REPLY BRIEF OF APPELLANT

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

19-664

EMIL G. HAGEMAN,

Appellant

v.

ROBERT L. WILKIE,
SECRETARY OF VETERANS AFFAIRS,

Appellee.

SAMUEL L. AGOSTINI
CHISHOLM CHISHOLM & KILPATRICK
321 S Main St #200
Providence, Rhode Island 02903
(401) 331-6300 (Telephone)
(401) 421-3185 (Facsimile)

Counsel for Appellant

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APPELLANT'S REPLY ARGUMENTS

I. The Veteran's ankle condition does not need to impair his earnings before it is considered a disability under VA law.

The Secretary's argument that the "Appellant has pointed to no evidence showing that his periodic ankle symptoms impaired his earnings in any way," and therefore his ankle condition cannot be considered a disability under VA law, evidences his misinterpretation of the definition of a disability. *See* Secretary's Br. at 6; *but see Saunders v. Wilkie*, 886 F.3d 1356, 1368 (Fed. Cir. 2018). Mr. Hageman only needs to show that his limited range of motion and other symptoms reached a level of functional impairment in earning capacity. To do this, he may rely on VA's regulations showing that his functional loss, as a matter of law, functionally impairs his earning capacity.

As a matter of law, as the Secretary conceded in *Saunders*, "VA regulations invoke functional limitation as the indicator of reduced earning capacity and the barometer of disability."[1] *See id.* at 1362 (quoting 38 U.S.C. § 1155); *see also* 38 C.F.R. § 4.1 (2019); 38 C.F.R. § 4.10 (2019). Mr. Hageman experiences limited dorsiflexion in both ankles. R-3118; R-3171; R-3195. VA's rating regulations recognize that limitation of range of motion is productive of functional loss and, therefore,

[1] The Veteran's counsel acknowledges that *Wait v. Wilkie*, Vet.App. No. 18-4349, is pending before a panel of this Court and addresses this specific question. However, the Court need not reach that question in order to remand this case, because the Veteran has made other separate allegations of Board error. *See* Section II, *infra*; *see also* Appellant's Br. 9-12.

functionally impairing of one's earning capacity. *See* 38 C.F.R. § 4.71a (2019). And Diagnostic Code 5271 recognizes that an ankle that has limited motion is functionally impaired and causes functional impairment in earning capacity. *See* Appellant's Br. at 8; *see also* 38 C.F.R. § 4.71a, DC 5271. Additionally, the Veteran's right ankle would twist and roll and he had right ankle pain after physical overuse, which also resulted in functional loss because it constituted an inability to "perform the normal working movements of the body." *See* Appellant's Br. at 8; 38 C.F.R. § 4.40, 4.45 (2019); *see also* R-46; R-1181; R-2850.

Mr. Hageman was not required to submit vocational or economic evidence that his ankle condition impaired his earnings to show impairment in earning capacity because VA, through its rating schedule, has already established that fact. *But see* Secretary's Br. at 6. Because the rating criteria is a proxy for the average impairment in earning capacity caused by a disability, and because the Veteran's functional limitations are compensated by that rating criteria, that means it causes functional impairment in earning capacity. *See* 38 C.F.R. § 4.1. And because of this, his ankle condition is a present disability under *Saunders*. *See* 886 F.3d at 1368; 38 C.F.R. §§ 4.71a, 4.40, 4.45.

This notion is supported by 38 U.S.C. § 1155, which states that the "Secretary shall adopt and apply a schedule of ratings of reductions in earning capacity from specific injuries or combination of injuries," and these ratings "shall be based, as far as practicable, upon the average impairments of earning capacity resulting from such

injuries in civil occupations." *See also* 38 C.F.R. § 4.1 (stating that "[t]he percentage ratings represent as far as can practicably be determined the average impairment in earning capacity resulting from such diseases and injuries and their residual conditions in civil occupations"). And because the Veteran showed that his ankle condition caused functional loss under the rating criteria, as a matter of law, the evidence demonstrates that his condition affected his earning capacity, contrary to the Secretary's assertion. *See* Secretary's Br. at 6. At the very least, contrary to VA's argument, the Board did not provide an adequate statement of reasons or bases why the treatment notes did not demonstrate that Mr. Hageman had a disability. *See id.* Accordingly, the Secretary was incorrect that Mr. Hageman needed to point to evidence showing impaired earnings because of his ankle condition and that the evidence did not demonstrate that his condition affected his ankle's ability to function normally and, as a result, his earning capacity. Appellant's Br. at 7-9; *see* Secretary's Br. at 6.

II. The Secretary's arguments that the Board ensured compliance with its duty to assist are unpersuasive because the Veteran's statements to the VA examiner did not constitute a valid withdrawal and the April 2018 examination did not provide the Board with sufficient information to adjudicate the Veteran's right ankle claim under *Saunders*.

The Secretary's argument that the Board ensured compliance with its duty to assist fails to recognize that the Board acknowledged that the Veteran's statements to

the VA examiner were not "a valid withdraw[al] of [the right ankle claim]."[2] *See* R-6; Secretary's Br. at 7-8. The examiner seemingly did not complete the examination because she believed the Veteran to be withdrawing that claim. R-47. Because the Board did not find the Veteran's statement to the examiner to be a valid withdrawal and the examiner did not complete testing, the Board was left with insufficient information to adjudicate the Veteran's entitlement to service connection for his right ankle condition. *See* Appellant's Br. at 11-12; R-6; R-47; *Stefl v. Nicholson*, 21 Vet.App. 120, 123 (2007); *see also Acree v. O'Rourke*, 891 F.3d 1009, 1012-13 (Fed. Cir. 2018) (holding that a verbal withdrawal must be explicit, unambiguous, and done with a full understanding of the consequences of such action).

Initially, the record provides no indication that "Appellant . . . induce[d] the examiner not to conduct testing." *But see* Secretary's Br. at 8. Mr. Hageman simply expressed his interest in withdrawing his claim at a later date, which he did not do. R-47. And characterizing such a statement as an inducement is an improper post hoc rationalization in lieu of a proper assessment by the Board. *See* Secretary's Br. at 8; *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

[2] The Board's determination that the Veteran's statements to the examiner did not constitute a valid withdrawal is a favorable finding of fact that the Secretary cannot explain away nor can the Court overturn. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007).

counsel's 'post hoc rationalizations' for agency action, advanced for the first time in the reviewing court.").

The Secretary's reliance on the Court's holding in *Wood v. Derwinski*, 1 Vet.App. 190, 193 (1991) is also misplaced because Mr. Hageman's verbal communications did not constitute a valid withdrawal. *See* Secretary's Br. at 8. He asserts that the Veteran "cannot inform the examiner that he no longer wished to pursue the claim, and so induce the examiner not to conduct testing, and then reasonably complain that no testing was conducted." *Id.* But, as noted above, the Veteran's communication to the examiner was not a valid withdrawal. *See* R-6; R-47. Even though the examiner may not have been required to continue with the testing, with the Board's finding that this was not a valid withdrawal, it was still left without sufficient information to adjudicate the claim. Because of that, it was required to obtain sufficient information.

Moreover, the Board still had a duty to properly adjudicate all aspects of the Veteran's entitlement to service connection for his right ankle condition, including determining if there was sufficient information to adjudicate entitlement to service connection under *Saunders*. *See* 886 F.3d at 1368; *see also Wood*, 1 Vet.App. at 193. And it failed to do so. Appellant's Br. at 11-12; *see* R-6. By relying on this examination, the Board lacked information about Mr. Hageman's functional limitations and impairment in earning capacity. *See* R-6; *Saunders*, 886 F.3d at 1368. Rather, it needed, and failed, to properly address the adequacy of this examination to determine if it contained sufficient information to adjudicate entitlement to service

connection under *Saunders*. *See* 886 F.3d at 1368. And if it found that the examination contained insufficient information, it needed to obtain a new VA examination that addressed his functional limitations. *See Stefl*, 21 Vet.App. at 123.

And Mr. Hageman's case differs from that of Mr. Wood because Mr. Wood "failed twice to be sufficiently specific about the stressful events he had alleged." *Compare* R-47, *with Wood*, 1 Vet.App. at 193. Although the Court in *Wood* determined that "[t]he duty to assist is not always a one-way street," the veteran in that case might or should have possessed information that was essential to obtaining putative evidence. 1 Vet.App. at 193. But here, Mr. Hageman did not fail to provide the Board with necessary information. *But see* Secretary's Br. at 8.

Further, the Secretary's assertion that the Board did not clearly err in its implicit finding that the April 2018 VA examination was adequate for adjudication purposes is nothing more than a post hoc evaluation of the evidence. *See Martin*, 499 U.S. at 156. Moreover, the Board needed to provide a written statement of its findings and conclusions on all material issues of fact and law, such as the adequacy of the examination. *See* 38 U.S.C. § 7104(d)(1). An implicit finding of adequacy would not be sufficient under 38 U.S.C. § 7104(d)(1). And although a decision taken as a whole could show adequate consideration of all material evidence, the Board failed to explain how such an examination could be adequate for rating purposes despite the lack of sufficient information to adjudicate entitlement to service connection under *Saunders*. *See* R-47; 886 F.3d at 1368; *but see Janssen v. Principi*, 15 Vet.App. 370, 379

(2001). The Board determined that Mr. Hageman's communication to the examiner was not a valid withdrawal but did not determine the adequacy of the examination, contrary to the Secretary's argument. R-6-7; *see* Secretary's Br. at 7-8. Had it done so, it might have determined that the examination was inadequate. Appellant's Br. at 12; *see* R-6-7. Therefore, remand is required for the Board to address the adequacy of the examination. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998).

Moreover, the examination report was not substantially compliant with the Board's 2017 remand instructions. *See* Secretary's Br. at 7. The Secretary asserts that because the examiner found a lack of a diagnosis, the report addressed the nature and etiology of the Veteran's ankle condition. *Id.* But even if the examiner found that Mr. Hageman lacked a diagnosis, the lack of testing demonstrated that the examination failed to provide the Board with sufficient information to adjudicate whether the Veteran had functional impairment such that Mr. Hageman had a disability under VA law despite the lack of diagnosis. *See* Appellant's Br. at 10; *Stegall v. West*, 11 Vet.App. 268, 271 (1998). Because the examination report failed to provide this information, it was not substantially compliant with the Board's prior remand order to obtain an examination that determined the nature and etiology of his right ankle condition. *See* Secretary's Br. at 7; R-1172; *Stegall*, 11 Vet.App. at 271. Contrary to the Secretary's arguments, remand is required for the Board to obtain an examination that contains this information. Appellant's Br. at 12; *see* Secretary's Br. at 7; *Tucker*, 11 Vet.App. at 374.

CONCLUSION

The Secretary's arguments fail to consider that, as a matter of law, the Veteran need not show that his right ankle condition impairs his earnings. Because his right ankle condition caused functional loss under the rating criteria, the evidence demonstrated that his condition impaired his earning capacity.

Moreover, the Secretary's assertion that the Board complied with its duty to assist fails to address the fact that the Veteran's statement to the examiner was not a valid withdrawal. Further, the Secretary's attempts to explain the adequacy of the examination amount to post hoc rationalizations because the Board did not find the examination to be adequate or inadequate in light of the incomplete right ankle testing section of that opinion. And the Secretary's argument that the Board complied with its prior remand order fails to consider that the examination report did not provide sufficient information to allow the Board to adjudicate entitlement to service connection under *Saunders*. For these reasons, and contrary to the Secretary's arguments, the Board erroneously determined that the Veteran did not have a current disability and failed to ensure compliance with its duty to assist and with its prior remand order.

Respectfully submitted,

/s/ Samuel L. Agostini
Samuel L. Agostini
321 S Main St #200
Providence, RI 02903
(401) 331-6300 (telephone)
(401) 421-3185 (facsimile)
Counsel for Appellant