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United States Court of Appeals for Veterans Claims

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Vet. App. No. 15-2645

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THOMAS R. BYRD,

*Appellant,*

v.

ROBERT A. McDONALD,  
Secretary of Veterans Affairs,

*Appellee.*

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APPELLANT'S REPLY BRIEF

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## **PRELIMINARY STATEMENT**

The Appellant, Thomas R. Byrd, appeals the April 27, 2015, Board of Veterans' Appeals ("Board") decision that denied (1) entitlement to a rating for posttraumatic stress disorder ("PTSD") in excess of 70 percent; and (2) entitlement to Total Disability Based on Individual Unemployability ("TDIU"). Mr. Byrd filed his initial brief on February 22, 2016 ("App. Br."). The Secretary of Veterans Affairs ("Secretary") filed a brief in this case on June 4, 2016 ("Sec. Br."). Pursuant to U.S. Vet. App. R. 28(c), Mr. Byrd files this reply brief.

As discussed in more detail below, Mr. Byrd respectfully urges the Court to reject the Secretary's arguments for affirmance. Instead, the Court should issue an Order reversing the Board's finding that the criteria for a 100 percent rating for PTSD has not been met, or, alternatively, an Order vacating and remanding that part of the Board's decision as lacking an adequate statement of reasons and bases for that finding. The portion of the Board's decision denying entitlement to TDIU should be vacated and remanded with instructions for the Board to provide an adequate statement of reasons and bases for its finding that the criteria for TDIU have not been met during the appeal period.

## **ARGUMENT**

In response to Mr. Byrd's arguments that (1) the Board clearly erred when it found that his PTSD did not warrant a rating of 100 percent, or, alternatively, failed to provide an adequate statement of reasons or bases for that finding; and (2) that the Board failed to provide an adequate statement of reasons and bases for its denial of TDIU, the Secretary

offers some argument, but largely fails to respond to Mr. Byrd's detailed arguments or, where responsive, are meritless. The Secretary argues that the Board's decision had a plausible basis in the record and that its statements of reasons or bases supporting the denial of a higher schedular rating for PTSD and entitlement to TDIU are adequate. For the reasons described below, the Court should reject all of the Secretary's arguments.

**I. THE COURT SHOULD REJECT THE SECRETARY'S SINGLE ARGUMENT THAT THERE IS A PLAUSIBLE BASIS IN THE RECORD FOR THE BOARD'S FINDING THAT MR. BYRD'S PTSD SYMPTOMS DO NOT WARRANT A 100 PERCENT SCHEDULAR RATING.**

Mr. Byrd argued in his initial brief that his PTSD symptoms establish entitlement to a 100 percent rating under the schedular criteria and that the Board's finding to the contrary is clearly erroneous. App. Br. at 12–18. More specifically, Mr. Byrd argued that the evidence of record demonstrates that he suffers from symptoms *actually listed* in the rating schedule as exemplars of symptoms warranting a 100 percent rating if they result in total occupational and social impairment. App. Br. at 14–15. These symptoms include homicidal and suicidal tendencies and problems with emotional and behavioral controls that render Mr. Byrd “a danger to any work environment.” R. at 133 (130–34); App. Br. at 14–15. Additionally, Mr. Byrd argued that his symptoms are chronic, persistent, treatment resistant, and more severe than those listed in the 70 percent schedular rating. These symptoms include perceptual abnormalities in the form of seeing things, psychomotor agitation, and psychomotor retardation, as well as impairment in immediate memory, working memory, and concentration so profound that he was unable

to recall four items in both a forward and backward direction or recall any items from a three-item list after an interference task. App. Br. at 16–17.

In response, the Secretary makes the singular argument that because Mr. Byrd endorsed suicidal and homicidal ideation in a January 2009 psychological examination and then denied such ideation in an April 2009 VA examination, the Board’s finding that such ideation was intermittent was plausible. Sec. Br. at 6. However, the Secretary ignores, as did the Board, the January 2009 examiner’s conclusion that Mr. Byrd’s homicidal and suicidal tendencies together with his problems with emotional and behavioral controls are persistent enough to make him “a danger to any work environment.” R. at 133 (130–34). Notably, the January 2009 examiner did not provide any qualifier on that statement that would permit the Board to make an inference that Mr. Byrd might just be an intermittent danger in the workplace or that he would only be a danger in some work environments and not others. R. at 133 (130–34). Moreover the Secretary, like the Board, failed to address the fact that there is evidence of daily and nightly intrusive thoughts and dissociative symptoms. App. Br. at 15. Even assuming, *arguendo*, that the April 2009 VA examination constituted some evidence to support the Board’s finding (and Mr. Byrd maintains that it does not), the evidence as a whole demonstrates that the Board has made a mistake. *Gilbert v. Derwinski*, 1 Vet. App. 49, 52 (1990) (noting that a finding is clearly erroneous when *although there is evidence to support it*, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed) (emphasis added). This is particularly true

when, as here, the evidence shows that Mr. Byrd's symptoms are chronic, persistent and not highly amenable to treatment. App. Br. at 17.

Additionally, the Secretary failed to address entirely Mr. Byrd's arguments that some of his PTSD symptoms are more severe than those listed in the 70 percent rating and more closely approximate the higher 100 percent rating. App. Br. at 16–18. As the Secretary correctly notes, “a veteran may only qualify for a given disability rating under § 4.130 by demonstrating particular symptoms associated with that percentage or others of similar severity, frequency, and duration.” Sec. Br. 8 (quoting *Vasquez-Claudio v. Shinseki*, 713 F.3d 112, 117 (Fed. Cir. 2013)). In his initial brief, Mr. Byrd argued that his perceptual abnormalities in the form of seeing things out of the corner of his eyes, as well as his psychomotor retardation, psychomotor agitation, and significant impairments in immediate memory, working memory, and concentration, are symptoms of similar severity, frequency, and duration as those listed in the 100 percent rating criteria. The Secretary offers no response to this argument, presumably because he cannot offer any. The Secretary's failure to address these arguments should be construed as a concession warranting reversal. See *MacWhorter v. Derwinski*, 2 Vet. App. 655, 656 (1992).

As Mr. Byrd's symptoms and their impact on his occupational and social functioning warrant a 100 percent rating, reversal is appropriate.

**II. THE COURT SHOULD ALSO REJECT THE SECRETARY'S RESPONSE TO MR. BYRD'S ALTERNATIVE ARGUMENT THAT THE BOARD PROVIDED AN INADEQUATE STATEMENT OF REASONS AND BASES FOR ITS FINDING THAT HIS PTSD SYMPTOMS AND THE FUNCTIONAL IMPAIRMENT THEY CAUSE DO NOT MEET THE SCHEDULAR CRITERIA FOR A 100 PERCENT RATING.**

In his initial brief, Mr. Byrd argued, in the alternative, that the Board's denial of a rating in excess of 70 percent for his PTSD is not supported by adequate reasons and bases because the Board: (1) used the examples of symptoms listed in the 100 percent rating criteria as a checklist, thus ignoring other symptoms not listed therein; (2) failed to explain why Mr. Byrd's homicidal and suicidal ideation did not rise to the level of severity warranting a 100 percent rating; and (3) failed to explain why Mr. Byrd's disability picture had not more nearly approximated a 100 percent rating based on his symptoms and degree of social and occupational impairment noted in Mr. Byrd's private psychologist's medical opinions of June 2008 and January 2009. Here again, the Secretary only addresses one of Mr. Byrd's arguments and his silence on the other arguments should be construed as a concession. *See MacWhorter*, 2 Vet. App. at 656.

The Secretary addresses Mr. Byrd's argument that the Board inappropriately used the symptoms listed in the 100 percent rating criteria as a checklist, by noting that the Court's holding in *Mauerhan v. Principi*, 16 Vet. App. 436, 442 (2006), "does not mean that the Board is not permitted to review and discuss symptoms actually listed in the Schedule for Rating Disabilities." Sec. Br. at 8. While it is axiomatic that the Board should, and indeed must, address whether any of Mr. Byrd's symptoms are specifically listed in the 100 percent rating criteria—a fact confirmed by Mr. Byrd's own arguments that the Board failed to do exactly that in his case—Mr. Byrd's argument is that the Board impermissibly focused *solely* on these enumerated symptoms *to the exclusion* of other symptoms that are not explicitly listed, but are of a similar character and severity,

and that fall between the 70 percent and 100 percent exemplars. App. Br. at 18–19; *Gilbert*, 1 Vet. App. at 57.

The Secretary concludes his argument on this point by characterizing Mr. Byrd’s arguments as mere *post-hoc* attempts to have the Court weigh the evidence in a more favorable light. Sec. Br. at 8–9. To the contrary, Mr. Byrd has specifically discussed evidence in the record before the Board that the Board failed to address or even mention in its decision to deny him entitlement to a 100 percent rating. App. Br. at 16–17, 28–29. While it is certainly the province of the Board to weigh the evidence of record, this responsibility does not give the Board license to ignore other favorable, relevant evidence of record or excuse the Board from providing an adequate statement of reasons or bases for its rejection of any material evidence favorable to Mr. Byrd. *See Washington v. Nicholson*, 19 Vet. App. 362, 367–68 (2006); *Thompson v. Gober*, 14 Vet. App. 187, 188 (2000); 38 U.S.C. § 7104(d)(1).

Vacatur and remand are thus required for the Board to provide an adequate statement of reasons or bases to support its finding that Mr. Byrd is not entitled to a 100 schedular rating for his PTSD.

**III. THE COURT SHOULD ALSO REJECT THE SECRETARY’S ARGUMENTS THAT THE BOARD PROVIDED AN ADEQUATE STATEMENT OF REASONS OR BASES FOR ITS FINDING THAT MR. BYRD WAS NOT ENTITLED TO TDIU.**

The Board found that Mr. Byrd’s service-connected PTSD and diabetes did not render him unable to obtain or maintain substantially gainful employment because he could work as a truck driver. R. at 15–17 (2–21). In his initial brief, Mr. Byrd argued

that the Board's conclusion was not supported by an adequate statement of reasons or bases for its conclusions: (1) that he could work as a truck driver because he had worked as a truck driver before and did not leave the job due to his service-connected disabilities; and (2) that the April 2009 examination was adequate for rating purposes despite its dearth of rationale and the fact that it is not based on Mr. Byrd's full medical history. App. Br. at 21–26.

In response to Mr. Byrd's detailed arguments that in finding he was able to work as a truck driver, the Board ignored material favorable evidence of record and impermissibly substituted its own medical judgment for that of Dr. W.A. (who opined that Mr. Byrd is a danger to any work environment), *see* App. Br. at 21–25, the Secretary just repeats the Board's findings that Mr. Byrd left the workforce due to non-service connected disabilities and that he is not unemployable due solely to his service-connected disabilities. Sec. Br. at 9–11. However, Mr. Byrd's argument is not now, and never has been, that the Board failed to make a finding on whether he is entitled to TDIU or whether he is able to secure and maintain employment as a truck driver. Rather, Mr. Byrd's argument is that the Board failed to adequately support these findings and this failure frustrates judicial review necessitating remand. App. Br. at 21–25. It is this latter argument that the Secretary fails to counter. Indeed, nowhere in his brief does the Secretary even attempt to demonstrate that the Board properly rejected Dr. W.A.'s opinion that Mr. Byrd would be a danger in *any* work environment, or otherwise point out where in the Board's decision it did so. As a result, the Court should conclude that the Board provided an inadequate statement of reasons or bases for its finding that Mr.

Byrd can secure and maintain substantially gainful employment as a truck driver.

*MacWhorter*, 2 Vet. App. 656 (holding that the Court “has the authority to deem the Secretary’s failure to file an appropriate response a concession of error”).

In response to Mr. Byrd’s argument that the April 2009 VA medical opinion is inadequate because the examiner failed to provide a rationale for his opinion that Mr. Byrd’s PTSD symptoms would not preclude substantially gainful employment, the Secretary merely points out that this Court has held that there is no reasons and bases requirement to discuss favorable evidence imposed upon examiners and that the examiner noted that the claims file had been reviewed. Sec. Br. at 11–13.

The Secretary’s argument fails to appreciate that the examiner did not simply state that the claims file was reviewed. Rather, the examiner provided a detailed, chronological history of Mr. Byrd’s prior psychological examinations that stopped in September 2008, thus raising the question of whether he was aware of the subsequent January 2009 examination containing the psychologist’s opinion that Mr. Byrd would likely be a danger in any work environment. R. at 110–111 (109–112); 130–34. Moreover, even if the Secretary is correct and the January 2009 medical opinion was reviewed by the April 2009 VA examiner in the course of his claims file review and the examiner simply neglected to explicitly mention or discuss that examination report, *see* Sec. Br. at 12–13, the April 2009 VA examiner’s opinion that Mr. Byrd’s psychiatric symptoms “would not in and of themselves preclude employment” is itself an implicit rejection of the contrary January 2009 private medical opinion and the VA examiner provided no reasoning for that rejection. R. at 111 (109–112). As such, the opinion lacks

sufficient rationale rendering it inadequate for rating purposes and thus the Board's reliance upon that opinion is error necessitating remand. *See Nieves-Rodriguez v. Peake*, 22 Vet. App. 295, 304 (2008) ("most of the probative value of a medical opinion comes from its reasoning"); *Hicks v. Brown*, 8 Vet. App. 417, 421 (1995) (the Board's reliance on an inadequate medical examination frustrates judicial review and requires remand). At the very minimum, before relying on such an unsupported opinion, the Board should have returned it for clarification. *See Monzingo v. Shinseki*, 25 Vet. App. 97, 107 (2012) (VA is required to return a VA examination report for clarification when the report contains insufficient detail or where the diagnosis is not supported by the report's findings) (citing 38 C.F.R. §4.2).

Mr. Byrd further argued in his initial brief that the Board erred in defining the period on appeal from December 29, 2008, the date the VA received his application for TDIU, rather than construing that application as new and material evidence in connection with the then-pending increased rating claims for PTSD and diabetes. *Compare* R. at 11 (2–21) *with* App. Br. at 27–28. The Secretary responds by stating that "an application for TDIU alone and considered by itself does not qualify as new and material evidence" under 38 C.F.R. § 3.156(b). Sec. Br. at 13. The fundamental flaw in this statement is that 38 C.F.R. § 3.156(b) says no such thing. In fact, that regulation states that "[n]ew and material evidence received prior to the expiration of the appeal period, or prior to the appellate decision if a timely appeal has been filed . . . will be considered as having been filed in connection with the claim which was pending at the beginning of the appeal period." 38 C.F.R. § 3.156(b). Here, as explained previously, the claims pending at the

time the TDIU application was received in December 2008 were claims for an increased rating for PTSD and diabetes—both conditions which are listed in the application as preventing Mr. Byrd from securing or maintaining substantially gainful employment. R. at 176 (170–80); App. Br. at 27–28. In other words, the VA Form 21-8940 constitutes evidence (albeit lay evidence) that Mr. Byrd’s PTSD and diabetes render him unemployable, and as the Court held in *Rice v. Shinseki*, “[n]ew evidence that shows unemployability relating to the underlying condition during the pendency of the original claim is material *on its face*.” 22 Vet. App. 447, 454 (2009) (emphasis added). Thus, there can be no valid dispute that the TDIU application was new and material evidence relevant to both the PTSD and diabetes claims pending before the VA at the time and the Board’s adoption of the date the TDIU application was received as the date setting the outside limits of the appeal period was error.

While the Secretary cites *Rice*, 22 Vet. App. at 453, as support for the argument that “a veteran may, at any time, independently assert entitlement to TDIU based on an existing service-connected disability” and that such a request is “best analyzed as a claim for an increased disability rating based on unemployability[.]” where, as here, the increased rating is based on service-connected disabilities already pending, 38 C.F.R. § 3.156(b) requires that the application be considered new and material evidence as to the underlying claims. Sec. Br. at 14. At the very least, the Board was required to discuss why the TDIU application was or was not new and material evidence going to the PTSD and diabetes claims then pending, something the Board failed to do. The Board failed to provide such an explanation, and thus the Secretary’s attempt to supply one now is

nothing but a *post-hoc* rationalization which this Court should reject. *See Martin v. Occupational Safety & Health Rev. Comm'n*, 499 U.S. 144, 156-57 (1991); *Barr v. Nicholson*, 21 Vet. App. 303, 311 (2007).

The Secretary also misconstrues Mr. Byrd's argument as advocating for an earlier effective date and argues that the issue is moot because entitlement to TDIU has been denied. While the treatment of Mr. Byrd's TDIU application relative to his pending increased rating claims is certainly relevant to any effective date ultimately assigned for any increase in his PTSD rating, as well as to the effective date assigned for entitlement to TDIU if entitlement is granted, Mr. Byrd takes issue here not with the downstream issue of an effective date, but with the Board's demarcation of the appeal period for the purpose of evidence consideration in the present appeal for the maximum schedular rating for PTSD and entitlement to TDIU. This is an important distinction because as Mr. Byrd pointed out in his initial brief, the Board's decision to construe the appeal period from the date the TDIU application was received (December 29, 2008), rather than the date that the underlying claim for an increase in PTSD and diabetes was filed (July 8, 2008), resulted in the Board's failure to address certain favorable and relevant evidence. App. Br. at 28–30.

Finally, the Secretary failed to address entirely Mr. Byrd's argument that *even if* the Board were correct in limiting the appeal period to on or after December 29, 2008, that conclusion would not excuse the Board's failure to discuss material favorable evidence of record because the temporal focus in an increased rating claim is up to a year from the date the claim for increase was received, and because regulations require that

the Board's assignment of a disability rating must take into account the history of the disability. App. Br. at 29–30. As a result, the Court should conclude that the Board failed to consider relevant evidence in its adjudication of Mr. Byrd's PTSD and TDIU claims.

### **CONCLUSION**

For the foregoing reasons, and those explained in Mr. Byrd's initial brief, Mr. Byrd respectfully requests that this Court issue an Order reversing the Board's April 27, 2015 decision that denied his entitlement to a rating in excess of 70 percent for PTSD or, in the alternative, issue an Order finding that the Board's denial of the higher rating was not supported by an adequate statement of reasons and bases. Mr. Byrd further requests that the Court issue an Order vacating and remanding the portion of the Board's decision which denied entitlement to TDIU, so that the Board can provide an adequate statement of reasons and bases for its finding that Mr. Byrd's service connected PTSD, diabetes, and diabetic neuropathy do not prevent him from securing and maintaining substantially gainful employment.

Respectfully submitted,

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