

REPLY BRIEF OF APPELLANT

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

19-96

ARTURO MALDONADO, JR.,

Appellant,

v.

ROBERT L. WILKIE,
SECRETARY OF VETERANS AFFAIRS,

Appellee.

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APPELLANT'S REPLY ARGUMENTS

- I. The parties agree that the Board erred in denying service connection for diabetes when it failed to adjudicate an explicitly raised theory of entitlement and relied on inadequate medical examinations, and the Court should remand this issue for readjudication.**

The Secretary concedes that Mr. Maldonado explicitly raised the theory that his service-connected knee disabilities caused him to become overweight, which in turn caused him to develop diabetes. *See* Secretary's Br. at 7-8; *accord* Appellant's Br. at 11-15. Second, the Secretary agrees that the April 2016 and June 2017 VA examinations were inadequate because the April 2016 VA examiner imposed an excessive standard for nexus and the June 2017 VA examiner applied an incorrect standard for aggravation by a service-connected disability. *See* Secretary's Br. at 8-9; *accord* Appellant's Br. at 17-20. Accordingly, Mr. Maldonado respectfully requests that the Court accept the Secretary's concessions of error and remand the issue of service connection for diabetes for consideration of the Secretary's concessions and the other errors identified in Mr. Maldonado's opening brief. *See* Appellant's Br. at 17-20; Secretary's Br. at 8-9.

- II. The Secretary fails to adequately rebut Mr. Maldonado's argument that the Board erred in denying service connection for an acquired psychiatric disorder other than depression because his disability evaluation for depressive disorder did not contemplate his anxious distress.**

The Secretary asserts that neither reversal nor remand are warranted because Mr. Maldonado had only one diagnosed psychiatric disability. *See* Secretary's Br. at 10. Mr. Maldonado indeed only had one psychiatric disability diagnosed *at a time*. But

both the Secretary and the Board fail to appreciate that the March 2016 diagnosis of depression, for which VA granted service connection in May 2016, is distinct from the diagnosis of unspecified depressive disorder with anxious distress that was established by the June 2017 and January 2018 VA examinations. *See Unspecified Depressive Disorder*, Diagnostic and Statistical Manual of Mental Disorders, at 184 (5th ed. 2013) (“DSM-5”); *see also* Appellant’s Br. at 22-23. *Compare* R-1827 (1825-29) *and* R-1848 (1848-56) *with* R-991 (987-91) *and* R-1089 (1053-89). *But see* Secretary’s Br. at 10; R-19-20 (3-27). This distinction is critical because Mr. Maldonado’s 2016 VA evaluation for depression, which was made *before* the 2017 and 2018 medical evidence changed his diagnosis to unspecified depressive disorder with anxious distress, does not account for his symptoms of anxiety. *See* R-1828. As a result, Mr. Maldonado remains uncompensated for his anxious distress. *See id.*; *see also* Appellant’s Br. at 22-26.

Mr. Maldonado was diagnosed in March 2016 with unspecified depressive disorder, and the examiner listed “[d]epressed mood” as the only symptom that actively applied to the diagnosis. R-1848; R-1854. The RO, therefore, granted service connection for “depression as secondary to the service-connected left and right knee disabilities,” specifying that this evaluation was based *solely* on “[d]epressed mood” causing “[o]ccupational and social impairment due to mild or transient symptoms” R-1828. It found that a higher, 30 percent evaluation was not warranted because the evidence did not show occupational and social impairment with occasional decrease in work efficiency due to such symptoms as anxiety. *Id.*

Only *after* the RO awarded service connection, a June 2017 VA examiner opined that Mr. Maldonado had “[u]nspecified [d]epressive [d]isorder with anxious distress.” R-1089. Later, the January 2018 VA examiner opined that Mr. Maldonado had “depressive disorder with anxious distress” and that his depression and anxiety were comorbid. R-991. As noted, this diagnosis is distinct from Mr. Maldonado’s originally-diagnosed unspecified depressive disorder, as it expressly includes symptoms of anxiety. *See* R-1848; DSM-5 at 184. The Board cited these opinions to find that Mr. Maldonado only had one mental health diagnosis: depressive disorder with anxious distress, which Mr. Maldonado does not contest. R-19. But—as the Secretary fails to appreciate—the Board failed to recognize that Mr. Maldonado’s 10 percent evaluation for depression, which preceded the examiners’ opinions regarding Mr. Maldonado’s revised diagnosis, did not encompass the symptom of anxious distress. *See* R-14-20; R-1828; R-1848. *But see* Secretary’s Br. at 13. And, as a result, Mr. Maldonado should be granted an evaluation for his revised diagnosis that includes his symptom of anxious distress. *See generally* R-1848; Appellant’s Br. at 24-26.

In response to Mr. Maldonado’s alternative argument that the Board should have granted service connection for anxiety, the Secretary avers that Mr. Maldonado’s anxiety was a symptom of his service-connected depression and was therefore “not a separately diagnosed disability warranting service connection.” Secretary’s Br. at 14. But, as stated above, the Secretary fails to recognize that Mr. Maldonado’s anxious distress was not contemplated by his evaluation for depression. *See* R-1828; R-1848.

Therefore, even if Mr. Maldonado's anxious distress is encompassed under his *actual* diagnosis, it nevertheless represents a "distinct and separate" symptom from his *service-connected* condition, warranting entitlement to a separate disability evaluation. *See Esteban v. Brown*, 6 Vet.App. 259, 262 (1994).

Critically, the view shared by the Board in its decision, and the Secretary in his response brief, is prejudicial to Mr. Maldonado because his anxiety warrants additional compensation, and his current evaluation does not encompass that symptom. Under 38 C.F.R. § 4.130, Mr. Maldonado's anxious distress is not contemplated under the 10 percent schedular criteria, which does not explicitly account for symptoms of anxiety. *See* 38 C.F.R. § 4.130 (2019). In contrast, anxiety is listed in the 30 percent schedular criteria as a symptom that may demonstrate occupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks. *See id.* Indeed, in consideration of this distinction, the rating decision that initially granted Mr. Maldonado's 10 percent evaluation indicated that a showing of anxiety causing occupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks would warrant a higher, 30 percent evaluation. *See* R-1828. In contrast, its award of a 10 percent evaluation was based only on depressed mood. *Id.*

The Secretary argues that the Board's denial of service connection for an acquired psychiatric disorder *other than depression* is appropriate because Mr. Maldonado is already service connected for *depression* as secondary to his left and right knee

disabilities, and that to hold otherwise would result in pyramiding. *See* Secretary's Br. at 13. But the Board did not mention pyramiding at all in its decision on appeal, much less discuss it as a basis—even in part—to deny service connection for an acquired psychiatric disorder other than depression. *See* R-14-20. The Secretary's argument regarding pyramiding, therefore, amounts to a *post hoc* rationalization of the Board's scant reasoning for denying service connection, which the Court should decline to entertain. *See* Secretary's Br. at 13; *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.”).

Moreover, the Board did not need to discuss pyramiding because it is not a barrier here, contrary to the Secretary's assertion. *Contra* Secretary's Br. at 13. Mr. Maldonado does not seek service connection for an acquired psychiatric disorder to overlap with his depression evaluation, but rather, to compensate his anxious distress which remains uncompensated by his *existing* 10 percent evaluation for depression. *See* Appellant's Br. at 22-25. Contrary to the Secretary's understanding of the issue, Mr. Maldonado's service-connected *evaluation*—depression secondary to the left and right knee disabilities—is distinguishable from the *condition* that he currently has, depressive disorder with anxious distress. *See* R-1848; DSM-5 at 184; *see also* Appellant's Br. at 22-25. Thus, the Secretary's concerns of pyramiding are inapposite because Mr. Maldonado merely seeks appropriate compensation for his depressive

disorder with anxious distress through an award of service connection for an acquired psychiatric disorder other than depression, which would encompass his anxious distress. *But see* Secretary's Br. at 13.

The Secretary also argues that neither Mr. Maldonado nor his counsel "have presented evidence that they have the requisite medical expertise" to determine that his psychiatric diagnoses are distinct. Secretary's Br. at 12. But a claimant who has a competent medical diagnosis of a current disorder is not enjoined from referencing accepted medical treatises in support of his or her arguments. *Cf. Hensley v. West*, 212 F.3d 1255, 1265 (Fed. Cir. 2000). Mr. Maldonado's reference to the DSM-5 essentially amounts to referencing a dictionary definition, and he does not require the services of medical professionals "to show how the treatise applies to his case." *Cf. id.* Moreover, medical expertise is not required to identify the basis for Mr. Maldonado's disability evaluation, which is an adjudicatory matter. *See* 38 U.S.C. § 7104(d); *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table); 38 C.F.R. § 4.2 (2019). As stated above, the issue is not whether Mr. Maldonado's psychiatric diagnosis is in dispute, but rather whether he is being adequately compensated by VA for all of his psychiatric symptoms. *See* Appellant's Br. at 22-25. Since he is only service-connected for depression, and his rating for that condition does not account for or compensate his symptoms of anxious distress, additional compensation is necessary. *See* R-1828; R-1848. Neither Mr. Maldonado nor his counsel require medical expertise to point out this discrepancy.

Next, the Secretary's characterization of Mr. Maldonado's argument as "merely an attempt to reweigh the evidence and step into the shoes of the Board as the factfinder" is misplaced because the Board provided an assessment of Mr. Maldonado's entitlement that is contrary to law. *See* R-14-20. *But see* Secretary's Br. at 12. The Board's decision on appeal solely discussed whether Mr. Maldonado had an acquired psychiatric disorder other than depressive disorder with anxious distress. *See* R-14-20. However, the Board failed to properly recognize that his *existing* disability evaluation did not take that revised diagnosis into account and therefore does not compensate him for the addition of his anxious distress. *See id.*

The Secretary further insists that the Board had a plausible basis for finding that Mr. Maldonado only had one psychiatric disability during the pendency of his appeal and that his diagnosed unspecified depressive disorder with anxious distress was not a separate and distinct diagnosis from his service-connected depression. Secretary's Br. at 13. However, the Secretary misses the point: Mr. Maldonado indeed only has one psychiatric disability, but the depression for which he was service connected is distinct from the unspecified depressive disorder with anxious distress that he is now known to have. Mr. Maldonado was diagnosed *and* service connected for depression only. R-1827; R-1848-49. That service-connected depression and his currently-diagnosed depressive disorder with anxious distress are the same condition only if the diagnosis itself changed, because the two conditions are separate and discrete under the DSM-5. *See* DSM-5 at 184; *see also* Appellant's Br. at 23-24. And

the Board simply found that Mr. Maldonado had a single psychiatric disability rather than conducting an analysis of whether the different diagnoses represented a change or correction in diagnoses. *See* R-20.

38 C.F.R. § 4.125(b) (2019) provides:

If the diagnosis of a mental disorder is changed, the rating agency shall determine whether the new diagnosis represents progression of the prior diagnosis, correction of an error in the prior diagnosis, or development of a new and separate condition. If it is not clear from the available records what the change of diagnosis represents, the rating agency shall return the report to the examiner for a determination.

Here, the Board did not properly apply this provision. *See* R-14-20. It instead found that Mr. Maldonado “[did] not have an acquired psychiatric disorder other than depressive disorder with anxious distress,” but it did not reconcile the discrepant diagnoses of record in relation to his existing evaluation. *See* R-20. And, although it cited VA examiners’ opinions on that question, it failed to properly determine that Mr. Maldonado’s existing evaluation did not actually encompass his symptom of anxiety. *See* R-18-19; *see also* R-991; R-1089.

Had the Board properly considered whether Mr. Maldonado’s newly-diagnosed disorder “with anxious distress” was a new or changed diagnosis, it may have correctly determined in the first instance that his existing evaluation for depression did not adequately encompass that symptom—the pivotal issue that Mr. Maldonado highlights on appeal. *See* Appellant’s Br. at 23-25. The evidence otherwise demonstrates that Mr. Maldonado received an award for service connection that did

not encompass symptoms of anxiety. *See* R-14-20; R-1828; R-1848. Thus, contrary to the Secretary's position, the Board lacked a plausible basis even for its finding that Mr. Maldonado suffered only one psychiatric disability. *But see* Secretary's Br. at 13.

The Court may reverse a decision of the Board when (1) the case involves a legal question; (2) the agency analyzed the issue in the first instance; (3) the relevant facts were admitted; or (4) the only factual finding is to the issue of harmless error. *See Byron v. Shinseki*, 670 F.3d 1202, 1206 (Fed. Cir. 2012). And the Court may only reverse "where the Board has performed the necessary fact-finding and explicitly weighed the evidence." *DeLoach v. Shinseki*, 704 F.3d 1370, 1380 (Fed. Cir. 2013). Because no further fact-finding is required, and because there exists no plausible basis in the record for the Board's determination that Mr. Maldonado is not entitled to service connection for an acquired psychiatric disorder other than his service-connected depression, reversal is appropriate for an award of service connection to properly compensate Mr. Maldonado for his anxious distress that remains uncompensated under his existing evaluation for depression. *See id.*; *Crandell v. Derwinski*, 2 Vet.App. 113, 115 (1992); *see also* R-14-20; Appellant's Br. at 25.

Alternatively, if the Court does not agree that reversal is appropriate, at a minimum, remand is necessary for the Board to explain why his disability evaluation for depression is the same as, and therefore sufficient to compensate, his unspecified depressive disorder with anxious distress. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998); *see also* Appellant's Br. at 26.

CONCLUSION

The Secretary concedes that remand is warranted as to Mr. Maldonado's diabetes claim. Mr. Maldonado, therefore, respectfully requests that the Court accept the Secretary's concessions of error, and remand the issue for further development and readjudication supported by adequate reasons or bases. However, the Secretary defends the Board's decision on appeal to the extent that it denied service connection for an acquired psychiatric disability other than depression.

The Secretary's arguments fail to comprehend that Mr. Maldonado seeks only appropriate compensation for his symptom of anxious distress, which is not contemplated by his existing evaluation for depression secondary to the left and right knee disabilities. Although his actual diagnosis rendered by VA examiners is "depressive disorder with anxious distress," the latter symptom was neither in the record nor contemplated at the time that the RO granted service connection for depression. Thus, Mr. Maldonado's actual condition is different than the condition for which he was service-connected, requiring a new award of service connection to compensate him for his anxious distress.

For the foregoing reasons, as well as the arguments contained in his opening brief, Mr. Maldonado respectfully requests that this Court (1) vacate the portion of the Board's December 4, 2018 decision denying service connection for diabetes and remand the issue for readjudication, and (2) reverse the Board's clearly erroneous denial of service connection for an acquired psychiatric disorder other than

depression, or alternatively vacate and remand that issue to the Board for further development and a new adjudication that is both supported by adequate reasons and bases and consistent with the law.

Respectfully submitted,

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