SUPPLEMENTAL REPLY BRIEF OF APPELLANT

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

20-6259

JOE N. BRADDY, JR.,

Appellant

v.

DENIS McDONOUGH,
SECRETARY OF VETERANS AFFAIRS,

Appellee.

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APPELLANT'S REPLY TO APPELLEE'S SUPPLEMENTAL BRIEF

I. VA violated the Veteran's right to fair process when it failed to provide him with reasonable notice and opportunity to respond to the proper legal basis for the denial of his increased rating claim.

In the VA claims adjudication system, "the importance of systemic fairness and the appearance of fairness carries great weight." *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998); *see also Frantzis v. McDonough*, No. 20-5236, 2022 WL 2208386, *12 (June 21, 2022) (Jaquith, J., dissenting) (discussing the origins of the fair process doctrine). "[T]he relationship between the veteran and the government is non-adversarial and pro-claimant," *Jaquay v. Principi*, 304 F.3d 1267, 1282 (Fed. Cir. 2002), and "by law and regulation, [the system] is designed to be a partnership between the appellant and the Agency," *Bryant v. Wilkie*, 33 Vet.App. 43, 48 (2020). Therefore, "even in situations where no particular procedural process is required by statute or regulation, . . . additional process . . . is implicitly required when 'viewed against [the] underlying concepts of procedural regularity and basic fair play' of the VA benefits adjudicatory system." *Smith v. Wilkie*, 32 Vet.App. 332, 339 (2020).

These principles require that VA ensure fair process by informing claimants of the proper legal basis for its benefits decision and providing an opportunity to respond. *Roberts v. McDonald*, 27 Vet.App. 108, 112 (2014); *Smith*, 32 Vet.App. at 339. Failure to do so violates the fair process doctrine. *Roberts*, 27 Vet.App. at 112; *Smith*, 32 Vet.App. at 339.

Here, neither the RO nor the Board complied with this requirement. VA's first notice to the Veteran that the severance of service connection precluded the award of an increased rating from 2009 to 2017 was the Board's July 21, 2020 decision. In that decision,

the Board explained that "the claim must be denied as a matter of law" under 38 C.F.R. § 3.400(o)(1) (2021). R-12. By that time, however, the deadline for the Veteran to perfect his appeal of the severance decision had passed. *See* R-921 (Nov. 2018 letter transmitting severance SOC); 38 U.S.C. § 7105(d)(3) (2017) (providing a deadline of 60 days from the SOC to file a substantive appeal). As a result, the Veteran did not have a reasonable opportunity to respond by perfecting his appeal of the severance decision.

VA did not provide the Veteran with reasonable notice of the impact of section 3.400(o)(1) in the December 2016 severance proposal or the March 2017 severance decision. R-1476-84; R-1487-97. Those decisions informed him that as a result of the severance, "there will be no evaluation for service connected conditions." R-1484; R-1497. This nonsensical sentence did not reasonably notify the Veteran, a "lay person[]unskilled in the nuances of the law," *Smith*, 32 Vet.App. at 338, that the severance precluded a retroactive increased rating "as a matter of law" under section 3.400(o)(1), R-12.

VA also failed to provide reasonable notice of the effect of the severance in the March 2017 SSOC. R-1463-75. Although it recited 38 C.F.R. § 3.400(o)(1), R-1469, R-1472, it told the Veteran that a higher rating could not be granted because he did not meet the criteria for a 20 percent rating under 38 C.F.R. § 4.71a, DC 5003 or DC 5260, R-1472. This violated the fair process duty to explain the proper legal basis for the denial of an increased rating because the proper basis was section 3.400(o)(1), not section 4.71a. *See Roberts*, 27 Vet.App. 112.

The March 2017 SSOC also violated the then-extant regulatory duty to "inform the appellant of any material changes in, or additions to, the information included in the

Statement of the Case." 38 C.F.R. § 19.31(a) (2017); *see also* 38 C.F.R. § 19.29(b) (2017) (requiring that an SOC include a "discussion of how [] laws and regulations affect the [RO's] determination."); *see also Roberts*, 27 Vet.App. at 112. Obviously, the December 2012 SOC did not discuss how section 3.400(o)(1) affected the RO's denial of the increased rating claim, because the severance had not yet occurred. *See* R-2574-2606. But neither did the March 2017 SSOC—it just recited the regulation, without any explanation as to how it applied. R-1469; R-1472.

The March 2017 SSOC violated the fair process doctrine for another reason—it misled the Veteran to reasonably believe that he could secure a higher rating based on the evidence. *Smith*, 32 Vet.App. at 388; R-1472. "[W]hen VA's actions reasonably—but mistakenly—lead a claimant to conclude" something that is not true, the process is not fair. *Id.* And a veteran need not show VA misconduct to show that he or she was harmed by VA's misleading information. *Bailey v. West*, 160 F.3d 1360, 1365 (Fed. Cir. 1998).

The Board compounded this fair process error by eliciting testimony from Mr. Braddy about his left knee symptoms—evidence that is relevant only to whether he was potentially eligible for a higher rating and, therefore, relevant only if the severance did not remain intact. *See* R-1115-19. This included testimony about how his left knee interfered with his ability to work, even though under section 3.400(o)(1), a TDIU award based in any part on the knee was impossible. R-1120. By eliciting this testimony without providing any notice that the severance of service connection would preclude a higher rating as a matter of law, the Board member failed to provide reasonable notice of the legal basis for the denial of an increased rating, *see Roberts*, 27 Vet.App. 112, failed to comply with its regulatory duty to

explain the issues, 38 C.F.R. § 3.103(c)(2) (2017), and misled the Veteran into reasonably believing that he could still be awarded a higher rating for the pre-severance period, *see Smith*, 32 Vet.App. at 337. All three are fair process violations.

Nothing in the remand order that followed the Board's elicitation of testimony on the merits informed Mr. Braddy that he would be barred as matter of law from receiving a higher rating for the pre-severance period if the severance remained intact. R-1050-56. It explained that the increased rating claim and severance issue were "intertwined," but it did not explain that this was because the severance precluded an increased rating as a matter of law. R-1053. The Board also remanded TDIU as intertwined with the increased left knee rating but offered no explanation that TDIU based on the knee would be precluded as a matter of law unless the Veteran perfected his appeal and the severance was reversed. R-1054. If anything, the remand order further muddied the waters by ordering the RO to obtain a March 2016 VA examination report—evidence that would be relevant only if the severance was reversed. R-1053.

The Secretary maintains that because neither the RO nor the Board *affirmatively* suggested that the Veteran could be awarded an increased rating or TDIU if the severance stayed intact, the process was fair. Secretary's Br. at 19. He misunderstands that VA need not *affirmatively* mislead the Veteran to violate fair process. In *Roberts*, VA failed to ensure fair process not because it affirmatively told the claimant that she could collect both survivors benefit plan payments and DIC benefits, but because it failed to inform her of the proper legal authority for the recoupment of the DIC benefits. 27 Vet.App. 112. The Court should reject the Secretary's suggestion here that Mr. Braddy was required to somehow

divine from the RO's and the Board's confusing and misleading actions that he was required to perfect his appeal of the severance to protect his entitlement to an increased rating or TDIU. *See* Secretary's Supp. Br. at 19-20.

And under *Smith*, the question is whether VA's actions misled the Veteran to *reasonably believe* something untrue. *See* 32 Vet.App. at 338; *see also Bailey*, 160 F.3d at 1365. This is because "the particular relationship between veterans and the government" is meant to be "paternalistic." *Bailey*, 160 F.3d at 1365. So here, the question is whether VA gave the Veteran the *impression* that he could still receive an increased rating or TDIU, and not whether it affirmatively told him so. *See Smith*, 32 Vet.App. at 338.

The Secretary agrees that "the Board may have, at times, remained silent on the issue" of the relationship between the severance and the increased rating and TDIU. Secretary's Supp. Br. at 19-20. It is that very silence that infringed on the Veteran's right to fair process. The appearance of fairness is paramount in VA's claims adjudication system. *Hodge*, 155 F.3d at 1362. And it appears unfair that VA and the Board could fail to disclose that the severance precluded the award of a higher rating regardless of the evidence—and in fact mislead the Veteran to reasonably believe that additional evidence could establish a higher rating regardless of the severance—until he could no longer perfect his appeal of the severance decision. In these circumstances, the fair process doctrine demands more than silence. After all, the VA claim adjudication process "by law and regulation, is designed to be a partnership between the appellant and the Agency." *Bryant*, 33 Vet.App. at 48.

The Secretary contends that the Veteran "was presumed to have knowledge of th[e] interplay [between the severance and the increased rating claim] because he is presumed to

have knowledge of VA regulations." Secretary's Supp. Br. at 18 (citing *Morris v. Derwinski*, 1 Vet.App. 260, 265 (1991)). But the Court has made clear that "unsophisticated claimants cannot be presumed to know the law." *Ingram v. Nicholson*, 21 Vet.App. 232, 256 (2007). It is because "lay persons [are] unskilled in the nuances of the law" that VA must ensure that it does not even give claimants a mistaken *impression*. *Smith*, 32 Vet.App. at 338.

Morris—the case upon which the Secretary relies—is inapposite. Secretary's Supp. Br. at 18. There, the Court found that VA's letters to the veteran adequately notified him that his claims were subject to abandonment under 38 C.F.R. § 3.158(a) (1991). *Morris*, 1 Vet.App. at 265. But here, as argued above, neither the RO nor the Board adequately explained the relationship between the severance and the increased rating claim—in fact, they misled him into believing that an increased rating based on the evidence could be awarded notwithstanding the severance. The Secretary's reliance on dictum in *Morris* is therefore misplaced. *See* Secretary's Supp. Br. at 18; 1 Vet.App. at 265.

Turning to Mr. Braddy's October 2019 VA Form 21-8940, the Secretary argues that the Veteran's request for TDIU based in part on his left knee disability "does not necessarily indicate that Appellant misunderstood anything" about his claims. Secretary's Supp. Br. at 15. To the contrary, the Form 21-8940 shows that VA did not reasonably notify him that he could not be awarded TDIU based on his left knee. R-354. As the Secretary notes, the Veteran also listed his back condition on the form, yet he has never been awarded service connection for that condition. *Id.*; Secretary's Supp. Br. at 15. This shows that the Veteran, a "lay person[] unskilled in the nuances of the law," *Smith*, 32 Vet.App. at 338, was

unfamiliar with VA rules and was susceptible to being "lulled [] into accepting and relying upon" VA's insufficient and incorrect notices, *Bailey*, 160 F.3d at 1365.

The Secretary next argues that Mr. Braddy was afforded fair process because the November 2018 SOC told him he must file a substantive appeal to continue his appeal of the severance decision. Secretary's Supp. Br. at 15. But, like the adjudicative documents before it, the November 2018 SOC did not include a clear discussion of the severance's impact on the increased rating and TDIU issues. R-921-46. In fact, there was *no* mention of the pending increased rating claim. *See id.*; R-1053. So the Secretary's reliance on the November 2018 SOC should fail. *See* Secretary's Supp. Br. at 15.

In the same vein, the Secretary's argument that the Veteran "received reasonable notice and opportunity to appeal the severance of service connection before a decision was issued on his request for an increased rating" is incorrect. Secretary's Supp. Br. at 16. The earliest VA provided reasonable notice of the impact of section 3.400(o)(1) was in the Board's July 2020 decision, when it was too late for him to perfect his appeal of the severance decision. R-12. As a result, the Veteran did not have a reasonable opportunity to appeal the severance because he could not make an informed decision as to *whether* to complete his appeal during the allowable time. *See* R-921 (Nov. 2018 letter transmitting severance SOC); 38 U.S.C. § 7105(d)(3) (2017) (providing a deadline of 60 days from the SOC to file a substantive appeal). The Court should therefore reject the Secretary's argument that VA ensured fair process.

II. VA's failure to ensure fair process can be remedied by a holding that the Board waived the substantive appeal requirement in the Veteran's appeal of the severance decision. Alternatively, the time to submit a substantive appeal should be tolled until VA provides adequate notice of the proper legal basis for the denial of the increased rating claim.

The Board had jurisdiction over the Veteran's appeal of the 2017 rating decision severing service connection because he filed a timely notice of disagreement. *See* R-1107-09; R-1470-84. It is the notice of disagreement alone that gives the Board jurisdiction over a claim. *See Rowell v. Principi*, 4 Vet.App. 9, 17-18 (1993). However, the Board never adjudicated the propriety of the severance because the Veteran did not perfect his Legacy appeal. R-11; *see* R-921-46; 38 U.S.C. § 7105(d)(3) (2017).

The substantive appeal requirement was merely a claim-processing rule, immaterial to the Board's ability to adjudicate the propriety of the severance. *See Gomez v. Principi*, 17 Vet.App. 369, 372 (2003). "[F]ailure to file a timely [substantive appeal] does not automatically foreclose an appeal, render a claim final, or deprive the BVA of jurisdiction." *Rowell*, 4 Vet.App. at 17; *see also* 38 U.S.C. § 7105(d)(3) (2018). It is therefore a claim-processing requirement—it does not "create or withdraw jurisdiction." *Hall v. McDonough*, 34 Vet.App. 329, 331 (2021).

This Court should hold that, as a result of VA's fair process violations, the Board waived the right to demand compliance with the non-jurisdictional substantive appeal requirement in this case. Claim-processing rules such as the substantive appeal requirement may be waived when VA fails to provide a claimant fair process. *Beyrle v. Brown*, 9 Vet.App. 24, 28 (1996) (holding that VA waived the substantive appeal requirement); *see also Percy v. Shinseki*, 23 Vet.App. 37, 47 (2009) (holding that VA waived any objection to the adequacy

of the substantive appeal). In *Percy*, VA waived the 60-day period to file a substantive appeal when it treated the veteran's claim as timely filed. 23 Vet.App. at 46. Because the veterans' benefits claims adjudication system was intended to be pro-claimant and not "a stratagem to deny compensation to a veteran who has a decent claim," the Court ruled that "[i]f VA treats an appeal as if it is timely filed, a veteran is entitled to expect that VA means what it says." *Id.*; *see also Beyrle*, 9 Vet.App. at 28.

Similarly, here, VA waived any objection to the substantive appeal requirement when it failed to ensure fair process. Failing to disclose the proper legal basis for the denial of the rating and misleading the Veteran to reasonably believe that he could obtain a retroactive higher rating regardless of the severance is just as contrary to the pro-claimant VA adjudication system as treating an appeal as timely filed and then dismissing the claim. *See Percy*, 23 Vet.App. 46-47; *Beyrle*, 9 Vet.App. at 28. Accordingly, just as the Board waived the right to enforce the substantive appeal requirement in *Beyrle*, it waived the right to enforce the substantive appeal requirement here as to the appeal of the severance decision. *See* 9 Vet.App. at 28. Remand is required for the Board to adjudicate the propriety of the severance—a matter that was brought before the Board by the Veteran's August 2017 notice of disagreement. R-1107-09; *Rowell*, 4 Vet.App. at 17-18.

Alternatively, the Court should hold that the 60-day period for submitting the substantive appeal is tolled until VA adequately notifies the Veteran of the relationship between the severance and the increased rating claim and that he must submit a substantive appeal to protect to the availability of an increased rating. As a claim-processing rule, the 60-day period may be equitably tolled. *Hunt v. Nicholson*, 20 Vet.App. 519, 524 (2006). And

equitable tolling is warranted when VA misleads a claimant, "[g]iven the particular relationship between veterans and the government." *Bailey*, 160 F.3d at 1365. This is true even when "there is no suggestion of misconduct" by VA. *Id.* But because VA has not yet provided the Veteran with adequate notice of the relationship between the severance and the increased rating claim and provided him with an opportunity to respond, the 60-day period should be tolled until VA does so. *See Checo v. Shinseki*, 748 F.3d 1373, 1380 (Fed. Cir. 2014) (holding that the "stop-clock" approach applies to suspending the relevant time limitation). Remand is required for the Board to ensure that the Veteran is afforded this process.

CONCLUSION

VA failed to disclose the proper legal basis for the denial of the Veteran's increased rating claim until it was too late for him to perfect his appeal of the severance. In fact, it misled him to reasonably believe that he could still prove entitlement to a higher rating. As a result, the Board waived the right to enforce the substantive appeal requirement as to the severance decision or, alternatively, the time to comply with that requirement should be tolled.

Respectfully submitted,

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