

Board of Veterans' Appeals

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

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 Department of Veterans Affairs (VA) to make the below-listed persons available for testimony and documents available for inspection 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. Appellant Feeley is a member of the class certified by the CAVC in *Skaar*.
3. The CAVC, in *Skaar*, ordered the Board to evaluate whether the methodology used by the United States Air Force (USAF) in determining 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, such as Appellant Feeley.

4. Appellant has argued that VA’s reliance on dose estimates provided by USAF, which in turn rely 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

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

7. The subpoenas, requested to support Mr. Feeley’s claim for VA disability benefits, are “for the purposes of the 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). Being essential to investigation of compliance with 38 U.S.C. § 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. 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 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).

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”).

10. On November 5, 2021, Appellant sent a request for production of the individuals and documents listed in this motion to the VA General Counsel via email. *See* Exhibit 1. On November 8, 2021, Appellant sent a copy of the same letter to the VA General Counsel via overnight mail. *See id.*

11. 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.

12. Production of the below-listed documents and witness testimony 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.

13. In particular, and in furtherance of its obligation to ensure reliance on sound scientific evidence, *see* 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 VA or the USAF subsequently conducted on such methodology in order to come to a conclusion as to 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.

14. 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 that the following persons be made available for testimony:

1. The VA employee or employees most knowledgeable about adjudication of claims for service connection arising from radiation exposure at Palomares, the process of incorporating dose estimates produced by the USAF in these adjudications, and the production of dose estimates by the USAF. *See* Fed. R. Civ. P. 30(b)(6).

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

1. Any VA documents or data used by or provided to Labat-Anderson for the preparation of the 2001 Labat-Anderson Report.
2. Any VA documents or data related to the 2013 decision of the Air Force to change its methodology for producing dose estimates for exposure to radiation at Palomares.
3. Any VA records, documents or data related to the Palomares operation obtained or produced since January 1, 2018.
4. Any VA 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,

<https://www.safety.af.mil/Portals/71/documents/Weapons/Palomares%20Dose%20Assessment%20Rpt%207%20Jul%202020.pdf?ver=2020-08-05-113936-200>

[<https://perma.cc/P5QN-DDCF>].

5. Any VA policy or training documents, including those provided to or used by Regional Offices, specific to evaluating claims of Palomares veterans or implicating 38 U.S.C. § 3.311.
6. Any memoranda or dose estimates prepared about Mr. Feeley and/or his exposure at Palomares.
7. Records pertaining to Mr. Feeley from Exhibit C of the 2001 Labat-Anderson Report, unredacted.

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 Guilyard, Law Student Intern*
Talia K. Rothstein, Law Student Intern*
Andrew Smith, Law Student Intern*
Sarah Purtill, Law Student Intern*
Bardia Faghihvaseghi, Law Student Intern*
Matthew Handley, Law Student Intern*
Meghan Brooks, Supervising Attorney
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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

EDWARD P. FEELEY,

Appellant,

v.

DENIS MCDONOUGH,
Secretary of Veterans Affairs,

Appellee.

No. [REDACTED]

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 SUBPOENA REQUEST 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: _____

EXHIBIT 1

The Jerome N. Frank Legal Services Organization

YALE LAW SCHOOL

November 5, 2021

Office of General Counsel
U.S. Department of Veterans Affairs
810 Vermont Avenue NW
Washington, D.C. 20420

Re: [REDACTED]
Feeley, Edward P.
Request for Records and Testimony

To Whom It May Concern:

This letter requests production of records in the possession of the U.S. Department of Veterans Affairs (VA) and VA testimony for use in the above-captioned proceeding before the Board of Veterans' Appeals, Docket No. [REDACTED]. This request is made on behalf of our client Edward P. Feeley, a veteran of the United States Air Force (USAF), who was part of the nuclear cleanup operation at Palomares, Spain, in 1966, and whose claim for service-connected disability compensation due to a radiogenic illness is now before the Board. Under 38 C.F.R. § 20.700 and 38 C.F.R. § 20.302, appellants have a right to submit evidence or testimony at a BVA hearing. We request voluntary production of the records and testimony listed below. The BVA has statutory authority to subpoena records that are not voluntarily produced. *See* 38 U.S.C. § 5711; 38 C.F.R. § 20.709.

We request that you make one or more VA employees knowledgeable about the following topics available for testimony before the Board, *see* 38 C.F.R. § 20.709; *cf.* Fed. R. Civ. P. 30(b)(6) (providing for an organization to “designate one or more” knowledgeable persons “to testify on its behalf”):

1. VA adjudication of claims for service connection arising from radiation exposure at Palomares.
2. The process of incorporating dose estimates produced by the USAF in VA adjudications.
3. The production of dose estimates by the USAF to VA.

We also request that the following documents be produced or made available for inspection in advance of a hearing before the Board:

1. Any VA documents or data used by or provided to Labat-Anderson for the preparation of the 2001 Labat-Anderson Report.
2. Any VA documents or data related to the 2013 decision of the Air Force to change its methodology for producing dose estimates for exposure to radiation at Palomares.
3. Any VA records, documents or data related to the Palomares operation obtained or produced since January 1, 2018.
4. Any VA documents or data used by or provided to the Air Force for 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>.

5. Any VA policy or training documents provided to or used by Regional Offices specific to evaluating claims of Palomares veterans, or otherwise implicating 38 U.S.C. § 3.311.
6. Any memoranda or dose estimates prepared about Mr. Feeley and/or his exposure at Palomares.
7. Records pertaining to Mr. Feeley from Exhibit C of the 2001 Labat-Anderson Report, unredacted.

We ask that you provide the documents requested and plans for testimony of the requested individual by November 17, 2021.

Please furnish all materials to:

Michael Wishnie
Veterans Legal Services Clinic
Jerome N. Frank Legal Services Organization
Yale Law School
127 Wall Street
New Haven, CT 06511

In the alternative, materials may also be sent by email to Michael.Wishnie@ylsclinics.org.

Thank you for your prompt attention to this matter.

Sincerely,

/s/ Michael J. Wishnie
Daisy Guilyard, Law Student Intern
Talia Rothstein, Law Student Intern
Andrew Smith, Law Student Intern
Meghan Brooks, Supervising Attorney
Michael Wishnie, Supervising Attorney
Counsel for Edward P. Feeley