IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-0116

BILLY STORY,

Appellant,

v.

ROBERT L. WILKIE,

Secretary of Veterans Affairs,

Appellee.

APPELLANT'S REPLY BRIEF

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ARGUMENT

I. The Secretary concedes that vacatur and remand are required for the peripheral neuropathy claims because the 2016 VA examination is inadequate.

In his principal brief, Appellant argued that the Board failed to ensure VA provided an adequate medical examination for his peripheral neuropathy claims because the November 2016 VA examination did not discuss his risk factors or provide sufficient rationale on direct service connection pursuant to *Stefl v. Nicholson*, 21 Vet.App. 120, 124 (2007) and *Polovick v. Shinseki*, 23 Vet.App. 48, 55 (2009). *See* Appellant's Brief (App. Br.) at 11-13. The Secretary concedes that vacatur and remand are required because the November 2016 examination is inadequate in light of the foregoing. *See* Secretary's Brief (Sec. Br.) at 4-7. Given the parties' agreement, the Court should vacate and remand the portion of the Board's decision denying service connection for peripheral neuropathy of the lower and upper extremities for the Board to obtain an adequate examination.

II. The Secretary fails to show how the Board's statement of reasons or bases is adequate to support its findings.

Appellant next argued that the Board failed to provide adequate reasons or bases to support its finding that he was not entitled to a rating in excess of 50 percent for his service-connected posttraumatic stress disorder (PTSD) for two reasons. First, Appellant argued that the Board entirely failed to address his most severe symptomatology and favorable evidence, or explain its rejection of this favorable evidence, when assessing his level of impairment. *See* App. Br. at 15-18. Second, Appellant argued that the Board's analysis of his occupational and social impairment was inadequate because it provided a cursory discussion of the evidence favorable to him. App. Br. At 19-22. The Secretary responds

that the Board's determination that Appellant's disability most closely approximated a 50 percent rating has a "plausible basis in the record" and that the Board's statement of reasons and bases is adequate and should result in affirmance of the Board's decision. *See* Secretary's Brief (Sec. Br.) at 7-12.

While asserting that the Board's assignment of a 50 percent rating has a "plausible basis" and therefore should not be disturbed, the Secretary conspicuously does not discuss the requirement that the reasons or bases supporting the Board's conclusions must be adequate, including the explicit discussion of favorable evidence and an explanation for any rejection of such evidence. *See Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990). The Secretary relies on the assumption that "the Board considered all of the symptoms associated with his service-connected psychiatric disability" to characterize Appellant's arguments as reweighing of the evidence, Sec. Br. at 7, without pointing to the parts of the Board's statement where it supposedly considered and discussed the favorable evidence of additional hallucinations, difficulty with stress and relationships, disorientation, and avoidance. Sec. Br. at 8-11.

In discussing the Board's requirement for adequate reasons or bases to support its conclusions, this Court said:

> In making its statement of findings, "the Board must identify those findings it deems crucial to its decision and *account for the evidence which it finds to be persuasive or unpersuasive*." In providing its "reasons or bases," the Board must include in its decisions "the precise basis for that decision and the Board's response to the various arguments advanced by the claimant." *This must include "an analysis of the credibility or probative value of the evidence submitted by and on behalf of the veteran* in support of his or her claim *and a statement of the reasons or bases for the implicit rejection of this evidence* by the Board."

Moore v. Derwinski, 1 Vet.App. 401, 404 (1991) (emphases added) (ellipses, insertions, and internal citations omitted). While the Secretary argues that there is a plausible basis in the record for the Board's conclusions, the Board must also provide an adequate statement of reasons or bases to support those conclusions and facilitate Appellant's understanding and judicial review. Appellant's basic arguments on PTSD are that the Board failed to account for multiple pieces of relevant and favorable evidence in the first instance such that it is impossible to discern whether the Board failed to consider it or discounted it for some reason. *Gilbert*, 1 Vet.App. at 58.

In the present case, Appellant argued that the Board's failure to *discuss* the favorable evidence documenting his symptoms of auditory and olfactory hallucinations, spatial disorientation by getting lost, and difficulty with social relations and stress resulting in physical trembling and hair/teeth loss renders its statement of reasons or bases inadequate. *See* App. Br. at 18, citing *Todd v. McDonald*, 27 Vet.App. 79, 87 (2014) (finding that the failure to address "potentially favorable material evidence" frustrates judicial review); *Velez v. Shinseki*, 23 Vet.App. 199, 206-07 (2009) (remanding where "[n]othing in the Board's analysis addressed [a] piece of apparently relevant evidence"); *Daves v. Nicholson*, 21 Vet.App. 46, 51 (2007) (noting that the Board cannot reject favorable evidence without discussing that evidence); *Thompson v. Gober*, 14 Vet.App. 187, 188 (2000) (stating that the Board must provide an adequate statement of reasons or bases "for its rejection of any material evidence favorable to the claimant"). Rather than address the Board's failure in this regard, the Secretary attempts to argue that the Board did consider this evidence and

that there is a "plausible basis in the record" for the Board's conclusions. Sec. Br. at 8-9. However, this defense is deficient for a variety of reasons.

For example, the Secretary does not dispute the evidence Appellant raised that indicates "he had broken up with his girlfriend." Sec. Br. at 10. But the Secretary insists Appellant's contention that the Board failed to account for this evidence "is nothing but a disagreement with the Board's interpretation and weighing of the evidence." Sec. Br. at 10. What the Secretary fails to acknowledge is that the Board does not even mention, let alone interpret or weigh, this favorable evidence in its statement. The Secretary's assertion that the Court should *assume* the Board considered and weighed this evidence is contrary to this Court's jurisprudence and the well-established duty of the Board to explicitly address and explain any rejection of favorable evidence. *See Todd*, *Velez*, *Daves*, *Thompson*, *supra*.

If the Board had considered this evidence and rejected it as the Secretary asserts, then it follows that it was obligated to provide reasoning for such rejection; but again, the Board's statement contains no reasons or bases in this regard. The Secretary cannot show where the Board addressed the evidence that he broke up with his girlfriend, which plainly undermines its findings regarding the success of that relationship and lack of deficiency in social relations. *See* Sec. Br. at 11; **R. 13-14 (1-23)** ("given his successful relationships with his girlfriend…"). The Secretary's post-hoc assertion that the Board's conclusion "has plausible basis in the record as the evidence demonstrates that he had maintained a 23-year relationship with his girlfriend," Sec. Br. at 11, cannot make up for the Board's failure to address this evidence in the first instance. *See Frost v. Shulkin*, 29 Vet.App. 131,

140 (2017) ("[T]he Court cannot accept the Secretary's post-hoc rationalizations in lieu of reasons or bases from the Board."), citing *In re Lee*, 277 F.3d 1338, 1345-46 (Fed. Cir. 2002) ("'[C]ourts may not accept appellate counsel's post hoc rationalization for agency action.'") (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156 (1962)); *Evans v. Shinseki*, 25 Vet.App. 7, 16 (2011) (explaining that "it is the Board that is required to provide a complete statement of reasons or bases, and the Secretary cannot make up for its failure to do so").

Second, the Secretary improperly uses *Colvin v. Derwinski*, 1 Vet.App. 171, 175 (1991), to shield against the Board's failure to address evidence of hallucinations because some medical evidence did not affirmatively note that Appellant suffered from hallucinations. Sec. Br. at 9. The Secretary concedes that Appellant reported to the examiners that he "occasionally hear[s] voices and 'smell[s] death[.]" Sec. Br. at 8. However, the Secretary argues, citing *Colvin*, that the negative medical evidence constitutes "medical conclusions which the Board may not refute." Sec. Br. at 9. This is an incorrect application of *Colvin*'s holding.

In *Colvin*, the Board rejected a doctor's letter in support of in-service onset of multiple sclerosis by opining on the nature of his shift in vision to determine it was not related to multiple sclerosis and determined, over the opinion of the doctor, that his other symptoms of multiple sclerosis did not have the severity indicative of that condition. *Colvin*, 1 Vet.App. at 175. The Court rejected the Board's opinion because it did "not cite *medical evidence of record in this case*" or other independent evidence to support its

opinion. *Id.* The Court did not hold that medical conclusions cannot be refuted; rather, it was careful to note:

> Lest we be misunderstood, we are not saying that the BVA was compelled to accept the opinions of [the examiners]. We merely state that having reached a contrary conclusion, *it was necessary for the panel to state its reasons for doing so* and, more importantly, *point to a medical basis other than the panel's own unsubstantiated opinion* which supported the decision.

Id. (emphases added). This language contradicts the Secretary as it says the Board is able to refute the conclusions of a medical examiner so long as there is an independent medical basis for doing so.

In this case, Appellant highlighted numerous examples of medical evidence in the record noting his auditory and olfactory hallucinations under the mental status examinations. App. Br. at 18. Insofar as the Secretary appears to argue that the Board did not err in ignoring this evidence because the medical examiners found these were not hallucinations, this is first impermissible lay hypothesizing and post-hoc rationale for an analysis that the Board did not include. *See* Sec. Br. at 8 ("medical examiners still found that he exhibited neither auditory or visual hallucinations nor delusional thoughts"); *Hyder v. Derwinski*, 1 Vet.App. 221, 225 (1991) ("Lay hypothesizing [by VA counsel], particularly in the absence of any supporting medical authority, serves no constructive purpose and cannot be considered by this Court."). If the Board had considered and rejected this relevant evidence based on such reasoning as the Secretary asserts, where is the Board's explanation to that end?

Second, even if the reports are not specifically characterized as hallucinations, this does not relieve the Board of its duty to discuss relevant symptomatology. *See Mauerhan*

v. Principi, 16 Vet.App. 436, 442-43 (2002). Here, the Board found there was no deficiency in thinking. *See* **R. 13 (1-23)** ("there is no indication that the Veteran's occupational and social functioning was indicative of deficiencies in most areas, such as . . . thinking"). Yet, medical providers consistently recorded this symptomatology under "Thought Content" during mental status examinations. *See* App. Br. at 17-18, citing **R. 2002 (2001-03)** (Sept. 2010 record), **1372 (1371-74)** (May 2013 record), **1336 (1334-37)** (Oct. 2013 record); **R. 646 (645-47)** (Nov. 2017 record), **1321 (1321-23)** (Jan. 2014 record). If there was any question as to the significance or nature of this symptomatology, the Board was obligated to request clarification or reconciliation of the evidence, not to simply ignore the findings relevant to his thinking. *See* 38 C.F.R. § 4.2 ("If a diagnosis is not supported by the findings on the examination report or if the report does not contain sufficient detail, it is incumbent upon the rating board to return the report as inadequate for evaluation purposes."). While the Board noted one instance of auditory hallucinations from October 2010 in its recitation of the factual history, it neither analyzed this evidence, nor accounted for the additional findings, in determining whether a higher rating was warranted. *See* **R. 9 and 12-14 (1-23)**. Although the Board cannot make its own medical determinations, it must assess the weight of both the favorable and unfavorable medical evidence of record. *See Daves*, *supra*. Remand is required for the Board to address this evidence in the first instance when assessing Appellant's level of impairment.

Third, the failure to discuss the evidence of spatial disorientation and difficulty with stress resulting in physical manifestations that interfered with Appellant's ability to work highlights the Board's inadequate reasons or bases because it frustrates this Court's judicial

review of the Board's consideration, or lack thereof, of these reported symptoms. *See Gutierrez v. Principi*, 19 Vet.App. 1, 7 (2004) ("the Board is required to provide a written statement of the reasons or bases for its findings and conclusions on all material issues of fact and law presented on the record; the statement must be adequate to enable a claimant to understand the precise basis for the Board's decision, *as well as to facilitate review in this Court*") (emphasis added). Although the Secretary characterizes this as Appellant "disput[ing] the way the Board interpreted and weighed the evidence" or "attempt[ing] to reweigh the evidence," the real issue is that it is impossible for Appellant to know *how* the Board interpreted and weighed the evidence in his favor, or whether it even did so, if the Board failed to adequately discuss such evidence in its reasons or bases. *See* Sec. Br. 9-10.

The Secretary does not appear to dispute that the record holds evidence of disorientation, but argues that Appellant "ignores the multitude of medical evidence which show that he was consistently oriented to person, place, situation…" Sec. Br. at 9. Again, this does not show where the Board itself weighed this evidence against the record. As for the evidence of difficulty adapting to stressful circumstances, including physical manifestations, the Secretary tries to equate this with the Board's notation of the evidence finding that Appellant's ability to respond to coworkers, supervisors, or the general public or to changes in the work setting was "moderately impaired." Sec. Br. at 10, citing **R. 931 (921-32)** (November 2017 VA examination). As the Secretary notes, this evidence is from the November 2017 VA examination, while Appellant's report of his teeth and hair falling out "and that he feels he is falling apart and unable to deal with stress" is from a September

2010 VA mental health record, which the Board did not acknowledge. *See* **R. 9 (1-23)**; App. Br. at 19, citing **R. 2002 (2001-03)**. Notably, while the 2017 examiner noted moderate impairment, the 2010 VA treatment record appears to reflect a more severe impact that Appellant "feel[s] *completely incapable of working to support his family due to a high degree of stress* and overall questionable functioning." **R. 2003 (2001-03)** (emphasis added).

Rather than showing where the Board discussed and weighed this evidence, the Secretary repeatedly attempts to justify the Board's inadequate reasons or bases by providing post hoc rationale to support the 50 percent outcome. "[T]he Court cannot accept the Secretary's post-hoc rationalizations in lieu of reasons or bases from the Board." *Frost*, *Evans*, *supra*. Throughout his brief, the Secretary insists the Board considered this evidence and provides his own reasons or bases for the Board's decision to determine there was a "plausible basis" for its decision and therefore no error. *See* Sec. Br. at 7, 9, 12. Despite the Secretary repeatedly accusing Appellant of merely disputing the weighing of the evidence, it is the Secretary that is, in fact, weighing the evidence at first instance in lieu of adequate weighing of the evidence from the Board. *See* Sec. Br. at 9, 10. Remand is required for the Board, rather than the Secretary, to address the foregoing evidence in the first instance and provide adequate reasons or bases to support its conclusion.

The Secretary further contends that the Board simply "acknowledg[ing] that the custody of Appellant's [14 year-old] son had been transferred to his grandparents due to his mental health issues" provided adequate reasons or bases for its conclusion that Appellant was able to maintain social relationships because he has had a long-term

girlfriend and keeps regular telephonic contact with his other adult children. Sec. Br. at 10-11. However, simply acknowledging the favorable evidence does not satisfy the requirement to provide adequate reasons or bases. The Board must *explain why* it determined unfavorable evidence is more probative than favorable pieces of evidence. *See Lathan v. Brown*, 7 Vet.App. 359, 367 (1995) (holding "[t]he Board must analyze the credibility and probative value of the evidence, account for the evidence which it finds to be persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the veteran"). Here, the Board failed to explain how Appellant losing custody of his son due to the severity of his mental conditions was given less probative weight than previously having a long-term girlfriend or talking to his adult children on the phone. *See* **R. 13-14 (1-23)**. Again, judicial review of the Board's decision is frustrated by its failure to adequately discuss its weighing of the evidence before it. *See Gutierrez, supra*.

By focusing on whether there was a "plausible basis" for the Board's conclusions, it is clear that the Secretary is attempting to sidestep the issue of reasons or bases adequacy. The statutory requirement under 38 U.S.C. § 7104(d) that the Board provide adequate reasons or bases applies here. 38 U.S.C. § 7104(d)(1). This includes a statement of reasons or bases that addresses and explains any rejection of evidence favorable to the claim. Therefore, the Court should decide not whether a "plausible basis" existed for the Board's conclusions, but rather whether the Board provided adequate reasons or bases, as required by Section 7104(d), to support its conclusions. The Secretary has not shown where the Board adequately addressed the foregoing relevant evidence and whether it impacted his

social and occupational functioning resulting in deficiencies in most areas, such as family relations, work, thinking, and mood. While the Board concluded no deficiencies in these areas, the foregoing evidence shows impact on family relations, work, thinking, and mood due to inability to handle stress and take care of his son, separation from girlfriend, abnormal thought content, and disorientation. *See* App. Br. at 22.

III. The Board failed to address the evidence reasonably raising the issue of TDIU.

In the principal brief, Appellant argued that the Board failed to address the reasonably raised issue of total disability based on individual unemployability (TDIU). *See* Appellant's Brief (App. Br.) at 23-24. The Secretary responds that entitlement to TDIU did not need to be addressed by the Board because it was not explicitly raised by Appellant or reasonably raised by the record. *See* Secretary's Brief (Sec. Br.) at 12-14.

The Secretary concedes that the Social Security Administration (SSA) determined Appellant was disabled under vocational guidelines with an "anxiety disorders" impairment diagnosis code as the secondary cause of his impairment. Sec. Br. at 13; *see also* **R. 963 (958-69)**. The specific diagnoses evaluated by SSA were Appellant's PTSD and bipolar disorder, to which SSA attributed his anxious mood. **R. 963 (958-69)**. The Board also acknowledged the multiple psychiatric diagnoses of record but found that the medical examiners "repeatedly described the overlapping symptoms of his psychiatric diagnoses," and thus "all psychiatric symptoms are considered part of the service-connected diagnoses." **R. 12 (1-23)**. The Secretary's own concession of the SSA determination of record listing Appellant's mental disorder in part as a cause of his vocational disability contradicts the Secretary's later assertion that the issue of

unemployability due to his mental conditions was not "reasonably raised by the record." *See* Sec. Br. at 13-14.

Further, Appellant explicitly connected his PTSD to his unemployability. The Secretary dismissed Appellant's August 2010 statement by simply stating "Appellant reported being unemployed for one year and alleging that employers do not want to hire him because of his age." Sec. Br. at 13. However, this framing leaves out the context of Appellant's statement and that it was submitted as part of his claim for PTSD. Over seven pages, Appellant recounted his stressors and detailed how his condition has ruined his life. *See* **R. 2044-50**. At the end of the letter, Appellant said "I have filed for compensation financial disability. I still suffering from this disease, I've been unemployed for a year & better and am finding my age at 62 no one wanting to hire me [sic.]" **R. 2050 (2044-50)**. Viewed within context and sympathetically read, Appellant plainly submitted evidence of unemployability in seeking the appropriate compensation for his PTSD and that he feels his age simply exacerbates that problem. PTSD being the cause of his unemployability is supported by December 2011 SSA records stating that Appellant "[h]as been fired for interp[ersonal] issues in the past." **R. 964 (959-69)**. Raising his unemployed status in the context of his PTSD statement and within the context of other evidence explicitly raised the issue of TDIU eligibility that the Board should have considered. *See Comer v. Peake*, 552 F.3d 1362, 1366 (Fed. Cir. 2009) (explaining the issue of TDIU is raised whenever a claimant shows intent to seek a higher disability rating and submits cogent evidence of unemployability, regardless of whether he states specifically that he is seeking TDIU); *Rice v. Shinseki*, 22 Vet.App. 447, 453-55 (2009) ("[C]onsideration of TDIU is required once a

veteran submits evidence of a medical disability and makes a claim for the highest rating possible, and additionally submits evidence of unemployability").

Finally, the Secretary points to other evidence to argue Appellant's physical injuries as the cause for unemployability in order to argue the issue of TDIU consideration was not raised. Sec. Br. at 13. In doing so, the Secretary is impermissibly providing post hoc rationale for the Board's failure to address TDIU entitlement. *See Frost*, *supra*. Since vocational disability due to "anxiety disorders" was raised by the SSA records, those records showed he was fired for a lack of interpersonal skills, and Appellant explicitly raised his status as unemployed in the context of his PTSD during the pendency of his increased rating claim, the Board was required to address TDIU eligibility in the first instance rather than have the Secretary opine that the negative evidence should prohibit Appellant from entitlement. *See Id.*; *see also Rice*, 22 Vet.App. at 453-54 (establishes that entitlement to TDIU, "whether expressly raised by a veteran or reasonably raised by the record, is not a separate claim for benefits, but rather involves an attempt to obtain an appropriate rating for a disability or disabilities [. . .] as part of a claim for increased compensation.").

Remand is required for the Board to address the issue of TDIU benefits since it was expressly raised by Appellant and reasonably raised by the record.

CONCLUSION

For the reasons articulated above and in his principal brief, Appellant respectfully requests that the Court reverse in part and otherwise set aside the Board's decision of

September 10, 2018, and remand the matters for readjudication consistent with the points discussed in his briefs.

Respectfully submitted,

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January 30, 2020

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