APPELLANT'S REPLY 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.

John F. Cameron, Esq.
250 Commerce Street, Suite 201
P.O. Box 240666
Montgomery, AL 36124-0666
(334) 356-4888

Attorney for Appellant
ROBERT M. SELLERS

I. TABLE OF CONTENTS

II. TABLE OF AUTHORITIES

REGULATIONS Page(s)

CITATIONS TO RECORD BEFORE THE AGENCY Page(s)

III. 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 Secretary recognizes Mr. Sellers' argument that he was entitled to an effective date earlier than September 18, 2009, for the grant of service connection for his major depressive disorder (MDD) based on his March 1996 formal Application (Sec's brief [SB], pp. 3, 6-7) (App's brief [AB], pp. 9-15).

The Secretary argues that the Appellant did not request service connection in his March 1996 formal application for a psychiatric disability ("Appellant requested service connection for several individually-listed disabilities in his March 1996 Application for Compensation or Pension, but a mental disability was not one of them."). The Secretary argues that the Appellant's written statement on his formal application that he was "request[ing] s/c [service connection] for disabilities occurring during active service[ ]" did not "identify the benefit sought," relying on *Brokowski v. Shinseki*, 23 Vet. App. 79, 84 (2009). The Secretary argues that in *Brokowski*, this Court "conclud[ed] that a writing that requested service connection for 'all disabilities of record' was too broad to satisfy 38 C.F.R. § 3.155(a)'s requirement that an informal claim

'identify the benefits sought' because accepting such language as adequately identifying the benefit sought would nullify that specificity requirement." (SB. 7).

The Secretary's reliance on *Brokowski* is misplaced because it does not support the Secretary's argument. In *Brokowski*, the veteran claimed that "at the time that he filed his 1978 claim for benefits for depression and anxiety, the Board should have sympathetically read his application to include an informal claim for benefits for peripheral neuropathy." 23 Vet. App. at 86. The Court found that "to the extent that the medical records the appellant submitted to support the 1978 application discussed the possibility that he had any neurological disorder, the Board had a plausible basis for finding that there was no indication that peripheral neuropathy was considered to be a cause of the appellant's disability." *Id.* at 87. The Board had a plausible basis for its finding because at the time of his 1978 application he had received no diagnosis of peripheral neuropathy. The Court stated, "Here, although the limited question of possible neurological involvement in the appellant's disability picture was briefly raised by the one of the appellant's physicians, that question appears to have been resolved negatively by the time the appellant had filed his 1978 claim." *Id.* at 88.

In fact, this Court in *Brokowski* recognized the possibility of a viable claim where the veteran submits his statement coupled with the submission of

supporting medical records ("We do not hold that the inclusion of the term 'all disabilities of record' in an application for VA benefits coupled with the submission of particular medical records can be ignored in determining whether the appellant has sufficiently identified the benefit he is seeking. For example, if that term is used and if selected records are submitted to support the claim and they clearly discuss disabilities or specific symptoms other than those listed on the application, it may be inferred that those records were submitted because the appellant intended to apply for benefits for those conditions or conditions that are suggested by the specified symptoms."). *Id.* at 88-89.

In the instant appeal, the *pro se* veteran informed the VA in his 1996 formal application that he was seeking service connection for "disabilities occurring during active service[ ]". The VA obtained his SMRs which documented that he had been treated for and diagnosed with chronic anxiety, dysthymia, and multiple somatic dysfunctional reactions during active duty service. The combination of the veteran's claim form and his SMRs informed the VA that he was seeking service connection for these psychiatric disabilities. The veteran's claim form and his SMRs met the legal requirements of a claim for benefits. *See* 38 C.F.R. § 3.1(p) (2015) ("Claim means a written communication requesting a determination of entitlement or evidencing a belief in entitlement, to a benefit…."); *Brokowski v. Shinseki, supra*, at 84 ("Thus, it follows that (1) an intent to apply for benefits, (2) an identification of the

benefits sought, and (3) a communication in writing are the essential requirements of any claim, whether formal or informal."); *see also Brannon v. West*, 12 Vet. App. 32, 35 (1998) (holding that before VA can adjudicate an original claim for benefits, "the claimant must submit a written document identifying the benefit and expressing some intent to seek it").

In his formal Application, he explicitly requested service connection for those disabilities which he had manifested during his active duty service. Since the VA had obtained his service medical records (SMRs) by July 1996, the VA had actual knowledge of the disabilities which he had manifested during service and for which he was claiming service connection. (R. 2667).

The Secretary does not dispute the Appellant's arguments that "[t]he Board's 2016 decision does not explain why it ignored the veteran's March 1996 claim for his mental disability[ ]" or that "[i]n 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." (AB, 14, 16).

The Secretary does not dispute the Appellant's arguments that "[t]he VA did not mail a copy of either [July 5, or 8, 1996] letter to his appointed representative" and that his "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."(AB, 14-15).

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.

The Secretary disputes that the Appellant is entitled to a higher initial rating for his service connected psychiatric disability under the legal standard in 38 C.F.R § 4.132, Diagnostic Code 9411 (1996) because the Secretary believes that he did not file a claim for his psychiatric disability in the 1996 formal claim (SB, 8-9). The Secretary does not dispute the Appellant's argument that "[i]n its 2016 decision, the Board addressed Mr. Sellers' legal entitlement to a higher initial rating before it adjudicated when he filed his claim". (AB, 18).

The Secretary further mistakenly argues that the "Appellant provides no further support for the allegation that the Board erred in denying him an evaluation in excess of 70% for his service connected MDD." (SB, 9). On the contrary, the Appellant had argued that once the Board erred in determining the date of the claim, it applied an incorrect legal standard; and that the Appellant was unemployable solely due to his service connected psychiatric disability, entitling him to a 100% schedular rating under the correct legal standard applicable to his 1996 claim (AB, 18-20). If the Board concludes, on remand,

that the Appellant filed his claim in 1996, then it must apply the correct legal standard at that time.

If the Court decides to remand the Appellant's earlier effective claim for his 1996 formal claim to the Board, the Court should also remand the issue of his entitlement to a higher initial rating under the correct legal standard applicable to the veteran's potential 1996 claim. The Court should remand these issues to the Board for re-adjudication under the correct legal standards to determine whether he filed a claim for his psychiatric disability in 1996 and 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 Secretary argues that the Board has the authority to assign weight to the evidence of record (SB, 9), as the Appellant had recognized (AB, 24). The

Appellant does not dispute that the Board has the authority to assign weight to evidence in the record. The Appellant had argued that the Board had improperly discredited Mr. Young's vocational opinions because he was not a medical expert.

The Secretary does not dispute that the Appellant's argument that "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." (AB, 24-25). The Secretary does not dispute the Appellant's argument that the Board erred in finding that Mr. Young had made a "medical conclusion" which was not entitled to evidentiary weight because "he [is] not a medical professional." (AB, 24-25).

The Secretary mistakenly argues that "[t]he Board correctly found that Mr. Young did not acknowledge any level of social impairment … which is necessary for the next higher rating, 100% under 38 C.F.R. § 4.130, DC 9434." (SB, 10). The controlling legal standard in 38 C.F.R § 4.132, Diagnostic Code 9411 (1996) for his 1996 formal claim does not require a particular level of social impairment. In *Johnson v. Brown*, 7 Vet. App. 95, 97, 99 (1994), 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]."

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.

The Secretary concedes that the Appellant was granted service connection for his hearing loss in a June 1, 1971 rating decision between his two periods of active duty service (R. 2751-752) (SB, 14). The Secretary argues that the Appellant's "March 1996 Application for Compensation would have, at the most, constituted a request for an increased rating for service-connected hearing loss, and not a separate claim of entitlement to service connection for tinnitus." (SB, 14). The Secretary argues that "Appellant did not seek benefits for symptoms that he thought were caused by hearing loss that turned out to be caused by tinnitus; he requested benefits for hearing loss[ ]" and that tinnitus and hearing loss are separate and distinct disabilities (AB, 13).

In his March 1996 application to establish service connection for the disabilities which he had manifested during his active duty service, he explicitly stated that he sought service connection for his hearing loss ("Hearing Loss – (See records of hearing tests)") (R. 2684, 2687). In defining the scope of his claim, he explicitly referred the VA to his hearing tests.

The Secretary does not dispute the Appellant's argument that "[t]he 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) (AB, 26). 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) (AB, 26-27).

The Secretary does not explain why these explicit statements by the veteran in his March 1996 application in combination with the VA examiner's statement in the May 1996 report and his lay statements in this report should not 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).

The Secretary does not dispute that 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). The Secretary does not dispute that to date, the VA has never issued a Rating decision addressing the veteran's claim for his tinnitus.

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)). "[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.").

The Board should have referred the Appellant's claim for his tinnitus to the VA for an initial decision.

IV. 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 16th day of November 2017.

Respectfully submitted,

/s/ John F. Cameron
Attorney for Appellant
Robert M. Sellers

250 Commerce Street, Suite 201
P. O. Box 240666
Montgomery, AL 36124-0666
(334) 356-4888

CERTIFICATE OF SERVICE

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

Nathan Paul Kirschner, Esq.
Appellate Attorney
Office of the General Counsel (027D)
U.S. Dept. of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, D.C. 20420

This 16th day of November 2017.

/s/ John F. Cameron
Attorney for Appellant