REPLY BRIEF OF APPELLANT

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

17-1361

RICHARD M. SIMON

Appellant,

v.

ROBERT L. WILKIE.,
ACTING SECRETARY OF VETERANS AFFAIRS,

Appellee.

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APPELLANT'S REPLY ARGUMENTS

I. Mr. Simon's 30 percent rating was entitled to the protections afforded by 38 C.F.R. § 3.344.

The Veteran and the Secretary agree that in order for 38 C.F.R. § 3.344 to apply, a disability must become stabilized, or hold steady, for five years or more. Appellant's Br. at 7; Secretary's Br. at 16. The Veteran and the Secretary disagree, however, as to what that term means. *Compare* Appellant's Br. at 5-10 *and* Secretary's Br. at 9-22. The Secretary commits the same misreading of the plain language of regulation as the Board: a mere change in the rating is not dispositive of whether the disability has stabilized and is likely to improve. The question is not whether there has been any change in the rating. The question is whether the veteran has some baseline of symptoms that have been present throughout the five-year period. If so, then his rating cannot be reduced below that level without meeting section 3.344's requirements. The Board's misinterpretation requires remand.

The Secretary argues that the Veteran's "rating was not 'stable' and in fact improving, as is reflected in the medical examinations and consistent reductions in the rating levels for his service-connected disability." Secretary's Br. at 16. He relies in part on the Veteran's reduction from a 30 percent rating to a 10 percent rating. Secretary's Br. at 17 and 21. But the propriety of that reduction is what is at issue here. As argued, the Veteran's disability rating should not have been reduced to 10 percent and therefore the reduction is void ab initio. *See* Appellant's Br. at 15 *citing*

Kitchen v. Brown, 7 Vet.App. 320, 325 (1995) ("Where . . .the Court finds that the [Board] has reduced a veteran's rating without observing applicable laws and regulation, such a rating is void ab initio and the Court will set it as aside as not in accordance with law."). The Secretary cannot use an improper reduction to 10 percent as evidence of an improvement where the validity of the reduction remains under attack.

The Secretary acknowledges that the "total of the time period for the 50% rating and 30% rating amounted to over a 5 year period. . . ." Secretary's Br. at 13. (Indeed, the Veteran was only one month short of being rated at 30 percent for a five-year period.) The Secretary asserts though that the initial 50 percent rating does not count toward the missing months of the 5-year period because the Veteran's condition improved from a 50 percent rating. *Id.* He is mistaken for two reasons. First, the initial 50 percent rating was not based on an assessment of the Veteran's condition. It was instead an automatic rating based on the fact that the Veteran was discharged with a psychiatric disability. *See* 38 C.F.R. § 4.129 (2017);[1] R-2067.

Second, the Veteran is not seeking to retain the 50 percent rating. Appellant's Br. at 5-15. He claims instead that throughout a five-year period, he suffered from

[1] The previous version of the regulation, that was enforced at the time of the RO's decision was 38 C.F.R. § 4.131, or Mental Disorders incurred during war. That regulation stated that "If the mental disorder is sufficiently severe to warrant discharge from service, a minimum rating of 50 percent will be assigned with an examination to be scheduled within 6 months from discharge." *See* 38 C.F.R. § 4.129, 29 Fed. Reg. 6718 (May 22, 1964)

symptoms entitling him to a minimum 30 percent rating, and that his 30 percent symptoms did not improve. *Id.* Only a rating less severe than that 30 percent baseline demonstrates a betterment in the Veteran's overall condition. Because those 30 percent symptoms were subsumed by the 50 percent rating, they existed throughout the five-year period and were indeed stabilized.

In fact, the Secretary concedes that the same disability rating for the entirety of the five year period is not required. *See Simunovich v. Shulkin*, No. 16-2604; Secretary's Br. at 18-21. Although the facts of the veteran's case in *Simunovich v. Shulkin* differ from the facts of Mr. Simon's case, the point remains that the Secretary has interpreted section 3.344 to not require the same exact rating to be assigned for the entirety of the five-year period to enjoy the protections of that section. Secretary's Br. at 18-21. The Secretary fails to provide a meaningful distinction between the facts of Mr. Simunovich's and Mr. Simon's case. *See id.* Although Mr. Simunovich's disability rating was increased from 40 to 80 before his rating was improperly reduced to 20 percent, this does not mean section 3.344 does not apply to Mr. Simon's case where the opposite occurred. *See Simunovich v. Shulkin*, No. 16-2604. In each case the claimant's disability rating was at a baseline level for the five year required period, Mr. Simunovich at a 40 percent evaluation and Mr. Simon at a 30 percent evaluation. *See Simunovich v. Shulkin*, No. 16-2604; R-1934. And in each case, the VA was wrong to reduce the Veteran's rating below the baseline level.

The Secretary is correct that VA's brief in the *Simunovich* case is not binding on this case. Secretary's Br. at 18. The Veteran did not argue that it was. Appellant's Br. at 9-10. The Court can and should take judicial notice of the Secretary's position in that case as it is inconsistent with the position he has taken in this case. *See Brannon v. Derwinski*, 1 Vet.App. 314, 316 (1991); *Smith v. Derwinski*, 1 Vet. App. 235, 238 (1991). And the Court may consider inconsistent positions taken on interpretations of regulation to determine whether the Secretary's position in a case is entitled to deference. *See Correia v. McDonald*, 28 Vet.App. 158, 169-70 (2016) (noting Secretary's inconsistent position on the application of the regulation in determining no deference should be paid to the contrary interpretation proffered during the litigation of that case). Further, VA's interpretation of the regulation should not be afforded deference as it is overly restrictive and not veteran friendly. *Trafter v. Shinseki*, 26 Vet.App. 267, 272 (2013). The Court therefore should not defer to that interpretation. *See id.* The Court should provide the Board with the proper interpretation of section 3.344 and remand for it to readjudicate this case utilizing that proper interpretation.

II. There was clear and unmistakable error in the Regional Office's September 1974 rating decision that reduced Mr. Simon's rating to 10 percent as it misinterpreted 38 C.F.R. § 3.344. If the RO had properly interpreted and applied that regulation, it would have manifestly changed the outcome because the Veteran's 30 percent rating would not have been reduced to 10 percent.

If the Regional Office's September 1974 decision did not misinterpret and therefore misapply 38 C.F.R. § 3.344 it would not have reduced the Veteran's rating because it would have been barred from doing so by law. Thus, if that error had not occurred, it would have manifestly changed the outcome of the September 1974 decision because Mr. Simon's rating would not have been reduced to 10 percent. Appellant's Br. at 10-14. This is why there was CUE in that 1974 rating decision. Mr. Simon's argument is not merely a disagreement with the weighing of the evidence, contrary to the Secretary's argument. Secretary's Br. at 24. The Appellant has in fact met his burden to show CUE in the 1974 rating decision.

Section 3.344(a) states that the Board may reduce a rating on any one examination, if all of the evidence of record clearly warrants the conclusion that sustained improvement has been demonstrated. Despite the Secretary's argument to the contrary, the RO reduced Mr. Simon's rating from 30 to 10 on a single examination without the required finding that all of the evidence of record clearly warranted the conclusion that sustained improvement had been demonstrated. R-1934; Secretary's Br. at 26-27.

The Secretary argues that the 1974 RO determination was not based on only one VA examination and therefore was consistent with the regulation because the Board referenced the July 1976 VA examination report in its rating decision. Secretary's Br. at 26-27. The Secretary misses the point of the Veteran's argument, however. Referencing a VA examination that the Board relied upon to support a prior rating reduction has no bearing on whether, for purposes of its decision to reduce the Veteran's rating from 30 to 10 percent, the Board relied on more than one examination. It is evident from the RO's decision that it only relied upon the August 1974 VA examination, the "current examination" in reducing the Veteran's rating from 30 to 10 percent. *See* R-1934. This is supported by the language of the rating decision—it only refers to the "current examination," singular, in rendering its decision. *See id.* Insofar as the Veteran argued that the RO should have obtained another VA examination, this was not an argument that the RO failed to satisfy its duty to assist, but rather was an argument that if the RO wanted to reduce the Veteran's rating without determining on the basis of all of evidence that there was sustained improvement, it needed to get another examination to comply with the regulation. Appellant's Br. at 12; Secretary's Br. at 28. 38 C.F.R. § 3.344.

Following from that, because the RO relied upon a single examination to reduce the Veteran's rating to 10 percent, it was required by regulation, to determine that "all the evidence of record clearly warrants the conclusion that sustained improvement has been demonstrated." 38 C.F.R. s. 3.344(a). It did not. R-1934.

The text of the rating decision demonstrates that the only evidence the RO considered was the August 1974 rating decision. *Id.* The Secretary excuses the RO's error because "a statement of detailed reasons or bases was not required at the time, it cannot be said that had 3.344(a) been applied, that a manifestly different outcome would have occurred, as it is not undebatable that it would have manifestly changed the outcome." Secretary's Br. at 27.

It is true that the RO in 1974 was not required to provide a detailed statement of reasons or bases. *See Natali v. Principi,* 375 F.3d 1375, 1380 (Fed. Cir. 2004); *Pierce v. Principi*, 240 F.3d 1348, 1356 (Fed. Cir. 2001); *Joyce v. Nicholson*, 19 Vet.App. 36, 46 (2005). But that does not mean the RO could ignore the law. The text of the RO's determination does not demonstrate anything other than the fact that it improperly considered only the single August 1974 examination—and nothing else—when reducing Mr. Simon's rating. *See* R-1934. It did not, as required by law, determine whether on the basis of all of the evidence that there was sustained improvement in Mr. Simon's condition. *Id.* The cases the Secretary cites for the general proposition that it is not clear and unmistakable error when the RO does not set forth in-depth reasons or bases during this time period are distinguishable from the facts of this case.

In *Natali* the claimant argued that it was CUE for the rating board to not specifically cite the presumption of soundness and aggravation standards or the applicable standard to rebut those presumptions in its decision. *Natali,* 375 F.3d at 1380. The Federal Circuit held that although the rating decision did not use the

specific words of the regulation, the text of the rating decision made clear that the RO found the presumption of soundness did not apply. *Id.* That rating decision specifically found that the claimant's condition was shown by VA examination to be a congenital defect and there was no evidence that service aggravated the congenital condition. *Id.* The Federal Circuit found that those words were fully equivalent to a factual finding that the claimant's disability both preexisted service and was not aggravated by his service sufficient under the law to deny service connection for the claimant's eye condition. *Id.* That case is different from Mr. Simon's case because the words the RO used in its 1974 rating decision did not evidence that it made the findings required under section 3.344. In fact, it demonstrates the exact opposite.

In *Pierce* case the Federal Circuit held that a 1945 rating board decision was not required to set forth in detail the factual bases for its decision and that in the absence of evidence to the contrary, the rating board is presumed to have made the required findings. *Pierce*, 240 F.3d 1356. In this case, the words the RO used in its 1974 decision is the evidence to the contrary that it properly interpreted and applied the law. It focused only on that single examination and no other evidence. R-1934. Therefore that case does not defeat the Veteran's argument. Finally, in *Joyce* this Court held that it must be clear from the face of a decision made prior to the date the reasons or bases requirement was imposed on the RO that a particular fact or law had not been considered in the RO's adjudication of a case to rise to the level of CUE. *Joyce*, 19 Vet.App. at 46. There the Court found that the evidence before the RO at

the time of the decision was sufficient for it to find that the claimant's condition pre-existed service. *Id.* Here, the evidence does not compel the result that Mr. Simon's condition, based on all of the evidence of record, demonstrated sustained improvement. In both the 1969 and 1974 VA examinations the Veteran's condition was noted to be largely the same. *Compare* R-1938 *and* R-2026-30. For example, in both examinations the Veteran had hesitant speech, was described as being anxious, and was tense. R-1938; R-2026; R-2028.

Even though the RO was not required to provide a robust statement of reasons or bases when it issued its 1974 decision, the Secretary still may not supplement the RO's 1974 decision with his own reasons or bases. Secretary's Br. at 27. The Secretary's argues the RO decided "[t]he current examination shows a good industrial and social adjustment and reduction under VAR 1105E is indicated" which, in the Secretary's opinion, "clearly demonstrated that his conditions of ordinary life (work and social) were improving." Secretary's Br. at 27 (citing R-1934).[2] This is additional evidence that the Board only looked to the August 1974 VA examination report to consider whether a reduction was warranted. That aside, the VA's reference to VAR 1105E was a citation to the rating reduction regulation at the time of its decision,

[2] The Secretary has an extra quotation mark on this part of page 27. Secretary's Br. at 27. The quote of the RO's decision is: "[t]he current examination shows a good industrial and social adjustment and reduction under VAR 1105E is indicated." R-1934. The clause "which clearly demonstrates that his conditions of ordinary life (work and social life) were improving," which also ends with a quotation mark, is the Secretary's argument and does not appear in the text of the rating decision. *See id.*

which is now found in 38 C.F.R. § 3.105 (2017). *See Roberts v. Shinseki*, 23 Vet.App. 416 (noting that VAR 1105 is now 38 C.F.R. § 3.105).

Whether the Veteran, on that single examination demonstrated good social and industrial adjustment is not a proxy for demonstrating sustained improvement under the ordinary conditions of daily life overall, an assessment required by the regulation. 38 C.F.R. § 3.344. Instead, the RO had to determine whether "all the evidence of record clearly warrants the conclusion that sustained improvement has been demonstrated." 38 C.F.R. § 3.344. Moreover, the RO had to "ascertain, *based upon a review of the entire recorded history of the condition*, whether the evidence reflect[ed] an actual change in the disability." *Brown v. Brown*, 5 Vet.App. 413, 421 (1993) (emphasis added). The Secretary is wrong that *Brown v. Brown* does not apply to this case. Secretary's Br. at 21.

The RO's decision was problematic because there was no indication that any improvement under the ordinary condition of daily life that was likely to be sustained had actually happened. As noted in the opening brief, the 1974 examination in fact demonstrated a worsening of symptoms. Appellant's Br. at 12. The August 1974 examination report noted that the Veteran had no friends and was shaky and tremulous as a result of his nervousness. R-1938. Those two symptoms were not noted in the July 1969 examination report. *See* R-1938; R-2026-30. Overall, both the 1969 and 1974 VA examination reports evidenced that the Veteran was working, but was having psychological issues. *See* R-1938; R-2026-30. The evidence at the time of

the 1974 RO determination therefore does not demonstrate sustained improvement under Mr. Simon's ordinary conditions of life and work.

CONCLUSION

The Board erred when it misinterpreted the law and found that section 3.344 did not apply to Mr. Simon's case. Although the Veteran had higher ratings in excess of 30 percent, the Veteran's rating never fell below a 30 percent rating for five years. According to the plain language of section 3.344, a veteran is not required to have the highest rating assigned for a condition for five years in order to warrant application of the protections of section 3.344. He is only required by the plain language of the regulation to have a rating that goes no lower than the same level for a five year period. The Secretary attempts to distinguish *Simunovich v. Shulkin* from this case should be rejected.

Irrespective of the fact that the RO was not required to provide detailed reasons or bases at the time of its 1974 decision, the Veteran was prejudiced by the Board's misunderstanding of the regulation because that misinterpretation led it to find there was no CUE in the September 1974 rating decision that reduced the Veteran's rating from 30 to 10 percent. If the RO properly interpreted and applied section 3.344, it would have found the protections applied and would not have reduced the Veteran's rating to 10 percent. Therefore, the application of the regulation would have manifestly changed the outcome of the RO's decision. The examination that the Board used to reduce the Veteran's rating was less full and

complete than the one it used to grant the rating. This was in contravention of the regulation.

Further, the RO was required to determine whether there was improvement under the ordinary conditions of life before reducing the Veteran's rating. It failed to perform that analysis and the evidence of record demonstrates that it did not improve. The Court should provide the proper interpretation of the regulation and remand to the Board for a new decision consistent with that interpretation.

Respectfully submitted,

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