

Board of Veterans' Appeals

EDWARD P. FEELEY,)	
)	
Appellant,)	
)	
v.)	No. [REDACTED]
)	
DENIS MCDONOUGH,)	
Secretary of Veterans Affairs,)	
)	
Appellee.)	

MOTION FOR SUBPOENAS

Pursuant to 38 U.S.C. § 5711 and 38 C.F.R. § 20.709, Appellant, through counsel, respectfully requests that this Board issue subpoenas to compel the United States Air Force (USAF) to produce the documents listed below and to make the below-listed persons available for testimony at an evidentiary hearing. In support of this request, Appellant states the following:

1. Before the Board, Appellant challenges the Secretary's reliance on a flawed dosimetry methodology, *see* 38 C.F.R. § 3.311, the precise claim already adjudicated by a panel of the U.S. Court of Appeals for Veterans Claims (CAVC), *see Skaar v. Wilkie*, 33 Vet. App. 127 (Vet. App. 2020) (holding that the Secretary failed to justify reliance on same methodology).
2. Mr. Feeley is a member of the class certified by the CAVC in *Skaar*.
3. In *Skaar*, the Court ordered the Board to evaluate whether the methodology used by USAF to determine radiation dose estimates, created based on the 2001 Labat-

Anderson Report, constitutes “sound scientific evidence” as required by 38 C.F.R. § 3.311(c)(3), and to provide a statement of reasons and bases explaining its conclusions. *Skaar*, 33 Vet. App. at 143. This question applies to other members of the *Skaar* class, of which Appellant Feeley is a member.

4. Appellant has argued that the Department of Veterans Affairs’ (VA) reliance on dose estimates provided by USAF, which in turn relies on methodology derived from the Labat-Anderson Report, does not comply with the regulatory requirement that VA use sound scientific evidence in adjudicating claims for service connection for conditions arising from exposure to ionizing radiation. *See* 38 C.F.R. § 3.311(c).

5. Appellant has further argued that the Labat-Anderson Report itself does not constitute sound scientific evidence under § 3.311 and so cannot lawfully be the basis of VA’s dosimetry methodology. VA’s continued reliance on this preliminary report, which excludes without scientific basis the highest dose estimates measured contemporaneously and shortly after exposure at Palomares, is arbitrary and capricious in violation of 38 U.S.C. § 7261.

6. The Secretary has statutory authority to issue subpoenas to “aid claimants in the preparation and presentation of [their] claims” and “make investigations and

examine witnesses upon any matter within the jurisdiction of the Department.” 38 U.S.C. § 5711(a)(4), (5).¹

7. The subpoenas, requested to support Mr. Feeley’s claim for VA disability benefits, are “for the purposes of laws administered by the [Secretary].” *See Carroll Vocational Inst. v. United States*, 211 F.2d 539, 540 (5th Cir. 1954) (upholding VA subpoena directing trade school to produce records for inspection by VA auditors). Because the requested subpoenas are essential to investigate compliance with § 3.311, they also fall within the Secretary’s “field of powers and duties.” *See Gen. Trades Sch., Inc. v. United States*, 212 F.2d 656, 659 (8th Cir. 1954) (upholding VA subpoena ordering appearance of president of trade school that had contracted with VA to provide auto body training to veterans, as well as the production of records pertaining to the purchase of tools and supplies).

8. The Board has the power to issue a subpoena “to compel the attendance of [a] witness . . . [and] the production of tangible evidence . . . [w]hen necessary evidence cannot be obtained in any other reasonable way.” 38 C.F.R. § 20.709(a); *see Yu v.*

¹ The Board should waive the requirement in 38 U.S.C. § 5711(a)(1) that witnesses be within a radius of 100 miles from the place of hearing, given the COVID-19 pandemic and the necessity of remote, electronic hearings. *See VA Tele-Hearing Modernization Act*, Pub. L. No. 116-137 (2020) (permitting appellants to appear remotely in cases before the Board of Veterans’ Appeals); *see also* 38 U.S.C. § 7107(c) (instructing the Board to grant requests for a hearing by picture and voice transmission). Alternatively, the Board should construe the place of the hearing to be the place of remote participation of each witness. *See Nohr v. McDonald*, 27 Vet. App. 124, 128 n.4 (Vet. App. 2014) (implying that “the requirement that the witness reside within a radius of 100 miles from the place of the hearing [could] be calculated from a VA facility with equipment permitting the witness to participate in an electronic hearing”).

McDonald, No. 14-4294, 2016 WL 542816 (Vet. App. Feb. 11, 2016) (affirming VA power to issue subpoenas and remanding denial of subpoena motion to the BVA for it to explain its reasons for the denial).

9. The Appellant, through counsel, has attempted to arrange for the “voluntary appearance” of witnesses and production of evidence, to no avail. *See* 38 C.F.R. § 20.709(a).

10. On November 5, 2021, Appellant’s counsel sent a request for records and testimony to the USAF General Counsel Office of Contractor Responsibility and Conflict Resolution (SAF/GCR) via email (“November 5 letter”). *See* Exhibit 1.

11. This office acknowledged receipt but attempted to redirect Appellant to the FOIA division. *See* Exhibit 2.

12. On November 8, 2021, Appellant’s counsel sent a copy of the November 5 letter to the USAF General Counsel via overnight mail, requesting production of the individuals and documents listed in this motion.

13. On November 15, 2021, FedEx returned the November 5 letter to Appellant’s counsel, indicating that USAF General Counsel refused delivery. *See* Exhibit 3.

14. On November 18, 2021, Appellant’s counsel called several office phone numbers listed on the USAF General Counsel website asking to confirm email and mailing addresses. No one answered any of the numbers. One USAF General Counsel employee called back, directing Appellant to send the request to the Air Force Judge Advocate General’s office using the “publicly available” contact information.

15. On November 19, 2021, Appellant's counsel called several office phone numbers listed on the Air Force Judge Advocate General's office website. No one answered any of the numbers. Appellant was directed to an out-of-office voicemail.

16. On November 19, 2021, Appellant's counsel left a voicemail for the Air Force Judge Advocate General's Legal Services Office, explaining counsel's request for records and testimony and asking for a return call. As of the submission of this motion, Appellant's counsel has not received a return call.

17. As of the filing of this motion, Appellant has not received any documents in response to this request nor any communication from the individuals whose testimony is requested.

18. Production of the below-listed documents and testimony of the below-listed individuals is necessary to determine whether, in relying on dose estimates made pursuant to the Labat-Anderson Report, the VA has used sound scientific evidence in adjudicating Mr. Feeley's radiation exposure claim, as required by 38 C.F.R. § 3.311(c) and *Skaar v. Wilkie*, 33 Vet. App. at 143.

19. Lieutenant Colonel Alan C. Hale is Chief of Radiation Health for the Office of the Air Force Surgeon General. He is responsible for management of USAF radiation safety programs and for managing dose estimates for VA for radiation exposure claims. Appellant requests his testimony regarding dose estimate production processes, including reliance on the Labat-Anderson Report.

20. Steven E. Rademacher a USAF health physicist and the author of *Topical Issues for Assessment of Dose to Palomares Accident Recovery Workers* (1966) (2020

Report), United States Air Force Safety Center, July 2020, available at <https://www.safety.af.mil/Portals/71/documents/Weapons/Palomares%20Dose%20Assessment%20Rpt%207%20Jul%202020.pdf?ver=2020-08-05-113936-200>. This report is the most recent USAF publication regarding Palomares. Appellant requests his testimony regarding his analysis of the Labat-Anderson methodology and the report's conclusions.

21. In furtherance of its obligation to ensure reliance on sound scientific evidence, 38 C.F.R. § 3.311(c), the testimony and records sought will allow the Board to assess. Production of the below-listed documents is to necessary to determine whether, in relying on dose estimates made pursuant to the Labat-Anderson Report, the VA has used sound scientific evidence in adjudicating Mr. Feeley's radiation exposure claim, as required by 38 C.F.R. § 3.311(c) and *Skaar v. Wilkie*, 33 Vet. App. at 143.

22. In particular, and in furtherance of its obligation to ensure reliance on sound scientific evidence, 38 C.F.R. § 3.311(c), the testimony and records sought will allow the Board to assess (1) the process by which Labat-Anderson developed its methodology, (2) any analysis USAF subsequently conducted on such methodology in order to determine its soundness, (3) the role of dose estimates produced using this methodology in VA adjudications, and (4) the history and status of claims by veterans evaluated using the dose estimates arising from the challenged methodology.

23. The testimony of these persons and examination of these documents is therefore essential for the Board to determine whether the methodology in question constitutes sound scientific evidence as required by § 3.311.

Based on the foregoing authority, Appellant requests the following persons be made available for testimony:

1. Alan C. Hale, LtCol, USAF, BSC, CHP, Chief, Radiation Health, Office of the Air Force Surgeon General, Defense Health Headquarters, 7700 Arlington Blvd. Suite 5151, Falls Church, VA 22042.
2. Steven E. Rademacher, Health Physicist, USAF, 5408 Estrellita Del Norte Rd N, Albuquerque, NM 87111.

Appellant further requests the following documents be made available for inspection:

1. Any documents or data used by or provided to Labat-Anderson for the preparation of the 2001 Labat-Anderson Report.
2. Any documents or data related to the 2013 decision of USAF to change its methodology for producing dose estimates for exposure to radiation at Palomares.
3. Any documents or data related to the Palomares operation obtained or produced since January 1, 2018.
4. Any documents or data used by or provided to the Air Force for the preparation of the 2020 Report: Steven E. Rademacher, *Topical Issues for Assessment of dose to Palomares Accident Recovery Workers (1966) (2020 Report)*, United States Air Force Safety Center, July 2020, available at <https://www.safety.af.mil/Portals/71/documents/Weapons/Palomares%20Dose%20Assessment%20Rpt%207%20Jul%202020.pdf?ver=2020-08-05-113936-200>.

WHEREFORE, Appellant respectfully requests that the Board issue subpoenas as detailed above to compel the appearance of the listed individuals with knowledge of the

methodology used to produce dose estimates used in evaluating service connection for radiation at Palomares, and the production of documents related to such methodology.

The proposed subpoena is attached.

Dated: November 18, 2021

Respectfully submitted,

/s/ Michael J. Wishnie

Daisy A. Guilyard, Law Student Intern*
Talia K. Rothstein, Law Student Intern*
Andrew T. Smith, Law Student Intern*
Sarah A. Purtill, Law Student Intern*
Bardia Faghihvaseghi, Law Student Intern*
Matthew D. Handley, Law Student Intern*
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* Motion for law student appearance forthcoming

†This motion does not purport to represent the views of Yale Law School, if any.

Board of Veterans' Appeals

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EDWARD P. FEELEY,)	
)	
Appellant,)	
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DENIS MCDONOUGH,)	
Secretary of Veterans Affairs,)	
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Appellee.)	
_____)	

SUBPOENA

Pursuant to 38 U.S.C. § 5711 and 38 C.F.R. § 20.709 the Board of Veterans' Appeals commands _____ to appear before the Board in a remote hearing ____ day of _____, 2021, at _____ (am / pm) to give testimony in connection with 38 U.S.C. § 3.311.

The Board further commands the above-named individual to produce the following documentary evidence:

If you have any questions about this subpoena, please call _____, at _____.

The Hon. _____
Veterans Law Judge

(SEAL)

RETURN ON SERVICE OF SUBPOENA

I hereby certify that on the ____ day of _____, 2021, I served this subpoena on the individual indicated above by _____.

(Name & Title)

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing MOTION FOR SUBPOENAS and SUBPOENA on counsel for the Department of Veterans Affairs via Richard Sauber, at the following address: VA Office of the Chief Counsel, 810 Vermont Ave. NW Washington, DC 20420.

Signed: _____
Michael J. Wishnie, Esq.

Dated: _____