REPLY BRIEF OF APPELLANT

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

19-3124

ALLEN J. COOPER,

Appellant

v.

ROBERT L. WILKIE,
SECRETARY OF VETERANS AFFAIRS,

Appellee

NICHOLAS L. PHINNEY
166 Valley Street
Bldg. 6M, Suite 103
Providence, RI 02909
401-378-0733 (Telephone)
401-633-7781 (Facsimile)

Attorney for Appellant

TABLE OF CONTENTS

APPELLANT'S REPLY ARGUMENT 1

I. The Board's decision lacks the necessary discussion of several key pieces of evidence that support the Veteran's claim for a higher rating for his dysthymia and entitlement to TDIU. 1

II. The Board should have ensured that the latest psychiatric examination occurred during the winter. 6

CONCLUSION 7

TABLE OF AUTHORITIES

Cases

Ardison v. Brown, 6 Vet.App. 405 (1994) 7

Gilbert v. Derwinski, 1 Vet.App. 49 (1990) 1

Mittleider v. West, 11 Vet.App. 181 (1998) 4

Sharp v. Shulkin, 29 Vet.App. 26 (2017) 6

Voerth v. West, 13 Vet.App. 117 (1999) 6, 7

Statutes

38 U.S.C. § 7104 1

Regulations

38 C.F.R. § 4.16 4

Other Authorities

Dictionary of Occupational Titles ("DOT"), available at *http://www.occupationalinfo.com/appendxc_1.html* (last visited Feb. 12, 2020) 6

Record Before the Agency ("R") Citations

R-2-22 (March 2019 Board Decision) 1, 5

R-879-85 (September 2016 VA Examination) 3, 4, 6

R-1136-37 (October 2013 VA Treatment) 2

R-1193-1202 (January 2013 VA Examination) 3

R-1340-42 (July 2013 VA Treatment) 2

R-1345-47 (July 2013 VA Treatment) 2

R-1384-88 (July 2013 VA Treatment) 2

R-2044-62 (January 2013 VA Examination) 5

R-2192-2203 (March 2012 Statements) 1

APPELLANT'S REPLY ARGUMENT

I. The Board's decision lacks the necessary discussion of several key pieces of evidence that support the Veteran's claim for a higher rating for his dysthymia and entitlement to TDIU.

As the Veteran noted in his opening brief, the Board did not mention lay statements that the Veteran and his wife made to the Social Security Administration in 2011, in 2013 notices of disagreement, and in his July 2016 substantive appeal. Apa. Op. Brief at 12. The Secretary rightly notes that the Board is not required to discuss all evidence of record. Sec. Brief at 11. However, he misinterprets the Veteran's brief as containing an argument that the Board must discuss all of the evidence. But, as the Veteran stated, the Board has a duty to demonstrate that it considered all relevant evidence of record. Apa. Op. Brief at 8; 38 U.S.C. § 7104(d)(1); *Gilbert v. Derwinski*, 1 Vet.App. 49, 56 (1990). The Secretary does not contend that the evidence in question is not material to the issues at hand.

The Secretary further contends that the Board specifically addressed the lay statements of record. Sec. Brief at 12 (*citing* R-15 (2-22)). It is true that the Board referred to "claims" by the Veteran and things which the Veteran and his wife "contend." R-15. But, it is apparent that the Board was speaking of "March 2012 letters [from] the Veteran's spouse, mother, and family friend." R-8 (*citing* R-2192-2203). The Board also refers to statements by these individuals and a general contention by the Veteran that he believes his dysthymia is more severe than currently evaluated. R-15. Yet, the Board did not address the contentions in these other

statements regarding the Veteran's symptoms or whether they indicate a higher rating is warranted on the basis of this evidence. The Board's reference to certain lay statements does not show that it considered all of the lay statements.

Next, the Secretary rightly notes that the Board considered psychiatric treatment that Mr. Cooper underwent in July 2013. Sec. Brief at 12 (*citing* R-1385 (1384-88)). However, while the Board noted that this treatment indicated the Veteran was suffering from suicidal ideation, depression and hopelessness, as the Veteran noted, these and other records of the July 2013 hospitalization indicate a host of other symptoms that the Board needed to take into consideration in determining the correct rating for his dysthymia. Apa. Op. Brief at 11 (*citing* R-1340 (1340-42), 1345-46 (1345-47), 1385-87). Similar to its handling of the lay statements, the Board's discussion of some evidence from this time is not tantamount to a discussion of all evidence from this time.

The Secretary further states that the Veteran did not explain why the Board's failure to consider the October 2013 treatment record was erroneous. Sec. Brief at 14 (*citing* R-1136 (1136-37)). But, as the Veteran noted, evidence of additional symptoms such as the depression and lack of motivation shown in this treatment records as well as the other evidence and symptoms that the Board did not mention in its decision shows that it if had fully weighed all of the evidence, it may have found that he should receive a higher rating. Apa. Op. Brief at 12-13. Contrary to the Secretary's assertion, this record demonstrates depression, lack of motivation, and excessive anxiety, rather than simply showing depression. *See* R-1136; *see also* Sec. Brief at 14.

The Secretary also posits that the Veteran's assertion that the Board should consider the chronic fatigue syndrome is meritless since he is no longer service-connected for this condition. Sec. Brief at 14. Yet, Mr. Cooper simply argued that the Board should have considered the 2016 examiner's finding that the dysthymia resulted in chronic sleep impairment. Apa. Op. Brief at 13 (*citing* R-880 (879-85)). While fatigue syndrome is no longer for consideration, the sleep impairment is still pertinent as it is a symptom of the service-connected dysthymia.

In addition, the Secretary states that the 2013 and 2016 examiners distinguished the effects of the dysthymia from the panic disorder and anxiety disorder. Sec. Brief at 14 (*citing* R-879-85, 1193-1202). However, while these examiners noted that the Veteran had psychiatric conditions in addition to the dysthymia, the examiners did not separate the symptoms of the disorders. The 2013 examiner did not diagnose Mr. Cooper with panic disorder. *See* R-1193-1202. Plus, while the 2016 examiner diagnosed dysthymia as well as panic disorder and anxiety disorder, she attributed chronic sleep impairment, disturbances of motivation and mood, difficulty in establishing and maintaining effective work and social relationships, and difficulty in adapting to stressful circumstances, including work or a work-like setting to all of the psychiatric diagnoses. R-880. She also said the dysthymia was responsible for depressed mood while the panic disorder caused near continuous panic or depression. *Id.* Thus, the majority of the symptoms were found to be due to the dysthymia and/or multiple conditions including the dysthymia.

The Board had an obligation to provide an adequate statement of reasons or bases in which it demonstrated consideration of all of the relevant evidence and explained whether the Veteran was entitled to a higher rating for his dysthymia due to the symptoms demonstrated by the evidence. Its failure to do so prejudiced the Veteran since if it had afforded him with the proper analysis, it may have determined that a 70-percent rating is warranted.

Concerning the issue of TDIU entitlement, the Secretary contends that the 2016 examiner did state which psychiatric symptoms are attributable to which disorder. Sec. Brief at 16. But, as the Veteran noted above, the examiner found that most of the symptoms were part of the dysthymia or part of multiple conditions including the dysthymia. The Secretary is correct that the examiner found that the Veteran's impairment is consistent with a 70-percent rating rather than a finding of unemployability. *Id.* (*citing* R-880). But, the examiner's failure to separate the symptoms of the conditions means that they must all be considered part of the same disability. *Mittleider v. West*, 11 Vet.App. 181, 182 (1998). If the Board had properly considered this examination along with all of the other evidence that it failed to mention, it may have found that entitlement to TDIU is established.

The Secretary argues that the fact that the Veteran's dysthymia is secondary to his right ankle injuries does not create a single disability for TDIU purposes under 38 C.F.R. § 4.16(a)(2) (2019). But, the Secretary does not say why the fact that the dysthymia is secondary to the right ankle conditions does not show a common etiology.

Moreover, regardless of whether the issue is TDIU entitlement on a schedular basis or an extraschedular basis, the Board still had a responsibility to take all of the relevant evidence into account and explain whether TDIU or an extraschedular TDIU referral is needed in light of all of the Veteran's symptoms. Contrary to the Secretary's assertion, Mr. Cooper does not contend that the Board did not discuss the question of extraschedular TDIU referral. Sec. Brief at 17. Rather, it is the Board's failure to take all of the evidence and all of the symptoms of the dysthymia and right ankle conditions into account which resulted in an erroneous decision.

Furthermore, the Secretary asserts, as the Board noted, that the record does not suggest that Mr. Cooper's right ankle disabilities impacted his ability to work. Sec. Brief at 17-18 (*citing* R-16). The Secretary also posits that the Veteran did not point to any evidence showing that these conditions caused unemployability. Sec. Brief at 18. Yet, in his opening brief, the Veteran noted how the 2013 ankle examiner found the right ankle conditions resulted in pain and swelling with prolonged standing, loss of range of motion, stiffness, difficulty climbing stairs, weakened movement, inability to perform work requiring repeated climbing due to decreased motion, inability to perform prolonged walking or standing due to pain and swelling of the right ankle, and inability to perform in an occupational setting which requires protective footwear due to a painful scar. Apa. Op. Brief at 17 (*citing* R-2056-57, 2062 (2044-62)). Plus, while the examiner found that sedentary work was possible, as the Veteran noted, sedentary work involves a great deal of physical activity which he is incapable of performing. Apa. Op.

Brief at 17-19 (*citing Dictionary of Occupational Titles* ("DOT"), *available at http://occupationalinfo.com/appendxc_1.html* (last visited Feb. 12, 2020)).

If the Board considered all of the material evidence of the ankle conditions along with all of the material evidence of the dysthymia, it may have found TDIU or extraschedular TDIU referral to be needed. Hence, the Board prejudiced Mr. Cooper by not providing him with the necessary analysis of the issue of TDIU in light of all of the service-connected disabilities and the pertinent evidence.

II. The Board should have ensured that the latest psychiatric examination occurred during the winter.

The Secretary argues that no factor militates in favor of requiring VA to conduct a psychiatric examination of the Veteran during the winter. Sec. Brief at 20. However, he acknowledges a notation in the 2016 examination where the Veteran reported that he gets more depressed in the winter months. *Id.* (*citing* R-882). The Secretary describes this notation as vague but it appears plain on its face and the Secretary does show otherwise. Sec. Brief at 20.

The Secretary further asserts that there is no indication that social and occupational functioning worsens during the later months. Sec. Brief at 20. However, as the Veteran's depression increases during the winter and his condition affects his ability to work, psychiatric examinations should be conducted during the winter as it would be easy to schedule an examination during such a long period which VA knows when it would happen. *Sharp v. Shulkin*, 29 Vet.App. 26, 32 (2017); *Voerth v. West*, 13

Vet.App. 117, 123-24 (1999); *Ardison v. Brown*, 6 Vet.App. 405, 408 (1994).

While the Secretary is correct that variations in a claimant's symptoms may be accounted for in an in-person interview, the fact that the Veteran's depression increases during the winter and the condition is shown to affect his ability to work indicates that a winter-time examination is necessary unless an examiner can say what the condition would be like during the winter. The 2016 examiner made no such finding in the present case.

Finally, the Veteran did not ignore the fact that he had a psychiatric examination in January 2013. Yet, since later evidence has come to light indicating that the dysthymia is at its worst during the winter and this condition impacts the ability to work, the Board must ensure that any VA psychiatric examinations occur during the winter. The Board prejudiced Mr. Cooper by not requiring VA to conduct this latest examination during the winter since if it had, it may have shown that TDIU or a higher rating for the dysthymia are required.

CONCLUSION

The Board failed to explain why all of the evidence did not demonstrate the Veteran's entitlement to a higher rating for his dysthymia and TDIU. Therefore, Mr. Cooper respectfully requests the Court to remand his case back to the Board with instructions that it provide the required analysis whether either benefit is necessary in light of all of the symptoms caused by his service-connected dysthymia and right ankle conditions. The Board also neglected to afford the Veteran with a psychiatric

examination during the winter even though the law requires that his psychiatric examinations should happen at this time. Thus, Mr. Cooper respectfully requests the Court to remand his case back to the Board with instructions for it either ensure VA conducts a new examination during the winter or explains why this is not necessary.

Respectfully submitted,
Allen J. Cooper
By His Attorney,

/s/ Nicholas L. Phinney

NICHOLAS L. PHINNEY
166 Valley Street
Bldg. 6M, Suite 103
Providence, RI 02909
401-378-0733 (Telephone)
401-633-7781 (Facsimile)