REPLY BRIEF OF APPELLANT

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

19-257

MICHAEL W. MOORE, SR.,

Appellant

v.

ROBERT L. WILKIE,
SECRETARY OF VETERANS AFFAIRS,

Appellee

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APPELLANT'S REPLY ARGUMENTS

I. Reversal and restoration of Mr. Moore's 20 percent rating for a lumbar spine disability is the appropriate remedy because the Secretary conceded that the Board reduced his rating without observing applicable law.

The Secretary concedes that the Board did not "address whether, given Appellant's reports of pain exacerbated by physical activity, as well as pain and weakness which caused functional impairment, there was in fact 'an improvement in the veteran's ability to function under the ordinary conditions of life and work.'" Secretary's Br. at 8 (internal citations omitted). That is more than a mere reasons or bases error, contrary to the Secretary's position—it is the same type of error that the Court in *Brown v. Brown* found required reversal of the rating reduction and reinstatement of the pre-reduction rating. 5 Vet.App. 413 (1993). *But see* Secretary's Br. at 8-9.

In *Brown*, the Court reversed the Board's reduction because the Board failed to comply with applicable law and regulation. 5 Vet.App. at 421-22. In any rating reduction, the Board must apply sections 4.1, 4.2, and 4.10. *Brown*, 5 Vet.App. at 421; 38 C.F.R. §§ 4.1, 4.2, 4.10 (2019). But in *Brown*, the Board did not determine, based on the entire recorded history, if there was an actual change in disability and whether the reports showing such change are based on thorough examinations. *Id.*; 38 C.F.R. §§ 4.1, 4.2. Nor did it determine whether the improvement "reflect[ed] an improvement in the veteran's ability to function under the ordinary conditions of life and work." *Brown*, 5 Vet.App. at 421; 38 C.F.R. § 4.10.

This Court's holdings in *Kitchens v. Brown*, 7 Vet.App. 320 (1995) is also applicable here. In *Kitchens*, the Court held that the rating reduction did not comply with the applicable law—38 C.F.R. § 3.344 (2019). *Id.* at 324. The Board did not discuss the applicability of section 3.344, whether the examination was full and complete, and whether any improvement would be maintained under ordinary conditions of life. *Id.* Like in *Brown*, the Court in *Kitchens* reversed because "[w]here, as here, the Court finds that the BVA has reduced a veteran's rating without observing applicable law and regulation, such a rating is void ab initio and the Court will set it aside as 'not in accordance with the law.'" *Id.* at 325.

Although 38 C.F.R. § 3.344 does not apply here, the Board similarly erred when it failed to consider sections 4.1, 4.2, and 4.10 and reversal is appropriate in any reduction decision where the Board does not apply applicable law. *See* R-9. The Board found (1) that the Veteran's range of motion testing was "reflective of a physical improvement in the Veteran's service-connected lumbar spine disability," and (2) that muscle spasm and guarding were no longer present. R-9. But neither of these findings answers whether "based upon review of the *entire recorded history* of the condition, [ ]the evidence reflects an actual change in disability," or whether "the examinations reflecting such change are based upon thorough examinations." *Brown*, 5 Vet.App. at 421; R-9. *See also* Secretary's Br. at 8, 10. Nor did the Board make a finding as to whether "that improvement actually reflects an improvement in the veteran's ability to function under the ordinary conditions of life." R-9; *Brown*, 5

Vet.App. at 42; Secretary's Br. at 8. Accordingly, the Board failed to comply with sections 4.1, 4.2, and 4.10 when it upheld the reduction of Mr. Moore's rating. *See* R-9. Therefore, like in *Brown*, because "the Board reduced a veteran's rating without observance of applicable law and regulation" reversal and reinstatement of the 40 percent rating is necessary. 5 Vet.App. at 422.

Moreover, these facts are dissimilar to *Peyton v. Derwinski*, 1 Vet.App. 282 (1991), which the Secretary uses to support his argument that a reasons or bases remand, and not reversal, is warranted. *See* Secretary's Br. at 11. In that case, despite the fact that the issue before the Board was the propriety of the reduction of a veteran's rating for a psychiatric disability, the question presented to the Board was "Entitlement to *an increased evaluation for* anxiety neurosis with depression *currently rated 50 percent disabling*." 1 Vet.App. at 286 (emphasis in original). It is, therefore, not clear that the Board even knew that it was adjudicating a rating reduction. Accordingly, in *Peyton*, the Court needed to remand the case for the Board to adjudicate whether the rating reduction was proper in the first instance. 1 Vet.App. 285-87. But here, the Board acknowledged the issue on appeal was whether "[t]he rating reduction from 20 to 10 percent for lumbar strain was proper," and upheld the rating based on a finding of "physical improvement." R-8-9; *see* R-4. The Board clearly knew what it was adjudicating. It should not get a second bite at the apple merely because it failed to meet its burden. And further, this case lacks the "puzzling" absence of evidence that

"hampered" the Court in *Peyton* "both in reviewing this case and in preparing this opinion by the inadequacy of the record on appeal." *Peyton*, 1 Vet.App. at 283, 287.

The holding in *Faust v. West*, 13 Vet.App. 342 (2000) is similarly inapplicable because the facts of this case are distinguishable. *See* Secretary's Br. at 11. In *Faust,* the Court did not reinstate the claimant's TDIU rating because there was no prejudice, as the requirements of section 3.343 were satisfied. 13 Vet.App. 352-57. Nonetheless, it explained that, but for the rule of prejudicial error, because the Board should have, but did not, discuss applicable law and regulation, the Court "would generally reverse the Board's decision and remand the matter to the Board for it to reinstate the veteran's rating." *Id.* at 352. The same is not true here, as the Secretary has already conceded remand is warranted. *See* Secretary's Br. at 7-8.

He also cites to *Murincsak v. Derwinski*, 2 Vet.App. 363 (1992), where the Court also remanded a rating reduction case. Secretary's Br. at 11. But there, the Court acknowledged that "a reduction made without observance of the law is void *ab initio*." 2 Vet.App. at 369. However, it remanded, rather than reversed, because "the issue of the Court's jurisdiction to review administrative error committed by the VARO prior to the BVA decision on appeal . . . [was, at the time] before the Court . . . pending en banc review." *Id.* Accordingly, the reason for the Court's remand was not that the Board committed reasons or bases errors, but because the question of its jurisdiction was being considered in other cases pending at the time. *See id.* Again, the same is not true here.

Contrary to the Secretary's arguments, reversal is not only appropriate where "the Board did not abide by the required procedural protections for reductions or discontinuations or failed to apply the correct burden of proof." Secretary's Br. at 12. The Board's failure to comply with applicable law in and of itself is sufficient to warrant reversal. *See Kitchens*, 7 Vet.App. at 325. In *Kitchens*, the Board failed to discuss the applicability of 38 C.F.R. § 3.344(b), and as a result, there was doubt as to whether there was material improvement in Mr. Kitchens's condition. *See id.* The Court held that "when there is doubt as to whether a veteran's condition has materially improved, the rating should be continued pending reexamination." *Id.* at 324. Here, because of the Board's failure to comply with applicable law, there is doubt as to whether there was actual improvement in Mr. Moore's ability to function under the ordinary conditions of life and work as the regulation requires. *See Brown*, 5 Vet.App. at 421; 38 C.F.R. §§ 4.1, 4.2, 4.10. Therefore, his current 20 percent rating should be continued. *See Kitchens*, 7 Vet.App. at 324.

The Secretary conceded that "the Board did not apply the correct law." Secretary's Br. at 10. And it has not met its burden of proof to uphold the reduction, because it has not demonstrated that there was an actual improvement in Mr. Moore's back disability that reflects an improvement in his ability to function under the ordinary conditions of life and work. *See Brown*, 5 Vet.App. at 421-22; *Kitchens*, 7 Vet.App. at 325. "The Court would not remand a case when a veteran fails to carry a point on which he or she has the burden of proof. It would be unseemly to so

accommodate VA and the Board as to matters on which the Government has the burden of proof." *Cf. Horn v. Shinseki*, 25 Vet.App. 231, 244 (2012) (reversing when VA failed to meet its burden to rebut the presumption of soundness. In those cases, VA must produce clear and unmistakable evidence that a veteran's presumption of soundness at entry to service is rebutted). Accordingly, reversal is required. *Brown*, 5 Vet.App. at 422. If this Court is not persuaded that reversal is appropriate here, the parties agree remand is warranted. *Tucker v. West*, 11 Vet.App. 369, 374 (1998); *see* Secretary's Br. at 6-8.

II. VA has not met its burden to show that there was material improvement in diabetes that is reasonably certain to be maintained under the ordinary conditions of life and work.

The Secretary argues that "the June 2011 examiner [ ] explicitly state[d] that regulation of activities due to diabetes was not required, and any presumption of regulation of activities granted by the 1998 rating was no longer in effect." Secretary's Br. at 16-17 (citing R-1112). But by requiring that Mr. Moore demonstrate regulation of activities to keep his 40 percent rating, the Board "erroneously reversed the burden." *Kitchens*, 7 Vet.App. at 325. What is required for a 40 percent rating under diagnostic code 7913 is immaterial to whether a rating reduction was proper. *See id.*; 38 C.F.R. § 4.119 (2019). Rather, the applicable law is 38 C.F.R. § 3.344, which requires the Board to demonstrate, by a preponderance of the evidence, that there was material improvement reasonably certain to be maintained under the ordinary conditions of life. *See Brown*, 5 Vet.App. at 420. This must be based on a review of

the entire recorded history and may not be based on examinations that are less full and complete. *See id.* at 419.

Accordingly, it does not matter whether Mr. Moore is required to regulate his activities. *But see generally* Secretary's Br. The legal adjudication required the Board to determine whether there was material improvement in his diabetes condition. And this does not involve an application of the rating criteria, it requires application of 38 C.F.R. § 3.344. *Brown*, 5 Vet.App. at 419-21; *Kitchens*, 7 Vet.App. at 324-25. Here, the Board only found that Mr. Moore did not require regulation of activities and then declared that represented an overall improvement in the Veteran's impairment of functioning due to diabetes. *See* R-11. But whether Mr. Moore regulates his activities does not answer the question of whether there was material improvement. As the Secretary acknowledged, *see* Secretary's Br. at 16, Mr. Moore continues to suffer from vitiligo, retinopathy, erectile dysfunction, and diabetic nephropathy. *See e.g.*, R-926; R-1339. Although these are non-compensable under the rating criteria, they remain part of his overall disability picture. 38 C.F.R. § 4.10. His regulation of activities is only one part of the story. Accordingly, because "there is doubt as to whether a veteran's condition has materially improved, the rating should be continued pending reexamination." *Kitchens*, 7 Vet.App. at 324.

The fact that Mr. Moore did not challenge the Board's increased rating analysis, *see* R-13, does not create "a plausible basis in the record for finding Appellant's diabetes mellitus had actually improved by the time of his June 2011 examination."

But see Secretary's Br. at 20. The Board here improperly reduced Mr. Moore's rating for diabetes from 40 percent to 20 percent. R-10-11; Appellant's Br. at 9-17. Whether Mr. Moore met the criteria for an *increased rating* under diagnostic code 7913 is not relevant to whether the reduction from 40 percent was proper. *Hedgepeth v. Wilkie*, 30 Vet.App. 318, 323 (2018); *Kitchens*, 7 Vet.App. 320, 325 (1995). And the proper remedy to the Board's erroneous rating reduction is the restoration of Mr. Moore's 40 percent rating. *Hedgepeth*, 30 Vet.App. at 328. There was, therefore, no need for Mr. Moore to challenge the Board's adjudication of whether he is entitled to a rating in excess of 20 percent for diabetes, and the fact that he declined to do so does not create a plausible basis for the Board's findings.

Moreover, the Secretary's repeated implications that the original 1998 rating decision was incorrect are inappropriate in the rating reduction context. *See Alaska Airlines, Inc. v. Johnson*, 8 F.3d 791, 795 (Fed. Cir. 1993); Secretary's Br. at 15-17. VA assigned Mr. Moore a 40 percent evaluation in a 1998 rating decision. R-1768 (stating that "[a]n evaluation of 40 percent is assigned if insulin, restricted diet, and regulation of activities are required.). The law and governing regulations, in this situation, require a finding of regulation of activities to warrant a 40 percent rating for diabetes. 38 C.F.R. § 4.119, DC 7913. Because "[t]here is a presumption of regularity in the conduct of governmental affairs," 32 C.F.R. § 724.211 (2019), in the absence of evidence to the contrary, it can be presumed that the rating officer that adjudicated the claim properly assigned a 40 percent rating because he found regulation of

activities was required. *See Alaska Airlines*, 8 F.3d at 795; *Ashley v. Derwinski*, 2 Vet.App. 307, 307 (1992) (applying the presumption to VA adjudications); R-1767-72.

The Secretary and the Board are both incorrect in asserting that the fact that the 2011 examiner found no current regulation of activities demonstrates an improvement. *See* R-11; Secretary's Br. at 14-15, 18-19. The Board found that, because the April and May 2017 treatment records indicated that the Veteran lifted weights with repetitions and that he should exercise as tolerated, *see* R-108, 116, "[t]he preponderance of the evidence weighs against any such finding regarding regulation of activities that would warrant a higher 40 percent rating." R-13. In other words, the Board found this demonstrated actual improvement in this condition. Putting aside that this analysis was conducted as part of the Board's adjudication of whether a rating in excess of 20 percent was required for diabetes, which is a separate inquiry that is not relevant to the matter at hand, the Board is prohibited from questioning whether there was regulation of activities in 1998 because of the presumption of regularity. *See Alaska Airlines*, 8 F.3d at 795. The fact that the Veteran could lift weights and exercise as tolerated nearly two decades after the fact is not the kind of clear evidence required to rebut the presumption. *See Ashley*, 2 Vet.App. at 309.

But this does not show whether there was material improvement. It is unknown what regulation of activities was prescribed in 1998. *See* R-1768. There is no indication whether the activity the Board found Mr. Moore capable of, such as lifting weights and exercising as tolerated, as instructed by diabetic clinic providers, is

more or less activity than was prescribed in 1998. *See* R-13; R-108, R-116; Secretary's Br. at 19. As a result, neither the Board nor the Secretary can demonstrate that there was a material improvement in his diabetes that is reasonably certain to be maintained under the ordinary conditions of life. Appellant's Br. at 12-16; *but see* R-10-11; Secretary's Br. at 18-19.

The Board reduced Mr. Moore's rating for diabetes because it did not find regulation of activities, "the necessary element to warrant the higher 40 percent rating for diabetes mellitus." R-11. This is exactly the kind of burden shifting that *Brown* prohibits. 5 Vet.App. at 421. Mr. Moore was not obligated to demonstrate that he had regulation of activities, rather, the Board was obligated to demonstrate that his disability had improved. *See* 38 C.F.R. § 3.344(a). Because the Board has not, and cannot, demonstrate that Mr. Moore's diabetes materially improved in a way that is reasonably certain to be maintained under the ordinary conditions of life, it has not met its burden. *See Brown*, 5 Vet.App. at 420. It would be inappropriate to remand to allow the Board to "generate more evidence to make up the shortfall." *Cf. Horn*, 25 Vet.App. at 244 (reversing due to VA's failure to meet its burden in the presumption of soundness context, where, like in rating reductions, VA is burdened with demonstrating the elements required to rebut the presumption). Reversal is, therefore, the appropriate remedy. *Brown*, 5 Vet.App. at 422. If the Court is not persuaded that reversal is warranted here, remand is required. *Tucker*, 11 Vet.App. at 374.

CONCLUSION

The Secretary conceded that the Board did not address whether there was an improvement in the Veteran's ability to function under the ordinary conditions of life and work as required by *Brown*. Nor did it ascertain, based on review of the entire recorded history, whether the evidence reflects an actual change in the disability and whether the examination reports reflecting such change are based upon thorough examinations. As the Board has not met the burden required to demonstrate that the RO's reduction of Mr. Moore's 20 percent rating for lumbar spine disability was appropriate, reversal and reinstatement of that rating is required.

When adjudicating whether a rating reduction was appropriate, it is not the Veteran's burden to substantiate his entitlement to the higher rating. Rather, here, the Board was required to show that his diabetes had materially improved and was reasonably certain to maintain improvement under the ordinary conditions of life. But instead, the Board and the Secretary only inappropriately challenged the 1998 finding of regulation of activities, and failed to establish that there was any improvement in that regard. Reversal and reinstatement of Mr. Moore's 40 percent rating for diabetes is required.

Respectfully submitted,

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