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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 16-3479

KERRY E. SHEA, APPELLANT,

V.

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

Before MEREDITH, *Judge*.

MEMORANDUM DECISION

Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.

MEREDITH, *Judge*: The appellant, Kerry E. Shea, through counsel appeals a July 27, 2016, Board of Veterans' Appeals (Board) decision that granted entitlement to an effective date of July 7, 2008, for the award of benefits for a psychiatric disability, and to separate initial disability ratings of 10% each, for right and left hip disabilities. Record (R.) at 1-29. The Board's assignment of a July 7, 2008, effective date for the award of benefits for a psychiatric condition and its assignment of separate, initial 10% disability ratings for the appellant's right and left hip disabilities are favorable factual findings that the Court may not disturb. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007); *see also Bond v. Derwinski*, 2 Vet.App. 376, 377 (1992) (per curiam order) ("This Court's jurisdiction is confined to the review of final Board . . . decisions which are adverse to a claimant.").

The Board denied entitlement to a disability rating in excess of 40% for a lumbar spine disability and granted a 10% initial disability rating, but no higher, for fractures of the seventh and eighth ribs. In her brief, the appellant expressly states that she is not appealing these matters and requests that the Court dismiss any appeal of these matters. *See* Appellant's Brief (Br.) at 1 n.1. The Court will dismiss the appeal as to the abandoned issues. *See Pederson v. McDonald*, 27 Vet.App. 276, 285 (2015) (en banc). The Board also remanded the matter of entitlement to a

separate compensable disability rating for a muscle group injury, and that matter is not before the Court at this time. *See Breeden v. Principi*, 17 Vet.App. 475, 478 (2004) (per curiam order) (a Board remand "does not represent a final decision over which this Court has jurisdiction"); *Hampton v. Gober*, 10 Vet.App. 481, 483 (1997) (claims remanded by the Board may not be reviewed by the Court).

This appeal is timely, and the Court has jurisdiction to review the Board's decision pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the following reasons, the Court will affirm that part of the Board's decision that denied entitlement to an effective date prior to July 7, 2008, for the award of benefits for a psychiatric disability, and will vacate that portion of the Board's decision that denied entitlement to initial disability ratings in excess of 10% each for a right hip disability and a left hip disability and will remand those matters for further proceedings consistent with this decision. The Court will also deny the appellant's motion for oral argument.

I. BACKGROUND

The appellant served on active duty in the U.S. Air Force from October 2006 to July 2007. R. at 1992. Her pre-enlistment examination revealed a normal psychiatric condition. R. at 2370. Her service medical records reveal that she was diagnosed with an adjustment disorder with anxiety and depressed mood on January 19, 2007. R. at 2262. At that time, the appellant complained of "[s]pacing off," dizziness, and stress. *Id.* She stated that the Air Force was "much harder than anticipated," that she had trouble learning the material, and that she was "unable to adjust to [the] whole way of life in [the] [A]ir [F]orce." *Id.* Four days later, the appellant was struck by an 18-wheeler truck while on base. R. at 2481. Hospital records reveal that, as a result of the incident, the appellant sustained a broken pelvis and a pulmonary contusion. R. at 2481-82, 2485. On January 31, 2007, the appellant was admitted to a rehabilitation center, where her diagnoses were listed as follows: a transverse process fracture of the L3 vertebra, a left iliac wing fracture, a right L3 acetabular fracture, a nondisplaced right inferior pubic rami fracture, a hairline fracture of the superior pubicramus, and a small right pneumothorax. R. at 2213, 2215. A consultation report completed the following day indicated that the appellant "showed mild impairment in memory" and noted her history of anxiety and depression. R. at 2360. The

consulting physician diagnosed the appellant with generalized anxiety disorder and depressive disorder. *Id.*

In March 2007, the appellant underwent a magnetic resonance image (MRI) scan to "rule out [an] organic cause for lapses in memory" noted by the appellant's life skills counselor at the rehabilitation facility. R. at 2532. The scan was normal. R. at 2533. Later that month, the appellant was discharged from rehabilitation. Her discharge summary indicated that she showed signs of depression because she "did not have any family members" living in the area. R. at 2568. The appellant began to take antidepressants and her condition improved. *Id.*

A March 2007 Air Force Medical Evaluation Board summary included adjustment disorder with anxiety and depression among the appellant's diagnoses and recommended that she be discharged from service. R. at 2286-87. The summary reflects that the appellant was not "compatible with anxiety and depression and sleep disturbance[,] which puts her at risk for inattention and evident self[-]harm." R. at 2287. Under "Final Diagnosis," the summary provided the following:

> Adjustment Disorder with Mixed Anxiety and Depressed Mood—Acute: Anxious and depressive symptom development in response to entering [basic training]; symptom severity in excess of what would be expected from exposure to [basic training] and military technical training; significant impairment in social and occupational functioning[.] Disturbance has been present for less than 6 months.

R. at 2291.

In May 2007, the Air Force Physical Evaluation Board determined that the physical injuries the appellant suffered in the accident were "unfitting conditions which are compensable and ratable," while her adjustment disorder with depression and anxiety was "not separately unfitting and not compensable or ratable." R. at 2018. The appellant was discharged from service by reason of physical disability in July 2007. R. at 1992, 2697.

In October 2007, the appellant submitted VA Form 21-526, Veteran's Application for Compensation and/or Pension. R. at 2137-52. Under the heading "What disability are you claiming," the appellant wrote only "[p]elvic [f]ractures and transverse process fracture of L3," "[s]hortness of breath," "[r]ight and [l]eft [p]ulmonary contusions," and "[p]ain[,] chest." R. at 2142. She listed the date that each condition began as January 23, 2007. *Id.*

In February 2008, a VA regional office (RO) granted the appellant's claims and assigned a 40% disability rating for transverse process fracture of L3, a 10% disability rating for a pelvic

fracture, and a noncompensable disability rating for fracture of the seventh and eighth ribs, claimed as a pulmonary contusion, shortness of breath, and chest pain. R. at 2026-30. The RO assigned an effective date of July 3, 2007—the date after the day of the appellant's discharge from service—for each grant of benefits. *Id.* On July 7, 2008, the appellant submitted a Notice of Disagreement (NOD) with that decision and attached a letter stating, of note, that she had experienced memory difficulties. R. at 2015.

In September 2008, the appellant submitted a statement in support of her claim in which she wrote: "I also ask to be [service connected] on a secondary condition of [post-traumatic stress disorder (PTSD)] as I am now having problems." R. at 2003. In an October 2008 statement to VA, the appellant clarified that her PTSD and memory problems were secondary to the in-service accident. R. at 1987.

In February 2009, the RO granted the appellant's claim for benefits for PTSD and assigned a 50% disability rating effective September 9, 2008, the date of the appellant's statement in support of claim expressly requesting benefits for that condition. R. at 1945-51. The appellant filed an NOD with respect to the effective date. She asserted that "this case has been in an appeals status since original application of 7/07. I ask to have grant go back to that date." R. at 1935.

In March 2014, the Board denied entitlement to an effective date prior to September 9, 2008, for the award of benefits for PTSD. R. at 1828-43. The appellant appealed that determination to the Court. The Board also remanded the appellant's hip disability claim for a new VA examination. Specifically, the Board directed the examiner to include "[t]ests of joint movement against varying resistance"; an opinion as to any "additional functional impairment due to weakened movement, excess fatigability, or incoordination in terms of the degree of additional range of motion loss"; and "an opinion concerning whether there would be additional limits on functional ability on repeated use or during flare-ups . . . . in terms of the degree of additional range of motion loss." R. at 1839.

In May 2014, the appellant underwent a VA medical examination. R. at 378-400. The examiner noted the appellant's report of flareups of hip pain when standing on her right foot and when walking. R. at 395. Range of motion testing revealed flexion in both hips to 40 degrees, extension greater than 5 degrees, and abduction not lost beyond 10 degrees. R. at 395-96. The examiner noted that the appellant was able to cross her legs and "toe-out" more than 15 degrees. R. at 396-97. The examiner also noted that the appellant experienced painful motion with flexion

and extension. R. at 395-96. The examiner stated that the appellant experienced functional loss in both hips in the nature of less movement than normal, weakened movement, pain on movement, and interference with sitting, standing, and/or weightbearing. R. at 397. The examiner stated that there was no additional loss of motion in the right hip after repetitive motion. R. at 400.

In December 2015, the Court granted the parties' joint motion to remand the Board's March 2014 denial of entitlement to an effective date prior to September 9, 2008, for the award of benefits for PTSD. R. at 245. In the joint motion, the parties agreed that the Board had failed to consider the appellant's July 7, 2008, statement that she experienced memory difficulties, which the parties stated was

> relevant to [the a]ppellant's claim of entitlement to an effective date earlier than September 9, 2008, for the grant of service connection for PTSD with mixed anxiety and depression—especially in light of subsequent medical evidence of record highlighting the symptom of memory loss before diagnosing her with PTSD and with an adjustment disorder with mixed anxiety and depressed mood.

R. at 241.

In July 2016, the Board issued the decision on appeal. The Board determined that the July 7, 2008, statement could be construed as an informal claim for benefits for a psychiatric condition that manifested in memory impairment. R. at 24. Accordingly, the Board determined that July 7, 2008, was the earliest possible effective date for the award of benefits for PTSD. *Id.* The Board found that the appellant's October 2007 initial claim for benefits could "not constitute a claim for service connection [] for a psychiatric disability as it does not identify that benefits are being sought for a psychiatric disability." *Id.*

With respect to the appellant's hip disabilities, the Board determined that, although the conditions had been rated as a single disability (characterized as residuals of a pelvic fracture), "the disability is more properly rated as separate disabilities of the right and left hip." R. at 15. To that end, the Board determined that, during the period on appeal, the appellant was entitled to a 10% disability rating for each hip based on painful motion. R. at 17 (citing 38 C.F.R. § 4.59 (2015)), 18-20. In reaching this determination, the Board relied heavily on the May 2014 VA examination. *See* R. at 15-17, 18-19. This appeal followed.

II. ANALYSIS

A. Motion for Oral Argument

On October 23, 2017, the appellant filed a motion for oral argument in this matter, asserting that this appeal raises "significant issues" related to reasonably raised claims. Motion for Oral Argument at 1. The Secretary took no position on the appellant's motion. *See id.*

Generally, oral argument will be held when the Court determines that it will "materially assist" the Court in resolving the issue before it. *See Beaty v. Brown*, 6 Vet.App. 532, 539 (1994); *see also Winslow v. Brown*, 8 Vet.App. 469, 471 (1996); *Mason v. Brown*, 8 Vet.App. 44, 59 (1995). The Court concludes that this matter is squarely controlled by existing precedent, and therefore oral argument would not materially assist the Court. *See* U.S. VET. APP. R. 34(b) ("Oral argument normally is not granted on . . . matters being decided by a single Judge."). Accordingly, the Court will deny the appellant's motion.

B. Effective Date for Psychiatric Disorder

The appellant first argues that the Board erred in finding that she is not entitled to an effective date prior to July 7, 2008, for the award of benefits for PTSD. Appellant's Br. at 12-21. She alleges that her "service medical records raised an informal claim for entitlement to service connection for psychological disabilities because they contain numerous references to her psychological diagnoses and ample additional evidence that her psychological disorders developed and were exacerbated during service." *Id.* at 10. The Secretary counters that the version of 38 C.F.R. § 3.155, pertaining to informal claims, that was in effect at the time of the appellant's October 2007 claim, specifically requires a claimant to identify the benefit sought, and that the Board's determination that the October 2007 application did not identify a psychiatric disability is not clearly erroneous. Secretary's Br. at 8-21.

One of the bedrock principles of veterans law is that "the character of the veterans' benefits statutes is strongly and uniquely pro-claimant." *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998) (citing *Coffy v. Republic Steel Corp.*, 447 U.S. 191, 196 (1980); *McKnight v. Gober*, 131 F.3d 1483, 1485 (Fed. Cir. 1997); *Smith v. Brown*, 35 F.3d 1516, 1522 (Fed. Cir. 1994)). Accordingly, it is well settled that VA has a duty to sympathetically read the filings of pro se claimants. *See Moody v. Principi*, 360 F.3d 1306, 1310 (Fed. Cir. 2004); *Roberson v. Principi*, 251 F.3d 1378, 1384 (Fed. Cir. 2001); *Hodge*, 155 F.3d at 1362.

Under regulations in effect in October 2007, a claim of entitlement to VA benefits could be either "a formal or informal communication in writing requesting a determination of entitlement[,] or evidencing a belief in entitlement, to a benefit." 38 C.F.R. § 3.1(p) (2007) (effective to Mar. 23, 2015). VA regulations also required that an informal claim "identify the benefit sought." 38 C.F.R. § 3.155(a) (2007) (effective to Mar. 23, 2015); *see MacPhee v. Nicholson*, 459 F.3d 1323, 1325 (Fed. Cir. 2006). Therefore, "the essential requirements of any claim, whether formal or informal," are "(1) an intent to apply for benefits, (2) an identification of the benefits sought, and (3) a communication in writing." *Brokowski v. Shinseki*, 23 Vet.App. 79, 84 (2009); 38 C.F.R. § 3.159(a)(3) (2007) (defining a "[s]ubstantially complete application" in part as one that identifies "the benefit claimed and any medical condition(s) on which it is based"). Consequently, although "the Board is required to consider all issues raised either by the claimant . . . or by the evidence of record," *Robinson v. Peake*, 21 Vet.App. 545, 552 (2008), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009), "[t]he mere existence of medical records generally cannot be construed as an informal claim; rather, there must be some intent by the claimant to apply for a benefit." *Criswell v. Nicholson*, 20 Vet.App. 501, 504 (2006).

"Determining whether an informal claim has been filed usually requires an application of the law"; that is, the application of the definition of "informal claim" to the facts of the present case. *Westberry v. West*, 12 Vet.App. 510, 513 (1999). The Court may overturn the Board's determination that an informal claim has not been filed only if that conclusion is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 38 U.S.C. § 7261(a)(3)(A); *Westberry*, 12 Vet.App. at 513; *Butts v. Brown*, 5 Vet.App. 532, 538-40 (1993) (en banc). A Board determination as to the proper effective date is a finding of fact that will not be overturned unless the Court finds the determination to be clearly erroneous. *See* 38 U.S.C. § 7261(a)(4); *Evans v. West*, 12 Vet.App. 396, 401 (1999). As with any material issue of fact or law, the Board must provide a statement of the reasons or bases for its determination "adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court." *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *see* 38 U.S.C. § 7104(d)(1); *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990).

Here, the Board explained that "any communication or action indicating an intent to apply for VA benefits from a claimant or representative may be considered an informal claim[,] *provided that informal claim identifies the benefit being sought*." R. at 23 (emphasis added) (citing *Brannon*

v. West, 12 Vet.App. 32 (1998); 38 C.F.R. § 3.155(a) (2015)). The Board acknowledged the appellant's assertion that the record before the RO in February 2008 raised an informal claim for benefits for a psychiatric condition, based on evidence of such a condition in her service medical records and post-service medical records. R. at 23-24. The Board, however, found:

> [T]hose diagnoses in the record before the VA were insufficient to constitute an informal claim. There is no indication that the [appellant] intended to file a claim for service connection for PTSD through the mere submission of medical records in support of her formal claims for service connection for non-psychiatric disabilities. 38 C.F.R. § 3.155(a) (2015); *Brannon v. West*, 12 Vet. App. 32 (1998). The mere existence of a diagnosis in the record does not indicate that the [appellant] wishes to file a claim for service connection for that disability. The October 2007 claim did not refer to any psychiatric disability or symptom that can be attributed to a psychiatric disability. Therefore, the Board finds that the October 2007 communication does not constitute a claim for service connection [] for a psychiatric disability[,] as it does not identify that benefits are being sought for a psychiatric disability.

R. at 24. The Court finds no error in the Board's conclusion.

The appellant relies on *Harris v. Shinseki* for the proposition that VA has a duty to "determin[e] all potential claims raised by the evidence." 704 F.3d 946, 948 (Fed. Cir. 2013) (citing *Roberson*, 251 F.3d at 1384). Further, she points out that *Harris* requires that any ambiguity in a filing be construed in the appellant's favor. *Id.* (citing *Moody*, 360 F.3d at 1310). Accordingly, she contends: "[A] claimant need not explicitly request benefits for [a particular] disability. Instead, an informal claim can be raised by record evidence alone." Appellant's Br. at 13.

Although the appellant correctly quotes *Harris*, in that case the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) considered only the distinction between VA's duty to sympathetically develop claims and its duty to afford a claimant the benefit of the doubt under 38 U.S.C. § 5107(b). *Id.* The Federal Circuit in *Harris* did *not* address the definition of informal claim under § 3.155(a), which is the crux of this matter, nor did the Federal Circuit hold that "an informal claim can be raised by record evidence alone." *Id*.

The appellant next contends that two of this Court's cases have "suggested that record evidence of psychological difficulties can be sufficient to raise a claim for entitlement to service connection." *Id*. She first cites *Brokowski*, which she reads as suggesting that "where service medical records contain a diagnosis of a particular disability, an explicit request for benefits for that disability is not necessary to raise a claim for entitlement to service connection." *Id.* at 14

(citing *Brokowski*, 23 Vet.App. at 88). In that case, the appellant, in addition to enumerating specific disabilities for which he was seeking benefits, explicitly stated: "This is also a claim for service[ ] connection for all disabilities of record." *Brokowski*, 23 Vet.App. at 82 (internal quotations omitted). The Court declined to find that the appellant's broad statement encompassed a claim for benefits for peripheral neuropathy in part because, at the time the appellant made the statement, the record contained no diagnosis of peripheral neuropathy. *Id.* at 86. The Court in *Brokowski*, however, did *not* hold that had the record contained evidence of a diagnosis of peripheral neuropathy at the time of the appellant's statement, his statement would have encompassed a claim for that disability. Instead, the Court *also* declined to find that the appellant's statement encompassed a claim for benefits for peripheral neuropathy because such a broad statement was "insufficient to satisfy the specificity required by § 3.155(a)'s requirement that a claim must identify the benefit sought." *Id.* (quotation omitted). Here, the appellant's claim was very specific—she identified "[p]elvic [f]ractures and transverse process fracture of L3," "[s]hortness of breath," "[r]ight and [l]eft [p]ulmonary contusions," and "[p]ain[,] chest" as the disabilities for which she was seeking benefits. R. at 2142. As the Board found, the appellant did not refer to any psychiatric conditions or symptoms attributable to her psychiatric condition in her October 2007 application. R. at 24.

The appellant next cites *Breniser v. Shinseki*, which she argues "suggests that a claim for entitlement to service connection can be raised if record evidence demonstrates both that the veteran suffers from a disability and that the disability is service-connected." Appellant's Br. at 14 (citing 25 Vet.App. 64, 78 (2011)). The Court in *Breniser*, however, expressly found that the documents, on which the appellant relied to argue that a claim for benefits for a stroke secondary to a service-connected condition had been reasonably raised by the record, did not evidence an intent to apply for benefits for that condition. 25 Vet.App. at 78. Here, the appellant cites no documents that she believes evidence an intent to apply for benefits for a psychiatric condition other than her service medical records. It is undisputed that the appellant's service medical records contain evidence that a psychiatric condition was present in service. Nevertheless, as the Court noted above, medical records alone are not sufficient to raise an initial claim for benefits. *See Criswell*, 20 Vet.App. at 504; 38 C.F.R. § 3.157(a) (2007) (effective to Sept. 25, 2014).

The appellant attempts to distinguish the caselaw that has expressly stated that medical evidence alone cannot raise a claim on the basis that the records in those cases did not contain

diagnoses of the claimed conditions in the service medical records. Appellant's Br. at 17-19 (citing *Criswell*, 20 Vet.App. 502; *Brannon*, 12 Vet.App. 32). In *Brannon* and *Criswell*, however, the issue was the appellant's *intent to apply* for the benefit at issue. *See Criswell*, 20 Vet.App. at 504; *Brannon*, 12 Vet.App. at 35. Here, the appellant plainly intended to apply for benefits in October 2007—she filed VA Form 21-526, Veteran's Application for Compensation and/or Pension. R. at 2137-52. The question is, as the Board explained, whether she *adequately identified a psychiatric disability* as one of the benefits sought. R. at 24; *see* 38 C.F.R. § 3.155(a). Accordingly, whether the appellants in *Brannon* and *Criswell* were diagnosed with the claimed conditions after service is not pertinent.

Next, the appellant attempts to distinguish *MacPhee*, 459 F.3d 1323, on the basis that the Federal Circuit did not establish a rule that medical evidence cannot raise a claim for benefits. Appellant's Br. at 18 n.5. There, the Federal Circuit stated:

> Even if the medical reports are read as suggesting that [the appellant's] alcohol dependence was caused by his PTSD, the reports themselves cannot be considered an informal claim for an increase in benefits due to alcohol dependence. Again, under § 3.157(b)(1)[,] a medical report will only be considered an informal claim "when such report[ ] relate[s] to examination or treatment of a disability for which service-connection has previously been established." [38 C.F.R.] § 3.157(b)(1) [(2006)].

MacPhee, 459 F.3d at 1327-28. The appellant's claim in this case is an original one. As the Federal Circuit in *MacPhee* explained, regulations in effect at the time the claim in this case was filed provided that medical records could *only* serve as an informal claim for an increased disability rating for an already service-connected disability. *Id.* at 1325-26.

The Court notes that the appellant briefly argues that the *VA Adjudication Procedures Manual* supports her argument that VA's duty to sympathetically read her October 2007 claim means that VA should have inferred a claim for benefits for a psychiatric condition. Appellant's Br. at 15-16. This argument is unpersuasive. None of the manual provisions on which the appellant relies provides that service medical records are sufficient to raise a claim for benefits. Again, the crux of this matter is whether the appellant adequately identified the benefit sought. VA manual provisions do not assist in addressing that question.

Finally, the appellant argues that, because she listed the date of her in-service accident as the date all her expressly claimed physical disabilities began, VA should have liberally construed that claim as including all residuals of the in-service accident—which she contends includes her

psychiatric disability. Appellant's Br. at 19-21. To support her argument, the appellant relies on a single-judge nonprecedential decision from this Court, *Wiggins v. McDonald*, No. 15-1692, 2016 WL 6091389 (U.S. Vet. App. Oct. 19, 2016) (mem. dec.). In that case, the appellant sought benefits for "several residuals of [an] in-service Jeep accident." 2016 WL 6091389, at *5. The Court found that the Board had not considered whether the appellant's initial claim for benefits, which included conditions resulting from the in-service accident but not a mental disorder, was an informal claim for benefits for a mental disorder that was diagnosed and attributed to the in-service accident after the appellant filed his initial claim.[1] *Id.* The Court stated that additional evidence developed during the pendency of the claim "reasonably raise[d] the possibility that [the appellant] intended [his initial claim] to serve as a claim for all residuals of the in-service Jeep accident." *Id.*

The Court is not persuaded that the reasoning of *Wiggins* should apply in this case. Here, the appellant does not rely on any additional evidence developed after she filed her original claim to assert that the evidence reasonably raised a claim for benefits for a psychiatric disability. Such development squarely implicates this Court's holding in *Clemons v. Shinseki*, 23 Vet.App. 1 (2009), as the Court noted in *Wiggins*. *See* 2016 WL 6091389, at *4 (citing *Clemons*, 23 Vet.App. at 5 (stating that the scope of a claim depends on several factors, including "the claimant's description of the claim[,] the symptoms the claimant describes[,] and the information the claimant submits *or that the Secretary obtains in support of the claim*" (emphasis added))), *5 ("[T]he Board was required to consider whether the disabilities expressly identified by the veteran in November 2006 could have encompassed a mental disorder when viewed in light of the evidence he subsequently submitted and that VA developed." (citing *Clemons*, 23 Vet.App. at 5)). Instead, here, the appellant relies on *the mere existence* of medical evidence of a psychiatric condition, in existence at the time of the formal claim for benefits for physical disabilities. The Court has expressly determined that such evidence alone does not raise an initial claim for benefits. *See Criswell*, 20 Vet.App. at 504; 38 C.F.R. § 3.157(a).

In light of this discussion, the Court finds that the Board's determination that the appellant's October 2007 initial claim did not reasonably raise a claim for benefits for a psychiatric disorder is not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.

[1] The Court notes that the *Wiggins* appellant's condition is unlike the appellant's condition in the present case, which may have been diagnosed in service. *See* Appellant's Br. at 17-19 (attempting to distinguish *Criswell* and *Brannon* on the basis that the claimants' conditions were not diagnosed in service).

38 U.S.C. § 7261(a)(3)(A); *Westberry*, 12 Vet.App. at 513. Consequently, the Court also concludes that the Board's determination that the earliest effective date for the award of benefits for PTSD is July 7, 2008, is not clearly erroneous. *See* 38 U.S.C. § 7261(a)(4); *Evans*, 12 Vet.App. at 401. The Court will affirm this part of the Board's decision.

B. Adequacy of May 2014 VA Medical Examination

With respect to her appeal of the disability ratings assigned for her bilateral hip disabilities, the appellant contends that the Board erred in finding the May 2014 VA examination adequate because the examiner failed to comply with the terms of the Board's March 2014 remand. Appellant's Br. at 21-24. The Secretary concedes, and the Court agrees, that the Board erred and remand is warranted. Secretary's Br. at 21-23.

A remand by the Board or this Court "confers on the [appellant] . . . , as a matter of law, the right to compliance with the remand orders," and the Board errs when it fails to ensure compliance with the terms of such a remand. *Stegall v. West*, 11 Vet.App. 268, 271 (1998). Although the Secretary is required to comply with remand orders, it is substantial compliance, not strict compliance, that is required. *See Dyment v. West*, 13 Vet.App. 141, 146-47 (1999) (holding that there was no *Stegall* violation when the examiner made the ultimate determination required by the Board's remand, because such determination "more than substantially complied with the Board's remand order"), *aff'd sub nom. Dyment v. Principi*, 287 F.3d 1377 (Fed. Cir. 2002); *Evans v. West*, 12 Vet.App. 22, 31 (1998) (holding that remand was not warranted because the Secretary substantially complied with the Board's remand order).

The Board's determination of whether there was substantial compliance with a remand is a finding of fact that the Court reviews under the "clearly erroneous" standard. *See Gill v. Shinseki*, 26 Vet.App. 386, 391-92 (2013) (reviewing the Board's finding of substantial compliance for clear error), *aff'd per curiam sub nom. Gill v. McDonald*, 589 F. App'x 535 (Fed. Cir. 2015); *Van Valkenburg v. Shinseki*, 23 Vet.App. 113, 120 (2009) (the Board's determination of whether the Secretary has fulfilled his duty to assist generally is a finding of fact that the Court reviews under the "clearly erroneous" standard of review).

Here, the Board determined that there had been substantial compliance with its March 2014 remand because the appellant underwent the requested VA examination and the RO readjudicated the appellant's claim for benefits for hip disabilities. R. at 3. In its discussion of VA's duty to assist, the Board also briefly stated: "[T]he examinations were adequate." R. at 7.

As the parties agree, in March 2014, the Board remanded the appellant's claim to obtain a new medical examination regarding the severity of her hip disability. R. at 1828-43. The Board expressly directed the examiner to (1) "test[] joint movement against varying resistance," (2) "assess the additional functional impairment due to weakened movement, excess fatigability, or incoordination in terms of the degree of additional range of motion loss," and (3) state "whether there would be additional limits on the functional ability on repeated use or during flare-ups." R. at 1839-40. The Secretary concedes that the May 2014 VA examination did not comply with the Board's directives pertaining to the appellant's flareups. Secretary's Br. at 22-23. Accordingly, the Court will vacate that part of the Board decision on appeal that denied entitlement to separate disability ratings in excess of 10% each for right and left hip disabilities, and remand those matters for the appellant to be provided a new medical examination.

On remand, the appellant is free to submit additional evidence and argument on the remanded matters, including the specific arguments raised here on appeal, and the Board is required to consider any such relevant evidence and argument. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002) (stating that, on remand, the Board must consider additional evidence and argument in assessing entitlement to the benefit sought); *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order). The Court reminds the Board that "[a] remand is meant to entail a critical examination of the justification for the decision," *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991), and the Board must proceed expeditiously, in accordance with 38 U.S.C. § 7112.

III. CONCLUSION

The appellant's motion for oral argument is DENIED. The appeal of the Board's July 27, 2016, decision denying entitlement to a disability rating in excess of 40% for a lumbar spine disability and denying an initial disability rating greater than a 10% for fractures of the seventh and eighth ribs is DISMISSED. After consideration of the parties' pleadings and a review of the record, that part of the Board's July 27, 2016, decision that denied entitlement to an effective date prior to July 7, 2008, for the award of benefits for a psychiatric condition is AFFIRMED. That part of the Board's July 27, 2016, decision that denied entitlement to initial disability ratings in excess of 10% each for a right hip disability and a left hip disability is VACATED, and those matters are REMANDED for further proceedings consistent with this decision.

DATED: December 28, 2017

Copies to:

Isaac Belfer, Esq.

VA General Counsel (027)