REPLY BRIEF OF APPELLANT

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

16-4053

JOSEPH SPELLERS,

Appellant,

v.

DAVID J. SHULKIN, M.D.,
SECRETARY OF VETERANS AFFAIRS,

Appellee.

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I. The Board erred in providing inadequate reasons or bases for its credibility determination.

The Board determined that the side effects the Veteran experienced from his pain medication did not warrant referral for extraschedular consideration because his reports of these side effects, including drowsiness and poor concentration, were not credible. R-12-13; Apa. Open. Br. at 12; *see* R-65. The Secretary lists multiple instances in which side effects were not noted in the record. *See* Sec. Br. at 9-10. However, in these instances, the Veteran did not explicitly *deny* having side effects, rather he did not discuss them. The April 2007 VA examination, September 2008 VA examination, September 2009 examination, April 2013 VA examination, and August 2014 examination all simply recorded the treatment the Veteran receives, including pain pills and physical therapy. R-727; R-1032-33; R-1716-17; R-2736; R-2807.

The Veteran did not deny side effects in these examinations. R-727; R-1032-33; R-1716-17; R-2736; R-2807. And none of these examinations indicate that the examiners asked the Veteran about any side effects. Moreover, the Board provided no foundation for assuming that the VA examiners would have asked about side effects. The Board must "first establish a proper foundation for drawing inferences against a claimant from an absence of documentation." *Fountain v. McDonald*, 27 Vet.App. 258, 272 (2015); *see Horn v. Shinseki*, 25 Vet.App. 231, 239 (2012) (absence of evidence cannot be taken as substantive negative evidence without "a proper

foundation . . . to demonstrate that such silence has a tendency to prove or disprove a relevant fact").

Further during the October 2015 examination, the Veteran discussed his poor eating habits and low weight and stated it was due to chronic use of opioids. R-283. He did not report *or* deny any additional side effects due to medication use because the discussion at that moment was regarding the Veteran's lifestyle and low weight. *Id.* The fact that the examiner did not list other side effects, does not necessarily mean the Veteran did not *experience* other side effects. Likewise, the other examinations on which the Secretary relies did not focus on the Veteran's use of pain medication.

For example, the April 2013 and 2014 examination focused on range of motion, symptoms for his nerve condition, nerves affected, reflex examination, use of assistive devices, and functional impact. R-727-33; R-1716-26. The September 2009 examination's focus was "to state if there are neurological findings related to the lumbar condition." R-1032-34. The September 2008 examination focused on a physical examination and a review of lumbosacral spine history for a diagnosis. R-2736-39. The April 2007 examination focused on a physical examination for a diagnosis. R-2807-08. Thus, neither the Board nor the Secretary explained why they expected the Veteran to explicitly discuss the side effects of his medication during unrelated physical examinations. *See* R-12-13; Sec. Br. 9-10.

Next, the Secretary, like the Board, relies on the fact that the Veteran agreed to report any significant side effects due to opioids. Sec. Br. at 9-10. However, as discussed in the Veteran's opening brief, the patient agreement was related to his opioid treatment and did not necessarily constitute a legal or contractual obligation to report symptoms. R-1045-46; Apa. Open. Br. at 12-13. Further, the agreement provided that Mr. Spellers report "any *significant* side effects." *Id.* (emphasis added). The agreement does not define which side effects would be considered significant, but listed such potential side effects. *See id.* The list does not include drowsiness or poor concentration, which the Veteran later reported in an affidavit. *See id.*; R-65. Therefore, these other symptoms were not necessarily "significant" according to the agreement and the Board erred when it assumed that Mr. Spellers would have reported them. *See* R-1046.

In fact, as the Secretary notes, the Veteran reported nausea as a side effect in January 2012. Sec. Br. at 10; R-950. But the Secretary is wrong that this indicates the Veteran did not suffer from any other side effects. The June 2009 VA pain opiate agreement explicitly lists nausea as a significant side effect that should be reported. R-1046. Therefore, it is understandable that the Veteran would report nausea, which is the first significant side effect listed, but may not report drowsiness and poor concentration, which are not listed at all. *See id.*

The Board and Secretary said the reports of drowsiness were not credible because the Veteran did not report them until May 2016, while endorsing nausea. R-

12-13. But the Veteran indeed noted drowsiness as a side effect of oxydone when directly asked on a disability report in April 2008. R-610. Then in May 2016, the Veteran again reported his pain medications make him drowsy and impair his ability to focus and concentrate. R-65. Because the Veteran endorsed drowsiness in an April 2008 disability report, there is no time delay in reporting drowsiness like the Board stated. *Compare* R-610 *to* R-12-13.

The Board "cannot determine that lay evidence lacks credibility merely because it is unaccompanied by contemporaneous medical evidence." *Buchanan v. Nicholson*, 451 F.3d 1331, 1336-37 (Fed. Cir. 2006); *see also Horn*, 25 Vet.App. at 239 (observing that the absence of evidence is not necessarily substantive negative evidence). Thus, the fact that the Veteran did not report problems with concentration until 2016 is not sufficient to find him not credible.

Further, the Veteran's report of nausea does not contradict his report of drowsiness and poor concentration. *See* Apa. Open. Br. at 12-14. Because the Board failed to adequately discuss why the 2016 statements are less persuasive, and the Secretary failed to demonstrate the Board's decision had adequate reasons or bases for doing so, the Board's dismissal of such favorable, material evidence is prejudicial to the Veteran. *See* Sec. Br. at 8-11.

II. The Board misinterpreted and misapplied 38 C.F.R. § 3.321 (2017) and failed to give adequate reasons or bases for determining that the first step of *Thun v Peake*, 22 Vet.App. 111 (2008) was not fulfilled because the Board failed to adequately consider the Veteran's use of assistive devices.

The Board acknowledged the Veteran's use of an assistive device is not specifically listed in the rating criteria, but it concluded that this was contemplated by the rating criteria. R-11; *see* Apa. Open. Br. at 7-8. It reasoned that "assistive devices are provided to alleviate the presence of symptoms and/or functional limitations caused by an individual's disability." *Id.* It then stated that "[t]he symptoms that necessitate use of an assistive device are fully contemplated by the rating criteria and associated regulations, and the use of such assistive device directly addresses a veteran's functional limitations." R-12.

The first step of *Thun* requires the Board to compare "the level of severity and symptomatology of the claimant's service-connected disability *with the established criteria found in the rating schedule*[.]" *Thun*, 22 Vet.App. at 115 (emphasis added). It does not ask the Board to extrapolate from general provisions of law or VA policy determinations, or to infer that all symptoms are covered by a general rule, which is what the Board did here. R-11-12. Despite suggesting that the rating criteria in general implicitly contemplate certain manifestations, the Board provided no analysis as to how the rating criteria in 38 C.F.R. § 4.120 (2017) contemplate the Veteran's use of a cane and walker. *Id.*

The Secretary asserts that a "cane or walker is merely a means of alleviating the effects of functional impairment" due to the Veteran's disability. Sec. Br. at 6. The Secretary states that the "use of a cane or crutch are not separately-compensable symptoms any more than putting a cast on a broken arm . . . ." *Id.* Notably, he offers no legal support for the assertion that using a cane or walker "is not a symptom of Appellant's condition itself but a device used to ameliorate the effects of a symptoms such as instability." *Id.*

Furthermore, in *Smith v. Shulkin*, the Court found that the Secretary's argument that a "back brace is akin to a hearing aid" was *post hoc* rationalization which is similar to the Secretary in this case saying a cane or walker is like "putting a cast on a broken arm." 2017 WL 5593786, at *4 (Nov. 21, 2017); U.S. VET.APP. R. 30(a); Sec. Br. at 6; *see Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 156 (1991) ("'[L]itigating positions' are not entitled to deference when they are merely appellate counsel's "post hoc rationalizations" for agency action, advanced for the first time in the reviewing court."); *Evans v. Shinseki*, 25 Vet.App. 7, 16 (2011) ("[I]t is the Board that is required to provide a complete statement of reasons or bases, and the Secretary cannot make up for its failure to do so.").

Nor is the Secretary's unsupported argument consistent with 38 C.F.R. § 3.321(b)(1) and the Court's interpretations in recent memorandum decisions. The first prong of *Thun* requires the Board to compare both the Veteran's symptoms and the *severity* of his condition to the rating criteria. *Thun*, 22 Vet.App. at 115. For

argument's sake, even if the Secretary is correct that the use of a cane or walker is not a "symptom," it is certainly indicative of the Veteran's severity, as is the Veteran's constant pain that interfered with driving and made it difficult for him to get out of bed and shower. R-12; *see* Apa. Open Br. at 9-10; R-746; R-1726.

As Mr. Spellers noted in his opening brief, this Court's non-precedential decisions are persuasive. U.S. VET.APP. R. 30(a). In *Emerson II v. McDonald*, the Court ordered the Board to provide adequate reasons or bases for its extraschedular analysis in light of Mr. Emerson's reliance on a cane. 2014 WL 6885369, at *1 (Vet.App. Nov. 26, 2014). In *Henderson v. Shulkin*, the Court found the Board erred when it failed to address the Veteran's requirement for assistive devices. 2017 WL 3096130, *1 (July 21, 2017). Like the Veteran here, the appellant in *Henderson* suffered from constant pain, required a cane to walk short distances and a walker to walk longer distances with frequent resting. *Compare id. with* R-1726. Most recently, in *Smith* the Court found that the Board "provided no explanation as to whether use of a back brace might demonstrate a disability or symptomatology that renders the schedular rating criteria inadequate. 2017 WL 5593786 at *4.

Having essentially conceded that the Veteran's reliance on his cane and walker are not enumerated in the rating criteria, the Board should have proceeded to the second step of *Thun*: determining whether other related factors such as marked interference with employment or frequent hospitalizations existed. *Thun*, 22 Vet.App. at 115. Instead, the Board conflated the two prongs of *Thun*, concluding, the

schedular ratings are "considered adequate to compensate for considerable loss of working time from exacerbation or illness proportionate to the nature and severity of the several grades of disability." R-14. Again, the Board abdicated its adjudicatory duties by espousing general provisions of law in lieu of assessing the Veteran's actual disability picture.

As Mr. Spellers noted in his opening brief, he was unable to walk for more than five to ten minutes and sit for more than 10 minutes. R-64; Apa. Open. Br. at 15. He also needed a cane for walking short distances and a walker for longer distances, in order to take frequent breaks. R-746; R-1726. The Veteran reported that he could not lift more than 10 pounds. R-64-65. However, his need for a cane or walker to walk would also impair his ability to lift and carry items. R-64-65; R-746; R-1033; R-1726; R-2807. The Veteran reported persistent back pain and difficulty with bending, lifting, and carrying. R-1033; R-2807. He was terminated from two of his recent jobs because he was "moving too slowly" at one and "wasn't physically qualified for the work" at another. R-64.

Mr. Spellers experienced significant interference with employment due to his service-connected bilateral lower extremity sciatica. *See* R-64-65; R-746; R-1033; R-1726; R-2807. Had the Board properly conducted the second step of *Thun*, it may have found the Veteran's effects on employment rose to the level of marked interference. *See* Apa. Open. Br. at 16. Had the Board properly conducted an extraschedular analysis under 38 C.F.R. § 3.321(b)(1), it may have determined that the

Veteran was entitled to extraschedular referral. *See Arneson v. Shinseki,* 24 Vet.App. 379, 388 (2011) (finding prejudice where the Board's errors "may have significantly affected the outcome of [the Veteran's] claim").

Finally, the Secretary states that "*Thun* made it clear that once the Board determines that the threshold inquiry - that an exceptional disability picture is not shown - that is the end of the inquiry and the Board need not address the second element." Sec. Br. at 7-8. But the Board's failure to engage in the second element of the *Thun* analysis was in error because it did not adequately consider the Veteran's symptoms and severity when it determined that they were contemplated by his assigned rating. *See Yancy v. McDonald*, 27 Vet.App. 484, 494 n.5 (2016) (noting that "an error in the Board's findings regarding the nature and severity of a claimant's symptoms could affect the Board's analysis of both the first and second *Thun* elements").

Due to the Secretary's incorrect argument that the Board did not need to address the second element of *Thun*, he also does not address the second element of *Thun* in his brief. Sec. Br. at 7-8. The Secretary fails to respond to the Veteran's arguments regarding step two of the *Thun* analysis. *Id.;* Apa. Open. Br. at 14-16*; see MacWhorter v. Derwinski*, 2 Vet.App. 133, 135-36 (1992) ("Where appellant has presented a legally plausible position in the form of a 'relevant, fair and reasonably comprehensive' brief, . . . and the Secretary has failed to respond appropriately, the

Court deems itself free to assume, and does conclude, the points raised by appellant, and ignored by the General Counsel, to be conceded.").

III. The Board failed to adequately address the collective impact of the Veteran's service-connected disabilities.

In denying Mr. Spellers referral for extraschedular consideration, the Board failed to adequately contemplate the combined effects of his service-connected disabilities. *See* Apa. Open. Br. at 16-20. The Board concluded that the Veteran's "symptomology does not indicate that evaluation of the individual conditions fails to capture all of the symptoms associated with his service-connected disabilities." R-20.

As discussed above, the first step of *Thun* requires the Board to compare "the *level of severity* and symptomatology of the claimant's service-connected disability with the established criteria found in the rating schedule[.]" *Thun*, 22 Vet.App. at 115 (emphasis added). Both the Secretary and the Board failed to consider the level of severity of the Veteran's whole disability picture. Sec. Br. at 12; R-18-21.

The Secretary states that the Veteran's "argument mainly lists individual symptomatology with little analysis as to how this symptomatology combines to create an exceptional disability picture." Sec. Br. at 12. This is incorrect. The Veteran is unable to sit in one position for more than 10 minutes, which requires him to stand up for periods of time. R-64-65. When he stands up, he cannot stand still because of his leg pain. *Id.* Therefore, he has to walk, which he cannot do for more than five to ten minutes due to both his knee and back disabilities. *Id.* Once the Veteran is unable

to walk around, five to ten minutes later, he will have to sit or lay down and the cycle of getting up, walking around, and sitting down would repeat. Furthermore, while walking, the Veteran has to use assistive devices because of instability and weakness in his legs. R-746.

This evidence demonstrates that the Veteran's multiple service-connected disabilities worked against each other to affect his physical ability to stand, sit, walk, and lift. *See* R-64-65; R-746; R-2807. This combined disability picture is similar to that in *Yancy*, where the Court found that extraschedular referral was raised because the veteran's disabilities prevented both sitting and standing. *Compare* 27 Vet.App. at 496, *with* R-64-65, R-746, R-2807. Therefore, there is evidence to suggest that the combined effect of Mr. Spellers' service-connected disabilities created an exceptional disability picture that the Board should have discussed.

The Board's failure to adequately consider whether the Veteran's symptoms from his service-connected disabilities render him more disabled than contemplated by the rating criteria was prejudicial because it did not give adequate reasons or bases for its denial of referral for extraschedular consideration based on this collective impact. *See* R-18-21; Apa. Open. Br. at 20. Had the Board properly considered the above-cited evidence, it might have determined that the Veteran's collective disability picture resulted in "compounding negative effects" which were not contemplated by his assigned ratings. *See Johnson v. McDonald*, 762 F.3d 1362, 1366 (Fed. Cir. 2014). Therefore, remand is necessary. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998).

CONCLUSION

The Board erred in its determination that the Veteran's statements were not credible. The Secretary failed to show that the Board's credibility determination had sufficient reasons or bases. The Board erred when it failed to consider the Veteran's use of assistive devices in determining whether he presented an exceptional picture of disability. The Secretary's argument lacks legal support, is inconsistent with 38 C.F.R. § 3.321(b)(1) as well as the Court's interpretations in recent memorandum decisions. Finally, the Board erred when it did not give adequate reasons or bases as to why the combined effect of the Veteran's bilateral lower extremity sciatica and bilateral knee chondromalacia, as well as his other service-connected disabilities, did not present an unusual or exceptional picture of disability.

For these reasons, along with those presented in his opening brief, the Veteran respectfully asks the Court to vacate the Board's November 2016 decision and remand the case for the Board to provide adequate reasons and bases and properly apply the law.

Respectfully submitted,

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