

Dept. Of Vet Affairs
Board of Veterans Appeals
810 Vermont Ave. NW
Washington, D.C.

In reply to: [REDACTED]
[REDACTED]

Attn: VLJ [REDACTED]
re: New and Material Evidence

January 7, 2018

Dear Judge [REDACTED],

Mrs. [REDACTED] hereby submits an Independent Medical Opinion (IMO) in support of her husband's appeal (see Exhibit A-[REDACTED] MD). Please also consider this a waiver of AOJ review of the new IMO in the first instance as new and material evidence.

In addition, counsel wishes to amend the record. As Mr. [REDACTED] had no effective legal counsel prior to his demise, it appears the Agency of Original Jurisdiction might not have considered nor developed the claim for glioblastoma on a direct basis (see *Combee v. Brown* 34 F.3d 1039, 1043-44 (Fed. Cir. 1994)). As noted on Mr. [REDACTED]' DD 214, his MOS was motor vehicle operator. This exposed him to gasoline, petroleum products, numerous solvents and cleaning agents throughout his four-year enlistment-irrespective of his presumptive exposure to Camp LeJeune's water supply.

The list of cancerous contaminants published in the Federal Register (81 Fed. Reg. At 62,914) in 1982 included Trichloroethylene (TCE), Perchloroethylene (PCE), benzene and vinyl chloride. One ingredient common to both exposures (i.e. presumptive for Camp LeJeune water and motor pool operators) on the list of the chemicals is benzene. Benzene is a natural ingredient of crude oil and a major part of gasoline. See <https://www.cancer.org/cancer/cancer-causes/benzene.html> (last visited 1/07/2018). The American Cancer site also notes that vehicle exhaust is laden with it.

Independent Medical Opinion of
Dr. [REDACTED] MD, MPH

On 10/21/2016, [REDACTED] was asked to opine on Mr. [REDACTED]' service connection for glioblastoma multiforme, secondary to exposure to CLCW (Camp LeJeune Contaminated Water). The Independent Medical Evaluation (IME) conducted by Dr. [REDACTED] cited many pre- and post-service risk factors.

Mrs. [REDACTED] attests, under penalty of perjury per 28 USC §1746, and avers the following facts are true:

1) Mr. [REDACTED] preservice risk factor of "Service Station Operator" consisted of three months employment in [REDACTED] Georgia as a tow truck driver for the B&B Service Center (gas station) and changed customer's tires.

2) Mr. [REDACTED] second preservice risk factor as "Service Station Operator" subsequent to his employment at B&B consisted of two months employment at [REDACTED] Georgia's Hollis Service Center (gas station) in a similar role. Both employers had other personnel assigned to pump gasoline which severely discounts Dr. [REDACTED] conception of preservice exposure to benzene.

3) Mr. [REDACTED]' post-service risk factor for "metalworker" is unfounded. Structural engineers and their technicians x-ray weld joints and have risk factors for exposure to ionizing radiation. Mr. [REDACTED] was a structural worker who bolted together steel beams on high-rise apartments. He was never within any risk vicinity for ionizing radiation.

4) Dr. [REDACTED] notes construction workers, to include "metalworkers" are exposed to far higher dosages of "**polyvinyl chloride**" (emphasis added) than the trace levels found at Camp LeJeune. Appellant would point out that there were no trace levels of *polyvinyl chloride* mentioned in 81 Fed. Reg. At 62,914 but rather "vinyl chloride"- a completely different chemical and one not involved specifically with contaminated water at Camp LeJeune.

Appellant asks the Board to weigh the credibility of Dr. [REDACTED] Independent Medical Opinion if she is indeed opining on a chemical which is *not* on the list of Camp LeJeune's carcinogenic chemicals.

5) While Mr. [REDACTED] might have smoked for several decades, Dr. [REDACTED] presents no correlation between tobacco usage and glioblastoma-and indeed denies it under "Disease Specific Discussion". Mr. [REDACTED] did not suffer from lung cancer or report pulmonary distress throughout his life.

6) Dr. [REDACTED] states alcohol consumption may be a risk factor but proffers no cite(s) to support this contention. Mr. [REDACTED] was a social drinker-at best-during his lifetime but never drank on a daily basis according to Mrs. [REDACTED].

7) Dr. [REDACTED] notes glioblastoma has been associated with the viruses SV40, HHV-6 and cytomegalovirus. Pathology for Simian Virus 40 (SV40) was not reported in the pathology report of Mr. [REDACTED] excised tumor.

(see <http://www.sv40foundation.org/cpv-link.html> last visited 1/7/2018)

Human Herpes 6 virus (HH-6A & HH6B) is the virus most commonly associated with the childhood disease Roseola. Mr. [REDACTED] had no history of Roseola infection nor was he ever diagnosed with it.

(see <https://emedicine.medscape.com/article/219019-overview-> last visited 1/5/2018)

Similarly Mr. [REDACTED] was never diagnosed nor exhibited any of the well-known symptoms of the cytomegalovirus.(see <https://www.cdc.gov/cmV/overview.html> last visited 1/7/2018). Absent proof of any diagnoses of the above-mentioned viruses, they can hardly be included in a short list of potential risk factors for contraction of Mr. [REDACTED] glioblastoma.

8) Mr. [REDACTED] has also never had leukemia or lymphomas or impaired immune responses prior to diagnosis and onset of glioblastoma.

9) Dr. [REDACTED] goes on to list diseases and risk factors too numerous to enumerate which are inapplicable to Mr. [REDACTED]. Additionally, the IME submitted to counsel by Mrs. [REDACTED] on bright yellow 8.5"x11" paper, beginning on pages 20-22 of 127, has no footnote numbers to correlate to opinion expressed in the body of the **Disease Specific Discussion**. The absence of the cite number to footnote prevents other peer-situated medical specialists from opining on the validity of Dr. [REDACTED] reasoning and her belief that the glioblastoma was "less likely than not (less than 50% probability) caused by or the result of exposure to water contaminants at Camp LeJeune." This deficiency severely depreciates the probative value of the IMO and the power to convince others.

What appears missing from the above IMO is an accurate, probative analysis of the actual risk factors Mr. [REDACTED] was exposed to rather than a litany of all the risk factors he most certainly was not exposed to. Reasonable minds can agree the most extensive exposure was to *known carcinogenic substances* including above-average exposure to benzene. When the VA sets out to provide an examination, it must be a thorough and contemporaneous examination (see *Proscelle v. Derwinski*, 2 Vet. App. 629,632 (1992); *Green v. Derwinski*, 1 Vet. App. 121,124 (1991)). Dr. [REDACTED]'s opinion is lacking in discussion of Mr. [REDACTED]' possible direct service connection risk factors and thus is not probative.

The United States Court of Appeals for the Federal Circuit has emphasized that VA has a duty to fully and sympathetically develop a Veteran's claim to its optimum. *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998). This duty requires VA to "determine all potential claims raised by the evidence, applying all relevant laws and regulations," (see also *Roberson v. West*, 251 F.3d 1378, 1384 (Fed. Cir. 2001)), and extends to giving a sympathetic reading to all pro se pleadings of record. *Szemraj v. Principi*, 357 F.3d 1370, 1373 (Fed. Cir. 2004).

In *Combee v. Brown* 34 F.3d 1039, 1043-44 (Fed. Cir. 1994), the Federal Circuit Court of Appeals held that all claims for a presumptive disease are not so limited. Direct Service connection under 38 USC §1110 and 38 C.F.R. §3.303(d) is to be inferred and must be addressed in the first instance.

In Hodge v. West, 155 F.3d 1356, 1362-63 (Fed. Cir. 1998) the Federal Circuit described the obligations of the Department of Veterans Affairs thusly:

I[m]plicit in such a beneficial system has been an evolution of a completely ex-parte system of adjudication in which **Congress expects [the DVA] to fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits.** Even then, [the DVA] is expected to resolve all issues by giving the claimant the benefit of any reasonable doubt. In such a beneficial structure there is no room for such adversarial concepts as cross examination, **best evidence rule**, hearsay evidence exclusion, **or strict adherence to burden of proof.** (emphasis added)

In addition, Norris v. West, 12 Vet. App. 413, 421 (1999), Roberson v. Principi, 251 F.3d 1378 (Fed.Cir.2001) and Moody v. Principi, 360 F.3d 1306 (Fed. Cir. 2004) are on point as well. Clearly, Mr. [REDACTED] a pro se Veteran, and now Mrs. [REDACTED] who was recently substituted following his demise, did not have the claim nor the appeal developed to its optimum yet to consider glioblastoma multiforme on a direct service connection basis. It is irrelevant now who might have overlooked 38 CFR §3.304(d) and failed to develop any evidence that might be material to a decision for direct service connection.

Independent Medical Evaluation
by [REDACTED]:

A requested opinion by Veterans Law Judge [REDACTED] for an Independent Medical Evaluation (IME) dated November 2nd, 2017 was received by counsel on December 26th, 2017. Dr. [REDACTED] was asked to "provide a medical opinion as to whether it is at least as likely as not that the Veteran's glioblastoma is related to active service, to include exposure to contaminated water at Camp LeJeune."

Appellant notes that the Board's requested opinion includes not just the presumptive exposure appeal but also a more distinct request expanded to include direct service connection. In contrast, the prior opinion of Dr. [REDACTED] opined solely on the correlation to exposure to contaminated water. For this reason and others, Mrs. [REDACTED] respectfully requests the Board disregard her opinion as being speculative (see *Bloom v. West*, 12 Vet. App. 185, 187 (1999)) (speculative medical opinion cannot establish in-service medical nexus to service). Mrs. [REDACTED] feels the Independent Medical Opinion by Dr. [REDACTED] contains far more current scientific data and is more on point.

Dr. [REDACTED]'s opinion acknowledges that three of the five chemicals in the groundwater are known carcinogens and a fourth is "reasonably anticipated to be a human carcinogen". This statement embodies the crux of the problem-the uncertain knowledge about these chemicals and their carcinogenic properties. Reasonable minds can agree that the paucity of statistical data thwarts any ability to spot trends and predict who will or who will not develop tumors of the brain and under what set of circumstances. Absence of evidence is not negative evidence (see *McLendon v. Nicholson*, 20 Vet. App. 79, 84 (2006)). Ample proof of this ongoing increase in knowledge is the ever-continuing list of presumptive diseases being added to the list of herbicide-related disorders.

Dr. [REDACTED] opined on page two on the history of Mr. [REDACTED] "reported occupation as an iron worker". The field of the construction of iron extends from the mine producing iron ore all the way to the foundry where the iron is extracted and turned into steel. The finished product is transported to construction sites and subsequently assembled. Dr. [REDACTED] focused myopically on one narrow facet of iron production-as an iron worker in a foundry exposed to smelting. However, as Mrs. [REDACTED] has attested, he was not involved in this particular occupation. Thus, the consideration of that as a positive or negative risk factor is not probative to the discussion. Weighing it as a potential risk factor detracts from the probity of his IME.

Dr. [REDACTED]'s summary is predicated on there being no evidence for the belief that glioblastoma is service connected on a presumptive basis. He bases this heavily on the absence of glioblastoma on the list of eight diseases recognized as presumptives. As for service connection on a direct basis, the evidence against is essentially absence of evidence as well. Nevertheless, one of the chemicals Dr. [REDACTED] points to that contaminated the water supply is one which is shortly to be confirmed as a carcinogen beyond a reasonable doubt. In addition, Dr. [REDACTED] fails to opine on the duration of Mr. [REDACTED] exposure (two years). Notably, there is no discussion as well of his vastly increased exposure simultaneously to benzene in the petroleum distillates he encountered daily in his assigned MOS in addition to the contaminated water supply he bathed in and drank from.

Given this development, direct connection for glioblastoma needs to be addressed in the first instance. Mrs. [REDACTED] would prefer to conserve scarce judicial resources and allow the Board of Appeals to make this decision. Therefore, in aid of this objective, Mrs. [REDACTED] obtained a truly Independent Medical Opinion to address all aspects of the risk factors- and their correlation to Mr. [REDACTED] glioblastoma.

SUMMARY

As the Independent Medical Opinion authored by Dr. [REDACTED] is deficient in regard to a number of facts and even the correct identity of the chemicals involved, appellant feels its probative value has been rebutted. Dr. [REDACTED]'s IME is far more probative but narrowly focuses of the absence of evidence being negative evidence against the claim. However, Dr. [REDACTED]'s IMO discusses actual links between glioblastoma and exposure to the chemicals indicted in the CLCW exposure. This supplemental information also supports a valid reason why direct service connection might be for application as well as presumptive. The Board need not reach the argument as to which of the two risk factors (or both) is the etiologically causative agent. The standard of legal review merely ask for a determination based on the evidence as to whether either one is the culprit.

Based on two equally compelling medical opinions of record-both pro and con- and based on the evidence basically being in equipoise, appellant requests the benefit of the doubt.

Counsel for Appellant wishes to point out he is severely hamstrung by not having a current copy of the Record Before the Agency (RBA) and is unable to ascertain whether direct service connection was even considered at the AOJ level. Haste has been the primary objective. From review of the Statement of the Case, it would appear there was no development in this regard and indeed the Statement of the Case was devoid of discussion on the subject of direct service connection. The fact that the claim was developed at the AOJ solely based on a presumptive basis without any investigation on a direct basis of service connection for glioblastoma is fairly obvious from the evidence of record and Dr. [REDACTED]'s IMO instructions. If counsel is in error, he apologizes in advance.

Based on the new and material evidence submitted, Mrs. [REDACTED] feels the newer IMO places the appeal in equipoise and asks for the benefit of the doubt embodied in 38 CFR §3.102, 38 USC §501(2017).

Appellant appends the New IMO to the appeal with a waiver of review in the first instance at the AOJ. She respectfully requests the Board proceed to an immediate decision on the merits.

Respectfully submitted,

Gordon A. Graham, counsel for appellant
VA#39029 POA Code E1P

Attached:

Exhibit A from [REDACTED] MD Internist and Medical oncologist Board Certified

