REPLY BRIEF OF APPELLANT

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

19-581

RICHARD A. HARRINGTON,

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Regulations

Record Before the Agency ("R") Citations

APPELLANT'S REPLY ARGUMENTS

I. The Secretary incorrectly argues that the Board provided a holistic analysis of the severity, frequency, and duration of the Veteran's symptoms and resulting level of impairment, and the Veteran's arguments do not constitute a mere disagreement with the Board's weighing of the evidence.

The Board's decision does not support the Secretary's assertion that the Board engaged in a holistic analysis and adequately considered the severity, frequency, and duration of Mr. Harrington's symptoms. Secretary's Br. at 9-10; *see* R-10-11. The Board provided no such analysis and instead simply listed the evidence prior to stating its conclusion, which does not constitute adequate analysis under *Vazquez-Claudio v. Shinseki*, 713 F.3d 112, 117-18 (Fed. Cir. 2013). Appellant's Br. at 12. Although the Board concluded that the Veteran's symptoms "are not of the frequency, severity, or duration" required for a higher rating, it neglected to provide any legally or factually relevant analysis connecting its conclusion to the facts of this case. *See id.*; R-10-11.

Raising this distinction is not a mere disagreement with how the Board weighed the evidence or a request for the Court to re-weigh the evidence. *But see* Secretary's Br. at 11-14. Instead, the Veteran asserted an error of law in that the Board failed to conduct the legally required analysis of the severity, frequency, and duration of his symptoms and, as a result, failed to provide an adequate statement of reasons or bases. Appellant's Br. at 10-18. Indeed, the Veteran could not disagree with the Board's weighing of the evidence because, as argued, the Board failed to analyze or weigh the evidence. Appellant's Br. at 11. And the Board's errors resulted in prejudicial error. Appellant's Br. at 18-19. Contrary to the Secretary's contention, the Veteran was not required to show clear error because remand is the appropriate remedy where the Board misinterprets and misapplies the law and provides

inadequate reasons or bases for its decision, which is the case here. Secretary's Br. at 16-17; *see* Appellant's Br. at 18-19; *and see Tucker v. West*, 11 Vet.App. 369, 374 (1998).

The Secretary fails to provide any support for his assertion that the Board provided a holistic analysis and considered the severity, frequency, and duration of the Veteran's panic attacks or motivation in mood disturbances. Secretary's Br. at 10-11. Instead, he simply points to the Board's decision, which does not support that premise. *See id.* at 10-11; R-10-11. Therefore, because "the Secretary has failed to respond appropriately," the Court should find that the Secretary concedes that the Board failed to analyze the severity, frequency, duration, and resultant effects of the Veteran's panic attacks and motivation and mood disturbances. Appellant's Br. at 12-14; *see MacWhorter v. Derwinski*, 2 Vet.App. 133, 136 (1992) ("Where appellant has presented a legally plausible position . . . and the Secretary has failed to respond appropriately, the Court deems itself free to assume . . . the points raised by appellant, and ignored by General Counsel, to be conceded.").

As the Veteran argued, he would get one to two panic attacks per week and could not "force [him]self to go out into the world." Appellant's Br. at 13; *see* R-995; R-1749. He was having such severe panic attacks that he could not sit still. Appellant's Br. at 13; *see* R-1742. The Veteran's motivation and mood disturbances were frequent, severe, and of such a lengthy duration that he would need to have 8 to 10 drinks per day to cope with his mood issues. Appellant's Br. at 13; *see* R-1742. He also could not motivate himself to perform tasks to sell his home or build his grandchild's cradle. Appellant's Br. at 14; R-74; R-759. Had the Board analyzed this evidence, it might have found that a higher rating was warranted because the severity, frequency, and duration of his symptoms were akin to panic

attacks and motivation and mood disturbances at the 50 percent rating. *See* 38 C.F.R. § 4.130 (2019). Its failure to do so prejudiced the Veteran, requiring remand. *See Tucker*, 11 Vet.App. at 374.

Similarly, the Court should reject the Secretary's argument that the Board adequately considered the Veteran's difficulty with relationships. *See* Secretary's Br. at 11; R-10. The Secretary points to the Board's recognition that the Veteran "endorsed a positive relationship with his wife, stepson, and grandchildren." Secretary's Br. at 11 (internal quotation marks omitted). But the Board failed to explain why a higher rating was not warranted in light of this evidence. *See* R-10. In its actual analysis, the Board noted only some difficulty in establishing and maintaining effective *work* relationships and concluded without explanation that he maintained effective friendships and family relationships. *See id.* Accordingly, the Veteran was correct in his argument that the Board ignored his difficulty with family and social relationships in its analysis because it failed to explain its conclusion in light of the record. *But see* Secretary's Br. at 11. It did not explain why his irritability and lack of patience resulting in him lashing out at his wife and being combative with her, and the fact that his perimeter checks upset her did not constitute difficulty in establishing and maintaining effective relationships. Appellant's Br. at 14; *see* R-336-37; R-1001; R-1784. Nor did it discuss in its analysis that he also only socialized with fellow veterans and had anxiety in crowds. Appellant's Br. at 14; *see* R-765; R-995. Because section 4.130 contemplates difficulty establishing and maintaining effective work *and* social relationships at the 50 percent rating, the Board's failure to adequately address the Veteran's social relationships resulted in prejudicial error. *See* Appellant's Br. at 14-15.

Regarding his obsessional rituals, the Secretary asserts that the Veteran "merges the evidence of hypervigilance into purported evidence of obsessional rituals." *See* Secretary's Br. at 12. But the Veteran argued that his hypervigilance resulted in perimeter checks around his property every morning and at night, which constituted obsessional rituals that interfered with routine activities, such as sleeping. Appellant's Br. at 15. The Secretary fails to consider the link between the Veteran's hypervigilance and the result of that symptom, his obsessional rituals. *See* Secretary's Br. at 12. The Veteran's argument that the Board failed to address his obsessional rituals was not a request to re-weigh the evidence, it was an assertion that the Board failed to address this symptom in its analysis. Appellant's Br. at 15; *but see* Secretary's Br. at 12. Because the symptoms in the rating criteria are non-exhaustive, the Board must still analyze all of a veteran's symptoms to decide if they are of the severity, frequency, and duration of those in the higher rating. *See Vazquez-Claudio*, 713 F.3d at 117. Here, it is not the presence of hypervigilance that is crucial, but its effect which VA needs to match to a particular rating. *See Mauerhan v. Principi*, 16 Vet.App. 436, 442 (2002).

Accordingly, the Board failed to adequately analyze the severity, frequency, and duration of Mr. Harrington's symptoms, and his arguments did not amount to a disagreement with the Board's weighing of the evidence. *But see* Secretary's Br. at 9-13. He would perform these checks every morning and every night, while sometimes carrying a baseball bat. R-1001. They also interfered with his sleep because he would wake up at night to patrol around his property. *Id.* This evidence demonstrates the severity, frequency, and duration of this symptom. *See id.*; *Vazquez-Claudio*, 713 F.3d at 117. Therefore, the Court

should vacate the Board's denial of a rating higher than 30 percent for the Veteran's PTSD and remand the appeal for re-adjudication. *See Tucker*, 11 Vet.App. at 374.

II. Contrary to the Secretary's arguments, the Board did not adequately explain its reasons for denying a rating in excess of 30 percent for PTSD.

The Secretary asserts that the Board adequately addressed the Veteran's concentration difficulties because it found that he suffered from decreased concentration. Secretary's Br. at 13; R-10. But again, simply acknowledging that he suffered from this symptom did not equate to an analysis of whether his concentration difficulties resulted in a deficiency in thought, or explain why they do not. *But see* Secretary's Br. at 13; *see also Vazquez-Claudio*, 713 F.3d at 118.

The Veteran did not contradict his own argument in pointing out an inability to concentrate at times while also arguing that he had a persistent inability to concentrate. *But see* Secretary's Br. at 14. Persistent difficulties mean that they "exist[ed] for a long or longer than usual time *or* continuously." *Persistent*, Merriam-Webster's Online Dictionary, *https://www.merriam-webster.com/dictionary/persistent* (last visited Mar. 9, 2020) (emphasis added). His concentration difficulties could have existed for a long or longer than usual time, and hence be persistent, without having them be constant, contrary to the Secretary's argument. *Compare id.*, *with* Secretary's Br. at 14.

Second, the Secretary asserts that the Board properly relied on the Veteran's volunteer work at the vineyard "as it [was] demonstrably more strenuous than being comfortable at home or engaging in limited activity." Secretary's Br. at 15. But the Board only noted that he "ha[d] enjoyable hobbies." R-10. It said nothing about the strenuous nature of the vineyard work, nor did it explain why his hobbies showed he did not have

occupational impairment with reduced reliability and productivity. *See id.* Nor did it explain how these hobbies amounted to evidence that he could perform work duties such as showing up at a particular time or meeting a certain level of production. *See id.* Because the Board did not provide this explanation, the Court should decline to accept the Secretary's assertion because it amounts to an improper *post hoc* rationalization of the Board's reliance on the Veteran's engagement in hobbies. *See* Secretary's Br. at 14-15; *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 counsel's '*post hoc* rationalizations' for agency action, advanced for the first time in the reviewing court."). Accordingly, the Board failed to adequately explain its reasons for denying a higher rating. Appellant's Br. at 16-17.

III. The Secretary incorrectly asserts that the Board did not need to articulate the standards it used to differentiate between the various levels of occupational and social impairment because 38 C.F.R. § 4.130 contains subjective terms of degree.

First, the Secretary fails to explain how the Board explained the difference between occupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks under the 30 percent rating and reduced reliability and productivity under the 50 percent rating. *See* Secretary's Br. at 17-20. Instead, the Secretary argues that 38 C.F.R. § 4.130 is the standard to which VA adjudicators are held and that there are no subjective terms of degree in that regulation, as in *Johnson v. Wilkie*, 30 Vet.App. 245, 255 (2018), that would require further explanation. Secretary's Br. at 17-22.

But "occasional decrease," "intermittent periods," and "reduced reliability and productivity" are just as subjective as "prolonged," "completely prostrating," and "very

frequent," the terms the Court found lacking in standards in *Johnson*. Appellant's Br. at 20-21. The practical difference between the levels of impairment in section 4.130 is unclear in the Board's decision. *See id.* at 20-21.

The cases the Secretary cites that describe the Board's obligations to adequately analyze the Veteran's symptoms and their resulting level of impairment do not define the different levels of impairment between the various ratings. *See* Secretary's Br. at 18; 38 C.F.R. § 4.130. He first cites to *Vazquez-Claudio* which discusses the degree to which the severity, frequency, and duration of a veteran's symptoms must factor into the analysis, but the Federal Circuit did not define the differences between the various levels of impairment in that case. *See* 713 F.3d at 116, 117-18. The Court also did not define the differences between those levels in *Mauerhan*. *See* 16 Vet.App. at 442-44. Instead, it held that the focus of the analysis should be on the effects of a veteran's symptoms, not on whether he or she exhibits the exact symptoms listed in the rating criteria. *See id.* at 442-44; *but see* Secretary's Br. at 18. Finally, the Court in *Bankhead v. Shulkin*, 29 Vet.App. 10, 22 (2017), held that VA must engage in a holistic analysis that assigns an evaluation that most nearly approximates the level of occupational and social impairment, but it did not define the differences between each level of impairment. *But see* Secretary's Br. at 18.

The Veteran's argument that the Board failed to adequately analyze the Veteran's symptoms and impairment in accordance with *Vazquez-Claudio* was not internally inconsistent. *But see* Secretary's Br. at 18. Even if the Board adequately analyzed the severity, frequency, and duration of his symptoms, which it did not do, the fact remains that it failed to differentiate between the levels of impairment in the various percentage ratings.

See Appellant's Br. at 12-16, 19-22; 38 C.F.R. § 4.130; *Vazquez-Claudio*, 713 F.3d at 117-18; *but see* Secretary's Br. at 18. The fact that the rating assessment is symptom-driven does not tell the adjudicator how to distinguish between the specific ratings listed in section 4.130, since the Veteran (a) need not have all or even any of the symptoms listed in the rating and (b) the symptoms in the ratings overlap. *See Vazquez-Claudio* 713 F.3d at 116, 117; *but see* Secretary's Br. at 18.

Accordingly, the Secretary's arguments that the Board applied the proper standard and provided adequate reasons or bases fail to consider the subjective terms in the rating criteria. *See* Secretary's Br. at 17-22. Remand is required for the Board to articulate the standards it used. Appellant's Br. at 21-22; *see Tucker*, 11 Vet.App. at 374.

IV. The Secretary's argument that the Board need not have considered staged ratings fails to consider its duty to maximize benefits.

Initially, the Secretary incorrectly asserts that *Morgan v. Wilkie*, 31 Vet.App. 162 (2019) is a non-precedential decision and, therefore, does not provide the Veteran with the relief he seeks. *But see* Secretary's Br. at 23. *Morgan* is a precedential decision and obligates the Board to exhaust all schedular alternatives, including consideration of a staged rating when raised by the record, as part of VA's duty to maximize benefits. 31 Vet.App. at 168.

The Secretary argues that the factual findings must show distinct time periods warranting a higher rating but fails to recognize that the Board is required to, but did not make those findings, violating its duty to maximize benefits. *See* Secretary's Br. at 23-24; *Morgan*, 31 Vet.App. at 168. And it could have made this finding because in 2017 the Veteran was at times unable to leave his house and suffered from more frequent anxiety attacks. R-1748; R-1749. He also experienced worsening mood and increased anger and

irritability. R-1744. In that regard, the Secretary misses the point in asserting that "*Hart* is the proper authority on this matter." Secretary's Br. at 23. The Board failed to exhaust all avenues towards maximizing benefits despite the fact that the evidence raised the issue of staged ratings from 2017, which violated the Court's precedent in *Morgan*. *See* 31 Vet.App. at 168.

Therefore, this evidence raised the issue of staged ratings and the Board was required to make such factual findings to determine if they were appropriate. *Morgan*, 31 Vet.App. at 168. The Secretary, like the Board, fails to consider that this determination was necessary under the duty to maximize benefits. *See* Secretary's Br. at 22-23; R-9-11.

V. The Secretary is mistaken that the Board properly considered the issue of entitlement to TDIU because the Board did not consider the Veteran's income or whether his symptoms precluded him from performing all the tasks required for work.

None of the Board's reasons for denying entitlement to TDIU were legally or factually sufficient. Appellant's Br. at 22-30; *but see* Secretary's Br. at 26. It erroneously used his current volunteer work, the reasons for his previous retirement, and his failure to submit a VA Form 21-8940 against him, while failing to adequately address his educational and occupational history and the collective impact of his service-connected disabilities. Appellant's Br. at 23-29.

The Secretary's argument that the Board considered the economic component of unemployability is incorrect because the economic test for TDIU is earning more than the poverty level. *See* Secretary's Br. at 26. Mr. Harrington volunteered at his friend's vineyard without pay, placing him below the poverty level, which the Board failed to consider when it

determined that he was employed at his friend's vineyard. Appellant's Br. at 26; R-690; *see* R-11-12; *but see* Secretary's Br. at 26.

The Secretary's assertions that the Board complied with the non-economic component of *Ray* is mistaken. *See* Secretary's Br. at 26-29. The Board reasoned that the Veteran was unemployed by choice and did not endorse to a physician that he was prohibited from performing his job duties. R-13. But that is not the same as considering the factors set forth in *Ray v. Wilkie*, 31 Vet.App. 58, 73 (2019). *But see* Secretary's Br. at 26. Instead, *Ray* instructs that the Board had to consider his mental limitations "concerning memory, concentration, ability to adapt to change, handle work place stress, get along with coworkers, and demonstrate reliability and productivity," because the evidence raised the applicability of those factors. Appellant's Br. at 23; 31 Vet.App. at 73.

That evidence exists even if the Veteran did not expressly announce that he could not perform work duties. The Secretary, however, incorrectly suggests that the evidence did not necessitate a discussion of the *Ray* factors. *See* Secretary's Br. at 28. Mr. Harrington had concentration and memory limitations, R-996, and his PTSD symptoms, such as difficulty leaving the house, depressed mood, difficulties with social interaction, and irritability demonstrated that he would be unable to handle the rigors of employment. R-765; R-995; R-689-90; R-1744; R-1749. His symptoms also could have resulted in reduced reliability and productivity, as discussed above. Appellant's Br. at 18. Moreover, his issues with focusing negatively impacted his job performance in the past, as did his hearing difficulties. R-1000. Accordingly, his symptoms directly implicated the factors in *Ray* and showed how they

negatively impacted his job performance in the past, thus necessitating a discussion of those factors. *See* 31 Vet.App. at 73; *but see* Secretary's Br. at 28.

Additionally, Mr. Harrington's volunteer work at the vineyard did not demonstrate that he had the ability to show up on time, maintain a schedule, get along with coworkers, meet quotas, or other strenuous workplace requirements because this was a volunteer, unpaid position. *But see* Secretary's Br. at 26. And his concentration difficulties, social deficiencies, irritability, and depressed mood – all of which the Board should have but failed to properly consider under *Ray* — demonstrate that he could not meet these employment requirements. *But see id.* The Secretary's argument that the Board factored in his mental and physical abilities, therefore, fails to recognize that citing to evidence that he performed volunteer work is not an adequate consideration of his capability of obtaining and maintaining substantially gainful employment, applying the factors in *Ray*. Appellant's Br. at 23-25; *but see* Secretary's Br. at 27; *see also* 31 Vet.App. at 73.

Moreover, the Secretary's argument that the Board could not have cited to *Ray* misses the point that *Ray* rested on previous precedential decisions and relevant law. *See* Secretary's Br. at 28; 31 Vet.App. at 73. Well before *Ray* was decided, the Board had to consider the Veteran's physical and mental limitations in the TDIU analysis and provide adequate reasons or bases for its decision. *See Van Hoose v. Brown*, 4 Vet.App. 361, 363 (1993) (cited by *Ray* at footnote 113); *Gleicher v. Derwinski*, 2 Vet.App. 26, 28 (1991) (cited by *Ray* at footnote 114); *and see Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990). Its *conclusion* that the Veteran was capable of performing the physical and mental actions required by employment is not the same as *analyzing* the Veteran's mental limitations to determine if he was capable of obtaining

and maintaining substantially gainful employment. *See* R-13; 31 Vet.App. at 73; *but see* Secretary's Br. at 28. Although the Board could not cite directly to *Ray*, it nevertheless failed to perform the required analysis. Appellant's Br. at 23-25; *see* 31 Vet.App. at 73; *but see* Secretary's Br. at 28.

Had the Board correctly interpreted and applied the law governing TDIU, it might have found that the facts illustrate that Mr. Harrington was incapable of obtaining and maintaining substantially gainful employment. Appellant's Br. at 23-25; *see* Secretary's Br. at 27. As the Veteran argued, he had poor concentration, R-1742, motivation and mood disturbances, hypervigilance, and chronic sleep impairment, R-689-90, a lack of socialization with those who were not fellow veterans, anxiety in crowds, R-765; R-995, and hearing difficulties, R-1000. In 2012, his psychiatric condition was also worsening. R-994. His symptoms implicated the factors in *Ray* and demonstrated that he was not capable of obtaining and maintaining substantially gainful employment. Appellant's Br. 24-25; *see* 31 Vet.App. at 73.

The Secretary's differentiation of the instant case from *Cathell v. Brown*, 8 Vet.App. 539 (1996) and *Gleicher* fails to recognize that providing a summary and assessing the probative value of some of the evidence before concluding that the Veteran was not unemployable does not actually relate his educational and occupational history to his disabilities or provide more than a bare, conclusory statement that he was not capable of obtaining or maintaining substantially gainful employment. *But see* Secretary's Br. at 28-29. As the Veteran argued, the Board failed to explain how employment in an autonomous and predictable environment was possible in light of his GED education level and prior job

history as a mechanic. Appellant's Br. at 27. Nor did the Board adequately factor in his PTSD symptoms to its determination that he could work in an autonomous and predictable environment. *Id.* Because the Board failed to actually explain the skills Mr. Harrington possessed that would allow for such employment, it failed to comply with the Court's holdings in *Cathell* and *Gleicher*. Appellant's Br. at 27; 8 Vet.App. at 544; 2 Vet.App. at 28; *but see* Secretary's Br. at 28-29.

The Secretary cites to the non-precedential decision in *Wingo v. Shulkin*, 2017 U.S. App. Vet. Claims LEXIS 1630, 2017 WL 5171687 (Vet. App. Nov. 8, 2017), but does not explain why it supports the Board here. *See* Secretary's Br. at 29. Indeed, the Court in *Wingo* recognized that where a veteran's symptoms worsened after his last employment, a discussion of his educational and vocational background is needed. 2017 WL 5171687 at *3. Such is the case here. R-1748; R-1749; *see* R-690.

The Secretary also fails to adequately respond to the Veteran's argument that the Board erred when it relied on the absence of a VA Form 21-8940. *See* Secretary's Br. at 29-30; Appellant's Br. at 28-29. He argues that the Board did not "den[y] his claim simply due to the lack of a VA Form 21-8940" and instead "analyzed Appellant's abilities and employment history in deciding TDIU." Secretary's Br. at 29-30. But the Veteran did not argue that the Board denied his claim simply because of the lack of this form. Appellant's Br. at 28-29. Instead, the Veteran argued that the Board could not use the lack of the form as a rationale at all because it already possessed the relevant information it needed that could have been obtained through the Form 21-8940. Appellant's Br. at 28-29. Because the Secretary does not address this contention, the Court should find that the Secretary has

conceded that the Board erred when it relied on the absence of the Form 21-8940. *See* Secretary's Br. at 29-30; *MacWhorter*, 2 Vet.App. at 136.

Finally, the issue of entitlement to TDIU remains intertwined with his PTSD claim because the Board committed prejudicial legal error in its adjudication of both the Veteran's PTSD claim and entitlement to TDIU. Appellant's Br. at 29-30; *but see* Secretary's Br. at 29. Because there was an error in the Board's adjudication of the Veteran's PTSD claim, there remains an error with its adjudication of his entitlement to TDIU, necessitating remand of both as they are so closely tied together that a final decision on one cannot be rendered until a decision on the other has been rendered. Appellant's Br. at 29-30; *see Harris v. Derwinski*, 1 Vet.App. 180, 183 (1991); *see also Ephraim v. Brown*, 5 Vet.App. 549, 550 (1993) (holding that inextricably intertwined claims should be remanded together). As the Veteran argued, an adequate discussion of the Veteran's occupational impairment from his psychiatric condition would provide relevant information in determining whether Mr. Harrington was capable of obtaining and maintaining substantially gainful employment. Appellant's Br. at 29-30. And any adequate discussion of the Veteran's entitlement to TDIU would require an analysis of the occupational effects caused by his PTSD, which would provide relevant insight into the appropriate schedular rating. Appellant's Br. at 30; *see* 38 C.F.R. § 4.130. Accordingly, because the Secretary's arguments that the Board adequately adjudicated the Veteran's entitlement to an increased rating and to TDIU are incorrect, the Appellant's assertion that the issues are inextricably intertwined remains true. *But see* Secretary's Br. at 29-30. The two remain inextricably intertwined. Appellant's Br. at 29-30.

CONCLUSION

For the reasons discussed above, the Secretary's assertions that the Board adequately analyzed the Veteran's PTSD symptoms and their resulting impairment fails to consider that stating a conclusion after listing evidence does not constitute an analysis of the severity, frequency, and duration of those symptoms. Moreover, the Board did not adequately analyze the Veteran's thought deficiency even though it noted concentration difficulties. And the Board did not explain its reliance on Mr. Harrington's hobbies; the Secretary's arguments to the contrary amount to improper *post hoc* rationalizations and are legally inadequate.

The Secretary also fails to recognize that merely citing to 38 C.F.R. § 4.130 and *Vazquez-Claudio* is not a proper articulation of the standard the Board used in light of the subjective terms of degree in the diagnostic code. The Board made no factual findings to determine if staged ratings were appropriate under its duty to maximize benefits. The Secretary incorrectly labels *Morgan* non-precedential and does not address its holding or rationale.

Finally, the Secretary's assertions regarding TDIU are incorrect because the Board failed to address both the economic and non-economic components of *Ray*. He also was incorrect that the Board complied with the Court's holdings in *Cathell and Gleicher* and failed to respond to the Veteran's argument that the Board erred when it relied on the absence of a Form 21-8940. And due to these errors, the Veteran's entitlement to an increased rating for PTSD and to TDIU remain inextricably intertwined. Contrary to the Secretary's arguments, remand is required for the Board to address these inadequacies.

Respectfully submitted,

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