APPELLANT'S REPLY BRIEF

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-1477

CYNTHIA FRANKLIN

Appellant,

v.

ROBERT L. WILKIE,

SECRETARY OF VETERANS AFFAIRS,

Appellee.

Amy S. Borgersen, Esq.
Adam G. Werner, Esq.
Gordon & Partners
4114 Northlake Boulevard
Palm Beach Gardens, FL 33410
(561) 799-5070 – Tel
(561) 799-4050 – Fax

Counsel for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

RECORD BEFORE THE AGENCY ("R")

OTHER SOURCES

PRELIMINARY STATEMENT

The Appellant, Cynthia Franklin ("Appellant"), appeals the January 11, 2019, decision by the Board of Veterans Appeals ("Board") that denied her appeal for service connection for the cause of her late husband's death; entitlement to DIC, entitlement to a rating, in excess of 50 percent for MDD, for accrued benefits purposes; and entitlement to TDIU, for accrued benefits purposes.

Appellant filed her initial brief on October 15, 2019 ("App. Br."). The Secretary of Veterans Affairs ("Secretary") filed his responsive brief on January 30, 2020 ("Sec. Br."). Pursuant to U.S. Vet. App. 28(c), Appellant files this reply brief.

For the reasons detailed below, and within Appellant's opening brief, the Court should reject the Secretary's arguments for affirmance of the January 2019 decision and should issue an order vacating the Board's Decision that denied Appellant's appeal for the cause of her late husband's death; entitlement to DIC; entitlement to a rating in excess of 50 percent for the service-connected MDD, for accrued benefits purposes; and entitlement to TDIU, for accrued benefits purposes. In the alternative, the Court should remand Appellant's appeal for a new, adequate VA examination and for the Board to provide an adequate statement of reasons or bases.

ARGUMENT

I. APPELLANT IS ENTITLED TO TDIU, BECAUSE TDIU WAS INEXTRICABLY INTERTWINED WITH HER APPEAL FOR A RATING IN EXCESS OF 50 PERCENT FOR THE SERVICE-CONNECTED MDD, FOR ACCRUED BENEFITS PURPOSES.

As explained in her initial brief, the Board erred by not granting Appellant's claim for TDIU, because TDIU was inextricably intertwined with her appeal for rating in excess of 50 percent for the service-connected MDD, for accrued benefits purposes. (App. Br. at 26-29).

In his response brief, the Secretary challenges Appellant's argument, baldly stating, "[s]he is incorrect." (Sec. Br. at 7). However, as the Court previously determined in *Rice v. Shinseki*, "there is no freestanding claim for TDIU." *See* 22 Vet. App. 447, 451 (2009). Thus, the Secretary's contention that (1) two claims are inextricably intertwined *only* where the Court finds that they are so "intimately connected" (Sec. Br. 9-10); and (2) "simply because a veteran may be entitled to an increase rating does not necessarily follow that they might be entitled to TDIU[,]" is incorrect. (Sec. Br. at 10). Again, as the Court in *Rice* emphasized, evaluating a claim for TDIU can be addressed *when* a veteran later asserts that his disability(ies) has worsened, as a claim for increased compensation. *See id*. at 452-53; *Dalton v. Nicholson*, 21 Vet. App. 23, 32-34 (2007) (holding that a TDIU matter is based on a condition that has already been service connected is an increased rating claim for purpose of the application of 38 U.S.C. § 5110(b)(2)).

Additionally, the Federal Circuit supports the Appellant's argument. *See Comer v. Peake*, 552 F.3d 1362, 1367 (Fed. Cir. 2009) (reiterating "A claim to TDIU benefits is not

a free-standing claim that must be pled with specificity; it is implicitly raised whenever a prose veteran, who presents cogent evidence of unemployability seeks to obtain a higher disability rating."); *Robertson v. Principi*, 251 F.3d 1378, 1384 (Fed. Cir. 2001) (holding that "consideration 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."'); (App. Br. at 27-29).

Next, contrary to the Secretary's contention, the facts in this case substantiate that TDIU is intertwined with Appellant's appeal for a higher rating for the service-connected MDD. (Sec. Br. at 10); (App. Br. at 21-22, 27-28). At the time the Veteran submitted his claim for an increased rating for the service-connected MDD, he indicated that he was unemployed. [R. at 2522]. As discussed within Appellant's brief, the Veteran had been unemployed since 2001. (App. Br. at 3-4, 26-29). Indeed, the Veteran's MDD-related symptoms were sufficiently severe to prevent him from maintaining substantially gainful employment. (App. Br. at 27-28). [R. at 700, 1796, 1798, 2151, 2153, 2186-88, 3608, 3614]. Additionally, the Veteran's service-connected bilateral patellofemoral syndrome ("bilateral knee condition") also prevented him from engaging in any substantially gainful employment. (App. Br. at 28). [R. at 2105, noting complaints of knee pain and at times "his left knee gives out" and, that he has been unemployed since October 2001]; [R. at 2189, reporting he stopped working because "he couldn't walk"]. Indeed, a VA examiner agreed there was functional loss and/or functional impairment associated with service-connected bilateral knee condition, which "impacted [the Veteran's] ability to work" [R. at 3608, 3614]. Primarily because, he exhibited pain on movement that disturbed

locomotion and interfered with sitting, standing, and weight bearing. [R. at 3608]. Moreover, because the Veteran regularly used a cane for ambulation he was unable to carry more than a few pounds. [R. at 2145, 3613].

Although, the Secretary does not dispute that the Veteran's service-connected MDD and his bilateral knee disabilities impaired his employment and earning capacity, (Sec. Br. at 11-12), the Secretary appears to correlate the Veteran's ability and/or inability to secure or follow a substantially gainful occupation to his disability percentage(s). (Sec. Br. 11-12); *see Van Hoose v. Brown*, 45 Vet. App. 361, 363 (1991). In this instance, the combined disability rating totaled 60 percent, which included 50 percent for the MDD and 20 percent for his bilateral knee condition (10 percent for the left knee and 10 percent for the right knee). [R. at 635-36]; 38 C.F.R. § 4.16. Although, the Court in *Van Hoose* recognized that it might be difficult for a veteran with a high disability rating to obtain and keep employment, the question of unemployability rested on whether "the veteran is *capable* of performing the physical and mental acts required by employment . . . ." *See id.*

Appellant reiterates, due to the aggregate impact of her late husband's disabilities he was incapable of engaging in or maintaining substantially gainful employment. *See Norris v. West*, 12 Vet. App. 413, 421 (1999) ("A claim for TDIU is based on the acknowledgment that even though a rating less than 100% under the rating schedule may be correct, objectively, there are subjective factors that may permit assigning a 100% rating to a particular veteran under particular facts."); *see generally Thun v. Peak*, 22 Vet. App. 111, 118 (2008) ("It is not the symptoms, but there effects, that determine the level of impairment."). As outlined within Appellant's brief, the Veteran's MDD, as well as his

bilateral knee condition clearly prevented him from obtaining or securing gainful employment. (App. Br. at 3-4, 21-22, 27-28); *Faust v. West*, 13 Vet. App. 342, 356 (2000) (concluding that a substantially gainful occupation is "[an occupation] that provides [the veteran with an] annual income that exceeds the poverty threshold for one person . . . .").

Moreover, with regard to his MDD, the Secretary agrees that the Board failed to consider favorable evidence that substantiated Appellant's appeal for a rating in excess of 50 percent for her late husband's service-connected MDD. (Sec. Br. at 8-9). In light of the Secretary's concession, Appellant reasserts that her late husband's MDD patently fell within the 70 percent to 100 percent disability rating criteria. (App. Br. at 21-22); *Quarles v. Derwinski*, 3 Vet. App. 129, 135 (1992); *Maurhan v. Principi*, 16 Vet. App. 436 (2002) (emphasizing that the symptoms listed in VA's General Rating Formula for Mental Disorders were not meant to be an exhaustive list or to be requirements, but were meant to serve as examples of the type and degree of symptoms or their effects that would justify a particular rating). Taking this evidence into account, the Secretary's argument that TDIU was not inextricably intertwined with Appellant's appeal for a rating, in excess of 50 percent for the service-connected MDD must fail.

II. THE SECRETARY HAS FAILED TO DEMONSTRATE THAT THE BOARD HAS PROVIDED AN ADEQUATE MEDICAL OPINION TO EVALUATE APPELLANT'S CLAIM FOR THE CAUSE OF DEATH OF HER LATE HUSBAND.

Contrary to the Secretary's argument, neither the April nor the May 2016 VA examiner's report adequately discussed the Veteran's cause of death from cardiovascular disease, nor did either examiner clearly reference relevant, probative evidence contained

in the Veteran's medical history. (Sec. Br. at 13-19); (App. Br. at 16-17, 24-26); [R. at 151-52, 155-57]; *see Nieves-Rodriguez v. Peake*, 22 Vet. App. 295, 301, 304 (2008) ("It is the factually accurate, fully articulated, sound reasoning for the conclusion . . . that contributes probative value to a medical opinion . . . ."). When an examination lacks supporting rationale or is inconsistent with the evidence of record, the VA should return that examination report for clarification or explain why it is not necessary to do so in light of the conflicting evidence of record. *See Vazquez-Flores v. Peake*, 22 Vet. App. 37, 50 (2008), *vacated on other grounds sub nom, Vazquez-Flores v. Shinseki*, 580 F.3d 1270 (Fed. Cir. 2009).

The Secretary's defense of the April 2016 VA examiner's opinion as being adequate must fail because, as discussed in Appellant's brief, the examiner applied an improperly high evidentiary standard when he opined it was less likely than not that the Veteran's use of NSAIDs to treat the service-connected bilateral knee condition caused or contributed to his development of CAD—despite reporting that NSAID usage may "influence" the development of heart disease. [R. at 156]; (App. Br. at 16); *see* 38 U.S.C. § 5107(b); 38 C.F.R. § 3.102; *see also Wise v. Shinseki*, 26 Vet. App. 517, 531 (2014); *Jones v. Shinseki*, 23 Vet. App. 382, 388 n.1 (2010); *McLendon v. Nicholson*, 20 Vet. App. 79, 83 (2006) (observing that the third prong of § 3.159(c)(4)(i), "establishes a *low threshold*."). If the Court is to preserve VA's long-standing pro-veteran, benefit of the doubt rule, the Secretary's argument must fail. *See Wise*, 26 Vet. App. at 531.

With regard to the examiner's negative opinion, that it was less likely than not that the deceased Veteran's cause of death from cardiovascular disease was not directly related

to the in-service complaints of left-sided chest pain, because he was not diagnosed with a heart condition while on active duty. (App. Br. at 16-18, 23-25). Appellant points out that the Court has previously determined that service connection can still be established when a chronic condition, shown as such in service, with "subsequent manifestations of the same chronic disease at any later date, however remote, are service connected, unless clearly attributable to intercurrent causes . . . ." *Wilson v. Derwinski*, 2 Vet. App. 16, 19 (1991); *Cosman v. Principi*, 3 Vet. App. 503, 506 (1990) ("even though a veteran may not have had a particular condition diagnosed in service, or for many years afterwards, service connection can still be established"). Indeed, heart disease is a chronic condition. *See* 38 C.F.R. §§ 3.303(b), 3.309(a).

Next, the Secretary's defense of the May 2016 VA examiner's opinion as being adequate must also fail because, as Appellant pointed out, the examiner also applied an improperly high evidentiary standard when she determined the Veteran's service-connected MDD did not contribute to his cause of death from cardiovascular disease. *See* § 5107(b); § 3.102; *Wise*, 25 Vet. App. at 531 (emphasizing, "Congress has not mandated that a medical principle have reached the level of scientific consensus to support a claim for VA benefits."); *Jones*, 23 Vet. App. at 388 n.1 (2010) (citing *Hodges v. Sec'y of Dep't. of Health and Human Servs.*, 9 F.3d 958, 961-63 (Fed. Cir. 1993) (pointing out, "the legal standard of evidentiary preponderance is not to be confused with the clinical standard of medical certainty."). The scientific evidence relied upon by the examiner indeed, supported Appellant's theory that the service-connected MDD, contributed, aided, and lent assistance, to her late husband's cause of death from cardiovascular disease. (App. Br. at

1, 14, 26). As discussed above, the Court in *Jones* cited to *Hodges*, wherein the Federal Circuit determined that although, "the data may not establish a causal relationship to a medical certainty [which means 95% confidence level, or general acceptance by the medical community], they may nonetheless meet the *more-likely-than-not standard of the law*." *See Hodges*, 9 F.3d at 965 (further emphasizing that "in the veterans benefits system the benefit of the doubt as to 'any issue material to the resolution of the claim' goes to the veteran if the evidence is in equipoise.").

The Secretary's defense of the probative value of the examiner's opinion must fail because, contrary to the examiner's rationale, there is a connection between the service-connected MDD and cardiovascular disease. (Sec. Br. at 14-17); [R. at 151-52]. Indeed, the National Institute of Mental Health does in fact suggest that depression and cardiovascular disease can co-occur, because "[p]eople with depression have an increased risk of [developing] cardiovascular disease." (App. Br. at 14)[1]. [R. at 152]. Moreover, irrespective of the examiner's unfavorable opinion, the Secretary seems to have forgotten that 100 percent medical certainty is not required under the more-likely-than not evidentiary standard. *See* § 5107(b); § 3.102; *see also Jones*, 23 Vet. App. at 388 n.1. Therefore, the Secretary's contention that the examiner's finding "has a plausible basis" indeed, fails to take account for the pro-veteran, benefit of the doubt rule. (Sec. Br. at 15); *see* § 5107(b); § 3.102. Moreover, in keeping in line with Congressional intent, in its

[1] NATIONAL INSTITUTE OF MENTAL HEALTH, HEALTH & EDUCATION PUBLICATION: *Chronic Illness & Mental health, available at* https://www.nimh.nih.gov/health/publications/chronic-illness-mental-health/index.shtml.

enactment of section 5107(b)'s low standard of proof, the Board was authorized to resolve the examiner's unfavorable opinion, predicated on the necessity for 100 percent medical certainty in Appellant' favor, because as discussed within Appellant's initial brief, there was an approximate balance with the evidence. *See Wise*, 25 Vet. App. at 531; *Gilbert v. Derwinski*, 1 Vet. App. 49, 54 (1990) (emphasizing that this '"unique" standard of proof is lower than any other contemporary American jurisprudence and reflects 'the high esteem in which our nation holds those who have served in the Armed Services."').

Contrary to the Secretary's assertion, Appellant is not asking the Court to reweigh the evidence of record nor did she try to insert her own insight or medical authority when she pointed out that the National Institute of Mental Health's (NIMH) study on chronic illness and mental health actually supported her theory that her late husband's MDD caused or contributed to his death from cardiovascular disease. (Sec. Br. at 16) (App. Br. at 14). Consequently, the Secretary cannot defend the adequacy of this examiner's opinion or the April 2016 examiner's opinion because; an adequate medical opinion must provide the Board with a foundation sufficient to evaluate the probative worth of that opinion. *See Ardison v. Brown*, 6 Vet. App. 405, 407 (1994).

III. THE BOARD HAS FAILED TO PROVIDE AN INADEQUATE STATEMENT OF REASONS OR BASES FOR ITS RELIANCE ON THE INADEQUATE AND UNFAVORABLE VA MEDICAL OPINIONS, WHEN THERE WAS POSITIVE EVIDENCE, FAVORBLE TO APPELLANT'S APPEAL.

The Secretary cannot defend the adequacy of the Board's stated reasons or bases, because the reasons and bases it provided to support its denial of Appellant's appeal failed to comply with 38 C.F.R. § 7104(d)(1). (App. Br. at 11-19); (Sec. Br. at 19-28); [R. at 10-

12]. As explained in Appellant's brief, the Board's reliance upon the inadequate and unfavorable VA medical opinions without identifying or discussing any of the positive evidence identified by Appellant was erroneous. (App. Br. at 15-18); *Gabrielson v. Brown*, 7 Vet. App. 36, 39-40 (1994) (emphasizing, "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[,]" *inter alia*, the Board's "reasons and bases for [its] findings and conclusions serves a function similar to that of *cross-examination* in adversarial litigation.") (emphasis added); *Gilbert*, 1 Vet. App. at 57.

Contrary to the Secretary's assertion, the Board did not discuss all of the positive evidence favorable to Appellant's appeal. (Sec. Br. at 19). Indeed, the bulleted evidenced contained in Appellant's brief (1) was not considered by the Board; (2) is relevant to the question on appeal; and (3) is positive evidence, favorable to Appellant's claim. (Sec. Br. at 19) (App. Br. at 16-18). A review of the Board's decision substantiates Appellant's argument that the Board did not discuss any evidence regarding the deceased Veteran's lengthy use of high dosages of NSAIDs to treat his service-connected bilateral knee condition. [R. at 10-12]. Regardless of the Secretary's justification, evidence of an influential relationship between NSAIDs and CAD, was certainly favorable to Appellant's claim and should have been discussed by the Board. (Sec. Br. at 23); *see Moody v. Wilkie*, 30 Vet. App. 329, 339 (2018).

With regard to the service-connected MDD, the Secretary already conceded that the Board failed to consider favorable evidence that supported Appellant's argument that she was entitled to a rating in excess of 50 percent for her late husband's service-connected

MDD. (Sec. Br. at 8-9). Indeed, the evidence identified by Appellant also substantiated her theory that the Veteran's service-connected MDD substantially contributed to his cause of death from cardiovascular disease. (App. Br. 16-18). Included within evidence of record was a highly probative nexus opinion form Dr. H.S.'s who opined the Veteran's service-connected MDD "contributed both substantially and materially to his cause of death." (App. Br. at 16); [R. at 35-36]. Dr. H.S. also opined that the Veteran's MDD aided in the development of and permanently aggravated his non-service connected hypertension, which in turn caused him to develop cardiovascular disease. (App. Br. at 16-17); [R. at 35-36]. Surprisingly, the Secretary does not disagree with the expert's suggestion that "there is no question that depression is associated with both developing cardiovascular disease and death . . . ."[2] (Sec. Br. at 20-22). Nevertheless, the Secretary determined Dr. H.S.' favorable opinion was less probative than the unfavorable VA opinions from April and May 2016, because Appellant's private physician did not (1) provide a specific rationale for causation between the two; (2) cite to any specific evidence that would have shown that the Veteran's MDD caused or contributed to his cardiovascular disease and death; or (3) review the record. (Sec. Br. at 20-22). Appellant asserts that this is not true. (App. Br. at 6, 16-17, 19); [R. at 35-56].

Again, the Secretary's reasoning and/or skepticism about why, in his opinion, VA's unfavorable opinions are more probative than Dr. H.S.'s favorable opinion conflicts with the Court's well-established benefit of the doubt rule, and ignores the low-threshold with

[2] Alexander Glassman & Peter Schapiro, *Depression and the Course of Coronary Artery Disease*, 155 AM. J. OF PSYCHIATRY 4, 4-11 (1998). (App. Br. at 19).

linking non-service connected disabilities acquired secondary to service-connected conditions. *See Wise*, 26 Vet. App. at 531; *Jones*, 23 Vet. App. at 388 n.1; *McLendon*, 20 Vet. App. at 83. Indeed, the evidence was in equipoise that Appellant's late husband's service-connected MDD at least as likely as not substantially and materially caused or contributed to his death from cardiovascular disease. (App. Br. at 18-19); [R. at 37-43, 46, 49, 54-57].

Interestingly, the Secretary has suggested that after parsing the July 2017 private physician's language carefully, he believes that Dr. H.S. *conceded* that there is no evidence to support a conclusion that the Veteran's MDD "contributed both substantially and materially to his cause of death." (Sec. Br. at 21) [R. at 35-36]. The Secretary's suggestion is duplicitous, due to his earlier implication that Appellant inserted her own "unhelpful insight" regarding the NIMH study (Sec. Br. at 16). In fact, the Secretary's analysis into the Dr. H.S.'s linguistics is a complete mischaracterization of his favorable opinion that is counter to the Court's pro-veteran/non-adversarial claims process. *See Gabrielson*, 7 Vet. App. at 40 (emphasizing that "[t]he VA claims adjudication process is not adversarial . . . ."); *Gilbert*, 1 Vet. App. at 54. Consequently, the Secretary cannot defend the adequacy of the Board's stated reasons or bases, because the Board's reasoning not only failed to consider favorable evidence, but also failed to apply the benefit of the doubt rule when evaluating the evidence contained in the evidence of record. *See Moody*, 30 Vet. App. at 339 § 5107(b); § 3.102.

CONCLUSION AND STATEMENT OF RELIEF

For the foregoing reasons, and those reasons explained in Appellant's initial brief, Appellant respectfully requests this Court to issue an Order that vacates and remand the Board's January 11, 2019 decision that denied her entitlement to (1) DIC service-connection benefits; (2) a rating in excess of 50 percent for the service-connected MDD; and (3) TDIU, so that the Board may provide an adequate statement of reasons or bases and a new, adequate VA examination that applies the correct evidentiary standard.

Respectfully Submitted,

Dated: February 27, 2020

/s/ Amy S. Borgersen

Amy S. Borgersen, Esq.
Gordon & Partners
4114 Northlake Boulevard
Palm Beach Gardens, FL 33410
(561) 799-5070 – Tel
(561) 799-4050 – Fax

Counsel for Appellant

Dated: February 27, 2020

/s/ Adam G. Werner

Adam G. Werner, Esq.
Gordon & Partners
4114 Northlake Boulevard
Palm Beach Gardens, FL 33410
(561) 799-5070 – Tel
(561) 799-4050 – Fax

Counsel for Appellant