REPLY BRIEF OF APPELLANT

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

18-5810

BRADLEY NUTTY,

Appellant,

v.

ROBERT L. WILKIE,
SECRETARY OF VETERANS AFFAIRS,

Appellee.

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APPELLANT'S REPLY ARGUMENTS

I. The Board failed to fulfill its obligation under 38 U.S.C. § 7104 to conduct a de novo review of the record and provide an adequate statement of reasons or bases regarding the Veteran's functional loss.

The Board denied a rating higher than 10 percent for the Veteran's left knee condition, stating that "at no time has [he] had a flexion limited to 45 degrees or less." R-9-10. It reasoned further, "while the Veteran does not currently meet the requirement of flexion being limited to at least 45 degrees as needed for a 10 percent rating, his additional pain on movement and occasional additional loss upon repetitive testing due to pain, weakness, and fatigue were considered to afford the Veteran a 10 percent rating." R-10. "Thus, the requirements of *DeLuca* were already considered in the rating provided." *Id.*

Although the Secretary concedes that "when a disability of the joints is evaluated based on limitation of motion, the *Board* must consider additional limitations due to pain, weakness, or fatigue," he merely reiterates the Board's acknowledgment that "Appellant's pain, weakness, and fatigue had been considered when providing a rating decision." Secretary's Br. at 16 (emphasis added). In that regard, he misses the point. The Regional Office's purported consideration of functional loss factors beyond range of motion measurements did not relieve the Board of its duty to consider those factors. *See* 38 U.S.C. § 7104(a). Indeed, it is the Board's "responsibility . . . to interpret reports of examination in light of the whole recorded history, reconciling the various reports into a consistent picture so that the

current rating may accurately reflect the elements of disability." 38 C.F.R. § 4.2 (2019).

"[T]he Board conducts de novo review of regional office proceedings" and issues decisions "based on the entire record." *Disabled American Veterans v. Sec'y of Veterans Affairs*, 419 F.3d 1317, 1319 (Fed. Cir. 2005); *see also Kuppamala v. McDonald*, 27 Vet.App. 447, 457 (2015); *Wages v. McDonald*, 27 Vet.App. 233, 239 (2015). Here, the Board simply noted that the Veteran's flexion was not limited to 45 degrees and pointed to previous rating decisions that assigned a 10 percent rating despite that fact. R-9-10. But it was the Board's job to explain, under 38 C.F.R. §§ 4.40 and 4.45 (2019), and above all under 38 U.S.C. § 7104(a), "how pain on use" and other functional loss considerations were "factored into its evaluation of the veteran's disability in terms of limitation-of-motion equivalency." *DeLuca v. Brown*, 8 Vet.App. 202, 208 (1995). It failed to fulfill that obligation by neglecting to make its own findings about the Veteran's functional loss regardless of initial range of motion measurements. R-9-10; 38 U.S.C. § 7104(d)(1).

The Board's failure to apply and explain its consideration of 38 C.F.R. §§ 4.40 and 4.45 prejudiced the Veteran's claim because he experienced as many as three flare-ups per day that limited his functioning, and caused impairments with sitting, standing, walking, and exercising due to pain. Appellant's Br. at 19-20; *see also* R-326; R-3574; R-4123; R-4326. Even reading the decision as whole, as the Secretary contends, it is not "clear that the Board did address Appellant's reported flare ups and

the limitations that the pain from the flare-ups cause." Secretary's Br. at 17. Appellant does not disagree with the Board's weighing of the evidence because it performed no such weighing; it simply adopted the Regional Office's decisions. *See id.*; *see also* R-9-10. Simply acknowledging evidence of flare-ups during its recitation of evidence did not account for the effects of those flare-ups in relation to the rating schedule, nor did it account for the Veteran's impairments with sitting, standing, walking, and exercising due to pain. *See id.*; *see also* R-8-10. And "clearly denot[ing] what examiners reported does not comply with the Board's reasons or bases requirement. Secretary's Br. at 16; *see Abernathy v. Principi*, 3 Vet.App. 461, 465 (1992) (holding that the Board errs by merely listing evidence without analysis of the evidence).

Section 4.40 instructs that "[w]eakness is as important as limitation of motion, and a part which becomes painful on use must be regarded as seriously disabled." Section 4.45 provides that the Board must consider, in relevant part, weakened movement, excess fatigability, pain on movement, disturbance of locomotion, and interference with sitting, standing, and weight-bearing. Had the Board fulfilled its obligation and applied these regulations, it might have found that a higher rating was warranted due the Veteran's flare-ups that caused limited mobility, pain with standing and at rest, and "difficulty supporting his body weight and remaining stable during exercise." R-3574; *see also* R-4123; R-4326; *and see* 38 C.F.R. § 4.40. Similarly, it might have found that impairments with sitting, standing, and walking warranted a higher

rating. R-326; *see also* 38 C.F.R. § 4.45. Remand is therefore required for readjudication with consideration of sections 4.40 and 4.45. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998).

II. The Secretary fails to adequately rebut the Veteran's argument that the Board misinterpreted the law when it found that he failed to cooperate with VA's attempts to assist him in substantiating his claim without submitting good cause.

A. Contrary to the Secretary's request, the Court should consider the Veteran's argument on appeal because it bears directly on his entitlement to a higher rating.

The Secretary argues that the Court should ignore Mr. Nutty's argument that the Board did not provide an adequate explanation for its refusal to afford him a VA medical examination. *See* Secretary's Br. at 9-10. Citing *Scott v. McDonald*, the Secretary contends that this is a procedural argument that he did not raise before the Board or Regional Office, and "it is appropriate for the Board and the Veterans Court to address only those procedural arguments specifically raised by the veteran." *Id.* at 9 (citing 789 F.3d 1375, 1381 (Fed. Cir. 2015)). But the Secretary's reading of *Scott* is unduly narrow.

For one, *Scott* is not applicable because, here, the Board sua sponte raised the issue of the Veteran's purported failure to report to the VA examination. R-9. It explicitly found that "the Veteran never responded" to VA's attempts to schedule an examination, stating that the duty to assist "is not a 'one-way street'" and he "cannot passively wait for it in circumstances where he may or should have evidence that is

essential in obtaining the putative evidence." *Id.* Accordingly, the Board was required to fully support its finding—if not an implicit one—that VA properly notified Mr. Nutty of the need to schedule an examination and that he failed to respond without good cause. *See Kyhn v. Shinseki*, 26 Vet.App. 371, 374-75 (2013).

Moreover, *Scott* held that invocation of issue exhaustion is appropriate only when the issue in question is purely procedural, and Mr. Nutty's argument is not purely procedural. 789 F.3d at 1381. "There is a significant difference between considering closely-related theories and evidence that could support a veteran's claim for disability benefits and considering procedural issues that are collateral to the merits." *Id.* "[T]he veteran's interest is *always* served by examining the record for evidence that would support closely related claims that were not specifically raised." *Id.* (emphasis added).

Here, the Board specifically found that, because Mr. Nutty did not RSVP to VA, it "must adjudicate the issue on appeal based upon the evidence that is currently of record." R-9. As a result, the sufficiency of VA's notice to him regarding his responsibility to schedule a VA examination is not "purely procedural"; instead, it relates *directly* to the merits of his claim. *Cf. Scott*, 789 F.3d at 1381. The Board's own finding supports this conclusion. *See* R-9. Accordingly, the Court should decline the Secretary's invitation to disregard the Veteran's argument as his entitlement to a higher rating is directly at stake, and his interest in having the Court adjudicate the issue thus outweighs "VA's institutional interests in addressing the . . . issue early in

the case." *Scott*, 789 F.3d at 1381; *see Dickens v. McDonald*, 814 F.3d 1359, 1361 (Fed. Cir. 2016). *But see* Secretary's Br. at 9-10.

However, even if, for the sake of argument, the Veteran's argument is purely procedural (and Mr. Nutty maintains that it is not), the Court should still reject the Secretary's invitation to invoke the issue exhaustion doctrine. In *Scott*, the claimant was represented by the same counsel before the Board and the Court, and counsel had previous opportunities to raise the adequacy of the claimant's hearing before the Board and the Court but failed to do so. *See Scott*, 789 F.3d at 1377. In this context, the Federal Circuit warned, "failure to raise an issue may as easily reflect a *deliberate* decision to forgo the issue as an oversight." *Scott*, 789 F.3d at 1381 (emphasis added).

The Court prohibited resurrecting a purely procedural issue "months or even years later when, based on new circumstances, the veteran decides that raising the issue is now advantageous." *Id.* This is consistent with the long-understood principle that invocation of issue exhaustion is generally appropriate when a veteran raises an argument for the first time on appeal to Court, and the Court determines that VA's "institutional interests outweigh the interests of the veteran" in presenting his or her argument on appeal. *Dickens*, 814 F.3d at 1361. But here, Mr. Nutty was not represented by his current counsel—or any counsel, for that matter—prior to his present and only appeal to this Court, and his argument is presented before this Court at his first opportunity, in an effort to cure an error that materially affects his claim. *See* R-9.

Furthermore, in *Scott*, the Federal Circuit acknowledged that there are exceptions to the rule that purely procedural issues must be raised below. 789 F.3d at 1381. The Court recognized that there may exist "extraordinary circumstances" which were only not apparent in that particular case—in which the Court should address and adjudicate a facially procedural argument that the veteran did not raise before the Board. *See id.* Therefore, even if Mr. Nutty's argument were purely procedural, it would nevertheless fall within the extraordinary circumstances category, because it involves VA's obligation to notify him of the examination scheduling process. This is information only the agency possesses, which the Veteran could not otherwise obtain. And, as explained in his opening brief and further in Section I.d. below, Mr. Nutty suffers from significant service-connected psychiatric and post-concussive syndrome disabilities that may prevent him from adequately representing his interests before the agency. *See* Appellant's Br. at 12-14.

The Federal Circuit's cautious approach in *Scott* stemmed in part from its concern that "further remands to cure procedural errors . . . at the end of the day, may be irrelevant to final resolution and may indeed merely delay resolution." 789 F.3d at 1381. Here, however, remand is plainly relevant to final resolution because, as the Board expressly found, procurement of proper medical evidence as to Mr. Nutty's left knee condition is essential to evaluating his claim because none of the VA examinations of record complied with *Correia v. McDonald*. *See* R-903. Therefore,

even if the Veteran's argument were purely procedural, the Court should not decline to review it.

The Court should also reject the Secretary's argument that Mr. Nutty "acknowledged his failure to reply to telephone calls and a letter but made no assertion of non-receipt." Secretary's Br. at 10, 12 (citing R-23). The Veteran's representative, who drafted the May 2018 post-remand brief to which the Secretary refers, appears to have simply recited the language of the May 2018 Supplemental Statement of the Case as part of the "Statement of the Facts." *Compare* R-22-23, *with* R-32, R-38-39. Accordingly, the Court should find that the Veteran did not concede that there exists no documentation showing good cause for his failure to report for the examination; rather, his VSO representative merely recited VA's findings to illustrate the procedural posture of the claim.

B. The Secretary fails to rebut the Veteran's argument that the Board should have discussed the presumption of regularity, as well as the documents it relied on in implicitly finding that he was properly notified of the Regional Office's request to schedule an examination.

As Mr. Nutty argued, the record shows that the Regional Office did not follow its regular procedures for sending notice to schedule an examination. *See* Appellant's Br. at 11-12. Accordingly, the Board should have discussed the applicability of the presumption of regularity, as well as the documents it used to implicitly find that he was notified of VA's requests to schedule the examination under its established procedure. *See id.* at 10-11.

The Secretary disagrees, and first attempts to distinguish *Kyhn* from the instant case because, according to the Secretary, in this case the Board "made no such finding" about proper notification. Secretary's Br. at 10. The Secretary contends that, as a result, the Board was "not obliged to provide a statement of reasons or bases to support a finding that was never made." *Id.* But the Secretary overlooks that the Board necessarily made the implicit finding that the Regional Office adequately followed VA's notice procedures in providing the Veteran with notice to schedule an examination. *See* R-9. Had it not made such an implicit finding, the Board could not have concluded that the Veteran "never responded" to VA's invitation to schedule an examination. R-9. But the Board failed to provide adequate reasons or bases in support of its implicit finding that he was properly notified when it failed to discuss whether the presumption of regularity applied, or the relevant documents on which it relied. Remand is warranted to allow it to do so. *See* Appellant's Br. at 10-12; *Kyhn*, 26 Vet.App. 373-74. *But see* Secretary's Br. at 10-11.

The Secretary refers to *Baxter v. Principi* for the proposition that the Board need not explain VA's compliance with the duty to notify when compliance is not disputed, and notes that Mr. Nutty "has never asserted that he was not properly notified of the scheduling of the VA examinations." Secretary's Br. at 10; *see* 17 Vet.App. 407, 410 (2004). He thus argues that the Board was not required to examine the presumption of regularity unless the Veteran alleged non-receipt. *See* Secretary's Br. at 11.

Baxter is also distinguishable, however, because in that case, the Board did not sua sponte conduct an analysis regarding whether the disputed missing communication—there, a rating decision—had been properly received. *See* 17 Vet.App. at 409-10. Here, the Board engaged in a full analysis of Mr. Nutty's failure to schedule his VA examination, and ultimately concluded that he failed to respond. *See* R-9. Accordingly, the Board's decision itself placed the duty to notify in dispute, and the Board was therefore required to adequately discuss whether the RO properly complied with the duty to notify. *See* Appellant's Br. at 10-12; *McCray v. Wilkie*, 31 Vet.App. 243, 254 (2019) ("[W]hen the Board relies on evidence unfavorable to a claimant, it must explain why such evidence has persuasive value as to the issue at hand."). *But see* Secretary's Br. at 10-11.

C. *The Secretary fails to support his argument that the Board was not required to address whether the Veteran's service-connection psychiatric and post-concussive symptoms constituted good cause for his failure to respond to VA's attempts to schedule an examination.*

The Secretary summarily argues that "[t]he Board was not required to discuss hypothetical reasons that might have constituted good cause for [Mr. Nutty's] failure to respond" to VA's RSVP request. Secretary's Br. at 11. However, Mr. Nutty's psychiatric limitations are not merely hypothetical, because his symptoms are evident from the record. *See id.* at 11-12 (citing *Robinson v. Mansfield*, 21 Vet.App. 545, 553 (2008) for the premise that the Board is not required "to assume the impossible task

of inventing and rejecting every conceivable argument in order to produce a valid decision").

Mr. Nutty's PTSD and post-concussive syndrome, residuals of a traumatic brain injury, are rated 50 and 40 percent disabling, respectively. R-2630. His 50 percent rating for PTSD contemplates difficulty in understanding complex commands, impairment of short- and long-term memory (e.g., retention of only highly learned material, forgetting to complete tasks), impaired judgment and abstract thinking, and disturbances of motivation. R-4106-07 (4103-08) (Dec. 2010 rating decision). His 40 percent rating for post-concussive symptoms indicates the highest severity level of impairments with memory, attention, concentration, and executive functions. R-3881 (3875-81) (July 2011 rating decision). As he argued, the Federal Circuit has noted that veterans afflicted with psychological disabilities may need additional assistance from VA, and section 3.655(a) includes illness as an example of good cause for failing to report to an examination. Appellant's Br. at 13-14 (citing *Comer v. Peake*, 552 F.3d 1362, 1369 (Fed. Cir. 2009) and 38 C.F.R. § 3.655(a) (2018)).

The Veteran's service-connected symptoms are not merely "hypothetical reasons that might have constituted good cause," but rather pose very real limitations, which were evidence to the Board on his ability to respond to any requests to schedule VA examinations outside of his home. In *Comer*, the Federal Circuit took the permissive view that TDIU was reasonably raised by evidence of significant employment difficulties, even though the veteran did not explicitly raise the issue of

entitlement to TDIU. 552 F.3d at 1367. Similarly, here, Mr. Nutty's good cause is demonstrated by evidence of his severe psychiatric limitations, even if he did not explicitly raise those symptoms as good cause.

The pro-veteran, paternalistic nature of the VA benefits appeals process requires VA to sympathetically construe Mr. Nutty's claim. Congress has "'place[d] a thumb on the scale in the veteran's favor in the course of administrative and judicial review of VA decisions.'" *Henderson v. Shinseki*, 562 U.S. 428, 440 (2011) (quoting *Shinseki v. Sanders*, 556 U.S. 396, 416 (2009) (Souter, J., dissenting)). In adjudicating a veteran's claim, the Board cannot demand "legal sophistication beyond that which can be expected of a lay claimant." *Ingram v. Nicholson*, 21 Vet.App. 232, 256 (2007). Accordingly, where, as here, the record indicates that a veteran's service-connected disabilities may interfere with his ability to cooperate with VA's attempts to develop the record, the Board is required to consider, sua sponte, whether his disability picture might constitute good cause for failing to RSVP to VA's request. Therefore, the Board should have considered whether Mr. Nutty's service-connected disabilities may have interfered with his ability to cooperate with VA's attempts to develop the record as part of its duty to consider all arguments in support of Mr. Nutty's claim, and the Secretary's argument to the contrary must fail. *See Robinson*, 21 Vet.App. at 553.

Finally, should the Court agree that the Board erred by finding that Mr. Nutty failed to respond to the VA medical center's invitations to schedule an appointment for VA examinations without good cause, it should reject the Secretary's argument

that "the Board's reliance on previous examinations does not necessitate a remand." Secretary's Br. at 13. He concedes that the previous examinations were not compliant with *Correia*, but asserts that "the duty to assist is not a one-way street, and Appellant cannot be a passive participant in seeking assistance to develop a claim." *Id.* As explained, however, the duty to assist was violated by the Board, not the Veteran, when the Board failed to discuss the presumption of regularity and address whether Mr. Nutty's disabilities constituted good cause for his failure to respond to VA's attempts to schedule an examination. Appellant's Br. at 10-14; *see also* Sections II.B. and C., *supra*. Because of this, the Board erred in relying on the inadequate February 2010, November 2010, and January 2013 VA examinations to deny the Veteran a rating higher than 10 percent for his left knee condition. *See* Appellant's Br. at 15-17.

CONCLUSION

The Board failed to fulfill its obligation under 38 U.S.C. § 7104(a) and address and apply sections 4.40 and 4.45 when it denied a rating higher than 10 percent for Mr. Nutty's left knee condition, and the Court should reject the Secretary's argument to the contrary. Further, Mr. Nutty's arguments as to his failure to respond to the Regional Office's request to schedule an examination are not new theories raised on appeal, and the Board was required to explain its finding that he was notified of VA's request to schedule an examination. The Secretary's reliance on *Scott* is misplaced, and he fails to recognize that the evident deficiencies in the Regional Office's notice

procedure warranted discussion by the Board. The Secretary also fails to provide adequate support for his argument as to the Board's failure to consider whether the Veteran's service-connected psychiatric and post-concussive symptoms constituted good cause for failing to RSVP to VA.

Therefore, Mr. Nutty respectfully requests that this Court vacate the Board's June 21, 2018, decision and remand his appeal to the Board for further development as needed, and a new adjudication that is both supported by adequate reasons and bases and consistent with the law.

Respectfully submitted,

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