

REPLY BRIEF OF APPELLANT

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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

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15-3635

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ROBERT GONZALEZ

Appellant,

v.

ROBERT A. MCDONALD,  
SECRETARY OF VETERANS AFFAIRS,

Appellee.

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## APPELLANT'S REPLY ARGUMENTS

- I. **The Board failed to consider pertinent, favorable evidence in its analysis and therefore failed to provide an adequate statement of reasons or bases for its decision contrary to the Secretary's arguments.**

The Secretary acknowledges that Mr. Gonzalez argued that "the BVA erred by overlooking certain favorable medical evidence consisting of VA treatment records that show he was prescribed systemic therapy, Methotrexate, for the service-connected psoriasis for the period prior to July 17, 2007, as required for a compensable rating under DC 7816." Secretary's Br. at 10-11 (citing Appellant's Open. Br. at 8-10). However, the Secretary avers that the Veteran "is mistaken since the BVA considered the evidence of record prior to July 17, 2007, which shows that he was in fact prescribed Methotrexate for a different condition, psoriatic arthritis, for which he was subsequently awarded service connection on a secondary basis in March 2010." Secretary's Br. at 11. The Secretary's argument should be rejected by the Court.

Although the Secretary believes that the Veteran "is mistaken since the BVA considered the evidence of record prior to July 17, 2007," a review of the Board's analysis for the period prior to July 2007 reveals otherwise. The Board's analysis for the earlier period of time is limited to three paragraphs. R-8-9 (2-12). At no point does the Board mention the March 10, 2007, treatment record or the fact that Mr.

Gonzalez was prescribed Methotrexate. *Id.* The Board's analysis focused only on the March 2006 examination. *Id.*

Therefore, it is clear that the Board did not discuss the March 10, 2007, treatment record. As the initial factfinder, the Board had a duty to discuss March 10, 2007, treatment note because it supports the Veteran's argument for a compensable rating for service-connected psoriasis prior to July 17, 2007. *See Hensley v. West*, 212 F.3d 1255, 1263 (Fed. Cir. 2000) (noting "the general rule that appellate tribunals are not appropriate fora for initial fact finding"); *Dela Cruz v. Principi*, 15 Vet.App. 143, 149 (2001). It is evident that the Secretary's argument is simply his *post hoc* evaluation of the Board's statement of reasons or bases in lieu of the Board's actual discussion of the evidence. *See Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 156 (1991) ("'[L]itigating positions' are not entitled to deference when they are merely appellate counsel's 'post hoc' rationalizations' for agency action, advanced for the first time in the reviewing court.").

The law is clear that the Board, not the Secretary's counsel, is tasked with making final appellate decisions within the Department, including the reasons or bases for the decisions being made. 38 U.S.C. § 7104(a). Thus, the Court should conclude that the Board failed to consider pertinent, favorable evidence and ultimately failed to provide an adequate statement of reasons or bases for its decision. The Secretary's argument to the contrary should be rejected by the Court.

**II. The Board erred when it failed to consider certain residuals of the Veteran's service-connected psoriasis in its extraschedular analysis.**

The Secretary next recognizes that Mr. Gonzalez argued that “the Board failed to explain how his constant itching, shedding and/or crusting are specifically contemplated in DC 7806 [sic]. . . .” Secretary’s Br. at 13. Nevertheless, the Secretary asserts that “the Board correctly found that a comparison between the level of severity and symptomatology associated with his service-connected psoriasis with the established criteria in DC 7816, showed that the rating criteria reasonably described his disability level and symptomatology.” *Id.* The Secretary’s argument in this regard should also be rejected by the Court.

In the present case, the Board failed to properly make the comparison between the level of severity and symptomatology associated with his service-connected psoriasis. R-9-10. The Board concluded “that all the symptomatology and impairment caused by the Veteran’s service-connected psoriasis are specifically contemplated by the schedular rating criteria, and no referral for extraschedular consideration is required.” R-10. This conclusory statement cannot withstand scrutiny.

To that end, the Veteran’s psoriasis is rated non-compensable prior to July 17, 2007. R-3. The Board looked at the criteria under diagnostic code 7816. R-9-10. The criteria for the ratings under that diagnostic code are limited to the percentage of

affected areas of the skin and types of drug treatment. 38 C.F.R. § 4.118 (2016) (diagnostic code 7816). Nowhere in diagnostic code 7816 do the criteria contemplate constant itching, shedding, or crusting. *Id.* Moreover, nowhere in the Board's extraschedular analysis does the Board address the Veteran's constant itching, shedding, and crusting. R-9-10.

The Board's analysis was conclusory, and a bare conclusory statement that the claimant's disorder is not so unusual or exceptional as to render impractical the application of the regular rating standards is not an adequate statement of reasons or bases for determining the need for an extraschedular referral. *See Kuppamala v. McDonald*, 27 Vet.App. 447, 455 (2015); *Johnston v. Brown*, 10 Vet.App. 80, 86 (1997). As the Board did not consider the foregoing residuals in its extraschedular analysis its statement of reasons or bases is inadequate. The Secretary's argument to the contrary should be rejected by the Court.

### CONCLUSION

For these reasons, along with those presented in his opening brief, Mr. Gonzalez respectfully requests the Court vacate the Board's decision. The Court should remand the appeal with an instruction for the Board to readjudicate the

Veteran's claim under a correct interpretation of the law, and to provide adequate reasons or bases for its decision.

Respectfully submitted,  
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