FAX

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2. (202) 273 6385 Re: CAVC Docket 17-2990
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AND

Attorney Ann Gavin-Lawrence RE: SF-95
Reconsideration 021B:GCL:258324

IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

LEMUEL CLAYTON BRAY Appellant, in Pro Se vs. DAVID J. SHULKIN, MD Secretary of Veterans Affairs Appellee,	Docket 17-2990 MOTION TO CORRECT THE RBA

This motion is brought under Rule 10 (b).

There are many missing items from the RBA relevant to the Appellant's claim and appeal. While most of the items are not relevant to the NOA current issue, they are relevant to the BVA Remand and bode for causing a return to the CAVC if not obtained and considered for CUE in previous Rating Decisions and Appeals Decisions. Obtaining a carefully copied, in original order, new, complete copy of the "hard paper" Medical Division OPTR files and IPTR files from the VA Records Management Center should provide most of the missing evidentiary documents and in a reasonably organized fashion while not including much of the superfluous and disorganized documents in the RBA. The rest can be obtained from the Communications Division in the VA Central Office.

Missing, specifically, but not limited to:

1. Multiple Audiology examinations, some just the back page, which should be in the Medical Division OPTR file. (directly related to the issue on appeal; the rest is related to the remand not yet on appeal but likely to be if the AOJ doesn't have it for consideration)

2. Record Management Center CD of 02/09/2017 page 2120, DOCTOR'S PROGRESS NOTES, dated 3 Oct 69.

3. Record Management Center CD of 02/09/2017 page 2531 which is page 2 of RBA page 4000. Page 4000 is page 2532 of the RMC CD.

4. MISSHION HILLS MEDICAL CENTER, Report dated April 22, 1988 referred to on page 2531 of the RBA.

5. DEFERRED OR CONFIRMED RATING DECISION, dated 12/30/88, page 2288 of the 02/09/2017 CD from the VA Records Management Center with provable by the record, deceptive remarks.

6. Page 2096 of the RMC CD of 02/09/2017 dated 24 May 1989 erroneously in the Appellant's file that led to an erroneous decision on SDD.

7. Page 2254 of the RMC CD of 02/09/2017 dated 5/25/89 apparently referencing a missing 6-2-89 psychiatric exam. Box checked is Examination as scheduled.

8. Signed page of Section C of Examination Report form on page 2271 of the RMC CD of 02/09/2017 signature and date only of the 6-2-89 psychiatric examination.

9. The referenced 6-2-89 psychiatric examination that is probably a re do of the 3-10-89 examination that ignored objective data in the file in favor of subjective opinions from subjective history and also ignored generally accepted clinical practices of psychiatry with statements made.

10. RMC CD of 02/09/90 pages 1913 & 1914, EMMERGENCY ROOM NURSING RECORD date 9/16/90 at 4:10 PM.

11. 5 months of OPTRs for Seizure Clinic visits at the West Los Angeles Medical Center that started 2 weeks from 9/17/90, reference RBA pages 3290 (page1) & 3289 (page 2).

12. 6 or more months of OPTRs for Spine Clinic or Back Clinic reference RBA 2996 dated 9/12/91included in IPTR file.

13. The Appellant has a copy of the 10/28/91 Back Clinic visit which is now missing from the IPTR file but dates the visits from April 1, 1991 which was in the copies provided by Cheyenne VARO.

14. 1-5-90 X-ray report of X-ray ordered on RBA page 3256, pages 1985 &1986 of the RMC CD of 02/09/2017.

15. RMC CD dated 02/09/2017 pages 2192 & 2193 Form 21-4138 with employer's statement.

16. Documents requesting reconsideration to BVA for October 17. 1990 decision and relative to 1994 appeal in letter dated October 25, 1994, RBA page 2792.

17. Neuropsychological Assessment, undated, but dated by a Progress Note on RBA page 3343 as 8/16/91 in IPTR. Appellant has a copy of this Assessment from the hard copy of the file sent to Appellant by Cheyenne VARO.

18. Multiple additional hard copy radiographic reports that will be in the Medical Division OPTR and INPTR files. Probably omitted because of odd size.

19. Multiple EEG reports that should be in the Medical Division OPTR file. Probably omitted because of odd size.

20. Lemuel C Bray's letter to the BVA dated November 26, 199[illegible] page length not the longer letter, requesting assistance to obtain MRI Films and EEG tracings.

21. Denver VARO internal memos and VAOIG letters responding to the Appellee's alleged failure by a DRO to provide a hearing in Cheyenne in 1994 or 1995 on the appeal of the 1/22/1992 Rating Decision, (RBA page 3106) in addition to the Denver VARO letter dated JUL 20, 1998, RBA pages 2626 thru 2628, closing the claim appeal on June 19, 1995. The Appellant has an interoffice memo provided by the Communications Division in the VA Central Office last year. It is available from the same resource to the Appellee's attorney for inclusion in the RBA as are probably many of the other missing items. Use the Denver VARO JUL 20, 1998 letter to the VAOIG as a reference point to get the memos. The Appellant has copies of additional related inter office Denver Varo memos.

22. Missing IPTR from May 8, 1993 thru June 11, 1993. Referenced on RBA page 2464.

23. Denver VARO letter of June 19, 1995 Closing the appeal of the 1/22/1992 referenced on RBA pages 2626 & 2710.

24. The missing letters from me stating periods of unavailability for a hearing because of traveling for obligations to family and friends including the transfer to DC when the hearing hadn't been provided while I was in Wyoming before my move to DC. The letters are detailed on that interoffice memo provided to me by the Communications Division in the Central Office last year.

The RBA is 4529 pages long, much of it duplications, and is not in any way correlated to the 3151-page CD that I received dated 02/09/2017 which I have done considerable work on. Nor, is it in any systematic order other than the minimum required by Rule 10.

It is presumed the missing items were removed from the files by adjudicators who either failed to return them to the file room or when returned, were miss filed or not filed. Or were among the documents shredded by employees to remove cases from their desks. Or the copy person failed to include because they didn't fit the automatic feeder.

The Appellant has had to reference pages from the CD from the VA Records Management Center as; 02/09/2017 CD that the Appellant has not yet found in the RBA. I can forward to the attorney for the Appellee via Adobe Creative Cloud or by Fax broken up for large files, as the attorney requests by phone or email, items that I have that escaped becoming paper mashie from water damage from my original copies, or from the hard copies sent to me by Cheyenne VARO in 2015 or were on the 1420-page CD provided to Attorney Ellermann for the BVA hearing.

The items that the Appellant does not have, have been previously requested by FOIA on numerous occasions and responded to with items from the C&P file in a non-denial denial response. *"This is all of the records we have,"* quoting the letter dated, February 9, 2017, (RBA page 1056) from The Records Management Center in response to my FOIA of August 11, 2016, (RBA 1399 thru 1405). Quoting from the Appellant's letter:

> *"I'm requesting all C&P Documentation that was not included on the CD provided to my attorney, Vanessa Ellermann via correspondence dated March 28, 2016.*
>
> *There is a big gap from the time I was in Japan until 2009. In that time, I had a claim and an appeal that is either incomplete or denied that there is no documentation of on the CD.*
>
> *<u>Also, I'm attaching a previous request for Medical Division copies of Medical files to replace documents that have gone missing from my C&P file</u>."*

The Record Management Center is under the Appellee's jurisdiction and is not responding with the missing items from the hard copy of the pre-computerized Medical Division

OPTR and IPTR files which fall under the jurisdiction of the Director of the Medical Division which was the former position of the Secretary and has not provided a complete record of the correspondence via the U S Consulate from 1998 thru 2012 regarding attempts to get a C&P exam for pending claims and appeals. The Appellant has the back and forth emails in the Appellant's email file if they are not obtainable from an official source.

The Appellee's attorney may stipulate that efforts to obtain a qualified English Speaking Neuropsychological Assessment were impossible and that therefore all claims and appeals between 1998 and the present are still open for decision on remand in lieu of those records.

The RBA is missing the response to the VAOIG by Denver VARO acknowledging the failure to give the requested hearing in the appeal of the 1/22/1992 Decision. The Appellant has a copy of the memo (which is not in the RBA) sent to the Appellant by the Communications Section in the Central Office detailing the dates of the Appellant's letters, that seems to have been used to prepare the letter the Appellant saw in the Appellant's file on the Appellant's last review of it in Washington, DC, dates the Appellant would be unavailable, dates of the AOs letters in the period of unavailability and dates of hearings set in the period of unavailability on those same letters. The letter from Denver VARO to the VAOIG in the RBA isn't the original one that the Appellant saw that correlates to the memo provided. The record shows an apparent effort by the DRO to take a short cut to clear his desk and was complained about to the VA OIG. And many of the missing records may be attributed to that DRO.

<u>The Appellant requests the Appellee's attorney fulfill all previously requested FOIA letters, from January 1, 1990 through the present</u>, as required by 38 CFR 3.159, that were responded to with non-denial denials from the Medical Division or stipulate to the Appellant's

belief of what is on those documents, and radiographic films, which had incomplete reports not rejected by AOs, as required by 38 CFR 3.159 and 4.2, for failure of completeness and failure to provide etiology opinion statements, and EEG tracings which would show, if given to a second opinion professional requesting a complete report including an etiology statement form the medical history included in the Appellant's medical file.

By 1990 these items were produced digitally except for the hard copy OPTRs & IPTRs and should be archived somewhere for research access. The films, that were shown to the Appellant, would have been retired after 5 years but, replaceable from the digital data on CD for viewing. The hard copy EEG tracings are probably similarly disposed of on the Telemetry Units, but the digital video and tracings should be reproducible from archives on CD for viewing.

The several "abnormal" EEGs and 9/16/1990 IPTR in the RBA should be sufficient to provide the Appellee's attorney's grounds for stipulations as to the similarity of what could or would be produced given the West LA VARMC was using the telemetry units for a "cutting edge" theory research leading to "professional inattentive blindness" that led to over a decade of wrong information regarding temporal lobe seizures being diagnosed by VA physicians, and other physicians, as pseudo and psychogenic seizures and being passed as "clinically approved," affecting all Americans with this particular failure to diagnose and treat temporal lobe seizures.

The Appellee's attorney can, while keeping in mind the Appellant's TBI residuals which cause the Appellant to be off and on center, rely upon the Appellant's residual 126 verbal IQ and 13 plus years as a Naval Hospital Corpsman independent duty qualified and having been

shown the Radiographic films by the attending physicians, and while being present when the EEG technicians left my side to get a physician for a stat reading of an EEG by the attending physician, or while being present when the ultra sound technician left my side to obtain a stat viewing by the attending physician and having noted them in writing over several years in requesting the copies of the films on the refusal of the medical division to do complete reports including etiology assessments as required by 38 CFR 3.159 and 4.2.

The Appellant will raise no objection to an Appellee's request for an extension to 30 days of the time to respond to this request to correct the RBA.

At the same time, the Appellant requests the opportunity to make further requests to correct the very lengthy and complex RBA in the interest of getting it right the first time and not having to carry this action out further.

Dated this Eighteenth day of November 2017.

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