REPLY BRIEF OF APPELLANT

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

21-4881

TINA L. LUCKETT

Appellant,

v.

DENIS MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS,

Appellee.

April Donahower
Chisholm Chisholm & Kilpatrick
321 S Main St #200
Providence, Rhode Island 02903
(401) 331-6300
(401) 421-3185 (facsimile)
Counsel for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Regulations

Record Before the Agency ("R") Citations

APPELLANT'S REPLY ARGUMENTS

I. The Secretary's argument that diagnostic code 7610 precludes a separate rating for urinary frequency is contrary to the unambiguous meaning of 38 C.F.R. § 4.116 (2022) and the duty to maximize benefits.

The Secretary counters Ms. Luckett's argument that the Board erred in not addressing her entitlement to a separate rating for urinary frequency by invoking the rule against pyramiding. Sec. Br. at 6-14; *see* App. Br. at 11-18. He argues that a rating under diagnostic code 7610 is assigned based on "the frequency and effectiveness of treatment" and not "specific symptoms." Sec. Br. at 9. As a result, he argues, the DC contemplates "any and all symptoms" of a disease or injury of the vulva or clitoris that are "treated through . . . treatment for" that disease or injury. *Id.* at 8-9; *see* 38 C.F.R. § 4.116 (2022). In Ms. Luckett's case, he argues, DC 7610 contemplates her urinary frequency and precludes a separate rating because the Board and the October 2019 examiner found that urinary frequency was "treated congruently with[] her vulvovaginitis." Sec. Br. at 11.

The Secretary's argument that "the continuity and effectiveness of *treatment*" determines whether DC 7610 contemplates a given *symptom* puts the proverbial cart before the horse. Sec. Br. at 9. The plain text of the DC and the structure of the general formula for rating diseases and injuries of the female reproductive organs defeat this argument. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) (explaining that to determine whether a regulation's meaning is clear, "a court must carefully consider[ ] [its] text, structure, history, and purpose"). These show that DC 7610 contemplates "Symptoms" of "Vulva or clitoris, disease or injury of (including vulvovaginitis)." 38 C.F.R. § 4.116. DC 7610 is encompassed within the "General Rating Formula for Disease, Injury, or Adhesions of Female

Reproductive Organs" and provides a rating for "Vulva or clitoris, disease or injury of (including vulvovaginitis)." *Id.* Under the general formula, a rating is assigned based on whether "Symptoms" require and are controlled by continuous treatment. *Id.*

The first question, then, is whether a person has a disease or injury of the female reproductive organ(s) of the vulva and/or clitoris, including vulvovaginitis. *Id.* The next question is whether a person has "Symptoms" of that disease or injury. *Id.* It is only *after* these two questions have been answered in the affirmative that the continuity and effectiveness of treatment matter for purposes of assigning a rating under DC 7610. *Id.*; *cf.* Sec. Br. at 9. If there are no "Symptoms" of a disease or injury of the vulva or clitoris, then treatment is irrelevant. 38 C.F.R. § 4.116.

The Secretary appears to claim that the regulation's "history[] and purpose" show that the continuity and effectiveness of treatment for urinary frequency determine whether a rating under DC 7610 contemplates it and precludes a separate rating. Sec. Br. at 9. He is mistaken. The 1995 amendment of section 4.116 shows that determining what DC 7610 contemplates focuses on the nature of the symptom. VA explained when finalizing the amendment that it would retain separate sections of the rating schedule for genitourinary and gynecological conditions because "in females . . . the genital tract is independent of the urinary tract and is the focus of the separate specialty of gynecology," and "[c]ombining these systems would be contrary to a major focus of the current revision, which is to bring the rating schedule in line with current medical practice." Schedule for Rating Disabilities; Gynecological Conditions and Disorders of the Breast, Final Rule, 60 Fed. Reg. 19851, 19583 (Apr. 21, 1995). Accordingly, and as Ms. Luckett pointed out, section 4.116 houses

DCs for gynecological conditions, while 38 C.F.R. § 4.115a (2022) provides ratings for dysfunctions of the genitourinary system including urinary frequency. App. Br. at 15.

This further shows that in determining whether DC 7610 contemplates a symptom, the question is the nature of the symptom—for example, whether it indicates a gynecological or a genitourinary condition—and not the continuity and effectiveness of its treatment. The text, structure, history, and purpose of section 4.116 should defeat the Secretary's argument that any symptom that is continuously and effectively treated along with vulvovaginitis is contemplated by DC 7610 and ineligible for a separate rating. Sec. Br. at 9, 11.

Moreover, the Secretary's interpretation of DC 7610 is inconsistent with VA's duty to maximize benefits. "VA must render decisions that grant every benefit the law supports and 'exhaust all schedular alternatives for rating a disability,' including rating a single disability under multiple DCs." *Walleman v. McDonough*, 35 Vet.App. 294, 306 (2022) (footnote omitted) (quoting *Morgan v. Wilkie*, 31 Vet.App. 162, 164 (2019)). "[E]ntitlement to a separate evaluation in a given case depends on whether the manifestations of disability for which a separate evaluation is being sought have already been compensated by an assigned evaluation under a different DC." *Lyles v. Shulkin*, 29 Vet.App. 107, 109 (2017).

Here, it is undisputed that there are manifestations of Ms. Luckett's service-connected vulvovaginitis apart from urinary frequency that support evaluation under DC 7610. Sec. Br. at 11; R-9. VA has a duty to maximize Ms. Luckett's benefits by assigning a separate rating for her urinary frequency under section 4.115a in addition to her rating under DC 7610. The fact that the urinary frequency is treated with other symptoms of the service-connected vulvovaginitis notwithstanding, it is a separate and distinct manifestation of

disability for which she is entitled to an evaluation under section 4.115a. *Lyles*, 29 Vet.App. at 109; *Esteban v. Brown*, 6 Vet.App. 259, 261 (1994).

The Secretary's reading of DC 7610 is broad in its implications. Sec. Br. at 9. There seemingly is no limiting principle. Take, for example, a veteran who suffers from vaginal pain and other symptoms because of service-connected vulvovaginitis and who develops tension headaches as a result. If the headaches are separately rated under DC 8100—as they should be according to VA's duty to maximize—then they can be evaluated as up to 50 percent disabling. *See* 38 C.F.R. § 4.124a, DC 8100 (2022). And they must be rated without regard to the ameliorative effects of medication. *McCarroll v. McDonald*, 28 Vet.App. 267, 271 (2016); *see* 38 C.F.R. § 4.124a, DC 8100.

Under the Secretary's interpretation, though, if the veteran's clinician prescribes an oral analgesic for both the vaginal pain and the headaches, the headaches are "treated through her treatment for vulvovaginitis." Sec. Br. at 9. According to the Secretary's interpretation of DC 7610, the headaches are contemplated by the veteran's rating under DC 7610, and additional compensation is precluded. *Id.* As a result, so long as the prescribed analgesic is effective, she cannot obtain an evaluation higher than 10 percent for the headaches, regardless of their frequency or severity. *Compare* 38 C.F.R. § 4.116, DC 7610 *with* 38 C.F.R. § 4.124a, DC 8100.

The Court should reject the Secretary's interpretation of DC 7610 because it is contrary to the text, structure, history, and purpose of section 4.116. *Kisor*, 139 S. Ct. at 2415. If the Court disagrees that section 4.116 is unambiguous, the Secretary has forfeited an argument that his interpretation is entitled to deference. Sec. Br. at 9 (arguing that the

meaning of DC 7610 is "clear"); *see Ray v. Wilkie*, 31 Vet.App. 58, 69 (2019) (noting that "deference [is] a waivable argument"). Deference is nonetheless unwarranted because the Secretary's exceedingly broad and benefit-minimizing interpretation of the regulation is contrary to the duty to maximize benefits and exceeds "the bounds of reasonable interpretation," as the example above shows. *Kisor*, 139 S. Ct. at 2416.

After rejecting the Secretary's misplaced focus on treatment, the Court should hold that DC 7610 allows a separate rating for urinary frequency. This Court recently rejected the argument that a DC that does not refer to specific symptoms contemplates all symptoms and precludes a separate rating under the rule against pyramiding. In *Walleman*, 35 Vet.App. 294, the Secretary argued that the DC for "symptomatic" meniscectomy residuals (5259) contemplates knee instability when it is a residual of a meniscectomy and therefore precludes a separate rating under the DC for instability (5257), *id.* at 300. *See* 38 C.F.R. § 4.71a (2022).

The Court relied on "the broad, general language" of DC 5259 to reject that argument. *Walleman*, 35 Vet.App. at 304. Because DC 5259 "does not identify (or exclude for that matter) any specific symptoms," the Court explained, "[n]othing in the plain language of DC 5259 . . . enumerate[s] any specific symptoms that are necessary to support a rating under DC 5259." *Id.* The Court declined to "change [the] regulation in the way the Secretary's interpretation functionally asked [it] to do." *Id.*

The Court also determined that "the nature of the rating schedule compels the conclusion that DC 5257 is the appropriate vehicle by which to evaluate lateral instability" even if it is a symptom of a meniscectomy. *Id.* It explained that "it is most appropriate to rate a condition using a DC in which the condition is specifically listed, rather than rate the

condition under a general, non-specific provision." *Id.* Because DC 5257 provides compensation for the specific condition of lateral instability, it is inappropriate to rate instability under DC 5259, even if it is the only residual of a meniscectomy. *Id.*

The Court should hold that DC 7610 permits a separate rating for urinary frequency for the same reasons. Like DC 5259, DC 7610 does not specify what symptoms are necessary to support a rating. *See* 38 C.F.R. § 4.116. Accordingly, it cannot be read to preclude rating urinary frequency under a different DC. *See Walleman*, 35 Vet.App. at 304. And because urinary frequency is specifically listed elsewhere in the rating schedule, *see* 38 C.F.R. § 4.115a, it should be rated there and not by analogy to a disease or injury of the vulva or clitoris. *See Walleman*, 35 Vet.App. at 304; *see also* App. Br. at 18.

The Secretary misapprehends the significance in this case of the rule against rating a listed condition by analogy. *See* Sec. Br. at 12 (citing *Copeland v. McDonald*, 27 Vet.App. 333, 337 (2015)). It is not that "vulvovaginitis . . . is specifically contemplated by DC 7610," *id.*, because Ms. Luckett is not arguing that the Board should have rated that listed *condition* by analogy under a different DC. Rather, it is that the *symptom* of urinary frequency is specifically contemplated by section 4.115a, so it is inappropriate to rate it by analogy under DC 7610 instead. *See Walleman*, 35 Vet.App. at 304.

The Secretary misplaces reliance on *Holmes v. Wilkie*, 33 Vet.App. 67 (2020), to argue that DC 7610 broadly precludes separately rating distinct manifestations of vulvovaginitis. *See* Sec. Br. at 8-9. The DC at issue there, DC 8100, is distinguishable from DC 7610. The *Holmes* Court determined that because DC 8100 refers to "migraine[s]," and because a migraine is more than just head pain, compensation for migraine "attacks" under DC 8100

contemplates all the manifestations of a migraine attack and precludes separate ratings for individual migraine symptoms other than head pain, 33 Vet.App. at 73. Unlike DC 8100, DC 7610 provides compensation for "symptoms" of any disease or injury of the vulva or clitoris, and not "attacks" of one specified condition. *Compare* 38 C.F.R. § 4.116 *with* 38 C.F.R. § 4.124a. It is more like the DC at issue in *Walleman*, DC 5259, whose general reference to symptoms does not preclude a separate rating for a symptom that is specifically listed elsewhere in the schedule. *Walleman*, 35 Vet.App. at 304.

The Secretary also misplaces reliance on *Doucette v. Shulkin*, 28 Vet.App. 366 (2017), as support for his capacious reading of DC 7610. Sec. Br. at 8. The Court in *Doucette* did not "hold[] that [the] rating criteria for hearing loss contemplates [sic] a *full range of symptomatology related to hearing loss* even though . . . symptoms are not listed." *Id.* (emphasis added). Instead, it stated that it could *not* conclude that the rating criteria for hearing loss contemplated "other functional effects, such as dizziness, vertigo, ear pain, etc.," because "the rating criteria do not . . . discuss, let alone account for" them. *Doucette*, 28 Vet.App. at 369. It held only that the criteria "contemplate the functional effects of decreased hearing and difficulty understanding speech." *Id.* The Secretary overreads *Doucette* in suggesting that it supports a reading of DC 7610 to contemplate "any and all symptoms" of vulvovaginitis. Sec. Br. at 8.

The Court should vacate the Board's denial of a higher rating and remand with instructions to determine the appropriate separate rating for Ms. Luckett's urinary frequency under section 4.115a. It is undisputed that Ms. Luckett's urinary frequency is a manifestation of her service-connected vulvovaginitis disability. Sec. Br. at 13; R-9. That distinguishes this case from *Rivera-Colon v. McDonough*, 35 Vet.App. 221 (2022), where the appellant had other

diagnoses to which his symptoms could be attributable, and the Board had not made a finding about whether his symptoms were attributed to his service-connected gastritis, so additional fact finding was required, *id.* at 230. As a matter of law, DC 7610 does not preclude a separate rating for urinary frequency. *See Walleman*, 35 Vet.App. at 304. And it is undisputed that there are other manifestations of Ms. Luckett's vulvovaginitis disability that independently support evaluation under DC 7610. Sec. Br. at 11; R-9.

Accordingly, Ms. Luckett is entitled to a separate rating for urinary frequency. *Walleman*, 35 Vet.App. at 307 (reversing the Board's determination that a separate rating was categorically precluded and remanding for the Board to assign the appropriate rating); *Lyles*, 29 Vet.App. at 121; *see* Appellant's Br. at 15-16. There is no need for further Board fact-finding, including on whether urinary frequency is typical or exceptional, because Ms. Luckett's entitlement to a separate rating obviates an extra-schedular analysis. *See Morgan*, 31 Vet.App. at 168; *cf. Rivera-Colon*, 35 Vet.App. at 230-31 (remanding for additional reasons or bases because VA had not defined what the usual and typical symptoms of gastritis are, nor had the Board explained its implicit finding that Mr. Rivera-Colon's gastritis symptoms were not exceptional).

II. The Secretary's argument that a compensable rating under DC 7610 requires continuous symptoms is contrary to the unambiguous meaning of section 4.116.

It is undisputed that Ms. Luckett "gets vaginal yeast infections at least 2 to 3 times a year for which she uses Monistat." R-533; *see* App. Br. at 20; Sec. Br. at 16. It is undisputed that Ms. Luckett's use of over-the-counter medication qualifies as "treatment" under DC 7610. R-9; *see* App. Br. at 23; Sec. Br. at 17. And it is undisputed that she requires treatment

for the duration of each recurrence of her vulvovaginitis. R-9; R-346; R-533; *see* App. Br. at 20; Sec. Br. at 17.

Continuing to misplace his focus on treatment, the Secretary reads DC 7610 to preclude a compensable rating for recurrent vulvovaginitis. Sec. Br. at 16. He argues that "[t]he very definition of . . . recurrent . . . is contradictory to 'continuous' as used under DC 7610." *Id.* That is because "[s]omething cannot be simultaneously 'repeated or periodically reappearing as opposed to . . . constantly present' while also being 'marked by uninterrupted extension in space, time, or sequence.'" *Id.* (cleaned up). Because Ms. Luckett's "vulvovaginitis was marked by clear interruptions in space, time, and sequence," he argues, it cannot "require continuous treatment" within the meaning of the regulation. *Id.*

The Secretary's interpretation is contrary to the unambiguous meaning of the regulation, as shown by its text, structure, and history. *Kisor*, 139 S. Ct. at 2415. He argues that vulvovaginitis "cannot be simultaneously [recurrent] while also being [continuous]." Sec. Br. at 16. But there is no requirement of continuous vulvovaginitis symptoms in the criteria for a 10 percent rating. 38 C.F.R. § 4.116.

Because of his misplaced focus on treatment, the Secretary fails to recognize that the adjective "continuous" in the criteria does not modify both "symptoms" and "treatment." *Compare id. with* Sec. Br. at 16. A 10 percent rating is warranted for "Symptoms that require continuous treatment," and a 30 percent rating is warranted for "Symptoms not controlled by continuous treatment." *See* 38 C.F.R. § 4.116. The first question, then, is whether there are symptoms. *Id.* The second is whether the symptoms require treatment. *Id.* The third is whether the treatment must be continuous when symptoms are present. *Id.* And the fourth

is whether the continuous treatment controls the symptoms. *Id.* At no point does the regulation ask whether symptoms are continuous. *See id.*

The Court should reject the Secretary's attempt to read a requirement of continuous symptoms into the regulation. *Ortiz-Valles v. McDonald*, 28 Vet.App. 65, 71 (2016) (declaring that "[t]he Secretary cannot simply add restrictions to a regulation where they do not exist"). The regulation plainly does not require continuous symptoms of vulvovaginitis. *See* 38 C.F.R. § 4.116. As a result, it provides for a higher rating if symptoms "require continuous treatment" when they *are* present, even if they are not *always* present. *Id.* If a recurrent condition requires continuous treatment during each recurrence, then it can meet the criteria for a compensable rating. And if that treatment does not control symptoms during a recurrence, a higher 30 percent rating is warranted. *See* 38 C.F.R. § 4.116.

This is supported by the structure of the general rating formula. *Kisor*, 139 S. Ct. at 2415. The touchstone for assigning a compensable rating under the general formula is whether "symptoms" require "continuous treatment," and not whether the underlying "disease or injury" named in each DC requires continuous treatment. 38 C.F.R. § 4.116. This recognizes the possibility that a disease or injury may not always be symptomatic and yet requires continuous treatment when it is.

The Secretary is mistaken that a reading of the DC contrary to his interpretation "would result in . . . *any* treatment [being] considered continuous, even if used only once," and "a noncompensable rating could only be assigned when . . . symptoms . . . *never* require[] treatment." Sec. Br. at 15, 18 (emphases added). Even though the regulation does not require constant symptoms, the requirement of "continuous" treatment still imposes a

duration requirement that differentiates between the noncompensable and 10 percent ratings. 38 C.F.R. § 4.116; *see Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("[A] [regulation] ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant."). Symptoms can be so fleeting and intermittent that they require treatment but not "continuous" treatment. *See* 38 C.F.R. § 4.116. Reading the regulation not to require continuous symptoms does not, therefore, make the requirement of "continuous treatment" superfluous.

If the Court determines that section 4.116 is ambiguous, the Secretary's interpretation nonetheless falls outside the "bounds of permissible interpretation." *Kisor*, 139 S. Ct. at 2416. He argues the gynecological conditions DBQ shows that a recurrent condition cannot meet the criteria for a compensable rating because an examiner is not prompted to opine on whether symptoms require continuous treatment unless symptoms exist at the time of examination. Sec. Br. at 22-23; *see Gill v. Shinseki*, 26 Vet.App. 386, 388 (2013) (noting the Secretary's argument for deference based on a DBQ); R-729-30 (Oct. 2019 DBQ). But the text and structure of the regulation show that the Secretary knew how to modify "Symptoms" with "continuous" if he wished to do so. 38 C.F.R. § 4.116; *see Kisor*, 139 S.Ct. at 2416 (explaining that text and structure "establish the outer bounds of permissible interpretation"). He chose to modify "treatment" but not "Symptoms" in this way. 38 C.F.R. § 4.116. He should not be permitted to add a continuity requirement to "Symptoms" now, in the guise of a deference argument.

The Secretary also argues that if treatment eliminates symptoms, the treatment cannot be "continuous" and therefore cannot support a compensable rating under DC 7610. Sec.

Br. at 18. Rather, "the only rational interpretation of the 10% rating criteria is that when treating the symptoms continuously, symptoms are [only] controlled [and] not eliminated." *Id.* On the contrary, the regulation plainly does not require "continuous symptoms that require continuous treatment" or "symptoms despite continuous treatment." *Compare id. with* 38 C.F.R. § 4.116. The Secretary's interpretation once again seeks to add to the regulation a requirement of continuous symptoms. That is the thrust of his argument that to obtain a compensable rating, "when treating the symptoms continuously, symptoms [must] . . . not [be] eliminated." Sec. Br. at 18. If symptoms are "not eliminated" despite the required continuous treatment, then the symptoms are continuous. *Id.* But a 10 percent rating only requires "Symptoms that require continuous treatment." 38 C.F.R. § 4.116.

The history and purpose of the rule also show that a 10 percent rating does not require the continued presence of symptoms despite treatment. *Cf.* Sec. Br. at 18. In the final rule, VA explained, "A person who requires continuous treatment is more disabled than one who does not, and one who *has* symptoms *despite continuous treatment* is even more impaired. . . . Our method of evaluating . . . these conditions . . . assigns those who *have* symptoms *despite treatment* the *highest* level of evaluation . . . ." Schedule for Rating Disabilities; Gynecological Conditions and Disorders of the Breast, Final Rule, 60 Fed. Reg. at 19583 (emphases added). This clearly contemplates eligibility for a 10 percent rating when a person does *not* "have symptoms despite treatment." *Id.* The Court should reject the Secretary's attempt to add this requirement. *Ortiz-Valles*, 28 Vet.App. at 71.

The Secretary's defense of the Board's denial of a higher rating under DC 7610 is based on a misinterpretation of the regulation, and the Court should reject it. What is more,

the Secretary's argument fails on factual grounds. It erroneously assumes that Ms. Luckett's "symptoms resolve after treatment." Sec. Br. at 18. On the contrary, the August 2020 examiner noted that Ms. Luckett's problems had *worsened* "despite treatments," including "several creams and medications." R-2260. This suggests that Ms. Luckett's symptoms are not controlled by medication and that she is entitled to a 30 percent rating. App. Br. at 26.

III. The Secretary's defense of the Board's reliance on the examination reports to find that Ms. Luckett's symptoms did not require continuous treatment is based on his misinterpretation of the regulation and misreading of the record.

The Board found that the private and VA examiners "ma[d]e explicit findings that the Veteran's symptoms [did] not require continuous treatment." R-10. As Ms. Luckett argued in her opening brief, the Board's finding was incorrect because the examiners either did not make that finding or did not consider over-the-counter treatment. App. Br. at 20-24; R-533; R-729-30.

The Secretary's defense of the Board's finding is largely based on his misinterpretation of section 4.116 to condition a compensable rating on the continuous presence of symptoms. He argues that any evidence in the examination reports that Ms. Luckett did not currently have symptoms is evidence that she did not have continuous symptoms and thus evidence that her symptoms did not require "continuous treatment." *See* Sec. Br. at 18, 19, 20; *see also id.* at 21 (Oct. 2013 examination), 22-24 (Oct. 2019 examination), 26 (Mar. 2020 examination), 27-28 (Aug. 2020 examination); R-184; R-538; R-729-30; R-2260. As argued above, the Court should reject his attempt to add a requirement of continuous symptoms to the regulation.

The Court should reject the Secretary's other defenses of the Board's reliance on the

examination reports to find that Ms. Luckett did not require continuous treatment. Although the Secretary claims that the October 2019 and March 2020 examiners' accounts of Ms. Luckett's history of treatment for her symptoms were full and accurate, he does not and cannot point to where the examiners discussed her reports of over-the-counter treatment, which—the Secretary agrees—the Board implicitly found credible. Sec. Br. at 20, 24, 25-26; *see* App. Br. at 23, 24-25; R-9; R-330-33; R-346; R-729-30. Accordingly, the reports were inadequate for purposes of determining whether her symptoms required continuous treatment. *Miller v. Wilkie*, 32 Vet.App. 249, 260 (2020). The Secretary does not explain how an examiner's "presumed" but silent consideration of Ms. Luckett's treatment history could adequately inform the Board. Sec. Br. at 27.

The record belies the Secretary's argument that the Board's prior and more recent findings about the adequacy of the October 2019 examiner's discussion of Ms. Luckett's treatment are reconcilable. Sec. Br. at 24-25. He claims the Board in its prior remand only found that the examiner did not discuss the treatment of symptoms Ms. Luckett reported *after* the examination. *Id.* But the symptoms the Board mentioned are identical to those the examiner had noted. *Compare* R-729 *with* R-702.

Finally, the Secretary disputes whether several examiners discussed treatment for uterine fibroids and not vulvovaginitis. *Id.* at 23, 27-28; *see* App. Br. at 21-22, 25-27. Nonetheless, he has not shown that any examiner made an explicit, adequately supported finding that her vulvovaginitis symptoms did not require continuous treatment.

The Court should reject the Secretary's argument that the Board had a plausible basis for finding that the examiners made "explicit findings that the Veteran's symptoms do not

require continuous treatment," R-10. Sec. Br. at 29. But for the Board's error, it could have granted a compensable rating based on Ms. Luckett's competent reports that her symptoms required continuous treatment during recurrences and even worsened despite treatment. App. Br. at 26-28. The Court should vacate the Board's denial of a compensable rating and remand for a legally and factually correct readjudication.

CONCLUSION

There is no dispute that the Board did not consider whether Ms. Luckett is entitled to a separate rating for her urinary frequency. The Secretary's argument that this was not error is contrary to the plain language of section 4.116 and to his duty to maximize benefits. The Secretary's argument that Ms. Luckett was unentitled to a compensable rating under DC 7610 also is contrary to the regulation's plain language, which unambiguously does not require continuous symptoms.

The Court should reject the Secretary's arguments and hold that the Board erred in denying a separate or higher rating for Ms. Luckett's recurrent vulvovaginitis. Because the undisputed facts show entitlement to a separate rating, the Court should direct the Board to determine the appropriate rating under section 4.115a. The Court should additionally direct the Board to determine whether a higher rating is also warranted.

Respectfully submitted,

/s/ April Donahower
April Donahower
Chisholm Chisholm & Kilpatrick Ltd
321 S Main St #200
Providence, RI 02903
(401) 331-6300
(401) 421-3185 (facsimile)
Counsel for Appellant