Case No. 2017-1749

IN THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

LAWRENCE J. ACREE,
Claimant-Appellant,

v.

DAVID J. SHULKIN, Secretary of Veterans Affairs,
Respondent-Appellee.

Appeal from the United States Court of Appeals for Veterans Claims
Case No. 15-0031, Judge Alan G. Lance, Sr.

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STATEMENT OF RELATED CASES

Pursuant to Rule 47.5, respondent-appellee's counsel states that he is unaware of any other appeal in or from this action that was previously before this Court or any other appellate court under the same or similar title. Respondent-appellee's counsel also states that he is unaware of any cases pending before this Court that may directly affect or be directly affected by this Court's decision in this appeal.

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STATEMENT OF THE ISSUES

1. Whether the Court of Appeals for Veterans Claims (Veterans Court) correctly determined that the question of whether Mr. Acree withdrew his claims was a question of fact to which the "clearly erroneous" standard applies.

2. Whether this Court possesses jurisdiction to consider Mr. Acree's arguments challenging the Veterans Court's determination to sustain the Board of Veterans Appeals's (board) finding that he withdrew certain claims during a hearing before the board, and that the board provided adequate reasons and bases for its decision.

3. Whether, assuming the Veteran Court possesses jurisdiction over Mr. Acree's arguments challenging the determination that his claims were withdrawn,

the Veterans Court correctly determined that Mr. Acree withdrew the claims at issue pursuant to 38 C.F.R. § 20.204(b).

4. Whether the Veterans Court correctly held that the hearing officer met his duties under 38 C.F.R. § 3.103(c)(2) to fully explain the issues relevant to substantiating Mr. Acree's claims during the hearing.

STATEMENT OF THE CASE SETTING FORTH THE RELEVANT FACTS

I. Nature Of The Case

Mr. Acree appeals the Veterans Court's decision in *Lawrence J. Acree v. Robert D. Snyder, Acting Secretary of Veterans Affairs*, No. 15-0031 (Vet. App. Jan. 30, 2017), which affirmed a board decision dated November 20, 2014, dismissing Mr. Acree's claims for service connection for exposure to Gulf War hazards; an initial rating in excess of ten percent for degenerative arthritis with tendonitis of the left shoulder; a total disability rating based on individual unemployability, and earlier effective dates for service connection for degenerative arthritis with tendonitis of the left shoulder; lumbar strain; post-traumatic stress disorder (PTSD), and sinusitis. Appx1-5.[1] The Veterans Court sustained the board's finding that Mr. Acree had withdrawn each of these seven claims during a September 2014 hearing. Appx3-5.

[1] "Appx__" refers to pages in the joint appendix. "App. Br.__" refers to pages in Claimant-Appellant's Brief.

II. Factual And Procedural Background

Mr. Acree served on active duty in the U.S. Navy from June 1985 to June 1989 and from June 2007 to April 2008. Appx1, Appx9. After service, he brought several service-connection claims before the VA's Louisville, Kentucky Regional Office (RO), which were decided in July 2009 and June 2011. Appx9, Appx348-57; *see* Appx441-449. Mr. Acree appealed a total of eleven claims to the board. Appx8-9. While pursuing his claims before the RO and the board, Mr. Acree was represented by an accredited veteran's service organization, Disabled American Veterans. Appx9, Appx348.

On September 10, 2014, Mr. Acree testified at a hearing before the board. Appx2. He was joined by a Disabled American Veterans representative, Greg Belak, who appeared on his behalf. Appx2, Appx146-185. At the outset of the hearing, the presiding board member, Judge Milo Hawley, asked Mr. Acree whether he was withdrawing seven of the eleven claims 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. Following this exchange, Judge Hawley listed the "issues that we will be discussing that are going to continue to be in appellate status[.]" Appx 148. Judge Hawley then asked Mr. Acree's representative, "[I]f I have correctly identified the issues, would you like to proceed?" *Id.* Mr. Belak responded, "Yes, thank you, Judge." *Id.* Mr. Belak then described the contents of a compact disk submitted to the board, which he stated contained documents "in reference to issues *we're still contending on appeal* and specifically the issues for increase." *Id.* (emphasis added).

The seven claims that Mr. Acree had stated he wished to withdraw were not discussed further during the hearing. Appx148-185. Before adjourning the hearing, Judge Hawley asked Mr. Acree and his representative if there was anything else they wished to discuss, and, while both addressed other issues, neither raised any of the seven withdrawn claims. Appx182-185. There is no record of any subsequent communication from Mr. Acree to the board before it issued its decision on November 20, 2014.

In its November 20, 2014, decision, written by Judge Hawley, the board found that Mr. Acree had withdrawn his appeal with respect to the seven claims

during the September 2014 hearing. Appx11. The board, citing 38 C.F.R. § 20.204, stated that an "appeal may be withdrawn as to any or all issues involved in the appeal at any time before the Board promulgates a decision." *Id.* The board dismissed those seven claims and remanded the four remaining claims for further proceedings. Appx12-17. Only the seven claims are at issue in this appeal.

III. The Veterans Court's Decision Affirming The Board's Finding

Mr. Acree appealed the board's decision to the Veterans Court. Appx363. Mr. Acree argued that the board had provided an inadequate statement of the reasons or bases for its conclusion that he had withdrawn the seven claims. Appx2, Appx383-388. In support of this argument, he contended that the board failed to make a finding that he had fully understood the consequences of withdrawing his claims. Appx2, Appx383-388. He also argued that, during the September 2014 hearing, Judge Hawley failed to fulfill his duty to explain the consequences of the withdrawal, and failed to determine Mr. Acree's state of mind at the hearing, including whether he was competent to withdraw his claims. Appx2, Appx388-94.

On January 30, 2017, the Veterans Court sustained the board's conclusion that Mr. Acree's testimony during the September 2014 satisfied the criteria under 38 C.F.R. § 20.204 for withdrawal. Appx2-5. Noting that the question of whether Mr. Acree's claims had been withdrawn was one of fact and thus reviewable under

a clearly erroneous standard, Appx2-3, the Veterans Court held that the board's finding that Mr. Acree withdrew his claims was not clearly erroneous. Appx3-4; *see also* Appx451. Quoting from 38 C.F.R. § 20.204(a) and § 20.204(b), the Veterans Court explained that "[o]nly an appellant, or an appellant's authorized representative, may withdraw an appeal" and that, "[e]xcept for appeals withdrawn on the record at a hearing, appeal withdrawals must be in writing." Appx3. The court added: "Thus, a withdrawal is only effective where it is explicit, unambiguous, and done with a full understanding of the consequences of such an action on the part of the claimant." Appx3 (citing *DeLisio v. Shinseki*, 25 Vet. App. 45, 57 (2011)).

The Veterans Court rejected Mr. Acree's argument that the board erred by not making specific findings regarding Mr. Acree's understanding of the consequences of his withdrawals, finding *DeLisio* distinguishable because here, unlike in that case, the "[b]oard hearing transcript reflects that [Mr. Acree's] withdrawal of his claim was explicit and unambiguous." Appx3. The Veterans Court thus found that the board was "not required to delve into further analysis, and the explanation that the [b]oard provided in its statement of reasons or bases is adequate." Appx3-4 (citing 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet. App. 517, 527 (1995)).

The Veterans Court next rejected Mr. Acree's argument that 38 C.F.R. § 3.103(c)(2) imposed an obligation on the board member to explain the consequences of withdrawal to Mr. Acree during the hearing. Appx4. 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." Appx4 (quoting *Bryant v. Shinseki*, 23 Vet. App. 488, 496 (2010)).[2] The Court noted that *Bryant* "clarified that 'the hearing officer has a duty to fully explain the issues still outstanding that are relevant and material to *substantiating* the claim.'" Appx4 (quoting *Bryant*, 23 Vet. App. at 496) (emphasis added by Veterans Court). The Veterans Court explained that "[t]he appellant cites no authority requiring a [b]oard 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." Appx4 (citations omitted).

[2] A separate holding in *Bryant* – that the procedural rights afforded to veterans in 38 C.F.R. § 3.103 applied to hearings before the board as well as those before VA regional offices, 23 Vet. App. 493-98 – was the subject of a VA rule in 2011 and subsequent litigation, *see Nat'l Org. of Veterans Advocates, Inc. v. Sec'y of Veterans Affairs*, 710 F.3d 1328, 1331-32 (Fed. Cir. 2013), none of which is relevant to the holding in *Bryant* quoted above, which is good law.

Finally, the Veterans Court rejected Mr. Acree's assertion that the board erred by failing to determine whether he was competent at the time of the hearing. Appx4. The court declined to adopt the waiver standard used in criminal cases, noting that it is not bound by the Federal Rules of Criminal Procedure and that, unlike in criminal cases, "the withdrawal of a claim for disability benefits does not lead to a forfeiture of rights on the scale of incarceration." *Id.* (citations and quotation omitted). The Veterans Court also noted that Mr. Acree had cited "no evidence indicating that he may have been incompetent at the time of the withdrawal or otherwise raising the issue such that the [b]oard was required to address it." *Id.* (citation omitted).

The court entered judgment on February 22, 2017. Appx373. This appeal followed. Appx366-367.

SUMMARY OF THE ARGUMENT

Mr. Acree makes three principal arguments. First, he argues that the Veterans Court erred when it found that the question of whether his claims had been withdrawn was a question of fact subject to a clear error standard. Second, he challenges the Veterans Court's determination to uphold the board's finding that he withdrew seven of his claims, arguing that both the board and the Veterans Court failed to apply the standard governing withdrawals under 38 C.F.R. § 20.204(b) and the Veterans Court's decision in *DeLisio*. Third, he contends that the Veterans

Court incorrectly held that, under 38 C.F.R. § 3.103(c)(2), the hearing officer was not required, during the September 2014 hearing, to explain to him the consequences of his decision to withdraw his claims, or to assess his competence.

With respect to Mr. Acree's first argument, the Veterans Court correctly recognized that the question as to whether he withdrew certain claims is factual in nature. The Veterans Court properly held that the board's factual finding that Mr. Acree withdrew his claims was subject to a clear error standard of review, and not the *de novo* standard urged by Mr. Acree.

This Court does not possess jurisdiction to entertain the second argument challenging the determination that his claims were withdrawn because it essentially asks the Court to review a factual finding, *i.e.*, that he withdrew his appeal as to the seven claims. To the extent that Mr. Acree argues that the board and Veterans Court misapplied 38 C.F.R. § 20.204(b), and that the board did not provide sufficient reasons and bases for its findings, that is the application of law to fact and thus beyond this Court's jurisdiction under 38 U.S.C. § 7292.

If the Court reaches the merits of the second argument, it should affirm. The board and the Veterans Court did not apply the wrong legal standard governing a veteran's withdrawal of an appeal before the board, which is controlled by 38 C.F.R. § 20.204(b). The rule Mr. Acree urges, whereby board officers must make explicit findings as to a veteran's understanding of a decision to withdraw his

claim, is unsupported by the plain text of 38 C.F.R. § 20.204(b), as well as the Veterans Court's precedent. Mr. Acree's reliance upon the Veterans Court's decision in *DeLisio* is unavailing. As the Veterans Court correctly recognized, *DeLisio* is factually distinguishable and does not establish the across-the-board legal rule that Mr. Acree advocates, and, in any event, Mr. Acree's withdrawal satisfied the *DeLisio* criteria for withdrawal.

With respect to Mr. Acree's third argument, the Court should affirm because the Veterans Court did not commit any legal error. Mr. Acree's argument that the hearing officer was required by 38 C.F.R. § 3.103(c)(2) to explain, during the September 2014 hearing, the consequences of Mr. Acree's decision to withdraw his claims, and to ask questions to determine Mr. Acree's competence, is misplaced. Mr. Acree seeks a significant expansion of the duties imposed on a hearing officer by 38 C.F.R. § 3.103(c)(2). His argument finds no support in the plain language of the regulation, which, as the Veterans Court correctly found, does not impose such obligations on hearing officers. Further, the Veterans Court properly rejected Mr. Acree's arguments based upon comparisons to legal systems outside of the VA.

ARGUMENT

I. Jurisdiction And Standard Of Review

Under 38 U.S.C. § 7292(a), this Court has limited jurisdiction to review Veterans Court decisions. The Court may 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 a determination as to a factual matter) that was relied on by the [Veterans] Court in making the decision." 38 U.S.C. § 7292(a). Under 38 U.S.C. § 7292(c), this Court has exclusive jurisdiction "to review and decide any challenge to the validity of any statute or regulation or any interpretation thereof brought under [section 7292], and to interpret constitutional and statutory provisions, to the extent presented and necessary to a decision."

Section 7292(d)(1) provides that, when reviewing a Veterans Court decision, the Court must decide "all relevant questions of law, including interpreting constitutional and statutory provisions." This Court must affirm the Veterans Court's decision as to an interpretation of a statute or regulation unless it is: "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or (D) without observance of procedure required by law."

Except with respect to constitutional issues, this Court "may not review (A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case." *Id.* § 7292(d)(2).

II. The Veterans Court Properly Held That Whether Mr. Acree Withdrew His Claims Was A Question Of Fact To Which The "Clear Error" Standard Applies

As the Veterans Court has long recognized, the determination of whether an appeal has been withdrawn is a factual finding. *See Kalman v. Principi*, 18 Vet. App. 522, 524 (2004) ("The Board's determination of whether [appellant's statement] constituted a withdrawal of his appeal is a finding of fact.")); *Hanson v. Brown*, 9 Vet. App. 29, 32 (1996) (same); *see Lawson v. Shinseki*, 405 Fed. Appx. 476, 478 (Fed. Cir. 2010) (non-precedential) ("The determination as to whether [the veteran] in fact had withdrawn his appeals is a finding of fact, over which we have no jurisdiction."). Factual findings of the board are subject to a "clearly erroneous" standard on appeal before the Veterans Court. *Warren v. McDonald*, 28 Vet. App. 214, 217-18 (2016) ("A [b]oard 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)") (citation omitted).

Indeed, determining whether a veteran has orally withdrawn an appeal during a hearing necessarily requires the board to take into account not only the witness's testimony, but also his credibility, demeanor, and the surrounding

circumstances, all of which are factual matters reserved to the board. *Hanson*, 9 Vet. App. at 32 (when deciding whether a claim has been withdrawn, the board must "consider all the evidence available to it germane to that issue").

Mr. Acree argues that the Veterans Court should have applied a *de novo* standard of review because, he asserts, 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." App. Br. at 18. He also asserts that "[t]here are no conclusions tied to evidence" in the board's decision. *Id.*

Aside from the fact that this argument is really a challenge to the adequacy of the board's reasons and bases for its decision, which this Court lacks jurisdiction to consider, *Cook v. Principi*, 353 F.3d 937, 940 (Fed. Cir. 2003), this argument misreads the board's decision. Appx10. The board noted that Mr. Acree had testified before Judge Hawley, the author of the board's decision, in September 2014, and that a "transcript of the hearing is of record." *Id.* The board then stated, in a section titled "Finding of Fact," that, in September 2014, it had "received notification from [Mr. Acree] that a withdrawal of the appeal for [the seven claims at issue] was requested." *Id.* And, in the section of its decision titled "Reasons and Bases for Finding and Conclusions," the board stated that, at the September 2014 hearing, Mr. Acree "withdrew his appeal" with respect to the seven claims.

Appx12. These are factual findings that were expressly "tied to" the evidence, App. Br. at 18, in particular, the transcript of the September 2014 hearing.

Accordingly, the Veterans Court correctly concluded that the board's finding that Mr. Acree withdrew his claims was factual in nature and subject to a clear error standard. Appx2; 38 U.S.C. § 7261(a)(4).

III. This Court Does Not Possess Jurisdiction To Entertain Mr. Acree's Argument Challenging The Finding That He Withdrew His Claims Pursuant To 38 C.F.R. § 20.204(b)(1)

Mr. Acree's principal argument is that the board and the Veterans Court erred in determining that he withdrew the seven claims at issue. App. Br. at 12-28. Mr. Acree argues that his single-word answer ("Yes") to Judge Hawley's question during the September 2014 hearing was insufficient to constitute a withdrawal under 38 C.F.R. § 20.204(b)(1). *Id.* at 12. According to Mr. Acree, pursuant to 38 C.F.R. § 20.204(b)(1) and the Veterans Court's decision in *DeLisio*, Judge Hawley should have asked more questions during the hearing to assess whether Mr. Acree's purported withdrawal was explicit, unambiguous, and done with a full understanding of the consequences. *Id.* at 21 (citing *DeLisio*, 25 Vet. App. at 57).

Although he frames his argument as raising a legal question, Mr. Acree essentially challenges a factual determination or, at most, the application of law to fact, matters over which this Court lacks jurisdiction.

In support of his arguments challenging the finding that he withdrew his claims, Mr. Acree does not, in fact, challenge any interpretation of a statute or regulation adopted by the board or the Veterans Court. 38 U.S.C. § 7292. He does not take issue with the Veterans Court's recitation of the relevant legal standards governing withdrawals of claims, and indeed, the court's recitation of the standard under 38 C.F.R. § 20.204(b) is identical to the rule urged by Mr. Acree, namely, 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 (quoting *DeLisio*, 25 Vet. App. at 57). Mr. Acree's argument regarding 38 C.F.R. § 20.204 thus raises no legal issues regarding the elaboration of the meaning of a statute or regulation for this Court to review under 38 U.S.C. § 7292. *See Forshey v. Principi*, 284 F.3d 1335, 1349-51 (Fed. Cir. 2002) (en banc), *superseded by statute on other grounds as stated in Morgan v. Principi*, 327 F.3d 1357, 1359-60 (Fed. Cir. 2003). Rather, Mr. Acree's argument on appeal, like the one he made below, Appx383-88, boils down to a disagreement with the board's finding that he withdrew his claims. App. Br. at 18.

As demonstrated above, however, the board's finding that he withdrew his claims, sustained by the Veterans Court, is a question of fact, and thus beyond this Court's jurisdiction to review on appeal. 38 U.S.C. § 7292(d)(2); *Johnson v. Derwinski*, 949 F.2d 394, 395 (Fed. Cir. 1991) ("Because [the veteran] only

challenges factual determinations, he has not carried his burden of establishing jurisdiction in this case and dismissal is appropriate."); *see also Lawson*, 405 Fed. Appx. at 478 (holding that the Court lacks jurisdiction to review whether had, in fact, withdrawn his appeal).

To the extent that Mr. Acree asks the Court to find that the board and the Veterans Court misapplied 38 C.F.R. § 20.204(b) when they held that the criteria set forth in the regulation were satisfied, such an argument is likewise beyond this Court's jurisdiction to review because it asks the Court to examine the application of law to fact. *Cook*, 353 F.3d at 937-38 ("Although Mr. Cook presents his argument couched in terms of statutory interpretation, the review Mr. Cook requests ultimately reduces to an application of the law to the facts. We therefore find that it is outside of our jurisdiction . . . .") (citing 38 U.S.C. § 7292). Nor is it sufficient to ask this Court to re-weigh the evidence by asking it to draw certain conclusions about the transcript of the September 2014 hearing. App. Br. at 23; *see, e.g.*, *Maxson v. Gober*, 230 F.3d 1330, 1333 (Fed. Cir. 2000) ("The weighing of this evidence is not within our appellate jurisdiction.").

Nor does this Court possess jurisdiction to review Mr. Acree's argument, which he makes in support of his contention that the Veterans Court adopted the wrong legal standard with respect to the withdrawal issue, that the board did not provide an adequate statement of reasons and bases when it found that Mr. Acree

withdrew his claims. App. Br. at 24-25. Mr. Acree argues that the board failed to find certain facts, namely, that he fully understood the consequences of his withdrawal of his claims, and that the board "never provided *any* reasoning as to why it concluded that the withdrawal at the hearing was effective." *Id.* at 24 (citing 38 U.S.C. § 7104(d)(1)). Mr. Acree also contends that the Veterans Court erred when it held that the board was "not required to delve into further analysis" and that its explanation of the reasons or bases for its conclusion that Mr. Acree had withdrawn his claims was adequate. *Id.* at 26 (citing Appx3).

The board is required to provide a written statement of the reasons or bases for its findings and conclusions on all material issues of fact and law presented on the record. 38 U.S.C. § 7104(d)(1). It is well-established, however, that this Court does not possess jurisdiction to review the sufficiency of the board's statement of reasons and bases for its decisions. *Cook*, 353 F.3d at 940. A review as to whether the board's decision contained adequate reasoning in support of its holding would unavoidably involve scrutinizing the application of law to the facts, which is beyond this Court's jurisdiction to do. 38 U.S.C. § 7292(d)(2).

IV. In Any Event, The Veterans Court's Determination Based Upon 38 C.F.R. § 20.204(b) Should Be Affirmed

If the Court reaches the merits of Mr. Acree's arguments based upon 38 C.F.R. § 20.204(b), it should affirm the Veterans Court's judgment.

A. Mr. Acree's Proposed Standard For Withdrawing A Claim Pursuant To 38 C.F.R. § 20.204(b) Has No Basis In Law Or Fact

Under VA's regulations, an "appeal may be withdrawn as to any or all issues in the appeal." 38 C.F.R. § 20.204(a). Section 20.204(b)(1) sets forth requirements governing the "form and content" of a veteran's withdrawal of an appeal:

> 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 . . . , 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.

Id. § 20.204(b)(1) (emphasis added). Although withdrawal of an appeal effectively ends it, under 38 C.F.R. § 20.204(c), "[w]ithdrawal does not preclude filing a new Notice of Disagreement and, after a Statement of the Case is issued, a new Substantive Appeal, as to any issue withdrawn, provided such filings would be timely under these rules if the appeal withdrawal had never been filed."

Citing the Veterans Court's statement in *DeLisio* 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," 25 Vet. App. at 57, Mr. Acree argues that the board must expressly address each of the criteria set forth in *DeLisio*, and that the board erred by failing to do so here. App. Br. at 16, 22-29.

The plain language of section 20.204(b)(1) does not support Mr. Acree's argument. As Mr. Acree concedes, the "text of the regulation is *silent* as to what is required for an appeal to be withdrawn on the record at a hearing." App. Br. at 13 (emphasis in original). Indeed, although the regulation specifies certain information that must be included in a written withdrawal – the veteran's name, the VA file number, and a "[s]tatement that the appeal is withdrawn" – the regulation does not speak to what constitutes an effective withdrawal "on the record at a hearing." 38 C.F.R. § 20.204(b)(1). And notably absent is any requirement that the board officer presiding over a hearing must ask explicit questions in order to assess the degree to which a claimant understands the consequences of his withdrawal.

The rule Mr. Acree urges would impose a burden on the board that not only finds no support in the express language of the regulation, but that is contrary to the history and purpose of the regulation. Prior to 2003, VA's regulation allowed appeals to be withdrawn, but only if in writing. 38 C.F.R. § 20.204(b) (2002) ("A substantive appeal may be withdrawn in writing at any time before the [board] promulgates a decision."). Also, under the pre-2003 regulation, a VA's representative could not withdraw an appeal on the veteran's behalf. *See Board of Veterans' Appeal: Rules of Practice - Appeal Withdrawal*, 68 Fed. Reg. 13,235 (Mar. 19, 2003). The VA amended the regulation in 2003, however, to allow for

appeals to be withdrawn on the record at a hearing, and to allow a veteran's representative to withdraw the appeal. *Id.* The stated purpose of this amendment was to "remove an unnecessary restriction on who may withdraw an appeal to the [board] and to clarify appeal withdrawal procedures." *Id.*

The VA's regulations left open to the board, however, to determine, on a case-by-case basis, whether a veteran had, in fact, withdrawn an appeal. Indeed, hearing officers are in the best position to make such determinations about a veteran's oral request to withdraw a claim, taking into account, for example, whether the veteran is proceeding *pro se* or, as here, the veteran is represented by a veteran's organization or by an attorney. The VA's regulation plainly does not require the board to ask any questions of the veteran. 38 C.F.R. § 20.204(b).

Mr. Acree seeks to impose new obligations on the board contrary to the regulation's text and purpose. Under Mr. Acree's rule, a hearing officer must question a veteran who states his intention to withdraw his claims at a hearing to probe his decision, must assess his understanding of the consequences of his doing so, and must make explicit findings on the record. App. Br. at 29. The withdrawal procedures would become more complicated than what VA intended, with different requirements for appeals withdrawn at a hearing as compared to those withdrawn in writing. Under section 20.204(b)(1), a veteran can withdraw a claim made in writing by merely listing basic identifying information about the veteran

and stating his request to withdraw. The regulation does not identify any information that must be stated on the record of a hearing for an oral withdrawal to be effective. Mr. Acree would subject oral and written withdrawals to different standards, however, and impose a more onerous standard on the former compared to the latter. This makes no sense, especially since the regulation makes clear that a withdrawal made in writing is effective if it provides certain, basic information without requiring any assessment of the veteran's competence. 30 C.F.R. § 20.204(b).

Moreover, to the extent that Mr. Acree argues that section 20.204(b) requires an assessment of the veteran's competence and understanding of withdrawal in every case in which such a request is made at a hearing, that argument is inconsistent with section 20.204(a), which expressly allows an "appellant's authorized representative," as well as the appellant, to withdraw an appeal. By Mr. Acree's logic, however, the veteran would have to testify and answer questions about his withdrawal in every case, instead of relying upon his representative.

Contrary to Mr. Acree's arguments, the Veterans Court's decision in *DeLisio* does not support the rule he advocates, notwithstanding the court's statement in that case 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." 25 Vet. App. at 57.

First, as the court below correctly recognized, *DeLisio* is factually distinguishable. Appx3-4. In *DeLisio*, the hearing officer listed fifteen issues that required adjudication, and asked the veteran if he "got the issues straight," 25 Vet. App. at 58, to which the veteran responded, "I think so." *Id.* at 48. The hearing officer did not mention other issues addressed in the veteran's "supplemental claim" that had not yet been decided by the Regional Office. *Id.* at 48. The Veterans Court held those latter claims had not yet been withdrawn, noting that "the transcript reflects neither an explicit discussion of withdrawal nor any indication that [the veteran] understood that he might be withdrawing claims for benefits for any disabilities not discussed." *Id.* at 58.

Here, by contrast, the transcript of the September 2014 hearing "reflects that [Mr. Acree's] withdrawal . . . was explicit and unambiguous[.]" Appx3. Indeed, as the transcript shows, Judge Hawley listed the seven claims, asked Mr. Acree if he was "withdrawing [his] appeal with respect to all" of them, to which Mr. Acree affirmatively responded that he was. Appx147. Contrary to Mr. Acree's suggestion that the only evidence of an intent to withdraw was a "single word answer" to Judge Hawley's question, App. Br. at 4, the subsequent passage in the transcript further confirms that Mr. Acree and his representative understood that he had withdrawn his claims. Upon hearing Mr. Acree's confirmation ("Yes") that he intended to withdraw his claims, Judge Hawley listed the four remaining issues on

appeal that "we will be discussing [and] that are going to continue to be in appellate status[,]" Appx 148, in contrast to the withdrawn issues, which would no longer be in "appellate status." Judge Hawley then asked Mr. Acree's representative, Mr. Belak, to confirm that he had "correctly identified the issues," to which Mr. Belak responded, "Yes, thank you, Judge" and proceeded to discuss a disk containing documents pertaining to issues "we're still contending on appeal . . . ." *Id.* There would have been no reason for Mr. Belak to refer to certain issues as "still" in contention if none of the claims had, in fact, been withdrawn.

Thus, the record contains an unambiguous recitation of the issues to be withdrawn, an explicit discussion of Mr. Acree's decision to withdraw them from appeal, and, when read as a whole and taking into account the role played by Mr. Acree's representative, gives no indication of a lack of understanding on the part of Mr. Acree regarding his decision. Appx147-148; *see DeLisio*, 25 Vet. App. at 58. Especially given the clearly erroneous standard that governs the board's finding, the record is more than sufficient to sustain the board's determination that Mr. Acree withdrew the seven claims, even if this Court were to adopt the formula set forth in *DeLisio*. Thus, Mr. Acree's appeal would still fail, because the record supports the conclusion that this standard was met.

Indeed, *DeLisio* did not adopt an across-the-board rule governing precisely how withdrawal under 38 C.F.R. § 20.204(b) must be effected in every case.

DeLisio concerned the purported withdrawal of a claim "that has not yet been decided by the RO," as opposed to a claim, like the one here, that has been appealed to the board, which is covered by 38 C.F.R. § 20.204(b). 25 Vet. App. at 58. As the Veterans Court noted in *DeLisio*, "there is no regulation specifically governing" the former situation. *Id.* (citing 38 C.F.R. § 20.204 (titled "Withdrawal of *Appeal*") with a "*cf.*" signal and emphasizing the word "appeal").

DeLisio, and the previous Veterans Court cases it cites, *id.*,[3] illustrate that, in a given case, the board must decide whether a claim has been withdrawn based upon the specific facts before it, which are then reviewable for clear error on appeal. *Id.* at 58-59. *DeLisio* does not, however, dictate certain findings that must be explicitly made in every case, especially one governed by 38 C.F.R. § 20.204. The board may, for example, consider the veteran's express statements on the record, as well as the context of those statements and other contemporaneous evidence. *Hanson*, 9 Vet. App. at 32; *Kalman*, 18 Vet. App. at 524-25; *see also Warren*, 28 Vet. App. at 218-19 (citing evidence that veteran did not intend to withdraw his claim during a telephone call with VA). And a veteran's silence as to issues that have been purportedly withdrawn, both during the hearing and thereafter, might also support a finding that he understood they had been

[3] *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).

withdrawn. *Kalman*, 18 Vet. App. at 525; *Hanson*, 9 Vet. App. at 31. Conversely, a lack of understanding can be shown by contradictory statements regarding withdrawal, or the veteran's continued pursuit of the allegedly withdrawn issues. *See Kalman*, 18 Vet. App. at 525; *Verdon*, 8 Vet. App. at 533. The case law does not impose requirements on hearing officers to ask specific questions, however.

Mr. Acree's reliance upon the four Veterans Court decisions cited in *DeLisio* is also unavailing. App. Br. at 14. In *Hanson*, the Veterans Court held that the board's factual finding that the claim was withdrawn was not clearly erroneous, noting that there was "no indication that the veteran was misguided or lacked understanding of the consequences of his actions." 9 Vet. App. at 31. It did not require affirmative evidence showing that the veteran did understand the consequences. *Kalman* involved a *written* withdrawal of an appeal that was held to be defective because the veteran "never stated that he was withdrawing his appeal or any portion thereof." 18 Vet. App. at 525. In *Verdon*, the evidence was likewise ambiguous: the veteran did not expressly withdraw the claim. 8 Vet. App. at 532. And in *Isenbart*, the veteran's statement did not explicitly address withdrawal, and, the court held, the veteran's oral statement was not sufficient anyway because, at the time, a claim could "only be withdrawn in writing." 7 Vet. App. at 539 (citing 38 C.F.R. § 20.204(a), (c) (1994)).

In several non-precedential decisions issued subsequent to *DeLisio*, the Veterans Court has upheld the board's finding that a veteran's withdrawal of an appeal during a hearing was effective based upon the particular circumstances, even where the board officer did not specifically question the veteran about his or her understanding of the consequences of withdrawal. *See Ford v. McDonald*, 2015 WL 1513968, at *4-5 (U.S. App. Vet. Claims, Apr. 3, 2015) (the veteran "fails to assert or demonstrate that he did not understand the consequences of withdrawing his appeal. He also fails to identify any evidence of record suggesting that he was confused or that his withdrawal was unknowing."); *Barnes v. Shinseki*, 2013 WL 2458538, at *5 (U.S. App. Vet. Claims June 7, 2013) (board's conclusion that veteran withdrew his claim was not clearly erroneous based upon veteran's statements during the hearing indicating his intent to withdraw and his representative's acknowledgment that the withdrawal was correct); *Meeks v. Shinseki*, 2012 WL 5817325, at *1 (U.S. App. Vet. Claims, Nov. 16, 2012) (holding that veteran withdrew certain claims by responding "yes" when asked by the hearing officer whether he wished to withdraw them); *Nesbit v. Shinseki*, 2011 WL 2682902, at *2-6 (U.S. App. Vet. Claims, July 12, 2011) (sustaining board finding that veteran withdrew his claim where his representative confirmed "[w]e are withdrawing" it during the hearing).

In other non-published cases (not relied upon by Mr. Acree), the Veterans Court has found that the board did not adequately explain whether the standard for withdrawal under 38 C.F.R. § 20.204 and *DeLisio* had been met. For example, in *Pearson v. McDonald*, 2016 WL 4191763, at *2-3 (U.S. App. Vet. Claims, Aug. 8, 2016), the court held that the board "did not provide any discussion whatsoever" as to whether the criteria for withdrawal had been met and thus did not comply with 38 U.S.C. § 7104(d)(1); *see also Reilly v. McDonald*, 2016 WL 7473952, at **4-5 (Ct. App. Vet. Cl. Dec. 29, 2016) (board did not provide an adequate statement of reasons or bases for its decision that veteran had withdrawn his appeal). But as explained above, it is not for this Court to decide whether the board's statement of reasons or bases was sufficient, 38 U.S.C. § 7104(d)(1), because this Court does not possess jurisdiction to reach that question.

In another non-precedential case, *Henry v. Shinseki*, 2012 WL 2856129, at *2-3 (Ct. App. Vet. Cl. Jul. 12, 2012), the Veterans Court remanded the board's conclusion that the veteran had withdrawn his claims, citing not only the lack of any explanation by the board of the consequences of withdrawal, but also that the hearing officer gave an ambiguous statement that never used the word "withdraw" and did not solicit any agreement from the veteran or representative with the hearing officer's statement that the issues would be limited. *Id.* Here, by contrast, the board relied on evidence showing that Judge Hawley used the word

"withdraw" and that he elicited Mr. Acree's confirmation that the seven claims were no longer at issue. As discussed below, the board's finding was correct, and certainly not clearly erroneous.

B. The Veterans Court Correctly Affirmed The Board's Finding That Mr. Acree Had Withdrawn His Claims

As the Veterans Court concluded, the board correctly found that Mr. Acree's withdrawal of the seven claims was effective.

When directly asked by Judge Hawley if he was withdrawing seven claims, which Judge Hawley identified individually, Mr. Acree responded unequivocally: "Yes." Appx147; *see also Hanson*, 9 Vet. App. at 32. There was no ambiguity in either his statement or the context in which it was made. Appx147; *see also Kalman*, 18 Vet. App. at 524-25. That Judge Hawley raised the issue of withdrawal of certain claims at the outset of the hearing suggests that Mr. Acree or his representative may have expressed an intent to withdraw the seven claims prior to the hearing. Throughout the remainder of the hearing and afterwards, Mr. Acree was silent as to the withdrawn claims. Appx148-185; Appx416; *see also Kalman*, 18 Vet. App. at 525; *Hanson*, 9 Vet. App. at 32. Even when Mr. Acree and his representative were given the opportunity to discuss any additional issues before the hearing was terminated, the withdrawn claims were not discussed. Appx182-185; *see also Kalman*, 18 Vet. App. at 525.

At no point did Mr. Acree or his representative say anything inconsistent with the notion that the seven claims were withdrawn and thus no longer being pursued, and Mr. Acree's representative confirmed that the hearing officer had correctly listed the issues that were not withdrawn. Appx148; *see Kalman*, 18 Vet. App. at 525. Simply put, "there is no indication that the veteran was misguided or lacked understanding of the consequences of his actions." *Hanson*, 9 Vet. App. at 32.

V. The Veterans Court Applied The Correct Legal Standard With Respect To 38 C.F.R. § 3.103(c)(2)

A. Mr. Acree's Reliance Upon 38 C.F.R. § 3.103(c)(2) Is Misplaced

Mr. Acree next argues that the board and the Veterans Court erred in failing to recognize that a hearing officer's duties under 38 C.F.R. § 3.103(c)(2) require him to explain during a hearing the consequences of withdrawing a claim. App. Br. at 29-40. This argument is incorrect.

Section 3.103 of title 38 of the Code of Federal Regulations contains procedural due process and appellate rights for claimants involved in VA adjudications. *See Nat'l Org. of Veterans' Advocates*, 710 F.3d at 1330. Subsection (c)(2) provides, in relevant part, that "it is the responsibility of the [VA] 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." 38 C.F.R. § 3.103(c)(2).

The Veterans Court explained in *Bryant* that section 3.103(c)(2) imposes "two distinct duties" on hearing officers: (1) "The duty to explain fully the issues," and (2) "[T]he duty to suggest the submission of evidence that may have been overlooked." 23 Vet. App. at 492. With respect to the first duty, "the hearing officer has a duty to fully explain the issues still outstanding that are relevant and material to substantiating the claim. Thus, when an element of the claim is not at issue in an appellant's case, there is no need for the hearing officer to discuss it." *Id*. at 496. As to the second duty, "the hearing officer must suggest that a claimant submit evidence on an issue material to substantiating the claim when the record is missing any evidence on that issue or when the testimony at the hearing raises an issue for which there is no evidence in the record." *Id*. at 496 (citations omitted).

Mr. Acree argues that section 3.103(c)(2) further requires a hearing officer to explain the consequences of withdrawing an appeal and to create a record demonstrating the claimant's clarity of mind. *See* App. Br. at 34. But this argument finds no support in the plain language of the regulation or the governing case law interpreting it. "The hearing officer has a duty to fully explain the *issues still outstanding* that are relevant and material to *substantiating the claim*." *Bryant*, 23 Vet. App. at 496 (emphasis added). Similarly, a hearing officer "must suggest that a claimant submit evidence on an issue material to *substantiating the claim*." *Id.* (emphasis added). Once Mr. Acree withdrew his appeals as to the

seven issues, those issues were no longer outstanding and were not relevant and material to substantiating his remaining claims. *See Hanson*, 9 Vet. App. at 31 ("[W]hen a claim is withdrawn by a veteran, it ceases to exist; it is no longer pending and it is not viable."); *see also id*. at 32 ("When claims are withdrawn, they cease to exist.").

Because the requirements Mr. Acree seeks to impose on the hearing officer were not relevant to outstanding issues and not material to substantiating any claims, the hearing officer had no duties under section 3.103(c)(2) with respect to those withdrawn claims. *See Bryant*, 23 Vet. App. at 496 ("Thus, when an element of the claim is not at issue in an appellant's case, there is no need for the hearing officer to discuss it."); *see also Ford*, 2015 WL 1513968, at *4-5 (finding that section 3.103(c)(2) and *Bryant* do not impose an obligation on a hearing officer to explain the consequences of withdrawing an appeal). Thus, the Veterans Court's decision on this issue was correct. Appx4.

B. Mr. Acree's Comparisons To Other Areas Of Law Are Irrelevant And Unpersuasive

Unable to identify any provision in VA's regulations requiring the hearing officer to conduct such a competency evaluation during a hearing, Mr. Acree invokes areas of law outside the VA system involving *pro se* litigants in the Social Security system and criminal defendants. *See* App. Br. at 34-39. The Veterans

Court properly declined to superimpose obligations on hearing officers from these other areas of the law.

Mr. Acree argues that, in cases brought by *pro se* litigants seeking Social Security benefits, the "beneficent purposes" of the Social Security Act are comparable to the benefit of the doubt rule in the VA context, and that administrative law judges have a special duty to protect the rights of *pro se* claimants. App. Br. at 35-36. None of the cases Mr. Acree cites involved a litigant's purported withdrawal of a claim, however, and thus none of those cases is persuasive. Further, this Court has previously declined to adopt procedural requirements from the Social Security context based on arguments that they are consistent with the benefit of the doubt rule. *See White v. Principi*, 243 F.3d 1378 (Fed. Cir. 2001) (declining to adopt the treating physician rule utilized by the Social Security Administration).

Moreover, the protections Mr. Acree asserts that such claimants enjoy (*e.g.*, liberal construction of arguments and protections afforded to *pro se* claimants), are already present in the VA context and applied to the determination of whether a claim has been withdrawn. As the Veterans Court has previously explained "[i]n considering the question of abandonment of [a] claim, we must take into consideration the nonadversarial setting of the [VA] claims adjudication process, in which VA is required to construe liberally all submissions by a claimant." *Verdon*,

8 Vet. App. at 533 (quotation and citations omitted). Despite these protections, though, no amount of liberal construction could turn Mr. Acree's explicit and unequivocal withdrawals into an ambiguous statement. *See* Appx147. Indeed, Mr. Acree does not dispute that his answer ("Yes") was unambiguous.

Mr. Acree's reliance on the benefit of the doubt rule is also misplaced. The benefit of the doubt rule requires that

> [VA] shall consider all information and lay and medical evidence of record in a case before [VA] with respect to benefits under laws administered by [VA]. When there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, [VA] shall give the benefit of the doubt to the claimant.

38 U.S.C. § 5107(b). As made clear by the plain language of the statute, the benefit of the doubt rule is only applicable when "there is an approximate balance of positive and negative evidence." 38 U.S.C. § 5107(b); *see also Ortiz v. Principi*, 274 F.3d 1361, 1364 (Fed. Cir. 2001) ("[T]he benefit of the doubt rule is inapplicable when the preponderance of the evidence is found to be against the claimant."). Here, the benefit of the doubt rule is inapplicable. There is not an approximate balance of positive and negative evidence on the question of whether Mr. Acree withdrew the seven claims at issue. In fact, as demonstrated above, there is no evidence at all contradicting his withdrawal or indicating that he did not understand its implications. Further, nothing in the benefit of the doubt rule

supports imposing requirements on a hearing officer to inquire into a claimant's comprehension of the consequence of withdrawing an appeal.

The Veterans Court also correctly rejected Mr. Acree's comparison to criminal law in support of his argument based upon section 3.103(c)(2). Mr. Acree argues that the policies adopted to protect criminal defendants are "noteworthy[.]" App. Br. at 37. He urges the Court to fashion a new standard governing withdrawals like the one used in criminal cases to ensure that a defendant's guilty plea is knowing and voluntary. *Id.* at 37-38 (citing cases).

As an initial matter, Mr. Acree's argument is premised on his assertion that he has "since his time of service and PTSD diagnosis been under the influence of medications that impact his state of mind." App. Br. at 37-38.[4] This is an unsubstantiated factual allegation that this Court cannot review in the first instance. The medical records Mr. Acree cites, *see* App. Br. at 38, are from December 2008, Appx219, to May 2012, Appx48-53, the latest of which is almost two and a half years prior to the September 2014 hearing. Moreover, the VA physicians who prescribe his medications are presumed competent to prescribe an appropriate

[4] Mr. Acree also highlights his previous statement that "I am on so much medication I cannot function." *See* App. Br. at 6, 31. This statement is from a report from 2008, however, *i.e.*, six years prior to his hearing, and which concluded that he had no difficulty hearing, reading, understanding, concentrating, talking, or answering, and no problem with coherency. Appx190.

dosage and generally afford him a better level of health. *See Mozingo v. Shinseki*, 26 Vet. App. 97, 106-07 (2012).

Additionally, Mr. Acree is attempting to draw a parallel between VA benefits adjudication and criminal law that does not exist. Withdrawal of an appeal for VA benefits does not lead to a forfeiture of rights on the same scale as incarceration and loss of liberty. This fact is emphasized by 38 C.F.R. § 20.204(c), which provides that even after a claimant has withdrawn an appeal, he or she is not precluded from filing a new Notice of Disagreement or Substantive Appeal as to any issue withdrawn, provided the filings would be timely if the withdrawal has not been filed. 38 C.F.R. § 20.204(c). Further, there is nothing that would prevent a claimant from filing a new claim for an issue that was previously withdrawn, with the only adverse effect being a later effective date for any award granted. Thus, Mr. Acree's suggestion that the ramifications of entering a guilty plea are akin to those of withdrawing an appeal is unpersuasive.

At best, Mr. Acree's comparisons to Social Security and criminal-law systems is a policy argument as to what VA's statutes and regulations should require. Such arguments are best directed to Congress and the VA.

CONCLUSION

For these reasons, this Court should dismiss the appeal, in part, and otherwise affirm the decision of the Veterans Court.

Respectfully submitted,

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August 18, 2017

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on the 18th day of August, 2017, a copy of the Brief for Respondent-Appellee was filed electronically. This filing was served electronically to all parties by operation of the Court's electronic filing system.

/s/ Alexander O. Canizares

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C)(i), I certify under penalty of perjury that the attached brief is proportionately spaced using Microsoft Word, uses a Times New Roman typeface in 14 point font size, and, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), contains 8,468 words.

August 18, 2017

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