APPELLANT'S BRIEF

UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

No. 16-2993

ROBERT M. SELLERS,

Appellant,

v.

DAVID J. SHULKIN, M.D.,
Secretary of Veterans Affairs,

Appellee.

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B. Whether the Board erroneously denied Mr. Sellers a higher initial rating for his service connected major depression because it had mistakenly found that he filed his claim for his psychiatric disability in September 2009, having ignored his pending March 1996 application.

C. Whether the Board improperly discredited the vocational expert's March 2016 professional opinions because it erroneously treated the expert's opinions as a medical expert opinion.

D. Whether the Board failed to refer Mr. Sellers' pending 1996 claim to establish service connection for his tinnitus to the VA Regional Office (VARO) for adjudication.

IV. STATEMENT OF FACTS

Mr. Robert M. Sellers ("Appellant" or "veteran") served on active duty in the U.S. Navy from April 17, 1964 until February 7, 1969, when he received his honorable discharge (Record Before the Agency [R.]. 1137), and in the U.S.

Army from January 15, 1981 until February 29, 1996 (R. 1136). He was born on April 9, 1947, and is 70 years old today (R. 1137).

V. STATEMENT OF THE CASE

In August 1988, November 1993, February 1994, April 1995, and May 1995, Mr. Sellers was treated for chronic anxiety, chronic insomnia, moderate depression, dysthymia, multiple somatic dysfunctional reactions (R. 777, 2922-924, 2926, 2930, 2939, 2940-941, 2943).

On March 11, 1996, Mr. Sellers filed his application for compensation or pension benefits for his right leg numbness and tingling, hearing loss, left knee injury, back injury from parachute jump, and right middle and index finger injury (R. 2683, 2684-687). He stated that he was '[r]equest[ing] s[ervice]/c[onnection] for [his] disabilities occurring during active duty service." (R. 2687).

On May 23, 1996, the VA provided a VA C&P examination for his hearing and tinnitus (R. 2675-676, 2677-678)

On July 5, 1996, the VA Regional Office (VARO) issued its Rating decision granting Mr. Sellers service connection for spondylolisthesis, lumbosacral spine with a 20 percent evaluation effective March 1, 1996; continuing a 0 percent evaluation of bilateral high frequency hearing loss; granted service connection for left knee injury, postoperative with a 10 percent

evaluation effective March 1, 1996; granted service connection for laceration and tendon injury, index and middle fingers, right (major) hand with a 0 percent evaluation effective March 1, 1996; and granted service connection for fractured tip of right great toe with a 0 percent evaluation effective March 1, 1996 (R. 2662-670).

In October 2008, Mr. Sellers was diagnosed with mild lumbar instability, mild thoracolumbosacral spondylosis, minimal degenerative disc and mild spondylosis with corresponding bilateral neural foramina encroachment from C3-C6, insomnia, and adjustment disorder with anxiety by the VA Medical Center (VAMC) Montgomery, AL. Mr. Sellers stated he does not sleep well (R. 1903-910, 1278-279, 1280-283). His pain level was recorded as 9 (R. 1910-913).

On April 14, 2009, Mr. Sellers was treated at the VAMC Montgomery for sleep difficulty with nightmares and flashbacks related to military combat training (R. 1842-846). Mr. Sellers stated that he could not get a job after he retired from service. He had worked a while in construction, but it was too hard on his back. He then started his lawn care business. He continued to do lawn care sporadically. He earned a gross income of $3,699 for 2008 in his lawn care business (R. 1844-845).

On September 18, 2009, Mr. Sellers called the VA and filed an informal claim for his right index and middle finger, post traumatic stress disorder (PTSD), and an increase for his left knee and back condition (R. 2645, 2647).

On December 2, 2009, Mr. Sellers informed the VAMC Montgomery that he had fatigue during the day with difficulty staying asleep (R. 1759-762).

In January 2010, Mr. Sellers stated that he was feeling very depressed and felt like killing himself (R. 1733-738, 1742-745).

In December 2010, Mr. Sellers was diagnosed with sleep disorder-insomnia type and depression (R. 1640-641).

On March 7, 2011, the VARO issued its Rating decision increasing Mr. Sellers' spondylolisthesis, lumbosacral spine to 40 percent disabling effective September 18, 2009; continuing a 0 percent evaluation of his laceration and tendon injury, right index and middle fingers; continuing a 10 percent evaluation of his left knee injury; denying service connection for PTSD; and denying entitlement to individual unemployability (R. 3019-030).

On May 13, 2011, a VA C&P examination for mental disorders was conducted at the VAMC Montgomery (R. 2435-442). Mr. Sellers was diagnosed with major depressive disorder, recurrent, moderate, and PTSD with a GAF of 49 over the past 2 years (R. 2441). His GAF for depression was noted as 50 and PTSD as 53 (R. 2441). The examiner found reduced reliability and productivity due to mental disorder symptoms. "Vet[ ] may have difficulty in getting along with a boss who is other than supportive and kind. Vet describes himself as getting very little sleep and this seems to result in considerable irritability.

Finally, the cognitive effects of the significant physical pain he seems to be in right now would significantly reduce his concentration" (R. 2442).

In May 2011, Mr. Sellers stated he sleeps about 2.5 hours per night, he has nightmares 3-4 times per week, and he dozes during the day (R. 1597-598).

On July 21, 2011, in a VA C&P examination (R. 1442-454) for mental disorders, Dr. Stephen A. Sams noted "Pt gives long history of being angry/disgruntled due to not being promoted, sense of failure, poor sleep, dysphoria." (R. 1443). Dr. Sams administered the Beck Depression Inventory-II. Mr. Sellers obtained a score of 45, suggesting the presence of severe depression. Vegetative symptomatology revealed by Mr. Sellers' responses included moderate agitation, marked anhedonia, moderate indecisiveness, a moderately reduced energy level, marked irritability, a mildly reduced appetite, moderate difficulties concentrating, marked fatigue, and a moderately reduced libido (R. 1450-451). He diagnosed Mr. Sellers with major depressive disorder, recurrent, moderate, with a GAF of 48 current (R. 1452).

On September 1, 2011, the VARO issued its Rating decision granting service connection for major depressive disorder with a 70 percent evaluation effective May 13, 2011, and denied service connection for bilateral ankle condition (R. 3004-018).

On September 28, 2011, in a VAMC Montgomery MHC Social Work Note, Mr. Sellers presented as tired and irritable (R. 1569-570).

On October 13, 2011, Mr. Sellers filed his Notices of Disagreement (NODs) with the VA's March 2011 and September 2011 Rating decisions (R. 2351-355, 2361-369).

On March 27, 2014, the VARO issued its Rating decision granting an earlier effective date of September 3, 2010, for Mr. Sellers' service connected major depressive disorder (R. 2983-994).

On March 27, 2014, the VARO issued its Statement of the Case on the issues of entitlement to an initial higher evaluation than 70 percent for major depressive disorder; service connection for left ankle condition; and service connection for right ankle condition (R. 2175-196).

On March 27, 2014, the VARO issued its Statement of the Case on the issues of entitlement to a higher evaluation than 40 percent for spondylolisthesis, lumbosacral spine; entitlement to a higher evaluation than 0 percent for laceration and tendon injury, right index and middle fingers; entitlement to a higher evaluation than 10 percent left knee injury; service connection for PTSD; entitlement to individual unemployability; and entitlement to an earlier effective date than September 18, 2009, for his increase for spondylolisthesis, lumbosacral spine (R. 2146-174).

On April 25, 2014, Mr. Sellers filed his substantive appeal with the VA's two March 2014 Statements of the Case (R. 2121-122, 2124-128).

On April 25, 2014, Mr. Sellers filed his Notice of Disagreement with the VA's March 2014 Rating decision (R. 2118-120).

On September 17, 2015, the VARO issued its Statement of the Case on the issue of entitlement to an earlier effective date of September 3, 2010 for service connection of his major depressive disorder (R. 133-53).

On October 16, 2015, Mr. Sellers filed his substantive appeal with the VA's September 2015 Statement of the Case (R. 129-32).

In its April 29, 2016 decision, the Board of Veterans' Appeals (Board or BVA) denied an effective date earlier than September 18, 2009, for the award of service connection for his major depressive disorder, denied Mr. Sellers an initial evaluation in excess of 70 percent for his major depressive disorder, and denied an effective date earlier than September 18, 2009, for the award of a 40 percent evaluation for his lumbosacral spine disability (R. 2-27, 30-57).

On August 26, 2016, Mr. Sellers filed his Notice of Appeal with this Court to obtain judicial review of the Board's April 2016 decision.

VI. SUMMARY OF ARGUMENT

The Board improperly denied an earlier effective date than September 18, 2009, for Mr. Sellers' major depressive disorder. The Board erroneously found that he had not filed a claim for his mental disorder before September 18, 2009. The Board improperly ignored Mr. Sellers' claim for service connection for his

chronic mental disorder in his March 1996 formal application. The Board failed to provide adequate reasons or bases for its findings and conclusions which are sufficient to inform the claimant of the basis of its decision.

The Board improperly denied Mr. Sellers a higher initial rating for his service connected major depression because it had mistakenly found that Mr. Sellers filed his claim for his psychiatric disability in September 2009. The Board mistakenly relied only on 38 C.F.R. § 4.130, Diagnostic Code 9434 to determine his correct rating for his September 2009 claim.

The Board improperly discredited the vocational expert's March 2016 professional opinions because it erroneously treated the expert's opinions as a medical expert opinion. The vocational expert made only vocational conclusions for which he was qualified and competent to make. Mr. Young assumed the veteran's vocational history and the validity of Dr. Sams' and Dr. Sack's medical conclusions, and he concluded, based on the mental limitations, that there would be no competitive work in the national economy for a person like Mr. Sellers who had these mental limitations.

The Board improperly failed to refer Mr. Sellers' pending 1996 claim to establish service connection for his tinnitus to the VA Regional Office for adjudication. The Board failed to recognize the statements from the veteran in his March 1996 application in combination with the VA examiner's statement in the May 1996 report as a claim to establish service connection for his tinnitus.

The VA has failed to issue a Rating decision directly addressing the veteran's claim for his tinnitus.

VII. ARGUMENT

A. THE BOARD IMPROPERLY DENIED MR. SELLERS ENTITLEMENT TO AN EFFECTIVE DATE EARLIER THAN SEPTEMBER 18, 2009, FOR THE VA'S GRANT OF SERVICE CONNECTION FOR HIS MAJOR DEPRESSIVE DISORDER.

The Board's 2016 decision granted an earlier effective date of September 18, 2009, for the VA's grant of service connection for his major depressive disorder (R. 19-21). The Board erroneously found that the veteran had not filed a claim for his mental disorder before September 18, 2009. The Board stated,

> The Board observes that VA received no claim (informal or otherwise) for service connection for any psychiatric disability prior to September 1[8], 2009. Notably, prior to this date, VA had not received any correspondence from the Veteran or a representative since 1996. Also, although the Veteran had filed an original VA compensation claim in April 1971 and a claim for benefits in March 1996, these did not include any claim for psychiatric disorder or problems that could be reasonably construed as a claim for service connection for psychiatric disability.

(R. 20). In finding that an effective date of September 18, 2009 was required for the veteran's major depressive disorder, the Board's 2016 decision referred to

the September 18, 2009 informal claim for psychiatric disability, claimed as PTSD (R. 19, 2647).

Legal Standards.

The effective date for a VA disability compensation claim based on an original claim or a reopened claim "shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application therefor." 38 U.S.C. § 5110(a). The Secretary's regulation provides that the effective date for a disability claim not filed within one year of the veteran's discharge from active duty shall be the "date of receipt of claim, or date of entitlement arose, whichever is later." 38 C.F.R. § 3.400(b)(2).

A "claim" is "[a]ny communication or action indicating intent to apply for one or more VA benefits", 38 C.F.R. §§ 3.1(p), 3.155 (2015); *Rodriguez v. West*, 189 F.3d 1351 (Fed. Cir. 1999). "A specific claim in the form prescribed by the Secretary … must be filed in order for benefits to be paid or furnished to any individual under the laws administered by the Secretary." 38 U.S.C. § 5101(a); *see also* 38 C.F.R. § 3.151(a). A claim or application is "a formal or informal communication in writing requesting a determination of entitlement, *or evidencing a belief in entitlement*, to a benefit." *See* 38 C.F.R. § 3.1(p). (emphasis supplied).

The VA administrative claims process recognizes formal and informal claims. A formal claim is one that has been filed in the form prescribed by the Secretary. Once filed, it will be reviewed for completeness. *See* 38 U.S.C. §§

5103(a), 5107(a). "Any communication or action, indicating an *intent to apply* for one or more benefits under the laws administered by [VA], from a claimant, his or her duly authorized representative, a Member of Congress, or some person acting as next friend of a claimant who is not *sui juris may be* considered an informal claim. … Upon receipt of an informal claim, if a formal claim has not been filed, an application form will be forwarded to the claimant for execution." 38 C.F.R. § 3.155(a) (2015) (emphasis added). When a claim has been filed that meets the requirements of 38 C.F.R. § 3.151 (i.e. formal claims for disability compensation under 38 U.S.C. § 5101(a)), "an *informal request* for increase or *reopening will be* accepted as a *claim*." 38 C.F.R. § 3.155(c) (emphasis added).

The Board is required to state adequate reasons or bases for its findings and conclusions which are sufficient to inform the claimant of the basis of its decision and permit this Court to review the Board's decision. *See* 38 U.S.C. § 7104(d)(1); *Livesay v. Principi*, 15 Vet. App. 165 (2001); *Ohland v. Derwinski*, 1 Vet. App. 147, 149 (1991).

1. 1996 Formal Claim.

The Board reviewed the veteran's March 1996 formal application for service connection, but it ignored his claim for service connection for his chronic mental disorder in that application ("…although the Veteran had filed an original VA compensation claim in April 1971 and a [formal] claim for benefits in March 1996, these did not include any claim for psychiatric disorder

or problems that could be reasonably construed as a claim for service connection for psychiatric disability.") (R. 20).

When Mr. Sellers filed his *pro se* March 1996 application to establish service connection, he stated on the claim form that he was "request[ing] s/c [service connection] for disabilities occurring during active duty service[.]" (R. 2687, 2684-687). During his active duty service, Mr. Sellers had been treated for and diagnosed with his chronic mental disability on multiple occasions. On August 16, 1988, he received medical treatment for his chronic anxiety[1] (R. 777). On November 9, 1993, his physician diagnosed him with dysthymia[2] secondary

[1] Anxiety or Panic Attacks are a neurotic disorder characterized by chronic, unrealistic anxiety often punctuated by acute attacks of anxiety or panic. It afflicts 5% of the population, is characteristically a disorder of young adults, and affects women twice as often as men. Emotional stress often precipitates anxiety. Anxiety is a symptom in all psychiatric disorders, but it occurs alone or as the primary symptom in anxiety neurosis. Acute anxiety attacks (panic disorder) form the cardinal feature of anxiety neurosis and are among the most painful life experiences. They may occur repetitively over a period of time and are self-limited, generally lasting a few minutes to an hour or two. The patient experiences a subjective sense of terror that arises for no evident reason and a haunting dread of some nameless, imminent catastrophe, temporarily preventing rational thinking. Of the somatic symptoms integral to anxiety, the most common are cardiorespiratory, with tachycardia, palpitations, occasional premature beats, and precordial pain usually described as sharp or sticking in quality. Trembling, visible as a fine tremor of the outstretched hands, sweating, complaints of "butterflies in the stomach," and generalized motor weakness and dizziness are common; nausea and occasionally diarrhea occur. The patient may notice a feeling of unreality and loss of contact with people and objects in his environment. A sense of air hunger leading to hyperventilation often is experienced. This can result in a secondary respiratory alkalosis, varying degrees of muscular stiffness in the extremities, and a feeling of pins and needles or numbness around the mouth and in the fingers and toes. The Merck Manual. 16th Edition. Merck Research Laboratories. 1992. Pgs. 1582-1583.

[2] Dysthymia is characterized by milder subsyndromal and nonpsychotic depressive manifestations with less prominent somatic signs but marked disturbances in the

to his chronic left knee and right hand conditions (R. 2930, 2940-941). On February 2, 1994, his physician provided treatment for his multiple somatic dysfunctional[3] reactions from the traumas to his left knee and lumbosacral area (R. 2939). In April 1995, he received further medical treatment for his mental disorder (R. 2922-923, 2943). On May 1, 1995, his physician treated and diagnosed him again with dysthymia (R. 2924, 2926).

It is beyond question that the Secretary has a duty to sympathetically read a *pro se* veteran's filings to determine whether a claim has been raised and that it applies to any claim for benefits. *See Szemraj v. Principi*, 357 F.3d 1370, 1373 (Fed. Cir. 2004). The VA is required to read and construe all communications from a *pro se* veteran in a sympathetic manner and grant all possible benefits. *See Moody v. Principi,* 360 F.3d 1306, 1310 (Fed. Cir. 2004) (The Court stated any

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personality domain. These patients are gloomy, pessimistic, humorless or incapable of fun; passive and lethargic; introverted; skeptical, hypercritical, or complaining; self-critical, self-reproaching, and self-derogatory; and preoccupied with inadequacy, failure, and negative events, sometimes to the point of morbid enjoyment of one's failures. Robert Berkow, M.D., Editor-in-Chief, The Merck Manual, Edition 16, 1599 (1992).

[3] Somatic dysfunction is a mental disorder characterized by multiple somatic complaints that cannot be fully explained by any known general medical condition or the direct effect of a substance, but are not intentionally feigned or produced, beginning before the age of 30 and occurring over several years. Complaints comprise a combination of at least multiple pain symptoms, multiple gastrointestinal symptoms, a sexual symptom, and a neurological symptom. They are often presented in a dramatic, vague, or exaggerated way, with involvement of numerous physicians, numerous diagnostic evaluations, and unnecessary medical treatment or surgery. *Dorland's Online Medical Dictionary*. Copyright 2013. Elsevier (USA). Web. 30 July 2014. www.dorlands.com.

"ambiguity" in the veteran's earlier pleadings "should be resolved in favor of the veteran"); *Roberson v. Principi,* 251 F.3d 1378, 1384 (Fed. Cir. 2001).

Prior to issuing the VA's July 1996 decision on Mr. Sellers' 1996 application, it had obtained his service medical records and was aware of his in-service medical treatment for his chronic mental disability. The VA's decision stated it had reviewed the following evidence: "Evidence: (1) Service medical records for the period 04-17-64 through 01-22-69 and the period 02-20-81 through 02-26-96." (R. 2667, 2666-670).

The Board's 2016 decision does not explain why it ignored the veteran's March 1996 claim for his mental disability. In fact, the Board stated that it had reviewed the veteran's March 1996 application, and it erroneously found that "these [applications] did not include any claim for psychiatric disorder or problems that could be reasonably construed as a claim for service connection for psychiatric disability." (R. 20).

When the VA made its July 5 and 8, 1996 decisions, it did not make an explicit decision on his pending claim for his mental disorder and did not provide any indication that it had adjudicated his claim for his mental disorder (R. 2662-670). The VA did not mail a copy of either letter to his appointed representative (R. 2662-670). This lack of notice to the veteran's appointed representative was particularly important because the veteran had a chronic mental disability which impaired his ability to respond to the VA's decision

without the aid of his appointed representative. Mr. Sellers' 1996 claim for his chronic mental disorder remained pending because the VA did not provide notice of its decision to the veteran and his representative. *See* 38 U.S.C. § 5104; 38 C.F.R. § 3.103(f); *see also Sellers v. Shinseki,* 25 Vet. App. 265, 274 (2012).

2. 2009 Informal Claims.

The Board reviewed the veteran's filings and documents for an informal claim after his 1996 application, but it stated that it had found no claim for service connection for his chronic mental disorder ("The Board observes that VA received no claim (informal or otherwise) for service connection for any psychiatric disability prior to September 1[8], 2009. Notably, prior to this date, VA had not received any correspondence from the Veteran or a representative since 1996.") (R. 20).

The Board did not state why either the January 21, 2009 VA treatment record or the April 14, 2009 document were not claims to establish service connection for his mental disability (R. 1859, 1861-863, 1842-846). On January 21, 2009, the veteran presented to Mental Health at the VA Medical Center (VAMC) for a consultation referral for his complaints of depression (R. 1859). In the VA treatment record, the examiner recorded the veteran's statement that he had seen a psychiatrist during his service and that he spent three weeks as an in-patient for treatment (R. 1861-863).

At his April 14, 2009 visit to the VAMC, the veteran reported to the VA examiner that he was having sleep difficulties, nightmares, and flashbacks related to his military combat training exercises (R. 1843, 1845-846, 1842-846). The examiner stated that "[h]e became overwhelmed with tears when discussing these matters." (R. 1845). The veteran reported to the examiner that he had retired from the military, but he could not obtain a job afterwards (R. 1844).

The veteran's March 1996 application, the January 21, 2009 VA treatment record, and the April 14, 2009 VA document were in the record before the Board when it made its 2016 decision and before the VARO when it made its September 2011 decision granting service connection. *See Bell v. Derwinski*, 2 Vet. App. 611, 612-13 (1992). The Board is required to base its decision on the record as a whole. *See* 38 U.S.C. § 7104(a) ("Decisions of the Board shall be based on the entire record in the proceeding and upon consideration of all evidence and material of record and applicable provisions of law and regulation.").

In ignoring these relevant documents that were material and favorable to his claim, the Board failed to state any adequate reasons or bases for its finding that they did not raise a formal or an informal claim. *See* 38 U.S.C. § 7104(d)(1); *see also Ohland v. Derwinski*, supra, at 149 (1991) ("The BVA decision here includes neither an analysis of the credibility or probative value of the evidence submitted by or on behalf of the veteran in support of his claim nor any

explanation of the Board's conclusion…."). "[T]he BVA is not free to ignore the issues that a veteran raises in his appeal." *Godfrey v. Derwinski*, 2 Vet. App. 352, 356-67 (1992). The Board's failure to address this issue was in error. *Cf. Suttman v. Brown*, 5 Vet. App. 127, 132 (1993) ("Where such review of all documents and oral testimony reasonably reveals that the claimant is seeking a particular benefit, the Board is required to adjudicate the issue of the claimant's entitlement to such a benefit or, if appropriate, to remand the issue to the RO for development and adjudication of the issue; however, the Board may not simply ignore the issue so raised.").

Since the Board failed to address the veteran's written statement in his original application that he was "request[ing] s/c [service connection] for disabilities occurring during active duty service" and failed to make any explicit findings on the issue of whether the 2009 VA documents raised a claim, the appropriate action would be to remand this claim to the Board for it to make the required findings in the first instance. *See Byron v. Shinseki*, 670 F.3d 1202, 1206 (Fed. Cir. 2012) ("When there are facts that remain to be found in the first instance, a remand is the proper course.").

The Board's error in denying the Appellant's claim under the March 1996 application was prejudicial. If the Board had found the 1996 application raised a service connection claim for his major depression, then it would have potentially

entitled the veteran to service connection benefits from March 1996 through the assigned effective date of September 18, 2009 (R. 16).

B. THE BOARD ERRONEOUSLY DENIED MR. SELLERS A HIGHER INITIAL RATING FOR HIS SERVICE CONNECTED MAJOR DEPRESSION BECAUSE IT HAD MISTAKENLY FOUND THAT HE FILED HIS CLAIM FOR HIS PSYCHIATRIC DISABILITY IN SEPTEMBER 2009, HAVING IGNORED HIS PENDING MARCH 1996 APPLICATION.

As discussed above, Mr. Sellers filed his formal application in March 1996 to establish service connection for his major depression. This 1996 application remained pending and unadjudicated until the VA's September 2011 decision granted service connection for his depression (R. 2392-401, 2684-687, 3004-018).

In its 2016 decision, the Board addressed Mr. Sellers' legal entitlement to a higher initial rating before it adjudicated when he filed his claim (R. 8-16, 19-20). The Board erroneously found that Mr. Sellers filed his claim for his psychiatric disability in September 2009, because it ignored his pending March 1996 formal application. The Board relied only on 38 C.F.R. § 4.130, Diagnostic Code 9434 to determine his correct rating for his September 2009 claim (R. 5, 9-17).

As a result of ignoring the veteran's claim for service connection for his major depression in his formal March 1996 application, the Board erroneously did not apply the correct legal standard in 38 C.F.R § 4.132, Diagnostic Code

9411 (1996), which was in effect in March 1996, to Mr. Sellers' 1996 claim. This prior regulation provided that a 100% schedular rating was to be assigned where:

> (1) the attitudes of all contacts except the most intimate were so adversely affected as to result in virtual isolation in the community, (2) where there existed totally incapacitating psychoneurotic symptoms bordering on gross repudiation of reality with disturbed thought or behavioral processes associated with almost all daily activities such as fantasy, confusion, panic and explosions of aggressive energy resulting in profound retreat from mature behavior, or (3) *where the individual was demonstrably unable to obtain or retain employment.* (emphasis added)

Id. 38 C.F.R. § 4.132, Diagnostic Code 9411 (1996) ("DC 9411") was in effect from January 1988 until November 7, 1996, when 38 C.F.R. § 4.130 amended it.

Each of the above three criteria in DC 9411 provided an independent basis for granting a 100% schedular evaluation for PTSD. *See Johnson v. Brown*, 7 Vet. App. 95, 97, 99 (1994). In *Johnson*, the Secretary conceded that "… whenever unemployability is caused solely by a service-connected mental disorder, regardless of its current disability rating, a 100% schedular rating is warranted under section 4.132[, DC 9411]." *Id.* at 97.

In its 2016 decision, the Board found that Mr. Sellers is unemployable as a result of his service connected disabilities and it granted a TDIU rating (R. 20-21). Under *Johnson* and DC 9411, Mr. Sellers was entitled to a 100% schedular

rating for his major depressive disorder if the evidence proved that he is unemployable solely due to his service-connected mental disorder.

Given that the Board applied an erroneous legal standard to the veteran's 1996 claim, the Court should remand this issue to the Board for re-adjudication under the correct legal standard to determine whether he is unemployable solely due to his service connected major depression. *See Tucker v. West*, 11 Vet. App. 369, 374 (1998) (holding that remand is the appropriate remedy "where the Board has incorrectly applied the law, failed to provide an adequate statement of reasons or bases for its determinations, or where the record is otherwise inadequate"); *Deloach v. Shinseki*, 704 F.3d 1370, 1381 (Fed. Cir. 2013).

C. THE BOARD IMPROPERLY DISCREDITED THE VOCATIONAL EXPERT'S MARCH 2016 PROFESSIONAL OPINIONS BECAUSE IT ERRONEOUSLY TREATED THE EXPERT'S OPINIONS AS A MEDICAL EXPERT OPINION.

The Board considered the expert opinion from the vocational expert, Christopher Young, in denying Mr. Sellers a rating higher than a 70% schedular rating for his service connected major depression (R. 16, 85-97). The Board mistakenly believed that the vocational expert was providing expert medical opinions for which the Board found that he was not competent. In discrediting Mr. Young's professional opinions, the Board stated,

> The Board has considered the vocational assessment dated in March 2016, which reflects that the Veteran is precluded

> from work by his service-connected major depression alone. However, the vocational expert does not acknowledge any level of social impairment, much less total social impairment, that would support a higher schedular disability rating for MDD. Also, his statement of total disability is incongruous with his acknowledgement that the symptoms cause diminished ability to function independently without any discussion thereof. *The Board finds that his medical conclusions are of diminished probative value as he not a medical professional and his findings are incongruous with his discussion of the Veteran's symptoms*. (emphasis added).

(R. 16).

The vocational expert did not make any medical conclusions in his report. He made only vocational conclusions for which he was qualified and competent to make. He reviewed the veteran's vocational history and the medical opinions in the record, and he expressed only his professional vocational opinions on the availability of competitive work given the mental restrictions imposed on this veteran by the VA's examining psychologists Dr. Stephen Sams and Dr. Nancy Sack (R. 87-90, 2408-420, 2435-442). Mr. Young stated in relevant part as follows:

> Mr. Sellers' psychological disability alone precludes all competitive employment in the national economy for a number of reasons. The VA granted Mr. Sellers a 70% disability rating for his major depressive disorder from September 3, 2010. A 70% rating includes such vocationally significant symptoms as:
>
> * Deficiencies in work, school. * Impaired impulse control. * Difficulty in adapting to a work like setting,

> including work. * Deficiencies in judgment, thinking or mood. * Diminished ability to function independently.
>
> Mr. Sellers was also given a GAF score of less than 50 by Dr. Sams on July 21, 2011. This GAF score of less than 50 means that Mr. Sellers suffers from "severe symptoms", meaning that these symptoms are severe enough to prevent work of any exertional or skill level.
>
> Dr. Sams gave Mr. Sellers a GAF score of 48, and he documented symptoms including marked irritability and fatigue, with moderate difficulties in concentration. There are also deficiencies in judgment, thinking, and mood. These symptoms preclude employment as no employer would take the risk of hiring someone with "impaired impulse control", or "marked irritability" because of the liability involved.
>
> Dr. Sack, in her May 13, 2011 report, concluded that the veteran would need a sheltered work environment where his employer is "supportive and kind." Also that he had difficulty getting along with others in a work situation. She also documents interpersonal issues, stating that the veteran threatened a police officer and supervisors. In other words, the veteran needs "special accommodations", thus precluding work that exists at a competitive level in the national economy. Dr. Sack noted similar mental restrictions as Dr. Sams.
>
> In my 30+ years of finding employment for the disabled, it has been my experience that these levels of mental restrictions preclude competitive work of any kind.

(R. 89-90).

Contrary to the Board's finding of fact that "his medical conclusions are of diminished probative value as he [is] not a medical professional", the

vocational expert did not make any medical conclusions or state any opinions on the veteran's mental abilities to function due to his service connected major depression. Mr. Young assumed the veteran's vocational history and the validity of Dr. Sams' and Dr. Sack's medical conclusions, and he concluded, based on the mental limitations, that there would be no competitive work in the national economy for a person like Mr. Sellers who had these mental limitations. Mr. Young concluded that Dr. Sams "documented symptoms including marked irritability and fatigue, with moderate difficulties in concentration. There are also deficiencies in judgment, thinking, and mood. These symptoms preclude employment as no employer would take the risk of hiring someone with 'impaired impulse control', or 'marked irritability' because of the liability involved." (R. 89).

Mr. Young stated that the Global Assessment of Functioning (GAF) scores assigned by Dr. Sams and Dr. Sack, namely less than 50 [4], indicate a person who suffers from "severe symptoms", meaning that "these symptoms are severe enough to prevent work at any exertional or skill level." (R. 89, 2418, 2441). Mr. Young also opined that Dr. Sack's requirement that the veteran would need an employer who is "supportive and kind" meant that the veteran

[4] A GAF score of 50 indicates serious symptoms (e.g., suicidal ideation, severe obsessional rituals, frequent shoplifting) OR any serious impairment in social, occupational, or school functioning (e.g., no friends, unable to keep a job). American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders (DSM-IV)*. 4th ed, (Washington, DC: American Psychiatric Association, 1994), 30-32.

would need a sheltered work position (R. 90, 2442) ("Vet[eran] may have difficulty in getting along with a boss who is other than supportive and kind."). Dr. Sack had also documented that the veteran had threatened a police officer and supervisors, and Mr. Young opined that this veteran needs "special accommodations", precluding work that exists at a competitive level in the national economy (R. 90, 2437).

A vocational expert is a professional who is educated, trained, and skilled in job placement and knowledgeable about labor market conditions. Vocational experts have been asked to formulate vocational opinions about specific job opportunities of a person based on his education, background, work history, and medical condition and limitations since *Kerner v. Flemming*, 283 F.2d 916 (2nd Cir. 1960) ("Accepting this as we do, we think there was here no substantial evidence that would enable the Secretary to make any reasoned determination whether applicant was 'unable to engage in substantial and gainful activity' commensurate with his age, educational attainments, training experience, mental and physical capacities). … a determination requires resolution of two issues -- what can applicant do, and w[ ]h[a]t employment opportunities are there for a man who can do only what applicant can do? Mere theoretical ability to engage in substantial gainful activity is not enough if no reasonable opportunity for this is available.").

While the Board, as the Secretary's finder of fact, has the authority to assign weight to probative evidence, *see Buchanan v. Nicholson*, 451 F.3d 1331, 1336 (Fed. Cir. 2006), the Board is required to state adequate reasons or bases for its findings. *See Ohland v. Derwinski*, supra, at 149. Here, the Board's finding that Mr. Young's "medical conclusion are of diminished probative value as he [is] not a medical professional" is not an adequate reason or basis for discounting the vocational expert's professional opinions. *See Id.*

The Board's consideration of Mr. Young's professional opinions was particularly important here where the opinions of the two VA psychologists were internally inconsistent. Dr. Sams noted that Mr. Sellers' score on the Beck Depression Inventory-II was 45 "suggest[ing] the presence of a severe depression[,]" and he assigned a GAF score of 48 [5], but diagnosed him with recurrent moderate major depressive disorder (R. 2416-418). He concluded that there was not a total occupational and social impairment due to his mental signs and symptoms, without stating any reasons or rationale, but also concluded that his mental disorder's signs and symptoms would result in deficiencies in his judgment, thinking, family, work, and mood (R. 2419).

[5] A GAF score of 48 indicates serious symptoms (e.g., suicidal ideation, severe obsessional rituals, frequent shoplifting) OR any serious impairment in social, occupational, or school functioning (e.g., no friends, unable to keep a job). American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders (DSM-IV)*. 4th ed, (Washington, DC: American Psychiatric Association, 1994), 30-32.

Dr. Sack's C&P report was also internally inconsistent. Dr. Sack diagnosed Mr. Sellers with recurrent moderate major depressive disorder, but assigned a GAF score of 50 for his depression with a GAF score of 49 over the past two years (R. 2441, 2435-442). She concluded that the "vet[eran] seemed to credibly describe[ ] himself as having difficulty in getting along with other[s], particularly in work situations[ ]" and "vet[eran] may have difficulty in getting along with a boss who is other than supportive and kind." (R. 2441-442). She also recognized that he had mild anger, medication side-effects of drowsiness and dizziness, concentration problems, and he had a sleep impairment which prevented him from obtaining more than two hours of sleep each night (R. 2438-439). Nonetheless, she concluded that the veteran did not have a total occupational and social impairment due to his mental disorder and that his mental disorder does not result in deficiencies in his judgment, thinking, family relations, work, mood, or school without stating any reasons or rationale (R. 2442).

D. THE BOARD FAILED TO REFER MR. SELLERS' PENDING 1996 CLAIM TO ESTABLISH SERVICE CONNECTION FOR HIS TINNITUS TO THE VA REGIONAL OFFICE (VARO) FOR ADJUDICATION.

As discussed above, Mr. Sellers filed his March 1996 application to establish service connection for the disabilities which he had manifested during

his active duty service (R. 2687). Mr. Sellers' application explicitly stated that he sought service connection for his hearing loss ("Hearing Loss – (See records of hearing tests)") (R. 2684). The VA's May 23, 1996 C&P examination report explicitly raised his claim for his tinnitus when he stated that he had tinnitus related to his noise exposure during service (R. 2677-678). The VA examiner stated that "[h]e reports bilateral constant tinnitus. He was exposed to excessive noise in the military with the use of ear protection." (R. 2677). The VA examiner further stated,

> The patient reports bilateral constant tinnitus since 1985. He relates the tinnitus to noises in which he was exposed to during his military career. He describes the tinnitus as a constant, high pitched ringing noise in both ears. He states that sleep and concentration[ ] are both affected by the condition and he rates the disability as moderate.

(R. 2677).

These statements from the veteran in his March 1996 application in combination with the VA examiner's statement in the May 1996 report should be recognized as a claim to establish service connection for his tinnitus. *See* 38 C.F.R. § 3.155 (2015); *see also Scott v. McDonald*, 789 F.3d 1375, 1381 (Fed. Cir. 2015) ("*Roberson*, *Robinson*, and *Comer* thus require the Veterans Court to look at all of the evidence in the record to determine whether it supports related claims for service-connected disability even though the specific claim was not raised by the veteran.").

When the VA issued its July 1996 decision, it denied an increased rating for his service connected hearing, but it did not address his tinnitus claim (R. 2662-665, 2666-670). To date, the VA has never issued a Rating decision addressing the veteran's claim for his tinnitus.

Referral of a matter is appropriate when the Board lacks jurisdiction over the matter being referred. *See Godfrey v. Brown*, 7 Vet. App. 398, 410 (1995). The Court has held that "the BVA must review all issues which are reasonably raised from a liberal reading of the appellant's substantive appeal." *Rivers v. Gober*, 10 Vet. App. 469, 471 (1997) (quoting *Myers v. Derwinski*, 1 Vet. App. 127, 129 (1991)); *see Godfrey v. Brown*, 7 Vet. App. 398, 410 (1995)).

It is well settled that this Court has jurisdiction to determine whether the Board had jurisdiction to take the action it took in its decision. *See King v. Nicholson,* 19 Vet. App. 406, 409 (2006). Moreover, "[o]nce the Board has jurisdiction over a claim … it has the authority to address *all issues* related to that claim, even those not previously decided by the RO." *Jarrell v. Nicholson,* 20 Vet. App. 326, 332 (2006) (en banc) (emphasis added); *Garlejo v. Brown,* 10 Vet. App. 229, 232 (1997) (reviewing Board's determination that claimant failed to file a Notice of Disagreement, such that the claim was not in appellate status).

VIII. CONCLUSION

The Appellant moves the Court to vacate the Board's April 2016 decision on these claims and to remand his claims to the Board for re-adjudication of his claims consistent with the above discussion.

This 5th day of June 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have electronically filed the foregoing Appellant's Brief with the Clerk of the Court using the CM/ECF system which will send electronic notification of such filing to:

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This 5th day of June 2017.

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