UNITED STATES COURT OF VETERANS APPEALS

NO. 94-1031

BERNARD R. SMITH, APPELLANT,

V. VA FILE NO. 159 14 4235

JESSE BROWN,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before NEBEKER, *Chief Judge*, and KRAMER, FARLEY, HOLDAWAY, IVERS, and STEINBERG, *Judges*.

O R D E R

On consideration of the motion of the Secretary for reconsideration by the panel, it is by the panel

ORDERED that the Court's opinion entered on September 4, 1996, is amended by striking the fourth full sentence on page 6. It is further

ORDERED that the motion for reconsideration is otherwise denied. It is further by the full Court

ORDERED that the motion for review by the full Court is denied.

DATED: January 17, 1997 PER CURIAM.

HOLDAWAY, *Judge,:* concurring: I agree with the dissenting members. The Board, correctly, based on the precedent from this Court that was cited and relied upon in its decision, found the case not well grounded. That finding, if correct, would obviate consideration of the issues upon which remand was based. Nonetheless I vote to deny en banc consideration. This case provides no precedent except in a very narrow range of cases that are factually identical. As such it is not a case of "exceptional importance" nor does it purport to vitiate our general rule that requires medical nexus. In short this case is an abberation. This judge, at least, will continue to apply the precedents cited in the dissent that preclude lay persons from supplying medical nexus to "well ground" a claim".

STEINBERG, *Judge*, with whom KRAMER, *Judge*, joined, dissenting: We voted for the Secretary's motion for en banc review of this two-judge opinion because we believe that the Secretary is correct that the Court's holding that the claim here is well grounded is essentially

inconsistent with the Court's caselaw requiring medical-nexus evidence where the question at issue is of a medical nature (for example, etiology, causation, or diagnosis). *See Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table); *Grottveit v. Brown*, 5 Vet.App. 91, 93 (1993). Hence, we believe that en banc review "is necessary to . . . maintain uniformity of the Court's decisions or to resolve a question of exceptional importance". U.S. VET. APP. R. 35(c).

As the Secretary points out there is no "competent evidence establishing[1] that the alleged kick in the groin [during service] caused the development of a varicocele." Motion at 2. The Court relies, for its finding that the claim is well grounded, upon the appellant's testimony and his wife's statement that "the symptoms [it is unclear what symptoms specifically] continued over the years and had interfered with his sexual performance." *Smith (Bernard) v. Brown*, 9 Vet.App. 363, 366-67 (1996).

In contrast, the Board concluded:

> Since there is no medical authority to support [the appellant's] position [that a kick in the groin caused his varicocele], the incidental evidence showing that he was treated for an unspecified pre-existing disorder in August 1944 and that his basic training was abbreviated is not relevant as those circumstances are germane to the issue of service incurrence only if one accepts his medically unsupported position that trauma caused the varicocele.

R. at 12. We believe that the Board is correct that lay evidence cannot be competent evidence of medical causation and that such evidence is required to well ground this claim. *See Stadin v. Brown*, 8 Vet.App. 280, 284 (1995); *Moray v. Brown*, 8 Vet.App. 211, 214 (1993); *Kates v. Brown*, 5 Vet.App. 93, 95 (1993); *Grottveit, supra*; *Espiritu v. Derwinski*, 2 Vet.App. 492, 494-95 (1992).

Although the Court in its opinion does not cite 38 C.F.R. § 3.303(b) (1995), regarding continuity of symptomatology, the Secretary seems to suggest in his motion that the Court's opinion is implicitly relying on continuity of symptomatology to well ground the claim and that the conditions under which that might be permissible are not present because this case does not involve a potentially chronic condition that arose in service. On November 20, 1996, this Court issued a briefing order in *Savage v. Brown*, U.S. Vet. App. No. 94-503, raising numerous questions about the meaning and application of § 3.303(b) regarding the use of or need for continuity of symptomatology as to a service-connection claim and what the relationship of that concept is to the need for medical

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[1]Indeed, there is no competent medical evidence even suggesting such causation; evidence less definitive than that which establishes a fact meets the degree of certitude necessary to well ground a claim, *see Meyer v. Brown*, 9 Vet.App. 425, 432 (1996) ("[t]he amount of evidence sufficient to make a claim well grounded differs from the amount sufficient for an award of service connection"); *Robinette v. Brown*, 8 Vet.App. 69, 76 (1995) ("to be well grounded a claim need not be supported by evidence sufficient for the claim to be granted").

evidence of a nexus between a current medical condition and the veteran's service. Until those issues are resolved in *Savage*, the current opinion should be withheld.

In *Caluza*, the Court reiterated that medical evidence of nexus to service was generally required in order to well ground a service-connection claim. *Caluza*, *supra* (citing *Grottveit*, *supra*). As the Secretary's motion indicates, the Court's opinion in *Smith* will add confusion to the Court's caselaw on the question of the nature and quality of the evidence needed to well ground a claim. *Compare Tirpak v. Derwinski*, 2 Vet.App. 609, 610-11 (1992) (holding physician statement that veteran's death "may or may not" have been averted if medical personnel had been able to intubate him, a procedure complicated by his service-connected injuries, insufficient to well ground claim for service connection for veteran's cause of death), *and Boeck v. Brown*, 6 Vet.App. 14, 16-17 (1993) (applying *Tirpak*, *infra*, and holding that physician's statement that veteran was "ill-served" as a patient at VA hospital was too vague and speculative to well ground claim), *and Lathan v. Brown*, 7 Vet.App. 359, 365-66 (1995) (distinguishing *Tirpak* and stressing that medical opinions need not "be expressed in terms of certainty in order to serve as the basis for a well[-]grounded claim"), *and Molloy v. Brown*, 9 Vet.App. 513, 516 (1996) (distinguishing *Tirpak* and stating in dictum that medical evidence as to nexus to service expressed as "could" suffices for requirement of well-grounded claim), *with Alemany v. Brown*, __ Vet.App. __, __, No. 94-1025, slip op. at 3 (Nov. 20, 1996) (ignoring *Tirpak* and holding that medical evidence as to nexus to service expressed as "possible" suffices for requirement of well-grounded claim), *and Watai v. Brown*, 9 Vet.App. 441, 443 (1996) (ignoring *Tirpak* and holding that medical evidence as to nexus to service expressed as "very well might have been" suffices for requirement of well-grounded claim); *cf. Falzone v. Brown*, 8 Vet.App. 398, 403, 406 (1995) (holding appellant's flat-feet claim to be well grounded based on his statements regarding continuity of symptomatology, in-service notation indicating worsening of his pes planus, and confirmed existence of current condition on VA examination; his statements as to continuity of symptomatology "provide a direct link between the appellant's active service and the current state of his condition"); *Godfrey v. Brown*, 7 Vet.App. 398, 406 (1995) (where service-connection claim is based on continuity of symptomatology under 38 C.F.R. § 3.303(b) (1994), competent medical evidence not necessarily required to make claim well grounded).