IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

Vet. App. No. **18-6044**

ERIC C. ELDER
Appellant

v.

ROBERT L. WILKIE
Secretary of Veterans Affairs
Appellee

On Appeal From the Board of Veterans' Appeals

Brief of the Appellant Eric C. Elder

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Whether the Board failed to provide adequate reasons or bases for its denial of the Veteran's claim.

Whether the PHP and TDIU claims are inextricably intertwined with the Veteran's claim for viral meningoencephalitis.

Whether the Veteran was prejudiced by the VA's and the Board's failures.

STATEMENT OF THE CASE

A. JURISDICTION STATEMENT

The Court's jurisdiction in this matter is based on 38 U.S.C. § 7252.

B. NATURE OF THE CASE

Appellant, Eric C. Elder ("the Veteran" or "the Appellant"), is appealing a September 7, 2017 BVA decision which (1) denied his claim for clear and unmistakable error (CUE) in a 1976 rating decision that denied service connection for residuals of viral meningoencephalitis, (2) denied entitlement to an effective date prior to February 21, 2008 for the grant of service connection for panhypopituitarism (PHP) with hypothyroidism as residuals of viral meningoencephalitis, and (3) denied entitlement to an effective date prior to February 21, 2008 for the grant of service connection for total disability rating based on individual unemployability (TDIU) . R. at 3 (2-18).

FACTUAL BACKGROUND

The Appellant is a Vietnam and Gulf War Era veteran who served in the United States Air Force from June 20, 1966 to January 15, 1976, when he was honorably discharged from his first term of service. R. at 7023. The Veteran served a second term of service in the United States Air Force from July 10, 1979 to August 31, 1990, when he was honorably discharged. R. at 7022.

The Veteran's entrance examination was conducted on November 7, 1966 and contained no report of medical conditions subsequently claimed. R. at 6667 (6666-68). Additionally, his medical history and examination on April 23, 1969, prior to entering Officer Training School, contained no report of viral meningoencephalitis, PHP, or other disabling medical conditions. R. at 6875-76. On August 18, 1972, the Veteran was hospitalized and diagnosed with viral meningoencephalitis while enroute between duty stations. R. at 7016 (6997-7017). The Veteran was hospitalized for several days for the condition and was discharged on August 24, 1972 with prescribed medication, instructions to limit physical activity, and instructions to follow-up with a neurologist or internist when he arrived at his next duty station. R. at 7017 (6997-7017). The treating physician indicated that he will "most likely have no significant difficulty and that he will probably not need repeat lumbar punctures." *Id*. The physician did not state that the Veteran had fully recovered at the time of discharge, only that he was asymptomatic. *Id*. Additionally, the Veteran's skull radiography report from that period of hospitalization stated that "[t]he sella does not appear to be destroyed, although its size is prominent." R. at 7010 (6997-

7017). Subsequently, the Veteran was diagnosed by MRI with empty sella syndrome in 2007 and he was hospitalized for adrenal crisis in 2010. R. at 281 (280-82), 293, 5704. In a letter from Dr. Camp, dated January 7, 2009, which was included in the September 21, 2010 Statement of the Case, the Veteran's viral meningoencephalitis, empty-sella syndrome, and panhypopituitarism (PHP) were linked together, and the combination of empty-sella syndrome and PHP was described as "responsible for his symptoms." R. at 3304.

The Veteran reported his viral meningoencephalitis and frequent, severe headaches during his exit examination on December 19, 1975. R. at 6839-40. He first submitted an application for service-connected disability for epididymitis and prostatitis, viral meningoencephalitis, and kidney inflammation in January 1975, while still in the service. R. at 7028-29. It is unclear when this application was received by the VA as there are multiple stamps indicating various dates received (some of which are not legible). *Id*. The clearest stamp indicates that this application was received in January 1976, a full year after the Veteran signed it. *Id*. at 7029 (7028-29). However, a stamp on the first page of the application contradicts this date received as it indicates that it was received in February, but the year is not legible. *Id*. at 7028 (7028-29). Despite clear evidence of an ongoing need for care following his discharge from the hospital (R. at 3304), the February 17, 1976 rating decision denied the Veteran's claim, stating viral meningoencephalitis was "not found on last examination" and "was shown as recovered at the time of discharge [from the hospital]." R. at 7019, 7026. The Veteran provided lay testimony regarding the history of his viral meningoencephalitis and PHP symptoms and their ongoing impact on him in

medical exams, testimony, and other written communications with the Board. R. at 5046-85, 5768-69. Additionally, the Veteran's spouse provided written and spoken testimony regarding his viral meningoencephalitis and PHP symptoms and their ongoing impact on him. R. at 5046-85, 5770.

The Veteran submitted a compensation and pension application on August 23, 1991. R. at 6475-6480. The Veteran attached a continuation sheet in order to add additional remarks and referred to this sheet "see attached sheet" in the section of the application requesting information on diseases and injuries being claimed. R. at 6478 referring to R. at 6475-76 (6475-80). On this sheet, the Veteran included information about his viral meningoencephalitis and hospitalization. R. at 6475, 6479, (6475-80). The subsequent compensation and pension examination on October 3, 1991 errantly indicated that "[w]hile in service in 1970 he contracted probable viral meningitis from which he completely recovered" and the exam report contained a handwritten note in the diagnosis section stating, "history of meningitis." R. at 549. There was no indication of a follow-up on the prominent sella noted in the original hospitalization report for the 1972 viral meningoencephalitis diagnosis. The rating decision issued on January 7, 1992 lists viral meningoencephalitis as not service connected, but failed to analyze whether the August 1991 application constituted a new formal or informal claim for residuals of viral meningoencephalitis, or a request to reopen his previous claim for viral meningoencephalitis and discuss whether new and material evidence had been submitted to reopen the claim. R. at 540 (538-40).

The Veteran resubmitted his 1991 application on May 1, 1992 with a handwritten note entered on the application stating that he wanted "to receive VA compensation for [his] 20% disability," plus he included a typed, signed letter stating the same. R. at 6413-6416. Two of the other denied conditions, high frequency hearing loss in the right ear and tinnitus, were later deemed service connected and the previous denial of service connection for the right ear hearing loss was acknowledged by the VA to contain CUE. R. at 5951-52, 5964.

The Veteran submitted a Statement in Support of Claim, dated December 18, 2002, in which he requested that his claim to increase service connection for bilateral hearing loss be reopened. R. at 6328 (6325-28). A February 26, 2003 VA rating decision denied the increase and continued to list viral meningoencephalitis as not service connected without providing any analysis regarding whether the Veteran's additional application for benefits constituted a new formal or informal claim for residuals of viral meningoencephalitis, or a request to reopen his previous claim with an analysis on whether new and material evidence had been submitted to reopen the claim. R. at 6328 (6325-28). The Veteran responded in a letter dated February 28, 2003, disagreeing with the decision and describing the occurrence of viral meningoencephalitis. R. at 6313 (6310-15). The VA acknowledged the Veteran's notice of disagreement on March 20, 2003, and his election of the Decision Review Officer (DRO) process on May 16, 2003 for his appeal, but it did not proceed to treat the Veteran's mention of viral meningoencephalitis and other conditions described in the February 28, 2003 letter as a new formal or informal claim or as a request to reopen his initial claim. R. at 6274 (6274-75), 6279. On June 30, 2004, the

Veteran provided a letter in support of his hearing loss appeal and described viral meningoencephalitis as possibly related. R. at 6080 (6080-82). The rating decision dated October 20, 2005 not only did not change the hearing loss rating, but again it did not treat the June 30, 2004 letter as either an informal claim for residuals of viral meningoencephalitis or as a request to reopen the Veteran's previously denied claim for viral meningoencephalitis and continued to simply list it as not service connected without explanation. R. at 5983.

An MRI report dated July 6, 2007 indicated that the Veteran's sella were empty. R. at 5704. The Veteran described the empty sella in a 2008 letter to one of his physicians, Dr. Drucker (specific date unknown). R. at 5768-69. Additionally, the compensation and pension exam conducted on August 4, 2010 notes that hypopituitarism and empty sella syndrome were diagnosed in 2007. R. at 263 (262-73), 293. The empty sella syndrome, viral meningoencephalitis, and PHP were linked together in a letter written by private physician, Dr. Camp, on January 7, 2009. R. at 3304. Subsequently, the connection between sella syndrome and PHP was acknowledged in the Statement of the Case dated September 21, 2010, but was determined not to be service connected. R. at 3342-43. In a rating decision dated September 12, 2008, service connection for PHP was still denied. R. at 5327. However, service connection for PHP was awarded in a rating decision dated January 6, 2010 when it was determined that medical statements provided "a plausible basis to conclude that the Veteran's panhypopituitarim first manifest [sic] itself during the August 1972 in-service hospitalization for aseptic viral meningoencephalitis. R. at 4109, 4184. The Veteran was later awarded a 100% disability rating, effective February 21, 2008,

for service connection for PHP with hypothyroidism, residuals of viral meningoencephalitis. R. at 1273.

In the September 7, 2017 decision, the Board denied CUE for the 1991 claim, but did not address why it or the 1992 resubmission could not be considered a formal or informal claim for residuals of viral meningoencephalitis or as requests to reopen the Veteran's previously denied claim for viral meningoencephalitis. R. at 11-12 (2-18).

SUMMARY OF ARGUMENT

The Board failed to adjudicate all of the Veteran's claims.

The Board failed to provide adequate reasons or bases for its denial of the Veteran's claim.

The PHP and TDIU claims are inextricably intertwined with the Veteran's claim for viral meningoencephalitis.

The Veteran was prejudiced by the VA's and the Board's failures.

ARGUMENT

I. THE BOARD FAILED TO ADJUDICATE ALL OF THE VETERAN'S CLAIMS.

A claim is a formal or informal communication in writing requesting a determination of entitlement or evidencing a belief to entitlement to a benefit. 38 C.F.R. § 3.1. Any communication or action indicating an intent to apply for VA benefits from a claimant or representative may be considered an informal claim and such informal claim must identify the benefit sought. *See* 38 C.F.R. § 3.155.

A pending claim is "[a] claim which has not been finally adjudicated." 38 C.F.R. § 3.160(c). *See Meeks v. Brown*, 5 Vet.App. 284, 287 (1993); *cf. Tablazon v. Brown*, 8 Vet.App. 359, 361 (1995). "A claim that is adjudicated by the Department of Veterans Affairs as either allowed or disallowed is considered finally adjudicated by whichever of the following occurs first: (1) The expiration of the period in which to file a notice of disagreement, pursuant to the provisions of § 20.302(a) or § 20.501(a) of this chapter, as applicable; or, (2) Disposition on appellate review." 38 C.F.R. § 3.160(d). If there is no final denial of a pending, unadjudicated claim, then, as part of an appeal of an effective-date decision, a claimant may argue that the proper effective date for a subsequently granted claim may be anchored in the pending, unadjudicated claim. *See Ingram v. Nicholson*, 21Vet. App. 232, 242 (2007), *Hanson v. Brown*, 9 Vet. App. 29, 31 (1999).

The VA has a duty to sympathetically read a pro se veteran's filings to determine whether a claim had been raised and investigate potentially applicable theories of service connection that are reasonably raised. *Ingram v. Nicholson*, 21 Vet. App. 232, 239 (2007); *Delisio v. Shinseki*, 25 Vet. App. 45, 55 (2011). Additionally, when confronted with evidence demonstrating the potential applicability of a statutory provision or regulation that was not expressly raised by the claimant earlier, the BVA must inform the claimant that he or she may be eligible under that provision. *Douglas v. Derwinski*, 2 Vet. App. 103, 109 (1992); *aff'd in relevant part, Douglas v. Derwinski*, 2 Vet. App. 435 (1992) (en banc).

The Veteran submitted an application for compensation in August 1991. R. at 6475-80. In response to requests for information about treatment received while in service and hospitalizations while in service, the Veteran provided information about his viral

meningoencephalitis and hospitalization. R. at 6415, 6475, 6479. The rating decision issued on January 7, 1992 in response to the 1991 application did not include any discussion regarding the Veteran's viral meningoencephalitis claim, or residuals thereof. R. at 6426-27. Also, on January 7, 1992, the VA issued a deferred rating decision indicating that the "Veteran previously denied service connection for meningitis. Appeal right has expired. Request new evidence to reopen claim." R. at 6436. Hence, the VA acknowledged that the Veteran's 1991 application included at the very least a request to reopen his previously denied claim. However, the VA never provided an opinion regarding whether new and material evidence had ever been submitted to reopen the Veteran's claim for viral meningoencephalitis. Likewise, the VA never even considered the Veteran's 1991 application as a formal or informal claim for residuals of viral meningoencephalitis. The Veteran resubmitted an application for compensation in May 1992 and again included his viral meningoencephalitis disability. R. at 6413-16. However, no further development of his claim for viral meningoencephalitis or residuals of viral meningoencephalitis occurred.

The Veteran submitted a Statement in Support of Claim on December 18, 2002, requesting that his claim to increase service connection for bilateral hearing loss be reopened. R. at 6328 (6325-28). The VA rating decision issued on February 26, 2003 denied the requested service connection increase and listed viral meningoencephalitis among the conditions not service connected. R. at 6328 (6325-28). The Veteran responded by letter on February 28, 2003, disagreeing with the DVA decision and describing the occurrence of viral meningoencephalitis. R. at 6313 (6310-15). The VA acknowledged the Veteran's notice of disagreement on March 20, 2003, and his election of the Decision

Review Officer (DRO) process on May 16, 2003 for his appeal, but in neither case did it treat the Veteran's mention of viral meningoencephalitis in the February 28, 2003 letter as either a request to reopen his previously denied claim for viral meningoencephalitis or as a formal or informal claim for residuals of viral meningoencephalitis, and no further development of this claim occurred. R. at 6274 (6274-75), 6279.

On June 30, 2004, the Veteran provided a letter in support of his hearing loss appeal and described viral meningoencephalitis as possibly related. R. at 6080 (6080-82). The rating decision dated October 20, 2005 not only continued the hearing loss rating without change, but again it did not treat the June 30, 2004 letter as a request to reopen for viral meningoencephalitis or as a formal or informal claim for residuals of viral meningoencephalitis, continuing to list it as not service connected without further explanation. R. at 5983.

In addition, in the August 2009 decision which granted entitlement to service connection for PHP, the Board acknowledged two medical statements as providing "a plausible basis to conclude that the Veteran's panhypopituitarism first manifest [sic] itself during the August 1972 in-service hospitalization for aseptic viral meningoencephalitis." R. at 4839 (4833-43). Thus, any claim for viral meningoencephalitis should also constitute an informal claim for PHP, which could form the basis for an earlier effective date for the Veteran's service-connected PHP. If the 1991 application and 1992 resubmission of the application are found to be informal claims for PHP with hypothyroidism as residuals of viral meningoencephalitis, then these claims were never adjudicated and are pending, unadjudicated, claims upon which the Veteran could anchor a claim for an earlier effective

date. The VA failed to adjudicate these claims and the Board failed to assess whether they could constitute requests to reopen the Veteran's viral meningoencephalitis and PHP claims. The BVA decision at issue should be vacated and remanded to correct these errors.

II. THE BOARD FAILED TO PROVIDE ADEQUATE REASONS OR BASES FOR ITS DENIAL OF THE VETERAN'S CLAIM.

The Board is statutorily required to articulate adequate reasons or bases for its "findings and conclusions… on all material issues of fact and law presented in the record." 38 U.S.C. § 7104(d)(1). The statement must be sufficient to enable a claimant to understand the precise reasons for the disposition of the claim and to facilitate Court review. *Norris v. West*, 11 Vet.App. 219, 224-25 (1998); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1990). To comply with this requirement, the Board must analyze the credibility and probative value of the evidence, account for the evidence it finds persuasive or unpersuasive, and provide for its rejection of evidence favorable to the claimant's position. See *Caluza v Brown*, 7 Vet.App. 498, 506 (1995); *Abernathy v. Principi*, 3 Vet.App. 461, 465 (1992); *Simon v. Derwinski*, 2 Vet.App. 621, 622 (1992); *Gilbert*, 1 Vet.App. at 58-59. While the Board is not required to accept any particular piece of evidence, it must address evidence that is favorable to the veteran and give adequate reasons or bases for rejecting it. *Thompson v. Principi*, 16 Vet.App. 467, 470 (2002); *YR v. West*, 11 Vet.App. 393, 398 (1998).

A prior VA decision can be reversed or amended where evidence establishes a "clear and unmistakable error" (CUE). This is a very specific and rare kind of error that when called to the attention of later reviewers, compels the conclusion, to which reasonable

minds could not differ, that the results would have been manifestly different but for the error. 38 C.F.R. § 20.1403. A clear and unmistakable error exists when, (1) either the correct facts, as they were known at that time, were not before the adjudicator (i.e., more than a simple disagreement as to how the facts were weighed or evaluated), or the statutory or regulatory provisions extant at the time were incorrectly applied; (2) the error must be undebatable and of the sort which, had it not been made, would have manifestly changed the outcome at the time it was made; and (3) a determination that there was a CUE must be based on the record and law that existed at the time of the prior adjudication in question. *Damrel v. Brown*, 6 Vet. App. 242, 245 (1994).

The Board failed to provide adequate reasons or bases for its denial of the Veteran's claim of CUE in the 1976 rating decision that denied service connection for viral meningoencephalitis, or residuals thereof. The Board acknowledged that the Veteran asserted CUE in a February 17, 1976 rating decision that denied service connection for viral meningoencephalitis. R. at 2 (2-18). The Veteran's entrance examination, conducted on November 7, 1966, contained no report of medical conditions subsequently claimed. R. at 6667 (6666-68). Therefore, the Veteran was presumed to be of sound condition upon entry into the service. 38 U.S.C. § 1111. Additionally, the Veteran's medical history and examination on April 23, 1969, prior to entering Officer Training School, contained no report of viral meningoencephalitis, PHP, or other disabling medical conditions. R. at 6875-76. Viral meningoencephalitis was first diagnosed in service on August 18, 1972 while the Veteran was traveling between duty stations. R. at 7016 (6997-7017). At that time, the Veteran was hospitalized for nearly a week for the condition and discharged on

August 24, 1972. R. at 6997-7017. The Veteran reported his viral meningoencephalitis and frequent, severe headaches during his exit examination on December 19, 1975. R. at 6839-40. While still in the service, the Veteran filed his original claim for service connection for epididymitis and prostatitis, viral meningitis, and kidney inflammation on January 12, 1975. R. at 7028-29, 7036-41.

In a February 17, 1976 rating decision, the Veteran's claims were denied despite clear evidence of ongoing need for post-discharge care. R. at 7026, 3304. The rating specialist(s) errantly indicated that the Veteran's original claim was received January 22, 1976. R. at 7026. While there is a clear date received stamp that indicates receipt on January 22, 1976 (R. at 7029 (7028-29)), there are also other date received stamps on this document, including one indicating that the claim was received in February (year ineligible), and the date that the Veteran signed the document (January 12, 1975). R. at 7028-29. The rating decision failed to account for these discrepancies or discuss the benefit of the doubt doctrine. 38 C.F.R. § 3.102. The rating specialist(s) also stated that the Veteran's viral meningoencephalitis was "not found on last examination" and errantly indicated that it "was shown as recovered at the time of discharge [from the hospital]." R. at 7019, 7026. However, the discharge report indicated that the Veteran was asymptomatic, not that he was fully recovered at the time of discharge. R. at 7017 (6997-7017). The treating physician indicated that he will "most likely have no significant difficulty and that he will probably not need repeat lumbar punctures." *Id*. Such statements convey optimism about a future recovery, but do not indicate that the condition is fully resolved.

The correct facts, as they were known at the time, were not before the rating specialist(s). The hospital records showed that when the Veteran was discharged, he was given medication to take for several days after discharge. R. at 7017 (6997-7017). He was also given orders to engage in only light activity for several days, after which, "if there were no significant symptoms" he could travel. *Id*. The Veteran was instructed to consult with a neurologist or an internist when he arrived at his new duty station. *Id*. Based on these facts, the Veteran's viral meningoencephalitis had not recovered when he was discharged from the hospital. However, the Board accepted the 1976 rating decision's misstatement of this fact, indicating "[f]ollowing discharge from the hospital in August 1972, it appears that his viral meningoencephalitic condition resolved." R. at 10 (2-18). The Board failed even acknowledge the 1976 rating decision's misstatement of this fact, let alone to provide adequate reasons or bases for its determination that there was no CUE in this decision .

The Board also failed to provide adequate reasons or bases for its determination that there was not a "claim for residuals of viral meningoencephalitis that was received prior to February 21, 2008" that would constitute an earlier effective date for his service-connected PHP with hypothyroidism. R. at 12 (2-18). As indicated above in Section I of this Appellant's Brief, the VA failed to adjudicate or analyze all the Veteran's subsequent applications for compensation benefits, which arguably included formal or informal claims for residuals of viral meningoencephalitis or requests to reopen his previously denied claim for viral meningoencephalitis. The Veteran submitted a compensation and pension application on August 23, 1991. R. at 6475-6480. The application included information about his viral meningoencephalitis and hospitalization. R. at 6475, 6479. The subsequent

compensation and pension examination on October 3, 1991 indicated that "[w]hile in service in 1970 he contracted probable viral meningitis from which he completely recovered" and the exam report contained a handwritten note in the diagnosis section stating "history of meningitis." R. at 549. There was no indication of a follow-up on the prominent sella noted in the original hospitalization report for the 1972 viral meningoencephalitis diagnosis. The rating decision issued on January 7, 1992 lists viral meningoencephalitis as not service connected but does not provide any analysis regarding whether new and material evidence was submitted to reopen the Veteran's claim for viral meningoencephalitis or whether the subsequent application included a formal or informal claim for residuals of viral meningoencephalitis. R. at 540 (538-40). A letter from the VA dated March 6, 1992, denied service connection for viral meningoencephalitis, stating that the evidence failed to show that it, along with other conditions, was "incurred in or aggravated during [his] service." R. at 6418, 6421. However, no supporting rationale was provided. *Id*. The Board failed to provide adequate reasons or bases for its determination that these were not requests to reopen which could form the basis for service connection of viral meningoencephalitis or formal or informal claims for the Veteran's service-connected PHP with hypothyroidism which could form the basis for an earlier effective date. The Board failed to address why the August 1991 or May 1992 applications should not be considered as either requests to reopen the Veteran's claim for viral meningoencephalitis or as informal claims for residuals of viral meningoencephalitis. The Board's failure to do so constituted error and the Board's decision should be remanded to correct this error.

In rendering its decision, the Board is required to provide a written statement of the reasons or bases for its "findings and conclusions on all material issues of fact and law presented on the record." 38 U.S.C. § 7104(d)(1). The statement must be adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court. *See Gilbert v. Derwinski*, 1 Vet. App. 49, 57 (1990). The Board failed to provide adequate reasons or bases for its conclusion that the CUE arguments amounted to only a difference with how the evidence was weighed at the time of the 1976 denial or in a failure in the duty to assist. R. at 11 (2-18). The Board also failed to provide adequate reasons or bases for why the Veteran's earlier applications should not be considered formal or informal claims for residuals of viral meningoencephalitis or as requests to reopen his previously denied claim for viral meningoencephalitis. The Board failed to analyze the credibility and probative value of the evidence provided above, account for the evidence it finds persuasive or unpersuasive, and provide for its rejection of evidence favorable to the claimant's position. The Board failed to provide adequate reasons and bases for its denial of the veteran's claim. This failure is error and, as such, the BVA decision at issue should be vacated and remanded.

III. THE PHP AND TDIU CLAIMS ARE INEXTRICABLY INTERTWINED WITH THE VETERAN'S CLAIM FOR VIRAL MENINGOENCEPHALITIS

Claims are inextricably intertwined when a decision on one claim could have a significant impact on another claim and render that claim meaningless. *See Harris v. Derwinski*, 1 Vet. App. 180, 183 (1991). The Court may decline to review partial decisions of the Board if the appealed issue is inextricably intertwined with an undecided issue

pending. *Tyrues v. Shinseki,* 732 F.3d 1351, 1366 (Fed. Cir. 2013). Additionally, "a request for TDIU, whether expressly raised by a veteran or reasonably raised by the record, is not a separate claim for benefits, but rather involves an attempt to obtain an appropriate rating for a disability or disabilities, either as a part of the initial adjudication of a claim or . . . as a part of a claim for increased compensation." *Rice v. Shinseki,* 22 Vet.App. 447, 453-54 (2009); *Comer v. Peake,* 552 F.3d 1362, 1367 (Fed. Cir. 2009) (a request for TDIU benefits "is not a free-standing claim that must be pled with specificity; it is implicitly raised whenever a pro se veteran, who presents cogent evidence of unemployability, seeks to obtain a higher disability rating"); *See Smith v. Gober,* 236 F.3d 1370, 1373 (Fed. Cir. 2001) (finding that where facts underlying separate claims are "intimately connected," interests of judicial economy and avoidance of piecemeal litigation require that the claims be adjudicated together).

The Veteran's PHP with hypothyroidism and TDIU claims are inextricably intertwined with the meningoencephalitis claim. Because the Veteran's PHP claim was granted as a secondary condition to viral meningoencephalitis, it is inextricably intertwined with that claim. Similarly, the TDIU claim is inextricably intertwined with the PHP claim, as secondary to meningoencephalitis. The Board has already acknowledged that "the claim is inextricably intertwined with the issues of whether there was CUE with respect to the 1976 RO decision denying service connection for viral meningoencephalitis, and whether an EED is warranted for the award of service connection for panhypopituitarism." R. at 1046 (1034-47). The Board has also indicated that "the Veteran's symptomatology which precluded substantially gainful employment is related to his PHP with hypothyroidism."

R. at 3 (2-18). Thus, both the PHP and TDIU claims should be remanded with the meningoencephalitis claim.

IV. THE VETERAN WAS PREJUDICED BY THE VA'S AND THE BOARD'S FAILURES

When the VA fails to comply with one of its duties, the appellant must plead the alleged error with some particularity. *Coker v. Nicholson,* 19 Vet.App. 439, 443 (2006). Furthermore, under 38 U.S.C. §7261(b), the court must take into account the role of prejudicial error when deciding an appeal. *Conway v. Principi*, 353 F.3d 1369, 1374-75 (2004). In his Brief, the Appellant has demonstrated that the VA and the Board failed (1) to adjudicate all of the Veteran's claims and (2) to provide adequate reasons or bases for its decision. As a result of these errors, the Veteran was not afforded the benefit of the law, and the outcome of those errors is a denial of the Veteran's claim.

The Veteran was irreparably harmed by the Board's errors. As such, these errors affect the essential fairness of the adjudication, and the Veteran is prejudiced as a result. *Overton v. Nicholson*, 20 Vet. App. 427, 435 (2006). The United States Court of Appeals for Veterans Claims is obligated to consider the rule of prejudicial error when deciding cases before it. *Mlechick v. Mansfield*, 503 F.3d. 1340, 1345 (Fed. Cir. 2007). As part of that statutory obligation, the Court is permitted to "go outside of the facts as found by the Board to determine whether an error was prejudicial by reviewing 'the record of the proceedings before the Secretary and the Board.'" *Id.* (*citing Newhouse v. Nicholson*, 497 F.3d. 1298 (Fed. Cir. 2007) (*quoting* 38 U.S.C. §7261(b)(2)). Additionally, the Supreme Court has observed "that 'courts may sometimes make empirically based generalizations

about what kinds of errors are likely, as a general matter, to prove harmful.'" *Crock v. Astrue*, 154 Soc. Sec. Rep. Service 120 (2010) (*quoting Shinseki v. Sanders*, 129 S. Ct. 1696, 1707 (2009)). As such, notwithstanding Appellant's valid assertion of prejudice, the CAVC is free to independently find that the veteran has been prejudiced by the errors committed by the VA and BVA.

CONCLUSION

WHEREFORE, for the reasons stated herein, the Appellant respectfully requests this Court to vacate and remand the Board's September 7, 2017 decision, and to grant all remedies available to him at law including reversal if this Honorable Court deems fit.

Respectfully submitted,

ERIC C. ELDER

Dated: August 19, 2019

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