REPLY BRIEF OF APPELLANT

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

18-7310

DIMAS M. VALENTIN,

Appellant

v.

ROBERT L. WILKIE
SECRETARY OF VETERANS AFFAIRS,

Appellee.

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APPELLANT'S REPLY ARGUMENTS

In his initial brief, Mr. Valentin argued that his 1996 VA Form 21-526 sufficiently raised an informal claim for a left ankle disability, and the Board erred in finding that he did not submit a claim for that disability prior to 2008. *See generally* Appellant's Br. at 10 -17. Under VA regulations extant at that time, an informal claim was "any communication or action, indicating an intent to apply for one or more benefits . . . ." 38 C.F.R. § 3.155(a) (1996).

The Secretary maintains that the communication could not constitute an informal claim for a left ankle disability, because "Appellant has failed to cite any evidence showing an intent to file a claim for a left ankle disorder prior to July 22, 2008." Secretary's Br. at 5. The Secretary's argument is inconsistent with this Court's and the Federal Circuit's case law. Accordingly, the Court should reject the Secretary's argument for affirmance, vacate the Board's decision, and remand the matter for the Board to issue a new decision applying the correct law and facts.

First, the Secretary argues that "the term 'medical problems' is too broad to show an intent to file an ankle disorder claim." Secretary's Br. at 5. But Mr. Valentin did not simply list "medical problems" as the disabilities for which he sought disability compensation: he also directed the adjudicator to "see medical records" and listed both periods of active service on his application. R-3707. And his service medical records included an in-service diagnosis related to the left ankle. R-1435. At the time the RO rendered its March 1999 rating decision, it also had in its possession a VA

medical examination report noting in-service trauma to the left ankle and diagnosing "s/p bilateral injuries with recurrent sprains." R-3507; R-3508.

In *Sellers v. Wilkie*, this Court made clear that a "general statement of intent to seek benefits, *coupled with a reasonably identifiable in-service medical diagnosis reflected in service treatment records* in VA's possession prior to the RO making a decision on the claim, may be sufficient to constitute a claim for benefits." 30 Vet.App. 157, 161 (emphasis added). Here, Mr. Valentin's request for disability benefits for "medical problems" was a "general statement of intent to seek benefits." *See id.*; R-3707. And the diagnosis of left ankle inversion sprain was a "reasonably identifiable in-service medical diagnosis reflected in service treatment records in VA's possession" at the time of the RO's March 1999 rating decision. R-1435; *see also* R-3391 (March 1999 rating decision noting that service medical records from December 1976 to March 1991 were considered). And—beyond the evidence deemed sufficient in *Sellers*—the record here also included a post-service left ankle diagnosis by a VA Compensation and Pension examiner. R-3508.

Thus, from the evidence before the RO when it rendered its decision in March 1999, it was obvious that the "medical problems" from which Mr. Valentin suffered included a left ankle disability. *See Sellers*, 30 Vet.App. at 163-64 (holding that the severity of a disability and the number of medical records documenting the disability are factors to be considered in determining whether a diagnosis was "reasonably identifiable.") The evidence passed the *Sellers* test, and the Board's

finding that Mr. Valentin did not file a left ankle disability claim prior to 2008 requires vacatur and remand. *See* R-7.

The Secretary argues that *Sellers* is distinguishable from this case because "the term 'medical problems' does not show that Appellant intended to apply for a claim for service connection for an ankle condition." Secretary's Br. at 6. But this ignores the Court's holding that while, under *Brokowski*, "general statements of intent" are insufficient to raise an informal claim, "records containing diagnoses that are reasonably identifiable from a review of the record may otherwise cure an insufficient general statement of intent to seek benefits." *Sellers*, 30 Vet.App. at 164. So while Mr. Valentin's statement demonstrating a general intent to seek compensation benefits for "medical problems" *alone* might be insufficient, any insufficiency was cured by the medical records in the RO's possession at the time of the 1999 rating decision documenting diagnoses of a left ankle disability. *See id.* *Sellers* is therefore binding in this case.

The Secretary also suggests—wrongly—that a claimant's intent must be measured at the time of the submission. *See* Secretary's Br. at 6. He argues that because none of the records that Mr. Valentin attached to his 1996 VA Form 21-526 document an ankle disability, he did not evince an intent to seek benefits for that condition. Secretary's Br. at 5-6. The Secretary points out that "[w]hen Appellant noted to 'see medical records' in the April 1996 application form, none of the medical records shows [sic] an ankle condition." Secretary's Br. at 6.

But this Court made abundantly clear in *Sellers* that in-service diagnoses that are reasonably identifiable "at the time a claimant seeks benefits *or prior to the RO's deciding the claim*" inform the adjudicator as to the scope of the claim. 30 Vet.App. at 163 (emphasis added). It is not, as the Secretary argues, *only* the time that the initial claim document is submitted that is relevant to the determination of the scope. *See id.* And this rule makes practical sense. It is rare that a claimant would have possession of the service medical records and submit them along with the initial claim document. "Because many veterans lack the knowledge and resources necessary to locate relevant records, Congress has appropriately placed the burden on the VA to ensure that all relevant service medical records are obtained and fully evaluated." *Moore v. Shinseki*, 555 F.3d 1369, 1375-76 (Fed. Cir. 2009). To expect a claimant to submit the service treatment records *with* the initial claim document is unreasonable and the Court recognized as much when it measured the relevant time period as "prior to the RO's deciding the claim." *See Sellers*, 30 Vet.App. at 160, 163.

And, contrary to the Secretary's implication, Mr. Valentin was not required to identify "specific medical records" in his 1996 VA Form 21-526 in order to demonstrate an intent to file a claim for the left ankle. *See* Secretary's Br. at 6-7. This Court has made clear that "VA may not ignore in-service diagnoses of specific disabilities, even those coupled with a general statement of intent to seek benefits . . . ." *Sellers*, 30 Vet.App. at 163. And while the veteran identified specific records in *Shea v. Shulkin*, the Federal Circuit did not hold that *only* records identified

in the initial claim document define the scope of the claim. *See* 926 F.3d 1362, 1368-69 (Fed. Cir. 2019).

Instead, the Federal Circuit held that "in deciding what disabilities, conditions, symptoms, or the like the claim-stating documents are sympathetically understood to be identifying, VA must look beyond the four corners of those documents when the documents themselves point elsewhere—here, to medical records." *Shea*, 926 F.3d at 1369. Here, Mr. Valentin identified both periods of service, and in the section of the VA Form 21-526 requesting that he identify the "nature, sickness, disease or injuries for which this claim is made," directed VA to "see medical records"—the same language used in *Sellers*. R-3707; *see Sellers*, 30 Vet.App. at 163. VA was therefore required to "look beyond the four corners" of the VA Form 21-526 and review the service treatment records from both periods of service to identify "in-service diagnoses of specific disabilities." *See Shea*, 926 F.3d at 1369; *Sellers*, 30 Vet.App. at 163.

The Federal Circuit held in *Shea* that "while a pro se claimant's 'claim must identify the benefit sought,' the identification need not be explicit in the claim-stating documents but can also be found indirectly through examination of evidence to which those documents themselves point when sympathetically read." 926 F.3d at 1368. Here, Mr. Valentin specifically identified both periods of active service, and directed VA to consider his "medical records." R-3707. VA was required by law to obtain his records from both periods of service, and those records included the left ankle

diagnosis. R-1435; *see Jolley v. Derwinski*, 1 Vet.App. 37, 39-40 (1991). This diagnosis was not hidden in thousands of pages of service medical records and was confirmed by the VA examination that the RO itself ordered. *See Sellers*, 30 Vet.App. at 164-65 ("[T]he sheer volume of medical records may potentially be a factor in determining whether a condition would have been reasonably identifiable to a VA adjudicator."). Therefore, when sympathetically read, Mr. Valentin's identification of "medical problems" and the sympathetic reading of his request that VA adjudicators "see medical records" was sufficient to raise a claim for the left ankle disability. *See Shea*, 926 F.3d at 1368.

Further, contrary to the Secretary's argument, Mr. Valentin's specific identification of other conditions for which he sought compensation did not render his general statement of intent to file for "medical problems" void. *See* R-3707; *contra* Secretary's Br. at 6. In *Shea*, the veteran identified specific disabilities on her VA Form 21-526 but stated in a different document that she was "[a]pp[l]ying [f]or se[r]vice connected disabilit[i]es." 926 F.3d at 1365. The Federal Circuit held in that case that the claim documents may have been sufficient to invoke a claim for a psychiatric disability—a condition that was not specifically identified on the forms. *See id.* at 1370.

Likewise, in *Sellers*, the veteran "list[ed] various physical injuries as disabilities," but also wrote that he requested service connection "for disabilities occurring during active service." 30 Vet.App. at 161. The Court remanded in that case for the Board

to determine whether the claim encompassed a psychiatric disability. *Id.* at 163. In neither case did the court find that the veteran's identification of specific disabilities somehow trumped the veteran's general statement of intent to seek benefits. *See id.*; 926 F.3d at 1370. The Court should refuse the Secretary's invitation to do so here.

Finally, the Secretary suggests that Mr. Valentin's initial brief before this Court was the first time he argued that his 1996 submission was meant to initiate a claim for this disability. Secretary's Br. at 5. But that is plainly wrong. Mr. Valentin argued to the RO and the Board that he submitted his claim in 1996 and requested more than once that VA correct his current effective date to reflect that the date of the claim was 1996. R-2106; R-2487. The Court should reject the Secretary's argument to the contrary.

As argued in Mr. Valentin's initial brief and further above, the 1996 VA Form 21-526 contained a general statement of intent to seek benefits and the records before the RO when it rendered its initial decision included a reasonably identifiable left ankle diagnosis. The Board was therefore required to determine whether the 1996 claim form and the medical records before the RO in 1999 raised an informal claim for the left ankle. *See Sellers*, 30 Vet.App. at 160, 163. Its failure to do so constituted prejudicial error, because any left ankle disability claim initiated by the 1996 VA Form 21-526 remained pending on the date of the Board's decision and Mr. Valentin may be entitled to an earlier effective date. *See* Appellant's Br. at 17-20. Accordingly, vacatur and remand are required for the Board to determine in the first instance

whether the left ankle diagnosis was reasonably identifiable to VA adjudicators in 1999. *See Sellers*, 30 Vet.App. at 163 (holding that whether an in-service diagnosis was reasonably identifiable "is a factual determination for the Board").

CONCLUSION

When the RO adjudicated Mr. Valentin's 1996 claim for "medical problems" in 1999, it had before it an in-service diagnosis of a left ankle inversion sprain and a VA examination report that continued the left ankle diagnosis. When viewed together, the claim form and medical records reasonably raised an informal claim for a left ankle disability. But the Board failed to make any mention of this evidence when it determined that Mr. Valentin had not filed a claim for a left ankle disability prior to 2008. The Court should therefore vacate the Board's decision and remand the matter for the Board to address in the first instance whether a claim for a left ankle disability has been pending since 1996, thereby entitling Mr. Valentin to an effective date earlier than 2008 for the award of service connection.

Respectfully submitted,

/s/ Amy F. Odom

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