BRIEF OF APPELLANT

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

19-3124

ALLEN J. COOPER,

Appellant

v.

ROBERT L. WILKIE,
SECRETARY OF VETERANS AFFAIRS,

Appellee

NICHOLAS L. PHINNEY
166 Valley Street
Bldg. 6M, Suite 103
Providence, RI 02909
401-378-0733 (Telephone)
401-633-7781 (Facsimile)

Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Regulations

Record Before the Agency ("R") Citations

ISSUES PRESENTED FOR REVIEW

I. In considering the need for a higher rating for a condition and the question of entitlement to Total Disability based on Individual Unemployability, the Board of Veterans' Appeals must discuss all of the relevant evidence and explain whether increased benefits are warranted in light of this evidence. The Board denied the Veteran a higher rating for his service-connected dysthymia without mentioning several important pieces of evidence that, when considered along with the evidence it cited, tend to show a higher rating for the condition is warranted. The Board also denied TDIU without referring to this evidence and additional evidence which indicates that the service-connected right ankle disability impacts the ability to work. Did the Board's failure to analyze the case in light of all of the pertinent evidence render its decision inadequate as a matter of law?

II. To ensure compliance with the duty to assist, the Board must require that an examination for a condition takes place during a flare-up whenever the evidence indicates flare-ups of the disability are predictable, last for extended periods, and the condition affects the claimant's ability to work. The Board neglected to afford the Veteran with an examination during the winter even though evidence indicates his dysthymia worsens during the winter, which is an extended period of time, and impacts his employability. Did the Board err as a matter of law by not requiring VA to provide the Veteran with a winter-time psychiatric examination?

STATEMENT OF THE CASE

Appellant, Allen J. Cooper, served on active duty from September 1994 to September 1998. R-2553. In April 1999, VA issued a rating decision in which it awarded him service connection for limited motion of the right ankle (rated at 20 percent), painful scar of the right ankle (rated at 10 percent), and dysthymia as secondary to the ankle disabilities (rated as non-compensable). R-2550-52, 2558-63. In October 2010, the Veteran filed a claim for a higher rating for the dysthymia. R-2235-37.

In January 2011, he noted taking medications including for depression and pain and that his medications resulted in trouble with concentration and memory. R-2340, 2343 (2337-44). The Veteran underwent a disability evaluation for a claim of Social Security Administration benefits in March 2011. R-1828-31. He complained of poor sleep, inadequate energy, and depression. R-1829. In a SSA function report that Mr. Cooper completed that same month, he noted that on the rare occasions when he does venture out, his fatigue rises to the level that he feels sick and spends the next two to three days in bed. R-1815 (1815-22). He stated that depression and fatigue negatively affected his personal hygiene and appearance. R-1816. He said that he rarely left his bedroom. R-1817. He stated that he only spent time with his wife and children, had no friends, and had severely limited control with family and could not attend Thanksgiving and Christmas celebrations in the last year and even avoided family birthday parties. R-1819-20. He reported that medication affected his memory

and concentration. R-1820. Mr. Cooper's wife also completed a SSA function report in the same month in which she said that she would only see him for short periods as he is confined to his bed due to symptoms including fatigue and pain. R-1403 (1403-10). She stated that he was too fatigued to do much other than speak to his children. *Id.* She also indicated that symptoms including depression and fatigue made it a struggle for him to get out of bed. R-1406. She wrote that on the rare times when they do visit other family, he isolates himself and the visits are short. R-1408.

The Veteran's wife provided a statement in March 2012 in which she wrote that his psychiatric symptoms, including depression and fatigue, prevented him from attending family events and cost him every job that he attempted. R-2202-03 (2201-03). Mr. Cooper also submitted a statement that same month in which he noted that his psychiatric problems, including depression and fatigue, prevented him from lasting more than a short period at several jobs and that depression left him with little motivation to leave the house. R-2206 (2205-09). The Veteran also filed an application for TDIU simultaneously in which he listed several jobs he had between 2001 and 2004, all which he quit due to illness. R-2189 (2189-90).

In a January 2013 VA ankle examination, the expert noted pain and swelling with prolonged standing, loss of range of motion, stiffness, difficulty climbing stairs, and weakened movement. R-2056-57 (2044-62). In discussing how the right ankle disorders impacted the ability to work, the examiner concluded: "Able to perform sedentary work. Unable to perform work requiring repeated climbing due to

decreased motion of right ankle. Unable to perform prolonged walking or standing due to pain and swelling of the right ankle. Unable to perform in an occupational setting which requires protective footwear due to pain of scar." R-2062.

Mr. Cooper also received a psychiatric examination in January 2013. R-2064-70. The expert stated that the dysthymia caused long-lasting depressed mood, lack of energy, too much sleep, low self-esteem, and feelings of hopelessness. R-2066. The Veteran complained of chronic fatigue that left him not feeling like doing much and that fatigue, depression, and other problems kept him in his bedroom recliner for 90 percent of the day. R-2067-68; *see* R-1815. The examiner noted constricted affect and difficulty in adapting to stressful circumstances including work or a work-like setting. R-2068-69.

In February 2013, VA issued a rating decision in which it increased the rating for the dysthymia to 30 percent since October 2010 and deferred the issue of TDIU entitlement. R-2008-23. VA issued a rating decision in May 2013 in which it denied TDIU. R-1954-63. The Veteran filed timely notices of disagreement with both decisions in June 2013. R-1932-33, 1936-37. He reported major depression, decreased productivity, low energy/fatigue, work problems, disturbance of motivation and mood, difficulty in establishing and maintaining effective work and social relationships, and impairments in judgment, abstract thinking, and memory. R-1933, 1937.

During psychiatric treatment in July 2013, Mr. Cooper complained of

depression, racing thoughts, lots of suicidal thoughts including multiple plans, anhedonia, impaired concentration, expansive moods including grandiosity, excessive spending, irritability, and feeling hopeless. R-1385-87 (1384-88). A nurse noted ineffective coping, an expressionless face, decreased motor activity, reduced speech, being withdrawn, somatic complaints, poor insight and poor judgment. R-1340 (1340-42). The Veteran also reported feeling worthless, angry, and sad as well as crying spells, not liking being around others, and drug use. R-1345-46 (1345-47).

In September 2013, VA issued a rating decision in which it increased the rating for the dysthymia to 50 percent for the entire period and recharacterized the condition as "dysthymia with associated symptoms of depression, anxiety with panic attacks, and chronic fatigue syndrome." R-1911-16. The following month, Mr. Cooper reported feeling quite depressed and unmotivated. R-1136 (1136-37).

VA issued a statement of the case in June 2016 in which it denied TDIU and a higher rating for the dysthymia. R-915-52. The Veteran filed his timely substantive appeal in July 2016, at which time, he complained of deficiencies in work, family, thinking, mood, and judgment, rarely seeing his extended family or attending family functions in part due to dysthymia and chronic fatigue, inability to function independently or effectively partly due to dysthymia and chronic fatigue, as well as inability to work. R-911-12.

In September 2016, the Veteran underwent a VA psychiatric examination. R-879-85. The expert found that the Veteran's dysthymia caused depressed mood,

flattened affect, chronic sleep impairment, disturbances of motivation and mood, difficulty in establishing and maintaining effective work and social relationships, and difficulty in adapting to stressful circumstances, including work or a work-like setting. R-880. Apart from the depression and flattened affect, the examiner said that panic disorder and generalized anxiety disorder also caused these symptoms. *Id.* The Veteran reported feeling more depressed during the winter months, being "really short fused" over the past couple of years and suffering from impulsivity. R-882-83. The examiner said that the dysthymia caused a considerable degree of social and occupational impairment due to the symptoms he described. R-884.

VA issued a rating decision in May 2017 in which it severed service connection for panic disorder and generalized anxiety disorder and chronic fatigue syndrome. R-729-35.

The Board issued a decision in March 2019 in which it denied a higher rating for dysthymia with associated symptoms of depression above 50 percent and denied TDIU. R-3 (2-20). This appeal ensued.

SUMMARY OF THE ARGUMENT

The Board erred in denying Mr. Cooper a higher rating for his service-connected dysthymia without explaining why a higher rating was not appropriate based on all of the relevant evidence of record. The Board further erred by denying him TDIU without explaining why all of the evidence of problems caused by the service-connected dysthymia and right ankle disabilities did not demonstrate the requirements for a TDIU

award. The Board also erred by not requiring VA to provide the Veteran with a new psychiatric examination during the winter, when his dysthymic symptoms would be expected to be at their worst.

STANDARD OF REVIEW

The Board's determination regarding a claim for service connection and compensation is a finding of fact subject to the "clearly erroneous" standard of review. 38 U.S.C. § 7261(a)(4); *Lennox v. Principi*, 353 F.3d 941, 944 (Fed. Cir. 2003). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990) (*quoting United States v. U.S. Gypsum Co.,* 333 U.S. 364, 395 (1948)). The scope of the duty to assist is a question of law. *Beasley v. Shinseki*, 709 F.3d 1154, 1157 (Fed. Cir. 2013). The Court also reviews claimed legal errors by the Board under the *de novo* standard, by which the Board's decision is not entitled to any deference. 38 U.S.C. § 7261(a)(1); *see Butts v. Brown*, 5 Vet.App. 532, 538 (1993) (en banc). The Court may hold a clearly erroneous finding unlawful and set it aside or reverse it. *See* 38 U.S.C. § 7261(a)(4). The Court will set aside a conclusion of law made by the Board when it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Butts*, 5 Vet.App. at 538. The Court should determine whether the Board's decision, in which it failed to provide adequate reasons or bases, and did not mandate compliance with the duty to assist, was erroneous, without affording the Board any deference.

ARGUMENT

I. The Board failed to explain why all of the evidence did not demonstrate the Veteran is entitled to a higher rating for his dysthymia and TDIU.

The Board must show consideration of all pertinent evidence of record, and discuss all "potentially applicable" laws and regulations. *Gutierrez v. Principi*, 19 Vet.App. 1, 7 (2004); *Majeed v. Principi*, 16 Vet.App. 421, 431 (2002); *Schafrath v. Derwinski*, 1 Vet.App. 589, 593 (1991); *see* 38 U.S.C. § 7104. Under 38 U.S.C. § 7104(d)(1), a decision of the Board shall include a written statement of the Board's findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented on the record. *Gilbert v. Derwinski*, 1 Vet.App. at 56. Deficiencies in the Board's analysis in the instant case preclude effective judicial review and thus, a remand is warranted. *Id.* at 57.

Under 38 C.F.R. § 4.130 (2018) (diagnostic code 9433), a 70-percent rating is warranted when a claimant's service-connected dysthymia results in:

> Occupational and social impairment, with deficiencies in most areas, such as work, school, family relations, judgment, thinking, or mood, due to such symptoms as: suicidal ideation; obsessional rituals which interfere with routine activities; speech intermittently illogical, obscure, or irrelevant; near-continuous panic or depression affecting the ability to function independently, appropriately and effectively; impaired impulse control (such as unprovoked irritability with periods of violence); spatial disorientation; neglect of personal appearance and hygiene; difficulty in adapting to stressful circumstances (including work or a worklike setting); inability to establish and maintain effective relationships.

Id. The use of the term "such as" before the list of symptoms which the Board is to consider demonstrates that this is not an exhaustive list and that the Board must

consider whether there are other areas of functioning in which a claimant may have difficulties. *Mauerhan v. Principi*, 16 Vet.App. 436, 442 (2002). Instead of necessitating that a claimant suffer from all of the symptoms in the criteria for one of these ratings, rather the claimant must exhibit the particular symptoms associated with that percentage, or others of similar severity, frequency, and duration. *Vazquez-Claudio v. Shinseki*, 713 F.3d 112, 117 (Fed. Cir. 2013).

In this case, the Board found:

> [T]he Veteran's dysthymia with associated symptoms of depression is manifested by depressed mood, lack of energy, low self-esteem, feelings of hopelessness, flattened affect, chronic sleep impairment, disturbances of motivation and mood, difficulty in establishing and maintaining effective work and social relationships, and difficulty in adapting to stressful circumstances, including work or a worklike setting, resulting in, at most, occupational and social impairment with reduced reliability and productivity. Therefore, a rating in excess of 50 percent for such disorder is not warranted.

R-12-13. In doing so, the Board overlooked several important pieces of evidence that when considered with the evidence that it acknowledged, demonstrates that a 70-percent rating is warranted.

In January 2011, the Veteran completed a SSA continuing disability review report where he spoke of taking medications including for depression and pain and that his medications resulted in trouble with concentration and memory. R-2340, 2343. He also underwent a SSA disability evaluation in March 2011 where he complained of poor sleep, inadequate energy, and depression. R-1829. In a SSA function report that he filled out that same month, he noted that on the rare occasions

when he does venture out, his fatigue rises to the level that he feels sick and spends the next two to three days in bed, that depression and fatigue negatively affected his personal hygiene and appearance, and that he rarely left his bedroom. R-1815-17. He said that he only spent time with his wife and children, had no friends, and had severely limited control with family and could not attend Thanksgiving and Christmas celebrations in the last year and even avoided family birthday parties. R-1819-20. He reported that medication affected his memory and concentration. R-1820. His wife also completed a SSA function report in the same month in which she said that she would only see him for short periods as he is confined to his bed due to symptoms including fatigue and pain. R-1403. She indicated that he was too fatigued to do much other than speak to his children. *Id.* She also stated that symptoms including depression and fatigue made it a struggle for him to get out of bed. R-1406. She wrote that on the rare times when they do visit other family, he isolates himself and the visits are short. R-1408.

In notices of disagreement that Mr. Cooper filed in June 2013, he spoke of major depression, decreased productivity, low energy/fatigue, work problems, disturbance of motivation and mood, difficulty in establishing and maintaining effective work and social relationships, and impairments in judgment, abstract thinking, and memory. R-1933, 1937.

During psychiatric treatment in July 2013, Mr. Cooper complained of depression, racing thoughts, lots of suicidal thoughts including multiple plans,

anhedonia, impaired concentration, expansive moods including grandiosity, excessive spending, irritability, and feeling hopeless. R-1385-87. A nurse noted ineffective coping, an expressionless face, decreased motor activity, reduced speech, being withdrawn, somatic complaints, poor insight and poor judgment. R-1340. The Veteran also reported feeling worthless, angry, and said as well as crying spells, not liking being around others, and drug use. R-1345-46. In October 2013, Mr. Cooper reported feeling quite depressed and unmotivated. R-1136.

In his July 2016 substantive appeal, the Veteran complained of deficiencies in work, family, thinking, mood, and judgment, rarely seeing his extended family or attending family functions in part due to dysthymia and chronic fatigue, inability to function independently or effectively partly due to dysthymia and chronic fatigue, as well as inability to work. R-911-12.

The Board noted that Mr. Cooper received treatment for suicidal ideation, depression, and hopelessness in July 2013. R-10. However, it failed to take the other problems demonstrated by the July 2013 treatment records into account. These treatment notes also show the Veteran suffering from racing thoughts, anhedonia, impaired concentration, expansive moods including grandiosity, excessive spending, irritability, ineffective coping, flat affect, decreased motor activity, reduced speech, being withdrawn, somatic complaints, poor insight, poor judgment, crying bouts, dislike of being around others, drug use, and lack of motivation. R-1340, 1345-46, 1385-87.

The Board made no mention of the 2011 SSA records which show the Veteran suffering from decreased concentration and memory, isolation, lack of care with personal hygiene and appearance, fatigue so bad that leaving the house causes sickness so bad that it requires two or three days spent in bed to recover, inability to attend family events or becoming isolative when he did, and isolation from his wife and children. R-1403, 1406, 1408, 1815-17, 1819-20, 2340, 2343. The Board also failed to reference notices of disagreement that Mr. Cooper filed in June 2013 where he spoke of major depression, decreased productivity, low energy/fatigue, work problems, disturbance of motivation and mood, difficulty in establishing and maintaining effective work and social relationships, and impairments in judgment, abstract thinking, and memory. R-1933, 1937. Furthermore, the Board did not cite an October 2013 treatment record in which Mr. Cooper reported feeling quite depressed and unmotivated. R-1136. Finally, the Board did not discuss the July 2016 substantive appeal in which the Veteran complained of deficiencies in work, family, thinking, mood, and judgment, rarely seeing his extended family or attending family functions in part due to dysthymia and chronic fatigue, inability to function independently or effectively partly due to dysthymia and chronic fatigue, as well as inability to work. R-911-12.

The Board found a 50-percent rating was appropriate since the Veteran suffered from occupational social impairment with evidence showing deficiencies in the areas of work, general social relations, sleep, and mood. R-12-13. However,

additional evidence, which the Board either failed to discuss or gave attention to only parts of it, also demonstrates deficiencies in the areas of family relations, judgment, and thinking. The Board found that the evidence showed Mr. Cooper had a stable marriage and was an engaged father to his children and that isolation from extended family was due to his non-service-connected anxiety and panic attacks. R-13-14. But, the 2011 SSA records show that the Veteran's fatigue is so bad that leaving the house results in sickness that requires two or three days spent in bed to recover and that the fatigue also caused an inability to attend family events or becoming isolative when he did, and isolation from his wife and children. R-1403, 1406, 1408, 1815. Although the Veteran is no longer service-connected for chronic fatigue syndrome, the 2016 examiner noted that the dysthymia resulted in chronic sleep impairment. R-880. Plus, while this other evidence also indicates that panic disorder and anxiety are partially responsible for some of these problems, no expert has said how much is due to dysthymia and how much is due to panic/anxiety. Therefore, these problems are attributable to the service-connected dysthymia. *Mittleider v. West*, 11 Vet.App. 181, 182 (1998).

If the Board fully weighed all of this additional evidence along with the evidence that it discussed, it may have found that a higher rating for the dysthymia is warranted. Hence, the Board prejudiced Mr. Cooper by failing to explain why a higher rating was not necessary given all of the pertinent evidence and a remand is needed for the Board to provide the required analysis of all of the material documents

of the Veteran's symptoms.

Moreover, in considering the question of TDIU entitlement, the Board stated that the 2016 examiner found that while the dysthymia caused a considerable degree of social and occupational impairment, most of his difficulties in this regard were due to his non-service-connected panic disorder and generalized anxiety disorder. R-19 (*citing* R-880). But, the examiner stated that the depressive disorder resulted in reduced motivation and energy and chronic sleep impairment. R-880-81. Plus, as the Board noted, because his chronic sleep impairment, disturbances of motivation and mood, difficulty in establishing and maintaining effective work and social relationships, and difficulty in adapting to stressful circumstances, including work or a work-like setting were attributed to multiple conditions, they were considered part of the service-connected dysthymia. R-11; *see* R-880 (attributing these symptoms to dysthymia as well as the anxiety and panic disorders); *see also Mittleider*, *supra*. The examiner did not state what symptoms of the panic and anxiety disorders were responsible for the deficiencies in most areas. Without such an explanation, the deficiencies must be attributed to the dysthymia and thus, the Board must view this condition as causing deficiencies in most areas in evaluating the need for a higher rating and TDIU. The Board's failure to do so prejudiced the Veteran since if it properly weighed the evidence on this basis, it may have found a higher rating for the dysthymia and TDIU are appropriate. A remand is required for the Board to properly consider the claims as a result of the examiner's failure to truly separate all the psychiatric symptomatology.

Additionally, in addressing the question of TDIU, the Board omitted any discussion of the evidence that it failed to discuss in considering the question of a higher rating for the dysthymia. The Board failed to cite the 2011 SSA records which show the Veteran suffering from decreased concentration and memory, isolation, lack of care with personal hygiene and appearance, fatigue so bad that leaving the house causes sickness so bad that it requires two or three days spent in bed to recover, inability to attend family events or becoming isolative when he did, and isolation from his wife and children. R-1403, 1406, 1408, 1815-17, 1819-20, 2340, 2343. The Board also did not speak of the June 2013 notices of disagreement in which Mr. Cooper reported major depression, decreased productivity, low energy/fatigue, work problems, disturbance of motivation and mood, difficulty in establishing and maintaining effective work and social relationships, and impairments in judgment, abstract thinking, and memory. R-1933, 1937. The Board did not mention an October 2013 treatment record in which Mr. Cooper reported feeling quite depressed and unmotivated. R-1136. Lastly, the Board did not discuss the July 2016 substantive appeal in which the Veteran complained of deficiencies in work, family, thinking, mood, and judgment, rarely seeing his extended family or attending family functions in part due to dysthymia and chronic fatigue, inability to function independently or effectively partly due to dysthymia and chronic fatigue, as well as inability to work. R-911-12.

Moreover, under 38 C.F.R. § 4.16(a) (2018): "Total disability ratings for

compensation may be assigned, where the schedular rating is less than total, when the disabled person is, in the judgment of the rating agency, unable to secure or follow a substantially gainful occupation as a result of service-connected disabilities." Schedular TDIU requires a single disability rated as 60-percent disabling or a 70-percent combined rating with at least one condition rated as 40-percent disabling. *Id.* Here, the Veteran has a combined rating of 60 percent due to his dysthymia (rated at 50 percent), limited motion in right ankle (rated at 20 percent), and right ankle scar (rated at 10 percent). R-733. The dysthymia is the result of the right ankle injuries, as VA noted in awarding service connection for the former. R-2561. Hence, as disabilities resulting from a common etiology or single accident which are rated as 60-percent combined, they form to meet the schedular threshold requirement of 38 C.F.R. § 4.16(a). Even if they did not, the Board still has a duty to consider whether to refer the case to the Compensation Director for extraschedular TDIU consideration in accordance with 38 C.F.R. § 4.16(b).

Problems with concentration, memory, isolation, lack of personal care and hygiene, fatigue that requires staying in bed for days, isolation, decreased productivity, lack of motivation, troubles with relationships, impaired judgment, impaired abstract thinking, and inability to function independently or effectively, as demonstrated by the evidence which the Board did not cite, would all be expected to negatively impact the Veteran's ability to work. If the Board addressed this additional evidence when it was considering the question of TDIU, it may have found that TDIU entitlement is

demonstrated. Thus, the Board prejudiced the Veteran by failing to evaluate this evidence in considering TDIU and a remand is necessary for the Board to discuss this evidence in ascertaining whether he should receive TDIU due to all of the problems caused by his dysthymia.

Also, in determining whether TDIU is appropriate, the Board stated that the evidence did not show that the right ankle conditions impacted employability. R-16, 19. Yet. in the January 2013 VA ankle examination, the examiner noted pain and swelling with prolonged standing, loss of range of motion, stiffness, difficulty climbing stairs, and weakened movement. R-2056-57. In discussing how the right ankle disorders impacted the ability to work, the examiner concluded: "Able to perform sedentary work. Unable to perform work requiring repeated climbing due to decreased motion of right ankle. Unable to perform prolonged walking or standing due to pain and swelling of the right ankle. Unable to perform in an occupational setting which requires protective footwear due to pain of scar." R-2062.

The *Dictionary of Occupational Titles* ("DOT") defines sedentary work as "involv[ing] sitting most of the time, but may involve walking or standing . . . occasionally," which the DOT describes as up to one third of an eight-hour work day (i.e., two hours and forty minutes) and defining light work as "requir[ing] walking or standing to a significant degree . . . sitting most of the time but entail[ing] pushing and/or pulling of arm or leg controls; and/or . . . working at a production rate pace entailing the constant pushing and/or pulling of materials even though the weight of

those materials is negligible."). *See http://www.occupationalinfo.com/appendxc_1.html* (last visited Oct. 17, 2019). The Board is not bound by either the Department of Labor's or the Social Security Administration's definitions of sedentary employment. Whatever standard the Board uses, however, must be described, so that the Veteran and the Court are aware of the rule being applied. *See Gilbert*, 1 Vet.App. at 57 (Board "decisions must contain clear analysis and succinct but complete explanations."); *cf. Thurber v. Brown*, 5 Vet.App. 119 (1993) (fair process requires the Board to notify claimant of evidence developed or obtained, as well as intended reliance on it and opportunity to respond); *see also Faust v. West*, 13 Vet.App. 342 (2000) ("[W]e find appropriate guidance in—albeit that we are not bound by—the definition of "substantially gainful activity" provided in regulations promulgated by the Social Security Administration (SSA)."). The Board must then ensure that the evidence of record allows it to apply the definition it has chosen. 38 C.F.R. § 19.9 (2018).

Plus, in *Pederson v. McDonald*, 27 Vet.App. 276, 287 (2015), the Court held that it is the claimant's burden to challenge or cite evidence against a Board finding that service-connected conditions do not preclude employment. But where the record indicates the claimant's service-connected disability prevents performance of the full scope of work, as it does here, consistent with *Pederson*, the burden is on the Board to address his "ability to secure employment."

Although the 2013 ankle examiner found that the Veteran could perform sedentary work, she also noted that the Veteran experienced difficulties as a result of

his right ankle conditions which would preclude the type of employment that the DOT defines as sedentary due to inability to perform prolonged walking or standing. *See* R-2056-57. Hence, the Board should have discussed whether the ankle condition prevented sedentary as well as physical employment. Furthermore, as noted above, the evidence demonstrates problems with concentration, memory, isolation, lack of personal care and hygiene, fatigue that requires staying in bed for days, isolation, decreased productivity, lack of motivation, troubles with relationships, impaired judgment, impaired abstract thinking, and inability to function independently or effectively. This evidence tends to show that both physical and sedentary employment would be difficult for the Veteran to obtain and maintain. Thus, if the Board considered the effects of both the dysthymia and the ankle condition on Mr. Cooper's ability to work, it may have determined that TDIU is warranted. Accordingly, the Board prejudiced the Veteran by failing to consider the ankle disabilities along with the dysthymia in evaluating the question of TDIU entitlement and a remand is necessary for the Board to provide the required analysis in light of all of the service-connected conditions.

II. The Veteran should receive an examination during the winter, when his psychiatric symptoms would be expected to be at their worst.

A claimant is entitled to VA's assistance in developing the facts pertinent to a claim. 38 U.S.C. § 5103A (a)(1). VA's duty to assist a claimant requires it to obtain a medical opinion "when such an . . . opinion is necessary to make a decision on the

claim." 38 U.S.C. § 5103A(d)(1); *see Charles v. Principi,* 16 Vet.App. 370, 375 (2002) (Board erred in failing to obtain a medical nexus opinion necessary to make decision on claim); 38 C.F.R. § 3.159(c)(4)(i)(C) (2018). In some circumstances, VA also has an obligation to request clarification of an opinion. *See* 38 C.F.R. § 4.2 (2018) ("If a diagnosis is not supported by the findings on the examination report or if the report does not contain sufficient detail, it is incumbent upon the rating board to return the report as inadequate for rating purposes."); *see also* 38 C.F.R. § 19.9(a) ("If further evidence, clarification of the evidence, correction of a procedural defect, or any other action is essential for a proper appellate decision, a Veterans Law Judge or panel of Veterans Law Judges shall remand the case to the agency of original jurisdiction, specifying the action to be undertaken."). Once VA undertakes the effort to provide an examination, even if not legally obligated to do so, it must obtain an adequate examination or explain why it need not do so. *Barr v. Nicholson*, 21 Vet.App. 303, 311-12 (2007). Plus, in deciding whether the duty to assist is satisfied, the Board must provide an adequate statement of the reasons or bases for its conclusions. *See Duenas v. Principi*, 18 Vet.App. 512, 517 (2004).

In *Ardison v. Brown*, 6 Vet.App. 405 (1994), the Veteran sought an increased rating for his skin condition. He noted how flare-ups of the condition would last several weeks. *Id.* at 408. The RO, however, afforded him an examination while his skin was not in a flare-up period. *Id.* On appeal, the Court found the examination to be inadequate since it did not occur during an active period of the disease and remanded

the case so the RO could provide him with an examination during an active period of his condition. *Id.*

Later, in *Voerth v. West*, 13 Vet.App. 117 (1999), the claimant sought an increased rating for his pilonidal cyst. On appeal, he argued that he should receive an examination when his condition is inflamed. *Id.* at 123. In denying the claimant's appeal, the Court distinguished his case from the situation in *Ardison* by stating that the claimant in *Ardison* had a condition which affected his employability, whereas the *Voerth* claimant did not, and that in *Ardison*, the claimant's flare-ups lasted weeks or months whereas in *Voerth*, the claimant's flare-ups only lasted a matter of days. *Id.* at 123-24. Hence, the question of whether a claimant is entitled to an examination during an active period of the disease depends on whether the condition affects employability and how long the active period lasts.

More recently in *Sharp v. Shulkin*, 29 Vet.App. 26, 32 (2017), the Court held: "the lesson of *Ardison* and *Voerth* is that once VA determines that an examination is warranted, its obligation to schedule that examination during a flare is contingent upon the frequency and duration of flares in a specific case." It found that an examination conducted during a flare-up was not warranted in Mr. Sharp's case because the record did not indicate the frequency or duration of flare-ups or what precipitated them. *Id.*

In the present case, Mr. Cooper underwent a VA psychiatric examination in September 2016. R-879-85. At that time, the Veteran reported higher levels of depression during the winter months. R-882. The winter is a long three-month period

during which it would be easy to schedule an examination. Also, the examiner noted that the dysthymia interfered with the Veteran's ability to maintain work relationships and function in a work environment. R-880. Hence, the criteria for requiring the Board to afford the Veteran a winter-time examination is met. Yet, the Board did not provide him with one nor did it explain why this was not required. This prejudiced him since if he received his latest psychiatric examination during the winter, it may have supported the need for a higher rating for the dysthymia or TDIU entitlement. Hence, a remand is needed for the Board to either procure such an examination or explain why it is not required to do so. *See Duenas*, *supra*.

CONCLUSION

All of the evidence when considered together tends to show that the Veteran should receive a higher rating for his dysthymia and TDIU. The Board erred in failing to discuss numerous pieces of relevant evidence that tend to show increased benefits are appropriate in Mr. Cooper's case. Thus, Mr. Cooper respectfully requests the Court to remand his case back to the Board with instructions for it to evaluate the questions of the rating for the dysthymia and TDIU in light of all of the material evidence. In addition, the Board erred by failing to ensure that VA procured a new psychiatric examination during the winter, when the dysthymia resulted in higher amounts of depression. Therefore, Mr. Cooper respectfully requests the Court to remand his case back to the Board with instructions for it to either mandate VA provide him with a new psychiatric examination during the winter months or explain why this is unnecessary.

Respectfully submitted,
Allen J. Cooper
By His Attorney,

/s/ Nicholas L. Phinney

NICHOLAS L. PHINNEY
166 Valley Street
Bldg. 6M, Suite 103
Providence, RI 02909
401-378-0733 (Telephone)
401-633-7781 (Facsimile)