a second letter to the RO on February 26, 2010, again asking for copies of new records. R. at 16. This letter was received by the Board on March 19, 2010. R. at 17. On March 26, 2010, counsel for the appellant sent a third letter to the RO again requesting

copies of new records. R. at 14. The Board received the letter on April 19, 2010. R. at 15. On May 2, 2010, the Board responded to the appellant's attorney's request for records and mailed him a copy of the requested documents. R. at 13. The Board issued the decision here on appeal on June 3, 2010. R. at 3-10.

II. ANALYSIS

The appellant argues that the Board failed to afford him fair process, as it did not provide him with a copy of an October 7, 2009, VA medical examination report until fewer than 30 days before the Board's June 2010 decision. Appellant's Brief (Br.) at 10-16. He also asserts that VA "violated [his] right to counsel or right to legal representation" and that the Board "failed to ensure that the [RO] had complied with its July 2009 remand." Appellant's Br. at 13, 15. The appellant does not otherwise challenge the Board's decision, nor does he assert that the October 2009 examination was inadequate for rating purposes. For the reasons that follow, the Court is not persuaded by the appellant's arguments.

First, the appellant argues that the Board failed to afford him fair process in the adjudication of his claim.[1] Specifically, he alleges that the Board violated

[1] Initially, the Court notes that the appellant has been represented by the same attorney, an experienced practitioner before the Court, since April 26, 2004. R. at 655. Given the experience of the appellant's attorney with veterans law, the Court is troubled by several issues. First, counsel for the appellant appears to have

(Continued on following page)

38 C.F.R. § 20.903 when it issued a decision on his claim fewer than 60 days after providing him with a copy of the October 2009 examination. Appellant's Br. at 12-13. This argument fails for several reasons. First, although the appellant cites to 38 C.F.R. § 20.903 in support of his argument, that regulation is inapplicable in the present case. It provides, in part, that:

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ignored instructions in the November 13, 2009, letter from the RO directing the appellant to send all new evidence and requests to the Board and not to the RO. R. at 33; *see* R. at 14-19 (letters from the appellant's counsel mailed to the RO after the appellant's case was forwarded to the Board). This no doubt hindered VA's timeliness in responding to his requests, as the RO had to forward the letters to the Board.

Second, although counsel for the appellant now argues that he "was preparing his request for [an] extension" to file new evidence in June 2010, Appellant's Reply Br. at 3, it is unclear why he did not file this request during the 90-day window provided to submit new evidence to the Board, which expired on February 11, 2010. R. at 24; *see* 38 C.F.R. § 20.1304(a)-(b) (2011). The appellant's attorney is charged with full knowledge of VA's rules and regulations. *See Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384-85 (1947) ("Just as everyone is charged with knowledge of the United States Statutes at Large, Congress has provided that the appearance of rules and regulations in the Federal Register gives legal notice of their contents. 49 Stat. 502, 44 U.S.C. § 307."); *see also Janssen v. Principi*, 15 Vet.App. 370, 374 (2001) (Court presumes a claimant's counsel to know and understand the law as it relates to the facts of the claimant's case). He also does not explain why he waited nearly a month after receiving a copy of the examination before beginning his preparations to file such a motion. *See* R. at 13 (May 2, 2010, letter indicating claims file had been sent).

> If the Board requests a medical opinion *pursuant to Rule 901 (§ 20.901 of this part)*, the Board will notify the appellant and his or her representative, if any. When the Board receives the opinion, it will furnish a copy of the opinion to the appellant, subject to the limitations provided in 38 U.S.C. § 5701(b)(1), and to the appellant's representative, if any. A period of 60 days from the date the Board furnishes a copy of the opinion will be allowed for response, which may include the submission of relevant evidence or argument.

38 C.F.R. § 20.903(a) (2011) (emphasis added). Section 20.901 provides that: "The Board may obtain a medical opinion from an appropriate health care professional in the Veterans Health Administration [VHA] . . . on medical questions involved in the consideration of an appeal when, in its judgment, such medical expertise is needed for equitable disposition of an appeal." 38 C.F.R. § 20.901(a) (2011).

This, however, is not a case where the Board obtained an advisory opinion from the VHA. Rather, the Board remanded the appellant's claim to the RO to obtain a Compensation and Pension examination. Evidence received by the RO is governed not by 38 C.F.R. § 20.903 but rather by 38 C.F.R. § 19.37, which provides, in part, that:

> Evidence received by the [RO] prior to transfer of the records to the Board . . . after an appeal has been initiated (including evidence received after certification has been

> completed) will be referred to the appropriate rating or authorization activity for review and disposition. If the Statement of the Case and any prior Supplemental Statements of the Case were prepared before the receipt of the additional evidence, a Supplemental Statement of the Case will be furnished to the appellant and his or her representative.

38 C.F.R. § 19.37 (2011). There is no affirmative duty for VA to provide a copy of the medical examination. *Prickett v. Nicholson*, 20 Vet.App. 370, 381 (2006) (noting that a copy of a medical report discussed in the Statement of the Case need be provided only upon request). Rather, VA is required to provide a copy of the examination if it is requested by the appellant. *Id.*

Here, the examination was requested and received by the RO. R. at 37-50. Thus, § 19.37, and not § 20.903, applies to the October 2009 examination report. Following its receipt of the examination report, the RO, pursuant to § 19.37, readjudicated the appellant's claim and issued an SSOC that discussed the examination and its conclusions. R. at 34-35. The appellant did not request a copy of the examination report until after the RO had issued the SSOC, and the Board provided the appellant with such a copy after it received the appellant's forwarded requests. R. at 13-19; *see Prickett, supra*. Even without a copy of the actual examination, the appellant and his

attorney were put on notice of its existence and conclusion by the SSOC. R. at 34-35.

The appellant's reliance on *Thurber v. Brown*, 5 Vet.App. 119 (1993), in support of his contentions is also misplaced. The appellant cites *Thurber* for the proposition that the Board must provide a claimant with reasonable notice of evidence and an opportunity to respond to it before adjudicating a claim. Appellant's Br. at 12-13. In *Thurber*, however, the Court held that the Board must provide such notice with respect to "evidence developed or obtained by it *subsequent to the issuance of the most recent SOC or SSOC* with respect to such claim." 5 Vet.App. at 126 (emphasis added). That is not the case here, as the examination was obtained by VA *before* the October SSOC was issued. Moreover, the appellant did, in fact, have the opportunity to respond after receiving *notice* of evidence, as he had a total of 120 days after the SSOC was issued to submit new evidence. *See* R. at 24, 33. The Court can discern no error in the process afforded to the appellant and holds that the appellant has failed to demonstrate prejudice. *See Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (holding that the appellant has the burden of demonstrating error), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000) (table).

As to the appellant's assertion that VA violated his right to counsel, the Court holds that the appellant has not alleged error with sufficient particularity "so that the Court is able to review and assess the validity of the appellant's arguments." *See Coker v.*

Nicholson, 19 Vet.App. 439, 442 (2006), *vacated and remanded on other grounds sub nom. Coker v. Peake*, 301 F. App'x 371 (Fed. Cir. 2008). This is especially true in light of the fact that the appellant has been, as noted above, represented by counsel throughout the appeals process. *See* R. at 655. The Court cannot manufacture arguments on behalf of appellants, represented or otherwise, and therefore holds that the appellant has not met his burden of demonstrating error. *See Coker*, 19 Vet.App. at 442 ("[T]he 'court of appeals is not required to manufacture [the] appellant's argument.'"quoting *Hernandez v. Starbuck*, 69 F.3d 1089, 1093 (10th Cir.1995))); *Hilkert, supra*.

Finally, the Court is not persuaded by the appellant's argument that the Board failed to ensure that the RO had complied with the July 2009 remand order. Although the appellant contends that VA did not "afford [him] and his attorney an opportunity to respond" as instructed in the remand order, Appellant's Br. at 13-14, this contention is belied by the record. This Court, in *Stegall v. West*, held that "a remand by this Court or the Board imposes upon the [Secretary] a concomitant duty to ensure compliance with the terms of the remand." 11 Vet.App. 268, 271 (1998). This duty requires only substantial, not absolute, compliance with the remand order. *See Dyment v. West*, 13 Vet.App. 141, 146-47 (1999) (no *Stegall* violation when examiner "more than substantially complied with the Board's remand order"). The Court reviews the Board's factual findings under the "clearly erroneous" standard of review. 38 U.S.C. § 7261(a)(4).

Under the terms of the July 2009 remand order, once the RO determined that the appellant's claims would remain denied, it was required to "issue a supplemental statement of the case and afford the Veteran and his attorney an opportunity to respond." R. at 68. The RO did just that, issuing an SSOC on October 21, 2009, and informing the appellant of his right to submit new evidence in support of his claim. R. at 33-35. Further, the appellant had an additional opportunity to present evidence while his claim was pending before the Board. *See* R. at 24 (letter from RO notifying the appellant of 90-day window to submit new evidence). Based on this, the Court cannot conclude that the Board clearly erred when it determined that VA had substantially complied with its notice and assistance requirements and, by implication, the July 2009 remand order. Accordingly, the Court will affirm the Board's decision.

III. CONCLUSION

After consideration of the parties' briefs and a review of the record, the Board's June 3, 2010, decision is AFFIRMED.

DATED: February 23, 2012

Copies to:
John F. Cameron, Esq.
VA General Counsel (027)

[SEAL] **BOARD OF VETERANS' APPEALS**
DEPARTMENT OF VETERANS AFFAIRS
WASHINGTON, DC 20420

IN THE APPEAL OF JIMMY R. SPRINKLE [Social Security Number Omitted]

DOCKET NO. 05-06 785 A) DATE JUN 03 2010
)
)

Received from the
Department of Veterans Affairs
Regional Office in Portland, Oregon

THE ISSUES

1. Entitlement to service connection for mitral valve prolapse.

2. Entitlement to service connection for benign familial myoclonus.

REPRESENTATION

Appellant represented by: John F. Cameron, Attorney

ATTORNEY FOR THE BOARD

Kathy Diener, Associate Counsel

INTRODUCTION

The Veteran had active service from April 1973 to February 1974.

This matter comes before the Board of Veteran's Appeals (Board) on appeal from an August 2002 rating decision by the Department of Veterans Affairs (VA) Regional Office (RO) in Nashville, Tennessee. The claims are currently under the jurisdiction of the RO in Portland, Oregon.

The case was previously before the Board in July 2009 and was remanded for further development. The Board is satisfied that there has been substantial compliance with the remand directives and the Board may proceed with review of the issues decided herein. *Stegall v. West*, 11 Vet. App. 268 (1998).

FINDINGS OF FACT

1. Mitral valve prolapse did not begin in service or within one year of separation and has not been shown by competent medical evidence to be causally related to service, to include administration of Thorazine.

2. Benign familial myoclonus did not begin in service or within one year of separation and has not been shown by competent medical evidence to be causally related to service, to include administration of Thorazine.

CONCLUSIONS OF LAW

1. The criteria for service connection for mitral valve prolapse are not met. 38 U.S.C.A. §§ 1110, 5103,

5103A, 5107 (West 2002), 38 C.F.R. §§ 3.102, 3.159, 3.303, 3.304 (2009).

2. The criteria for service connection for benign familial myoclonus are not met. 38 U.S.C.A. §§ 1110, 5103, 5103A, 5107 (West 2002), 38 C.F.R. §§ 3.102, 3.159, 3.303, 3.304 (2009).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

Notice and Assistance

Upon receipt of a complete or substantially complete application for benefits and prior to an initial unfavorable decision on a claim by an agency of original jurisdiction, VA is required to notify the appellant of the information and evidence not of record that is necessary to substantiate the claim. *See* 38 U.S.C.A. § 5103(a); 38 C.F.R. § 3.159; *Pelegrini v. Principi*, 18 Vet. App. 112 (2004); *Quartuccio v. Principi*, 16 Vet. App. 183 (2002); *Mayfield v. Nicholson*, 444 F.3d 1328 (Fed. Cir. 2006). The notice should also address the rating criteria or effective date provisions that are pertinent to the appellant's claim. *Dingess v. Nicholson*, 19 Vet. App. 473 (2006).

Adequate preadjudication notice was not provided in this case. However, the RO provided the appellant notice by letter dated in October 2004, and the claim was readjudicated in a February 2005 statement of the case. Complete notice addressing both the rating criteria and effective date provisions that are pertinent to the appellant's claim was sent in a September

2007 letter, and the claim was readjudicated in an April 2009 supplemental statement of the case. *Mayfield*, 444 F.3d at 1333.

Moreover, the record shows that the appellant was represented by counsel throughout the adjudication of the claims. *Overton v. Nicholson*, 20 Vet. App. 427 (2006). Thus, based on the record as a whole, the Board finds that a reasonable person would have understood from the information that VA provided to the appellant what was necessary to substantiate his service connection claims, and as such, that he had a meaningful opportunity to participate in the adjudication of his claims such that the essential fairness of the adjudication was not affected. *Vazques-Flores v. Peake*, 22 Vet. App. 37 (2008).

VA has obtained service treatment records, assisted the appellant in obtaining evidence, afforded the appellant physical examinations, and obtained medical opinions as to the etiology and severity of disabilities. All known and available records relevant to the issues on appeal have been obtained and associated with the appellant's claims file; and the appellant has not contended otherwise.

VA has substantially complied with the notice and assistance requirements and the appellant is not prejudiced by a decision on the claim at this time.

Service Connection Claims

Service connection may be granted if the evidence demonstrates that a current disability resulted from an injury or disease incurred or aggravated in active military service. 38 U.S.C.A. § 1131; 38 C.F.R. § 3.303(a). In order to prevail on the issue of service connection there must be competent evidence of a current disability; medical evidence, or in certain circumstances, lay evidence of in-service occurrence or aggravation of a disease or injury; and competent evidence of a nexus between an in-service injury or disease and the current disability. *See Hickson v. West*, 12 Vet. App. 247, 253 (1999); *Jandreau v. Nicholson*, 492 F.3d 1372 (Fed. Cir. 2007); *Buchanan v. Nicholson*, 451 F.3d 1331 (Fed. Cir. 2006).

A disorder may be service connected if the evidence of record reveals that the veteran currently has a disorder that was chronic in service or, if not chronic, that was seen in service with continuity of symptomatology demonstrated thereafter. 38 C.F.R. § 3.303(b); *Savage v. Gober*, 10 Vet. App. 488, 494-97 (1997). In addition, certain chronic diseases, including valvular heart disease and epilepsies, may be presumed to have been incurred during service if they become disabling to a compensable degree within one year of separation from active duty. 38 C.F.R. §§ 3.307, 3.309. Disorders diagnosed more than one year after discharge may still be service connected if all the evidence, including pertinent service records, establishes that the disorder was incurred in service. 38 C.F.R. § 3.303(d).

Discussion

The Veteran is seeking service connection for mitral valve prolapse and benign familial myoclonus. He contends that mitral valve prolapse existed prior to service but was not diagnosed and was then misdiagnosed as schizophrenia in service. He further alleges that his heart disorder was aggravated by administration of Thorazine in service in October 1974, and that benign familial myoclonus subsequently manifested as a result of this use of Thorazine.

Service treatment records reflect that no abnormalities or pre-existing conditions were noted during the Veteran's entrance physical examination. In October 1973, the Veteran was absent without leave (AWOL) when he went home on leave and did not return. He later told doctors that he became very anxious and felt that something terrible would happen if he returned to his military post. After secluding himself in his room for 10 days, he went to his family doctor, who advised him to return to military control. The Veteran turned himself in and was admitted to a military hospital. He described feelings of impending doom and stated that "his mind seem[ed] to be going 1000 miles per hour." He admitted that he had been under psychiatric care at the time of enlistment, but he had hidden this information in order to be accepted for service. He reported that he had little difficulty during basic training, but his anxiety had been increasing since then. When interviewed, he was extremely anxious and obsessed with the idea of returning to a hospital nearer his home. He was alert

and oriented and his memory was good, but his concentration was poor. He denied hallucinations, but he had a vague illusion of impending doom. A consultation was obtained from the psychology service, which determined that the Veteran had global anxiety and was utilizing a variety of neurotic defenses, obsessive rigidity, and functional disability in the psychotic range. He was diagnosed with schizophrenia, pseudoneurotic type, and he was treated with Thorazine. Thereafter, he was recommended for separation.

The claims file contains pre-service treatment records which indicate that the Veteran underwent inpatient psychiatric treatment as an adolescent. He was diagnosed with obsessive-compulsive reaction and psychoneurosis. The record indicates that he received continuous psychiatric treatment through at least 1972.

He was seen with complaints of extreme anxiety and obsessive thoughts of his own death in November 1971. He was also admitted to a psychiatric program after service in October and November 1975, and he continued to receive treatment, including medications, through at least 1982.

VA treatment records reflect that mitral valve prolapse and benign familial myoclonus were both confirmed in August 1990. At that time, the Veteran reported a one-year history of abnormal movement in his left arm. It was also noted that two of his sisters and his son had movement disorders identified as "Sydenham's Chorea." In June 1991, the Veteran was

determined by the Social Security Administration (SSA) to be severely disabled because of his movement disorder and unable to perform even sedentary levels of physical exertion. He was also noted to have depression.

The claims file contains letters from B.K., a private physician who treated the Veteran for his heart condition, dated in July and October 2001, in which she states that the Veteran is not depressed and has no symptoms of pseudoneurotic type schizophrenia. She opines that his anxiety symptoms and panic attacks are secondary to mitral valve prolapse. She further states that the Veteran was treated in service with high doses of Thorazine, which "has severe adverse side effects, including neuro-muscular like reaction; . . . tardive dyskinesia which would likely worsen mitral valve prolapse and myoclonus."

Pursuant to the Board's remand instructions, the Veteran was afforded a VA examination in October 2009. The examiner reviewed the claims file and noted that the Veteran was prescribed Thorazine in service. He also noted that mitral valve prolapse and benign familial myoclonus were diagnosed in 1990, many years after the Veteran's separation from service. He concluded that mitral valve prolapse is not related to the Veteran's active service since there is no evidence that the condition existed or was functionally significant at enlistment or at any time during service. Furthermore, mitral valve prolapse is not caused by the administration of Thorazine, and there is no reason to think that the brief administration of

Thorazine in 1974 would exacerbate a cardiac defect more than 15 years later. Similarly, the examiner concluded that the administration of Thorazine in 1974 would not cause a movement disorder to develop years later. Rather, the evidence suggests that the Veteran's condition is a genetic disorder affecting multiple members of his family and would have become manifest independent of any medications. The examiner noted that tardive dyskinesia is a movement disorder that may result from long-term Thorazine use; however, the Veteran received Thorazine for only a brief period in service, and there is no evidence that he experienced tardive dyskinesia at that time.

After carefully reviewing the relevant evidence, the Board concludes that service connection is not warranted for benign familial myoclonus. The weight of the evidence indicates that the Veteran's movement disorder is a genetic condition, and it is shown that several other members of his family have also been diagnosed with related movement disorders. No medical evidence of record suggests that the disorder is directly caused by the Veteran's service, to include administration of Thorazine.

The Board also finds that service connection is not warranted for the Veteran's mitral valve prolapse as the disorder was not diagnosed in service or for many years thereafter. The Board acknowledges B.K.'s opinion that the Veteran's panic attacks and anxiety are secondary to his heart condition. In stating that she finds no evidence of a mental disorder, B.K. appears to suggest that the Veteran's heart condition

was present in service but misdiagnosed as anxiety. However, B.K. gives no indication that she has reviewed the entire record, which clearly reflects that the Veteran was diagnosed with an anxiety disorder at an early age and received psychiatric treatment for several years before and after service. Other symptoms that have been associated with mitral valve prolapse, such as chest pain, fatigue, and dyspnea, were not noted during his hospitalization in service, and the Veteran had physical examinations in service and afterward in which no heart abnormalities were detected. Accordingly, the Board finds that mitral valve prolapse did not manifest in service or for many years after separation.

In addition, the weight of the evidence does not support a finding that either mitral valve prolapse or benign familial myoclonus was permanently worsened because of any incident of service, to include the administration of Thorazine. The Board acknowledges B.K.'s assertion that Thorazine has side effects such as tardive dyskinesia which "would likely worsen" the Veteran's claimed conditions. However, the VA examiner clarified that tardive dyskinesia is associated with long-term use of Thorazine, while the Veteran was administered the drug for only a short time in service. In any event, the record does not establish that the Veteran ever experienced tardive dyskinesia, or any other side effects associated with Thorazine, in service or afterward. As there is no evidence that the veteran ever experienced the adverse side effect which "would likely" have exacerbated his

conditions, B.K.'s assertion is not relevant to the facts as shown by the record.

In summary, the evidence does not establish that mitral valve prolapse or benign familial myoclonus began during or because of active service, or was permanently aggravated by any incident of active service, to include the administration of Thorazine. Accordingly, the claims are denied.

ORDER

Service connection for mitral valve prolapse is denied.

Service connection for benign familial myoclonus is denied.

/s/ ME Larkin
M.E. LARKIN
Veterans Law Judge,
Board of Veterans' Appeals

NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

JIMMY R. SPRINKLE,
Claimant-Appellant,

v.

Eric K. Shinseki,
SECRETARY OF VETERANS AFFAIRS,
Respondent-Appellee.

2012-7156

Appeal from the United States Court of Appeals for Veterans Claims in No. 10-3231, Judge Alan G. Lance Sr.

ON PETITION FOR REHEARING AND REHEARING EN BANC

Before RADER, *Chief Judge*, NEWMAN, LOURIE, DYK, PROST, MOORE, O'MALLEY, REYNA, WALLACH, TARANTO, and CHEN, *Circuit Judges*.

PER CURIAM.

ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the Appellant,

and the petition for rehearing, having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for rehearing is hereby DENIED.

The petition for rehearing en banc is hereby DENIED.

The mandate of the court will issue on January 29, 2014.

Circuit Judge Hughes did not participate.

FOR THE COURT

January 22, 2014
Date

/s/ Daniel E. O'Toole
Daniel E. O'Toole
Clerk of Court

28 U.S.C. § 2111. Harmless error

On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

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38 U.S.C. § 7109. Independent medical opinions

(a) When, in the judgment of the Board, expert medical opinion, in addition to that available within the Department, is warranted by the medical complexity or controversy involved in an appeal case, the Board may secure an advisory medical opinion from one or more independent medical experts who are not employees of the Department.

(b) The Secretary shall make necessary arrangements with recognized medical schools, universities, or clinics to furnish such advisory medical opinions at the request of the chairman of the Board. Any such arrangement shall provide that the actual selection of the expert or experts to give the advisory opinion in an individual case shall be made by an appropriate official of such institution.

(c) The Board shall furnish a claimant with notice that an advisory medical opinion has been requested under this section with respect to the claimant's case and shall furnish the claimant with a copy of such opinion when it is received by the Board.

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38 C.F.R. § 19.9. REMAND FOR FURTHER DEVELOPMENT.

(a) General. If further evidence, clarification of the evidence, correction of a procedural defect, or any other action is essential for a proper appellate decision, a Veterans Law Judge or panel of Veterans Law Judges shall remand the case to the agency of original jurisdiction, specifying the action to be undertaken.

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38 C.F.R. § 19.29. STATEMENT OF THE CASE.

The Statement of the Case must be complete enough to allow the appellant to present written and/or oral arguments before the Board of Veterans' Appeals. It must contain:

(a) A summary of the evidence in the case relating to the issue or issues with which the appellant or representative has expressed disagreement;

(b) A summary of the applicable laws and regulations, with appropriate citations, and a discussion of how such laws and regulations affect the determinations; and

(c) The determination of the agency of original jurisdiction on each issue and the reasons for each such determination with respect to which disagreement has been expressed.

(Authority: 38 U.S.C. 7105(d)(1))

57 FR 4104, Feb. 3, 1992.

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38 C.F.R. § 19.31. SUPPLEMENTAL STATEMENT OF THE CASE.

(a) Purpose and limitations. A "Supplemental Statement of the Case," so identified, is a document prepared by the agency of original jurisdiction to inform the appellant of any material changes in, or additions to, the information included in the Statement of the Case or any prior Supplemental Statement of the Case. In no case will a Supplemental Statement of the Case be used to announce decisions by the agency of original jurisdiction on issues not previously addressed in the Statement of the Case, or to respond to a notice of disagreement on newly appealed issues that were not addressed in the Statement of the Case. The agency of original jurisdiction will respond to notices of disagreement on newly appealed issues not addressed in the Statement of the Case using the procedures in §§ 19.29 and 19.30 of this part (relating to statements of the case).

(b) When furnished. The agency of original jurisdiction will furnish the appellant and his or her representative, if any, a Supplemental Statement of the Case if:

(1) The agency of original jurisdiction receives additional pertinent evidence after a Statement of the Case or the most recent Supplemental Statement of the Case has been issued and before the appeal is certified to the Board of Veterans' Appeals and the appellate record is transferred to the Board;

(2) A material defect in the Statement of the Case or a prior Supplemental statement of the Case is discovered; or

(3) For any other reason the Statement of the Case or a prior Supplemental Statement of the Case is inadequate.

(c) Pursuant to remand from the Board. The agency of original jurisdiction will issue a Supplemental Statement of the Case if, pursuant to a remand by the Board, it develops the evidence or cures a procedural defect, unless:

(1) The only purpose of the remand is to assemble records previously considered by the agency of original jurisdiction and properly discussed in a prior Statement of the Case or Supplemental Statement of the Case; or

(2) The Board specifies in the remand that a Supplemental Statement of the Case is not required.

(d) Exception. Paragraph (b)(1) of this section does not apply in proceedings before the General Counsel conducted under part 14 of this chapter to cancel accreditation or to review fee agreements and expenses for reasonableness.

38 C.F.R. § 19.38. ACTION BY AGENCY OF ORIGINAL JURISDICTION WHEN REMAND RECEIVED.

When a case is remanded by the Board of Veterans' Appeals, the agency of original jurisdiction will complete the additional development of the evidence or procedural development required. Following completion of the development, the case will be reviewed to determine whether the additional development, together with the evidence which was previously of record, supports the allowance of all benefits sought on appeal. If so, the appellant and his or her representative, if any, will be promptly informed. If any benefits sought on appeal remain denied following this review, the agency of original jurisdiction will issue a Supplemental Statement of the Case concerning the additional development pertaining to those issues in accordance with the provisions of § 19.31 of this part. Following the 30-day period allowed for a response to the Supplemental Statement of the Case pursuant to Rule of Practice 302, paragraph (c) (§ 20.302(c) of this chapter), the case will be returned to the Board for further appellate processing unless the appeal is withdrawn or review of the response to the Supplemental Statement of the Case results in the allowance of all benefits sought on appeal. Remanded cases will not be closed for failure to respond to the Supplemental Statement of the Case.

38 C.F.R. § 20.901. RULE 901. MEDICAL OPINIONS AND OPINIONS OF THE GENERAL COUNSEL.

(a) Opinion from the Veterans Health Administration. The Board may obtain a medical opinion from an appropriate health care professional in the Veterans Health Administration of the Department of Veterans Affairs on medical questions involved in the consideration of an appeal when, in its judgment, such medical expertise is needed for equitable disposition of an appeal.

(Authority: 38 U.S.C. 5103A(d), 7109)

(b) Armed Forces Institute of Pathology opinions. The Board may refer pathologic material to the Armed Forces Institute of Pathology and request an opinion based on that material.

(Authority: 38 U.S.C. 7901(a))

(c) Opinion of the General Counsel. The Board may obtain an opinion from the General Counsel of the Department of Veterans Affairs on legal questions involved in the consideration of an appeal.

(Authority: 38 U.S.C. 7104(c))

(d) Independent medical expert opinions. When, in the judgment of the Board, additional medical opinion is warranted by the medical complexity or controversy involved in an appeal, the Board may obtain an advisory medical opinion from one or more medical experts who are not employees of the Department of Veterans Affairs. Opinions will be secured, as requested by the Chairman of the Board,

from recognized medical schools, universities, clinics, or medical institutions with which arrangements for such opinions have been made by the Secretary of Veterans Affairs. An appropriate official of the institution will select the individual expert, or experts, to give an opinion.

(Authority: 38 U.S.C. 7109)

(e) For purposes of this section, the term "the Board" includes the Chairman, the Vice Chairman, any Deputy Vice Chairman, and any Member of the Board before whom a case is pending.

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38 C.F.R. § 20.903. RULE 903. NOTIFICATION OF EVIDENCE SECURED AND LAW TO BE CONSIDERED BY THE BOARD AND OPPORTUNITY FOR RESPONSE.

(a) If the Board obtains a legal or medical opinion. If the Board requests an opinion pursuant to Rule 901 (§ 20.901 of this part), the Board will notify the appellant and his or her representative, if any. When the Board receives the opinion, it will furnish a copy of the opinion to the appellant, subject to the limitations provided in 38 U.S.C. 5701(b)(1), and to the appellant's representative, if any. A period of 60 days from the date the Board furnishes a copy of the opinion will be allowed for response, which may include the submission of relevant evidence or argument. The date the Board furnishes a copy will be presumed to be the same as the date of the letter or

memorandum that accompanies the copy of the opinion for purposes of determining whether a response was timely filed.

Date: OCT 8, 2009

Compensation and Pension
Exam Report
VA DOMICILIARY,
WHITE CITY OR.
** FINAL **
Processing time: 35
For HEART Exam

Name: SPRINKLE, JIMMY RAY SSN:
C-Number:
DOB:

Address:
City,State,Zip+4: Res Phone:
Bus Phone: UNANSWERED

Entered active service: MAY 31, 1973 Last rating
Released active service: FEB 19, 1974 exam date:

Priority of exam: Other

Examining provider: ADEN-WANSBURY,CORY
Examined on: OCT 7,2009@10:30

Examination results:

LOCAL TITLE: C&P EXAM
STANDARD TITLE: C & P EXAMINATION NOTE
DATE OF NOTE: OCT 07, 2009@10:30
ENTRY DATE: OCT 07, 2009@11:21:51
AUTHOR: ADEN-WANSBURY,CORY
EXP COSIGNER:
INSTITUTION: WHITE CITY VAMC
DIVISION: WHITE
URGENCY: STATUS: COMPLETED

COMPENSATION AND
PENSION EXAMINATION
HEART

REVIEW OF MEDICAL RECORDS

C-FILE WAS: Reviewed
MEDICAL RECORDS WERE: Reviewed

PROBLEM: Mitral Valve Prolapse
DATE OF ONSET: August 1990
CIRCUMSTANCES AND INITIAL MANIFESTATION OF THE DISEASE OR INJURY: Fatigue, chest pain. Work up at VAMC Birmingham, Alabama, revealed mild mitral valve prolapse, ant. leaflet with grade 1/4 mitral incompetence.
COURSE SINCE ONSET: Stable
CURRENT TREATMENT(S) FOR THIS CONDITION: None
****

PROBLEM: familial myoclonus
DATE OF ONSET: Diagnosed approximately 1990
CIRCUMSTANCES AND INITIAL MANIFESTATION OF THE DISEASE OR INJURY: Involuntary movement of L facial muscles, especially when turning head to L, beginning in 1975. MRI, CT, EEG have been normal. Family history of movement disorders.

COURSE SINCE ONSET: Stable
CURRENT TREATMENT(S) FOR THIS CONDITION: None
****

MEDICAL HISTORY

IS THERE A HISTORY OF HOSPITALIZATION OR SURGERY? Yes
SUMMARY OF ALL HOSPITALIZATIONS AND SURGERIES:
HOSPITAL AND LOCATION: VAMC Birmingham, Alabama
DATE: August 1990
CARDIAC SPECIFIC PROCEDURES:
REASON OR OTHER TYPE OF SURGERY:
no surgery. Had EEG, and ECHO cardiogram.
****

IS THERE A HISTORY OF TRAUMA TO THE HEART? No

IS THERE A HISTORY OF CARDIAC NEOPLASM? No

IS THERE A HISTORY OF MYOCARDIAL INFARCTION? No

IS THERE IS HISTORY OF CONGESTIVE HEART DISEASE? No
IS THERE IS HISTORY OF RHEUMATIC HEART DISEASE? No

IS THERE A HISTORY OF HYPERTENSIVE HEART DISEASE? No

IS THERE A HISTORY OF SYPHILITIC HEART DISEASE? No

IS THERE A HISTORY OF ENDOCARDITIS? No

IS THERE A HISTORY OF PERICARDITIS? No

IS CONTINUOUS MEDICATION REQUIRED? No
IS THERE A HISTORY OF SYNCOPE? Never
IS THERE A HISTORY OF FATIGUE? Never

IS THERE A HISTORY OF ANGINA? Never

IS THERE A HISTORY OF DIZZINESS? Never

IS THERE A HISTORY OF DYSPNEA? None

PHYSICAL EXAMINATION

GENERAL APPEARANCE:
Slightly obese, Caucasian male, whose upper body is in constant motion, but, other wise, appears oriented to time, place and person and is in no distress, and is alert.

VITAL SIGNS

PULSE: 100 bpm
RESPIRATORY RATE: 24
BLOOD PRESSURE: 160/88 mmHg
HEIGHT: 71 inch
WEIGHT: 240 POUNDS
WEIGHT CHANGE: None

CARDIAC EXAM FINDINGS

JVD: Absent
HEART SOUNDS PRESENT: S1 S2
RHYTHM: Regular
MURMUR: Absent

CLICK: Absent
PERICARDIAL RUB: Absent
ANY OTHER CARDIOVASCULAR FINDINGS:
With veteran's involuntary movement disorder, it is difficult to hear any murmur.

PERIPHERAL EDEMA FINDINGS: None

TESTS

STRESS TEST RESULTS (METS):
Prior evaluations have cleared this veteran as having no physical limitations due to mitral insufficiency. These were conducted by the Socal Security Admin. and are part of the records reviewed.

WAS TESTING FOR LV DYSFUNCTION DONE? Yes

WHAT WAS THE EJECTION FRACTION: 25%

WHAT IS THE HEART SIZE? Normal
METHOD OF DETERMINATION OF HEART SIZE: Echocardiogram

ECG/HOLTER/ECHO TEST RESULTS:
Normal L ventriular function and sisze but there is a 25% ejection fraction, mitral valve prolapse with 1/4 regurgitation.

OTHER TESTS ORDERED AND RESULTS:
EKG wnl
WERE ALL TESTS RESULTS INCLUDED ON THE EXAM REPORT? Yes

DIAGNOSIS

SUMMARY OF ALL PROBLEMS, DIAGNOSES, AND FUNCTIONAL EFFECTS OF HEART DISEASE:
DIAGNOSIS OF PROBLEM: Mitral Valve Prolapse
PROBLEM ASSOCIATED WITH THE DIAGNOSIS: Mitral Valve Prolapse
GENERAL OCCUPATIONAL EFFECT: Not Employed

ARE THERE EFFECTS OF THE PROBLEM ON USUAL DAILY ACTIVITIES: Yes
CHORES: Severe
SHOPPING: Moderate
EXERCISE: Severe
SPORTS: Severe
RECREATION: None
TRAVELING: Moderate
FEEDING: None
BATHING: None
DRESSING: None
TOILETING: None
GROOMING: None
****

DIAGNOSIS OF PROBLEM: familial myoclonus
PROBLEM ASSOCIATED WITH THE DIAGNOSIS: familial myoclonus
GENERAL OCCUPATIONAL EFFECT: Not Employed
ARE THERE EFFECTS OF THE PROBLEM ON USUAL DAILY ACTIVITIES: Yes
CHORES: Severe
SHOPPING: Severe
EXERCISE: Severe
SPORTS: Prevents
RECREATION: Moderate
TRAVELING: Severe
FEEDING: Severe
BATHING: Severe
DRESSING: Severe
TOILETING: Severe
GROOMING: Severe
****

WAS A MEDICAL OPINION REQUESTED? Yes
****

COMPENSATION AND
PENSION EXAMINATION
MISCELLANEOUS
NEUROLOGICAL DISORDERS

REVIEW OF VETERAN'S MEDICAL
RECORDS AND C-FILE

C-FILE WAS:
Reviewed
MEDICAL RECORDS WERE:
Reviewed

PROBLEM: familial myoclonus
DATE OF ONSET: 1975
CIRCUMSTANCES AND INITIAL MANIFESTATIONS: began to have beginning of involuntary movements of L side. Finally diagnosed as Familial Myoclonus, after negative work up, when he was hospitalized at the VA in 1990.
COURSE SINCE ONSET: Progressively worse
CURRENT TREATMENT FOR THIS CONDITION: None
****

MEDICAL HISTORY

HISTORY OF HOSPITALIZATION OR SURGERY? Yes
SUMMARY OF HOSPITALIZATIONS AND SURGERIES:
HOSPITAL AND LOCATION: VAMC, Birmingham, Alabama
DATE: August 1990
REASON OR TYPE OF SURGERY: no surgery; was hospitalized for work up of chest pain and movement disorder
****

HISTORY OF TRAUMA TO THE CNS? No

HISTORY OF CNS NEOPLASM? No

DISORDER(S) BEING EVALUATED

PARAMYOCLONUS MULTIPLEX

MUSCLE AND/OR MUSCLE GROUPS AFFECTED BY MYOCLONIC ACTIVITY:
L side of face, L shoulder, tremor of L leg, torso,
DESCRIPTION OF FREQUENCY AND DURATION OF MYOCLONIC MOVEMENTS:
Intermittent motion, on a daily basis, which waxes and wanes in intensity, worse when stressed or sick.

PHYSICAL EXAMINATION

VITAL SIGNS

PULSE: 100
RESPIRATORY RATE: 24
BLOOD PRESSURE: 160 / 88
HEIGHT: 71 INCHES
WEIGHT: 240 POUNDS
WEIGHT CHANGE: None

MOTOR EXAM

IS STRENGTH NORMAL? Yes

IS MUSCLE TONE NORMAL? Yes

IS MUSCLE BULK NORMAL? Yes

DESCRIPTION OF OTHER MOTOR EXAM FINDINGS:
involuntary motion of L shoulder, and torso, worse turning head to L

SENSORY EXAM

IS LIGHT TOUCH NORMAL? No
DESCRIPTION OF ABNORMAL LIGHT TOUCH:
diminished on L foot

IS PIN PRICK NORMAL? Yes

IS VIBRATORY SENSE NORMAL? Yes

IS POSITION SENSE NORMAL? Yes

NORMAL FUNDOSCOPIC EXAM? Yes

NORMAL MENTAL STATUS? Yes

ARE ALL CRANIAL NERVES INTACT? Yes

ARE REFLEXES NORMAL? No
PLANTAR RESPONSE NORMAL (FLEXOR): Yes
DESCRIPTION OF ABNORMAL DEEP TENDON REFLEXES:
hypoactive DTR's of upper extremities bilaterally

IS CEREBELLAR EXAM NORMAL? Yes

IS THERE EVIDENCE OF CHOREA? Yes
IS THERE A LOSS OF STRENGTH? No

IS THERE IMPAIRED COORDINATION: Yes
DESCRIPTION OF IMPAIRED COORDINATION:
spontaneous, undirected movement of L hand

IS TREMOR PRESENT: Yes
DESCRIPTION OF TREMOR:
tremor of L shoulder, and arm. Some spontaneous movement of R arm.

IS A CAROTID BRUIT PRESENT? No carotid bruits.

TESTS

WERE THE RESULTS OF ALL TESTS INCLUDED IN THE EXAM REPORT? Yes

RESULTS OF TESTS PERFORMED:
EEG WNL, MRI WNL 8/24/90

DIAGNOSIS

SUMMARY OF ALL PROBLEMS, DIAGNOSES, AND FUNCTIONAL EFFECTS

DIAGNOSIS: Familial Movement Disorder
PROBLEM ASSOCIATED WITH THIS DIAGNOSIS: familial myoclonus
EFFECT ON USUAL OCCUPATION: Not Employed
ARE THERE EFFECTS OF THE PROBLEM ON USUAL DAILY ACTIVITIES: Yes
CHORES: Severe
SHOPPING: Severe
EXERCISE: Severe
SPORTS: Severe
RECREATION: Severe
TRAVELING: Severe
FEEDING: Severe
BATHING: Severe
DRESSING: Severe

TOILETING: Severe
GROOMING: Severe
****

WAS A MEDICAL OPINION REQUESTED? Yes
****

COMPENSATION AND
PENSION EXAMINATION
MEDICAL OPINION

A STAND MEDICAL OPINION WAS REQUESTED.
PROVIDERS RESTATEMENT OF REQUESTED MEDICAL OPINION. THIS IS NOT THE MEDICAL OPINION ITSELF:
Familial myoclonus & mitral valve prolapse is due to or a result of administration of Thorazine while on active duty
WERE PRIVATE MEDICAL RECORDS REVIEWED: Yes
WERE SERVICE MEDICAL RECORDS REVIEWED: Yes
WERE VETERANS ADMINISTRATION RECORDS REVIEWED: Yes
WERE OTHER RECORDS REVIEWED: No

(NONSTANDARD EXAMINERS MEDICAL OPINION)
THE CONDITION/DISABILITY Familial myoclonus & mitral valve prolapse IS NOT CAUSED BY OR A RESULT OF administration of Thorazine while briefly on active duty.
RATIONALE FOR OPINION GIVEN: Mitral valve prolapse is not caused by administration of thorazine. There is no evidence that this condition existed or was functionally significant at the time of enlistment, or while on active duty. Tardive

dyskinesia is a side effect of LONG TERM administration of Thorazine. The brief administration of Thorazine in 1974, while the veteran was on active duty, did not cause the appearance of a movement disorder years later, particularly in a patient eventually diagnosed with a FAMILIAL Movement Disorder. Similarly, there is no reason to believe that the brief administration of Thorazine in 1974, would exacerbate a valvular cardiac defect 15-16 years after the fact. It has been suggested that, since the veteran received Thorazine, he might have experienced Tardive Dyskinesia, which could have exacerbated Mitral Valve Prolapse and Familial Movement Disorder. He did not have those diagnoses at that time, and there is no evidence that the veteran suffered tardive dyskinesia, while receiving Thorazine, during active duty, that I can find in the records. When present, this side effect is usually seen in patients who have been on the drug long-term. The Veteran's motility disorder is apparently a manifestation of a genetic disorder affecting multiple members of his family, which would have become manifest independent of the administration of any medications, none of which could have caused the disorder. The records show evidence of early manifestations of neuropsychiatric disease prior to enlistment, consistent with his diagnosis of familial disease.
****

/es/ CORY ADEN-WANSBURY MD

Signed: 10/07/2009 11:21

This exam has been reviewed and approved by the examining provider.