REPLY BRIEF OF APPELLANT

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

19-13

LILLIAN GREEN,

Appellant

v.

ROBERT L. WILKIE,
SECRETARY OF VETERANS AFFAIRS,

Appellee.

MEGAN M. ELLIS
CHISHOLM CHISHOLM & KILPATRICK
321 S Main St #200
Providence, Rhode Island 02903
(401) 331-6300
(401) 421-3185 Facsimile
Attorney for Appellant

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APPELLANT'S REPLY ARGUMENTS

I. The Secretary's defense of the Board's negative credibility finding is post hoc and ignores favorable evidence and the Board's statements.

The Board relied on three pieces of evidence to conclude that the Veteran's reports regarding his symptoms were not credible: his 1997 description of his reports of suicidal ideation and hallucinations as a "game" meant to facilitate his admission to treatment, a December 2000 Social Security examiner's assessment of the Veteran's reports as "not fully credible," and a January 2001 Social Security examiner's assessment of the Veteran's reports as "not credible." R-9-11. The Board failed to support its negative credibility finding with adequate reasons or bases, however. *See id.* It failed to explain why those three pieces of evidence were the most probative on the issue of the Veteran's credibility and did not address the context of the Veteran's admission that he fabricated his symptoms. *See id.*; Appellant's Br. at 14-17.

The Secretary argues that Appellant's assertions are "based on a mischaracterization of the Board's analysis and a misunderstanding of the law." Secretary's Br. at 14. But the Secretary misunderstands Appellant's argument. Ms. Green is not arguing that the Board *only* looked at the December 1997 record when making its credibility determination. *But see* Secretary's Br. at 15. Rather, she is arguing that the Board needed to weigh the evidence it cited against the rest of the Veteran's history, where he continued to consistently report his symptoms and during which his credibility was *not* questioned. *See* Appellant's Br. at 14-16.

"When the Board relies on evidence unfavorable to a claimant, it must explain why such evidence has persuasive value as to the issue at hand." *McCray v. Wilkie*, 31 Vet.App. 243, 254 (2019). Contrary to the Secretary's argument, it is not enough that the Board cited evidence that supported its negative credibility finding. *But see* Secretary's Br. at 14-15. It is also required to explain why that evidence is more persuasive than the rest of the evidence which supported the Veteran's credibility. *See McCray*, 31 Vet.App. at 254; *Thompson v. Gober*, 14 Vet.App. 187, 188 (2000) (the Board is required to provide an adequate statement of reasons or bases "for its rejection of any material evidence favorable to the claimant").

The Secretary further argues that the reasons for the Veteran's mis-reporting of his symptoms in 1997 "is simply irrelevant" because the "basis for the rating sought is the existence of particular symptoms." Secretary's Br. at 16. This is incorrect for several reasons. First, the basis for psychiatric ratings is not the "existence of particular symptoms," but the frequency, severity, and duration of those symptoms, and the level of occupational and social impairment *caused* by those symptoms. *See* 38 C.F.R. §§ 4.126, 4.130 (2019). If, as Ms. Green argued, the Veteran's reasons for fabricating symptoms to obtain inpatient treatment reflect a higher level of severity or occupational and social impairment, they are undoubtedly relevant and must be discussed. *See Dela Cruz v. Principi*, 15 Vet.App. 143, 149 (2001) (finding the Board is not required to discuss all evidence of record but must discuss all relevant evidence).

Second, VA has instructed that "each disability be viewed in relation to its history," and that the Board must "reconcile various reports into a consistent picture so that the current rating may accurately reflect the elements of disability present." 38 C.F.R. §§ 4.1, 4.2 (2019). The Board is therefore not free to ignore the context in which a claimant reports his symptoms. *Contra* Secretary's Br. at 16. As Ms. Green pointed out, the fact that her husband felt the need to obtain *inpatient* treatment for his disability demonstrated the severity of his condition. *See* Appellant's Br. at 16-17. Had the Board fully considered that fact, it might not have found that his reports made him an unreliable witness. *But see* R-9-11.

Finally, the Secretary argues that Ms. Green has "micharacterize[d] Appellant's reasons for seeking treatment in December [1997]," and offers his own interpretation of the Veteran's reports. Secretary's Br. at 16. But this is nothing more than the Secretary's own post hoc interpretation of the evidence. *See Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 156 (1991) ("'[L]itigating positions' are not entitled to deference when they are merely appellate counsel's 'post hoc rationalizations' for agency action, advanced for the first time in the reviewing court."). The Board did not find that the Veteran "lied to be admitted to appease his wife so he would be let back into the house." Secretary's Br. at 16. The 1997 record does not say anything about being "let back into the house," only that his wife wanted him to be admitted because of his overuse of drugs and her belief in his reports of suicidal ideation and hallucinations. R-1894. It is for the Board to determine what impact that evidence has on the probative

value of the Veteran's reports. Remand is warranted for it to do so. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998).

II. The Board's assessment of the Veteran's symptoms and his level of occupational and social impairment was contrary to the law and insufficiently supported; the Secretary's arguments are based on a misunderstanding of the Board's duties and the appropriate analysis.

The Board's determination that the Veteran was not entitled to ratings in excess of 30 and 50 percent was flawed in light of the Board's improper reliance on the absence of symptoms and failure to address all of the relevant evidence. *See* Appellant's Br. at 17-29. The Secretary's defense of the Board's analysis demonstrates his misunderstanding of the law and the Board's duties. *See* Secretary's Br. at 16-25.

a. The Board failed to sufficiently explain its citation to the absence of certain symptoms.

The Secretary does not dispute that part of the Board's analysis of the Veteran's entitlement to higher PTSD ratings was a recitation of all of the symptoms he did not experience. *See* R-15, 18; Secretary's Br. at 17-18, 23. Nor does he dispute that reliance on the absence of those symptoms as evidence against the claim is inappropriate. *See* Secretary's Br. at 17-18, 23. Instead, he simply maintains that it is not wrong for the Board to note the absence of certain symptoms, and that the Board in this case did not rely on that absence. *See id.*

However, what the Secretary fails to explain is why the Board would have spent time listing the symptoms it determined the Veteran did not have if it did not believe that this absence was relevant and entitled to probative weight. *See id.*; *see also* R-17-18, 23. To evaluate the Board's reasons or bases, the Court and the claimant must be able to

understand why the Board found certain evidence persuasive or unpersuasive. *See Bowling v. Principi*, 15 Vet.App. 1, 6-7 (2001). Because the Board failed to explain what weight it gave the absence of the symptoms it listed, there is no way for the Court to tell whether the Board improperly relied on the absence of symptoms as evidence against the claim. *See id.* Remand is therefore warranted for the Board to explain whether and why it believed this absence was significant. *See Fountain v. McDonald*, 27 Vet.App. 258, 272-73 (2015) (holding that the Board must provide a foundation for its reliance on the absence of evidence).

b. The Board failed to sufficiently address all favorable and material evidence.

Ms. Green argued that the Board erred when it failed to address evidence showing that her husband experienced symptoms that were similar in frequency, severity, and duration to those consistent with higher ratings. *See* Appellant's Br. at 20-25, 27-29. The Secretary's response essentially consists of either an assertion that the Board adequately considered the evidence, or a dispute that the evidence was relevant to the Veteran's rating. *See* Secretary's Br. at 16-17, 18-21, 23-24. However, he misunderstands the Board's duty to address evidence and fails to recognize when evidence is relevant. *See id.*

The April 2002 Social Security examination. The Secretary argues that the Board "noted" the April 2002 SSA assessment and considered it as "one piece of a series that included many assessments." Secretary's Br. at 16-17. He insists that the Board's discussion of the assessment was sufficient because it "identified the evidence that supported [its] overall assessment." *Id.* at 17. The Board's duty consists of more than

identifying the evidence that supported its findings. *But see id.* It is also required to explain why the evidence that supports its conclusion is more persuasive than the evidence to the contrary. *See McCray*, 31 Vet.App. at 254. As Ms. Green argued in her opening brief, the Board failed to do so here. *See* Appellant's Br. at 17-18.

The Board concluded the December 2000 SSA assessment, which showed the Veteran had only minimal limitations, was "highly probative." R-10. The April 2002 SSA assessment demonstrated the Veteran had a significantly more severe disability, including marked difficulties in maintaining social functioning and maintaining concentration, persistence, and pace; moderate restriction of activities of daily living; and four or more episodes of decompensation. R-5250. Although the Board provided bases for rejecting other portions of the Veteran's Social Security records, it did not do so for the April 2002 assessment. *See* R-12-13. Contrary to the Secretary's argument, the Board's reliance on the December 2000 assessment does not adequately explain its rejection of the April 2002 assessment. *But see* Secretary's Br. at 16-17.

Impaired judgment and disturbances of motivation and mood. The record shows that in addition to a May 2001 altercation with medical staff, the Veteran also became verbally abusive in March of that year, exhibited "agitated and demanding behavior" in October 2001, drove and worked while high, and would stop taking his medications so he could experience manic episodes. R-12; R-3559; R-3578-79. The record also contains evidence showing that he struggled with motivation, including receiving the lowest score for motivation when evaluated by his therapist. R-3473;

R-3577-78; R-3579. His moodiness and uncooperative behavior interfered with his treatment for substance abuse. R-3579. Although the Board acknowledged the Veteran did have "some impaired judgment and some disturbances in motivation and mood," it concluded that they were "not with such frequency, severity, and duration" that they would warrant a higher rating. R-16. But it did not explain why the above evidence was insufficient to show the required amount of frequency, severity, and duration to meet the standard. *Id.*

The Secretary argues that the Board did not err, because it noted some of this evidence, because some of the evidence is from outside the appeal period, and because he believes the Veteran's "documented difficulties with drug treatment" are not evidence of disturbances of motivation and mood. Secretary's Br. at 18-20. Again, however, he misunderstands the Board's duties. The fact that the Board noted a piece of evidence is not enough to establish that it provided an adequate statement of reasons or bases, it must also explain why it did nor did not find the evidence persuasive. *See McCray*, 31 Vet.App. at 254. The fact that evidence occurred outside the appeal period does not make it irrelevant, as each disability must be viewed in relation to its history. 38 C.F.R. § 4.1; *Romanowsky v. Shinseki*, 26 Vet.App. 289, 294 (2013). And the Secretary's opinion that a particular piece of evidence would or would not support a higher rating is nothing more than post hoc analysis. *See Martin*, 499 U.S. at 156. It is for the Board to decide—and adequately address—whether the Veteran's struggles to comply with treatment are evidence of disturbances of motivation and mood. 38 U.S.C. § 7104(a).

Ability to establish and maintain relationships. The Secretary notes that "the Board's characterization of the marriage rests on its duration and the fact that they were able to vacation together." Secretary's Br. at 24. In his view, these are "intelligible and reasonable bases to draw a conclusion about the nature of the marriage" and therefore adequate. *Id.* As noted above, however, the Board's duty is not only to point to evidence that supports its conclusion. *But see id.* It is also required to explain why it found other evidence less persuasive. *See McCray*, 31 Vet.App. at 254. It needed to address all of the evidence bearing on the effectiveness of the Veteran's relationships before announcing its conclusion. *See id.*

Moreover, the Secretary's opinion that limited communication, pursuit of an affair, and threats to kick the Veteran out of the house "do not indicate on their face difficulty maintaining an effective relationship" is also nothing more than post hoc rationalization. *See* Secretary's Br. at 20-21; *Martin*, 499 U.S. at 156. Nor is there a plausible basis for the Secretary to argue that the Veteran's pursuit of an affair, his wife's threats to kick him out, and the fact that he "hardly spoke with his family," were not relevant to the Board's analysis such that it did not need to consider those factors. *But see* Secretary's Br. at 20-21.

Ms. Green's citation to relevant evidence that the Board failed to consider in its analysis is not just a "disagreement with the conclusion drawn from the evidence." *Contra* Secretary's Br. at 24. Rather, it is a charge that the Board failed to properly execute its duty to provide its reasons for rejecting favorable evidence. *See Thompson*,

14 Vet.App. at 188. Contrary to the Secretary's belief, the Federal Circuit's decision in *Newhouse* did not absolve the Board of this duty. Secretary's Br. at 24-25 (citing *Newhouse v. Nicholson*, 497 F.3d 1298, 1302 (Fed. Cir. 2007)). Indeed, this Court has continually reaffirmed that duty. *See*, *e.g.*, *Harper v. Wilkie*, 30 Vet.App. 356, 362 (2018); *Johnson v. Wilkie*, 30 Vet.App. 245, 254 (2018); *Spellers v. Wilkie*, 30 Vet.App. 211, 221 (2018). Remand is therefore necessary for the Board to consider and discuss all of the evidence that reflects on the effectiveness of the Veteran's relationships and provide an adequate explanation regarding the persuasiveness of that evidence.

Near-continuous depression. Finally, the Secretary again attempts to dismiss evidence of the Veteran's severe depression through his own post hoc evaluation of the evidence. *See* Secretary's Br. at 23-24. He points to the Board's bare conclusion that the Veteran did not experience near-continuous depression as sufficient to satisfy the reasons-or-bases requirement. *Id.* However, a bare conclusion is not the same as an explanation for why the Board found that the Veteran's depression was not similar in frequency, severity, and duration to near-continuous depression that affected his ability to function independently, appropriately, and effectively. *See Buczynski v. Shinseki*, 24 Vet.App. 221, 224 (2011) (holding that "it is not sufficient to simply state that a claimant's degree of impairment lies at a certain level without providing an adequate explanation"). Nor does the Board's vague and ill-supported credibility finding support its conclusion, given that none of the evidence that it cited stated that the Veteran exaggerated his level of depression. *But see* Secretary's Br. at 24.

c. The Secretary's interpretation of "inability to establish and maintain effective relationships" is incorrect.

The Secretary argues that the Board was not required to discuss the ability to establish relationships because the rating criteria are "conjunctive, not disjunctive, requiring inability to both establish and maintain relationships." Secretary's Br. at 25. The Secretary is correct that "establish and maintain" is conjunctive. Thus, to meet the criteria, he has to show that he cannot both "establish *and* maintain" relationships. *See* 38 C.F.R. § 4.130. But he cannot "establish *and* maintain" relationships if he is unable to establish one. Ms. Green's reading does not require the regulation to be read in the disjunctive as the Secretary asserts. Secretary's Br. at 25. Contrary to the Secretary's interpretation, "either inability would suffice" because the inability to establish *or* the inability to maintain relationships leaves the Veteran unable to both "establish *and* maintain" relationships. *But see id.* Remand is therefore necessary for the Board to discuss the Veteran's ability to establish relationships.

III. Because the Board ordered additional development regarding the impact of the Veteran's bipolar disorder on his employment, it erred when it failed to explain how it nevertheless had sufficient information to adjudicate the increased rating claim. The Secretary's arguments to the contrary are based on a misunderstanding of the law.

The Secretary's insistence that the Veteran's increased rating and TDIU claims must be "inextricably intertwined" for the Board to have erred is incorrect. *See* Secretary's Br. at 25. Ms. Green did not argue that the Board was required to adjudicate the claims together. *See* Appellant's Br. at 9-14. Rather, she argued that the Board

prematurely decided the PTSD claim given its remand order, which showed that it did not have sufficient information to adjudicate the claim. *See id.*

The Secretary's "inextricably intertwined" arguments are nothing more than red herrings that distract from the question at hand: did the Board have all of the information it needed to adjudicate the PTSD claim? *See* Secretary's Br. at 25-30; Appellant's Br. at 9-14. Given the Board's conflicting findings on the issue, it is impossible for the Court to tell. *See Brambley v. Principi*, 17 Vet.App. 20, 24 (2003) ("It is difficult to understand how the Board can maintain these divergent positions concerning the completeness of the record."). The issue is not whether the claims would "significantly impact" one another, it is whether the development the Board ordered demonstrated that it did not have a full picture of the Veteran's PTSD when it adjudicated his claim. *See Brambley*, 17 Vet.App. at 24. Ms. Green did not need to establish that the claims were inextricably intertwined, or point to evidence that "reasonably raised" the issue that they were intertwined, to answer this question. *But see* Secretary's Br. at 30. Indeed, in *Brambley* the Court found error in the Board's decision despite the fact that the claims were not necessarily inextricably intertwined. 17 Vet.App. at 24.

The Secretary's misunderstanding of the relevant question leads him to fault Ms. Green for relying only on the "mere possibility" that the development will produce relevant evidence. *See* Secretary's Br. at 25. What the Secretary fails to understand is that it is *precisely because* the Board recognized that there was potentially relevant evidence that

it had not yet obtained that its decision to deny the Veteran a higher rating for PTSD was premature and inadequately supported. *See id.* at 25-30; Appellant's Br. at 9-14.

In its remand, the Board ordered additional development, including the completion of a VA Form 21-8940, which details the Veteran's work history and time lost from work due to disability; verification of his prior employment; and an opinion "as to the functional effects of the service-connected disabilities alone on his ability to obtain or maintain substantially gainful employment." R-19. This demonstrates that the Board believed it did not have all of the relevant information on the Veteran's work history, time lost from work, any accommodations from his employers, his reasons for leaving jobs, and the impact of his service-connected conditions on his ability to work. *See id.*; *Douglas v. Shinseki*, 23 Vet.App. 19, 26 (2009) (holding that VA "has an affirmative duty to gather the evidence necessary to render an informed decision on the claim").

The Secretary cannot realistically argue that such evidence is irrelevant to a determination of the Veteran's appropriate PTSD rating. *But see* Secretary's Br. at 27-28. His assertion that evidence of the Veteran's *employment* history is irrelevant to an assessment of his level of *occupational* impairment is entirely without support. *See* Secretary's Br. at 28. There is no plausible way to interpret the term "occupational impairment" where a claimant's previous occupations, length of employment, time lost from disability, and periods of unemployment would be irrelevant considerations. *But see id.*

Nor can he argue that the Board's failure to obtain sufficient evidence on the Veteran's occupational impairment was harmless because the rating criteria also take social impairment into account. *But see* Secretary's Br. at 28. The rating criteria are based primarily on occupational impairment. *See* 38 C.F.R. §§ 4.1 and 4.126(b). And, had the Board obtained additional evidence that the Veteran's occupational impairment was worse than previously shown, it might have determined that his overall impairment more closely approximated a higher rating despite the absence of more serious social impairment. *See* 38 C.F.R. § 4.7 (2019); *Wagner v. United States*, 365 F.3d 1358, 1365 (Fed. Cir. 2004) ("Where the effect of an error on the outcome of a proceeding is unquantifiable, however, we will not speculate as to what the outcome might have been had the error not occurred.").

The Secretary's attempts to distinguish *Brambley* also fall flat. *See* Secretary's Br. at 29. He argues that because both issues in that case—TDIU and entitlement to an extraschedular rating—involved consideration of *all* of the claimant's disabilities, the development ordered for TDIU "by definition was due to the very same conditions for which the Board had denied an extraschedular rating." *Id.* (citing *Brambley*, 17 Vet.App. at 22-24). This is a distinction without a difference. Just as in *Brambley*, the Board here ordered development that showed that it did not have all of the necessary information to adjudicate the increased rating claim on appeal. R-19; *Brambley*, 17 Vet.App. at 22-24. Just as in *Brambley*, it nevertheless denied the increased rating claim. *See* R-4-5; *Brambley*, 17 Vet.App. at 22-24. And just as in Brambley, the claims at issue both "require a

complete picture" of the disability and its effect on the Veteran's employability. *See* 38 C.F.R. §§ 4.16, 4.130; *Brambley*, 17 Vet.App. at 24. The fact that the Board here also ordered development that involved disabilities that were not on appeal is immaterial. *But see* Secretary's Br. at 29. The development the Board ordered was still crucial to a full and appropriate assessment of the Veteran's PTSD; the Secretary's arguments fail to demonstrate otherwise. *See* Secretary's Br. at 25-30.

The fact that there was evidence speaking to the Veteran's level of occupational impairment is yet another red herring. *See id.* Although the Secretary repeatedly asserts that the Board could not have committed an error because there was evidence addressing the Veteran's level of occupational impairment, this alone is insufficient to exonerate the Board. *But see id.* The issue is that the Board effectively conceded that it did *not* have all of the relevant evidence on the issue of occupational impairment when it remanded for the development of evidence regarding the Veteran's employment history and the impact of his disability on his ability to work. *See* R-19.

On its face, the remand order demonstrates a lack of information that is difficult to square with the Board's implicit conclusion that it knew everything it needed to know about the Veteran's level of occupational impairment. *See* R-9-19. It is this conflict in the Board's findings that leaves the Court unable to review the Board's determination that it had sufficient information to adjudicate the PTSD claim. *See Brambley*, 17 Vet.App. at 24. The Secretary's insistence that the Board's implicit finding that there was sufficient evidence to adjudicate the PTSD claim is enough to warrant affirmance effectively moots

the Court's holding in *Brambley*. *See id.*; Secretary's Br. at 29-30. Because the Court's reasoning in *Brambley* is directly on point in this case, remand is appropriate. *See* 17 Vet.App. at 22-24.

CONCLUSION

During the appeal period, Ms. Green's husband repeatedly reported suffering from suicidal ideation and hallucinations. He also exhibited impaired impulse control and judgment, disturbances of motivation and mood, an inability to establish and maintain effective relationships, and near-continuous depression that affected his ability to function. The Board erroneously discounted these symptoms based on an inadequate negative credibility finding and a failure to recognize and address all of the favorable evidence in the record. Ms. Green therefore requests that the Court vacate the Board's decision and remand for the Board to readjudicate the claim and provide an adequate statement of reasons and bases. At a minimum, she requests that the Court vacate the Board's decision given its determination that the record was significantly incomplete with regard to the Veteran's level of occupational impairment.

Respectfully submitted,
/s/ Megan M. Ellis
MEGAN M. ELLIS
Chisholm, Chisholm & Kilpatrick
321 S Main St #200
Providence, RI 02903
(401) 331-6300
(401) 421-3185 Facsimile
Counsel for Appellant