IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 15-0031

LAWRENCE J. ACREE
Appellant,

v.

Robert A. McDonald,
Secretary of Veterans Affairs
Appellee.

On appeal from the Board of Veterans Appeals

OPENING BRIEF OF APPELLANT LAWRENCE J. ACREE

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INTRODUCTION

This appeal presents a straightforward issue of law. Mr. Acree contends that his one word answer – "Yes" – when asked by a Veterans Law Judge ("VLJ") if he was withdrawing disability claims did not demonstrate an understanding of the concept of withdrawal or an appreciation of the consequences of claim withdrawal. *See DeLisio v. Shinseki*, 25 Vet. App. 45, 47 (2011). Under this Court's precedent and the regulations governing the duties of a hearing officer, the Veteran is entitled to greater procedural safeguards before his claims for disability benefits can be dismissed. Here, there was no writing confirming the withdrawal of the seven claims for service-connected benefits and neither the VLJ nor the Board made findings with respect to whether Mr. Acree understood the consequences of withdrawing the claims at issue. It was therefore error to conclude the withdrawal was effective. The legal errors committed by both the VLJ and the Board warrant remand for further development of the seven disability claims.

STATEMENT OF THE ISSUES

1. Whether the Board's statement of reasons or bases for dismissing an appeal is inadequate where the Board fails to discuss the *DeLisio* requirements.

2. Whether the Veterans Law Judge failed to carry out his duties under 38 C.F.R. § 3.103(c)(2) where he failed to explain the issues pertinent to the withdrawal of claims.

3. Whether the Veterans Law Judge had a duty to adduce at the hearing Mr. Acree's capability to understand and/or actual understanding of the consequences of withdrawing his claims.

STATEMENT OF THE CASE

Mr. Acree served on active duty in the Navy from June 1985 through June 1989 and from June 2007 to April 2008. R. 2, 1687. After his initial four years of active duty, Mr. Acree enlisted with the Naval Reserves in 2001. R. 1681, 1683. In 2007, Mr. Acree was deployed to Iraq. R. 1683, 2335. He would later receive a medal for his combat service. R. 283. In Iraq, Mr. Acree was diagnosed with Post Traumatic Stress Disorder ("PTSD"). R. 1458, 2339; *see also* R. 1341 (condition described as "anxiety disorder with PTSD features"). He also suffers from persistent nightmares. R. 591-95. Following his combat tour, Mr. Acree was honorably discharged in 2008. R. 283.

To treat Mr. Acree's anxiety disorder and PTSD symptoms, he has long been medicated with psychotropic drugs, including Lithium, Xanax and BuSpar® and other antidepressants and agents to help him sleep. *See, e.g.*, R. 474-75, 556-58, 581, 594-95, 1336-41, 1348, 1459, 1682-83; *see also* R. 1454-1460, 1680-1723, 2330-2379. As Mr. Acree has explained: "I am on so much medication I cannot function. It makes me drowsy and fatigued. I am easily distracted. I have trouble sleeping. I suffer from anxiety." R. 1073. Mr. Acree currently suffers from and is being treated for bladder cancer. R. 21.

Mr. Acree filed appeals to the Board of Veterans Appeals from ratings decisions of the Louisville, Kentucky Regional Office of the Department of Veterans. R. 2. Eleven issues were certified for appeal:

1. Increased rating for degenerative arthritis with tendonitis of the left shoulder.

2. Earlier effective date for the award of service connection for degenerative arthritis with tendonitis of the left shoulder.
3. Earlier effective date for the award of service connection for a lumbar strain.
4. Earlier effective date for the award of service connection for posttraumatic stress disorder.
5. Earlier effective date for the award of service connection for sinusitis.
6. Entitlement to service connection for exposure to Gulf War hazards.
7. Entitlement to a total disability rating based on individual unemployability.
8. Increased rating for a lumbar strain.
9. Increased rating for PTSD.
10. Entitlement to an initial compensable rating for sinusitis.
11. Entitlement to service connection or sleep apnea, claimed as a sleep disorder.

R. 2-3.

On September 10, 2014, the VLJ conducted a formal hearing of the Board of Veterans Appeals (Louisville, KY). R. 978-1017. Mr. Acree attended with his representative from the Disabled Amercian Veterans organization. R. 3, 979. The VLJ began the hearing by asking Mr. Acree whether he was withdrawing seven of the eleven issues from appeal:

> JUDGE: Thank you.
>
> The issues certified for appellate consideration today, well there's more issues certified than what we're going to be discussing because some of the issues have been withdrawn. So let me address the issues that have been withdrawn first. The issue of an increased rating for degenerative arthritis of the tendonitis of the left shoulder. An earlier effective date for service connection for degenerative arthritis with tendonitis of the left shoulder, lumbar strain, Post-Traumatic Stress Disorder and sinusitis. Entitlement to service

> connection for exposure to Gulf War hazards and entitlement to a total disability rating based on individual unemployability.
>
> You're withdrawing your appeal with respect to all of those issues, is that correct, Mr. Acree?
>
> VETERAN: Yes.

R. 979-80. After asking Mr. Acree whether he is withdrawing these seven issues ("the claims at issue"), the VLJ did not further engage Mr. Acree to confirm that he understood what it meant to withdraw the claims at issue. R. 980. Nor did the VLJ inquire as to whether Mr. Acree was incapacitated, under the influence of substances, or otherwise competent to make decisions that would result in a relinquishment of rights. R. 980.

On November 20, 2014, the Board issued a decision that dismissed the claims at issue as withdrawn. R. 3-4. Mr. Acree timely noticed this appeal.

SUMMARY OF THE ARGUMENT

1. The Board erred in finding that Mr. Acree's alleged withdrawal of the claims at issue was effective. Under this Court's precedent in *DeLisio v. Shinseki* and its progeny, a verbal withdrawal of claims is not effective unless the withdrawal "is explicit, unambiguous, and done with a full understanding of the consequences of such action on the part of the claimant." *DeLisio*, 25 Vet. App. at 47. The record is devoid of any indication that Mr. Acree's alleged withdrawal was "with a full understanding of the consequences." Because the Board offered no analysis to support the finding that the withdrawal was effective and omitted any mention of the *DeLisio* requirements, the Board failed to provide an adequate statement of reasons or bases for its determination.

Consequently, dismissal of Mr. Acree's claims contravenes this Court's precedent and compels a remand.

2. Remand is independently warranted because the VLJ failed to carry out his duty to explain the issues attending the withdrawal of the claims at issue. Under 38 C.F.R. § 3.103(c)(2), the VLJ had a duty to explain to Mr. Acree the issues in the appeal. One such issue, and the one that gives rise to this appeal, was whether Mr. Acree had the requisite understanding of the consequences of withdrawing his claims. But theVLJ never explained that this was an issue, and made neither inquiries nor findings with respect to Mr. Acree's understanding.

3. The relinquishment of a claim for service-connected disability benefits is procedurally analogous to the forfeitures that occur when a criminal defendant enters a guilty plea. The duties incumbent on a district court under Federal Rule of Criminal Procedure 11 are therefore instructive in understanding the duties of the VLJ in this case. The VLJ should have inquired as to whether the veteran recently ingested any substance that could potentially impair his ability to make a knowing and intelligent verbal withdrawal of his disability claims. Because the VLJ failed to develop any record with respect to Mr. Acree's state of mind or the severity of the side effects of his medications, he erred as a matter of law much the same way a district court errs when there it fails to assess whether a criminal defendant entering into a plea is competent.

ARGUMENT

I. STANDARD OF REVIEW

The Court reviews the Board's dismissal of appellant's claims *de novo*. 38 U.S.C. § 7261(a); *Evans v. Shinseki*, 25 Vet. App. 7, 10-11 (2011) (citing *Butts v. Brown*, 5 Vet. App. 532, 539 (1993) (en banc)); *see also Martin v. Brown*, 6 Vet. App. 272, 274 (1994). Withdrawal of a claim is ineffective unless it is "explicit, unambiguous, and done with a full understanding of the consequences of such action on the part of the claimant" (the "*DeLisio* requirements"). *DeLisio*, 25 Vet. App. at 47. When the Board dismisses an appellant's claim but does not discuss the *DeLisio* requirements, this Court's review is frustrated. *See Allday v. Brown*, 7 Vet. App. 517, 527 (1995). When judicial review is frustrated, remand is appropriate. *Tucker v. West*, 11 Vet. App. 369, 374 (1998) (remand is appropriate "where the Board has incorrectly applied the law, failed to provide an adequate statement of reasons or bases for its determination, or where the record is otherwise inadequate.").

II. THE BOARD'S INADEQUATE STATEMENT OF REASONS OR BASES FOR ITS DETERMINATION THAT THE WITHDRAWAL OF THE CLAIMS AT ISSUE WAS EFFECTIVE REQUIRES REMAND

The Board "failed to provide an adequate statement of reasons or bases for its determination" that Mr. Acree's alleged withdrawal of the claims at issue was effective. *Tucker*, 11 Vet. App. at 374 (1998). Specifically, in dismissing the claims at issue, neither the VLJ nor the Board made findings with respect to whether Mr. Acree's alleged withdrawal was "with full understanding of the consequences." *DeLisio*, 25 Vet. App. at 47 (reversing Board finding that claim was withdrawn); *see also Kalman v. Principi*, 18

Vet. App. 522, 524 (2004) (same); *Isenbart v. Brown*, 7 Vet. App. 537, 541 (1995) (same). Accordingly, this Court should vacate the decision of the Board dismissing the claims at issue and remand.

In this case, Mr. Acree is alleged to have withdrawn the claims at issue at the September 10, 2014 hearing before the Regional Office. R. 979-80. Although an appellant or his authorized representative may withdraw an appeal at a hearing, 38 C.F.R. § 20.204(a) – (b)(1), "it is well settled that withdrawal of a claim is only effective where the withdrawal is explicit, unambiguous, and done with a full understanding of the consequences of such action on the part of the claimant." *DeLisio*, 25 Vet. App. at 47 (emphasis added). The Board never mentioned or analyzed the *DeLisio* factors. The Board's entire statement of "Reasons and Bases" for dismissing the claim is contained in one paragraph:

> The Board may dismiss any appeal which fails to allege specific error of fact or law in the determination being appealed. 38 U.S.C.A. § 7105 (West 2002). An appeal may be withdrawn as to any or all issues involved in the appeal at any time before the Board promulgates a decision. 38 C.F.R. § 20.204 (2014). Withdrawal may be made by the appellant or by his or her authorized representative. 38 C.F.R. § 20.204. At the September 2014 hearing, the appellant withdrew his appeal with respect to the claims for entitlement to an increased rating for arthritis of the left shoulder, entitlement to earlier effective dates for the awards of service connection for arthritis of the lefts shoulder, a lumbar strain, PTSD, and sinusitis, entitlement to service connection for exposure to Gulf War hazards, and entitlement to TDIU. Hence, there remain no allegations of error of fact or law for appellate consideration. Accordingly, the Board does not have jurisdiction to review the appeal with respect to these claims and they are dismissed.

R. 5. The Board's first three sentences partially state the applicable law but omit any mention of the *DeLisio* requirements. The next sentence, finding that Mr. Acree

"withdrew his appeal," assumes without stating that Mr. Acree's withdrawal of the listed claims was effective. The Board provides no analysis to say why it thought the withdrawal was effective and specifically omits any mention of the *DeLisio* requirements. The Board did not include any mention of whether Mr. Acree understood the consequences of withdrawing the claims at issue. The absence of any such finding of analysis leaves the record incomplete. *See Allday*, 7 Vet. App. at 527. The Board failed to complete the analysis this Court's precedent requires; the failure was legal error that warrants remand. *See Tucker*, 11 Vet. App. at 374.

The Board's "Conclusions of Law" are erroneous because neither the hearing officer nor the Board satisfied the *DeLisio* requirements. The Board found as a matter of law that, with respect to each of the claims at issue, the criteria for dismissal were met. R. 4-5 (citing 38 C.F.R. § 20.204). It based this on a "Finding of Fact" that "[i]n September 2014, prior to the promulgation of a decision in the appeal, the Board received notification from the appellant that a withdrawal of the appeal for [the claims at issue] is requested." R. 4. This limited factual findings implies that the criteria the Board deemed met are (1) that the withdrawal occur prior to the promulgation of a decision in the appeal (§ 20.204(b)(3)), and (2) that the withdrawal was purportedly requested by the appellant or his authorized representative (§ 20.204(a)). Although these criteria are explicitly listed in the applicable regulations, they do not include "well settled" criteria for effectiveness of the withdrawal under *DeLisio*. Accordingly, the Board's "Conclusions of Law" are not supported by its "Finding of Fact," and this Court should vacate the Board's decision.

The Court should follow the approach it took in *Pitcher v. McDonald*, 2014 WL 6968055, at *1-2 (CAVC Dec. 9, 2014)[1] in which it vacated and remanded a Board decision dismissing allegedly withdrawn claims. In *Pitcher*, as in this case, the Board "explicitly noted that Mr. Pitcher's withdrawal met the requirements of § 20.204." *Id.* at *1. Just as in this case, the Board failed to discuss the *DeLisio* requirements. *Id.* at *1-2. The Court reasoned that the Board's failure to discuss the *DeLisio* factors frustrated judicial review. *Id.* (citing *Allday*, 7 Vet. App. at 527). Thus, the Court held "remand [was] warranted" under *Tucker*. *Id.* at *2.

Pitcher explains that Board findings limited to the explicit criteria of § 20.204, but omitting the *DeLisio* requirements, are insufficient to sustain a withdrawal of claims. The logic of Pitcher applies with full force to this case. Moreover, the Court should follow the *Pitcher* approach because requiring specific findings with respect to the *DeLisio* requirements is consistent with Congress' policy in creating non-adversarial procedures for veterans to claim benefits. *See* Section III, *infra*.

Yet, even if the Court were to diverge from its approach in *Pitcher* and view the Board's "conclusions of law" as containing *sub silentio* findings with respect to *DeLisio*, remand would nonetheless be required. The record does not support the "conclusions of law" because the VLJ never adduced any evidence from which the Board might have concluded that Mr. Acree had the requisite understanding, and circumstances exist that cast doubt on whether he did. The hearing transcript is silent as to whether Mr. Acree

[1] Pursuant to U.S. Vet. App. R. 30(a), *Pitcher* is cited only for the persuasive value of its logic any reasoning.

had the requisite understanding to effectively withdraw his claims. The transcript only reflects one question from the hearing officer – "You're withdrawing you appeal with respect to all of the claims at issue, is that correct, Mr. Acree?" – and Mr. Acree's one-word response, "Yes." Whether Mr. Acree understood the consequences of the withdrawal simply cannot be discerned from the record. Moreover, there was reason to doubt that Mr. Acree had the requisite understanding. Specifically, the record shows that at the time of the hearing, Mr. Acree was being medicated for an anxiety disorder and was taking other prescription drugs relating to his cancer treatment. R. 211-12.

In considering the effect of evidence suggesting a lack of understanding, the Court should follow its decision in *Clay v. Shinseki*, No. 11-1141, 2012 WL 2856113, at *1-2 (CAVC July 12, 2012).[2] In *Clay*, the Court held erroneous an explicit Board finding that a withdrawal was made with full understanding because the Board failed to explain how such a finding was consistent with potentially contrary evidence in the record. *Id.* Like Mr. Acree, Mr. Clay was undergoing treatment for a psychiatric disorder at the time of his purported withdrawal of claims. *Id.* at *1. Nonetheless, the Board held the *DeLisio* requirement of understanding satisfied because "there [was] no evidence of record that the Veteran had no reasoning to understand what he was doing as the record shows that he was simultaneously pursuing a claim for service connection for a psychiatric disorder." *Id.* (internal quotations omitted). The Court, however, disagreed with the Board's approach and found such evidence in "the content and timing of Mr. Clay's

[2] Pursuant to U.S. Vet. App. R. 30(a), *Clay* is cited only for the persuasive value of its logic any reasoning.

submissions." *Id.* The Court wrote that the Board's misapprehension of the evidence and failure to explain how the evidence fit into the *DeLisio* analysis frustrated judicial review and warranted remand under *Allday* and *Tucker*. *Id.* at *2.

In sum, the VLJ and the Board's failure to adduce any record with respect to the *DeLisio* requirements frustrates the Court's review of the effectiveness of the withdrawal of Mr. Acree's claims. The Court cannot ascertain from the record whether Mr. Acree had full understanding of the consequences of withdrawing his claims, and circumstances at the time of the hearing suggest he may not have understood. Under such circumstances, dismissing Mr. Acree's claims contravenes this Court's precedent. Accordingly, the Court should vacate the Board's decision dismissing the claims at issue and remand.

III. REMAND IS ALSO WARRANTED BECAUSE THE VETERANS LAW JUDGE FAILED TO CARRY OUT HIS DUTY UNDER 38 C.F.R. § 3.103(c)(2)

A remand is also proper under 38 C.F.R. § 3.103 in light of the uniquely pro-claimant principles underlying the veterans' benefits system. The veterans' benefit system is a "'veteran-friendly,' nonadversarial, administrative claims system." *DeLisio*, 25 Vet. App. at 55 (quoting *Kouvaris v. Shinseki*, 22 Vet. App. 377, 381 (2009)). To this end, "[t]he veterans' benefits system has been calibrated with uniquely pro-claimant principles." *Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs*, 710 F.3d 1328, 1330 (Fed. Cir. 2013). "Consistent with these proclaimant principles, and pursuant to statute, the VA regulations in 38 C.F.R. § 3.103 provide for certain

procedural due process and appellate rights for veterans involved in VA adjudications." *Id.*

These procedural and appellate rights require VA officials to "explain fully the issues." *Id.* In particular, 38 C.F.R. § 3.103(c)(2) imposes "two distinct duties" on a hearing officer: "The duty to explain fully the issues and the duty to suggest the submission of evidence that may have been overlooked."[3] *Bryant v. Shinseki*, 23 Vet. App. 488, 492 (2010). "Importantly, the VA has consistently applied the 3.103 rights both to hearings conducted at the regional offices level and in appellate hearings conducted before the Board of Veterans' Appeals." *Nat'l Org. of Veterans' Advocates*, 710 F.3d at 1330.

[3] Section 3.103 is titled, "Procedural due process and appellate rights." The relevant text of subsection (c)(2) states:

> The purpose of a hearing is to permit the claimant to introduce into the record, in person, any available evidence which he or she considers material and any arguments or contentions with respect to the facts and applicable law which he or she may consider pertinent. All testimony will be under oath or affirmation. The claimant is entitled to produce witnesses, but the claimant and witnesses are expected to be present. The Veterans Benefits Administration will not normally schedule a hearing for the sole purpose of receiving argument from a representative. *It is the responsibility of the employee or employees conducting the hearings to explain fully the issues and suggest the submission of evidence which the claimant may have overlooked and which would be of advantage to the claimant's position.* To assure clarity and completeness of the hearing record, questions which are directed to the claimant and to witnesses are to be framed to explore fully the basis for claimed entitlement rather than with an intent to refute evidence or to discredit testimony. In cases in which the nature, origin, or degree of disability is in issue, the claimant may request visual examination by a physician designated by VA and the physician's observations will be read into the record.

38 C.F.R. § 3.103 (emphasis added).

Here, the VLJ did not "fully explain the issues" to Mr. Acree as § 3.103(c) requires. As the hearing transcript shows, the VLJ did not explain to Mr. Acree the consequences of withdrawing any of the claims at issue. Instead, the VLJ simply asked Mr. Acree whether he would be withdrawing those claims, and did so presuming that those claims were already withdrawn:

> JUDGE: Thank you.
>
> The issues certified for appellate consideration today, well there's more issues certified than what we're going to be discussing ***because some of the issues have been withdrawn. So let me address the issues that have been withdrawn first.*** The issue of an increased rating for degenerative arthritis of the tendonitis of the left shoulder. An earlier effective date for service connection for degenerative arthritis with tendonitis of the left shoulder, lumbar strain, Post-Traumatic Stress Disorder and sinusitis. Entitlement to service connection for exposure to Gulf War hazards and entitlement to a total disability rating based on individual unemployability.
>
> ***You're withdrawing your appeal with respect to all of those issues, is that correct, Mr. Acree?***
>
> VETERAN: Yes.

R. 979-80 (emphases added). A hearing officer cannot dismiss claims simply by presuming they are withdrawn and then confirming their withdrawal. Such a procedure runs counter to the "'veteran-friendly,' nonadversarial, administrative claims system" and "the uniquely pro-claimant principles" underlying that system. *See DeLisio*, 25 Vet. App. at 55 (quoting *Kouvaris*, 22 Vet. App. at 381); *Nat'l Org. of Veterans' Advocates*, 710 F.3d at 1330.

The facts of this case highlight the need for the hearing officer to explain fully the issues. Mr. Acree has a long history of taking psychotropic medications. The morning of the hearing, Mr. Acree was medicated and lacked the full clarity of mind required to appreciate the consequences of claim withdrawal. Mr. Acree has previously explained that he was on "so much medication" that he "cannot function." R. 1073. Given these circumstances, the VLJ should have at least inquired as to whether Mr. Acree had the capacity to appreciate the consequences of dismissing the claims at issue.

IV. THE VETERAN IS ENTITLED TO PROCEDURAL SAFEGUARDS ENSURING "FULL UNDERSTANDING OF THE CONSEQUENCES" WHEN RELINQUISHING A RIGHT AT A HEARING

The VLJ's failure to carry out the duties incumbent under 38 C.F.R. § 3.103(c) bears real life consequences. There is a decided difference between the knowledge or understanding of a claimant withdrawing claims under the influence of psychotropic medications and a claimant not experiencing the side effects of such medications. The real life impact of psychotropic medications is recognized in the criminal context, where an accused defendant cannot waive Due Process protections unless there is "an intentional relinquishment or abandonment of a known right or privilege." *United States v. Cole*, 813 F.2d 43, 46 (3d Cir. 1987) (quoting *McCarthy v. United States*, 394 U.S. 459, 466 (1969)); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). The safeguards called for in *DeLisio* addressing whether a veteran has demonstrated "full understanding of the consequences," 25 Vet. App. at 47 (2011), track the "intelligent waiver" demanded before a court will accept a guilty plea. *United States v. Damon*, 191 F.3d 561, 564 (4th Cir. 1999) (internal citations omitted); *see also Godinez v. Moran*, 509 U.S. 389, 400

(1993) (holding that before a court may accept a guilty plea, it must ensure that the plea is knowing and voluntary and that the defendant is competent to enter the plea). In both instances, the relinquishment of a right can only occur when the litigant is competent.

In view of the parallel forfeiture of rights at a plea hearing and a hearing withdrawing claims for disability benefits, Federal Rule of Criminal Procedure 11 is instructive. Rule 11 demands inquiry into a defendant's competence before accepting a guilty plea, including whether "the defendant has recently ingested drugs or other substances capable of impairing his ability to make a knowing and intelligent waiver of his constitutional rights." *Cole*, 813 F.2d at 46. Such an approach should also attach to the duties of a VLJ when determining whether the veteran's withdrawal of claims during a hearing is knowing, voluntary, and with full understanding of the consequences.

Mr. Acree is entitled to the full scope of the protections afforded by Congress pursuant to the nonadversarial, pro-claimant character of the DVA system. According to the *ex-parte* system of adjudication where the VA is expected to sympathetically develop disability claims and "resolve all issues by giving the claimant the benefit of any reasonable doubt," there is a commonality between the strict protections afforded to a criminal defendant relinquishing a right and a veteran relinquishing a claim for disability benefits. *See* H.R. Rep. No. 100-963, at 13, 15 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5782, 5795, 5797. Just as a defendant has a fundamental right not to be convicted while incompetent, *United States v. Wingo*, 789 F.3d 1226, 1235 (11th Cir. 2015), a veteran should not be deemed to withdraw claims at a hearing while impaired or, as in this case,

experiencing the side effects of pharmaceuticals directed to treatment of an anxiety disorder and insomnia.

Here, the VLJ simply failed to develop any record with respect to Mr. Acree's state of mind. The VLJ did not question him about his competence or the severity of the side effects of his medications. Nor did the VLJ attempt to ascertain whether Mr. Acree used medications that might impact his state of mind. In the criminal context, this failure to develop a record would have been reversible error. *See Cole*, 813 F.2d at 46-47 (reversing a district court that failed to make a factual finding as to whether the defendant was under the influence of drugs or whether his ingestion of drugs impaired his understanding or judgment at the time of his plea); *United States v. Johnson*, 541 F.3d 1064, 1066 (11th Cir. 2008); *Damon*, 191 F.3d at 564-65 (finding error where the district court accepted a guilty plea while the defendant was on antidepressant medication but the court did not make further inquiry into the defendant's mental state or the possibility that his judgment was impaired); *see also United States v. Parra-Ibanez*, 936 F.2d 588, 595-96 (1st Cir. 1991).

Moreover, although Mr. Acree was represented by an accredited representative at the hearing on September 10, 2014, R. 979, and that representative should have kept Mr. Acree informed, the VLJ had a separate obligation to ensure that Mr. Acree was informed and fully understood the consequences of claim withdrawal. Here, a colloquy between Mr. Acree and the VLJ as to the impact of his medication regimen would have been legally significant. Had Mr. Acree misunderstood or been misinformed as to the consequences of answering "Yes" to the claim withdrawal question, the VLJ's inquiry

would have alerted Mr. Acree to this fact. Indeed, like the safeguards embedded within plea hearings where a colloquy between a judge and a defendant is "an important safeguard that protects defendants from incompetent counsel or misunderstandings," a simple line of questioning from the VLJ – as appropriate under 38 C.F.R. § 3.103(c)(2) – would have protected Mr. Acree against an ambiguous record. Because the exchange between the VLJ and the veteran sheds no light as to whether Mr. Acree understood the consequences of the claim withdrawal or whether he was competent while under the influence of medication to possess full knowledge of what he was potentially forfeiting, the failure to develop the record is a legal error that compels remand.

CONCLUSION

For the foregoing reasons, Mr. Acree respectfully asks this Court to vacate the Board's decision dismissing his claims for entitlement to an increased rating for arthritis of the left shoulder, entitlement to earlier effective dates for the awards of service connection for arthritis of the left shoulder, a lumbar strain, PTSD, and sinusitis, entitlement to service connection for exposure to Gulf War hazards, and entitlement to TDIU, and remand with instructions for the Board to send the case back to the RO for further factual development in accordance with this Court's opinion.

Dated: June 20, 2016

Respectfully submitted,

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