**IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS**

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No. 17-1350

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**KENNETH R. DODD**,

Appellant,

v.

**ROBERT L. WILKIE**,

Secretary of Veterans Affairs,

Appellee.

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# APPELLANT'S REPLY BRIEF

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### I. The Board's failure to ensure substantial compliance with its February 2016 remand order requires remand.

In his principal brief, Appellant argued that the Board failed to ensure compliance with its February 2016 remand, which instructed VA to fulfill its duty to assist and undertake reasonable efforts to obtain certain private treatment records ("PTRs"). Appellant's Brief ("App. Br.") at 11-13, citing **R. 81 (79-82).** The record reflects that some of those PTRs remain outstanding. The Secretary agrees that the pertinent fax transmission indicates only 30 of 66 pages were received by VA and that VA appears not to have made any follow-up requests to Appellant. Secretary's Brief ("Sec. Br.") at 6, citing 38 C.F.R. § 3.159(c)(1). As the Secretary himself concedes, making "reasonable efforts" under VA's own regulation requires at least one follow-up request. *See* § 3.159(c)(1) ("Such reasonable efforts will generally consist of an initial request for the records and, if the records are not received, at least one follow-up request."). Therefore, while the Secretary states that remand is required for the Board to address whether there was substantial compliance, given his concessions that VA received an incomplete fax transmission and did not make *any* follow-up requests, the Court should find that the Board clearly erred in concluding that there was compliance with its February 2016 remand order to fulfill the duty to assist and remand for further development.

### II. The Board failed to provide an adequate statement of reasons or bases.

Despite the Secretary's contention that the Court should decline to address Appellant's remaining arguments because he has identified a basis for remand, this Court

has discretion to address errors in a Board decision to provide better guidance on remand. *See Quirin v. Shinseki*, 22 Vet. App. 390, 395 (2009) (noting the Federal Circuit's recognition of the need to address additional arguments, after the court determines that remand is necessary, in order to provide guidance to the lower tribunal), citing *Xerox Corp. v 3Com Corp.*, 458 F.3d 1310, 1314-15 (Fed. Cir. 2006). Given the particular nature of Appellant's case, including his specific symptomatology and the extraschedular and scope-of-claim issues, the Court should exercise its discretion and provide guidance to the Board.

*A. Relevant Evidence / Extraschedular Consideration*

Appellant next argued that the Board failed to address favorable evidence in determining whether a rating in excess of 10% for his sinusitis or referral for extraschedular consideration was warranted. *See* App. Br. at 14-16. First, he explained that the Board entirely failed to address the lay evidence of record, including his reports in his September 2012 substantive appeal of "recently experienc[ing] more sinus infections and notably, that his nose was 'congested and crusted just about every morning.'" App. Br. at 15, citing **R. 643.** In that same statement, Appellant noted that his physician had informed him he was no longer a candidate for sinus surgery due to the severing of his sphenoid artery in 2005 during his previous in-service sinus surgery. *See* App. Br. at 16.

The Secretary responds that the Board did not err because in a subsequent examination in October 2014, the examiner found that Appellant had 5 to 6 non-incapacitating episodes of sinusitis per year, taking into account his reports. *See* Sec. Br. at 9. He relies on the examiner's statement 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 . . . or the medical records." *Id*., citing **R. 144 (139-45).**

Appellant's report of increased sinus infections and symptoms just about every morning, however, came in September 2012 – two years *prior* to the October 2014 examination, allowing for a possible staged rating. *See* **R. 643**; *see Fenderson v. West*, 12 Vet. App. 119 (1999) (stating that staged ratings can be assigned for separate periods of time); *see also Hart v. Mansfield*, 21 Vet. App. 505 (2007). Indeed, the July 2012 VA examination reflects Appellant's report that his symptoms had been worse that year and that since his episode in April 2012, "he believes he never cleared after that episode" and "attributes *ongoing symptoms* to having not taken a prednisone pack with antibiotics in 4-2012." **R. 680 (676-89)** (emphasis added). In this context, two months later in September 2012, Appellant reported almost daily sinus symptoms, including congestion and crusting. *See* **R. 643.**

The Secretary argues that the October 2014 examination necessarily encompassed a consideration of Appellant's report of almost daily sinusitis symptoms in 2012, but the 10% and 30% rating criteria under DC 6514 contemplate a specified number of episodes *per year*. *See* 38 C.F.R. § 4.97, DC 6514 (providing for a 10% rating for one or two incapacitating episodes per year or three to six non-incapacitating episodes per year, and a 30% rating for three or more incapacitating episodes per year, or more than six non-incapacitating episodes per year). While Appellant may not meet the 50% rating criteria, which require near-constant sinusitis symptoms after repeated surgeries, his report of almost daily symptomatology in 2012 would appear to support an assignment of a 30%

rating for more than six non-incapacitating episodes per year, because severe symptomatology almost every morning is a lot more often than 5-6 times per year. *See id*.

In his September 2012 substantive appeal, Appellant requested a higher rating based on his sinusitis symptoms on an almost daily basis, noting the limitation that he could not undergo any additional surgery. *See* **R. 643.** The 50% rating evaluates the severity of the sinusitis by considering required surgery and subsequent symptoms – following radical surgery with chronic osteomyelitis, or "near constant sinusitis characterized by headaches, pain and tenderness of affected sinus, and purulent discharge or crusting after repeated surgeries." 38 C.F.R. § 4.97, DC 6514. While Appellant's inability to undergo surgery effectively forecloses him from consideration of a 50% rating, his report of almost daily sinus symptoms in 2012 would seem to place his condition above the disability level contemplated by the 30% rating criteria at the very least, rather than the 10% rating. *See* 38 C.F.R. § 4.7 ("Where there is a question as to which of two evaluations shall be applied, the higher evaluation will be assigned if the disability picture more nearly approximates the criteria for that rating."). Appellant maintains that the Board's failure to address the foregoing lay evidence of record in determining whether a higher rating was warranted for his sinusitis at any time during the appeal period warrants vacatur and remand.

Appellant next argued that the Board's statement of reasons or bases for denying referral for extraschedular consideration was inadequate given his reports of disturbed sleep, fatigue, difficulty concentrating, and upset stomach/nausea due to his sinusitis. *See* App. Br. at 17. The Secretary neither disputes that Appellant reported the foregoing symptoms associated with his sinusitis, nor points to where the Board addressed them in

its extraschedular discussion.[1] Instead, the Secretary provides his own post-hoc rationalization by asserting that these symptoms are contemplated by the rating criteria as manifestations of Appellant's sinusitis and are thus not "exceptional or unusual." Sec. Br. at 10 ("appear to be manifestations of his sinusitis symptoms: headaches, pain, and purulent discharge or crusting"). As an example, he argues that nausea is not "unusual" because it is a manifestation of and/or associated with the use of antibiotics and purulent discharge, which are contemplated by the rating criteria. *See* Sec. Br. at 11 ("[T]he rating criteria contemplate the use of antibiotics and purulent discharge – it would seem plausible that some bacteria or discharge would drain into his stomach and cause it to be upset"). Not only is this bald lay hypothesizing, but the issue of causation – that the use of antibiotics and purulent discharge may have led to Appellant's upset stomach/nausea – does not address how nausea, a separate symptom, is contemplated or addressed by the applicable rating criteria. *See Hyder v. Derwinski*, 1 Vet. App. 221, 225 (1991) ("Lay hypothesizing [by VA counsel], particularly in the absence of any supporting medical authority, serves no constructive purpose and cannot be considered by this Court.").

Insofar as the Secretary cites to *Doucette v. Shulkin*, 28 Vet. App. 366, 372 (2017), his reliance is misplaced. *See* Sec. Br. at 10. In *Doucette*, this Court focused on the rating criteria specifically for hearing loss, which is based on a mechanical application of

[1] While the Secretary is correct that Appellant did not report having difficulty concentrating at the July 2012 VA examination, Appellant noted this as a report in the March 2010 VA examination. *See* App. Br. at 19, citing **R. 783-84 (781-84)** (March 2010 VA examination, report of 2 weeks of time lost from work and finding significant effects on occupation, including decreased concentration and increased absenteeism); Sec. Br. at 11.

audiometric testing results to a rating table, and found that it contemplated the functional effects of difficulty hearing and understanding speech. *See Doucette*, 28 Vet. App. at 371. In doing so, however, the *Doucette* Court expressly recognized that it did "*not* suggest that the rating criteria contemplate *all* functional impairment due to a claimant's hearing loss." *Id*. Therefore, it acknowledged that where the record held evidence of additional symptoms, the Board was obligated to consider whether the rating criteria adequately contemplate those. *See id*. (explaining that a hearing loss claimant "could provide evidence of numerous symptoms, including – for purposes of example only – ear pain, dizziness, recurrent loss of balance . . . and the Board would be required to explain whether the rating criteria contemplate those functional effects"). In this respect, this Court has expressly found remand warranted for consideration of extraschedular referral based on symptoms that Appellant suffers here, including disturbed sleep and fatigue, in the context of a DC not explicitly listing those symptoms. *See Kuppamala v. McDonald*, 27 Vet. App. 447, 459 (2015) ("Neither the Director nor the Board addressed [appellant's] symptoms – including weight loss, loss of appetite, disturbed sleep, fatigue, memory and concentration problems, and low back and leg pain – that are part of his complete disability picture.").

The Secretary also responds that "[s]imply because a claimant uses words that do not appear in the diagnostic code does not mean that an extraschedular rating is warranted." Sec. Br. at 10. While the Secretary may be correct that an extraschedular rating would not be warranted *simply because* a word is not found within the applicable diagnostic code, he ignores that comparing the symptoms contemplated and not contemplated under the applicable DC is part of the required analysis pursuant to this Court's jurisprudence. *See*

*Yancy v. McDonald*, 27 Vet. App. 484, 494 (2016) ("This inquiry requires 'a comparison between the level of severity and symptomatology of the claimant's service-connected disability with the established criteria found in the rating schedule for that disability."), citing *Thun v. Peake*, 22 Vet. App. 111, 115 (2008). It is difficult to imagine how the Board or VA could determine whether Appellant's disability picture is adequately contemplated by the applicable criteria *without* noting the symptomatology contemplated by the criteria. *See id*. ("[I]f the criteria reasonably describe the claimant's disability level and symptomatology, then the claimant's disability picture is contemplated by the rating schedule. . ."). To the extent that the Secretary argues the July 2012 and October 2014 VA examiners only noted Appellant's symptoms as headaches, pain, tenderness, and purulent discharge or crusting, this does not relieve the Board of its duty to discuss material evidence favorable to Appellant in the record and provide adequate reasons for any rejection of such. *See* Sec. Br. at 11; *Wise v. Shinseki*, 26 Vet. App. 517, 524 (2014) (citing *Caluza v. Brown*, 7 Vet. App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table)). Neither does it excuse the Board's failure to address whether the *severity* of Appellant's symptomatology was contemplated by the applicable rating criteria. *See Yancy*, *supra*; *Spellers v. Wilkie*, No. 16-4053, 2018 U.S. App. Vet. Claims LEXIS 1201, *12 (Sep. 7, 2018) (reaffirming that "the second part of *Thun*'s first element requires that we consider whether the rating schedule contemplates the severity of those symptoms").

Despite the Secretary's attempt to remedy this deficiency, it was the Board's duty in the first instance to address whether Appellant's additional symptoms, including disturbed sleep, fatigue, difficulty concentrating, and upset stomach/nausea, made his

disability picture "exceptional or unusual." *See Martin v. OSHRC*, 499 U.S. 144, 156 (1991) ("'[L]itigating positions' are not entitled to deference when they are merely appellate counsel's 'post hoc rationalizations' for agency action advanced for the first time in the reviewing court."). Because it failed to do so here, Appellant maintains that vacatur and remand are warranted on this basis. *See* **R. 7 (1-10)**; *see also Washington v. Nicholson*, 19 Vet. App. 362, 366-67 (2005) (stating the Board has the duty to determine the credibility and probative weight of the evidence); *see also Hensley v. West*, 212 F.3d 1255, 1263 (Fed. Cir. 2000) (stating that "appellate tribunals are not appropriate fora for initial fact-finding").

*B. Clemons: Scope of Claim*

Appellant also argued that the Board's failure to address whether the scope of his initial claim encompassed rhinitis rendered its statement inadequate pursuant to *Clemons v. Shinseki*, 23 Vet. App. 1, 5 (2009). *See* App. Br. at 19-21. The Secretary contends that *Clemons* is not applicable to Appellant's case. *See* Sec. Br. at 12. Although acknowledging that 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, the Secretary argues that because service connection has been granted for sinusitis, a "'newly diagnosed disorder'" cannot be the same claim when it has not been previously considered. *Id*.

As support, the Secretary cites to *Ephraim v. Brown*, 82 F.3d 399 (Fed. Cir. 1996). Appellant's case is plainly distinguishable from *Ephraim*, however. In *Ephraim*, the appellant had already been service connected and rated for his depressive neurosis, and the appeal stemmed from a reduction of his rating by the RO. *See Ephraim*, 82 F.3d at 400.

During continuing proceedings following his notice of disagreement, the appellant was diagnosed with post-traumatic stress disorder ("PTSD"). *Id*. Thereafter, the appellant himself filed a disability claim that requested a rating for a nervous disorder with consideration of PTSD, and the RO noted receipt of his claim for service connection for PTSD. *See id*. In this context, the Federal Circuit explained that a newly diagnosed disorder cannot be the same claim when it *had not been previously considered* because "all or a significant element of that claim had not yet been diagnosed." *Id*. at 401-02. In *Boggs v. Peake*, 520 F.3d 1330 (Fed. Cir. 2008), the Federal Circuit found that the appellant's later-filed claim could not be denied simply because the differently diagnosed disease overlapped symptomatology with the disease denied in the prior claim. *Id*. at 1335-37.

In contrast, Appellant's rhinitis was not a newly diagnosed disorder following his service connection for sinusitis, nor did he ever file a claim for service connection for rhinitis separately thereafter. Appellant noted that his *service treatment records* had documented assessments of rhinitis interchangeably with sinusitis. *See* App. Br. at 20, citing **R. 521** (April 2004 STR), **537** (June 2002 STR). This evidence was considered as part of his *initial* claim for service connection, and after the Regional Office granted service connection for sinusitis in September 2008, Appellant submitted a duplicate copy of the June 2002 STR containing an assessment of rhinitis along with his notice of disagreement. *See* App. Br. at 20, citing **R. 851, 855-57, 880-92.** He has also requested consideration of the presence of polyps in evaluating his disability throughout his appeal, which appear among the rating criteria for rhinitis, not sinusitis. *See* App. Br. at 20, citing **R. 41, 603, 713-14, 801-02**; Sec. Br. at 12; 38 C.F.R. § 4.97.

Therefore, Appellant's case is distinguishable from that in *Ephraim* in all relevant respects – his appeal stems from an initial request for service connection, where the RO had considered, and he had submitted, evidence relating to the diagnosis of rhinitis in conjunction with his sinusitis and requested evaluation of his associated symptoms. While the Secretary asserts that there is no indication Appellant intended to file a claim for service connection for rhinitis, the basic acknowledgment in *Clemons* is that pro se claimants do not have the legal or medical knowledge at the time their claim is filed to narrow the scope of that claim or condition to a specific diagnosis. *See* App. Br. at 20, citing *Clemons*, 23 Vet. App. at 5 and *Ingram v. Nicholson*, 21 Vet. App. 232, 256 (2007). Thus, the Board has a duty to construe claims broadly and based on the reasonable expectations of the pro se veteran. *See* App. Br. at 21, citing *Clemons*, 23 Vet. App. at 5 ("Although the appellant's claim identified [a disability] without more, it cannot be a claim limited only to that diagnosis, but must rather be considered a claim for any [mental disability] that may reasonably be encompassed by several factors including . . . the symptoms the claimant describes; and the information the claimant submits or that the Secretary obtains in support of the claim."). Furthermore, Appellant's repeated submission of STRs about rhinitis in conjunction with his claim for sinusitis does tend to indicate that he also sought benefits for rhinitis, but merely lacked the legal or medical expertise to properly separate the two. Appellant's case falls squarely within those circumstances envisioned by *Clemons* and this Court's jurisprudence. Appellant maintains that the Board was obligated to address whether the scope of his claim encompassed rhinitis, and its failure to do so requires vacatur and remand based on more than the narrow issue conceded by the Secretary.

## CONCLUSION

For the reasons articulated above and in his principal brief, Appellant respectfully requests that the January 26, 2017, Board decision on appeal be reversed in part and vacated, and remanded for readjudication consistent with the points discussed in the briefs.

Respectfully submitted,

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October 4, 2018

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