

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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|--------------------------------|---|---------|
| LEMUEL C BRAY, |) | |
| |) | |
| Appellant |) | |
| |) | |
| v. |) | |
| |) | 20-1675 |
| ROBERT L. WILKIE, |) | |
| Secretary of Veterans Affairs, |) | |
| Appellee |) | |
| |) | |

APPELLANT IN AN INFORMAL RESPONSE TO APPELLEE BRIEF OF 06/16/2020

Re: CAFC ORDER 07/22/2020, DOCKET 16

STATEMENT OF THE CASE

Appx103-108 is the CAVC Docket Report, Bray v Wilkie, Vet. App. 17-2990.

QUESTIONS ON APPEAL:

1. Does the Appellant have a Fifth Amendment “property right” to copies of all probative documents in his VA Medical File constructively of record as indicated in the Appellant’s CAVC Rule 10, Nov 18, 2017 RBA Dispute, Bray v. Wilkie, Vet. App. 17-2990, Appx109-115, to be in the RBA for the purpose of briefing the BVA and the CAVC? The Appellant complained of the incompleteness of the Record at the BVA Hearing on 08/15/2016 via his attorney on Appx137, and previously with FOIA/Privacy Act letters.

2. Does the Appellant have a right to all probative evidence in custody of the Appellee to be provided to the BVA on an appeal of a rating decision? The Appellant is appealing the arbitrary and capricious act by the CAVC in failing to enforce the CAVC Rule 10(b) CAVC Orders, 12/01/2017, Appx148 and 07/17/2018 Appx149-150 including the arbitrary and capricious act in the 10/15/2018 conference provided by the 10/01/2018 Order, Appx151, of trying to bully the Appellant into giving up on obtaining the withheld evidence in the custody of the Appellee needed for the Appellant's briefs. There is no transcript provided in the Docket of the Conference. This unconstitutional ongoing act of years of denial of due process in providing the Appellant requested evidence in the custody of the Appellee is arbitrary and capricious and arbitrarily and capriciously supported by the CAVC.
3. Has the CAVC Clerk's Order of October 17, 2018, Appx152, deprived the Appellant of Fifth Amendment Due Process in depriving the Appellant of probative documents necessary to prepare his opening brief in *Bray v Wilkie*, Vet. App. 17-2990 asking for a remand to the BVA for finding of facts based upon all constructively available probative documents of temporal lobe epilepsy (TLE) residuals of his TBI confirmation and treatment relative to his appeal of the Board of Veterans' Appeals Decision,

May 11, 2017, BVA Docket No. 15-34 597 (Appellee's Appx8-44)

constituting a basis for his TBI rating to be higher and a separate rating for his TLE?

4. Does Section 4 of the Fourteenth Amendment guarantee veterans' Fifth Amendment property rights as debts for examinations, treatment, and compensation according to law and regulations of SC injuries or conditions? (Appellant's Informal Brief, Box 2, 3, 4 & 5) Can the Appellee "arbitrarily and capriciously" withhold evidence in the Appellee's custody from the BVA and the Appellant because it has not been provided by the VA Medical Division to the Benefits Division or copies have been removed from the C&P file purposely or accidentally misfiled?
5. How does the Appellee's arbitrary and capricious avoidance of 38 CFR § 4.42 compliant C&P injury examinations affect the effective dates considering the Fifth Amendment property right of compensation and the Appellee's deceptiveness in avoiding providing that property? (compensation outcome)
6. Why did the Appellee not provide the detail required by the CAVC Clerk's December 1, 2017, Order Appx148, and the CAVC Clerk's July 17, 2018 Order, Appx149-150? (Appellant's Informal Brief, Box 2, 3, 4 & 5)

7. Did the CAVC Clerk's Office deny the Appellant due process by refusing to forward the Appellant's 11/15/2018 NOA, Appx153-154, of the Clerk's finale closing order of the Appellant's CAVC Rule 10, 11/18/2017 RBA Dispute, Bray v. Wilkie, Vet. App. 17-2990, Appx109-115, to the CAFC as required by FRAP 3(d):

"...The clerk must promptly send a copy of the notice of appeal and of the docket entries---and any later docket entries---to the clerk of the court of appeals named in the notice";

causing undue delay in the Appellant's appeal processing? Is it the jurisdiction the court being appealed from, or is it the jurisdiction of the appeal to court, to decide the timing and validity of an appeal? Appx155-157 is a copy of the CAVC's "Deputy Operations Manager's" CAVC letter docketed 02/08/2019 returning the filing fee check stating,

"We are returning your personal check, because it is what the Court charges to file an appeal to the Federal Circuit Court and your active case is not at that stage right now."

(Appellant's Informal Brief, Box 2, 3, 4 & 5) The Appellant's briefs were impeded by the failure to provide all probative medical documents in the custody of the Appellee that were unavailable to the BVA for fact finding.

8. Are 38 CFR § 4.42 compliant examinations a property right under the Fifth Amendment creating unadjudicated claims for any covered "all systems of

the body affected” that are ignored in examinations because they were not “specifically claimed” or specifically appealed? If so, would this include tinnitus resultant from noise trauma hearing injury loss? Left thumb articulation with the wrist because of ankylosis of the thumb carpometacarpal joint, 38 CFR § 4.71(a) 5215 (4)—5224 unfavorable 20%? Can the examination of the wrist injury be limited to only the articulation of the carpometacarpal joints of the fingers excluding the thumb carpometacarpal as has repeatedly been done arbitrarily and capriciously ignoring 38 CFR § 4.42? (Appellant’s Informal Brief, Box 3, 5, & 6)

9. A further example of the Appellee’s disregard of the Appellant’s Fifth Amendment due process rights, not raised in question before the CAVC, but available to be answered by the court on its own volition in the interest of saving time and rendering justice, has arisen in the Appellant’s review of the extremely disorganized RBA. Knowing the Appellant was diagnosed with a visual spatial disability, 09/01/1985 Neuropsychological Test Report , (RBA 3871-3874), and was living homeless (on the street and between relatives) at the time unable to maintain his own file copies; did the Director of Denver VARO, to provide cover for the Denver VARO Director’s July 20, 1998 letter to the VA OIG, Appx158-160, by hiding the denied to

exist, now unadjudicated timely filed Appellant's Substantive Appeal of November 26, 1994, Appx161-166, in response to the Appellee's May 26, 1994 SOC, Appx167-187; and did the Appellee's Director of the Denver VARO, arbitrarily and capriciously, grossly disorganize the Appellant's file that had been organized according to internal VA Directives, by Bobby Ogden, a VA Central Office employee, in 1995-1996?

10. Does the November 26, 1994, Substantive Appeal, Appx161-166, substantive response to the May 26, 1994 SOC, Appx167-187, make the 03/08/1993 NOD, Appx188, still open? (08/25/1992 Rating Decision Appx189-192)
11. Does the extreme RBA disorganization deprive veterans of mental category IV, III, veterans with PTSD, and with organic brain syndrome disabilities of due process under the ADA? (A digital RBA could be organized with folders, including a duplicate folder, and bookmarks to meet the old standard of right side, left side in ascending date order with tabs) (Appellant's Informal Brief, box 2, 3, 4, 5& 6)

ARGUMENT

The Appellee's Informal Brief appears to attempt to distract the court from the above direct primary appeal questions. Did the C&P examiners and the BVA

have a complete historical medical file on which to render facts and fact finding?

And did the Appellant have a complete file on which to base his briefs?

The Appellee is apparently trying to mislead the court by misrepresenting the contents and purpose of Appx109-115 Document 14, page 5, to be complete:

“all of the records discussed by the Board in the decision on appeal are contained in the RBA.”

(See the Appellant’s accompanying motion to provide specific copies that were not in the RBA provided by the Appellee to C&P examiners, the Rating Officers and the BVA) All missing Specialist Examination Reports, Neurological reports, Seizure Clinic Progress Notes, Psychiatric Progress Notes, EEG reports in the Appellant’s Medical Division Medical File, which is in the custody of the Appellee, were clearly probative to the BVA findings of fact and not all were in the Record before the BVA. To be compliant with 38 CFR § 4.1, and particularly § 4.2:

“It is the responsibility of the rating specialist to interpret reports of examination in the light of the whole recorded history, reconciling the various reports into a consistent picture so that the current rating may accurately reflect the elements of disability present.”

If the whole record is not available, obviously neither the rating specialist nor the BVA Judge can reconcile the facts and the Appellant is denied due process because evidence was withheld by the Appellee. Clearly the items withheld by the

Appellee are probative of the “*whole recorded history*” in issues before C&P examiners, the Rating Officers, the BVA and appeal to the CAVC.

The Appellee arbitrarily and capriciously limited the Appellant’s noise trauma injury Hearing Loss claim in the Rating Decision of 02/25/1976, Appx197-201, to decibel loss only having limited the noise trauma injury hearing loss examination of 07/31/1975 to decibel loss only. The Rating Decision of 01/22/1992, Appx193-196, was arbitrary, capricious and clearly erroneous in not finding that the 5 APR 1965 EENT Consult noting tinnitus, is a CUE causing a loss of employability for safety reasons as indicated by the Great Lakes Naval Base’s denial of a fork lift operator’s permit for safety reasons on the 04/05/1965 as indicated in the ENT Consultation. To the veteran, hearing loss from tinnitus or decibel loss is hearing loss and claimed as such not having read the regulations separating the two modes.

Reason and Equilibrium 25 Fed. Circuit B.J. 519.pdf (by Jenny J. Tang, Associate Counsel at the BVA, DVA and CAVC Bar Association’s Board of Governors, provides inciteful thought for “the perfect system” referencing the system as a “game.” Unfortunately, as in all games with numerous players, there are cheaters who perceive, rightly or wrongly, it in their interest to benefit by cheating, even if, just for the euphoria they gain in getting away with cheating.

In the Appellant's specific petition, the CAVC Clerk who conducted the 10/15/2018 hearing from the CAVC Clerk's Order on 10/1/2018, Appx151, has perceived it in his interest, real or misperception, to unjustly cheat for some personal benefit perceived; and to side with the Appellee's Attorney in blocking the retrieval of evidence probative to the appeal and evidence probative to previous and current administrative level actions.

1. The Appellee Attorneys have perceived it in their interest to block the retrieval of missing probative evidence, and with real or misperceived self-benefit, to unjustly cheat by ignoring the CAVC Clerks orders, Appx148, and Appx149-150, regarding the detail required to be reported and the actual retrieval of the evidence that should be in the RBA.
2. AOJ administrative clerks and rating officers have perceived it in their interests, real or misperceived, to unjustly cheat by removing evidence or not ensuring evidence was retained in the C&P Folder. And by ignoring objective evidence in favor of subjective evidence because of perceived self-interests, while not taking the whole record into consideration or obtaining 38 CFR § 4.42 complete compliant exams and complete exam reports as required by 38 CFR. (example: An X-ray report of my left wrist reported as WNL when a surgical revision had long since taken place and

previously reported arthritic degeneration was seen. If it was seen that improvement had taken place, it needed to be specifically stated in the report or the previous reports should have been noted with no change. No improvement had taken place though indicated by a WNL reading.)

3. DVA Medical Division Clerks have perceived it in their interests, real or misperceived, to unjustly cheat as far as the rules, seeing it in their interests to deny requested medical evidence and documents and copies of base objective evidence to the veteran and to the AOJ.
4. The DVA Medical Division individual, who in a petty vindictive interest, destroyed the Petitioner's DVA Medical File in 1987 causing Progress notes, that may have had more indications of seizure activity (under the careful clinical follow-up recommended), that were not copied to the CA Department of Rehabilitation in 1985 to be permanently irretrievable. (perhaps a friend of Dr. Gordon who, because of the Appellant's letters, was forced into retirement.)
5. The Petitioner has come to believe that he has been the subject of "whistle blower" type of retaliation for his activism on behalf of veterans with organic brain syndromes that began with his letter writing in 1986 which included complaints about Dr. Gordon and his arbitrary, capricious and

erroneous remarks on the May 13, 1985 psychiatric evaluation with the diagnosis of PTSD.

6. Because of all the above, plus contradictory examinations, the courts and administrative adjudicators cannot consider a VA medical examination report presumptively accurate, and must, on appeal, review the objective evidence or lack thereof in order to make a decision regarding its efficacy. If there is a lack of objective evidence supporting a challenged medical report, the decision must be in favor of the challenge because the historical records show such reports are often arbitrary and capricious to the point of even removing contrary evidence from the file or endeavoring to hide it in a large file.
7. The CAVC should be ordered to provide the voice recording of the Clerk/Appellant/Appellee hearing of October 15, 2018 at 11:00 AM EDT, Ordered in Appx151, on the issue of “agreement” or disagreement with the completeness of the RBA. The Appellant would not have, as immediately as possible, appealed the order if he had agreed with the completeness and accuracy of all documents in the RBA.

8. Can a CAVC Justice or Magistrate avoid being held to account for failing to follow laws and regulations in a Decision and Judgement by simply not noting specific contrary Documents in the Decision and Judgement?
 - a. Is this not the same escape from legal accountability as the failure of the Appellee and the Appellee's examiners by avoiding doing mandated examinations by mandated qualified examiners by avoiding mentioning and providing probative evidence?
 - b. The Appellant covered all basis of Fifth Amendment Due Process by bringing the Appeal under the relevant Constitutionally guaranteed rights. To allow a Court to escape being overturned by simply not mentioning Documents in the Docket Report, the law and regulations not being followed in the Decision runs contrary to the Common Law Reasonable Man's reasonable thought.
9. The Appellant stipulates, and will stipulate to the BVA, that he is more employable at 79 than he was at 35 years of age do to finally being appropriately treated in 2015 for his temporal lobe epilepsy. *But he experienced more than 46 years of diminished employability and nearly 31 years of unemployability because of the failure to follow 38 CFR § 4.42 by the adjudicators and examiners, causing a severe economic loss that needs*

to be addressed by remand or mandate or a Decision granting remedy by the Court. If remanded or mandated all probative medical reports in the “VA medical record” must be available to the fact finder. The Court has authority to issue its own judgement rendering justice to these long-delayed circumstances.

CONCLUSIONS

1. The Court should order the Appellee to provide to the Appellant copies of the Medical Division Medical File PROGRESS NOTES from the VAMC West Los Angeles Medical Clinic Seizure Clinic following the 10/18/1990 visit to the end of the following by the Seizure Clinic. And the VAMC, id, Back Clinic (aka Spinal Clinic) PROGRESS NOTES including 04/29/1991 visit cited on the Medical Certificate dated 04/29/1991 to the end of being followed by the Back Clinic. These are not in the over 10,000 two-sided hard copy pages provided by VARO Cheyenne or the copies of the RBA including the Amended RBA provided by the Appellee.
2. The Court should remand to the CAVC or Mandate to the BVA that the Appellant’s medical file should be completed by the Appellee within 90 days with all referenced documents by other documents or detail why and how the documents became missing from the file and hold a BVA fact

finding hearing within 90 days on the subject matter in the Appellant's incomplete adjudications.

3. In a precedent setting decision, the Court should hold that all failures to do full 38 CFR § 4.42 compliant examinations including arbitrary and capricious orders to examiners that they may not deviate from the specific ordered examinations result in an EED to the first date of a claim basis that the compliant examination was not done whether or not it was fully available at the time and place to be done based upon other records such as Social Security earnings, job retention ability and other objective records.
4. The Court, on its own volition, could, as a matter of Fifth Amendment Due Process, order the Appellee to develop and forward the unadjudicated substantive appeal to the Executive Director, Compensation Services for the issues under the Executive Director's 38 CFR § 3.321(b) jurisdiction and suggesting, in the interest of justice, the Appellant's long standing constructive claims represented in the reference of that Substantive Appeal should be considered as a basis for EED on all organic brain syndromes prior to the 2008 Congressional change re TBI as unadjudicated claims.
5. The Court should consider re-opening *Bray v Shinseki*, CAFC 12-7005 based upon the afore mentioned unadjudicated appeal and the Appellant's long-

standing effort for veterans with organic brain syndromes being obstructed by the Appellee.

6. The Court should order a remedy for the arbitrary and capricious “whistle blower” retaliatory acts taken against the Appellant for his long-standing activism for veterans with organic brain syndromes resulting from their military service.
7. Because of the demonstrated abuses of the Appellee’s officers, the Court should grant costs to the Appellant, including all costs previously withheld from awards for attorney fees and the Legal Research fees paid and due.

Date: July 27, 2020

SS//LEMUEL C BRAY

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APPENDIX UNDER SEPARATE COVER

And served separately. Appellant's Appendix is a Supplement to the Appellee's Appendix per Rule 30 requiring a combined appendix. Appellant therefore begins his Appendix at Bates Number Appx103 for adding onto the Appellee Appendix.

CERTIFICATE OF SERVICE

I hereby certify, under penalty of perjury under the laws of the United States of America, that on July 27, 2020, a copy of the foregoing Brief in Reply with Exhibits was electronically filed/mailed/faxed, or postage prepaid to:

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July 27, 2020

/s/ Lemuel C. Bray
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