

*Designated for electronic publication only*

**UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS**

No. 19-3877

EMILY R. PAYNE,<sup>1</sup> APPELLANT,

v.

ROBERT L. WILKIE,  
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, Emily R. Payne, through counsel appeals an April 9, 2019, Board decision that denied entitlement to vocational rehabilitation and employment<sup>2</sup> (VRE) benefits. Record (R.) at 4-16. 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 vacate the Board's decision and remand the matter for further proceedings consistent with this decision.

**I. BACKGROUND**

The appellant served on active duty in the U.S. Marine Corps from August 1989 to March 1992. R. at 2353. The record reflects that she receives benefits for acquired flatfoot, as well as non-service-connected pension. *See* R. at 34.

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<sup>1</sup> On September 17, 2019, the Secretary filed a corrected Board of Veterans' Appeals (Board) decision reflecting that the appellant's name is Emily R. Payne.

<sup>2</sup> On June 22, 2020, VA announced that this program would be known as the Veteran Readiness and Employment Service. VA Office of Public and Intergovernmental Affairs, *VA's Vocational Rehabilitation and Employment service signals transformation through readiness*, <https://www.va.gov/opa/pressrel/pressrelease.cfm?id=5473> (June 22, 2020).

VA first approved the appellant's request for VRE services in December 2008. *See* R. at 1611-12. A VA vocational rehabilitation counselor determined that she had a serious employment handicap that "significantly impair[ed] [her] ability to prepare for, obtain, and retain employment consistent with [her] abilities, aptitudes, and interests." *Id.* The counselor also determined that "[t]he feasibility of achieving a vocational goal is questionable at this time; therefore, [the appellant] will participate in an extended evaluation . . . to determine feasibility." R. at 1612.

The appellant's January 2009 individualized extended evaluation plan (IEEP) reflects three objectives. First, "[p]articipation in medical and mental health treatment to maintain good mental and physical health." R. at 1607. Second, "[c]ontinued sobriety and participation in [an addictive disorders treatment program] and/or [Narcotics Anonymous (NA)] meetings." *Id.* Finally, "[s]uccessful participation in a volunteer activity and continuing education courses." R. at 1608. Under the heading "Progress Notes" for the first objective, the IEEP form contains an undated handwritten note that the appellant's "attendance stopped during Apr[il] 2009" and that "[s]he also stopped attending [addictive disorders treatment] groups." R. at 1607. Under the third objective, an undated handwritten progress note reflects that the appellant did not contact her vocational rehabilitation counselor in March 2009 and did not attend an April 2009 appointment. R. at 1608; *see* R. at 1677-81.

In December 2011, the appellant again applied for VRE services. *See* R. at 1186-89. VA determined that she had a serious employment handicap, R. at 1494, but that her vocational goal was not reasonably feasible in light of her non-service-connected mental health disabilities, R. at 1495. Accordingly, VA denied entitlement to VRE services in December 2011 and advised the appellant that she could reapply if she believed that her situation had improved. R. at 1489-90.

The appellant submitted a January 2012 letter from her private treating psychotherapist, who wrote that the appellant had become "increasingly stable" since she "gain[ed] access to appropriate treatment" for her mental health conditions. R. at 1147. The psychotherapist noted the appellant's desire to return to school and reenter the workforce and stated that she was confident that the appellant was "ready to return to school as part of a vocational rehabilitation plan." *Id.* A statement from a private treating psychiatrist in February 2012 reflects that the appellant was "doing very well in all areas." R. at 1148. The psychiatrist stated that she had reviewed the appellant's records and that it was

apparent that [the appellant's] past providers had little knowledge of gender identity issues and how it can affect her presentation. She handled herself with admirable skill and advocated for herself ably. I have a firm opinion that she is an excellent candidate for vocational training[] and would do your program proud. She is motivated, intelligent, and has considerable skills.

*Id.* The following month, the appellant filed a Notice of Disagreement (NOD) with the December 2011 decision denying VRE benefits.<sup>3</sup> R. at 1465.

The appellant filed the present request for VRE services in October 2012. *See* R. at 1127. On a November 2012 VA Form 28-1902w, Rehabilitation Needs Inventory, she asked for VA's assistance in finishing her college degree in sociology and obtaining employment. R. at 1115. She conceded that her limitations were severe but stated that she was confident she could overcome them and find gainful employment with training. R. at 1117. She reported that her depression was improving, although her foot and back pain remained the same. *Id.*

Shortly thereafter, a VA vocational rehabilitation counselor determined that the appellant's "interest and stated goals are not appropriate vocational goals, considering h[er] physical and mental health limitations." R. at 1099. He found that the appellant had a serious employment handicap, R. at 1100, but stated that he was uncertain whether the achievement of a vocational goal was feasible, R. at 1101. Nevertheless, VA approved the appellant's request for VRE services. R. at 1093.

In April 2013, VA and the appellant agreed on the terms of an IEEP with six objectives. R. at 1087-90. First, "full[]" participation in an addictive disorders treatment program and recovery services. R. at 1087. Second, participation in a program of vocational evaluation. *Id.* Third, obtaining "necessary counseling and supportive services necessary to stabilize [her] personal issues[,] which will facilitate further vocational preparation and career planning." R. at 1088. Fourth, after completing the IEEP, "return[ing] to counseling to discuss progress and determine feasibility." R. at 1089. Fifth, maintaining abstinence from drugs and alcohol. *Id.* Sixth and finally, "[m]aintain[ing] physical and mental health that allows for full participation and progress during IEEP." R. at 1090. The IEEP outlined other requirements as well, such as attendance at all scheduled medical and mental health appointments; compliance with all treatment

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<sup>3</sup> The record of proceedings does not reveal the outcome of this appeal.

recommendations, including medications; compliance with rules and regulations outlined in school catalogs; and maintenance of at least a 3.0 grade point average (GPA). R. at 1087-90.

A case note dated the same day as the IEEP reflects the vocational rehabilitation counselor's "serious concerns" regarding the appellant's ability to follow through on her IEEP because her mental health conditions "could very well interfere with employment and/or rehabilitation." R. at 1080. The counselor further wrote that the appellant did not agree with her treatment providers at the VA medical center and refused to see her psychiatrist. *Id.* The counselor stated that notes in the appellant's file indicated that she was noncompliant with treatment due to her mental health conditions and "only wishes to receive treatment if it is within her approval, as she demands what treatment, medications, etc.[,] need to be provided, and demeans providers['] treatment and professional opinions." R. at 1080-81. The counselor advised the appellant that she was required to undergo a psychological evaluation "to gain treatment recommendations," and the appellant agreed. R. at 1081.

At a May 2013 meeting, the vocational rehabilitation counselor referred the appellant for a mental health evaluation and "work hardening" and evaluation. R. at 1080. The appellant asked to take one class during the summer, which the counselor authorized despite his reservations, "to test waters/evaluate [the appellant's] ability to succeed in a training environment." *Id.* He wrote that, if the appellant were successful, she might be able to return to school in the fall with a full course load. *Id.* The record reflects that the appellant earned an "A" in the class. R. at 1428.

A June 2013 VRE case note reflects that the appellant's former psychiatrist at the Minneapolis, Minnesota, VA medical center contacted her vocational rehabilitation counselor to advise him that the appellant had not been treated at that location since February 2013 "due to noncompliance and issues with staff." R. at 1079. The psychiatrist advised that the appellant was welcome to return to treatment provided she followed medical center guidelines and rules. *Id.* The appellant's counselor wrote that "[t]here seems to be a pattern of [the appellant] prescribing [her] own care, then [becoming] upset when that care is not provided or agreed upon." *Id.* The counselor further noted that the appellant had advised him that she was seeking treatment outside VA, but that she had not provided any treatment records. *Id.*

The appellant requested to attend the fall semester of school in August 2013. *Id.* A new vocational rehabilitation counselor wrote that, under the terms of the appellant's IEEP, she was required to provide documentation of ongoing mental health treatment and attendance at NA

meetings, which she had not done. *Id.* The counselor advised the appellant that, until VA could verify her treatment and attendance, she would not be permitted to take classes. *Id.* Later that month, the appellant submitted a statement from a private mental health counselor to the effect that she had been attending weekly two-hour counseling sessions since March 2013. R. at 1083; *see* R. at 1368.

The record contains an undated VA memorandum from the appellant's vocational rehabilitation counselor that recounts a September 2013 meeting between the appellant and the counselor. R. at 1076-78. The counselor advised the appellant that the single statement from a private provider regarding ongoing mental health treatment was insufficient to meet the dictates of her IEEP and therefore VA would not approve her attendance at school for the fall semester. R. at 1077. Instead, the counselor offered the appellant two options that would permit continued evaluation and assessment: She could either attend the Veterans Upward Bound program for the remainder of the fall semester or participate in a non-paid work experience (NPWE), working 30 to 40 hours per week. *Id.* The counselor informed the appellant that, if she were successful in either program, then there was a strong possibility that she could attend school full time for the spring semester. *Id.* The appellant declined both options. *Id.* The counselor referred the appellant's case to a vocational rehabilitation panel (VRP), "requesting recommendations" on the feasibility of the appellant's vocational goals, in light of "her non-compliance and unrealistic expectations for employment." R. at 1078.

The VRP reviewed the appellant's case in October 2013 and concluded she had not complied with any of the treatment recommendations and had not been following the objectives of her IEEP, including providing documentation of treatment and attendance at NA meetings. R. at 1074. The VRP unanimously concluded that it was not feasible for the appellant to pursue a vocational goal at that time. R. at 1075. Of note, the panel directed that, if the appellant wanted to resume VRE services, she had to agree, among other things, to "[r]efrain from seeing any mental health providers outside of the Minneapolis VA system." R. at 1075.

An October 2013 VA counseling narrative report reflects that a VA psychiatrist "declined the [appellant's] need for" a psychological evaluation because she had been evaluated in January 2013 and "the recommendations remain[ed] the same." R. at 1070. The psychiatrist stated that the appellant was not allowed to use VA mental health treatment services "unless she agrees to the programs recommended for her." *Id.* The report further reflects that the appellant's VRE services

were "terminated due to [her] refusal to cooperate in the program and meet the objectives stated in her IEEP." R. at 1069.

In an October 2013 letter, the appellant's vocational rehabilitation counselor advised her that the VRE services she had requested were denied and that the decision would become final in 30 days, unless she submitted new evidence. R. at 1061-65. In December 2013, the vocational rehabilitation counselor advised her that her VRE services were being discontinued. R. at 1050-51. The appellant filed an NOD with that decision, R. at 1412, and ultimately appealed to the Board, R. at 1386-94.

The appellant testified at a hearing before a Board member in August 2014. R. at 1788-804. In January 2016, the Board determined that the evidence the appellant had submitted regarding outside treatment "lack[ed] the detail necessary to determine whether [her] mental health disabilities permit training for her vocational goal at this time." R. at 1763. Accordingly, the Board remanded her claim for a VA regional office (RO) to "obtain all private treatment records from the identified [private] providers of record." *Id.*

In a November 2016 Supplemental Statement of the Case (SSOC), the RO indicated that it had obtained medical records from private treatment providers, R. at 1317, but confirmed the termination of VRE services on the basis that the appellant had violated her IEEP by refusing to participate in either Veterans Upward Bound or an NPWE and by discontinuing VA treatment and seeking outside mental health services, R. at 1320. The Board again remanded the appellant's claim in February 2018 for the RO to fully comply with the January 2016 remand order by making follow-up requests for missing private treatment records. R. at 66-72. An August 2018 SSOC confirmed the termination of the appellant's VRE benefits, finding that "there is no further medical documentation to change the original decision." R. at 41.

In the April 2019 decision on appeal, the Board confirmed the termination of the appellant's VRE services, finding that the vocational rehabilitation counselor and the VRP "properly discharged their duties both prior and subsequent to placing the [appellant's] case in 'interrupted' status," R. at 11, and that the "assignment of [the appellant's] 'discontinued' status was proper," R. at 12. This appeal followed.

## II. ANALYSIS

### A. Law

The goal of a chapter 31 vocational rehabilitation program is to "[e]valuate and improve the veteran's ability to achieve a vocational goal"; "[p]rovide services needed to qualify for suitable employment"; "[e]nable the veteran to achieve maximum independence in daily living"; and "[e]nable the veteran to become employed in a suitable occupation and to maintain suitable employment." 38 C.F.R. § 21.70(a)(1)-(4) (2020); *see* 38 U.S.C. § 3104. There are three "basic requirements" for eligibility: (1) the veteran must establish basic entitlement to services under 38 C.F.R. § 21.40; (2) "[t]he services necessary for training and rehabilitation must be identified by [VA] and the veteran"; and (3) VA and the veteran must develop "[a]n individual written plan . . . describing the goals of the program and the means through which these goals will be achieved." 38 C.F.R. § 21.1(b)(1)-(3) (2020); *see* 38 U.S.C. § 3102.

Each veteran seeking chapter 31 VRE services is "assigned to a specific case status from the point of initial contact until all appropriate steps in the rehabilitation process have been completed." 38 C.F.R. § 21.180(a) (2020). Once an application for VRE services is received and eligibility under § 21.40 is established, the veteran is scheduled for an initial evaluation. 38 C.F.R. § 21.50(a) (2020). After the evaluation is complete, the veteran progresses to "evaluation and planning status." 38 C.F.R. § 21.180(e)(1)-(4). During this stage, VA determines whether the veteran has an employment handicap under § 21.40 and whether achieving a vocational goal is feasible.<sup>4</sup> *See* 38 C.F.R. §§ 21.50, 21.184(a) (2020).

When, as in the appellant's case, VA is unable to determine whether achieving a vocational goal is feasible during this stage, the veteran's case may be assigned to "extended evaluation" status. 38 C.F.R. § 21.57(a) (2020); *see* R. at 6-7; 38 C.F.R. §§ 21.180(e)(2), 21.184(a)(2), 21.188 (2020). This means that, instead of developing an individualized written rehabilitation plan (IWRP), VA and the veteran develop an IEEP. *See* 38 C.F.R. § 21.86 (2020). An IEEP includes the same elements as an IWRP, but the long-range goal is "to determine [if] achievement of a

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<sup>4</sup> "The term vocational goal means a gainful employment status consistent with the veteran's abilities, aptitudes, and interests." 38 C.F.R. § 21.35(h)(1) (2020). A vocational goal is "reasonably feasible" when "the effects of the veteran's disability (service and nonservice-connected), when considered in relation to [his or her] circumstances[,] does not prevent [him or her] from successfully pursuing a vocational rehabilitation program and becoming gainfully employed in an occupation consistent with [his or her] abilities, aptitudes, and interests." 38 C.F.R. § 21.35(h)(2).

vocational goal is currently reasonably feasible" and the "intermediate objectives relate to problems of questions which must be resolved for [ ] VA to determine the current reasonable feasibility of achieving a vocational goal."<sup>5</sup> 38 C.F.R. § 21.86(b).

"The successful development and implementation of a program of rehabilitation services require the full and effective participation of the veteran in the rehabilitation process." 38 C.F.R. § 21.362(a) (2020). Section 21.362 outlines the veteran's responsibilities as well as VA's. VA staff is responsible for ensuring that the veteran understands the following:

- (1) The services and assistance which may be provided under Chapter 31 to help the veteran maintain satisfactory cooperation and conduct and to cope with problems directly related to the rehabilitation process, especially counseling services;
- (2) Other services which [VRE] staff can assist the veteran in securing through non-VA programs; and
- (3) The specific responsibilities of the veteran in the process of developing and implementing a program of rehabilitation services, especially the specific responsibility for satisfactory conduct and cooperation.

38 C.F.R. § 21.362(b). The veteran is required to, among other things:

- (1) Cooperate with VA staff in carrying out the initial evaluation and developing a rehabilitation plan;

....

- (3) Seek the assistance of VA staff, as necessary, to resolve problems which affect attainment of the goals of the rehabilitation plan;

- (4) Conform to procedures established by VA governing pursuit of a rehabilitation plan including:

....

- (iv) Requesting medical care and treatment;

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<sup>5</sup> By contrast, in an IWRP, the statement of the "long-range rehabilitation goals" includes "[o]ne vocational goal for a veteran with an employment handicap" or "[o]ne vocational goal and, if applicable, one independent living goal for a veteran with a serious employment handicap." 38 C.F.R. § 21.84(b)(1) (2020). The intermediate objectives of an IWRP are "statements of achievement expected of the veteran to attain the long-range goal," and the activities included in the objectives must (1) relate to the achievement of the goal, (2) be definable in terms of observable behavior, (3) have a projected completion date, and (4) have measurable outcomes. 38 C.F.R. § 21.84(b)(2)(i)-(iv).



. . . . [and]

(5) Conform to the rules and regulations of the training or rehabilitation facility at which services are being provided.

38 C.F.R. § 21.362(c). VA may suspend the initial evaluation process, 38 C.F.R. § 21.50(d), terminate evaluation and planning status, 38 C.F.R. § 21.184(c)(2), or terminate extended evaluation status, 38 C.F.R. § 21.188(d), if the veteran fails to cooperate. *See* 38 C.F.R. § 21.364(a) (2020) ("If VA determines that a veteran has failed to maintain satisfactory conduct or cooperation, VA may, after determining that all reasonable counseling efforts have been made and are found not reasonably likely to be effective, discontinue services and assistance to the veteran."). However, VA is required to "[p]rovide assistance which may be authorized under Chapter 31, or for which arrangements may be made under other programs[,] to enable the veteran to maintain satisfactory conduct and cooperation." 38 C.F.R. § 21.362(d)(2).

Where VA determines that a veteran has failed to maintain satisfactory conduct or cooperation, the veteran's status may be changed first to "interrupted" status, the purpose of which is to "recognize that a variety of situations may arise in the course of a rehabilitation program in which a temporary suspension of the program is warranted." 38 C.F.R. § 21.197(a) (2020); *see* 38 C.F.R. § 21.197(c)(2) ("If a veteran's conduct or cooperation becomes unsatisfactory, services and assistance may be interrupted."). "A veteran's case may be interrupted and assigned to interrupted status," as relevant to the appellant's case, "prior to discontinuance and assignment to discontinued status." 38 C.F.R. § 21.197(c)(4). Under this subsection, "[t]he purpose of assignment to interrupted status is to assure that all appropriate actions have been taken to help the veteran continue in his or her program before discontinuing benefits and services." *Id.*

The final stage of the VRE process is "discontinued status," the purpose of which is "to identify situations in which termination of all services and benefits received under Chapter 31 is necessary." 38 C.F.R. § 21.198(a) (2020). VA may "discontinue the veteran's case and assign the case to discontinued status following assignment to interrupted status" for reasons including, as relevant to the appellant's case, "[u]nsatisfactory conduct and cooperation." 38 C.F.R. § 21.198(b)(2); *see* 38 U.S.C. § 3111.

An exception to reassignment from interrupted to discontinued status is made when there are "mitigating circumstances." 38 C.F.R. § 21.364(b)(3). When mitigating circumstances exist,

the case may be continued in "interrupted" status until VA staff determines the veteran may be reentered into the same or a different program because the veteran's conduct and cooperation will be satisfactory, or if a plan has been developed, to enable the veteran to reenter and try to maintain satisfactory conduct and cooperation.

*Id.* Mitigating circumstances include "[t]he effects of the veteran's service and nonservice-connected condition[s]," "[f]amily or financial problems which have led the veteran to unsatisfactory conduct or cooperation," and "[o]ther circumstances beyond the veteran's control." 38 C.F.R. § 21.364(b)(i)-(iii).

Finally, a VA regulation provides: "The veteran will be informed in writing of changes in case status by VA which affect his or her receipt of benefits and services under Chapter 31. The letter to the veteran will include the reason for the change of case status, and other information required under provisions of § 21.420." 38 C.F.R. § 21.180(d). Further, VA must provide a veteran "[p]rior notification of adverse action" and afford the veteran 30 days to review the notice, "[m]eet informally" with a VA staff member, review the basis for the decision, and submit any material relevant to the decision. 38 C.F.R. § 21.420(d) (2020).

Under chapter 31, the Secretary has broad authority to make awards and determine the scope of services and assistance. *Kandik v. Brown*, 9 Vet.App. 434, 438 (1996); *see* 38 U.S.C. § 3104. "Because of the high degree of discretion afforded the Secretary, the Court may set aside those determinations only if they are found to be 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Kandik*, 9 Vet.App. at 438 (citing 38 U.S.C. § 7261(a)(3)(A); *Foster v. Derwinski*, 1 Vet.App. 393, 393-94 (1991) (per curiam); *Smith v. Derwinski*, 1 Vet.App. 267, 278-80 (1991)). The Court reviews the Board's factual determinations, including whether a veteran has displayed unsatisfactory conduct and cooperation for the purposes of chapter 31, under the "clearly erroneous" standard of review. *McRae v. Brown*, 9 Vet.App. 229, 234 (1996) (per curiam). A finding of fact is clearly erroneous when the Court, after reviewing 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 (1948); *see Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990). 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*, 1 Vet.App. at 56-57.

### B. Parties' Arguments

The appellant first argues that VA failed to enable her to maintain "satisfactory conduct and cooperation" because (1) the vocational rehabilitation counselor offered only an NPWE or enrollment in Veterans Upward Bound, options that "were entirely inappropriate" for her, Appellant's Brief (Br.) at 13; (2) "rather than encouraging [her] to continue with her private healthcare and assisting [her] in developing further documentation, VA dismissed this evidence and concluded that [she] had been entirely non-compliant" with her IEEP, *id.* at 15; and (3) the vocational rehabilitation counselor rejected her evidence of attendance at NA meetings and did not attempt to obtain any other documentation, *id.* at 15-16. She also alleges that "VA unilaterally changed [the] expectations" of her IEEP when the vocational rehabilitation counselor limited her options to an NPWE or Veterans Upward Bound, *id.* at 17, and that the Board failed to address favorable evidence that she, in fact, met the requirements of her IEEP, *id.* at 18-20. The Secretary disputes this argument and generally asserts that VA attempted to assist the appellant, but she refused the assistance offered. *See* Secretary's Br. at 14-17.

Second, the appellant contends that the Board erred in concluding that VA followed proper procedure—including providing the necessary notice—before it placed her case in interrupted status. Appellant's Br. at 20-23. More specifically, she argues that, to find that her case was placed into interrupted status in October 2013, the Board must have relied on the October 2013 letter from her vocational rehabilitation counselor advising her that VRE services had been denied, but that letter does not comply with the regulatory requirements of § 21.197(b). *Id.* at 21-22. She further asserts that the Board provided inadequate reasons or bases for its finding that her case was properly placed into interrupted status. *Id.* at 23-24. The Secretary disputes the appellant's argument that she was not properly notified before her case was placed in interrupted status and argues that "a remand for the purpose of placing [her] case into interrupted status serves no legitimate purpose," because, "[i]n the nearly 6 years that passed between the discontinuance of her [VRE] services and the Board's decision, she still failed to submit evidence showing her compliance with her IEE[P]," and "she can simply reapply for [VRE] services and comply with her IEE[P]." Secretary's Br. at 21, 22.

Finally, the appellant asserts that the Board erred in concluding that VA properly placed her case in discontinued status. Appellant's Br. at 24-30. In particular, she contends that (1) VA "failed to meet its obligations to remain in contact" with her and did not affirmatively act to help her continue in her VRE program before placing her case in discontinued status, *id.* at 24-26; (2) VA failed to determine whether mitigating circumstances existed before changing the status of her case from interrupted to discontinued, *id.* at 26-28; and (3) the Board failed to provide adequate reasons or bases for its determination that VA acted properly in placing her case in discontinued status, *id.* at 28-30. The Secretary argues that the Board "did not find any mitigating factors present." Secretary's Br. at 19. He notes that the appellant's IEEP specifically required mental health treatment and that VA repeatedly attempted to assist her in obtaining such treatment, but she refused. *Id.* As a result, he contends, the appellant "should not, now, be permitted to assert that her mental illness was the cause of her noncompliance with her IEE[P]." *Id.*

### C. Board Decision

In the decision on appeal, the Board summarized the law discussed above, as well as the course of the appellant's case from the November 2012 determination that she was entitled to benefits to the present. R. at 6-11. The Board found:

[T]he [vocational rehabilitation counselor], as well as the VRP, properly discharged their duties both prior and subsequent to placing the [appellant's] case in "interrupted" status. These officials attempted to discuss the situation with the [appellant] on numerous occasions, each time informing her of the steps and documentation necessary to determine feasibility. They clearly made reasonable efforts to inform [her] of these requirements and her responsibilities in the process of developing and implementing a program of rehabilitation services, including offering her additional options not included in her IEEP that would assist in a feasibility determination. As noted above, the [appellant] declined all offers of assistance.

R. at 11.

The Board "acknowledge[d] the [appellant's] assertion that she was receiving inadequate care [through VA] and ceased VA treatment prior to the development of the IEEP." R. at 12. Further, the Board "recognize[d] the [appellant's] assertion that she was receiving the proper care through private providers, and the evaluations required by the [vocational rehabilitation counselor] were not necessary or warranted." *Id.* Nevertheless, the Board noted, the appellant "signed the April 2013 IEEP, indicating [that] she participated in the development of the plan and understood [that] her compliance with the plan was required." *Id.* The Board concluded that, "[i]n signing

the IEEP, the [appellant] agreed to receive mental health treatment and substance abuse counseling through [VA], comply with any recommended treatment plan, and submit evidence of attendance at NA meetings." *Id.*

Finally, the Board determined that "assignment of the [appellant's] 'discontinued' status was proper." *Id.* The Board explained:

The [appellant] was fully informed of her "discontinued" status by a letter that stated the reasons for the change in status, per 38 C.F.R. § 21.180(d), and she had been afforded prior notification of the adverse action, per 38 C.F.R. § 21.420(d). In making this determination, the Board reiterates [that] the [appellant] refused to comply with the objectives and requirements of the April 2013 IEEP, despite her participation in the development of the plan and understanding that compliance was necessary. When the [vocational rehabilitation counselor] offered other methods to gather the necessary evidence to make a feasibility determination, the [appellant] declined, asserting they were not appropriate for her needs.

R. at 12-13. After acknowledging the purpose of interrupted status—"to assure that all appropriate actions have been taken to help the veteran continue in his or her program before discontinuing benefits," R. at 13—the Board concluded that the purpose had been met and, "[t]herefore, assignment of the [appellant's] case to 'discontinued' status was proper." R. at 14.

#### D. Discussion

##### 1. *Duty To Assist*

The Court concludes that the Board failed to provide adequate reasons or bases for its decision. First, although the Board referred to § 21.362 twice in its analysis, it limited its discussion of that regulation to subsections (b) and (c), which pertain to VA's responsibilities and the veteran's responsibilities, respectively. R. at 11. The Board did not acknowledge subsection (d), which directs VRE staff to "[p]rovide assistance which may be authorized under Chapter 31, or for which arrangements may be made under other programs to enable the veteran to maintain satisfactory conduct and cooperation." 38 C.F.R. § 21.362(d) (2020); *see* Appellant's Br. at 12-14.

Further, the Board did not address the appellant's argument that the options offered to her—Veterans Upward Bound or an NPWE—were not appropriate for her in light of her education and experience. *See* R. at 1077, 1390; Appellant's Br. at 13-14; Reply Br. at 6. Instead, the Board summarily determined that, because VA offered these "additional options" and the appellant rejected them, VA had satisfied its duty to assist her. R. at 11; *see* R. at 10 (acknowledging the appellant's argument), 11-12 (finding that the appellant rejected VA's offer of assistance).

## 2. Interrupted Status

Second, the Board relied on an "October 2013 decision" as the basis for stating that the appellant's case was properly placed into interrupted status in that month. R. at 6. This appears to be a reference to the October 30, 2013, letter from the appellant's vocational rehabilitation counselor in which she stated: "I regret that I must deny the [VRE] services you requested. My decision becomes final in 30 days unless you send me new evidence that leads me to make a different decision." R. at 1061. The vocational rehabilitation counselor further wrote: "After carefully reviewing the evidence, I have determined that it is not reasonable to expect you to be able to train for or get a suitable job at this time." *Id.* Finally, she stated: "The severity of your service-connected and non-service[-]connected disabilities has significantly limited your ability to obtain and maintain employment. Due to the fact that you did not follow the objectives stated in your IEEP, we have determined that pursuit of a vocational goal is not feasible at this time." R. at 1062; *see* R. at 35 (Aug. 2018 SSOC indicating that the appellant's case was placed into interrupted status on Oct. 30, 2013).

As the appellant argues, however, the Board did not explain how that letter—which on its face notified her that her request for VRE services had been denied due to her failure to comply with her IEEP and that the decision would become final in 30 days unless she provided new evidence—constituted a decision as to interrupted status. Appellant's Br. at 21-22. The Board also did not consider whether that letter—or any other evidence in the record—satisfied any applicable regulatory requirements for assigning that status. Appellant's Br. at 22. In that regard, the Board noted the requirements of § 21.197(b) but did not discuss whether that regulation was applicable and, if so, whether it had been satisfied. R. at 10; *see* 38 C.F.R. § 21.197(b) ("A veteran's case will be assigned to interrupted status when . . . VA determines that a suspension of services . . . is necessary; and . . . [e]ither . . . [a] definite date for resumption of the program is established; or . . . [t]he evidence indicates that the veteran will be able to resume the program at some future date, which can be approximately established.").

Further, as argued by the appellant, § 21.197 provides that "[t]he purpose of assignment to interrupted status is to assure that all appropriate actions have been taken to help the veteran continue in his or her program before discontinuing benefits and services." 38 C.F.R. § 21.197(c)(4); Appellant's Br. at 21. Again, the Board did not discuss whether that regulation was applicable here and, if so, whether it had been satisfied. And, to the extent that the Board

found that the appellant's vocational rehabilitation counselor discharged her duties following the appellant's placement in interrupted status and assured that all appropriate actions had been taken, the Board did not identify or discuss any specific evidence in support of that conclusion. *See* R. at 11-14.

The Court notes that the evidence on which the Secretary relies to support the Board's determination that the appellant's case was properly placed into interrupted status does not appear to mention the status of the appellant's case. Secretary's Br. at 21 (citing R. at 1061 (Oct. 30, 2013, letter from the appellant's vocational rehabilitation counselor advising her that VRE benefits were denied), 1066 (Oct. 30, 2013, memorandum finding that the appellant's vocational goal was not feasible), 1069-70 (Oct. 30, 2013, narrative report for the purpose of referring the appellant's case to the VRP)). Moreover, the Board did not discuss or rely on any of the evidence the Secretary cites to reach its determination. *See Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 156 (1991) ("[A]gency 'litigating 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.").

### *3. Discontinued Status*

Third, the Court agrees with the appellant that, before concluding that VA acted properly in placing her case in discontinued status, the Board did not consider whether the vocational rehabilitation counselor fulfilled any duties required by § 21.197(e), namely whether she was required to and, if so, whether she did, "maintain contact with the [appellant] during interruption and . . . arrange for appropriate medical or other services" the appellant needed "to be able to enter or reenter a rehabilitation program or a program of employment services." Appellant's Br. at 24-25; *see* R. at 11-14. Further, although the Board included in its decision a paragraph explaining the regulatory provisions governing mitigating circumstances and acknowledging that mitigating circumstances would require VA to maintain the appellant's case in interrupted status, rather than place it into discontinued status, R. at 11 (citing 38 C.F.R. § 21.364(b)), the Board made no findings on that issue, Appellant's Br. at 26-28.

The Secretary's argument that the Board found no mitigating circumstances is not supported by a review of the Board decision. Secretary's Br. at 19 (citing R. at 11-12); *see* R. at

11-14. Moreover, the Secretary provides no legal support for his argument that the appellant "should not be permitted" to argue that her non-service-connected mental illness is the cause of her noncompliance with her IEEP. Secretary's Br. at 19; *see* 38 C.F.R. § 21.364(b)(3)(i).

#### 4. Prejudice

The Court is cognizant of its duty to consider whether Board errors are prejudicial. *See* 38 U.S.C. § 7261(b)(2) (requiring the Court to "take due account of the rule of prejudicial error"); *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) (holding that the harmless-error analysis applies to the Court's review of Board decisions and that the burden is on the appellant to show that he or she suffered prejudice as a result of VA error). Under the circumstances of this case, where the Board failed to (1) make necessary factual findings and provide analysis regarding multiple potentially applicable regulations or (2) evaluate all evidence pertaining to the appellant's entitlement to continued VRE services, the Court is simply unable to conclude that the Board's errors are harmless. Here, for example, that may require the Court in the first instance to assess whether VA staff complied with any applicable regulatory requirements, such as the duty to assist; whether the appellant was appropriately notified that her claim had been placed into interrupted status; and whether mitigating circumstances existed. The Court, however, may not weigh the evidence at issue in the first instance or evaluate its potential effect on the Board's findings. *See Deloach v. Shinseki*, 704 F.3d 1370, 1380 (Fed. Cir. 2013) ("[T]he evaluation and weighing of evidence are factual determinations committed to the discretion of the factfinder—in this case, the Board."). Accordingly, remand is necessary. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) ("[W]here the Board . . . failed to provide an adequate statement of reasons or bases for its determinations, . . . a remand is the appropriate remedy.").

#### 5. Remand

Given this disposition, the Court will not now address the remaining arguments and issues raised by the appellant. *See Quirin v. Shinseki*, 22 Vet.App. 390, 395 (2009) (noting that "the Court will not ordinarily consider additional allegations of error that have been rendered moot by the Court's opinion or that would require the Court to issue an advisory opinion"); *Best v. Principi*, 15 Vet.App. 18, 20 (2001) (per curiam order). On remand, the appellant is free to submit additional evidence and argument on the remanded matter, 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). To that end, the Court will direct that the appellant's briefs be added to the record before the Board on remand. 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**

After consideration of the parties' pleadings and a review of the record, the Board's April 9, 2019, decision is VACATED and the matter is REMANDED for further proceedings consistent with this decision.

DATED: October 8, 2020

Copies to:

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VA General Counsel (027)