

REPLY BRIEF OF APPELLANT

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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

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15-4436

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ELMER D. CATLIN

Appellant

v.

ROBERT A. MCDONALD  
SECRETARY OF VETERANS AFFAIRS,

Appellee.

BUCK N. HADDIX  
CHISHOLM CHISHOLM & KILPATRICK  
One Turks Head Place, Suite 1100  
Providence, Rhode Island 02903  
(401) 331-6300  
(401) 421-3185 Facsimile  
Attorney for Appellant

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## APPELLANT'S REPLY ARGUMENT

**The Board failed to explain how Mr. Catlin's continued painful motion throughout the appeal period reflected an improvement in his ability to function under the ordinary conditions of life and work.**

The Secretary does not dispute that the Board was required to adequately consider Mr. Catlin's painful motion in determining that a rating reduction for his service-connected right shoulder disability was warranted. *See* Sec. Brief at 6-7. The Secretary contends that "the Board's discussion of range of motion did include a discussion of functional limitation due to pain, in addition to the Board's explicit mentions of Appellant's continued shoulder pain." *Id.* at 6. The Board only discussed Mr. Catlin's functional loss due to painful motion in terms of his "near full range of motion." R-7. However, Mr. Catlin was previously granted a 20 percent rating for his right shoulder disability based on "objective evidence of painful motion," which is not limited to range of motion testing results. R-575 (567-71, 574-79); *see* Apa. Brief at 6. Rather than focus on Mr. Catlin's range of motion measurements, the Board was required to review the entire history of his disability, in order to determine whether an "improvement actually reflects an improvement in the veteran's ability to function under the ordinary conditions of life and work." *Brown v. Brown*, 5 Vet.App. 413, 420-21 (1993) (citing 38 C.F.R. §§ 4.1, 4.2 (2016)); *see* Apa. Brief at 5-7.

The RO previously relied on the February 2007 VA examiner's findings of Mr. Catlin's functional limitations when it granted him a 20 percent rating in 2008, and his May 2010 VA examination demonstrates the continued severity of his pain, which

limited his ability to work. *See* R-514-18; R-575; R-616-25; Apa. Brief at 6. During both examinations, Mr. Catlin continued to exhibit a constant pain level of nearly 7 out of 10, and both examiners noted his inability to reach overhead, extend and crawl without pain or instability. *See* R-515-16; R-617; R-622; Apa. Brief at 6. The Board failed to discuss whether objective evidence of the continuation of Mr. Catlin's painful motion reflected an improvement in his ability to function under the ordinary conditions of life and work, when it merely noted his "near full range of motion in his right shoulder." R-7; *see* Apa. Brief at 6-7.

The Secretary "disagrees with Appellant's characterization" of the foregoing evidence. Sec. Brief at 9. However, it is unclear why the Secretary avers that Mr. Catlin mischaracterized the evidence, given that the Secretary concedes that the February 2007 VA examiner "noted that [Mr. Catlin] 'should avoid using ladders, overhead reaching[,] and crawling[']'" and the "May 2010 VA examination report did state that Appellant had '[r]ight shoulder pain and decreased [range of motion] with overhead extension and crawling in tight spaces.'" *Id.* Moreover, the Secretary provides no explanation for his argument that "[t]he Board, however, discussed these findings," and offered only a general citation to the Board's decision for his argument. *Id.* The Board did not include the foregoing evidence in its recitation of the facts or analysis, and failed to provide any rationale for how the continuation of Mr. Catlin's painful motion, such as his inability to reach overhead, extend and crawl without pain

or instability, factored into its analysis, other than noting that he “demonstrated near full range of motion.” R-7.

The Secretary further points to private treatment records in support of the Board’s finding that “the medical evidence reflects the Veteran’s service-connected right shoulder disability significantly improved following his surgery in March 2009.” R-7; *see* Sec. Brief at 10-11. First, the Secretary refers to a May 2010 treatment note regarding Mr. Catlin’s one year follow-up with his private physician, which the Board does not discuss. *See* R-7; Sec. Brief at 10; *see also* R-459. The Secretary’s argument that the May 2010 treatment note supported the Board’s finding is merely a post hoc rationalization. It is for the Board to decide the facts in the instant case, not for the Secretary in his brief to the Court. *See Martin v. Occupational Safety & Health Review Comm’n*, 499 U.S. 144, 146 (1991) (holding that litigating positions are not entitled to judicial deference when they are merely counsel’s “post hoc rationalizations” for agency action and are advanced for the first time on appeal); *Wanless v. Principi*, 18 Vet.App. 337, 343 (2004) (Steinberg J., concurring) (stating that the “Court’s role is to review whether the Board in its decision, rather than the Secretary in his brief, provided an adequate statement of reasons or bases”). Nothing the Secretary now argues corrects the Board’s prejudicial errors.

Second, the Board’s reliance on a different private treatment note that Mr. Catlin’s condition was “much improved” after his surgery is irrelevant in a rating reduction case, unless “the improvement actually reflects an improvement in the

veteran's ability to function under the ordinary conditions of life and work." *See* R-7; R-660 (657-61); *Brown*, 5 Vet.App. at 421; Apa. Brief at 6-7. The Board failed to reconcile VA examination findings that Mr. Catlin continued to demonstrate an inability to reach overhead, extend and crawl without pain or instability, with its determination that "his reviewing medical professionals have consistently noted his condition was improved." *See* 38 C.F.R. § 4.2 ("It is the responsibility of the rating specialist to interpret reports of examination in the light of the whole recorded history, reconciling the various reports into a consistent picture so that the current rating may accurately reflect the elements of disability present."); *see* R-7; Apa. Brief at 6-7. Moreover, the Secretary acknowledges the Board's notation that Mr. Catlin "continued to experience painful motion after surgery." R-7; *see* Sec. Brief at 7. The Board's reliance on the private physician's conclusion that Mr. Catlin's condition improved does not relieve it of its responsibility to evaluate his disability "in relation to its history," which includes explaining how the continuation of his painful motion factored into its analysis. 38 C.F.R. § 4.1; *see* Apa. Brief at 7.

The only other basis for the Board's decision is its finding that "[t]he medical evidence does not suggest [Mr. Catlin] was not able to raise his arm above shoulder level at any point during the period on appeal." R-7. A discussion of the relevant evidence in the context of the rating schedule is inapposite in a rating reduction case. *See Brown*, 5 Vet.App. at 421 ("This is a rating reduction case, not a rating increase case."); Apa. Brief at 7-8. The burden is on the Secretary to show that a reduction is

warranted by a preponderance of evidence. *Brown*, 5 Vet.App. at 421; *see* Apa. Brief at 7; *see also* Sec. Brief at 5. The Secretary maintains that the Board did not conflate the standards for a rating reduction and a rating increase. Sec. Brief at 7-8. Even if the Board did not place the burden on Mr. Catlin to demonstrate that his condition warranted a rating in excess of 10 percent, the Secretary failed to demonstrate that the Board met its burden in a rating reduction case. The Board primarily relied on Mr. Catlin's "near full range of motion," without addressing the continuation of his pain level and inability to reach overhead, extend and crawl without pain or instability, which are noted in both the May 2010 and February 2007 VA examinations. *See supra* at 1-2; Apa. Brief at 6-7. Given that the RO previously granted Mr. Catlin a 20 percent rating based on "objective evidence of painful motion," which is not limited to range of motion testing results, the Board did not support its determination by a preponderance of the evidence. *See* R-575.

The Board's reduction of a disability rating without regard to the law is *void ab initio*. *See Schafrath v. Derwinski*, 1 Vet.App. 589, 595 (1991); *see also Kitchens v. Brown*, 7 Vet.App. 320, 325 (1995); Apa. Brief at 8. Mr. Catlin respectfully requests that the Court order reinstatement of his prior rating. *See Schafrath*, 1 Vet.App. at 595. In the alternative, the Board's decision should be vacated and the appeal remanded, in order for the Board to adjudicate Mr. Catlin's claim consistently with applicable law.

## CONCLUSION

Based on the foregoing reasons, as well as the arguments set forth in Mr. Catlin's opening brief, he respectfully requests the Court to find the Board's decision that reduced his disability rating *void ab initio* and to remand his claim in order to restore his prior rating. In the alternative, Mr. Catlin requests the Court to vacate the Board's decision and remand his claim, with instructions for the Board to adjudicate the propriety of the rating reduction consistently with applicable law.

Respectfully submitted,

Elmer D. Catlin,  
By His Representatives,  
CHISHOLM CHISHOLM & KILPATRICK

/s/ Buck N. Haddix

Buck N. Haddix  
Chisholm Chisholm & Kilpatrick  
One Turks Head Place, Ste. 1100  
Providence, Rhode Island 02903  
(401) 331-6300 (Telephone)  
(401) 421-3185 (Facsimile)