MOTION DENIED

For the Panel
August 26, 2020

Amanda L. Meredith
Judge

IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

PAUL G. WAIT, Appellant,	)	
v.	)	Vet. App. No. 18-4349
ROBERT L. WILKIE, Secretary of Veterans Affairs, Appellee.	)	

APPELLANT'S MOTION FOR THE COURT TO TAKE JUDICIAL NOTICE OF THE SECRETARY'S CONCESSION

Pursuant to U.S. Vet.App. Rule 27, Appellant moves the Court to take judicial notice of the Secretary's apparent concession that VA regulations recognize pain as a form of functional impairment.

In this case, the Appellant argued that VA's rating regulations contemplate the level of functional impairment of earning capacity necessary to establish a disability under *Saunders*, such that reference to these regulations is sufficient to show that a veteran's pain and its resulting effects constitutes a disability for VA purposes. *Saunders v. Wilkie*, 886 F.3d 1356, 1364 (Fed. Cir. 2018); *see* Appellant's Opening Br. at 8-11; Appellant's Reply Br. at 1-7; Appellant's Mot. for Panel at 1-5 (filed Nov. 1, 2019); Appellant's Resp. to Appellee's Resp. to Court Order (filed Feb. 18, 2019).

During oral argument, Counsel for the Secretary acknowledged that the "diagnostic codes and VA's rating schedule . . . might be instructive and there might be indications that certain manifestations might suggest functional impairment of

earning capacity," but contended that they do not "establish functional impairment of earning capacity as a matter of law." *Wait v. Wilkie*, Oral Argument at 30.42-31:10 (June 23, 2020); *see also* Appellee's Resp. to Court Order at 3-4, 12.

However, at the oral argument in *Martinez-Bodon v. Wilkie* (Docket No. 18-3721), Counsel for the Secretary conceded that in *Saunders*, the Federal Circuit "recognized that there is a unique relationship between pain and the Secretary's . . . regulations as far as the rating criteria and the schedule and pointed out the fact that the regulations actually treat pain as functional impairment in several regulations." *Martinez-Bodon v. Wilkie*, Oral argument at 34:06-34:34 (July 7, 2020). Although the Secretary "would not concede that *Saunders* can necessarily be applied to every other potential disability or impairment or condition that may be raised by a veteran," Oral argument at 34:40-34:55, Counsel for the Secretary also said: "As the [Federal Circuit in *Saunders*] discussed in its analysis, pain has a unique relationship with the regulations as far as VA's disability rating regulations treat pain as a form of functional impairment." *Martinez-Bodon*, Oral argument at 39:39-39:55.

This Court may "take judicial notice of the Secretary's contrary positions" in different cases. *Correia v. McDonald*, 28 Vet.App. 158, 163, n.3 (2016) (citing *Smith v. Derwinski*, 1 Vet.App. 235, 238 (1991) and *Brannon v. Derwinski*, 1 Vet.App 314, 316-17 (1991)). By agreeing that VA's disability regulations treat pain as functional impairment, the Secretary undercuts his contention that a claimant must point to something other than the regulations to demonstrate functional impairment due to

pain. *Compare Martinez-Bodon*, Oral argument at 34:06-34:34, 39:39-39:55 *with Wait*, Oral Argument at 30.42- 31:10; Appellee's Resp. to Court Order at 3-4, 12. Therefore, in rendering its decision in Mr. Wait's case, the Court may take judicial notice of the Secretary's concessions in *Martinez-Bodon*. *See Correia*, 28 Vet.App. at 163, n.3.

Wherefore, Appellant respectfully requests this Court to take judicial notice of the Secretary's concession that VA regulations recognize pain as functional impairment.

Counsel for Appellee is opposed to the granting of this motion and reserves the right to respond in writing.

Respectfully submitted,

/s/ *Alec Saxe*
Alec Saxe

/s/ *Alyse Galoski*
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