



**USFC2010-7073-01**

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# **APPELLANT'S BRIEF**

2010-7073

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UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT

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PERRY R. ALEXCE

PLAINTIFF-APPELLANT

V.

ERIC K. SHINSEKI

SECRETARY OF VETERANS AFFAIRS

DEFENDANT-APPELLEE

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APPEAL FROM THE UNITED STATES COURT OF APPEALS

FOR VETERANS CLAIMS

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APPELLANT'S "CORRECTED" BRIEF (WITH APPENDIX)

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MARCH 25, 2011

FILED  
U.S. COURT OF APPEALS FOR  
THE FEDERAL CIRCUIT

MAR 25 2011

JAN HORBALY  
CLERK

**Certificate of Interest**

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Perry R. ALEXCE v. ERIC K. SHINSEKI, Sec of VA

No. 2010-7073

CERTIFICATE OF INTEREST

Counsel for the (petitioner) (appellant) (respondent) (appellee) (amicus) (name of party)

Perry R. ALEXCE certifies the following (use "None" if applicable; use extra sheets if necessary):

1. The full name of every party or amicus represented by me is:

Perry R. ALEXCE

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

NONE

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

NONE

4.  The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

NONE

6-29-10  
5-19-10  
Date

Nadmi E. Farve  
Nadmi E. Farve  
Signature of counsel  
NADMI E. FARVE  
Printed name of counsel

Please Note: All questions must be answered

cc: \_\_\_\_\_

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**STATEMENT OF RELATED CASES**

No other appeal in or from this civil action or proceeding in the lower court or body was previously before this or any other (NON-VA) appellate court.

**JURISDICTIONAL STATEMENT**

Jurisdiction of this Court is invoked under 38 USC 7292.

This Appeal is from a final judgment.

## STATEMENT OF THE ISSUES

- 1) Whether Appellant acquired a due process right in his claim to entitlement to VA benefits that was violated when the VA, unilaterally, and without notice to the Appellant, removed and destroyed medical evidence from Appellant's claim file?
- 2) Whether the VA's unilateral removal of medical evidence from Appellant's claim file (without prior notice to the Appellant) and the subsequent destruction of the "removed" medical evidence warrants a spoliation "adverse inference"?

## STATEMENT OF THE CASE

Appellant, Perry R. Alexce, filed for, but was denied by the Board of Veterans Appeal in its May 11, 2006 decision, a disability rating in excess of 10% for a post-surgical knee condition.

Appellant, after filing his Notice of Appeal with the Court of Appeals for Veterans Claims, discovered (and RO notations confirmed) that certain medical records submitted by Appellant had been removed and discarded by the VA.

On December 14, 2007, Appellant filed a motion for a 30-day stay of proceedings pending receipt of the records in question.

On December 27, 2007, the Court ordered the Secretary of the VA to file a response to the Appellant's motion.

On January 11, 2008, the Secretary filed a response to the Court's Order and, on January 23, 2008, Appellant filed a reply to the Secretary's response.

On February 7, 2008, the Court of Appeals for Veterans Claims issued an order stating, inter alia:

“ it would appear that the medical records in question were .... discarded by personnel at the RO because they were believed to be duplicate records. Since the records are not available, a stay of proceedings would not further the appellant's cause.”

The Court denied the motion to stay proceedings and ordered the Appellant to file a brief within 60 days after the date of the Court's Order.

On March 3, 2008, Appellant filed motions for reconsideration and for panel decision on the Court's order of February 7, 2008.

On March 13, 2008, the Court denied Appellant's motions.

On April 3, 2008, Appellant, through Counsel, filed a petition for extraordinary relief in the nature of a writ of mandamus.

On April 30, 2008, the Court denied the petition.

On May 5, 2008, Appellant filed a motion for a full-court decision "in response to the Court's March 13, 2008 decision in which the Court denied Appellant's Motion for Reconsideration and Motion for Panel Decision."

On June 23, 2008, the Court denied Appellant's Motion for a full-court decision "as not contemplated by the rules."

On July 15, 2008, the Court ordered Appellant to explain why the Court should not dismiss Appellant's appeal because of Appellant's failure to comply with the Court's rules.

On July 29, 2008, Appellant, through counsel, filed a response stating that a brief could not be filed without the benefit of all the evidence previously submitted.

On August 26, 2008, the Court ordered Appellant to file a brief within 21

days after the date of the Order, or Appellant's appeal would be dismissed for failure to comply with the Court's rules.

On September 22, 2009, the Court affirmed the BVA's 5-11-06 decision denying Appellant entitlement to a disability rating in excess of 10% for his post-surgical knee condition.<sup>1</sup>

On October 13, 2009, Appellant, through Counsel, filed a Motion for Both Single-Judge Reconsideration and a Panel Decision on the Court's September 22, 2009 Order.

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<sup>1</sup> The appellant raises a single argument on appeal. He asserts that VA's destruction of medical evidence that he submitted in January 2005 constitutes spoliation. He argues for sanctions including an adverse presumption that the evidence destroyed would have proven that he is entitled to a disability rating in excess of 10%.

The Secretary responds that VA destroyed the evidence because it was duplicative of medical records already in the claims file. He further states that such destruction of duplicative material is standard procedure. See VA Adjudication Procedure Manual and Manual Rewrite(M-21-1MR), pt. III, sub pt. II, CH 4, Sec G, para. 23(d). The manual, which sets forth claim handling procedure for internal VA purposes, states that the objective of this procedure for eliminating duplicate documents is to prevent the claim file --- which can become quite voluminous in the course of protracted development --- from growing in size beyond what is demanded by the claim. Id.

The Court stated further, however, that: '... Of course, if it could be shown that documents were destroyed that were both nonduplicative and relevant, such developments could have substantially different implications. See *Cushman v. Shinseki*, 576 F. 3d 1290 (Fed. Cir. 2009).'

In his motion, Appellant stated, inter alia, through his Counsel, that his case, indeed, fell within the purview of the Cushman case cited by the Court in its September 22, 2009 Order and that his case should, therefore, be decided accordingly.

On February 2, 2010, the single judge denied Appellant's motion for reconsideration and the panel denied Appellant's Motion for a panel decision.

Judgment was entered in the case on February 25, 2010, from which Appellant now appeals.

#### **STATEMENT OF THE FACTS**

On January 14, 2005, Appellant submitted medical records to the New Orleans, Louisiana VA Regional Office (RO) that he believed substantiated his claim for entitlement to VA benefits for a post-surgical knee condition in excess of his 10% disability rating.

It was upon review of Appellant's claim file during the pendency of his appeal (before the U.S. Court of Appeals for Veterans Claims) that Appellant's Counsel discovered (and RO notations and the VA Secretary later confirmed) that the medical records submitted by Appellant on January 14, 2005 had been removed and discarded.

Appellant requested the medical records from Appellee on several

occasions while his appeal was pending before the Court of Appeals for Veterans claims (CAVC). Appellant never received the medical records from the Appellee.

### SUMMARY OF THE ARGUMENT

1. Appellant is entitled to disability benefits upon a showing that he meets the eligibility requirements set forth in the statutes and regulations that govern the nondiscretionary, statutorily mandated benefits. Such an entitlement to benefits is a property interest protected by the Due Process Clause of the Fifth Amendment to the United States Constitution.

Appellant's due process right in his claim was violated when the VA removed and destroyed medical records from his claim file.

2. The VA's unilateral removal of medical evidence from Appellant's claim file (without prior notice to the Appellant) and the subsequent destruction of the "removed" medical evidence warrant a spoliation "adverse inference."

### THE ARGUMENT

On January 14, 2005, Appellant submitted medical evidence that he believed substantiated his claim for entitlement to disability benefits as a result of his military service.

The medical records were relevant and material to his claim of entitlement to an increase in VA benefits.

Without prior notice to the Appellant, the VA unilaterally removed the medical records and destroyed them.

Such a “removal and destruction” violated Appellant’s right to “due process.”

#### OBSCURE MANUAL

The VA counters Appellant’s due process argument and opines that the unilateral removal of Appellant’s medical records (without prior notice to Appellant) and their subsequent destruction is justified pursuant to the provisions of an obscure and in-house manual – known, apparently, only to the personnel of the VA.

The claim adjudication process and procedures ( normally governed by statutes and regulations in the public domain and generally known to the Veteran population ) provide for written notice to a claimant when the RO determines evidence is a “duplication” of evidence previously filed.

The Veteran-claimant is then allowed to file a Notice of Disagreement that initiates the Veteran’s opportunity to disagree with the finding of “duplication”

and to show that the evidence is not a duplication of evidence previously submitted.

Appellant was denied this opportunity to be heard and was thus prevented and denied the opportunity to show that the submitted evidence was not a duplication.

Consequently, as a result, Appellant was denied the right to a fair hearing on the matters reflected and contained in his medical records that were removed and destroyed by the VA.

#### CUSHMAN

In its 9-22-09 order affirming the BVA's 5-11-06 decision denying Appellant his claim to increased VA benefits, the CAVC points to a case recently decided by the Federal Circuit that Appellant submits is dispositive of the "removal and destruction" of evidence issue.

In Cushman v. Shinseki 576 F. 3d 1290 (Fed. Cir. 2009) this Circuit found a violation of due process where the Appellant's records were "altered".

The Appellant's records in the instant case were, admittedly, removed and destroyed – actions that Appellant would submit are at least as egregious as "altering" documents.

## SPOLIATION

Spoliation of evidence is defined as “the destruction or significant alteration of evidence, or the failure to preserve property for another’s use as evidence in pending or reasonably foreseeable litigation.” Mosiad Techn., Inc. v. Samsung 348 F. Supp. 2d 332, 335 (D.N.J.2004)

Among the range of spoliation sanctions are: dismissal, exclusion of evidence, allowing for an adverse inference.

An adverse inference or spoliation instruction informs the trier of fact that it may receive the fact of the document’s nonproduction or destruction as evidence that the party that has prevented production did so out of ..... fear that the contents would harm him. Brewer v. Quaker State Oil Ref. CO., 72 F. 3d 326, 334 (3d Cir. 1995)

Before giving an adverse inference instruction, the Court must find that: 1) the evidence was within the party’s control; 2) there was an actual suppression or withholding of evidence; 3) the evidence destroyed or withheld was relevant to the claim or defenses; and 4) it was reasonably foreseeable that the evidence would be discoverable.

Appellant’s claim file, and his medical records, were in the VA’s control; the VA admitted that individuals at the VA removed and destroyed medical

records from Appellant's claim file; the evidence was submitted by Appellant to substantiate the basis for an increase in his VA benefits. The medical records, therefore, were relevant. It was also foreseeable that the medical records would be needed for the adjudication of Appellant's claim.

### **CONCLUSION AND STATEMENT OF RELIEF SOUGHT**

The medical records removed and destroyed by the VA were essential and crucial to Appellant's attempt to substantiate his claim to entitlement to VA benefits.

Without the records, Appellant was hampered, handicapped and thwarted in his attempt to substantiate and prove his claim to the requested VA benefits.

A "tampered-free" record is of the utmost importance to a claimant as well as to the fairness and integrity of our judicial system. Perry Alexce, Appellant herein, submits that the Agency's (Dept. of Veterans Affairs's) unilateral removal of records/evidence from Appellant's file, without prior notice to Appellant, and the subsequent destruction of those records by the agency present not only exceptional importance, but also present a question of fundamental fairness.

There is no substitute for the medical evidence that Appellee removed

from Appellant's file.

It would be an egregious act and an affront to fundamental fair play (and justice) to require and/or compel Appellant to proceed in this matter without his medical records.

**WHEREFORE**, Appellant prays that this Honorable Court would:

- 1) Vacate the CAVC September 22, 2009 decision;
- 2) Enter an Order in favor of Appellant on the issue of "due process"
- 3) Further order that an adverse "spoliation" inference is warranted regarding the removal and destruction of Appellant's medical records
- 4) Further order all other legal and equitable remedies as may be appropriate in this case.

Respectfully Submitted

  
Naomi E. Farve  
Counsel for Appellant  
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New Orleans, LA. 70117  
(504) 289-5389

APPENDIX

Docket 13 (A)

United States Court of Appeals 13 (B)

For Veterans Claims

Memorandum Decision

Dated: September 22, 2009

Appellant's Motion for 13 (C)

Both Single-Judge

Reconsideration and a

Panel Decision

Dated: October 13, 2009

View the [Full Docket](#)

**General Docket**  
**United States Court of Appeals for Veterans Claims**

<b>Case Number:</b> 06-3559	<b>Docketed:</b> 01/09/2007
<b>Perry R. Alexce v. Eric K. Shinseki</b>	
<b>Appeal From:</b> Department of Veteran Affairs	
<b>Fee Status:</b> Assessed but no fee	
<b>Case Type Information:</b>	
1) NOA - Veterans Appeal	
2) -	
3) -	

(A)

02/25/2010	Judgment (AMN)
04/26/2010	Appellant's notice of appeal to the USCA for the Federal Circuit (NEF)
04/28/2010	Appellant's Notice of Appeal transmitted to USCA for the Federal Circuit (JES)
05/07/2010	RECEIVED: Notice of Docketing from the USCA for the Fed Cir. , dated 5/5/10. [2010-7073] (JES)
08/18/2010	RECEIVED: Copy of ORDER: from the USCA for the Fed Cir, dated 8/12/10. Dismissed for failure to prosecute. Issued as a mandate on 8/12/10. [2010-7073] (JES)
12/14/2010	Mandate (Recalled per order dated 2/16/11)—[Edited 02/16/2011 by JES] (JES)
12/14/2010	Case Closed 06-3559 (Reopened per Fed Cir order dated 1/14/11)—[Edited 02/14/2011 by JES] (JES)
01/20/2011	Case has been reopened (SL)
01/20/2011	RECEIVED: Copy of order from USCA for the Fed Cir., dated 1/14/11; It is ORDERED that the ord of dismissal and the mandate be, and the same hereby are, VACATED and RECALLED, and the notice of appeal REINSTATED. (JES)
02/16/2011	Order that the 12/14/10, mandate was issued in error and is recalled. (JES)

*Designated for electronic publication only*

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 06-3559

PERRY R. ALEXCE, APPELLANT,

v.

ERIC K. SHINSEKI,  
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before DAVIS, *Judge*.

MEMORANDUM DECISION

*Note: Pursuant to U.S. Vet. App. R. 30(a),  
this action may not be cited as precedent.*

DAVIS, *Judge*: U.S. Army veteran Perry R. Alexce appeals through counsel from a May 11, 2006, Board of Veterans' Appeals (Board) decision that denied a disability rating in excess of 10% for a postsurgical knee condition. This Court has jurisdiction to review the Board's decision pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the following reasons, the Court will affirm the Board's May 2006 decision.

The appellant raises a single argument on appeal. He asserts that VA's destruction of medical evidence that he submitted in January 2005 constitutes spoliation. He argues for sanctions including an adverse presumption that the evidence destroyed would have proven that he is entitled to a disability rating in excess of 10%.

The Secretary responds that VA destroyed the evidence because it was duplicative of medical records already in the claims file. He further states that such destruction of duplicative material is standard procedure. *See VA Adjudication Procedure Manual and Manual Rewrite (M-21-1MR)*, pt. III, subpt. ii, ch 4, Sec G, para. 23(d). The manual, which sets forth claims handling procedure for internal VA purposes, states that the objective of this procedure for eliminating duplicate documents

(B)

is to prevent the claims file—which can become quite voluminous in the course of protracted development—from growing in size beyond what is demanded by the claim. *Id.*

In such administrative matters the Court will assume, in the absence of clear evidence to the contrary, that VA properly discharged its official duties. *See Warfield v. Gober*, 10 Vet.App. 483, 486 (1997); *Ashley v. Derwinski*, 2 Vet.App. 62, 64-65 (1992). The Court has previously applied this presumption to matters involving the maintenance of a claims file. *See Redding v. West*, 13 Vet.App. 512, 515 (2000) (no clear evidence that VA removed a document from the claims file and concealed it). Of course, if it could be shown that documents were destroyed that were both nonduplicative and relevant, such developments could have substantially different implications. *See Cushman v. Shinseki*, 576 F.3d 1290 (Fed. Cir. 2009).

Therefore, in consideration of the foregoing, the Court AFFIRMS the Board's May 11, 2006, decision.

DATED: September 22, 2009

Copies to:

Naomi E. Favre, Esq.

VA General Counsel (027)

**IN THE UNITED STATES COURT OF APPEALS  
FOR VETERANS CLAIMS**

<b>PERRY R. ALEXCE,</b>	)	
	)	
Appellant,	)	
	)	
v.	)	Vet. App. No. 06-3559
	)	
<b>JAMES B. PEAKE, M.D.</b>	)	
Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	
	)	
_____	)	

Motion For Both Single-Judge  
Reconsideration and a  
Panel Decision

Comes now Appellant-Petitioner, Perry Alexce, who requests a reconsideration of the single-judge decision in this case, dated September 22, 2009, and who also requests a panel decision in the instant case.

Points of Law Overlooked  
Or Misunderstood

The Court overlooked (and/or misunderstood) that a veteran's entitlement to disability benefits is a property interest protected by the Due Process Clause of the United States Constitution.

The Court further overlooked (and/or misunderstood) that the unilateral removal of relevant documents from Appellant's claim file, without prior notice to Appellant, was a violation of Appellant's due process right to a fair hearing and determination of his case.

(c)

### Discussion

In the Court's September 22, 2009 decision in this case, it intimated that a different outcome may have resulted if Appellant's case came within the purview of Cushman v. Shinseki, 576 F. 3d 1290 (Fed. Cir. 2009)

Appellant submits that his case indeed falls within the purview of the Cushman case, and should therefore, be decided accordingly.

### Argument

Appellant submitted medical records he believed substantiated essential elements of his claim to entitlement to disability benefits as a result of his military service.

The medical records were relevant to his claim.

Without prior notice to the Veteran, the VA unilaterally, and without prior notice to the veteran, removed the medical records from Appellant's claim file.

Such a "removal" violated Appellant's right to "due process"

### Conclusion

Based on the foregoing: 1) the Court's September 22, 2009 decision should be vacated, and 2) an Order should be entered in favor of Appellant-Petitioner.

Respectfully Submitted

//S// Naomi Farve

Naomi Farve

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Table of Cases

Cushman v. Shinseki  
576 F. 3d 1290 (Fed. Cir. 2009)

Certificate of Service

I hereby certify under penalty of perjury that a copy of the foregoing Appellant's "Corrected" Brief (With Appendix ) was mailed first class, postage pre-paid to:

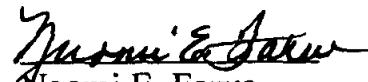
Clerk

U.S. Court of Appeals  
For the Federal Circuit  
717 Madison Place, N.W.  
Washington, D.C. 20439

Appellee

Jane Vanneman  
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Commercial Litigation Branch  
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Done this 25th Day of March, 2011

  
Naomi E. Farve