UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-0287

PATRICK RODRIGUEZ,

Appellant

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,

Appellee.

REPLY BRIEF OF THE APPELLANT

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PRELIMINARY STATEMENT

On August 2, 2019, the appellant, Patrick Rodriguez (Rodriguez), filed his principal brief (App. Br.) in this appeal of the December 17, 2018 decision of the Board of Veterans' Appeals (Board) denying his claims for entitlement to (1) service connection for his right shoulder condition; (2) an increased evaluation in excess of 30 percent for his migraines; and (3) an increased evaluation in excess of 30 percent for his PTSD. Record before the Agency (R.)-1-18. Rodriguez files this reply brief to respond to the arguments advanced by Appellee, the Secretary of Veterans Affairs, in his brief (Sec. Br.) filed on November 15, 2019.

APPELLANT'S REPLY ARGUMENTS

I. The Board committed prejudicial error in refusing to develop Rodriguez's claim for his right shoulder condition.

In his argument to the Board, Rodriguez averred that his right shoulder condition is secondary to his cervical spine condition. R-29. Service connection for Rodriguez's cervical spine condition was one of the appeals that he opted into Higher Level Review (HLR) along with his shoulder condition, and it was discussed by his representative in the informal conference held on September 17, 2018. R-81-82, 178, 272. The HLR Informal Conference Worksheet reflects Rodriguez's contention that his cervical spine condition is directly related to his active duty service, and that the examination conducted by VA to evaluate his neck was inadequate. R-82. The Higher Level Reviewer deferred adjudication on Rodriguez's cervical spine condition for VA to obtain a medical opinion based on a direct theory of service connection, pursuant to its duty to assist. R-69.

In his written brief to the Board, Rodriguez specifically contended that his right shoulder condition was claimed as secondary to his cervical spine condition, remand to the AOJ was warranted pending the adjudication of his cervical spine condition. R-29. In its decision, the Board did not acknowledge the theory of service connection on a secondary basis that Rodriguez had advanced. In fact, it stated that "the Veteran contends that he suffers from a right shoulder disability as a direct result of his active duty service." R-8. Because Rodriguez's Service Treatment Records (STRs) did not show an injury, diagnosis, or treatment for his right shoulder, the Board stated that an examination to evaluate a direct theory of service connection was not warranted. R-9.

The Secretary argues that the Board's refusal to order a VA Examination and consider secondary service connection of Rodriguez's right shoulder condition was a harmless error. Sec. Brief at 7-12. The Secretary emphasizes that because Rodriguez's cervical spine condition was not service connected at the time of the Board's decision, there is no basis for a finding of service connection, and no duty to assist in obtaining an examination based on that theory. Sec. Brief at 9, 12.

The Secretary's argument is premised on an impermissible post-hoc rationalization. *See Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 146 (1991) (holding that litigating positions are not entitled to judicial deference when they are merely counsel's "post-hoc rationalizations" for agency action and are advanced for the first time on appeal); *see also Hensley v. West*, 212 F.3d 1255, 1263 (Fed. Cir. 2000) (noting "the general rule that appellate tribunals are not appropriate fora for initial fact finding"). The Secretary is positing reasons to support the Board's denial of Rodriguez's theory of service

connection on a secondary basis, when the Board did not acknowledge the theory and seemingly viewed Rodriguez's appeal as limited to a direct theory of service connection. Contrary to the Secretary's allegations, there is evidentiary support in the record for Rodriguez's theory of service connection. Furthermore, the Board is not free to ignore the issues a veteran raises in his appeal. *Godfrey v. Derwinski*, 2 Vet. App. 352, 356–57 (1992).

On May 19, 2017, VA healthcare personnel ordered an x-ray to address Rodriguez's "posterior neck pain with radiculopathy to bilat[eral] shoulders." R-99. On August 31, 2017, Rodriguez presented to the VA reporting:

> Continued posterior neck pain and right shoulder pain. States this has been chronic since 2008. He denies any specific injuries but notes he has 6 deployments and some IED blasts. He has a constant 2-3/10 pain in neck and shoulder and increases to 4-5 with high impact such as running.

R-177.[1] These treatment notes constitute medical evidence suggesting an association between the two conditions. Sec. Brief at 11. To trigger VA's duty to provide a medical examination with respect to service connection claims on a secondary basis, the appellant need only establish that the evidence of record "indicates" that the current disability "may be associated with the claimant's ... service." 38 U.S.C. § 5013A(d)(2). This is a "low threshold." *McLendon v. Nicholson*, 20 Vet. App. 79, 83 (2006) (explaining that the third element "requires only that the evidence 'indicates' that there 'may' be a nexus .... [which] is a low threshold"). This medical evidence, in conjunction with Rodriguez's explicit

[1] The Secretary alleges that this treatment note was misrepresented by Appellant in his arguments to the Court. Sec. Brief at 11. Appellant respectfully disagrees. Rodriguez's report that "this has been chronic" encompasses his neck and shoulder condition pain, at the very least indicating that they are indeed related.

argument to the Board that his condition is secondary, is sufficient to meet the low threshold. *Id*. Thus, it was in error for the Board to refuse to order a medical examination.

While the Secretary argues that Rodriguez's election of Higher Level Review and subsequent Direct Review foreclosed VA's duty to assist, this is incorrect. Sec. Brief at 12. Under the Appeals Modernization Act (AMA), the Board still has the duty to remand issues when necessary to correct a pre-decisional duty to assist error. *See* Pub L. No. 115-55 section (2)(d); 38 C.F.R. § 20.802 (a). This was the same under the Rapid Appeals Modernization Program (RAMP), in effect when the Board issued its decision. *See* Appeals Management Office (AMO) Policy Letter 18-01. Notably, the Higher Level Reviewer in Rodriguez's case deferred on several issues to remedy duty to assist errors, including direct service connection for the cervical spine impairment. R-69.

In addition to ignoring the evidence of record supporting Rodriguez's theory of entitlement, the Board also ignored his arguments. The Board "is not free to ignore the issues a veteran raises in his appeal," and the Court will remand the matter where the Board does so. *Godfrey*, 2 Vet. App. at 356–57. In *Godfrey*, the Board denied service connection for a veteran's hearing loss, citing to the lack of notation in the veteran's STRs. *Id*. at 353. In so holding, it failed to acknowledge arguments raised by the veteran in his VA Form 9 as to the etiology of his hearing loss. *Id*. at 356. The Court faulted the Board for "simply ignor[ing] appellant's contentions on this point," and stated that the veteran had properly raised an issue "that the Board was not entitled to brush aside in such cavalier fashion." *Id*. at 356-57. Rodriguez contends that the Board has committed an identical error in simply

ignoring his argument that his right shoulder condition is secondary to his cervical spine condition. *See id*.

The Federal Circuit Court of Appeals has recognized that separate theories in support of a claim for a particular benefit are not equivalent to separate claims and that a final denial on one theory is a final denial on all theories. *Bingham v. Principi*, 421 F.3d 1346, 1349 (Fed. Cir. 2005). Thus, the foregoing errors are prejudicial, because the Board's denial amounts to a final decision on Rodriguez's theory of service connection on a secondary basis, which VA did not develop pursuant to its duty to assist. *See* 38 U.S.C. § 7261(b)(2) (requiring the Court to "take due account of the rule of prejudicial error"). An adequate VA medical examination and discussion of the record evidence may reveal a medical nexus between Rodriguez's shoulder condition and cervical spine condition. *Arneson v. Shinseki*, 24 Vet. App. 379, 389 (2011) (finding prejudice when an error "could have altered" the Board's determinations). Therefore, vacatur and remand are warranted.

II. The Board erred in denying an increased evaluation for Rodriguez's headaches.

In Rodriguez's written brief to the Board, he identified medical evidence of record showing that his headaches significantly interfere with his ability to work, congruent with a finding of "severe economic inadaptability" contemplated by a 50 percent evaluation under 38 C.F.R. § 4.124a, Diagnostic Code (DC) 8100. R-22-24. The Board concluded that Rodriguez's disability picture did not warrant an evaluation in excess of 30 percent. R-10-13. In his initial brief, Rodriguez contended that the Board's statement of reasons and bases

in support thereof violated *Pierce v. Principi*, 18 Vet. App. 440, 446 (2004). App. Br. at 13-16.

The Secretary reduces Rodriguez's argument to a mere disagreement with how the Board weighed the evidence, but simultaneously admonishes him for failing to highlight favorable evidence in the record. Sec. Brief at 14 ("…Appellant fails to point to any evidence at all…"; *but see id*. at 15 ("Appellant's argument ultimately amounts to a mere disagreement with how the Board weight the evidence"). The dearth of favorable evidence enumerated in Rodriguez's initial brief is because his arguments on this issue are purely legal. The Board premised its denial of a 50 percent evaluation for Rodriguez's headaches on the fact that Rodriguez was employed. R-12. This is an error of law under *Pierce.* 18 Vet. App. at 446.

In his brief to the Board, Rodriguez contended that his headaches were productive of severe economic inadaptability based on the evidence of record, including an October 2017 Headaches C & P Examination. R-22-24. In his October 2017 Headaches C & P Examination, Rodriguez reported that he experiences three to four headaches per day that are intense, throbbing, and last 30 minutes to an hour, with accompanying photophobia. R-457. The examiner noted: "His concentration and focus are affected at work when they occur." *Id*. The examiner noted that Rodriguez has characteristic prostrating attacks of headache pain, and opined that the condition impacts his ability to work, because it limits his concentration and productivity. R-458. The Board acknowledged the examiner's notation that Rodriguez's headaches interfere with his ability to work, but stated that "they

were not productive of severe economic inadaptability, as he remained employed for the period on appeal." R-12.

In *Pierce*, the Board denied an evaluation in excess of 30 percent for a veteran's headaches when there was evidence on the record showing that his headaches impacted his ability to work, including a notation from a treatment provider that his headaches caused concentration difficulties and memory problems. 18 Vet. App. at 442, 445-46. The Court vacated the Board's decision, faulting it for concluding that the veteran's headaches were not productive of severe economic inadaptability when it "merely listed the evidence it considered without analyzing how that evidence does or does not relate specifically to the term 'severe economic inadaptability.'" *Id*. at 446. The Court reiterated its holding in *Gilbert v. Derwinski* that Board decisions must contain "clear analysis and succinct but complete explanations. A bare conclusory statement, without both supporting analysis and explanation, is neither helpful to the veteran, nor 'clear enough to permit effective judicial review', nor in compliance with statutory requirements." *Id*. (citing *Gilbert v. Derwinski*, 1 Vet. App. 49, 57 (1990)(quoting *Int'l Longshoremen's Assoc. v. Nat'l Mediation Bd*., 870 F.2d 733, 735 (D.C. Cir. 1989)). It expanded that "nothing in DC 8100 requires that the claimant be completely unable to work in order to qualify for a 50% rating." *Id*.

The Board committed an identical error as that in *Pierce*. It recognized the October 2017 examination findings that Rodriguez's headaches interfered with his concentration and focus at work, but in the following paragraph, it concluded that "they were not productive of severe economic inadaptability." R-8. This amounts to a mere listing of the evidence the Board considered without analysis of how the evidence relates specifically to

the term "severe economic inadaptability." *See id*. This was specifically condemned by the Court in *Pierce*. *See id.* Furthermore, the Board's reliance on Rodriguez's employment status to deny entitlement to a higher evaluation is also condemned by the Court in *Pierce*. *See id*.

The Secretary dismisses the Board's analysis as merely referencing Rodriguez's employment in its "discussion of the totality of the evidence" rather than premising its denial on it (Sec. Brief at 14). Rodriguez responds that the Board's statement of reasons and bases is so bare that this notation represents its discussion of the totality of the evidence and is the only discernible justification offered for its denial. R-10-12. Thus, vacatur and remand is warranted.

III. The Board erred in denying an increased evaluation for Rodriguez's PTSD.

In his written brief to the Board, Rodriguez asserted that his occupational and social impairment, detailed in his VA treatment notes and examinations, is increasingly severe than that contemplated by a 30 percent evaluation under 38 C.F.R. § 4.3 DC 9411 (2017). R-25-28. Rodriguez specifically identified the symptom of "thoughts of death" endorsed in a VA examination, and contended that this warrants a 70 percent evaluation consistent with the Court's direction in *Bankhead v. Shulkin*, 29 Vet. App. 10, 20 (2017). R-27-28. The Board concluded that an evaluation in excess of 30 percent was not warranted. R-13-18. In his initial brief, Rodriguez asserted that in so holding, it did not discuss the applicability of *Bankhead*, and it erroneously found that in the context of Rodriguez's occupational and social functioning, he was married and employed for the entire time on appeal. App. Br. at 16-20.

The Secretary reduces the arguments proffered in Rodriguez's initial brief as a mere disagreement with how the facts were weighed. Sec. Brief at 23. Rodriguez counters that the Board committed prejudicial errors of law in its assessment of his occupational and social functioning and in its dismissal of the thoughts of death Rodriguez endorsed.

In his October 2017 VA Examination, the examiner reported that Rodriguez had "passive thoughts of death." R-832. The Board acknowledged this notation, but stated that it did not amount to "serious suicidal ideation, intent, or plan." R-16. The Secretary adopted this statement, employing the same descriptor to dismiss Rodriguez's symptom—that there was "no serious suicidal ideation, intent, or plan." Sec. Brief at 23. Rodriguez responds that the Board's decision and the Secretary's position contravene the Court's holding in *Bankhead*. 29 Vet. App. at 20.

In *Bankhead*, the Board decision at issue denied a disability evaluation in excess of 50 percent for a veteran's depression when the evidence of record included the veteran's intermittent expression of suicidal thoughts. *Id*. at 14-15. Throughout the period on appeal, the veteran sporadically endorsed thoughts of death to his treatment providers but also denied suicidal ideation at various points, including in a C & P Examination. *Id*. at 14-17. The Board held that the veteran's "passive" suicidal ideation did not rise to the level contemplated in a 70 percent disability evaluation, because he was at a low risk of self-harm throughout the period on appeal and he retained some social and occupational functioning. *Id*. at 20. The Court faulted the Board for requiring "evidence of more than thought or thoughts to establish the symptom of suicidal ideation," and set aside its decision. *See id*. at 20-21.

In so holding, the Court described suicidal ideation as a "continuum"—at one end, there is passive suicidal ideation, which includes thoughts "such as 'wishing you would go to sleep and not wake up,'" with active suicidal ideation further down the continuum, which entails thoughts of specific ways to end one's life. *Id*. The Court stated that ultimately both passive and active suicidal ideation are "comprised of thoughts," and that neither "requires suicidal intent, a plan, or prepatory behavior." *Id*. at 20. The Court applied its definition of suicidal ideation to the rating criteria, observing:

> Suicidal ideation appears only in the 70 [percent] evaluation criteria. There are no analogues at the lower evaluation levels, see [*Vazquez-Claudio v. Shinseki*, 713 F.3d 112, 116 (Fed. Cir. 2013)](tracking the increasing severity, frequency, and duration of panic attacks and memory loss across the various disability levels). Additionally, there are no descriptors, modifiers, or indicators as to suicidal ideation in the 70 [percent] criteria (including no specific mention of "active" suicidal ideation, "passive" suicidal ideation, suicidal "intent," suicidal "plan," suicidal "prepatory behavior," hospitalization, or past suicide attempts). Thus, the language of the regulation indicates that the presence of suicidal ideation alone, that is, a veteran's thoughts of his or her own death or thoughts of engaging in suicide-related behavior, may cause occupational and social impairment with deficiencies in most areas.

Id. The Court faulted the Board for characterizing the veteran's suicidal thoughts as merely passive, for it "erroneously grafted risk of self-harm onto the symptom of suicidal ideation listed in the criteria for a 70 [percent] evaluation." *Id*. at 20.

The Board committed an identical error in its decision in finding that Rodriguez endorsed passive thoughts of death but no "serious" suicidal ideation, intent, or plan. R-16. Like in *Bankhead*, the Board erroneously grafted risk of self-harm onto the symptom of suicidal ideation. *See* 29 Vet. App. at 20. Its cursory dismissal of Rodriguez's professed

thoughts of death is counter to established case law, and is a prejudicial error warranting vacatur and remand. *See id.*

The Board additionally erred in summarizing Rodriguez's occupational and social functioning as: "The Veteran was married and employed throughout the time on appeal." R-16. This statement is erroneous, and the Secretary has conceded as much insofar as Rodriguez was not married for the time on appeal. Sec. Brief at 22. As to Rodriguez's occupational functioning, the Board failed to address important evidence showing his significant limitations. Rodriguez's former employer, Martha Serrano, submitted a statement on February 16, 2018, attesting to his limited "memory, concentration, [and] personality…" R-330-31. Serrano stated that she had to remind him of tasks assigned to him and observed his significant challenges in maintaining a positive attitude and communicating with clients. *Id*. at 331. Additionally, in the October 2017 Examination, the examiner noted that Rodriguez only worked 20 hours per week "due to his depression and lack of energy/motivation." R-827. Rodriguez's limitations, which necessitated his reduced work schedule due to his depression, warranted adequate discussion by the Board.

"The need for [an adequate] statement of reasons or bases is particularly acute when [Board] findings and conclusions pertain to the degree of disability resulting from mental disorders." *Mittleider v. West*, 11 Vet. App. 181, 182 (1998). To comply with this requirement, the Board must analyze the credibility and probative value of evidence, account for evidence that it finds persuasive or unpersuasive, and provide reasons for its rejection of material evidence favorable to the claimant. *Caluza v. Brown*, 7 Vet. App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table). In the context of mental

disorders, "[w]here ... the Board fails to adequately assess evidence of a sign or symptom experienced by the veteran, misrepresents the meaning of a symptom, or fails to consider the impact of the veteran's symptoms as a whole, its reasons or bases for its denial of a higher evaluation are inadequate." *Bankhead*, 29 Vet. App. at 22 (citing *Caluza*, 7 Vet. App. at 506; *Gilbert*, 1 Vet. App. at 52; *Mittleider*, 11 Vet. App. at 182. Rodriguez contends that the Board's assessment of his occupational and social functioning as he was "married and employed" throughout the time on appeal amounts to a misrepresentation of his symptoms, and a failure to consider the impact of his symptoms as a whole. *See Bankhead*, 29 Vet. App. at 22; R-16. This error, in conjunction with its impermissible reduction of Rodriguez's thoughts of death, renders its statement of reasons and bases inadequate. Vacatur and remand are warranted.

CONCLUSION AND RELIEF SOUGHT

Based on the foregoing reasons, as well as the arguments contained in Rodriguez's initial brief, Rodriguez requests vacatur and remand on the issues of his service connection for his right shoulder condition as secondary to his cervical spine condition, evaluation in excess of 30 percent for his headaches, and evaluation in excess of 30 percent for his PTSD.

Respectfully submitted on November 26, 2019 by:

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