

UNITED STATES COURT OF VETERANS APPEALS

No. 95-948

JEREMIAH SIMINGTON,

APPELLANT,

v.

VA FILE NO. 19 054 138

JESSE BROWN,

SECRETARY OF VETERANS AFFAIRS,

APPELLEE.

Before HOLDAWAY, IVERS, and STEINBERG, *Judges*.

ORDER

This matter is before the Court to resolve a dispute arising out of the appellant's proposed counter-designation of the record. *See* U.S. Vet.App. R. 10(b).

On June 16, 1995, the Board of Veterans' Appeals (Board or BVA) rendered a decision which denied service connection for residuals of dental trauma for the purpose of receiving VA outpatient treatment. The appellant filed his Notice of Appeal on October 2, 1995. On January 11, 1996, the appellant submitted documents to the Court that had not been designated as part of the Record on Appeal (ROA). On March 25, 1996, the Secretary filed the ROA. On July 2, 1996, the Court's Central Legal Staff conducted a telephonic conference pursuant to Rule 10 of this Court's Rules of Practice and Procedure regarding the designation of the ROA, but the dispute was not resolved.

The Secretary seeks to exclude the documents counter-designated by the appellant on the ground that the items were not a part of the "record of proceeding before the Secretary and the Board" at the administrative level. *See* 38 U.S.C. § 7252(b). The appellant asserts that all of the counter-designated items were submitted at a hearing at the regional office (RO) and that the RO had failed to forward the items to the Board. The disputed items consist of: (1) an Army service memorandum dated July 25, 1991; (2) an undated Army memorandum referencing a request for payment; (3) the second page of Army dental treatment records (the first page of which is included in the record); and (4) copies of statutes and regulations.

In *Bell v. Derwinski*, 2 Vet.App. 611, 613 (1992) (per curiam order), the Court noted that where "documents proffered by the appellant are within the Secretary's control and could reasonably be expected to be a part of the record 'before the Secretary and the Board,' such documents are, in contemplation of law, before the Secretary and the Board and should be included in the record." *Bell* noted that, if such documents could be determinative, a remand for readjudication would be required. Here, the disputed items would probably not be considered determinative, thus requiring a remand, but they are relevant and should be included in the ROA if they were in the Secretary's "control" so as to charge him with either actual or constructive knowledge.

As to the appellant's assertion that the documents were proffered to the Secretary, if the appellant can corroborate that assertion with any reliable evidence, for example, an original document with the date stamp showing VA receipt, a hearing transcript reference to the proffer or acceptance of the documents, a certified mail receipt, affidavits of any individuals present at the hearing, or any other information that would corroborate that the documents were, at any time, in the Secretary's possession, a rebuttable presumption would arise that the disputed evidence was "within the control of the Secretary" and should, therefore, be included in the record on appeal.

On consideration of the foregoing, it is

ORDERED that the appellant, within 45 days after the date of this order, provide evidence to corroborate his assertion that the disputed documents were previously proffered to the Secretary. It is further

ORDERED that the Secretary, within 30 days after service of the appellant's submission, may submit evidence and argument in rebuttal.

DATED: September 6, 1996 PER CURIAM.