IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-2024

MARIO N. DACOSTA,

Appellant,

v.

ROBERT L. WILKIE,

Secretary of Veterans Affairs,

Appellee.

APPELLANT'S REPLY BRIEF

Glenn R. Bergmann, Esq.
Jonathan D. Brenner, Esq.
Bergmann & Moore, LLC
7920 Norfolk Ave., Suite 700
Bethesda, MD 20814
(301) 290-3163

Counsel for Appellant

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ARGUMENT

I. The Secretary has failed to demonstrate that Appellant limited the scope of his appeal to a 30 percent disability rating for tension headaches.

Appellant argued that the Board of Veterans' Appeals (Board) clearly erred in determining that it did not have jurisdiction to adjudicate a rating in excess of 30% for tension headaches. **Appellant's Brief ("App. Br.") at 8-9**. The Secretary argued that an Appellant may withdraw an appeal according to 38 C.F.R. § 20.204(a)-(b)(2018)[1] when an appellant, or the representative, withdraws an appeal of one or more issues in a claim by submitting, in writing, a statement identifying the veteran, the applicable VA file number, "and a statement that the appeal is withdrawn." **Secretary's Brief ("Sec. Br.") at 4**. This citation by the Secretary, while the correct citation of law, is fatal to his argument.

Simply put, the Secretary's construal of Appellant's Notice of Disagreement (NOD) to be a statement tantamount to "the appeal is withdrawn" is just not the case here. **R. 390-91**. At the outset, the NOD creates the appeal, so it cannot withdraw the appeal at the very same time. *See* 38 U.S.C. § 7105. As to whether Appellant sufficiently limited his rating by typing "30%" on the NOD form, such is not equivalent to a statement that this percentage would satisfy his appeal to such an extent that he would be willing to withdraw his claim for any higher rating entirely after obtaining it. The Secretary does not point to anywhere in the September 2013 NOD where Appellant expressed a clear intent to withdraw after obtaining the percentage sought. He also does not point to anywhere in the NOD that communicated to Appellant the consequences of indicating his preferred rating.

[1] Since re-codified as 38 C.F.R. § 20.205.

Reading the NOD in this manner requires a significant leap from merely indicating a desired rating to full abandonment of an increased rating claim. The Secretary seemingly cannot glean any other meaning from the answer provided than a limitation of the appeal, but it was not Appellant who designed the form or asked the question.

Thus, the Secretary, like the Board, failed to point out how Appellant's written submission satisfies the high threshold to withdraw a claim. *See* 38 C.F.R. § 20.205(b)(1), *DeLisio v. Shinseki*, 25 Vet. App. 45, 57 (2011) (holding that "it is well settled that withdrawal of a claim is only effective where the withdrawal is explicit, unambiguous, and done with a full understanding of the consequences of such action on the part of the claimant."); *Acree v. O'Rourke*, 891 F.3d 1009, 1013 (Fed. Cir. 2018) (relying on the *DeLisio* standard that provides a bulwark against the inadvertent or uninformed forfeiture of a veteran's rights). *See also Henderson v. Shinseki*, 562 U.S. 428, 431, 131 S. Ct. 1197, 179 L. Ed. 2d 159 (2011) ("The VA's adjudicatory process is designed to function throughout with a high degree of informality and solicitude for the claimant." (citation and internal quotation marks omitted)).

Furthermore, the Secretary's reliance on *Evans v. Shinseki*, 25 Vet. App. 7, 15 (2011) is equally meritless. Here, the Secretary notes that an Appellant can limit an appeal where the intent to do so is clear. **Sec. Br. at 4**. While this may be so, the Secretary has failed to show that Appellant's NOD is demonstrative of a clear intent to file a statement that the appeal is withdrawn. 38 C.F.R. § 20.205(b)(1).

II. In the alternative, the Secretary has failed to show that the Board provided an adequate statement of reasons or bases for its factual and legal determinations.

Appellant also argued that the Board failed to provide adequate reasons or bases to support its findings of fact and conclusions of law. **App. Br. at 9-20**. The Secretary argued that the Board's statements of reasons or bases were adequate to enable judicial review of the claim. **Sec. Br. at 8-16**.

A. The Secretary erringly argued that Appellant clearly limited his appeal to 30 percent.

Appellant's Brief argued that the Board failed to provide adequate reasons or bases to support its findings that Appellant limited the scope of the appeal to a 30 percent rating. **App. Br. at 9-11**. The Secretary argued that the Board's reasons or bases were adequate to support its finding that Appellant limited the scope of the appeal to 30 percent. **Sec. Br. at 8-9**.

The Secretary first cited to Court precedent that the dual purpose of a statement of reasons or bases is first to enable the claimant to understand the precise basis for its decision, and second to facilitate judicial review. **Sec. Br. at 8-9**, *see also Allday v. Brown*, 7 Vet. App. 517, 527 (1995); *Gilbert v. Derwinski*, 1 Vet. App. 49, 56-57 (1990). The Secretary's explanation that Appellant's desire to limit his disability rating appeal is based upon "Appellant's unambiguous written statement[,]" and that "[t]he Board's finding in this regard was clear and fully explained." **Sec. Br. at 8**.

The Secretary here failed to explain how Appellant's NOD was a clear indication of Appellant's intent that the disability rating would be satisfied at 30 percent in light of Appellant's VA Form 9 which noted Appellant's worsening symptomatology. **R. 107-08,**

103-06. The Secretary, like the Board, cherry-picked the evidence that it found to be favorable to a limitation of the scope of the appeal, rather than basing its review on all of the evidence. *See Smith v. Derwinski*, 2 Vet. App. 137, 141 (1992) (holding that the Board cannot rely only upon the evidence it considers favorable to its position, but must review and base its decision upon all the evidence of record).

B. The Secretary erringly argued that even under a liberal and sympathetic reading, Appellant sought a 30-percent evaluation.

Appellant argued that the Board's reasons and bases are inadequate because there is a discrepancy between Appellant's NOD and his VA Form 9 regarding Appellant's symptomatology, which at the very minimum, should render Appellant's desire to limit the claim in excess of 30 percent, ambiguous. **App. Br. at 10-11**. The Secretary argued that a liberal and sympathetic reading of Appellant's NOD limited Appellant's claim to a 30 percent disability rating. **Sec. Br. at 9-10**.

The Secretary noted that Appellant's NOD did not create an ambiguity that required the Board to liberally interpret his NOD and that Appellant's intent was clear on its face. **Sec. Br. at 9-10**. The Secretary's reasoning here is flawed. Not only did the Board fail to address Appellant's VA Form 9, requesting an increased rating due to worsening symptomatology, (**R. 107-08)**, but in doing so, the Board failed to address all of the evidence in which it was required to do in order to infer Appellant's intent. *See Smith*, at 141. Once again, nowhere in the December 2018 decision for an increased rating for the headaches claim does the Board discuss Appellant's VA Form 9.

C. The Secretary erringly argued that Appellant's substantive appeal is not incongruous with his Notice of Disagreement.

Appellant argued that the Board's reasons or bases are inadequate because the Board failed to discuss Appellant's VA Form 9, which more generally indicates that Appellant desired the maximum disability rating afforded by law, when compared to the NOD. **App. Br. at 10-11**. The Secretary argued that Appellant's substantive appeal is not incongruous with the NOD. **Sec. Br. at 10-12**.

The Secretary first argued that Appellant's VA Form 9 does not conflict with or contradict the NOD. The Secretary's analysis of the two forms results in a post-hoc rationalization because the Board failed to discuss any of the contents of the VA Form 9 and its effects on the Board's decision to forego evaluation of Appellant's headache claim in excess of 30 percent. **R. 4-12**; *see also Doty v. United States*, 53 F.3d 1244, 1251 (Fed. Cir. 1995) ("'Courts may not accept appellate counsel's post hoc rationalizations for agency action. It is well established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself.'" (quoting *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983))); *Evans v. Shinseki*, 25 Vet. App. 7, 16-17 (2011) (holding that "[I]t 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."). Here, the Secretary's argument fails to make up for the Board's error that it must base its decision on all evidence of record. *See* 38 U.S.C. § 7104(a); *Smith*, at 141; *Jones v. Derwinski*, 1 Vet. App. 210, 217 (1991) ("the BVA opinion must include an evaluation of

the positive evidence . . . [and] a weighing of the positive and negative evidence[.]") (internal quotations omitted).

Furthermore, the Secretary miscited Appellant's VA Form 9 in his brief. **Sec. Br. at 11** ("The statement in Appellant's VA form 9, 'please reconsider an evaluation of 0% for my tension headaches' is in no way at odds with what he stated in his NOD."), **R. 108 (107-08)** ("please reconsider an evaluation *in excess of* 0 percent for my tension headaches.") (emphasis added for clarification). This distinction between the Notice of Disagreement and the VA Form 9 is evidence that the Board failed to discuss and provides that Appellant's purported request to limit the scope of the claim to a 30 percent disability rating is at the very minimum, ambiguous. *See AB v. Brown*, 6 Vet. App. 35, 39 (1993) (holding that "In his [NOD] and [substantive] Appeal, the veteran expressed general disagreement with the assignment of a 10% rating and requested a 'greater evaluation than granted'… Therefore, the RO and BVA were required to construe the appeal as an appeal for the maximum benefit allowed by law and regulation and thus to consider all potentially applicable [] disability ratings.").

Lastly the Secretary argues that documentation from outside of Appellant's NOD may be used to infer an intent to contradict limiting the scope of the claim. **Sec. Br. at 11-12**. While the Secretary is correct on this point, the Secretary also argued that there is no documentation currently in the claims file that may be used to contradict Appellant's express intent to limit the scope of the claim. **Sec. Br. at 11-12**. However, as indicated *supra*, while the Board failed to derive Appellant's intent from discussion that includes his VA Form 9, the *Secretary's attempt to derive* intent is an impermissible attempt at post hoc

rationalization. *See Doty*, *Evans*, both *supra*, **R. 4-12**, **107-08**. Rather, it is for the Board to provide adequate reasons or bases for its finds of fact and conclusions of law. *See* 38 U.S.C. § 7104(d)(1).

D. The Secretary erringly argued that the Board correctly applied AB v. Brown.

Appellant argued that the Board erred by not applying the favorable aspects of *AB v. Brown*, 6 Vet. App. 35 (1993). **App. Br. at 11-14**. The Secretary argued that the Board correctly applied the holding of *AB* to find that Appellant limited the scope of his appeal to the rating sought in the Notice of Disagreement. **Sec. Br. at 12-13**, **R. 390-91**.

Here, the Secretary incompletely cited to *AB*, omitting the favorable aspects which are fatal to the Secretary's argument. **Sec. Br. at 12-13**. First, the Secretary argued that "Appellant specifically indicated the percentage sought on his NOD, distinguishing this case from *AB*, where the claimant never stated a percentage sought." **Sec. Br. at 12**. On this note, the Court further held in *AB*, that "Nothing… evinces an intent to limit the issue on appeal to entitlement to only a 30% rating." 6 Vet. App. at 39. The *AB* Court also held that "where… there is no clearly expressed intent to limit the appeal to entitlement to a specific disability rating for the service-connected condition, the RO and BVA are required to consider entitlement to all available ratings for that condition." On this note, the Secretary's explanation that the VA Form 9 should not be found to be incongruous with the NOD (**Sec. Br. at 10-12**) and that the NOD represents a clear intent to withdraw a disability rating in excess of 30 percent is not meritorious because the Board failed to address the VA Form 9 in its decision. **R. 4-12**.

Second, the *AB* Court relied on *Shoemaker v. Derwinski*, 3 Vet. App. 248, 253 (1992) (holding that "At a minimum, the Board had an obligation to consider and discuss in its decision the applicability of the next-higher rating, 50%."). 6 Vet. App. at 39. The Secretary, while seeming to forget that the Board was obliged with considering and discussing the next higher rating for Appellant's headache claim, failed to apply *AB*'s holding that "Neither the veteran nor his representative ever stated that the veteran sought *no more than a 30% rating*." 6 Vet. App. at 39 (emphasis added). There is simply nothing in Form 21-0958 reflecting that by indicating a percentage sought, the Appellant is affirmatively rejecting any higher percentage. If the Secretary is concerned that this renders a statement about percentage sought "meaningless", (**Sec. Br. at 10**), he should have drafted his form more clearly. The form could have said, "Maximum Evaluation Sought", but did not. If the form warned appellants that identifying a percentage would bar them from receiving any higher percentage even if entitled to it under law, their specification of a percentage would be far better informed and carry more weight in determining that the scope of an appeal had been limited. As it stands, the characters "30%" on this particular NOD form resulted from meaningless instructions and therefore really were meaningless themselves and should have been disregarded by the Board.

E. The Secretary erringly argued that the holdings of DeLisio v. Shinseki and Acree v. O'Rourke are not applicable to Appellant's claims.

Appellant argued that the Board failed to provide adequate reasons or bases for its determination that Appellant sought to withdraw his claim for a higher disability rating because the high standards established under *DeLisio v. Shinseki*, 25 Vet. App. 45 (2011)

and *Acree v. O'Rourke*, 891 F.3d 1009 (Fed. Cir. 2018) were not substantiated. **App. Br. at 14-18**. The Secretary argued that Appellant misapplied the holdings of *DeLisio* and *Acree*, in that they only apply to withdrawals during Board hearings. **Sec. Br. at 13-16**.

Here, however, the Secretary first failed to understand Appellant's citations to *DeLisio* and *Acree* were cited to establish the foundation that there is a high threshold an Appellant must surmount for withdrawing claims *See DeLisio*, at 57 (holding that "it is well settled that withdrawal of a claim is only effective where the withdrawal is explicit, unambiguous, and done with a full understanding of the consequences of such action on the part of the claimant."). Furthermore, it is also noted that the high standard encapsulated in *DeLisio* may equally apply to written withdraws.[2] Inasmuch, the Secretary avers that, because Appellant wrote down a less than full percentage for a disability rating for headaches and was subsequently granted this disability rating percentage, that this is to be considered on the same level as what is required under 38 C.F.R. § 20.204 (2018), the Secretary's belief on this account not meritorious. Nowhere in the claims file did Appellant submit documentation tantamount to "I affirmatively withdraw the claim."

Furthermore, the Secretary's argument in response to the Board laying a trap for Appellant is unconvincing. The Secretary's reliance on *Maggitt v. West*, 202 F.3d 1370, 1375 (Fed. Cir. 2000) that Appellant is fully in charge of how wide or narrow is misplaced as it is an attempt at burden-shifting. *See AB*, at 39 (holding that there is nothing here that evinces an intent to limit the issue on appeal to entitlement to only a 30% rating). The

[2] At present, *Hembree v. Wilkie*, is being argued before this distinguished Court on this very issue.

bigger picture issue in this case as well as to the Veterans' benefit system is that while Appellant is pro se, the Secretary infers that Appellant is supposed to be an expert of headache disability claims by noting that Appellant understands the diagnostic code and what percentage he should receive based on his symptomatology. **Sec. Br. at 14-15**. Such a holding would be contrary to purposes of the veteran's benefits system. *See Comer v. Peake*, 552 F.3d 1362, 1370 (Fed. Cir. 2009) (citing *Cook v. Brown*, 68 F.3d 447, 451 (Fed. Cir. 1995) ("Although aides from veterans' service organizations provide invaluable assistance to claimants seeking to find their way through the labyrinthine corridors of the veterans' adjudicatory system, they are "not generally trained or licensed in the practice of law."); *Comer*, at 1369 (holding that the VA disability compensation system is not meant to be a trap for the unwary, or a stratagem to deny compensation to a veteran who has a valid claim, but who may be unaware of the various forms of compensation available to him); *see also Clark v. O'Rourke*, 30 Vet. App. 92, 97 (2018) ("[T]o waive a procedural right, 'the [claimant] must first possess a right, he must have knowledge of that right, and he must intend, voluntarily and freely, to relinquish or surrender that right.'") (quoting *Janssen v. Principi*, 15 Vet. App. 370, 374 (2001) (per curiam)).

The Secretary already expressed his understanding, on promulgation of standardized forms, that if an appellant specified a disadvantageous effective date on a standard form, "VA would grant the correct date." App. Br. at 17 (citing 79 Fed. Reg. 57,660, 57,685 (Sep. 25, 2014)). According to the Secretary's brief, however, if a pro se claimant mistakenly expresses a desire for less compensation than he is entitled to, the agency should follow his lead and limit his compensation accordingly. Appellant submits

that the Secretary was right the first time. *See Noah v. McDonald*, 28 Vet. App. 120, 132 (2016) ("As the Federal Circuit noted in *Barrett v. Nicholson*, "[t]he government's interest in veterans cases is not that it shall win, but rather that justice shall be done, that all veterans so entitled receive the benefits due to them." 466 F.3d 1038, 1044 (Fed. Cir. 2006)."). The Court should accordingly require far more than a bare number stating the evaluation purportedly sought to conclude that an appellant intended to affirmatively refuse greater compensation.

Moreover, the Secretary offers essentially no opposition to Appellant's argument that a greater headache rating could have been granted, such that the Board's limitation of the scope of the appeal was prejudicial. **Sec. Br. at 15-16**. Appellant maintains that record evidence supports a disability rating in excess of 30 percent. *See* **App. Br. at 18-20**; **R. 389**, **103-06, 107-08**. The Secretary's refusal to acknowledge this, or his earlier position upon promulgation of standardized forms, suggests that he is much more interested in winning than in doing justice in this case. *See Barrett, supra*; *cf. Jaquay v. Principi*, 304 F.3d 1276, 1280 (Fed. Cir. 2002) (recognizing that Congress has created a paternalistic veterans' benefits system to care for those who served their country in uniform); *Hensley v. West*, 212 F.3d 1255, 1262 (Fed. Cir. 2000) (recognizing that the veterans' benefit system is 'uniquely pro-claimant').

CONCLUSION

For the reasons articulated above and in his November 7, 2019 principal brief, Appellant respectfully requests that the Court reverse or alternatively set aside the Board's

decision of December 14, 2018, and remand this matter for readjudication consistent with the authorities discussed in his submitted briefs.

Respectfully submitted,

/s/ Glenn R. Bergmann
GLENN R. BERGMANN

March 6, 2020

/s/ Jonathan D. Brenner
JONATHAN D. BRENNER
Bergmann & Moore LLC
7920 Norfolk Ave., Suite 700
Bethesda, MD 20814
(301) 290-3163

Counsel for Appellant