IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

KENNETH R. DODD
Appellant,

v.

ROBERT L. WILKIE
Secretary of Veterans Affairs,
Appellee.

ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS

BRIEF OF APPELLEE SECRETARY OF VETERANS AFFAIRS

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IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

KENNETH R. DODD,	)	
	)	
Appellant	)	
	)	
v.	)	Vet.App. No. 17-1350
	)	
ROBERT L. WILKIE, Secretary of Veterans Affairs	)	
	)	
Appellee	)	

ON APPEAL FROM
THE BOARD OF VETERANS' APPEALS

BRIEF OF APPELLEE
SECRETARY OF VETERANS AFFAIRS

ISSUE PRESENTED

I. Should the Court remand the January 26, 2017, Board of Veterans' Appeals (Board) Decision that denied Appellant entitlement to an initial disability rating in excess of 10% for sinusitis post rupture of the sphenoid artery?

STATEMENT OF THE CASE

Nature of the Case

Appellant, Kenneth R. Dodd, appeals the January 26, 2017, Board decision that denied entitlement to an initial disability rating in excess of 10% for sinusitis post rupture of the sphenoid artery. [R. at 1–10]. The Court should remand the Board's decision.

Statement of Relevant Facts

Appellant served on active duty from September 1985 to August 2008. [R. at 928]. In September 2008, a VA regional office granted service connection for "chronic sinusitis status post endoscopic sinus surgery with polypectomy and status post rupture of sphenoid artery with subsequent surgical repair and no recurrence," and assigned a 10% rating. [R. at 866–870]; [R. at 891 (880–892)]. Appellant disagreed with his rating and asserted that he had more than three incapacitating episodes of sinusitis per year. [R. at 855 (855–857)].

Appellant underwent a VA examination in April 2010. [R. at 781–791]. The examiner noted that Appellant had four non-incapacitating episodes of sinusitis, lasting 7 to 14 days, with symptoms of purulent drainage and sinus pain. *Id.* at 782.

VA provided Appellant a Statement of the Case in June 2010 which continued the 10% rating. [R. at 751–766]. In response, Appellant requested an

extension to obtain additional evidence from his treating ENT specialist.[1] [R. at 741]. VA provided Appellant a Supplemental Statement of the Case (SSOC) in May 2012. [R. at 698–703].

Appellant appeared at a second VA examination in July 2012. [R. at 676–689]. The examiner diagnosed Appellant with chronic sinusitis, and declined to diagnose him with rhinitis. *Id.* at 676, 679. Appellant reported that his "ENT does not want him to consider additional surgery because of the complications he had in the past with sphenoid artery bleeding." *Id.* at 678. The examiner noted Appellant's symptoms as headaches, pain and tenderness, and purulent discharge or crusting, and that his episodes had required antibiotics. *Id.* at 680. The examiner noted that Appellant had 1 non-incapacitating episode of sinusitis in the past 12 months, and no incapacitating episodes of sinusitis requiring prolonged (4 to 6 weeks) of antibiotics treatment. *Id.*

VA provided Appellant another SSOC in August 2012. [R. at 663–668]. In a VA Form 9, Appellant stated he had been receiving weekly allergy shots; that his nose was congested and crusty on waking up; that he could not take time off of work; and that his ENT, Dr. K., stated he was no longer a candidate for sinus surgery. [R. at 643]. In June 2012, the Board remanded Appellant's case to obtain private medical records from Dr. K. [R. at 637 (633–640)].

[1] VA accepted this submission "in lieu of" a Form 9. [R. at 697].

VA provided Appellant an SSOC in May 2013 and the Board remanded Appellant's claim in May 2014 so that he could undergo a new VA examination. [R. at 550–554]; [R. at 564–572].

Appellant underwent a third VA examination in October 2014. [R. at 139–145]. The examiner diagnosed Appellant with chronic sinusitis and declined to diagnose him with rhinitis. *Id.* at 139–140. Appellant reported having a sinus infection every other month, "about 5-6 times per year usually requiring antibiotics." *Id.* at 140. He also reported that he "hasn't missed any work since 2013." *Id.* The examiner noted Appellant's symptoms as headaches, pain, tenderness, purulent discharge and crusting. *Id.* at 141.

Based on this examination, the examiner opined that Appellant had six non-incapacitating episodes of sinusitis per year, and no episodes of incapacitating sinusitis. *Id.* at 141. He explained that "the veteran's own description is that he states he has '5' or '6' episodes per year and describes episodes that are clearly non-incapacitating." *Id.* at 214. The examiner also noted a history of endoscopic surgery in 2005 and that Appellant did not have radical surgery (open sinus surgery). [R. at 141 (139–145)].

VA provided Appellant an SSOC in October 2014, and in March 2015, the Board denied an initial rating in excess of 10% for chronic sinusitis. [R. at 116–129]; [R. at 102–11]. Appellant appealed to this Court, where the parties agreed to a Joint Motion for Remand in December 2015. [R. at 95–100].

In February 2016, the Board remanded Appellant's claim and directed that the AOJ obtain outstanding private treatment records. [R. at 79–82]. In response to a February 2016 Veterans Claims Assistance Act (VCAA) letter, Appellant faxed records to the VA Claims Intake Center in Janesville, WI. [R. at 35–64]. VA provided another SSOC in June 2016. [R. at 17–32]. And on January 26, 2017, the Board denied Appellant entitlement to an initial disability rating in excess of 10% for Appellant's sinusitis. [R. at 1–10].

ARGUMENT

A. The Court should remand the January 26, 2017, Board decision that denied entitlement to an initial disability rating in excess of 10% for sinusitis post rupture of the sphenoid artery.

The Secretary agrees with Appellant that the Court should vacate and remand the Board's decision because the Board failed to address whether VA substantially complied with the Board's February 2016 Remand Order. [R. at 81 (78–82)]; *see Stegall v. West*, 11 Vet.App. 268, 271 (1998); *see also Donnellan v. Shinseki*, 24 Vet.App. 167, 176 (2010).

In December 2015, the parties agreed to remand Appellant's case to the Board to discuss whether VA satisfied the duty to assist in light of the October 2014 VA examiner's reference to private treatment notes from January 2014, June 2014, and August 2014. [R. at 97 (95–99)]; [R. at 139 (139–145)]. In February 2016, the Board requested that the AOJ "[u]ndertake reasonable efforts" to obtain these records and associate them with Appellant's claim's file.

[R. at 81 (78–82)]. VA then provided Appellant a VCAA letter requesting that he either complete and return VA authorization forms or place an enclosed cover sheet on top of any information or documents submitted in response to the letter. [R. at 65–71]. In response, Appellant faxed private treatment to the Janesville, WI VA Claims Intake Center. [R. at 35–64].

The heading on the last page of the fax submission indicates: "P.030/066". *Id.* at 64. This note appears to show that only 30 of 66 pages were received by VA. The agency, however, appears to have made no follow-up request to Appellant. "Reasonable efforts" generally include an initial request and at least one follow-up request for the records, unless a response to the initial request indicates that the records do not exist or that a follow-up request would be futile. 38 C.F.R. § 3.159(c)(1). The Board, however, did not address whether VA's efforts substantially complied with its February 2016 remand order and therefore satisfied VA's duty to assist. *See* [R. at 1–10]; [R. at 81 (78–82)].

Therefore remand is warranted for the Board to address whether VA substantially complied with the February 2016 remand order requesting that it undertake reasonable efforts to obtain Appellant's private treatment records. *See Stegall*, 11 Vet.App. at 271; *Schafrath v. Derwinski*, 1 Vet.App. 589, 593 (1991); 38 U.S.C. 7104(d)(1).

B. Because the Secretary has identified a basis for a full remand, the Court should decline to address any alleged reasons-or-bases error.

In addition to a *Stegall* error, Appellant also asserts that the Board committed several reasons-or-bases errors regarding Appellant's sinusitis claim. *See* Appellant's Br. at 13–21. However, as the Secretary has already identified a clear basis for remand for the only issue on appeal, the Court should decline to address Appellant's assertions of error. *See Best v. Principi*, 15 Vet.App. 18, 19–20 (2001) (per curiam order) (noting that a "narrow decision preserves for the appellant an opportunity to argue those claimed errors before the Board" and before the Court if the Board rules against him); *see also Dunn v. West*, 11 Vet.App. 462, 467 (1998) (remand of appellant's claim under one theory moots remaining theories raised on appeal). On remand, Appellant is free to submit additional evidence and argument to the Board, including the specific arguments raised here on appeal, and the Board would be required to consider and respond to Appellant's argument. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002).

C. The Board adequately explained why Appellant's sinusitis did not warrant a rating in excess of 10%.

Notwithstanding, Appellant's various reasons-or-bases arguments amount to little more than disagreement with his assigned rating or the criteria in the General Rating Formula for Sinusitis, and he fails to explain why his disability would warrant a rating higher than 10%. *See Hilkert v. West*, 12 Vet.App. 145, 151 (1999); *see also* 38 U.S.C. § 5107(a) (a claimant has the responsibility to present a support a claim for benefits). Appellant currently receives a 10% for his sinusitis under 38 C.F.R. § 4.97, Diagnostic Code 6514. The General Rating

Formula for Sinusitis instructs raters to assign a 10% rating where a claimant has:

> One or two incapacitating episodes per year of sinusitis requiring prolonged (lasting four to six weeks) antibiotic treatment, or; three to six non-incapacitating episodes per year of sinusitis characterized by headaches, pain, and purulent discharge or crusting.

Id.

To warrant a 30% rating, a claimant must have: "[t]hree or more incapacitating episodes per year of sinusitis requiring prolonged (lasting four to six weeks) antibiotic treatment, or; more than six non-incapacitating episodes per year of sinusitis characterized by headaches, pain, and purulent discharge or crusting." *Id.*

The Board found that "the rating criteria contemplate [Appellant's] disability." [R. at 7 (1-10)]. The Board explained that Appellant's "sinusitis is manifested by no more than six non-incapacitating episodes of sinusitis with symptoms including headaches, pain, purulent discharge, and crusting" all of which were "contemplated in the contemplated criteria." *Id.* The Board also explained that Appellant had not "described other functional effects that are 'exceptional' or not otherwise contemplated by the assigned evaluation." *Id.*

Appellant argues that the Board overlooked various lay reports of symptoms which he believes would either warrant an increased rating or an extraschedular evaluation. *See* Appellant's Br. at 13–19. First, Appellant's correct in noting the Board considered his statements that his nose was

"congested and crusted just about every morning" in its May 2014 remand order. Appellant's Br. at 15; [R. at 551 (550–554)]. Based on these statements, the Board found that his symptoms "may have worsened" and accordingly scheduled a new VA examination. *Id.*

Accounting for Appellant's reported symptoms, the October 2014 examiner found that Appellant had 5 to 6 non-incapacitating episodes of sinusitis per year. [R. at 144 (139–145)]. This fits squarely within the 10% criteria. 38 C.F.R. § 4.97, DC 6514 ("three to six non-incapacitating episodes per year of sinusitis characterized by headaches, pain, and purulent discharge or crusting"). The examiner explained that Appellant's "own description is that he states he has '5' or '6' episodes per year, and that "there is no indication of more than 3-6 episodes per year at any time in recent years, either based on [Appellant's] own history provided to [him] or the medical records." [R. at 144 (139–145)]. Based on Appellant's reports, the examiner identified Appellant's symptoms as headaches, pain, tenderness, purulent discharge, and crusting. *Id.* at 141. No law or regulation requires the Board to list out every one of Appellant's statements and explain why it is or is not relevant—the Board is presumed to have considered the record evidence. *See Newhouse v. Nicholson*, 497 F.3d 1298, 1302 (Fed. Cir. 2007); *Gonzales v. West*, 218 F.3d 1378, 1381 (Fed. Cir. 2000).

Second, Appellant fails to show how his symptoms qualify as "exceptional or unusual," so as to render impractical the rating criteria in 38 C.F.R. § 4.97. 38 C.F.R. 3.321(b)(1). Generally, the degrees of disability provided in the rating schedule are adequate to compensate for a claimant's average impairment of earning capacity. 38 C.F.R. § 4.1 (the rating schedule "represents as far as can practicably be determined the average impairment in earning capacity resulting from such disease and injuries and their residual conditions in civil occupation").

Appellant reported during the July 2012 VA exam that his chronic sinusitis made him "feel tired", that he had headaches, an upset stomach, and a sore throat. [R. at 678 (676–689)]. He stated that sinus pressure build-up would cause difficulty breathing and often limit sleeping. *Id.* Simply because a claimant uses words that do not appear in the diagnostic code does not mean that an extraschedular rating is warranted—these reports appear to be manifestations of his sinusitis symptoms: headaches, pain, and purulent discharge or crusting. *See id.* at 680; *compare Doucette v. Shulkin*, 28 Vet.App 371, 372 (2017) (noting that manifestations of difficulty hearing or understanding speech were contemplated by the schedular rating criteria). Practically speaking, if a claimant's nose is blocked with discharge, it follows that he would have difficulty breathing, and in turn, have some trouble sleeping if he tried to breathe through his nose. *See* [R. at 678 (676–689)]. Appellant fails to explain how nausea is

unusual—the rating criteria contemplate the use of antibiotics and purulent[2] discharge—it would seem plausible that some bacteria or discharge would drain into his stomach and cause it to be upset. Appellant also did not report having difficulty concentrating during the July 2012 VA examination as he asserts in his brief. *See* Appellant's Br. at 17 (citing [R. at 678 (676–689)]. Appellant fails to show how these reports qualify as exceptional or unusual symptom of sinusitis, which is his burden to show. *See Hilkert*, 12 Vet.App. at 151; § 3.321(b)(1). In any event, the July 2012 VA examiner noted Appellant's symptoms as headaches, pain, and purulent discharge or crusting. [R. at 680 (676–689)]. He declined to note any other symptoms on examination. *Id.* On the most recent examination in October 2014, the examiner recorded Appellant's symptoms as headaches, pain, tenderness, purulent discharge and crusting, all of which are contemplated under DC 6514. [R. at 141 (139–145)]; C.F.R. § 4.97, DC 6514. The examiner declined to note any other symptoms. *Id.*

Moreover, that Appellant's ENT did "not want him to consider additional surgery" is neither a symptom nor a functional effect of his sinusitis. *See id.* at 678. Appellant fails to explain how this is fact is relevant to how his disability impacts his earning capacity. *See* 38 C.F.R. § 4.1; *see Hilkert*, 12 Vet.App. at 151.

[2] "Purulent" is defined as "pertaining to or consisting of pus." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1558 (32d ed. 2012).

Finally, the Court should find that this Court's holding in *Clemons v. Shinseki* has no application in Appellant's case. 23 Vet.App. 1, 5 (2009). In *Clemons*, the Court held that an initial claim for service connection must be "considered a claim for any . . . disability that may reasonably be encompassed by" the claim. *Id.* Once VA has granted entitlement to service connection for a disability, however, "a newly diagnosed disorder, whether or not medically related to a previously diagnosed disorder, cannot be the same claim when it has not been previously considered." *Ephraim v. Brown*, 82 F.33d 399, 401 (Fed. Cir. 1996); *see Boggs v. Peake*, 520 F.3d 1330, 1336 (Fed. Cir. 2008) ("[C]laims based on separate and distinct diagnosed diseases or injuries must be considered separate and distinct claims.").

Here, Appellant's service-connected sinusitis is a distinct, separately diagnosed condition from his non-service connected rhinitis. For example, Appellant's treating physician diagnosed allergic rhinitis and stated that it was "due to pollen" and separately diagnosed Appellant with chronic sinusitis. [R. at 41 (35–64)]. As such, the Board would be prohibited from considering rhinitis in determining whether Appellant was entitled to an increased rating for his sinusitis and *Clemons* would not apply. *See Boggs*, 520 F.3d at 1335–36. Moreover, there is no indication that Appellant intended to file a claim for service connection for rhinitis. "Although the Board must interpret a claimant's submissions broadly, the Board is not required to conjure up issues that were not raised by the

claimant." *Brokowski v. Shinseki*, 23 Vet.App. 79, 84–85 (2009). In his application for benefits, Appellant claimed service connection for chronic sinusitis. [R. at 937]. If Appellant believes he raised a claim for service connection for rhinitis, he should pursue the matter with the RO. *See DiCarlo v. Nicholson*, 20 Vet.App. 52, 56 (2006) (discussing the proper procedure for a claimant to pursue a claim he believes to be unadjudicated).

On the whole, the Court should find that Appellant's reasons-or-bases arguments amount to a disagreement with his assigned rating and hold that Appellant has failed to show any prejudicial error with Board's explanation of its findings. *See Hilkert*, 12 Vet.App. at 151; *Microsoft Corp. v. Biscotti, Inc.*, 878 F.3d 1052, 1072–73 (Fed Cir. 2017) (an appellate court should not duplicate the efforts of the factfinder below); *see also* 38 U.S.C. § 7261(b)(2) (requiring the Court to "take due account of the rule of prejudicial error"); *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) (holding the harmless-error analysis applies to the Court's review of Board decisions and that the burden is on the appellant to show that he suffered prejudice as a result of VA error).

The Secretary has limited his response to only those arguments raised by Appellant in his brief, and, as such, urges this Court to find that Appellant has abandoned all other arguments not specifically raised. *See Norvell v. Peake*, 22 Vet.App. 194, 201 (2008). The Secretary, however, does not concede any material issue that the Court may deem Appellant adequately raised and properly

preserved, but which the Secretary did not address, and requests the opportunity to address the same if the Court deems it necessary.

CONCLUSION

For the above reasons, the Secretary respectfully requests that this Court remand the January 26, 2017, Board decision.

Respectfully submitted,

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