IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

ROSETTA MCKNIGHT,

Appellant,

v.

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

Appellee.

ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS

BRIEF OF APPELLEE SECRETARY OF VETERANS AFFAIRS

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TABLE OF CONTENTS

Table of Authorities

Cases

Statutes

Regulations

Other authorities

RECORD CITATIONS

IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

ROSETTA MCKNIGHT,	)	
Appellant	)	
	)	Vet. App. No. 17-0477
v.	)	
	)	
DAVID J. SHULKIN, M.D.,	)	
Secretary of Veterans Affairs,	)	
Appellee.	)	

ON APPEAL FROM THE BOARD OF VETERANS' APPEALS

APPELLEE'S BRIEF

I. ISSUE PRESENTED

Whether the Court should affirm that part of the Board of Veterans' Appeals (BVA or Board) November 14, 2016, decision that denied entitlement to an effective date prior to January 21, 2009, for service connected PTSD, as well as the denial of a rating greater than 70 percent for service connected PTSD, as well as the Board's denial of entitlement to an effective date prior to January 21, 2009, for the grant of a total disability rating based on individual unemployability due to service-connected disability (TDIU)
.

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

This Court has jurisdiction over the instant appeal pursuant to 38 U.S.C. § 7252(a) and § 7266(a).

B. Nature of the Case

Appellant appeals that part of the Board's November 14, 2016, decision that denied entitlement to an effective date prior to January 21, 2009, for the

grant of service connection and a 70 percent rating. (Appellant's brief (AB) at 1-7); [Record (R). at 4-5, 27 (1-29)]. The Secretary argues that Appellant has not presented convincing arguments for a reversal, and the Court should affirm the Board's decision.

Appellant presents no arguments regarding the denial of a rating in excess of 70 percent, nor the denial of an effective date prior to January 21, 2009, for TDIU. *See Disabled American Veterans*, *v. Gober*, 234 F.3d 682, 688 n.3 (Fed. Cir. 2000); *Degmetich v Brown*, 8 Vet.App. 208, 209 (1995) (issues or claims not argued on appeal are deemed to be abandoned); *Williams v. Principi*, 15 Vet.App. 189, 199 (2001); *Woehlhart v. Nicholson*, 21 Vet.App. at 456, 463 (2007) (Court will not address arguments that counsel for appellant fails to adequately develop in opening brief). Because Appellant proffers no argument on these claims, the Secretary asserts that Appellant has abandoned them, and thus, the Court should affirm the Board's denial of them. *Id.* Therefore, the only question present is that revolving around the effective date for Appellant's service-connected PTSD.

It should also be noted for the Court that the Appellant in this matter is the Veteran's widow, as the Veteran Leon McKnight, had passed away. Mrs. McKnight was substituted for her husband at the Regional Office (RO) level.

C. Statement of Relevant Facts

Veteran served in the US Army from November 1965 to November 1968 with service in Vietnam. [R. at 261, 2052]. In January 1985 Veteran filed an

original claim for "nerves." [R. at 1860 (1859-1862)]. VA provided an examination in March 1985, wherein the examiner did not diagnose Veteran as having PTSD. [R. at 1864-1866]. VA denied Veteran's claim in an August 1985 rating decision. [R. at 1835-1837]. Veteran filed a Notice of Disagreement (NOD) to the denial of his claim. [R. at 1834]. In response to the NOD, VA issued a Statement of the Case (SOC) in December 1985. [R. at 1826-1829]. In response, Veteran filed a VA Form 9 appeal. [R. at 1791-1795]. Upon review of the appeal, the Board denied his claim for a psychiatric disorder in an October 1987 decision and that decision became final. [R. at 1705-1709].

Veteran filed a claim specifically for PTSD in January 2009. [R. at 1336-1361]. VA provided an examination in February 2009. [R. at 1316-1319]. VA awarded service connection to Veteran for PTSD in March 2009 rating decision. [R. at 1303-1308]. Veteran was provided a VA PTSD examination in March 2010. [R. at 1213-1218]. VA issued a rating decision in April 2010 that continued Veteran's 50 percent evaluation. [R. at 1177-1185]. Veteran disagreed with that evaluation. [R. at 1164-1165]. Veteran received another VA examination in April 2011. [R. at 851-857]. In November 2011, Appellant's current attorneys of Bluestein, Nichols entered into an agreement of representation, which VA recognized. [R. at 747, 748-758, 765-776].

In May 2012, VA received a private psychiatric evaluation of Veteran by Dr. Mullen. [R. at 858-872]. In May 2012, Appellant's current attorney from Bluestein, Nichols began actively representing Veteran. [R. at 713-717]. In July

2012 Appellant's representative filed supplemental response to the Board regarding a higher rating for PTSD. [R. at 699-704]. Also in July 2012 the Board afforded Veteran a hearing. [R. at 661-680]. In March 2013, the Board issued a decision regarding the evaluation for Veteran's service connected PTSD, and remanded the matter. [R. at 645-657]. In May 2013 Appellant's attorney submitted arguments to VA regarding his claims. [R. at 617-619]. Also in May 2013, a VA Form 21-0980 PTSD Disability Questionnaire was completed. [R. at 569-574]. In July 2013, VA provided another psychiatric PTSD examination. [R. at 527-535].

In a July 2013 rating decision, VA awarded Veteran a 70 percent rating, with TDIU, and an effective date of January 2009. [R. at 495-501]. In November 2013, VA issued a Supplemental Statement of the Case (SSOC). [R. at 507-513]. In December 2013, Appellant's attorney responded to the SSOC of November 2013. [R. at 420-422]. Appellant's current counsel sent VA a VA Form 9 in April 2014. [R. 265-268]. Veteran appealed the assigned effective dates. [R. at 282-284]. Unfortunately, Veteran died on May 1, 2014. [R. at 259]. In light of the Veteran's passing, VA substituted Veteran's wife, as the claimant. [R. at 179].

The RO issued an SOC in August 2015. [R. at 136-159]. Appellant filed a VA Form 9 appeal for Board review. [R. at 97-100]. Appellant submitted a Board brief in August 2016. [R. at 35-38]. The Board issued the November 2016 decision on appeal denying earlier effective dates. [R. at 1-29]. In its decision, the

Board provided the following detailed analysis of Appellant's argument regarding section 3.114 -

> Regarding the alternative argument that the effective date should be January 21, 2008, the representative asserts that because there was a favorable change in the law and the Veteran had suffered from PTSD continuously since this change occurred in April 1980, the Veteran was entitled to an effective date of one year prior to the date of receipt of the claim on January 21, 2009. He bases this contention on 38 C.F.R. § 3.114(a)(3) and VAOPGCPREC 26-97 (July 16, 1997). However, he misconstrues and/or misapplies the regulation and VA General Counsel Opinion. Regarding the latter, he interprets it as holding that when a claimant is granted service connection for PTSD based on the favorable change in law, and he has had PTSD since April 11, 1980 (when VA changed how a diagnosis of PTSD was determined, and required the use of DSM-III [Diagnostic Statistical Manual for Mental Disorders, 3rd edition] which contained a separate diagnosis for PTSD allowing for a latency period of months/years following trauma), then the proper effective date is one year earlier than the date of claim. Prior to the change in law, DSM-II was used to diagnose mental disorders and PTSD was not among those listed in the publication. The representative asserts that if a claimant, who was denied a claim of service connection for PTSD because it did not manifest in service or within the presumptive period, was later granted service connection based on the new diagnostic criteria, then the effective date would be governed by 38 C.F.R. § 3.114(a)(3). This regulation states that if a claim is reviewed at the request of the claimant more than one year after the effective date of the law or VA issue, benefits may be authorized for a period of one year prior to the date of receipt of such request. He cites to the May 2012 medical report, in which Dr. Mullen opined that the Veteran began suffering PTSD in service and has suffered continuously since then; in other words, the Veteran had PTSD on or before April 11, 1980 until the date his PTSD claim was granted based on the new law. He further pointed out that the General Counsel Opinion noted that despite its publication in 1980, DSM-III was not used for adjudication purposes until January 1988 (when regulatory amendments were promulgated, discontinuing the requirement of diagnosing mental disorders in accordance with DSM-II); as DSM-III was not used in the 1987 Board decision, he argued that PTSD was not a recognized diagnosis in 1987.

> The Board notes that the question addressed by the General Counsel Opinion was whether the addition of a diagnosis of PTSD to the rating schedule, effective April 11, 1980, a "liberalizing law, or a liberalizing issue" for purposes of 38 C.F.R. § 3.114(a). The answer was yes; however, the effective date prior to the date of claim could not be assigned under the cited regulation unless the claimant met all eligibility criteria for the liberalized benefits on April 11, 1980, the effective date of the regulatory amendment adding the diagnostic code for PTSD, and such eligibility existed continuously from that date to the date of claim or administrative determination of entitlement. Here, the Veteran underwent a VA psychiatric examination in 1985, after PTSD was added to the rating schedule and VA officially recognized the diagnosis of PTSD in 1980, but he was not given a diagnosis of PTSD at that time (his initial diagnosis of PTSD came in 2008). He did not meet the eligibility criteria for such benefit then or earlier by April 1980 (previous hospitalizations in the 1970s reflected diagnoses of a psychotic disorder including paranoid schizophrenia, not PTSD). While it is true that when the Board adjudicated his psychiatric claim in 1987 VA had not officially adopted DSM-III, representing an important change in VA's approach to service connection for traumatic neurosis, the General Counsel Opinion specifically stated that the notice in 1980 adding a diagnostic code for PTSD to the rating schedule made clear that such action was taken to conform with DSM-III. Thus, this change was "considered as establishing an exception to the then-existing general requirement that diagnoses of mental disorders for rating purposes conform to DSM-II." In other words, at the time of the 1987 Board decision, PTSD was an officially recognized diagnosis. Yet, as earlier noted, the evidence of record shows that the Veteran did not have a diagnosis of PTSD at that time.

[R. at 24-26 (1-29)].

III. SUMMARY OF ARGUMENT

The Secretary argues that Appellant has not presented any convincing argument for reversal, let alone an overturning of 38 C.F.R. § 3.114. Therefore, the Secretary believes affirmance is appropriate. However, barring that, the Secretary argues that only remand would be available at best for the Appellant.

IV. ARGUMENT

Here, Appellant takes issue with the Board's decision as to its analysis of her request for an earlier effective date for benefits based on service- connected PTSD pursuant to 38 C.F.R. § 3.114 (regarding the effect of liberalizing laws on benefits). (AB 1-7); [R. at 1-29].

The effective date for an award of service connection, including secondary service connection, is the date that the claim was received or the date entitlement arose, whichever is later. 38 C.F.R. § 3.400(b)(2)(i) (2017); *see* 38 U.S.C. § 5110(a). The Board's determination of the proper effective date for an award of VA benefits is a finding of fact that the Court reviews under the "clearly erroneous" standard of review set forth in 38 U.S.C. § 7261(a)(4). *See Evans v. West,* 12 Vet.App. 396, 401 (1999); *Hanson v. Brown,* 9 Vet.App. 29, 32 (1996). A factual finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. *United States v. U.S. Gypsum Co.,* 333 U.S. 364, 395, 68 S. Ct. 525, 92 L. Ed. 746 (1948)).

However, the relevant portion of 38 C.F.R. § 3.114 (Titled, "Change of law or Department of Veterans Affairs issue.") states

> (a) Effective date of award. Where pension, compensation, dependency and indemnity compensation, or a monetary allowance under 38 U.S.C. chapter 18 for an individual who is a child of a Vietnam veteran or child of a veteran with covered service in Korea is awarded or increased pursuant to a liberalizing law, or a liberalizing VA issue approved by the Secretary or by the Secretary's direction, the effective date of such award or increase shall be fixed

> in accordance with the facts found, but shall not be earlier than the effective date of the act or administrative issue. Where pension, compensation, dependency and indemnity compensation, or a monetary allowance under 38 U.S.C. chapter 18 for an individual who is a child of a Vietnam veteran or child of a veteran with covered service in Korea is awarded or increased pursuant to a liberalizing law or VA issue which became effective on or after the date of its enactment or issuance, in order for a claimant to be eligible for a retroactive payment under the provisions of this paragraph the evidence must show that the claimant met all eligibility criteria for the liberalized benefit on the effective date of the liberalizing law or VA issue and that such eligibility existed continuously from that date to the date of claim or administrative determination of entitlement. The provisions of this paragraph are applicable to original and reopened claims as well as claims for increase.
>
> > **(1)** If a claim is reviewed on the initiative of VA within 1 year from the effective date of the law or VA issue, or at the request of a claimant received within 1 year from that date, benefits may be authorized from the effective date of the law or VA issue.
> >
> > **(2)** If a claim is reviewed on the initiative of VA more than 1 year after the effective date of the law or VA issue, benefits may be authorized for a period of 1 year prior to the date of administrative determination of entitlement.
> >
> > **(3)** If a claim is reviewed at the request of the claimant more than 1 year after the effective date of the law or VA issue, benefits may be authorized for a period of 1 year prior to the date of receipt of such request.

38 C.F.R. § 3.114(a). The statutory authority for this section is denoted as "38 U.S.C. 1805, 1815, 1821, 1832, 5110(g).

A. Initial observations regarding the limited nature of Appellant's argument

Initially, the Secretary would note that, beyond her allegation regarding section 3.114, Appellant foregoes any other argument regarding an earlier effective date for service-connected PTSD. *Degmetich*, 8 Vet.App. at 209; *Williams*, 15 Vet.App. 199; *Woehlart*, 21 Vet.App. at 463.

For instance, Appellant presents no argument that the relevant date of claim for the current claim of entitlement to service connection for PTSD, as found by the Board, is other than January 21, 2009. [R. at 4 (1-29), 1336-1361]. Also, Appellant presents no argument such as an outstanding and unadjudicated claim. As noted in the fact section, Veteran was initially denied entitlement to a nervous condition, based upon a VA examination in 1985. [R. at 4 (1-29); 1835-1837, 1864-1866]. Subsequent to Veteran's disagreement to that decision, the Board adjudicated the claim in an October 1987 decision and denied entitlement to service connection for a psychiatric disability. [R. at 1705-1709]. That decision became final, and Appellant does not offer any argument to the contrary, or make the finality of that Board decision an issue before the Court here. [R. at 22 (1-29)]; *Degmetich*, 8 Vet.App. at 209; *Williams*, 15 Vet.App. 199; *Woehlart*, 21 Vet.App. at 463; *see also*, 38 U.S.C. §§ 7104, 7266(a); 38 C.F.R. § 20.1100. Therefore, for purposes of the Board's August 2016 decision now on appeal, the prior Board decision of 1987 is final.

Thus, Appellant's argument here, and any outcome, is restricted to, and completely dependent on, the question of the application of section 3.114. *See Maggitt v. West*, 202 F.3d 1370, 1377 (Fed. Cir.2000); *Locklear v. Nicholson*, 20 Vet.App. 410, 416-417 (2006) (terse or undeveloped argument does not warrant detailed analysis by Court and is considered waived).

In addition, even within the ambit of Appellant's section 3.114 argument, the Secretary posits that Appellant has clearly abandoned one of her two section

3.114 arguments that were presented to the Board, namely that the effective date should be retroactive to January 1985. [R. at 20, 23-24 (1-29); 37 (35-38)]. In her brief Appellant offers no argument or exposition regarding an earlier effective date back to 1985. (AB 3-7); *Degmetich*, 8 Vet.App. at 209; *Williams*, 15 Vet.App. 199; *Woehlart*, 21 Vet.App. at 463; *Locklear*, 20 Vet.App. at 416-417. Thus, this case is ultimately about whether Appellant can be granted an effective date up to a year prior to January 21, 2009. The Secretary argues that Appellant cannot be granted such an effective date.

B. The Board properly found section 3.114 was not for application to Appellant's claim, mooting any regulatory challenge

In response to Appellant's brief, the Secretary argues that the Board conducted an appropriate analysis pursuant to *Brown v. Nicholson*, 21 Vet.App. 290 (2007) regarding the applicability to this claim, and correctly found that section 3.114 was not applicable to the instant case. Because of this, the Secretary argues that any challenges by Appellant to the Secretary's regulation are mooted, and the appeal can be decided on the basis of the question of the applicability of the regulation, and the Board's decision affirmed. To the extent that the Court would, *arguendo*, find that the Board's statement of reasons or bases is inadequate regarding the questions surrounding section 3.114, and the question of an earlier effective date, the Secretary avers that such inadequacies are remandable error and do not warrant a regulatory challenge or reversal. *Kay v. Principi*, 16 Vet.App. 529, 533-534 (2002).

As reiterated from the Board's decision, in the fact section of the Secretary's brief, the Board found that section 3.114 was not for application to Appellant's claim, because she misconstrued both the regulation and VA General Counsel's Opinion, VAOPGCPREC 26-97 (July 16, 1997). [R. at 24 (1-29)]. Specifically, the Board found that Appellant misunderstood that the General Counsel had determined that the effective date for the application and use of PTSD was 1980. However, what is problematic for Appellant here, as the Board explained, is that Veteran did not have a diagnosis of PTSD at the time of the liberalizing effect of adding PTSD to the rating code in 1980, continuously until his application in January 21, 2009. Appellant attempts to bootstrap the May 2012 private psychiatric evaluation by Dr. Mullen retroactively to 1980, because he opined Veteran had had PTSD since service. [R. at 858-872]. However, what Appellant does not dispute that Veteran did not have a PTSD diagnosis at any time prior to the 1987 Board decision, or for that matter, at any time prior to the 2012 opinion by Dr. Mullen. (AB 1-7).

Indeed, it is imperative to the discussion of the claim to understand that Veteran was provided a VA examination in March 1985, wherein the examiner did not diagnose Veteran as having PTSD. [R. at 1864-1866]. Based on that, VA denied Veteran's claim in an August 1985 rating decision. [R. at 1835-1837]. PTSD was already recognized as a diagnosis in 1980, some 5 years before Veteran's March 1985 VA examination. Yet, the VA examiner did not even mention PTSD as a diagnosis.

In this factual context, it is important for the Court's analysis to note that it has previously held that, in regard to section 3.114,

> The plain language of the statute and its implementing regulation require two specific findings: A finding that a liberalizing law or administrative issue was implemented, as well as a determination that the ultimate grant of benefits was "pursuant to" such a favorable change in the law.

Brown v. Nicholson, 21 Vet.App. 290, 295 (2007). In the case of *Brown*, the liberalizing regulation affecting the question affecting the effective date at issue was the 1994 amendment to section 3.309(c), regarding diseases specific to former prisoners of war, that recognized for the first time a causal connection between localize edema during captivity and subsequent development of ischemic heart disease. *Id.* Given the Appellant in *Brown's* prior rejection of her claim to reopen, despite promulgation of the liberalizing amendment to 3.309(c), the Court framed the question as whether Appellant's later grant of benefits was "pursuant to" the 1994 amendment of 3.309(c), or ***simply because of the submission of new and material evidence***. *Id.* Specifically, the Court had to consider whether an intervening Board decision rendered section 3.114(a)(3) and a retroactive assignment of an effective date, inapplicable. *Id.* In that case, the Board held that section 3.114 was not applicable to Appellant's claim and it was "not error for the Board to omit discussion of an earlier effective date in accordance with that regulation." *Id.*

The Court further stated that the plain language of 38 U.S.C. § 5110(g) and section 3.114(a)(3) "contemplate a cause-and-effect relationship between

the passage or promulgation of a liberalizing law, and a subsequent review of a prior final decision on a claim for benefits. *Brown*, at 296. Based on the facts of the case the Court found against Appellant's claim because there were no benefits awarded in a 1997 decision denying Appellant's claim, subsequent to the liberalizing change to section 3.309, and that the ultimate grant of benefits in the 2001 grant of benefits was based on new and material evidence. *Brown, at* 292, 296. The Court in *Brown* also cited to *Link v. West*, 12 Vet.App. 39, 46 (1998), a similar factual pattern, for the proposition that there is not an indefinite duration to the applicability of section 5110(g) and section 3.114(a). *Brown*, 21 Vet.App. at 295-296.

The case at bar presents a similar factual pattern to *Brown* and *Link* given the intervening final Board decision. As indicated above, the liberalization of the VA psychiatric ratings to include PTSD occurred in 1980, Veteran had an examination in 1985 for his claimed "nervous condition," and was then denied service connection in a 1987 Board decision that became final. [R. at 1705-1709]. Subsequent to that, Veteran specifically filed a claim for PTSD in January 2009, and VA awarded service connection in a March 2009 rating decision. [R. at 1303-1308, 1336-1361]. In point of fact, the March 2009 rating decision granted entitlement to service connection based on new evidence subsequent to the January 2009 claim for PTSD, in the form of the February 2009 VA examination. [R. at 1316-1319]. It should also be noted that, insofar as Appellant's reliance on the 2012 private examination by Dr. Mullen, that

examination had nothing to do with Veteran's grant of entitlement to service connection for PTSD, as it was submitted some 3 years after Veteran was service connected. [R. at 858-872]. Insofar as Appellant would argue that the Board decision in October 1987 did not specifically discuss PTSD, the Court in *Brown* was also faced with a situation where the Board had not expressly discussed the relevant regulations, but found that, based on long standing Court case law, the Board, is presumed to have performed its duties, which includes the review and consideration of relevant law. *Brown*, 21 Vet.App. at 296, FN 3, citing to *Marsh v. Nicholson*, 19 Vet.App. 381 (2005); *see also*, *Robinson v. Mansfield*, 21 Vet.App. 545, 553 (2008) (holding that "the Board's failure to mention something in its decision does not trigger a presumption that it was not considered"); *Newhouse v. Nicholson*, 497 F.3d 1298, 1302 (Fed. Cir. 2007). Therefore, Appellant's attempt to acquire an earlier effect date must be denied, as the Board here correctly found that section 3.114 was not for application. Based on this, the Court should decline to entertain any challenge to the Secretary's regulation and affirm the Board's decision.

C. VAOPGPREC 26-97 is not incorrect

To the extent Appellant argues that the VA General Counsel's Opinion VAOPGCPREC 26-97 "got it wrong" regarding the effective date of PTSD as a disability, his argument is without merit. (AB at 5-6). In effect, Appellant's argument that the VA General Counsel's Opinion VAOPGCPREC 26-97 was incorrect is essentially based on Appellant's simple conclusory say-so, and

should be rejected out of hand. *Woehlart*, 21 Vet.App. at 463; *Locklear*, 20 Vet.App. at 416-417

As to the heart of Appellant's argument, Appellant's interpretation of 45 Federal Register (FR) 26326 (1997), is inaccurate. The Court has recognized that 1980 was the date that VA "changed its regulations to incorporate PTSD for the first time." *Fletcher v. Derwinski*, 1 Vet.App. 394, 395 (1991). In addition, and relevant to this case, Appellant concedes that PSTD was henceforth being used in VA clinics, yet again, Appellant's 1985 examination contained no diagnosis of PTSD. [R. at 1864-1866].

Further, Appellant's reliance on the adoption of the Diagnostic and Statistical Manual (DSM) II is also misplaced. (AB at 6). As to the importance of the DSM, or more accurately, lack of importance, the Court in *Cohen v. Brown*, 10 Vet.App. 128 (1997), stated the following –

> As discussed above, to the extent that the Manual M21-1 provisions are more favorable to the claimant than the C.F.R. regulatory provisions, they are for application; to the extent that the Manual M21-1 contains added requirements that are more restrictive than the applicable PTSD C.F.R. regulation, they cannot be applied in a manner adverse to the veteran. *See Hayes, Austin*, *Karnas*, and *Fugere*, all *supra*. However, as to the DSM diagnostic criteria, the Court concludes that they -- whether DSM-III, DSM-III-R, or DSM-IV -- do not run afoul of the *Hayes/Austin/Karnas/Fugere* proscriptions because they were adopted generally as to mental disability by cross reference in the C.F.R. However, because regulation 3.304(f) is specific as to PTSD and the DSM incorporation provision in the C.F.R. is generalized as to mental disorders, we conclude that the DSM criteria cannot be read in a manner that would add requirements over and above the three primary elements set forth in § 3.304(f) as to PTSD service-connection claims. **Accordingly, the DSM criteria acquire an auxiliary role, as described below**.

Cohen, at 139-140. The Court went on to described how the DSM were more stringent and were applicable "only as the basis for a return of the examination report, and noted that "the Board cannot use the DSM provisions themselves as a basis for rejecting the veteran's favorable medical evidence…." *Id.*

D. The plain language of 38 C.F.R. § 3.114(a)

Essentially, Appellant argues that section 3.114 requires that the adjudicator, in determining whether a claimant met the requirements from the date of the liberalizing law forward, to determine whether such claimant may be granted an effective date up to a year earlier from their relevant date of claim, consider and apply all evidence, including medical evidence that offers a retrospective opinion. Appellant's argument is unconvincing.

First, Appellant's reliance on *Evans v. Mansfield*, 257 Fed.Appx. 297, FN 1 (Fed. Cir. 2007) is completely misplaced as that is not a precedential opinion with any force of law. While it is true that Federal Rule of Appellate Procedure (FRAP) 1 provides that the FRAP generally "govern procedure in the United States courts of appeals," Fed. R. App. P. 1, the Federal Rules of Appellate Procedure govern appeals from Article III district courts and are inapplicable to this Court, an Article I court. *Evans v. Principi,* 17 Vet.App. 41, 48 (2003) (holding that FRAP is not applicable to filings in this Court and looking to this Court's Rules to determine how to compute the time period for filing a document). Unlike FRAP, which are prescribed by the Supreme Court pursuant to 28 U.S.C. § 2072

and are presented to Congress pursuant to 28 U.S.C. § 2074 before going into effect, this Court prescribes its own rules, which go into effect after public notice and comment, 38 U.S.C. § 7264(a). *Durr v. Nicholson,* 400 F.3d 1375, 1382 (Fed. Cir. 2005) (discussing difference between this Court's Rules and FRAP).

Indeed, this Court's Rule 30 generally proscribes the use of non-precedential decisions. *Macklem v. Shinseki*, 24 Vet.App. 63, 70 (2010). As the Court explains in Rule 30 (Citation of Certain Authority), "A party, intervenor, or amicus curiae may not cite as precedent any action designated as nonprecedential by the Court or any other court…except when the cited action has binding or preclusive effect in the case on appeal.**"** CAVC R. 30(a)(emphasis added). The *Evans* case cited by Appellant has no direct connection to the case at bar, and therefore, cannot form the basis of any exception to CAVC R. 30(a), including application of law-of-the-case doctrine. Certainly, Appellant presents no arguments regarding any exception to CAVC R. 30(a) for precedential effect, and therefore, has abandoned any opportunity to do so. *Degmetich*, 8 Vet.App. at 209; *Williams*, 15 Vet.App. 199; *Woehlart*, 21 Vet.App. at 463; *see also*, *Locklear*, 20 Vet.App. at 416-417.

To the extent that Appellant would argue in her reply brief that she was relying on that part of CAVC R. 30(a) that indicates that "Actions designated as nonprecedential by this Court or any other court may be cited only for the persuasive value of their logic and reasoning…," Appellant makes no statement or argument to that affect, nor provide any type of exposition regarding the logic

and reasoning applicable in *Evans* to this matter. (AB 3-7); *Degmetich*, 8 Vet.App. at 209; *Williams*, 15 Vet.App. 199; *Woehlart*, 21 Vet.App. at 463; *see also*, *Locklear*, 20 Vet.App. at 416-417. Indeed, it is clear on its face that Appellant is attempting to use it as a precedential hall tree to hang his proverbial hat upon. However, without *Evans* to support his argument, it must invariably give way to gravity and fall to earth.

Addressing Appellant's further contentions, the Secretary avers that Appellant's argument fairs no better and must fail. Here, Appellant challenges the Board's interpretation of 38 C.F.R. § 3.114(a). Interpretation of a regulation is a question of law that this Court decides *de novo*. *Tropf v. Nicholson*, 20 Vet.App. 317, 320 (2006). The Courts have regularly held that regulatory interpretation begins with the plain meaning of the words used. Thus, if the regulation's language makes its meaning clear, "that is the end of the matter." *Good Samaratin Hosp. v. Shalala*, 508 U.S. 402, 409 (1993)). A regulation is ambiguous only when the application of the ordinary meaning of the words and the rules of construction to the plain language of the regulation fails to answer the question at issue. *Tropf*, 20 Vet.App. at 321 n. 1.

The role of the judiciary is to determine if regulatory language is consistent with the language of the statute and is a plausible or reasonable interpretation of the law. *Livesay v. Principi*, 15 Vet.App. 165, 172 (2001) (citing to *Chevron U.S.A., Inc. v Natural Resources Defense Council*, *Inc.,* 467 U.S. 837, 843-844,

104 S.Ct. 2778, 81 L.ed.23 694 (1991). In other words, the Department of Veterans Affairs is granted substantial deference in its interpretation. *Id.*

Further, the scope of the Court's review under the "arbitrary and capricious" standard is narrow, and "a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983). A regulation is not arbitrary or capricious if there is a "rational connection between the facts found and the choice made." *Id.* (citation and quotation marks omitted); *Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs,* 669 F.3d 1340, 1348 (Fed.Cir.2012). The Secretary notes that his interpretation should be accepted unless that interpretation was contrary to the regulation's plain meaning. *See Thun v. Shinseki,* 572 F.3d 1366, 1369 (Fed.Cir.2009). It is well established that an agency's interpretation need not be the only possible reading of a regulation—or even the best one—to prevail. When an agency interprets its own regulation, the Court, as a general rule, defers to it 'unless that interpretation is "plainly erroneous or inconsistent with the regulation. Beyond Appellant's citation to irrelevant case law, Appellant fails his pleading burden to show how the Board's application and interpretation of section 3.114 runs afoul of the authority statutory authority of 38 U.S.C. § 5110(g). (AB at 1-7); *Woehlart*, 21 Vet.App. at 463; *Locklear*, 20 Vet.App. at 416-417. Section 3.114 is a rational reflection, indeed, a nigh on mirror image of the statute. For his part, Appellant does not challenge the statute. *Woehlart*, 21 Vet.App. at 463; *Locklear*, 20 Vet.App. at 416-417. Ultimately, Appellant fails to

show that 3.114 is arbitrary and capricious - the rigorous, and deferential standards for challenging a regulation.

Moreover, the Secretary detects something of a red herring in Appellant's statutory argument insofar it is not clear that the Board actually made any express statement requiring "contemporaneous" evidence versus retroactive evidence in the context of section 3.114. (AB at 3-4); [R. at 25 (1-29)]. The citations to the Board's decision simply show that the Board, in passing, noted the 2012 private report by Dr. Mullen, and also simply stated an undisputed fact that at the literal time prior to Veteran's 1987 Board decision, Veteran did not have a diagnosis or indication of PTSD – a fact Appellant does not dispute.

Indeed, the only place the Board used the word "contemporaneous," was R. at 7, in its duty to assist discussion, wherein the Board simply stated that, given the general nature of effective date claims, a contemporaneous examination had not been provided. In addition to not meeting her burden to show that there was any controversy ripe for appellate review of 38 C.F.R. § 3.114 in the Board's statement of reasons or bases, the Secretary returns to his first argument to note that, indeed, the Board did not even address the question that Appellant wants to challenge, and therefore, not only is the question not even ripe for review, the Court is potentially lacking jurisdiction.

E. Remand, not reversal would be the appropriate remedy if the Court finds the Board's statement of reasons or bases lacking

The Court should affirm the Board's decision, but if the Court finds the Board's statement of reasons or bases remiss, remand, not reversal is warranted, and it would unnecessary for the Court to venture into a consideration of 3.114 as a regulatory challenge. Reversal is the appropriate remedy only "when 'there is absolutely no plausible basis' for the BVA's decision and where that decision 'is clearly erroneous in light of the *uncontroverted* evidence in [the] appellant's favor.'" *Bowling v. Principi,* 15 Vet.App. 1, 15 (2001); *see also Gutierrez v. Nicholson,* 19 Vet. App. 1, 10 (2005) (reversal is the appropriate remedy when the only permissible view of the evidence is contrary to the Board's decision, *citing Johnson v. Brown,* 9 Vet. App. 7, 10 (1996)).

On this point, the Secretary notes that the central factual pillar upon which Appellant relies for his argument is the presence of the May 2012 private psychiatric opinion by Dr. Mullen. (AB at 3-4); [R. at 858-872]. Appellant attempts to use this examination as a fulcrum to leverage 3.114 against the Board and VA. *Id.* The basis that he relies on is the fact that Dr. Mullen provided a vague and sweeping pronouncement that Appellant had been "under treatment since 1976 and his symptoms throughout this time have all been consistent with the diagnoses listed above" and that his PTSD has been "chronic and severe since Vietnam." [R. at 862, 864 (858-872)]. Without that particular piece of evidence, Appellant's whole argument falters.

However, Appellant herself argued, "[f]rom these two statements it is clear that the Board ignored Dr. Mullen's opinion and limited its analysis to contemporaneous medical evidence." (AB at 4); [R. at 25 (1-29)]. In other words, Appellant is arguing that the Board failed to consider and analyze a key piece of relevant medical evidence in its decision. The failure to consider relevant evidence is a hallmark of an inadequate statement of reasons or bases that frustrates judicial review, where the prescribed remedy is a remand. *See Gabrielson v. Brown*, 7 Vet. App. 36, 39-40 (1994); *Simington v. West*, 11 Vet.App. 41, 45 (1998)(deficiencies in the BVA's analysis that preclude effective judicial review warrant remand); 38 U.S.C. § 7104(a).

Indeed, the Board does not discuss the competence, credibility of Dr. Mullen's report or weigh it against any other evidence. Given this, the Board would have to consider this factual predicate before applying other laws and regulations to the claim. *Jandreau v. Nicholson*, 492 F.3d 1372, 1376 (Fed. Cir. 2007) ("The Board retains discretion to make credibility determinations and otherwise weigh the evidence submitted[.]"); *Washington v. Nicholson,* 19 Vet.App. 362, 367-368 (2005); *Madden v. Gober*, 125. F.3d 1477, 1481 (Fed.Cir.1997); *Owens v. Brown*, 7 Vet.App. 429, 433 (1995). This being the case, at best, Appellant can only be afforded a remand based on that narrow issue. *Kay v. Principi*, 16 Vet.App. 529, 533-534 (2002). However, as previously argued, the Secretary does not concede remand is warranted because the

regulation is not for application, and instead, believes that affirmance is the appropriate decision.

Because Appellant has limited her allegations of error to those noted above, Appellant has abandoned any other arguments, and therefore, it would be unnecessary for this Court to consider any other error not specifically raised by Appellant. *Disabled American Veterans*, 234 F.3d at 688 n.3; *Degmetich*, 8 Vet.App. 209; *Williams*, 15 Vet.App. 199. The Secretary does not concede any material issue that the Court may deem Appellant adequately raised, argued and properly preserved, but which the Secretary may not have addressed through inadvertence, and reserves the right to address same if the Court deems it necessary or advisable for its decision. *But cf. McWhorter v. Derwinski*, 2 Vet. App. 133, 136 (1992). The Secretary also requests that the Court take due account of the rule of prejudicial error wherever applicable in this case. 38 U.S.C. § 7261(b)(2); *see also Edenfield v. Brown,* 8 Vet.App. 384 390-391 (1995)

V. CONCLUSION

Wherefore, the Secretary respectfully requests that the Court affirm the Board's November 14, 2016, decision.

Respectfully submitted,

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