

THIS COURT HAS JURISDICTION

Mr. Donaghue filed his appeal from the Court of Appeals for Veterans Claims judgment under 38 U.S.C. § 7292(a) and Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction to review the Veterans Court's decisions, "with respect to the validity of a decision of the Court on a rule of law or of any statute or regulation . . . or any interpretation thereof (other than a determination as to a factual matter) that was relied on by the Court in making the decision."¹ Mr. Donaghue presents only pure questions of law.

The Board denied Mr. Donaghue benefits after relying on two exams, neither of which was legally sufficient to support the Board's denial. They ignored Mr. Donaghue's medical history and failed to explain their medical conclusions. The exams conflicted in reasoning and conclusions, yet the Board relied on both. The Veterans Court erred when it affirmed the Board's decision.

The Veterans Court misunderstood the difference between VA examiners having a) no reasons and bases requirement, and b) a

¹ 38 U.S.C. § 7292(a), (c); *Moore v. Shinseki*, 555 F.3d 1369, 1371 (Fed. Cir. 2009).

duty to provide sufficient detail to the Board for it to make a fully informed decision. The Veterans Court misinterpreted 38 U.S.C. § 5103A(d) so that examiners do not have to address inconsistencies in their conclusions and the evidence or explain their changes to earlier medical experts' diagnoses. But they do under the law.

The Veterans Court ignored § 5103A(b)(1)'s mandate that the VA must obtain private medical records. The Board and the Veterans Court knew of Mr. Donaghue's private mental health treatment records that were not in the record. But the Board did not attempt getting them, and the Veterans Court affirmed the Board's clear legal error.

The Veterans Court's harmless error review was illogical. It determined that any legal error that caused the Board to determine that Mr. Donaghue is not service-connected for a psychiatric disability is harmless because the examiners concluded Mr. Donaghue does not have a psychiatric disability. But the examiners legally erred to produce their erroneous conclusions.

This Court has jurisdiction under 38 U.S.C. § 7292 because Mr. Donaghue is challenging only the Veterans Court's holdings.

SPECIFIC LEGAL ISSUES PRESENTED

- I. Adequate medical rationale.** Exams are adequate only when an examiner provides a medical rationale and a reasoned explanation connecting facts and conclusions sufficient to inform the Board. The VA exams conflict with one another and almost all the evidence. Was it a legal error for the Board to rely on the exams despite the examiners never explaining why their conclusions contradict the record?
- II. Requesting private records.** The VA must try to get all of a claimant's relevant private medical records. Was it a legal error for the Veterans Court to affirm the Board's decision despite knowing that Mr. Donaghue had private mental health treatment records the VA never sought to get?
- III. Harmless error guessing.** The Veterans Court must "take due account of the rule of prejudicial error." To "take due account of" something is to give it the attention it deserves. Did the Veterans Court "take due account" when it illogically assumed its conclusion as a premise?

A STATEMENT OF MR. DONAGHUE'S CASE

The appellant—Bradley Donaghue—appealed the Board's decision.² The Veterans Court affirmed it.³ He now appeals the Veterans Court's decision.

Mr. Donaghue should be service-connected for a psychiatric disability and a related sleep disorder. His psychiatric and sleep claims are intertwined and are discussed together as a psychiatric disability. The two are intertwined because Mr. Donaghue's sleep problems are a symptom of his PTSD. He reported disturbed sleep in 2014 when he sought counseling from the La Cross Vet Center.⁴ His symptoms are nightmares "related to service"⁵ and sleep problems related to anxiety and irritability.⁶ His nightmares relate to the traumatic events he experienced during service.

When a decision in one case could affect another and render the second review wasteful, the two cases should be considered

² Appx11.

³ Appx1-10.

⁴ Appx25.

⁵ Appx315.

⁶ Appx773.

intertwined and analyzed together.⁷ That is the case here: the facts of Mr. Donaghue’s sleep claim and PTSD claim are intertwined, so the Court should review them together.

MR. DONAGHUE’S STORY

I. Mr. Donaghue Survived the Khobar Towers Bombing

Mr. Donaghue was an Air Force aircraft mechanic stationed in Saudi Arabia in 1996.⁸ While stationed on the Arabian Peninsula, terrorists bombed the Khobar Towers in Dhahran.⁹ They detonated a fuel truck filled with 20,000 pounds of explosives near the apartment complex housing Air Force members.¹⁰ The bomb blast blew out windows and a crater 85 feet wide and 35 feet deep. It was felt 20 miles away in Bahrain.¹¹ The terrorists targeted U.S. Air

⁷ See *Harris v. Derwinski*, 1 Vet. App. 180, 183 (1991); see also *Smith v. Gober*, 236 F.3d 1370, 1372 (Fed. Cir. 2001).

⁸ Appx227-245 at Appx236, Appx241.

⁹ See Appx771-772; *25 Years Later: Remembering Khobar Towers*, published June 25, 2021, available at <https://www.af.mil/News/Article-Display/Article/2671543/25-years-later-remembering-khobar-towers/> (last accessed December 11, 2021).

¹⁰ Murray, Thomas W., Jr., Maj. “Khobar Towers Aftermath: the Development of Force Protection” *The Army Lawyer*, October 1999.

¹¹ Appx274-275.

Force members—they killed 19 and injured hundreds more.¹² Mr. Donaghue was only 660 feet away from the blast which launched him “like a projectile being shot out of a cannon” into the cone of an F-16.¹³

Mr. Donaghue was knocked unconscious.¹⁴ He had blurry vision when he came to.¹⁵ But he didn’t receive medical attention until arriving at Isa Air Base on the southern shore of Bahrain, where the Air Force reassigned him a week after the blast.¹⁶ Scarier yet, the Air Force transported him to Isa from Saudi Arabia, in an unarmed civilian car on open Saudi roads without protection or communication.¹⁷ Mr. Donahue described his vulnerability as:

the scariest day of my life. Cars were breaking down on the sides of the roads. I was so young and I remember the feeling of the anxiety just swept over me. I get like that today, the anxiety thinking of it just sweeps over and is so overwhelming.¹⁸

¹² See Appx771-772.

¹³ Appx228, Appx234, Appx506-507 at Appx507, Appx409, Appx806-807 at Appx807.

¹⁴ Appx507.

¹⁵ Appx507.

¹⁶ Appx766-769 at Appx769.

¹⁷ Appx769.

¹⁸ Appx769.

II. Mr. Donaghue Developed a Psychiatric Disability

Mr. Donaghue began to have nightmares about the Khobar Towers bombing and the drive to Isa.¹⁹ His anxiety from driving long distances makes him sick, and he “think(s) about it every day.”²⁰ He has anxiety in social situations and in the car.²¹ He is much more emotional than he used to be and constantly thinks about the “people who didn’t make it home.”²²

In 2007, Mr. Donaghue sought behavioral health treatment from a private clinic because of his “emotional/psychological issues.”²³ He had lost 10 pounds in a week due to stress and anxiety.²⁴ He saw a private counselor once a week for several months.²⁵

Mr. Donaghue next sought treatment in 2014 at the VA’s La Crosse Vet Center for PTSD at least twelve times over two years.²⁶

¹⁹ Appx771.

²⁰ Appx771.

²¹ Appx771.

²² Appx761.

²³ Appx561-565 at Appx563.

²⁴ Appx561.

²⁵ Appx314.

²⁶ Appx776-Appx800.

A VA medical expert in diagnosing and treating PTSD noted that Mr. Donaghue “appeared to be struggling with symptoms of PTSD and trying to minimize the effects on the people around him.”²⁷ He reported being “angry all the time,” ruining his close relationships, persistently anxious and worried, and having nightmares.²⁸ He attended appointments on:

- May 16, 2014;
- August 21, 2014;
- September 24, 2015;
- October 1, 2015;
- October 8, 2015;
- October 23, 2015;
- October 30, 2015;
- November 13, 2015;
- December 4, 2015;
- December 17, 2015;
- February 1, 2016; and
- March 24, 2016.²⁹

At his intake appointment with the Vet Center, Mr. Donaghue endorsed:

- Difficulty concentrating, learning, and recalling information;
- Significant impairment in social or occupational functioning;
- Disturbed sleep;
- Irritability or aggression with little or no provocation;

²⁷ Appx799.

²⁸ Appx796.

²⁹ Appx776-777.

- Anxiety;
- Depression;
- Apathy or lack of spontaneity; and
- Changes in personality.³⁰

A La Cross Vet Center counselor diagnosed him with PTSD after observing various PTSD symptoms, including “anger, control, isolation, trust, worry, and anxiety.”³¹ The counselor concluded that Mr. Donaghue’s PTSD symptoms affected his familial relationships.³²

III. The VA Provided Two Inadequate Exams After Mr. Donaghue Made a Psychiatric Disability Claim

Mr. Donaghue claimed service connection for his PTSD symptoms: anxiety, depression, and sleep problems and described his experience to a 2017 VA examiner.³³

The examiner described the Khobar Towers bombing, including that Mr. Donaghue was “blown out the back of the tailpipe” of an

³⁰ Appx775-801.

³¹ Appx776, Appx787.

³² Appx788.

³³ Appx421-443.

F16 by the blast³⁴.³⁵ But he determined Mr. Donaghue did not “directly experience [a] traumatic event” or “witness[], in person, [a] traumatic event” that occurred to others.³⁶ In the first section of the PTSD Criterion, which asks if the claimant was exposed to actual or threatened death or serious injury, the examiner marked “No criterion in this section met.”³⁷ The examiner knew that Mr. Donaghue’s counselor at the La Crosse Vet Center—where he received PTSD treatment for about two years— diagnosed him with PTSD.³⁸ He mentioned that Mr. Donaghue told him that he had felt “stressed and anxious ever since” he was attacked.³⁹ But he somehow found that the terrorist attack did not qualify as a PTSD stressor.⁴⁰

The examiner read through Mr. Donaghue’s treatment file.⁴¹

But his notes contrast the evidence, including Mr. Donaghue’s

³⁵ Appx421-443.

³⁶ Appx427.

³⁷ Appx427.

³⁸ Appx425.

³⁹ Appx429-430.

⁴⁰ Appx426.

⁴¹ Appx423.

statements to the VA and his previous counselors. In December 2016, Mr. Donaghue told the VA he was only about an eighth of a mile away, knocked unconscious by the blast, and had anxiety and depression since.⁴² He told the VA about seeing wounded and dead Air Force members. But the 2017 examiner framed the experience as vicarious when it was personal, and his records say so. For instance, in describing the Khobar Towers attack, the 2017 examiner wrote that Mr. Donaghue had a “few friends who were hit by some shrapnel” but knew no one who was killed.⁴³

The examiner also did not find that Mr. Donaghue’s evacuation from Dhahran to Bahrain was a stressor.⁴⁴ The only note about the incident was: “They moved us from Dhahran down to Bahrain...the only way we could do it was to drive in civilian cars...we didn’t have any weapons...nothing happened....”⁴⁵ But in December 2016, Mr. Donaghue’s description was much different. In his statement, he said

⁴² Appx771.

⁴³ Appx426.

⁴⁴ Appx426.

⁴⁵ Appx426.

That was probably the scariest day of my life, driving civilian cars from Dhahran to Bahrain. Cars were breaking down on the sides of the roads. I was so young and I remember the feeling of the anxiety just swept over me. I get like that today, the anxiety thinking of it just sweeps over and is so overwhelming ... After the deployment, I was anxious all the time. If I'm going somewhere, or if I get together with friends, and we are on a road trip, and I get so anxious. By the time we get to our location, I am so sick from being anxious driving. I would say driving for prolonged trips is the worst trigger for me.⁴⁶

The 2017 VA examiner found Mr. Donaghue didn't have PTSD but diagnosed him with an unspecified anxiety disorder.⁴⁷ But because of the problems with the exam including that it did not jibe with the evidence, the VA sent Mr. Donaghue to another in 2019.⁴⁸

The 2019 examiner elicited more detail from Mr. Donaghue than the 2017 examiner. Mr. Donaghue described being "knocked out" from the explosion for between five and seven minutes, coming back to the barracks and seeing everyone "covered in blood," "hauling hurt soldiers on doors we ripped off of bedrooms," seeing a semi-trailer with body bags in it, and wishing that he could have

⁴⁶ Appx771.

⁴⁷ Appx422.

⁴⁸ Appx310-319.

helped more after the bombing.⁴⁹ The examiner reported that Mr. Donaghue wept while recounting the story and expressing his guilt about being unable to do more for the injured.⁵⁰

She also elicited more detail about the evacuation from Dhahran to Bahrain. Mr. Donaghue told her they were “forced to drive civilian vehicles from D[h]ahran (sic) to Bahra[i]n, unarmed and in civilian clothes, in convoys of cars, I was 18, vans overheating on the side of freeway, most stressful drive ever, I was a passenger in an old Crown Victoria, two in front, two in back, no radio communication, no sidearm, took two h[ou]rs to get there.”⁵¹

Mr. Donaghue described his symptoms of depression and anxiety being triggered by fireworks on the 4th of July—which he described as “horrible,” and which made him so startled he could “feel it in [his] heart”—and by jet fumes.⁵² The examiner wrote that Mr. Donaghue “denie[d] sleep problems” but that he had

⁴⁹ Appx315.

⁵⁰ Appx315.

⁵¹ Appx316.

⁵² Appx315.

nightmares in the same sentence.⁵³

The 2019 examiner assessed Mr. Donaghue using both the PHQ-9,⁵⁴ which measures how depressed a patient is and the PCL-M,⁵⁵ which measures post-traumatic stress.⁵⁶ She noted that although Mr. Donaghue had “minimal” symptoms on the PHQ-9, his PCL-M score was “high.”⁵⁷ She did not explain this and stated Mr. Donaghue’s PCL-M score “contradicts his subjective reporting of stressors in his day-to-day life,”⁵⁸ revealing that Mr. Donaghue underreported his symptoms.

Using the PTSD criteria in the C&P examination form, the 2019 examiner marked “yes” in Category A, which asks whether a veteran has experienced a stressful event.⁵⁹ But she marked “no” for the following:

⁵³ Appx315.

⁵⁴ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2219778/> (last accessed December 12, 2021).

⁵⁵ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2219778/> (last accessed December 12, 2021).

⁵⁶ Appx319.

⁵⁷ Appx319.

⁵⁸ Appx319.

⁵⁹ Appx316.

- Criterion B (Presence of the intrusion symptoms associated with the traumatic event(s), beginning after the traumatic event(s) occurred. But the examiner never explained why Mr. Donaghue’s report that he thinks about the stressful drive from Dhahran to Bahrain “everyday” or his recurrent nightmares do not satisfy this criterion.⁶⁰
- Criterion C (Persistent avoidance of stimuli associated with the traumatic event.) But the examiner did not explain why Mr. Donaghue’s avoidance of long car drives⁶¹ did not satisfy this criterion.
- Criterion D (Negative alterations in cognition and mood associated with the traumatic events.) But the examiner failed to explain why Mr. Donaghue’s persistent guilt and irritability did not satisfy this criterion.

The 2019 examiner disagreed with the 2017 examiner and found that Mr. Donaghue’s stressor—his proximity to the Khobar Towers bombing, the deaths, the destruction around him, and the unsecured drive to Isa Air Base—qualified as “directly experiencing the traumatic event” and “witnessing, in person, the traumatic event[] as [it] occurred to others.”⁶² She found this stressor event sufficient to cause PTSD.⁶³ But she also disagreed with the

⁶⁰ Appx316-317.

⁶¹ Appx771.

⁶² Appx316.

⁶³ Appx316.

previous examiner's opinion that Mr. Donaghue had a psychiatric disability.⁶⁴ She never explained why she disagreed with the previous examiner's diagnosis.

IV. The Board Denied Mr. Donaghue's Psychiatric Claims

The Board agreed that Mr. Donaghue had an acquired psychiatric disorder but found that the preponderance of the evidence was against finding that it began in service or related to an in-service injury.⁶⁵

To get there, it assigned more weight to the conflicting 2017 and 2019 PTSD exams—but only the parts that stopped Mr. Donaghue from being service connected—than Mr. Donaghue's testimony and his two years of counseling at the La Cross Vet Center.⁶⁶ The Board also found the 2017 and 2019 VA exams to be “competent and probative” evidence—even though the exams reached exactly opposite conclusions on each element of service connection and

⁶⁴ Appx310-311.

⁶⁵ Appx17.

⁶⁶ Appx16-30.

contained internally conflicting conclusions.⁶⁷

V. The Veterans Court Affirmed the Board's Decision

At the Veterans Court, Mr. Donaghue argued the May 2017 exam was inadequate because the examiner based his conclusion on an inaccurate factual premise—that Mr. Donaghue did not witness or experience a traumatic event qualifying as a PTSD stressor—without providing any rationale why being so close to a large bombing was not traumatic.⁶⁸ He argued the May 2019 exam was inadequate because the examiner did not provide any medical explanation for her finding that Mr. Donaghue did not meet PTSD diagnostic criteria B, C, or D—despite evidence from his PTSD treatment records showing that he did.⁶⁹ He also argued the examiner was proven not to have reviewed his records—otherwise, how could she find that he had no diagnosis or symptoms associated with his psychiatric disability.⁷⁰ The Board also relied on

⁶⁷ Appx22.

⁶⁸ Appx427.

⁶⁹ Appx92-123 at Appx110-111.

⁷⁰ Appx111-113, Appx311.

the latter exam despite treatment records proving the opinion was built on factual errors, including saying Mr. Donaghue was not diagnosed with a psychiatric disability despite being previously diagnosed with depression, PTSD, and anxiety.⁷¹

The Court affirmed the BVA decision, finding that the Board had not relied on adequate medical examinations and issued an adequate statement of reasons and bases for its decision.⁷² It did not.

On the one hand, the Veterans Court determined the 2017 examiner reasonably found that Mr. Donaghue's proximity to the Khobar Towers bombing and terrifying drive across Arabia were "inadequate to support a diagnosis of PTSD."⁷³ But then it determined that equally probative was the 2019 examiner's conclusion that the bombing and Arabian escape *were* adequate stressors to support diagnosing PTSD.⁷⁴ Likewise, the Veterans Court knew that the 2017 examiner diagnosed Mr. Donaghue with

⁷¹ Appx115.

⁷² Appx2, Appx5.

⁷³ Appx5.

⁷⁴ Appx2, Appx6-7.

a psychiatric disability.⁷⁵ But it also agreed it was probative that the 2019 examiner found no psychiatric disability now or ever.⁷⁶ And the Veterans Court paid no mind to the Board's heavy reliance on an exam the VA already determined was legally insufficient.⁷⁷ The Veterans Court did not uphold its duty to ensure the VA adjudicated Mr. Donaghue's claims under the law.⁷⁸

The Veterans Court treated the entire case as if there was no legal error, and Mr. Donaghue's appeal was his challenge to the Board's findings under the clearly erroneous standard of review.⁷⁹ The Veterans Court is wrong. Those findings stem from pure legal errors. Neither the Board nor the Veterans Court could find the exams probative because together, they make no sense without a medical explanation for their differences. The Board and the Veterans Court had to determine many medical facts to make any sense of the exams because the examiners never discussed how

⁷⁵ Appx6.

⁷⁶ Appx6.

⁷⁷ Appx1, Appx7.

⁷⁸ 38 U.S.C. § 7261(a)(3); 38 U.S.C. §§ 501, 5103A(d), 7104(d)(1).

⁷⁹ Appx7.

they arrived at their conclusions. And the latter examiner never discussed how or why she disagreed with the previous examiner's conclusions on the most material facts in Mr. Donaghue's claim. These are legal—not factual—errors because the examiners were legally required—but failed—to reconcile conflicting medical diagnoses and their opinions that conflict with all the evidence

Finally, the Veterans Court determined there was no harm if the exams were inadequate.⁸⁰ But the Veterans Court relied only on the examiner's conclusion that Mr. Donaghue does not have PTSD to determine the examiner's mistakes in arriving at that conclusion were not harmful: "... any error by the examiner in that regard is necessarily harmless, as . . . both the May 2017 and May 2019 VA examinations found no diagnosis of PTSD under the DSM-V criteria."⁸¹ Plus, the Board relied on what is left out in the ellipsis above as a reason for finding the exams' insufficiencies harmless: "any error by the examiner in that regard is necessarily harmless, as the Board found 'credible evidence that the Veteran was exposed

⁸⁰ Appx5.

⁸¹ Appx5.

to traumatic events during his military service.” It would take the *opposite* of that to make the legally insufficient exams harmless. The VA’s concession that these horrific events happened to Mr. Donaghue, and finding probative an exam saying they were not a big enough deal to be considered a stressor, began this error-ridden adjudication.

UNDERSTANDING VA PTSD EXAMS

To assess Mr. Donaghue’s depression and PTSD, the VA used two scored assessments in his May 2019 exam. Both revealed information about his psychiatric condition. They were:

The PHQ-9: The PHQ-9 (Patient Health Questionnaire-9) is a self-administered, 9-question instrument given to patients to measure levels of depression.⁸² It scores each of the nine DSM-V criteria as “0 (not at all) to 3 (nearly every day).”⁸³ “Major depression is diagnosed if five or more of the nine depressive symptom criteria have been present at least “more than half the

⁸² <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1495268/> (last accessed December 12, 2021).

⁸³ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1495268/> (last accessed December 12, 2021).

days” in the past two weeks, and one of the symptoms is depressed mood or anhedonia. Other depression is diagnosed if two to four depressive symptoms have been present at least “more than half the days” in the past two weeks, and one of the symptoms is depressed mood or anhedonia. One of the nine symptom criteria (“thoughts that you would be better off dead or of hurting yourself in some way”) counts if present at all, regardless of duration.”⁸⁴ “As a severity measure, the PHQ-9 score can range from 0 to 27, since each of the nine items can be scored from 0 (not at all) to 3 (nearly every day).”⁸⁵ A score on the PHQ-9 of 1-4 corresponds with no depression; 5-9 with mild depression; 10-14 with moderate depression; 15-19 with moderately severe depression; and 20-27

⁸⁴ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1495268/> (last accessed December 12, 2021).

⁸⁵ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1495268/> (last accessed December 12, 2021).

with severe depression.⁸⁶ Mr. Donaghue’s score was 5, reflecting mild depression.⁸⁷

The PCL-M: The PCL-M is the military version of a 17-item self-report measure reflecting DSM-V symptoms of PTSD.⁸⁸ It asks about stressful military experiences and is often used with active service members and veterans. It is organized into categories that correspond with the DSM-V criteria for PTSD categories A-E. The PCL-M can help determine whether an individual meets DSM-V criteria as defined by at least one “B item,” three “C items,” and two “D items.” It can also determine whether the total severity score “exceeds a normative threshold.”⁸⁹ A threshold of 30-35 points

⁸⁶ Kroenke, Kurt, M.D. and Robert L. Spitzer, MD. “The PHQ-9: A New Depression Diagnostic and Severity Measure.” *Psychiatric Annals* Vol. 32, Issue 9, September 2002, available at <https://pdfs.semanticscholar.org/de26/1882049731e262c7ba4a2e0a710cd0cc807c.pdf>. (last accessed December 11, 2021).

⁸⁷ Appx319.

⁸⁸ “Using the PTSD Checklist for DSM-V.” National Center for PTSD, available at <https://www.ptsd.va.gov/professional/assessment/adult-sr/ptsd-checklist.asp> (last accessed December 12, 2021).

⁸⁹ “Using the PTSD Checklist for DSM-V.” National Center for PTSD, available at <https://www.ptsd.va.gov/professional/assessment/adult-sr/ptsd-checklist.asp> (last accessed December 12, 2021)..

to a PTSD prevalence of 15% or below in people with that score. A threshold of 36-44 conveys a PTSD prevalence of 16-39% in people with that score. A threshold of 45-50 suggests a PTSD prevalence of 40% or above in people with that score.⁹⁰ Mr. Donaghue's score on the PCL-M was 52, in the "high PTS range."⁹¹

So by *both* measures, Mr. Donaghue had a mental disease or disorder: mild depression and severe PTSD.

The May 2019 examiner found that Mr. Donaghue did not have a mental disease or disorder but did not explain why her measurements using the two diagnostic tools showed that he did.

ARGUMENT SUMMARY

The Board cobbled together two exams that fundamentally disagreed about Mr. Donaghue's mental health diagnoses, stressors, and how he met PTSD criteria.⁹² The Board made no effort to reconcile these contradictory findings between the exams.

⁹⁰ "Using the PTSD Checklist for DSM-V." National Center for PTSD, available at <https://www.ptsd.va.gov/professional/assessment/adult-sr/ptsd-checklist.asp> (last accessed December 12, 2021).

⁹¹ Appx319.

⁹² Appx22.

Instead, it cherry-picked from each to deny Mr. Donaghue service connection:

	Stressor	Psych Symptoms	Psych Diagnosis
2017 examiner found:	NO	YES	YES
2019 examiner found:	YES	NO	NO

Service connection requires a green “YES” in each column. And Mr. Donaghue had that. But the Board chose to coarsely patch the red “NOs” together instead. But the red “NOs” are products of unlawful exams.

The 2017 exam—already found unsuitable for rating by the VA before the Board decision—was inadequate because the 2017 examiner relied on a material factual inaccuracy about the most critical fact in Mr. Donaghue’s medical history—or failed to explain how he concluded—that Mr. Donaghue never experienced a stressor event.

And the 2019 exam was no better because the examiner overlooked that Mr. Donaghue was diagnosed with several psychiatric disabilities—not none as she thrice reported—and did

not explain why the previous medical experts' diagnoses were wrong. She also failed to explain why she disagreed with the previous examiner about the stressor event or how the previous examiner's error may have affected his decision. And more than anything, the 2019 examiner never explained how she found Mr. Donaghue has so many psychiatric disability symptoms but then determined Mr. Donaghue does not have a psychiatric disability.

Compounding matters, the Veterans Court also failed to enforce Mr. Donaghue's statutory right for the VA to get his private mental health treatment records. These records could have provided the evidence Mr. Donaghue needed to reconcile the examiners' conflicting opinions and clarified both exams' inadequacies.

Rather than strive for a complete record or reconciling the many inconsistencies, the Veterans Court said that it did not matter even if the exams were inadequate because "the Board found 'credible evidence that the Veteran was exposed to traumatic events during his military service,' and both examiners found no diagnosis of PTSD under the DSM-V criteria. But both examiners overlooked Mr. Donaghue's previous psychiatric diagnoses and many of his

PTSD symptoms, and even his stressor event, to determine there was no PTSD. Their conclusions were useless.

THE LEGAL QUESTIONS THIS CASE ASKS

Mr. Donaghue's case asks whether 1) VA examiners have to provide sufficient rationale to assist the Board make its decision; 2) the VA has to retrieve private medical records; and 3) taking "due account" of harmless error includes assuming no error as a premise to the answer.

ARGUMENT

This Court's standard for reviewing the Veterans Court's legal determinations is *de novo*.⁹³

I. The VA exams were inadequate because the examiners did not base their decisions on Mr. Donaghue's medical history and failed to sufficiently inform the Board.

The Board and the CAVC relied on an inadequate medical opinion from the 2017 and the 2019 examiners who evaluated Mr. Donaghue.

⁹³ *Prenzler v. Derwinski*, 928 F.2d 392, 393 (Fed. Cir. 1991).

The Board has to ensure that any medical examination it orders is adequate.⁹⁴ Any medical opinion the Board relies on must be fully informed and based on fact. It must consider the claimant's history and condition.⁹⁵ While a medical examiner need not discuss all evidence favorable to an appellant's claim and engage in weighing the evidence, the examiner must show that he has considered the prior medical history and examinations.⁹⁶

The 2017 and 2019 VA examiners performed inadequate exams where they did not take Mr. Donaghue's medical history and previous medical examinations into account. Or at least their reports show no proof they did.⁹⁷ The Board erred by relying on those exams, and the Veterans Court erred in turn by endorsing the Board's error.

⁹⁴ *Barr v. Nicholson*, 21 Vet. App. 303, 311-12 (2007).

⁹⁵ *Stefl v. Nicholson*, 21 Vet. App. 120, 123 (2007); *Ardison v. Brown*, 6 Vet. App. 405, 407 (1994).

⁹⁶ *Thompson v. Gober*, 14 Vet. App. 187, 188 (2000); *Roberson v. Shinseki*, 22 Vet. App. 358, 366 (2009).

⁹⁷ *Stefl* at 124.

a. The Board violated § 5103A(d) when it relied on the examiners' conclusions that could only be arrived at by ignoring or mistaking Mr. Donaghue's medical history.

How could a mental health expert conclude that being in a bomb attack in Saudi Arabia and then almost immediately fleeing by driving across Arabia, unarmed and unguarded, in a private vehicle is not a traumatic stressor? How could a mental health expert conclude a person has not been diagnosed with a mental health disability when that person—after several years of treatment—was diagnosed by other mental health experts with depression, anxiety, and PTSD? If there is an answer to these questions, the examiners had to explain so the Board could weigh the conflicting evidence. But they didn't.

And because they did not, there is no explanation for the incongruence between 1) the uncontested facts and record evidence and 2) the examiners' conclusions except that the examiners did not perform the exams as required by § 5103A(d). The 2017 and 2019 exams fail to meet almost every legal requirement for the Board to rely on them:

Did the examiner:	2017	2019
Base her decision on Mr. Donaghue's entire medical history and previous exams? ⁹⁸	NO	NO
Provide sufficient medical rationale to inform the Board? ⁹⁹	NO	NO
Provide a reasoned explanation connecting facts and conclusions? ¹⁰⁰	NO	NO
Address an earlier exam and explain material contradictions? ¹⁰¹	n/a	NO
Describe Mr. Donaghue's psychiatric disability in sufficient detail to inform the Board? ¹⁰²	NO	NO
Avoid finding non-medical facts and an unlawful credibility determination? ¹⁰³	NO	YES
Consider the lay evidence? ¹⁰⁴	NO	YES
Avoid relying on a lack of contemporaneous medical evidence for their conclusions? ¹⁰⁵	NO	YES
Rely only on accurate factual premises? ¹⁰⁶	NO	NO

⁹⁸ *Stefl* at 123.

⁹⁹ *Monzingo v. Shinseki*, 26 Vet. App. 97, 105 (2012).

¹⁰⁰ *Nieves-Rodriguez v. Peake*, 22 Vet. App. 295, 301 (2008).

¹⁰¹ *Stefl* at 123; *Nieves-Rodriguez* at 304.

¹⁰² *Ardison*, 6 Vet. App. at 407.

¹⁰³ *Sizemore v. Principi*, 18 Vet. App. 264, 275 (2004).

¹⁰⁴ *Barr*, 21 Vet. App. at 311-12; *Stefl* at 123.

¹⁰⁵ *Buchanan v. Wilson*, 451 F3d 1331 (Fed. Cir. 2006).

¹⁰⁶ *Reonal v. Brown*, 5 Vet. App. 458, 461 (1993).

Whether the examiners relied on an inaccurate factual premise, overlooked the entire medical history, relied on a lack of contemporaneous records, ignored the lay evidence, or found the lay evidence not credible in the first instance, something isn't right. And the VA knew the 2017 exam was inadequate.

Neither the Board nor the Court discussed why the VA provided the 2019 exam. Under the law, there is only one reason: it did not provide the medical information necessary for the VA to decide the claim.¹⁰⁷ Despite whatever shortcomings the VA found in the 2017 exam, the Board found it highly probative.¹⁰⁸

The Veterans Court recited the requirements for the Board to accept an exam under § 5103A(d). But even if this Court accepts the Veterans Court's lists of exam requirements as fact rather than a recitation of the law, the Veterans Court misunderstood what an examiner has to inform the Board of.

¹⁰⁷ 38 U.S.C. § 5103A(d); *McLendon v. Nicholson*, 20 Vet. App. 79, 81-86 (2006).

¹⁰⁸ Appx6.

b. The Veterans Court misinterpreted § 5103A(d) when it concluded the examiners were not required to provide a rationale explaining their conclusions that were inconsistent with the evidence.

The Veterans Court determined that the May 2017 examiner provided adequate medical analysis because his exam “reflect[ed] a review of [Mr. Donaghue’s] VA e-folder, computerized patient record system, and administration of two mental health assessments.”¹⁰⁹ And then it surmised the May 2019 examiner did her job correctly because she “specifically considered [Mr. Donaghue’s] previous treatment and confirmed that she reviewed his VA e-folder.”¹¹⁰ Reviewing a claims file and citing records is not medical analysis. And not deleting it from a boilerplate document did not prove it happened. The Veterans Court once held that “treatment of the claims file as a surrogate for awareness of significant facts in a medical history may lead to error.”¹¹¹ “Review of a claims file by a VA examiner, without more, does not automatically render the examiner’s opinion competent or

¹⁰⁹ Appx6.

¹¹⁰ Appx6.

¹¹¹ *Nieves-Rodriguez*, 22 Vet. App. at 304.

persuasive.”¹¹² In short, saying the words is not enough—examiners have to prove their conclusions are trustworthy by offering data and reasoning for their conclusions.

The 2017 examiner offered no data or reasoning for his “expert” conclusion that being bombed and then forced to drive through your bomber’s territory—unguarded and unarmed—could not cause PTSD. The VA recognized the problems in the 2017 exam. But then, the 2019 examiner did not explain her counterfactual—to many other experts’ opinions and her own diagnostic tests—finding that Mr. Donaghue had no mental health diagnoses and did not suffer mental health disability symptoms.

When discussing the 2019 exam, the Veterans Court acknowledged the discrepancy between the examiner’s finding that Mr. Donaghue “did not have a mental health diagnosis” with his current treatment for PTSD and the May 2017 examiner’s opinion that he had an anxiety disorder.¹¹³ But the Veterans Court allowed the discrepancy without explanation because it overlooked that

¹¹² *Stefl* at 124.

¹¹³ Appx6.

examiners have to provide enough rationale to allow the Board to make an informed decision.

The Veterans Court repeatedly pointed out that examiners do not have to explain themselves.¹¹⁴ But that is only half accurate under the law. A medical opinion's sole purpose is to sufficiently inform the Board so the Board may make a fully informed decision.¹¹⁵ And thus exams are only legally adequate when examiners provide sufficient medical rationale to inform the Board¹¹⁶ and provide a reasoned explanation connecting facts and conclusions.¹¹⁷ An examiner must prove that she has considered the prior medical history and examinations.¹¹⁸ Neither did here. The Veterans Court's acceptance of the exams as legally sufficient was erroneously based on its idea that examiners do not have to provide reasoning for their decisions.

The Board determined the May 2017 exam was probative

¹¹⁴ Appx6-7.

¹¹⁵ *Hicks v. Brown*, 8 Vet. App. 417, 422 (1995), *Stefl at* 123; *Ardison at* 407. *Thompson*, 14 Vet. App. at 188; *Roberson*, 22 Vet. App. at 366; *Nieves-Rodriguez at* 304.

¹¹⁶ *Monzingo*, 26 Vet. App. at 105.

¹¹⁷ *Nieves-Rodriguez at* 301.

¹¹⁸ *Thompson at* 188; *Roberson at* 366.

despite explicitly rejecting the examiner's pivotal conclusion that Mr. Donaghue did not experience a PTSD stressor.¹¹⁹ The only reason Mr. Donaghue was not granted service connection in 2017 was the 2017 examiner's determination that being bombed by terrorists and then driving through the terrorists' territory on unguarded roads were not a big enough deal to cause PTSD. All of the examiner's answers about PTSD flowed from that mistake. The 2017 examiner never considered whether Mr. Donaghue's extraordinary stressor event caused his mental health disability *because he determined there was no stressor*. The VA had a good reason to provide a second exam, but the Board's reliance on that one—after cherry-picking negative parts to join with the 2017 exam—was equally misplaced.

The 2019 examiner peppered her report with internal and external contradictions. She found that Mr. Donaghue does not have a mental disorder diagnosis.¹²⁰ But he was diagnosed by

¹¹⁹ Appx22.

¹²⁰ Appx312, Appx319.

mental health experts with depression in 2007,¹²¹ PTSD in 2014,¹²² and an anxiety disorder in 2017.¹²³ She also inaccurately said that Mr. Donaghue doesn't have psychiatric symptoms.¹²⁴ But she contradicted that by her finding that he suffers:

- Nightmares about once a month related to his service;¹²⁵
- Guilt about not being in the barracks at the time of the bombing so that he could have helped more;¹²⁶
- Overt trauma triggered by fireworks and formerly by jet fuel;¹²⁷
- Fear of hostile or terrorist activity;¹²⁸ and
- Crying *during the exam* when discussing the bombing and unguarded and unarmed drive in a POV across Arabia after the bombing.¹²⁹

And her conclusion was also contradicted by other parts of the record—often found by other medical health experts—that Mr.

¹²¹ Appx563-564.

¹²² Appx776.

¹²³ Appx422.

¹²⁴ Appx317-318.

¹²⁵ Appx315.

¹²⁶ Appx315.

¹²⁷ Appx315.

¹²⁸ Appx316.

¹²⁹ Appx315, Appx318.

Donaghue has:

- Anxiety;¹³⁰
- Depression;¹³¹
- Difficulty concentrating, learning, and recalling information;¹³²
- Memory loss;¹³³
- Significant impairment in social or occupational functioning;¹³⁴
- Disturbed sleep;¹³⁵
- Irritability or aggression with little or no provocation;¹³⁶
- Apathy or lack of spontaneity;¹³⁷
- Changes in his personality.¹³⁸

There might be a medical reason for these discrepancies—other than the legal errors discussed above—but the person tasked to provide the reason was the examiner.¹³⁹

While the examiner need not *justify* her seemingly inaccurate conclusions, she had to *explain* them so that the Board would be informed sufficiently to weigh the evidence and render an informed

¹³⁰ Appx422, Appx778-779.

¹³¹ Appx563-564, Appx778-779.

¹³² Appx778-779.

¹³³ Appx313, Appx412, Appx429.

¹³⁴ Appx778-779.

¹³⁵ Appx778-779.

¹³⁶ Appx778-779.

¹³⁷ Appx778-779.

¹³⁸ Appx778-779.

¹³⁹ See *Colvin v. Derwinski*, 1 Vet. App. 171, 174 (1991).

decision.

The 2019 examiner had a duty to review the 2017 exam and base her opinion on Mr. Donaghue's prior medical history.¹⁴⁰ Mr. Donaghue's prior medical history includes mental health diagnoses including depression, PTSD, and generalized anxiety disorder.¹⁴¹ The May 2019 examiner never reconciled her finding that Mr. Donaghue had no mental health diagnosis with his mental health diagnoses and treatment.¹⁴² And the VA recognizes the importance of an examiner explaining a change to a previous examiner's diagnosis in its training manual for examiners:

Considerations in Changing a Previously Established Disability Examination Diagnosis

When a diagnosis is made that differs from a previously established disability examination diagnosis, an important question is presented for the examiner as to whether this change in diagnosis is reflective of a progression or correction of the prior diagnosis, or instead is a new and separate condition. It is critical in this circumstance that you provide a complete explanation with respect to the change in diagnosis and

¹⁴⁰ *Stefl* at 123, Appx110-113.

¹⁴¹ Appx422 ("unspecified anxiety disorder"); Appx771; Appx775-801 at Appx776 ("PTSD Assessed Status: PTSD").

¹⁴² Appx422 ("unspecified anxiety disorder"); Appx771; Appx775-801 at Appx776 ("PTSD Assessed Status: PTSD").

explain the reasons for the change.¹⁴³

The examiners failed to provide sufficient rationale for their conclusions that contradict the data in their exams and Mr. Donaghue's uncontested medical history.

II. The Veterans Court misinterpreted § 5103A(b) when it affirmed the Board's failure to gather or review the veteran's relevant private medical records.

The Veterans Court erred when it affirmed the Board's statutory violation not to seek relevant private medical records. Veterans claims are, by law, "uniquely pro-claimant," and the Board has "an obligation to 'fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits.'"¹⁴⁴ The duty to assist requires the VA to "make reasonable efforts to obtain relevant private records that the claimant adequately identifies to the Secretary."¹⁴⁵ It is not enough that the VA "considered some of the relevant records [if] it failed to consider all

¹⁴³ Appx1143-1190 at Appx1185.

¹⁴⁴ *McGee v. Peake*, 511 F.3d 1352, 1357 (Fed. Cir. 2008).

¹⁴⁵ 38 U.S.C. § 5103A(b)(1); *Moore v. Shinseki*, 555 F.3d 1369, 1374 (Fed. Cir. 2009); *McGee* at 1357; *Sullivan v. McDonald*, 815 F.3d 786 (Fed. Cir. 2016).

of them.”¹⁴⁶ This Court has explained that “the passage of Veteran’s Judicial Review Act §§ 103(a) and 203(a) create a statutory context in which the VA is required to assist the veteran claimant with fully developing a record before making a decision on the veteran’s claim.”¹⁴⁷

Mr. Donaghue saw a private counselor for PTSD in 2007 at “Ladysmith” for two to three months in 2007.¹⁴⁸ He reported it to VA medical staff in 2007 and told the 2017 examiner about it.¹⁴⁹ The entire 2007 treatment note is copied verbatim into his C&P exam.¹⁵⁰

The Veterans Court failed to follow its and this Court’s robust precedent. The Board had to try to get Mr. Donaghue’s private medical records. The VA didn’t try to add them to the record.

This legal error typically results in a remand for the Board to attempt to get complete records, and if obtained, consider them.¹⁵¹

¹⁴⁶ *Moore* at 1374.

¹⁴⁷ *McGee* at 1357.

¹⁴⁸ Appx314.

¹⁴⁹ Appx561.

¹⁵⁰ Appx314.

¹⁵¹ *See Gobber v. Derwinski*, 2 Vet. App. 470, 472 (1992).

The Court looks at the available evidence of record to determine whether the missing records relate to the claimed injuries.¹⁵²

“Records are relevant on their face” when they relate to the injuries at the heart of the claim.¹⁵³ Mr. Donaghue’s claim is about his psychiatric disabilities—the missing private records are about psychiatric health treatment.

The Veterans Court erred when it failed to remand to the Board to attempt to gather Mr. Donaghue’s service medical records.

Mr. Donaghue did not explicitly raise this issue at the Veterans Court. But the Court should consider it anyhow. First, it is not unfair to the Secretary as some sort of surprise—the Board and the Veterans Court reviewed the 2017 exam discussing the private mental health treatment so it knew the private records existed but were not requested.¹⁵⁴ And the issue was just one small part of the bigger picture—that the VA examiners could not have based their reports on Mr. Donaghue’s medical history. In *Morgan v. Principi*, this Court ruled that it had jurisdiction over “other “relevant”

¹⁵² *Golz v. Shinseki*, 590 F.3d 1317, 1323 (Fed. Circ. 2010).

¹⁵³ *Moore* at 1375.

¹⁵⁴ Appx2-10, Appx19-23.

questions of law.¹⁵⁵ In a footnote, the *Morgan* Court defined other relevant questions of law: “This last refers to a catch-all category that derives from the language of subsection (d)(1), and is understood to mean that issues relevant to an issue already before the court on appeal are properly reviewable, even if not specifically raised or decided below.”¹⁵⁶

III. The Veterans Court failed to “take due account” of harmless error when it relied on a logical fallacy to find no prejudice.

Because an exam’s value lies in its medical analysis and not its ultimate conclusion, the examiners’ lack of analysis and opposing findings cast doubt on both examiners’ conclusions and prejudiced Mr. Donaghue.¹⁵⁷ But the Veterans Court embraced the examiners’ conclusions despite no explanation for the opposite conclusions the examiners drew. Even if not for a new exam altogether, the Veterans Court should have at least remanded for explanations for the myriad material disparities. Instead, it called both exams good.

¹⁵⁵ 327 F. 3d 1357, 1364 (Fed. Cir. 2003).

¹⁵⁶ *Morgan* at 1364 citing *Forshey v. Principi*, 284 F.3d 1335, 1351 (Fed. Cir. 2002).

¹⁵⁷ *Nieves-Rodriguez*, 22 Vet. App. at 304.

The Veterans Court also ruled that if there was an error in the examiners' conclusion that Mr. Donaghue did not have a psychiatric disability, it was harmless because they concluded that Mr. Donaghue did not have PTSD. The first problem with this reasoning is that the 2017 examiner concluded that Mr. Donaghue did have an acquired psychiatric disability; only the 2019 examiner concluded that he did not have PTSD. But the Veterans Court's reasoning is circular: it relies on the examiners' conclusions about Mr. Donaghue's psychiatric disability to support a slightly different but highly related conclusion about his psychiatric disability. In short—it draws its conclusion and premise from the same place. The Veterans Court cannot guess at missing evidence, and it cannot make inadequate exams into adequate ones by selecting evidence from each exam. The examinations and the conclusions the examiners drew were legally inadequate, and the Veterans Court erred by relying on them.

CONCLUSION

At every opportunity, the Board, and the Veterans Court violated this Court's directive to create a "uniquely pro-claimant"

forum.¹⁵⁸ Rather than read the exams together to determine Mr. Donaghue is service-connected, they pieced the exams together to get the opposite result. Rather than discussing and deciding based on the plethora of psychiatric disability symptoms and diagnoses Mr. Donaghue has, the examiners and adjudicators focused on those symptoms he did not have.¹⁵⁹

This Court should vacate the Veterans Court's decisions with an order for the Veterans Court to remand to the Board so the VA can get Mr. Donaghue's private mental health records and provide him with a new, meaningful exam that accurately considers his entire medical history.

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¹⁵⁸ *Hodge v. West*, 155 F.3d 1356 (Fed. Cir. 1998); *Hensley v. West*, 212 F.3d 1255, 1262 (Fed. Cir. 2000).

¹⁵⁹ Appx1-10, Appx15-30, Appx310-319, Appx421-442.

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