No. 2017-1749

United States Court of Appeals
For the Federal Circuit

LAWRENCE J. ACREE,

Appellant,

v.

DAVID J. SHULKIN, M.D., SECRETARY OF VETERANS AFFAIRS,

Appellee.

Appeal from the United States Court of Appeals for Veterans Claims in Case No. 15-0031

OPENING BRIEF OF LAWRENCE J. ACREE

NATALIE A. BENNETT
MCDERMOTT WILL & EMERY LLP
500 North Capitol Street, N.W.
Washington, D.C. 20001
(202) 756-8000

Attorney for
Appellant Lawrence J. Acree

CERTIFICATE OF INTEREST

Counsel for the Appellant Lawrence J. Acree certifies the following:

1. **The full name of every party or amicus represented by me is:**

Lawrence J. Acree

2. **The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:**

None.

3. **All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:**

None.

4. **The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:**

McDermott Will & Emery: Natalie A. Bennett, Hersh H. Mehta and David Mlaver

/s/ *Natalie A. Bennett*
Natalie A. Bennett
McDermott Will & Emery LLP
Attorney for
Appellant Lawrence J. Acree

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STATEMENT OF RELATED CASES

No appeal in or from this same proceeding was previously before this Court or any other appellate court. Counsel is unaware of any other pending case that directly will affect or be affected by this Court's decision in this appeal.

STATEMENT OF JURISDICTION

The Federal Circuit has jurisdiction pursuant to 38 U.S.C. § 7292(a) to review "the validity of a decision of the [Veterans] Court on a rule of law or of any statute or regulation . . . or any interpretation thereof (other than determination as to a factual matter) that was relied on by the [Veterans] Court in making the decision." While this Court generally lacks jurisdiction to review challenges to the Board's factual determinations or to any application of law to fact, *Johnson v. Derwinski*, 949 F.2d 394, 395 (Fed. Cir. 1991), it does have jurisdiction to determine the proper interpretation of a regulation. *See, e.g., Blubaugh v. McDonald*, 773 F.3d 1310, 1312 (Fed. Cir. 2014) (deciding whether 38 C.F.R. § 3.156(c) requires the VA to determine if the veteran is entitled to an earlier effective date for his service-connected PTSD); *Sellers v. Principi*, 372 F.3d 1318, 1323 (Fed. Cir. 2004) (exercising jurisdiction where no factual issues are presented and appellant challenged the Veterans Court's interpretation of 38 C.F.R. § 4.130). This appeal presents legal questions as to the scope of applicable regulations. In particular, Appellant asks this Court to interpret what showing is required for effective claim withdrawal in the absence of a writing under 38 C.F.R. § 20.204 and to clarify the duties of a veterans law judge under 38 C.F.R. § 3.103(c)(2).

The Court of Appeals for Veterans Claims ("Veterans Court") exercised jurisdiction over the issues raised below pursuant to 38 U.S.C. §§ 7252(a) and

7266. APPX1. The Veterans Court opted to decide the substantive issues over the Secretary's objection that the Appellant failed to previously challenge the Board's findings before noticing the appeal. The Secretary urged the Veterans Court not to address the merits of the appeal under *Maggitt v. West*, 202 F.3d 1370, 1377 (Fed. Cir. 2000) where this court held that the Veterans Court has discretion to consider arguments presented in the first instance based on consideration of the interests of the individual and the interests of the agency. Because the Veterans Court exercised its discretion and decided the substantive issues raised below, the Secretary's position under *Maggitt v. West* is now moot.

PRELIMINARY STATEMENT

Mr. Acree's single word answer – "Yes" – when asked by a Veterans Law Judge ("VLJ") if he was withdrawing disability claims during a hearing before the Board of Veterans' Appeals ("Board") did not demonstrate an understanding of the concept of withdrawal or an appreciation of the consequences of claim withdrawal. *See DeLisio v. Shinseki*, 25 Vet. App. 45, 47 (2011). The text of the regulation governing the procedure for withdrawing an appeal for a veteran's disability claim, 38 C.F.R. § 20.204, does not state what criteria must be satisfied when a veteran or the veteran's representative attempts to withdraw a claim in the absence of a writing. The Veterans Court erred in departing from its own well-established precedent to conclude that the Board was not required to explain the reasoning behind the bare conclusion that the criteria for withdrawal of an appeal had been satisfied. It was legal error to disregard the third *DeLisio* requirement that withdrawal of a claim cannot be effective under 38 C.F.R. § 20.204 unless there are findings explaining the basis for concluding that Mr. Acree understood that he was relinquishing his claims and, relatedly, the consequences of the withdrawal.

The issues before this Court are matters of first impression. Currently there is no conclusive guidance as to the sufficiency of the record that must be adduced before the Board when an attempt is made to withdraw a claim during a hearing in the absence of a written request. Appellant maintains that the record was

inadequate for the Board to dismiss his claims in this case and the Veterans Court erred in adopting an interpretation of 38 C.F.R. § 20.204 that absolved the Board from explaining whether the veteran understood the implications of the purported claim withdrawal. Appellant further maintains that the Veterans Court erred in limiting the duties of a Board hearing officer under 38 C.F.R. §3.103(c)(2) when the hearing officer is best positioned to ensure that the veteran fully understood the consequences of such a withdrawal.

STATEMENT OF THE ISSUES

1. Did the Veterans Court err in determining that withdrawal of certain disability claims on the record during a hearing before the Board was effective under 38 C.F.R. § 20.204 when there was no inquiry or other explanation as to how the purported withdrawal was "explicit, unambiguous, and done with a full understanding of the consequences of such action on the part of the claimant"?

2. Did the Veterans Court err in its interpretation of 38 C.F.R. § 3.103(c)(2) to conclude that a hearing officer's duty to explain fully the issues does not encompass explanation of the consequences of withdrawing a claim on the record during a hearing?

STATEMENT OF THE CASE

A. The Facts and History Underlying Mr. Acree 's Appeal

Mr. Acree served on active duty in the Navy from June 1985 through June 1989 and from June 2007 to April 2008. APPX9; APPX255. After his initial four years of active duty, Mr. Acree enlisted with the Naval Reserves in 2001. APPX249-251. In 2007, Mr. Acree was deployed to Iraq. APPX251. He later received a medal for his combat service. APPX39. In Iraq, Mr. Acree was diagnosed with Post Traumatic Stress Disorder ("PTSD"). APPX99; APPX235-239; APPX305; *see also* APPX224 (condition described as "anxiety disorder with PTSD features"). He also suffers from persistent nightmares. APPX99-103. Following his combat tour, Mr. Acree was honorably discharged in 2008. APPX39.

To treat Mr. Acree's anxiety disorder and PTSD symptoms, he has long been medicated with psychotropic drugs, including Lithium, Xanax and BuSpar® and other antidepressants and agents to help him sleep. *See, e.g.*, APPX52-53; APPX83-85; APPX89-90; APPX102-103; APPX219-224; APPX231; APPX238; APPX296-345. At certain points in time, Mr. Acree has felt that his medication has impacted his basic functioning. He previously stated "I am on so much medication I cannot function. It makes me drowsy and fatigued. I am easily

distracted. I have trouble sleeping. I suffer from anxiety." APPX193. Mr. Acree currently suffers from and is being treated for bladder cancer. APPX20.

Mr. Acree sought review from the Board's dismissal of claims he had had pursued at the Louisville, Kentucky Regional Office of the Department of Veterans. APPX8. The eleven issues[1] certified for appeal were:

1. Increased rating for degenerative arthritis with tendonitis of the left shoulder.*
2. Earlier effective date for the award of service connection for degenerative arthritis with tendonitis of the left shoulder.*
3. Earlier effective date for the award of service connection for a lumbar strain.*
4. Earlier effective date for the award of service connection for post-traumatic stress disorder.*
5. Earlier effective date for the award of service connection for sinusitis.*
6. Entitlement to service connection for exposure to Gulf War hazards.*
7. Entitlement to a total disability rating based on individual unemployability.*
8. Increased rating for a lumbar strain.
9. Increased rating for post-traumatic stress disorder.
10. Entitlement to an initial compensable rating for sinusitis.
11. Entitlement to service connection or sleep apnea, claimed as a sleep disorder.

APPX8-9.

[1] Only the first seven claims form the basis of the current appeal. APPX10-11. The seven claims that are still at issue are annotated with an asterisk (*).

Thereafter, on September 10, 2014, the hearing officer or VLJ[2] conducted a formal hearing of the Board of Veterans Appeals (Louisville, KY). APPX146-185. The VLJ began the hearing by asking Mr. Acree whether he was withdrawing seven of the eleven issues from appeal:

> JUDGE: Thank you.
>
> The issues certified for appellate consideration today, well there's more issues certified than what we're going to be discussing because some of the issues have been withdrawn. So let me address the issues that have been withdrawn first. The issue of an increased rating for degenerative arthritis of the tendonitis of the left shoulder. An earlier effective date for service connection for degenerative arthritis with tendonitis of the left shoulder, lumbar strain, Post-Traumatic Stress Disorder and sinusitis. Entitlement to service connection for exposure to Gulf War hazards and entitlement to a total disability rating based on individual unemployability.
>
> You're withdrawing your appeal with respect to all of those issues, is that correct, Mr. Acree?
>
> VETERAN: Yes.

APPX147-148. After asking Mr. Acree whether he is withdrawing these seven issues, the VLJ did not further engage Mr. Acree to confirm that he understood what it meant to withdraw these claims. APPX148. Nor did the VLJ inquire as to whether Mr. Acree was incapacitated, under the influence of substances, or

[2] The relevant federal regulation, 38 C.F.R. § 3.103, uses the term "hearing officer" but the record transcript refers to the "hearing officer" as "Judge." For (continued…)

otherwise competent to make decisions that would result in a relinquishment of rights. APPX148.

B. The Veterans Court Decision

On November 20, 2014, the Board issued a decision that dismissed the seven claims at issue as withdrawn. APPX8-19. Mr. Acree timely noticed his appeal to the Veterans Court. The Veteran sought review of whether a verbal withdrawal is effective in the absence of any showing that the claimant fully understood the consequences of such an action (as required by the Veterans Court's precedent). On appeal Mr. Acree also asked the Veterans Court to determine whether the VLJ's duty to "explain fully the issues" required him to make an inquiry during the hearing as to whether Mr. Acree fully understood the consequences of the answering "Yes" to the claim withdrawal question and whether he had the capacity to make such an agreement given that he was under the influence of psychotropic medications. *See* APPX374-395; APPX423-440.

In a single-judge decision, the Veterans Court affirmed the Board decision dismissing the seven claims purportedly withdrawn during the September 10, 2014 hearing. APPX1-5.

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purposes of this appeal, Appellant uses the terms "hearing officer" and "VLJ" interchangeably.

The Veterans Court acknowledged that "the central issue in this case is whether the appellant's withdrawal is valid." APPX2. Recognizing a dispute between the parties as to the appropriate standard of review, the Veterans Court applied the clearly erroneous standard. *Id*. The Veterans Court referenced the text of 38 C.F.R. § 20.204 and confirmed that "a withdrawal is only effective where it is explicit, unambiguous, and done with a full understanding of the consequences." APPX3 (quoting *DeLisio*, 25 Vet. App. at 57). The Veterans Court concluded, however, that the Board was not required address the criteria stated in *DeLisio* or make any finding as to whether the veteran's withdrawal was made with a full understanding of the consequences. APPX3-4.

The Veterans Court also rejected the contention that the VLJ was required under 38 C.F.R. § 3.103(c)(2) to explain the consequences of claim withdrawal as part of the duty to "fully explain the issues still outstanding that are relevant and material to substantiating the claim." APPX4. Lastly, the Veterans Court determined that the VLJ did not err in failing to make an inquiry as to whether the Mr. Acree was competent at the time of the hearing where the withdrawal of claims was deemed to take place. APPX4.

The Veterans Court entered judgment on February 22, 2017. APPX373. Mr. Acree timely appealed to this Court on March 3, 2017. APPX366-367.

SUMMARY OF ARGUMENT

1. The Veterans Court's decision in *DeLisio v. Shinseki* acknowledges that 38 C.F.R. § 20.204 does not outline how to determine if an appeal is effectively withdrawn if the purported withdrawal occurs on the record during a hearing before the Board. The Veterans Court therefore fashioned appropriate criteria to gauge whether the withdrawal at the hearing was effective. In this case, the Veterans Court departed from the criteria annunciated in *DeLisio*. Rather than finding the withdrawal during the hearing effective only when it occurred (1) explicitly, (2) unambiguously, *and* (3) with a full understanding of the consequences on the part of the claimant, the Veterans Court read out the third requirement.

Appellant seeks reversal of the Veterans Court approach in this case, which excuses the Board from carrying out the required analysis and explaining the basis for finding that the withdrawal of the claims during the hearing was effective. Appellant petitions this Court to adopt the legal standard set forth by the Veterans Court in *DeLisio* and to clarify what showing is sufficient to demonstrate a full understanding of the consequences of claim withdrawal on the part of the claimant.

2. The Veterans Court separately erred in its interpretation of the duties of a Board hearing officer under 38 C.F.R. § 3.103(c)(2). During a hearing before the Board, a hearing officer is bound to "explain fully the issues" being discussed

with the claimant that might "be of advantage to the claimant's position." Appellant contends that the hearing officer's duty to fully explain the issues encompasses explanation of issues pertinent to claim withdrawal. Consistent with the proclaimant principles articulated by this Court in previous discussions of § 3.103, when a veteran attempts to withdraw a claim on the record during the hearing (and there is no written withdrawal), a hearing officer's duty includes (1) explaining the consequences of claim withdrawal to the veteran and (2) ensuring the veteran understands those consequences with demonstrated clarity of mind before the withdrawal is found effective.

STANDARD OF REVIEW

This Court reviews the Veterans Court's legal determinations *de novo*. *Cushman v. Shinseki*, 576 F.3d 1290, 1296 (Fed. Cir. 2009).

ARGUMENT

I. THE VETERAN'S SINGLE WORD ANSWER AT THE SEPTEMBER 2014 HEARING CANNOT DEMONSTRATE "A FULL UNDERSTANDING OF THE CONSEQUENCES" FOR WITHDRAWAL OF A CLAIM UNDER 38 C.F.R. § 20.204

A. The Well Settled Precedent of the Veterans Court Sets Forth the Requirements Under 38 C.F.R. § 20.204(b)(1) for Withdrawal of a Claim During a Hearing

The interplay of the pertinent federal regulation and the Veterans Court case law unpacking the scope of that regulation is critical to understanding the primary issue in this appeal. Rule 204 of the Board of Veterans' Appeals Rules of Practice,

38 C.F.R. § 20.204, controls "Withdrawal of an Appeal" for a veteran seeking disability relief. Subsection (b)(1) of § 20.204 provides:

> **(b)** ***Filing*** **-**
>
> > **(1)** ***Form and content.*** Except for appeals withdrawn *on the record at a hearing*, appeal withdrawals must be in writing. They must include the name of the veteran, the name of the claimant or appellant if other than the veteran (e.g., a veteran's survivor, a guardian, or a fiduciary appointed to receive VA benefits on an individual's behalf), the applicable Department of Veterans Affairs file number, and a statement that the appeal is withdrawn. If the appeal involves multiple issues, the withdrawal must specify that the appeal is withdrawn in its entirety, or list the issue(s) withdrawn from the appeal.

38 C.F.R. § 20.204(b)(1) (2015) (emphasis added). The plain text of the regulation distinguishes between an appeal that is withdrawn through a writing and an appeal that is withdrawn "on the record at a hearing" by an appellant or an appellant's representative. While subsection (b)(1) states with particularity the requirements for a withdrawal in writing, including name, file number, and a detailed statement, the text of the regulation is *silent* as to what is required for an appeal to be withdrawn on the record at a hearing.

Subsection (b)(3) of the same regulation is similarly silent as to what constitutes an "effective" withdrawal of an appeal when there is no accompanying writing:

> **(3)** ***When effective.*** Until the appeal is transferred to the Board, an appeal withdrawal is effective when received by the agency of original jurisdiction. Thereafter, it is not effective until received by the

> Board. A withdrawal received by the Board after the Board issues a final decision under Rule 1100(a) (§ 20.1100(a) of this part) will not be effective.

38 C.F.R. § 20.204(b)(3) (2015). In the absence of guidance in the text of the promulgated regulation, the Veterans Court has addressed through its decisions when a withdrawal of an appeal made at a hearing is "effective." The seminal case addressing this point is *DeLisio v. Shinseki*, 25 Vet. App. 45 (2011). There is no corresponding Federal Circuit decision reviewing the holding in *DeLisio*.

DeLisio expressly acknowledges that there is no regulation specifically governing circumstances where the claimant withdrew a claim for benefits without a written document. *DeLisio*, 25 Vet. App. at 57. Looking to 38 C.F.R. § 20.204, however, the Veterans Court declared that "it is well-settled that withdrawal of a claim is only effective where the withdrawal is explicit, unambiguous, *and done with a full understanding of the consequences of such action on the part of the claimant*." *Id*. (collecting cases from the Veterans Court) (emphasis added). The four decisions[3] cited by the *DeLisio* court provide examples of when a withdrawal did or did not meet the criteria of being explicit, unambiguous and done with a full understanding of the consequences. In particular, *DeLisio* cited an earlier decision where the Veterans Court found that "these few words spoken orally" did not

provide "the formality or specificity that withdrawal of [a Notice of Disagreement] requires." *Isenbart v. Brown*, 7 Vet. App. 537, 541 (1995). In *DeLisio*, the claims were not withdrawn effectively and were therefore remanded to the Board for further consideration. *DeLisio*, 25 Vet. App. at 62. In determining that the withdrawal was not effective, the Veterans Court relied on the fact that "the transcript reflects neither an explicit discussion of withdrawal nor *any indication that Mr. DeLisio understood* that he might be withdrawing claims for benefits for any disabilities not discussed." *Id*. (emphasis added).

When Mr. Acree first brought this appeal to the Veterans Court, he argued that a remand was warranted because Mr. Acree's single word answer – "Yes" – did not provide the specificity called for under *Isenbart* and does not demonstrate a "full understanding of the consequences" under *DeLisio*. In its argument below, the Secretary never suggested that *DeLisio* was wrongly decided and never disputed the crux of *DeLisio*'s holding. Similarly, the Veterans Court adopted the rationale in *DeLisio* and stated that "a withdrawal is only effective where it is explicit, unambiguous, and done with a full understanding of the consequences of such action on the part of the claimant." APPX3 (citing 25 Vet. App. at 47).

[3] *See Hanson v. Brown*, 9 Vet. App. 29, 32 (1996); *Kalman v. Principi*, 18 Vet. App. 522, 524 (2004); *Verdon v. Brown*, 8 Vet. App. 529, 533 (1996); *Isenbart v. Brown*, 7 Vet. App. 537, 541 (1995).

Yet, despite reciting the holding in *DeLisio*, the Veterans Court reached the perplexing conclusion that in this case that the Board was not required to address the criteria identified in *DeLisio* and not required to make findings as to whether Mr. Acree's withdrawal was made with a full understanding of the consequences. APPX3. Indeed, the Veterans Court decided that because the transcript reflects that Mr. Acree's withdrawal of his claims was "explicit and unambiguous," the Board "was not required to delve further into the analysis" and need not discuss whether the Veteran understood what was happening during the hearing nor whether he understood the consequences of withdrawing the claims at issue. APPX3.

Against this backdrop, Mr. Acree seeks the guidance of this Court to reverse the Veterans Court for its departure from *DeLisio* and its progeny. The issue identified by the Veterans Court as the "central issue in this case is whether the appellant's withdrawal was valid." APPX2. To determine whether the withdrawal was valid, or "effective" (the language of the regulation and *DeLisio*), the Veterans Court was bound to apply its own precedent. Because neither the VLJ nor the Board inquired as to whether the requirements for effective withdrawal were satisfied, Mr. Acree's claims should be remanded for additional proceedings.

B. The Veterans Court Applied the Incorrect Standard of Review, Yet Because the Lower Court Committed Legal Error Reversal is Warranted Under Either the *De Novo* or the Clear Error Standard

A secondary issue that calls out for correction is the application of the clearly erroneous standard of review by the Veterans Court. In the briefing below, the parties disagreed as to whether Mr. Acree presented an issue of law or an issue of fact. As set forth above, Mr. Acree argued that the VLJ and the Board committed an error of law in failing to make any mention of the requirements set forth in *DeLisio*. APPX428-429. The Secretary, however, maintained that the Board made findings of fact in determining that the claims were withdrawn and submitted that the Veterans Court should review under the more deferential clearly erroneous standard. The Veterans Court concluded that "[a] Board determination that a claimant withdrew his or his appeal is a finding of fact subject to the 'clearly erroneous' standard of review set forth in 38 U.S.C. § 7261(a)(4)." APPX2 (quoting *Warren v. McDonald*, 28 Vet. App. 214, 217-18 (2016)).

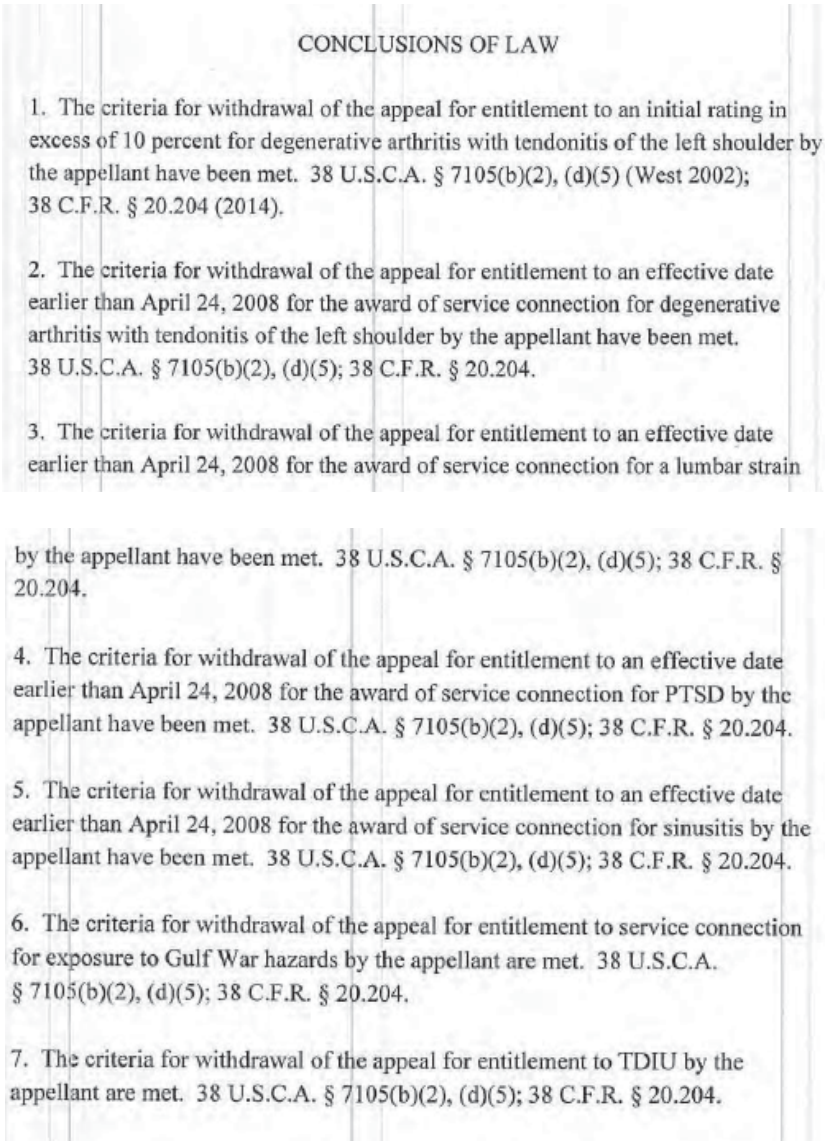
Appellant does not contest the approach taken in *Warren* where a veteran submitted to the VA a "Report of General Information form." *Warren*, 28 Vet. App. at 218. In that case there appeared to be a fulsome exchange during a hearing before the Board as to whether the veteran actually "*wished to withdraw*" his sleep apnea claim in light of the writing he had previously sent to the VA. *Id*. at 217 (emphasis added). The simple fact that there was a discussion on the record about

the Veteran's wishes as they related to his claim differentiates the circumstances in *Warren* from the present appeal. *See id*. In *Warren*, the Board made a finding that the written form "contained all the information necessary to properly withdraw an appeal required by 38 C.F.R. § 20.204." *Id.* at 218. The Board effectively tied its factual conclusion to the colloquy at the hearing about what the Veteran had intended or wished for his claim based on documents and representations made on the record. Under those circumstances, the clear error standard would be appropriate.

In this case, *de novo* review is the correct legal standard because the Board made no factual findings regarding whether Mr. Acree had a full understanding of what was happening during the hearing nor were there any findings that he appreciated the consequences of claim withdrawal. There are no conclusions tied to evidence. Mr. Acree's argument to the Veterans Court was that the VLJ or the Board *should have inquired* as to whether the Veteran had a full understanding of the consequences as required by *DeLisio*. Mr. Acree was seeking review as to whether the Board's *approach* was incorrect in determining that the withdrawal was effective. The issue presented below was therefore a question of law.

The Veterans Court misleadingly wrote that "Here, the Board *found* that the appellant's testimony on his September 14 Board hearing satisfied the criteria under 38 C.F.R. § 20.204 for withdrawal." APPX3 (citing APPX10-11) (emphasis

added). The Board, however, neither mentioned nor considered whether the purported verbal withdrawal was effective according to *DeLisio* — the standard as to whether the claim was properly withdrawn under under 38 C.F.R. § 20.204. The boilerplate statements provided by the Board in its "Conclusions of Law" were not "findings" so much as they were bare statements resting on an incorrect premise. The Board's purported "findings" are reproduced below:



CONCLUSIONS OF LAW

1. The criteria for withdrawal of the appeal for entitlement to an initial rating in excess of 10 percent for degenerative arthritis with tendonitis of the left shoulder by the appellant have been met. 38 U.S.C.A. § 7105(b)(2), (d)(5) (West 2002); 38 C.F.R. § 20.204 (2014).

2. The criteria for withdrawal of the appeal for entitlement to an effective date earlier than April 24, 2008 for the award of service connection for degenerative arthritis with tendonitis of the left shoulder by the appellant have been met. 38 U.S.C.A. § 7105(b)(2), (d)(5); 38 C.F.R. § 20.204.

3. The criteria for withdrawal of the appeal for entitlement to an effective date earlier than April 24, 2008 for the award of service connection for a lumbar strain by the appellant have been met. 38 U.S.C.A. § 7105(b)(2), (d)(5); 38 C.F.R. § 20.204.

4. The criteria for withdrawal of the appeal for entitlement to an effective date earlier than April 24, 2008 for the award of service connection for PTSD by the appellant have been met. 38 U.S.C.A. § 7105(b)(2), (d)(5); 38 C.F.R. § 20.204.

5. The criteria for withdrawal of the appeal for entitlement to an effective date earlier than April 24, 2008 for the award of service connection for sinusitis by the appellant have been met. 38 U.S.C.A. § 7105(b)(2), (d)(5); 38 C.F.R. § 20.204.

6. The criteria for withdrawal of the appeal for entitlement to service connection for exposure to Gulf War hazards by the appellant are met. 38 U.S.C.A. § 7105(b)(2), (d)(5); 38 C.F.R. § 20.204.

7. The criteria for withdrawal of the appeal for entitlement to TDIU by the appellant are met. 38 U.S.C.A. § 7105(b)(2), (d)(5); 38 C.F.R. § 20.204.

APPX10-11. Unlike *Warren*, the Board in this case never indicated that the purported withdrawal "*contained all the information necessary* to properly withdraw an appeal," *Warren*, 28 Vet. App. at 218 (emphasis added), and never made any attempt to tie the statements from the hearing to the bare conclusion that the criteria for withdrawal were met. Mr. Acree asked the Veterans Court to review whether the utter silence of the VLJ and the Board in lieu of analyzing the *DeLisio* requirements was an issue of law or fact. The CAVC was incorrect to equate the circumstances of this case with *Warren* and apply the clear error standard.[4]

Nonetheless, reversal is appropriate under either standard of review because the record facts are undisputed and the Veterans Court erred as a matter of law in determining the appropriate legal standard. It is well-established that no matter how deferential the standard of review, reversal is appropriate where the conclusion is predicated on legal error or an improper legal foundation. *United States v. Singer Mfg. Co*., 374 U.S. 174, 193 (1963) ("Given the court's own findings and the clear import of the record, it is apparent that its conclusions were predicated upon 'an erroneous interpretation of the standard to be applied. Thus,

[4] Interestingly, the three-judge panel in *Warren* applied the standard annunciated in *DeLisio* and found that the Board erred in finding that the Veteran withdrew his claims for sleep apnea because the record indicated that he did not manifest the requisite intent to withdraw. *Warren*, 28 Vet. App. at 218-219.

'(b)ecause of the nature of the District Court's error we are reviewing a question of law, namely, whether the District Court applied the proper standard to essentially undisputed facts.'"); *Ponder v. United States*, 117 F.3d 549, 552 (Fed. Cir. 1997) (reviewing judgments "to determine whether they are premised upon clearly erroneous factual determinations or otherwise incorrect as a matter of law"). The clearly erroneous standard does not apply where the issue being reviewed is a legal principal relating to the understanding of statutes or regulations. *Lennox v. Principi*, 353 F.3d 941, 945 (Fed. Cir. 2003) (citing *Miller v. Fenton*, 474 U.S. 104, 114 (1985)). Accordingly, the Board's legal errors in understanding the scope of the relevant federal regulations warrants reversal even under the more deferential standard of review.

C. The Veterans Court Erred in Presuming the Withdrawal was Effective Under 38 C.F.R. § 20.204 and Not Conducting Further Analysis

The Veterans Court erred by acknowledging that *DeLisio* was the controlling standard to assess whether there was claim withdrawal in the absence of a writing, APPX3, and then failing to require the Board to assess whether Mr. Acree's purported withdrawal was explicit, unambiguous, *and done with a full understanding of the consequences*. Failure to adduce any record with respect to the *DeLisio* requirements frustrates appellate review of the effectiveness of the purported withdrawal. The Veterans Court essentially absolved the Board from

making findings according to the correct standard, an abdication that constitutes legal error.

1. The Veterans Law Judge and the Board Erroneously Presumed the Withdrawal was Effective Without Assessing Whether the Veteran Had Any Understanding of the Consequences

What occurred at the September 2014 hearing is apparent from the transcript. There was no inquiry as to the Veteran's understanding of what was transpiring. Instead, the VLJ presumed at the hearing that the claim withdrawal criteria were satisfied and the Board then accepted that presumption without any further explanation.

> JUDGE: Thank you.
>
> The issues certified for appellate consideration today, well there's more issues certified than what we're going to be discussing ***because some of the issues have been withdrawn. So let me address the issues that have been withdrawn first.*** The issue of an increased rating for degenerative arthritis of the tendonitis of the left shoulder. An earlier effective date for service connection for degenerative arthritis with tendonitis of the left shoulder, lumbar strain, Post-Traumatic Stress Disorder and sinusitis. Entitlement to service connection for exposure to Gulf War hazards and entitlement to a total disability rating based on individual unemployability.
>
> ***You're withdrawing your appeal with respect to all of those issues, is that correct, Mr. Acree?***
>
> VETERAN: Yes.

APPX147 (emphasis added). The Board endorsed the VLJ's approach of presuming the claims are withdrawn and then confirming the purported withdrawal with a leading question. Beyond that, the transcript is entirely silent on this issue. And unfortunately for the Veteran (a lay person with no legal training who should not be expected to understand the legal concept of withdrawing an appeal), there is no way to discern from this record whether he understood the question being asked or the consequences of answering in the affirmative.

The Board's wholesale reliance on the word "Yes" is especially troubling given that the VLJ phrased the question by assuming the answer would be "Yes." Rather than leaving the inquiry open-ended, the VLJ stated "because some of the issues *have been withdrawn*" and "So let me address the issues that *have been withdrawn* first." APPX147 (emphasis added). By treating the withdrawal as a foregone conclusion and then making no further inquiry, the criteria for effective withdrawal were not satisfied because there is no record as to what the Veteran actually understood. Even if for the sake of argument it is presumed his answer qualified as explicit and unambiguous, it was still improper to presume the effectiveness of the withdrawal based on a single word response rather than actually gathering the information to make a determination. There is no evidence in the undisputed hearing transcript that could possibly satisfy the criteria in *DeLisio*.

On review, the Board had a statutory duty under 38 U.S.C. § 7104(d)(1) to articulate reasons and bases to provide for judicial review of its findings and conclusions." *Sickels v. Shinseki*, 643 F.3d 1362, 1365 (Fed. Cir. 2011). At the very least, the Board was required to provide some explanation for its determination that Mr. Acree's alleged withdrawal of the claims at issue was effective. *See Verdon v. Brown*, 8 Vet. App. 529, 533 (1996) (holding that when it is ambiguous whether a claim is withdrawn in a written letter, "it is not sufficient for the Board to conclude there was an abandonment without providing an adequate statement of reasons or bases to support that conclusion"). Yet the Board never provided *any* reasoning as to why it concluded that the withdrawal at the hearing was effective. The Board's entire statement of "Reasons and Bases" for dismissing the claims in contained in one paragraph:

> The Board may dismiss any appeal which fails to allege specific error of fact or law in the determination being appealed. 38 U.S.C.A. § 7105 (West 2002). An appeal may be withdrawn as to any or all issues involved in the appeal at any time before the Board promulgates a decision. 38 C.F.R. § 20.204 (2014). Withdrawal may be made by the appellant or by his or her authorized representative. 38 C.F.R. § 20.204. At the September 2014 hearing, the appellant *withdrew his appeal* with respect to the claims for entitlement to an increased rating for arthritis of the left shoulder, entitlement to earlier effective dates for the awards of service connection for arthritis of the lefts shoulder, a lumbar strain, PTSD, and sinusitis, entitlement to service connection for exposure to Gulf War hazards, and entitlement to TDIU. Hence, there remain no allegations of error of fact or law for appellate consideration. Accordingly, the Board does not have jurisdiction to review the appeal with respect to these claims and they are dismissed.

APPX11 (emphasis added). The Board's first three sentences partially state the applicable law but omit mention of the criteria for effective withdrawal under the facts of this case and the Board fails to conduct the analysis called for in *DeLisio*. The Board instead perpetuated the VLJ's presumption that the criteria for effective claim withdrawal were satisfied.

2. The Veterans Court Departed From Controlling Precedent Surrounding § 20.204 Without Any Justification For the Determination that the Board Was Not Required To Analyze the Veteran's Understanding of the Consequences

The Veterans Court should have recognized the Board's failure to fully explain its reasoning and then remanded for further development as to whether Mr. Acree understood the consequences of withdrawing the claims at issue. *See Adams v. Principi*, 256 F.3d 1318, 1322 (Fed. Cir. 2001) (finding that remand is appropriate to cure the defect of an inadequate statement so as to "obtain clarification as to the import of the evidence"). Indeed, "[w]ithout an adequate statement, it is impossible to understand the precise basis for the Board's decision and conduct informed appellate review." *Deloach v. Shinseki*, 704 F.3d 1370, 1380 (Fed. Cir. 2013). Instead of ordering a remand, the Veterans Court inexplicably excused the Board from carrying out its statutorily proscribed function:

> Although the appellant asserts that the Board erred by failing to explicitly address the factors set forth in *DeLisio*, as it did not make any finding as to whether his withdrawal was made with a full

> understanding of the consequences, Appellant's Br. at 6-7, he has not demonstrated that the Board was required to do so in this case.

APPX3. The Veterans Court then goes on to carefully parse the facts of *DeLisio* to conclude that the core holding that an effective withdrawal be (1) explicit, (2) unambiguous, and (3) done with a full understanding of the consequences does not apply in every case. The Veterans Court attempts to fashion a new interpretation of § 20.204 that when the appellant's purported withdrawal is "explicit and unambiguous," then the Board need not "delve further into further analysis" to determine whether the veteran understood the ensuing consequences.[5] APPX3. But the Veterans Court erred in premising the inquiry on only two of the three requirements for effective withdrawal of claims relinquished on the record at a hearing.

As a threshold matter, this rationale is wrong-spirited in that it rejects the uniquely pro-claimant principles underlying the veterans benefits system. Instead of adhering to the annunciated standard that secures protections for those who have served and are now litigating in a complicated administrative regime, the Veterans Court departed from well-established criteria — allowing the Board to avoid undertaking its statutory obligation.

[5] The Veterans Court appears to be adopting the Secretary's argument below that "Because the Appellant's withdrawal was explicit and unambiguous and did not (continued…)

More concerning, however, is that there is nothing in *DeLisio* or subsequent decisions that suggests that the "full understanding of the consequences" criteria can be disregarded if the purported withdrawal was explicit and unambiguous. In attempting to distinguish the facts of this case from *DeLisio*, the Veterans Court appears to have fashioned a new standard where the veteran's understanding of the consequences is only relevant where he gives some indication of confusion. *See* APPX3-4. Here, there is no way to know if the Veteran was confused or understood what he was agreeing to because he was never asked. The VLJ asked him a leading question and moved on. The Veterans Court's ruling in this case seems to put the onus on the Veteran to create a record that overcomes the VLJ's presumption that the withdrawal is effective.

Such an approach is directly contrary to prior precedent and the veteran-friendly, nonadversarial, administrative claims system. *See Gambill v. Shinseki*, 576 F.3d 1307, 1316 (Fed. Cir. 2009) (Bryson, J., concurring) (explaining the nonadversarial and paternalistic nature of DVA proceedings intended to function "with a high degree of informality and solicitude for the claimant") (internal citations omitted); *see also Kalman v. Principi*, 18 Vet.App. 522, 524 (2004) ("When reviewing the question of a claimant's withdrawal of an appeal to the

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raise the concerns presented in *DeLisio*, the Board had no duty to discuss *DeLisio*." APPX412.

Board, the Court must take into consideration 'the nonadversarial setting of the [VA] claims adjudication process,' during which VA is required to construe liberally all submissions by a claimant.") (internal citation omitted). Plainly read, the holding in *DeLisio* is not limited to the facts of that case and carves out no exceptions that support the Veterans Court "distinguishing" the circumstances of Mr. Acree's hearing. It was erroneous for the Veterans Court to conclude that "the Board was not required to delve into further analysis, and the explanation that the Board provided in its statement of reasons or bases is adequate." APPX3-4.

3. The Central Issue in this Appeal Presents a Question of First Impression

The circumstances presented here — a purported withdrawal of claims that occurred on the record at a hearing (but without a writing) — have not been unpacked by the Federal Circuit. The regulation itself, 38 C.F.R. § 20.204, references that claims withdrawn during a hearing are carved out from the typical circumstances detailed in subsections (b)(1) through (b)(3), but does not state what is required to make that form of withdrawal effective. The Veterans Court has filled this gap in addressing claims withdrawn during a hearing and reading 38 C.F.R. § 20.204(b) to require the criteria of a withdrawal being effective when it is (1) explicit, (2) unambiguous, *and* (3) done with a full understanding of the consequences. *DeLisio*, 25 Vet. App. at 57. This is the best and only guidance available to address the circumstances in this case.

This appeal presents a unique vehicle for the Federal Circuit to endorse the common sense approach adopted in *DeLisio*, an approach that ensures veterans cannot unknowingly assent to extinguishing claims they still wish to pursue. Moreover, any interpretation of the text and purpose of 38 C.F.R. § 20.204(b) might also offer clarification as to what constitutes "withdrawal with a full understanding of the consequences." Currently there is no measurable guidance to assess when a veteran has demonstrated the requisite understanding of an inherently complicated legal construct.

Mr. Acree requests that in situations where a claim is withdrawn at a hearing, the withdrawal should only be effective where the Veteran or the Veteran's representative has shown on the record that the withdrawal is (1) explicit, (2) unambiguous, *and* (3) done with a full understanding of the consequences. These criteria should apply in all instances where the withdrawal occurs during a hearing and is not accompanied by a writing. As discussed in the following section, the hearing officer or VLJ is in the best position to implement these requirements.

II. THE DUTY OF A HEARING OFFICER UNDER 38 C.F.R. § 3.103 ENCOMPASSES EXPLANATION OF THE CONSEQUENCES OF WITHDRAWING A CLAIM DURING A HEARING

The veterans' benefits system has been calibrated with uniquely pro-claimant principles that have long been recognized by this Court and the Supreme

Court. *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998). "Consistent with these proclaimant principles, and pursuant to statute, the VA regulations in 38 C.F.R. § 3.103 provide for certain procedural due process and appellate rights for veterans involved in VA adjudications." *Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs*, 710 F.3d 1328, 1330 (Fed. Cir. 2013). The relevant text of Section 3.013, titled "Procedural due process and appellate rights," states:

> The purpose of a hearing is to permit the claimant to introduce into the record, in person, any available evidence which he or she considers material and any arguments or contentions with respect to the facts and applicable law which he or she may consider pertinent. All testimony will be under oath or affirmation. The claimant is entitled to produce witnesses, but the claimant and witnesses are expected to be present. The Veterans Benefits Administration will not normally schedule a hearing for the sole purpose of receiving argument from a representative. *It is the responsibility of the employee or employees conducting the hearings to explain fully the issues and suggest the submission of evidence which the claimant may have overlooked and which would be of advantage to the claimant's position.* To assure clarity and completeness of the hearing record, questions which are directed to the claimant and to witnesses are to be framed to explore fully the basis for claimed entitlement rather than with an intent to refute evidence or to discredit testimony. In cases in which the nature, origin, or degree of disability is in issue, the claimant may request visual examination by a physician designated by VA and the physician's observations will be read into the record.

38 C.F.R. § 3.103(c)(2) (emphasis added).

As precedent recognizes, 38 C.F.R. § 3.103(c)(2) imposes "two distinct duties" on a hearing officer: "The duty to explain fully the issues and the duty to suggest the submission of evidence that may have been overlooked." *Bryant v.*

Shinseki, 23 Vet. App. 488, 492 (2010). "Importantly, the VA has consistently applied the 3.103 rights both to hearings conducted at the regional offices level and in appellate hearings conducted before the Board of Veterans' Appeals." *Nat'l Org. of Veterans' Advocates*, 710 F.3d at 1330. In this case the Veterans Court erroneously excused the VLJ from fully explaining the issues pertinent to claim withdrawal.

A. The Veterans Court Erred In Limiting the Reach of 38 C.F.R. § 3.103(c)(2)

The Veterans Court committed a separate legal error in its interpretation of a hearing officer's duty to fully explain the issues. Mr. Acree argued below that it was improper for the VLJ to frame the withdrawal during the hearing as a leading question and maintained that it was part of the VLJ's duty under 38 C.F.R. § 3.103(c)(2) to ensure that the Veteran demonstrated a "full understanding of the consequences" as required by *DeLisio*. APPX412-414 (citing 25 Vet. App. at 57). Mr. Acree explained that the practical need for an exchange with the VLJ as to the consequences of forfeiting a claim were pronounced in this case in view of Mr. Acree's long history of medications that affect his clarity of mind. *See* APPX193 (Mr. Acree has previously explained that he was on "so much medication" that he "cannot function."). The Veterans Court rejected this argument because of the "explicit nature of the appellant's withdrawal in this case" and the lack of authority

expressly requiring a VLJ to discuss the consequences of claim withdrawal occurring at a hearing. APPX4.

For the reasons explained in the previous section, the Veterans Court is incorrect to again singularly focus on the "explicit nature" of the purported withdrawal at the expense of reading out the requirement that there also be inquiry into the veteran's full understanding of the consequences. Stating "Yes" does not, *ipso facto*, indicate that an unsophisticated litigant fully understands what is happening during the proceedings. Additionally, the Veterans Court adopted an alarmingly narrow reading of what is required under § 3.103(c)(2) in its reading of the case law. *See* APPX4.

The case relied on by the Veterans Court for rejection of Mr. Acree's argument, *Bryant v. Shinseki*, 23 Vet. App. 488, 492 (2010), accurately states that a hearing officer's duties to "explain fully the issues and suggest the submission of evidence which the claimant may have overlooked" are *not detailed* in the regulation. The analysis in *Bryant* then goes on to discuss the language of § 3.103(c)(2) as it applies to the functions of a hearing officer in the unrelated context of preadjudicating or otherwise weighing conflicting evidence prior to or at the hearing. *Bryant*, 23 Vet. App. at 492-97. The Veterans Court concluded that the VLJ was not required explain the consequences of claim withdrawal because there is no case or regulation that expressly demands it, but there is also no case or

regulation that addresses this precise issue. Indeed, the scope of a hearing officer's duty in the context of claims being withdrawn during a hearing remains an open and entirely unevaluated question.

The guidance available from this Court as to the purpose of § 3.103 suggests that the hearing officer's duties are broader than the Veterans Court recognized. In *Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs* (hereinafter, "*NOVA*"), the VA issued an immediately-effective new rule that *eliminated* some of the rights previously provided under § 3.103. *NOVA*, 710 F.3d at 1330-31. The effect of the new rule was that veterans would no longer have the previously available procedural due process and appellate rights during Board appeals. *Id*. at 1331. When the Federal Circuit was asked to review the validity new rule, the Court strongly rebuked any efforts on the part of the VA to render § 3.103 inapplicable. *See id*. at 1333-34. Importantly, the panel in *NOVA* chastised the VA for "strip[ing] veterans of assistance that the Board would have otherwise been required to provide." *Id*. at 1333.

The issue presented here is whether veterans are entitled to assistance during the course of a hearing to fully understand the consequences of their potential forfeiture of a claim. While the Veterans Court concludes that in the absence of any authority, the proper course is to deny veterans this assistance, the proclaimant principles underlying the text of the regulation and the Federal Circuit's

endorsement of broad assistance for veterans in *NOVA* weighs in favor of interpreting a duty "to fully explain the issues" to encompass explanation of the consequences of withdrawing a claim during a hearing. *See NOVA*, 710 F.3d at 1330 (explaining that 38 C.F.R. § 3.103 requires the VA to grant veterans "every benefit that can be supported in law while protecting the interests of the Government"). The first duty of a hearing officer under § 3.103(c)(2) should thus be understood broadly to ensure that a hearing officer (1) explains the consequences of claim withdrawal to the veteran and (2) develops a record indicating that the veteran understands those consequences with demonstrated clarity of mind before the withdrawal is found effective.

B. The Protections Afforded to Litigants in Article III Courts Offer a Model for the Procedural Safeguards That Should Attach to Veterans Withdrawing Claims During a Hearing

A broad interpretation of § 3.103(c)(2) in the context of claim withdrawal during a hearing ensures the humane adjudication of veterans disability claims. Under this approach, a hearing officer would be expected to exercise the same care in explaining the ramifications of claim withdrawal (where there is no writing) that we expect throughout our judicial system when the litigant is *pro se* or under the influence of medications when relinquishing rights.

1. A Broad Interpretation of § 3.103(c)(2) Affords Veterans Appearing before a VLJ Protections Consistent With *Pro Se* Litigants in Federal District Court

The facts of Mr. Acree's case highlight the potential for a hypothetical unrepresented veteran to answer "Yes" to a hyper-technical question that the veteran did not understand and then be disadvantaged in seeking relief for service-connected injuries. Such a result is altogether less likely in an Article III court, where *pro se* litigants enjoy liberal construction of their arguments and courts must afford such a plaintiff "the benefit of any doubt" because they are proceeding without counsel. *See Karim-Panahi v. L.A. Police Dep't*, 839 F.2d 621, 623 (9th Cir. 1988); *see also Anaya v. Heckler*, 592 F. Supp. 624, 627 (W.D.N.Y. 1984) ("In that plaintiff appeared *pro se*, the ALJ had a particular responsibility to ensure that plaintiff's rights were adequately protected."). To limit the duty of a hearing officer under § 3.103(c)(2) so as not to require an explanation of claim withdrawal would yield the absurd result of a *pro se* litigant seeking social security benefits in federal district court having more procedural protections than a veteran proceeding in the proclaimant VA system.

Such a result is inconsistent with what Congress envisioned when it mandated a "benefit-of-the-doubt" rule to generously construe evidence and resolve ambiguities in the veteran's favor. *See Harris v. Shinseki*, 704 F.3d 946, 948-49 (Fed. Cir. 2013) (internal citations omitted). The benefit-of-the-doubt rule

for veterans is aligned with the "beneficent purposes" of the Social Security Act. In the Social Security context, the Secretary of the Department of Health and Human Services "is not obligated to furnish a claimant with counsel, but the ALJ has a *special duty to protect the rights of a pro se claimant*." *Lopez v. Sec. of Dep't. of Health and Human Servs.*, 728 F.2d 148, 149-50 (2d Cir. 1984) (emphasis added) (internal citations omitted). As is the case here, "[w]hen the ALJ fails to develop the record fully, he does not fulfill his duty . . ." *Id*. at 150 (citing *Hankerson v. Harris*, 636 F.2d 893, 895 (2d Cir. 1980) ("[T]he ALJ has a "duty . . . to scrupulously and conscientiously probe into, inquire of, and explore for all the relevant facts. . . . ")); *see also Rodriguez v. Barnhart*, No. 05-cv-3383, 2006 WL 988201, at *5 (S.D.N.Y. Apr. 13, 2006) (outlining the ALJ's responsibility to "protect the rights of [the] *pro se* litigant by ensuring that all of the relevant facts are sufficiently developed and considered."). In view of the Federal Circuit's call for broad assistance to veterans when fully explaining the issues under § 3.103 and the directive to grant veterans "every benefit that can be supported in law while protecting the interests of the Government," *NOVA*, 710 F.3d at 1330, the procedural protections for veterans should not be less robust than what is afforded to *pro se* litigants seeking social security benefits.

The simple act of explaining the consequences of claim withdrawal on the record at a hearing would require minimal effort on the part of the hearing officer,

but would promote access to justice for unrepresented veterans. An unrepresented veteran, often a lay person without legal sophistication, cannot be presumed to understand the consequences of claim withdrawal and is therefore disadvantaged unless a hearing officer explains what the withdrawal means. Our federal court system aims to reduce prejudice to *pro se* litigants by obligating courts to "make reasonable allowances to protect *pro se* litigants from inadvertent forfeiture of important rights because of their lack of legal training." *Randolph v. Lindsay*, 837 F. Supp. 160, 162 (W.D.N.Y. 2011) (quoting *Abbas v. Dixon*, 480 F.3d 636, 639 (2d Cir. 2007); *see also Szubielski v. Pierce*, 152 F. Supp.3d 227, 233 (D. Del. 2016) (stating that in the Third Circuit the district court has a responsibility to inquire *sua sponte* as to whether a *pro se* litigant is competent to litigate his action). A more liberal understanding of a hearing officer's role when a veteran withdraws claims at a hearing provides the same type of reasonable accommodation for the unrepresented so that there is no inadvertent forfeiture of rights.

2. A Broad Interpretation of § 3.103(c)(2) Protects Against the Inadvertent Forfeiture of Rights When A Veteran is Under the Influence of Medication

The policies adopted to protect criminal defendants from the inadvertent forfeiture of rights during a plea hearing are noteworthy in the context of a veteran's withdrawal of claims during a hearing before a VLJ. Mr. Acree has, since his time of service and PTSD diagnosis been under the influence of

medications that impact his state of mind. *See, e.g.*, APPX52-53; APPX83-85; APPX89-90; APPX102-103; APPX219-224; APPX231; APPX238; APPX296-345. In the criminal context, relinquishment of a right can only occur when the litigant is competent. *See Godinez v. Moran*, 509 U.S. 389, 400 (1993) (holding that before a court may accept a guilty plea, it must ensure that the plea is knowing and voluntary and that the defendant is competent to enter the plea). By ensuring that a hearing officer was required to develop a record during a hearing as to the veteran's full understanding of the consequences of claim withdrawal, the hearing officer would also be positioned to confirm that the veteran was competent or not otherwise impaired at the time he relinquished his claims.

In this case, the VLJ failed to develop any record with respect to Mr. Acree's state of mind. The VLJ did not question him about his competence or the severity of the side effects of his medications. Nor did the VLJ attempt to ascertain whether Mr. Acree used medications that might impact his state of mind. In the criminal context, this failure to develop a record would have been reversible error. *See United States v. Cole*, 813 F.2d 43, 46-47 (3d Cir. 1987) (reversing a district court that failed to make a factual finding as to whether the defendant was under the influence of drugs or whether his ingestion of drugs impaired his understanding or judgment at the time of his plea); *United States v. Johnson*, 541 F.3d 1064, 1066 (11th Cir. 2008); *United States v. Damon*, 191 F.3d 561, 564-65

(4th Cir. 1999) (finding error where the district court accepted a guilty plea while the defendant was on antidepressant medication but the court did not make further inquiry into the defendant's mental state or the possibility that his judgment was impaired); *see also United States v. Parra-Ibanez*, 936 F.2d 588, 595-96 (1st Cir. 1991).

If the duty of a hearing officer under § 3.103(c)(2) encompassed explanation of the consequences of claim withdrawal, the hearing officer would necessarily be asking the veteran if he understood the explanation provided and whether there were any circumstances that might interfere with the veteran's ability to understand. Engaging with the veteran and developing a record as to his understanding would have the tangential benefit of ensuring that a veteran like Mr. Acree demonstrated the requisite capacity at the time of the hearing to knowingly withdraw disability claims. In a plea hearing, such a colloquy between judge and defendant is an important safeguard that protects against misunderstandings. If the VLJ had been required to follow that model and engage in a simple line of questioning as to Mr. Acree's comprehension, it would have avoided litigation over an ambiguous record. A hearing officer's duty to fully explain the issues should encompass an inquiry as to whether the veteran understood the consequences of claim withdrawal and confirmation that the veteran was competent to demonstrate the requisite understanding.

CONCLUSION

For the foregoing reasons, Mr. Acree respectfully requests a reversal of the Veterans Court's decision to affirm the Board's dismissal of Mr. Acree's claims for:

1. Increased rating for degenerative arthritis with tendonitis of the left shoulder.
2. Earlier effective date for the award of service connection for degenerative arthritis with tendonitis of the left shoulder.
3. Earlier effective date for the award of service connection for a lumbar strain.
4. Earlier effective date for the award of service connection for post-traumatic stress disorder.
5. Earlier effective date for the award of service connection for sinusitis.
6. Entitlement to service connection for exposure to Gulf War hazards.
7. Entitlement to a total disability rating based on individual unemployability.

Appellant requests that this case is remanded to the Board for further factual development as to whether Mr. Acree is withdrawing the above-listed claims and, if so, whether the withdrawal is effective by satisfying the criteria of being "explicit, unambiguous, and done with a full understanding of the consequences." Appellant further requests instructions on remand that it is the duty of the hearing officer to, when faced with a veteran withdrawing an appeal during a hearing (1) explain the consequences of claim withdrawal to the veteran and (2) develop a record demonstrating that the veteran understands those consequences with demonstrated clarity of mind before the withdrawal is found effective.

Dated: May 22, 2017

/s/ *Natalie A. Bennett*

Natalie A. Bennett
McDermott Will & Emery LLP
500 N. Capitol Street, N.W.
Washington, DC 20001
Tel: (202) 756-8000
Fax: (202) 756-8087
nbennett@mwe.com

Attorneys for Appellant
Lawrence J. Acree

ADDENDUM

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 15-0031

LAWRENCE J. ACREE, APPELLANT,

V.

ROBERT D. SNYDER,
ACTING SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before LANCE, *Judge*.

MEMORANDUM DECISION

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

LANCE, *Judge*: The appellant, Lawrence J. Acree, served in the U.S. Navy from June 1985 to June 1989 and from June 2007 to April 2008, including service in Iraq. *See* Record (R.) at 2785, 2793. He appeals, through counsel, a November 20, 2014, Board of Veterans' Appeals (Board) decision that dismissed his claims for entitlement to service connection for exposure to Gulf War hazards, an initial rating in excess of 10% for degenerative arthritis with tendonitis of the left shoulder, a total disability rating based on individual unemployability (TDIU), and effective dates earlier than April 24, 2008, for the award of service connection for degenerative arthritis with tendonitis of the left shoulder, lumbar strain, post-traumatic stress disorder (PTSD), and sinusitis. R. at 1-13[1]. Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). This appeal is timely, and the Court has jurisdiction over the case pursuant to 38 U.S.C. §§ 7252(a) and 7266. For the reasons that follow, the Court will affirm the November 20, 2014, decision.

[1] The Court lacks jurisdiction over the claims for entitlement to increased initial ratings for lumbar strain and PTSD, an initial compensable rating for sinusitis, and service connection for sleep apnea, which were remanded, and they will not be addressed further. *See* 38 U.S.C. §§ 7252(a), 7266(a); *Howard v. Gober*, 220 F.3d 1341, 1344 (Fed. Cir. 2000).

In the decision on appeal, the Board dismissed the seven claims above, finding that the appellant withdrew them at a September 2014 Board hearing. R. at 4-5. Thus, the central issue in this case is whether the appellant's withdrawal was valid. The hearing transcript reflects that a representative from Disabled American Veterans represented the appellant during the hearing. R. at 978. At the start of the hearing, the Board member listed the seven matters now at issue and asked the appellant whether he was "withdrawing [his] appeal with respect to all of those issues." R. at 979. The appellant responded in the affirmative, *id.*, and the Board member proceeded to list the remaining issues on appeal, R. at 980.

The appellant presents three arguments in support of his assertion that the Board erred when it found that his withdrawal was valid. Appellant's Brief (Br.) at 4-5. First, he argues that it failed to address the requirements set forth in *DeLisio v. Shinseki* that withdrawal of a claim be "explicit, unambiguous, and done with a full understanding of the consequences of such action." 25 Vet.App. 45, 47 (2011); *see* Appellant's Br. at 6-11. Next, he contends that the Board member who presided over the hearing failed to fulfill his duty to explain the consequences of the withdrawal. *Id.* at 11-14. Lastly, the appellant argues that the Board member erred by failing to determine his state of mind at the time of the hearing, including whether he was competent to withdraw his claims at that time. *Id.* at 14-17. The Secretary disputes the appellant's contentions. Secretary's Br. at 7-22.

As an initial matter, the parties disagree as to which standard of review the Court should apply in this case. *See* Appellant's Br. at 6 ("The Court reviews the Board's dismissal of appellant's claims *de novo*" (citations omitted)); Secretary's Br. at 8 ("The question of whether a claim has been withdrawn is one of fact and reviewed under the 'clearly erroneous' standard . . . ." (citations omitted)). This Court recently confirmed, however, that "[a] Board determination that a claimant withdrew his or her appeal is a finding of fact subject to the 'clearly erroneous' standard of review set forth in 38 U.S.C. § 7261(a)(4)." *Warren v. McDonald*, 28 Vet.App. 214, 217-18 (2016) (citing *Kalman v. Principi*, 18 Vet.App. 522, 524 (2004)). "A factual finding 'is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Hersey v. Derwinski*, 2 Vet.App. 91, 94 (1992) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)). Under this standard, the Court may not substitute its own judgment for a factual determination made by the

Board, even if the Court might not have reached the same factual conclusion in the first instance. *Gilbert v. Derwinski*, 1 Vet.App. 49, 52-53 (1990).

Here, the Board found that the appellant's testimony at his September 2014 Board hearing satisfied the criteria under 38 C.F.R. § 20.204 for withdrawal. R. at 4-5. Namely, § 20.204(a) provides that "[o]nly an appellant, or an appellant's authorized representative, may withdraw an appeal," and § 20.204(b) states that, "[e]xcept for appeals withdrawn on the record at a hearing, appeal withdrawals must be in writing." 38 C.F.R. § 20.204 (2016). Thus, a withdrawal is only effective where it is explicit, unambiguous, and done with a full understanding of the consequences of such action on the part of the claimant. *DeLisio*, 25 Vet.App. at 57.

The Court is not persuaded that the Board failed to provide an adequate statement of reasons or bases to support its determination that his withdrawal was effective. *See Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) ("An appellant bears the burden of persuasion on appeals to this Court."), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000) (table). Although the appellant asserts that the Board erred by failing to explicitly address the factors set forth in *DeLisio*, as it did not make any finding as to whether his withdrawal was made with a full understanding of the consequences, Appellant's Br. at 6-7, he has not demonstrated that the Board was required to do so in this case.

The Board is required to address all issues raised by the appellant or reasonably raised by the evidence of record. *Robinson v. Peake*, 21 Vet.App. 545, 552 (2008), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009). In *DeLisio*, the Board member presiding over the veteran's hearing had listed 15 matters that required adjudication and asked Mr. DeLisio if he "got the issues straight," to which the veteran responded that he "thought" so. 25 Vet.App. at 58. The Board subsequently dismissed Mr. DeLisio's appeal as to the claims not included in the 15 listed matters. *Id.* On appeal, this Court held that the hearing transcript "reflects neither an explicit discussion of withdrawal nor any indication that Mr. DeLisio understood that he might be withdrawing claims," and it accordingly determined that the purported withdrawal did not comply with § 20.204. *Id.* In this case, by contrast, the Board hearing transcript reflects that the appellant's withdrawal of his claims was explicit and unambiguous, *see* R. at 979, and it is thus distinguishable from the situation in *DeLisio*. Accordingly, the Board was not required to delve into further analysis, and the

explanation that the Board provided in its statement of reasons or bases is adequate. *See* 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995).

The Court is likewise not persuaded that the Board member erred by failing to explain the consequences of withdrawal. *See* Appellant's Br. at 12 (citing *Bryant v. Shinseki*, 23 Vet.App. 488, 492 (2010)). In *Bryant*, the Court explained that 38 C.F.R. § 3.103(c)(2) imposes two duties on hearing officers: "to explain fully the issues and suggest the submission of evidence which the claimant may have overlooked and which would be of advantage to the claimant's position." 23 Vet.App. at 492 (citing § 3.103(c)(2)) (italic emphasis omitted). With respect to the first duty, the Court further clarified that "the hearing officer has a duty to fully explain the issues still outstanding that are relevant and material to *substantiating* the claim." *Id.* at 496 (emphasis added). The appellant cites no authority requiring a Board member to explain the consequences of *withdrawing* an appeal, and the Court discerns no error in this regard, particularly in light of the explicit nature of the appellant's withdrawal in this case. *See Locklear v. Nicholson*, 20 Vet.App. 410, 416 (2006) (holding that the Court will not entertain underdeveloped arguments); *Hilkert*, 12 Vet.App. at 151.

Finally, the Court rejects the appellant's contention that the Board member erred by failing to determine whether he was competent at the time of the hearing. Appellant's Br. at 14-17. The appellant's argument is premised on an assertion that "[t]he safeguards called for in *DeLisio* . . . track the 'intelligent waiver' demanded before a court will accept a guilty plea" in a criminal case. Appellant's Br. at 14. He suggests that, when analyzing whether a veteran effectively withdrew a claim for disability benefits at a hearing, "Federal Rule of Criminal Procedure 11 is instructive." *Id.* at 15. The Court disagrees. This Court is not bound by the Federal Rules of Criminal Procedure, *cf. Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 302 (2008) (holding that the Federal Rules of Evidence are not binding on the Court), and, as the Secretary notes, the withdrawal of a claim for disability benefits "does not lead to a forfeiture of rights on the scale of incarceration," Secretary's Br. at 21. Moreover, the appellant cites no evidence indicating that he may have been incompetent at the time of the withdrawal or otherwise raising the issue such that the Board was required to address it. *See Robinson*, 21 Vet.App. at 552. The Court thus discerns no error in this regard.

Therefore, after consideration of the parties' briefs and a review of the record, the Board's November 20, 2014, decision is AFFIRMED.

DATED: January 30, 2017

Copies to:
Natalie A. Bennett, Esq.
VA General Counsel (027)

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed Appellant's Brief with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system on May 22, 2017.

/s/ *Natalie A. Bennett*
Natalie A. Bennett
McDermott Will & Emery LLP
Attorney for
Appellant Lawrence J. Acree

CERTIFICATE OF COMPLIANCE

1. This brief compiles with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because it contains 9,102 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(A)(7)(B)(iii) and Federal Circuit Rule 32(b).

2. This brief compiles with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14 point font.

Dated: May 22, 2017

/s/ *Natalie A. Bennett*
Natalie A. Bennett
McDermott Will & Emery LLP

Attorney for
Appellant Lawrence J. Acree

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