IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

Vet. App. No. 19-1413

SUSAN R. JOHNSTON,
Appellant,

v.

ROBERT L. WILKIE,
Acting Secretary of Veterans Affairs,
Appellee.

ON APPEAL FROM THE BOARD OF VETERANS' APPEALS

BRIEF OF APPELLEE

WILLIAM A. HUDSON, JR.
Acting General Counsel

MARY ANN FLYNN
Chief Counsel

ANNA WHITED
Deputy Chief Counsel

STUART J. ANDERSON
Appellate Attorney
Office of General Counsel (027F)
U.S. Department of Veterans Affairs
810 Vermont Avenue, NW
Washington, DC 20420
(202) 632-6819

Counsel for the Secretary

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

RECORD CITATIONS

IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

SUSAN R. JOHNSTON,	)	
	)	
Appellant,	)	
	)	
v.	)	Vet. App. No. 19-1413
	)	
ROBERT L. WILKIE,	)	
Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS

BRIEF OF THE APPELLEE SECRETARY OF VETERANS AFFAIRS

ISSUE PRESENTED

Did the Board of Veterans' Appeals (Board) provide an adequate statement of reasons or bases for (1) denying a rating in excess of 70% for depression and (2) denying an effective date earlier than March 17, 2014, for a 30% rating for sinusitis?

STATEMENT OF THE CASE

I. Jurisdictional Statement

The U.S. Court of Veterans Appeals for Veterans Claims has jurisdiction over the instant appeal pursuant to 38 U.S.C. § 7252.

II. Nature of the Case

Appellant—Susan Johnson, widow of the deceased Veteran, Bruce J. Johnston—appeals that portion of the November 9, 2018, Board decision that denied a 100% rating for depression and an effective date earlier than March 17, 2014, for the 30% rating for sinusitis.[1] (Record Before the Agency (R.) at 3–29).

The Board denied entitlement to a rating in excess of 30% for sinusitis, and a compensable rating for bilateral sensorineural hearing loss and erectile dysfunction. (R. at 4). Appellant waives his appeal of these issues, and they should be dismissed. *See Pederson v. McDonald*, 27 Vet.App. 276, 283–85 (2015) (en banc). The Board granted entitlement to a total disability rating based on individual unemployability (TDIU) and service connection for sleep apnea. (R. at 4). To that extent, the Board's decision is favorable to Appellant and is not subject to review here. *See Roberson v. Principi*, 17 Vet.App. 135, 139 (2003). Finally, the Board remanded the issue of entitlement to a rating in excess of 20% for left shoulder torn labrum and rotator cuff tear prior to

[1] The Veteran passed away from a heart attack during the course of this appeal. *See* CAVC Case Number 19-1413, May 15, 2019, Appellant's Notice of Appellant's Death and Copy of Death Certificate. The Veteran's widow, Susan Johnston, was substituted as the Appellant. *See* CAVC Case Number 19-1413, May 15, 2019, Motion of Appellant to Substitute Party; Case Number 19-1413, August 19, 2019, Court Order (granting Motion to Substitute).

March 11, 2014, and beginning June 1, 2014. *Id*. That matter is therefore not before the Court. *Breeden v. Principi*, 17 Vet.App. 475, 477 (2004).

III. Statement of Facts

The Veteran served honorably in the Army from February 1994 to June 1994, from March 1996 to June 1996, and from June 1997 to March 2000. (R. at 3364, 3365, 3367).

In March 2000, the Veteran applied for service connection for sinusitis, among others. (R. at 6095–98). In a May 2000 rating decision, the VA regional office (RO) granted service connection for sinusitis and assigned a non-compensable rating. (R. at 6064–66, 6070–77).

In July 2001, the Veteran sought an increased rating for his sinusitis. (R. at 6054). In an October 2001 rating decision, the RO continued the non-compensable rating. (R. at 6033-34, 6036–40).

The Veteran filed a VA Form 21-8940, Application for Increased Compensation Based on Unemployability in November 2002, asserting that his service-connected bilateral knee and back conditions prevented him from securing or following any substantially gainful occupation. (R. at 5986–89).

In October 2003, the Veteran applied for entitlement to service connection for post-traumatic stress disorder (PTSD) and anxiety. (R. at 5794–95).

An October 2003 Psychiatry note records a report by the Veteran that he is self-isolated and nearly killed the family dog and the symptoms of insomnia, loss

of interest or pleasure, feelings of guilt, anergia or fatigue, concentration deficit, increased appetite, anhedonia, and depressed mood. (R. at 436 (435–39)). A January 2003 medical record documents the Veteran's report that he almost killed his dog during a fit of anger. (R. at 561 (560–62)). A November 2003 outpatient psychology note documented nightmares, panic attacks, and that the Veteran reported that he had experienced the passive suicidal gesture of not taking medications in the recent past. (R. at 825); *see also* (R. at 853 (851–55)).

In June 2004, the Veteran filed a VA Form 21-8940, Application for Increased Compensation Based on Unemployability, again asserting his service-connected bilateral knee and back conditions prevented him from seeking or following any substantially gainful employment. (R. at 5986–89).

In a medical record from July 2004, the Veteran reported that his sinusitis caused daily nasal congestion, bloody, yellow discharge, and nausea. (R. at 290–92).

In October 2004, VA provided the Veteran a Compensation and Pension (C&P) examination. (R. at 5406–16). The Veteran reported sinus pain, drainage, headaches, and blowing his nose, which he sometimes used antibiotics to treat. (R. at 5410).

In a February 2005 rating decision, the RO denied, amongst others, service connection for PTSD and a compensable rating for sinusitis. (R. at 5323–35).

In February 2011, the Veteran requested that VA re-open his claim for service connection for PTSD and a compensable rating for sinusitis. (R. at 5006). In a December 2011 rating decision, the RO continued the denial of service connection for PTSD and a compensable rating for sinusitis. (R. at 4530-35, 4545–52). In February 2012, the Veteran informed VA that the rating for his sinusitis condition should be higher and that he would like VA to reconsider the denial of service-connected benefits for PTSD. (R. at 4518).

He filed a VA Form 21-8940, Application for Increased Compensation Based on Unemployability, asserting that his service-connected bilateral knee condition, PTSD, diabetes, and hearing condition prevented him from securing or following any substantially gainful occupation in April 2012. (R. at 4501–05).

A January 2012 psychiatry note noted difficulty with sleep, repressed emotion, and social withdrawal. (R. at 1650–52 (1650–53)). A February 2012 psychiatry note documented the Veteran's reports of social isolation, insomnia, panic attacks, intrusive thoughts, nightmares, anger, irritability, feelings of sadness and worthlessness, anhedonia, and amotivation. (R. at 1646 (1646–48)). A May 2012 psychiatry outpatient note documented seclusion. (R. at 1604 (1604-06)). In April 2012, private treatment providers documented reports of depressive symptoms, denial of suicidal ideation, chronic anxiety, and occasional paranoid delusions. (R. at 3945-46).

In August 2013, VA provided the Veteran a mental disorders C&P examination. (R. at 1088–93). The examiner recorded a diagnosis of depressive disorder, NOS, related to hypertension and knee and shoulder conditions. (R. at 1090). The examiner also recorded symptoms of depressed mood, chronic sleep impairment, flattened affect, and disturbances of motivation and mood. (R. at 1093).

In a September 2013 rating decision, the RO granted entitlement to service connection for depression, and assigned a 50% rating, effective February 24, 2012. (R. at 4139–45, 4159–74). In a February 2014 rating decision, the RO continued the 50% rating. (R. at 3396-3400, 3408–19).

In March 2014, the Veteran filed a VA Form 21-526EZ, Application for Disability Compensation and Related Compensation Benefits, listing PTSD and sinusitis. (R. at 3394–95).

In May 2014, VA provided the Veteran a disability benefits questionnaire (DBQ) examination for sinus, rhinitis, and other conditions of the nose, throat, larynx, and pharynx. (R. at 2700-05). The examiner diagnosed the Veteran with allergic rhinitis and episodic acute sinusitis and stated that, in the previous twelve months, the Veteran had seven or more non-incapacitating episodes of sinusitis characterized by headaches, pain, and purulent discharge or crusting. (R. at 2700–01).

In June 2014, VA provided the Veteran a VA mental disorders C&P examination. (R. at 1796–1800). The examiner found occupational and social impairment with reduced reliability and productivity. (R. at 1797). The examiner also noted symptomatology of depressed mood, anxiety, chronic sleep impairment, flattened affect, disturbances in motivation and mood, difficulty in adapting to stressful circumstances, and difficulty in establishing and maintaining effective work and social relationships. (R. at 1798).

In a June 2014 rating decision, the RO, in pertinent part, assigned a 30% rating for the Veteran's sinusitis, effective March 17, 2014, and continued the 50% rating for depression. (R. at 2660–65, 2681–87). The Veteran filed a Notice of Disagreement (NOD). (R. at 2637–39). In May 2016, the RO issued a Statement of the Case (SOC) continuing the 30% rating for sinusitis and the 50% rating for depression. (R. at 2544–76). The Veteran then filed a VA Form 9. (R. at 2446–49). He argued that he was entitled to an earlier effective date for the assignment of the 30% rating for sinusitis and a rating in excess of 50% for depression. (R. at 2448–49).

On November 9, 2018, the Board issued the decision on appeal. (R. at 3–29). The Board found that the Veteran's depression caused occupational and social impairment with deficiencies in areas such as work, thinking, and mood, and granted a 70% rating, but no higher. (R. at 5). The Board also found that

March 17, 2014, was the earliest recognizable date of claim for an increased rating for the Veteran's service-connected sinusitis.

Regarding the increased rating for the Veteran's depression, the Board noted reports by the Veteran's attorney of a history of passive suicidal ideation by cession of medication and an episode in which the Veteran nearly killed the dog during an episode or anger.[2] (R. at 13). The Board also noted reports of visual hallucinations and difficulty getting out of bed. (R. at 14). The Board found that a 100% rating was not warranted because the Veteran was capably of efficiently conversing with the VA examiner and private physician, he could generally manage his daily activities on his own; and he was neither psychotic nor out of touch with reality. (R. at 15). The Board found that overall his depression did not result in the total occupational and social impairment required for a 100% rating. *Id*. This assessment was based on a finding that the Veteran's reports were generally credible but that the clinical findings of VA physicians were more probative. (R. at 15–16).

Regarding the claim for an earlier effective date for sinusitis, the Board noted that the earliest claim for an increased rating after a final rating decision in December 2011 was received on March 17, 2014. (R. at 25–27). The Board noted that a review of the claims file for the period from December 2011 to

[2] The May 2015 letter from the Veteran's counsel notes the history of passive suicidal ideation. (R. at 2461 (2459–62)).

March 2014 showed no report of hospitalization with indications of a worsening of the sinusitis, and that the treatment records for that period primarily pertained to other conditions and the April and June 2013 VA treatment records showed no nasal discharge or sinusitis. (R. at 27).

This appeal followed.

SUMMARY OF THE ARGUMENT

Appellant fails to demonstrate that the Board committed prejudicial error in denying a rating in excess of 70% for depression when the Board addressed the severity of the Veteran's relevant symptoms. Similarly, Appellant fails to demonstrate error in the Board's denying an effective date earlier than March 17, 2014, for a 30% rating for sinusitis, when entitlement to an earlier effective date was not factually ascertainable. The November 2018 Board decision should therefore be affirmed.

STANDARD OF REVIEW

A determination by the Board as to the proper evaluation of a disability is a factual determination subject to review under the deferential clearly erroneous standard. *Pierce v. Shinseki*, 18 Vet.App. 440, 443 (2004). Just the same, the effective date of an award is a question of fact and may be set aside only for clear error. *Scott v. Brown*, 7 Vet.App. 184, 188 (1994). A finding of fact is not clearly erroneous if there is a plausible basis for it in the record. *Gilbert v. Derwinski*, 1 Vet.App. 49, 52–53 (1990).

ARGUMENT

I. The Board Provided an Adequate Statement of Reasons or Bases for Denying a 70% Rating for Depression

The Board provided an adequate statement of reasons or bases for denying a rating in excess of 70% for the Veteran's depression. Appellant argues that the Board provided an inadequate statement of reasons or bases for denying a rating in excess of 70% where it (1) impermissibly introduced criteria outside the General Rating Formula for Mental Disorders, (2) failed to adequately address the occupational and social impact of the veteran's symptomatology, and (3) did not adequately explain why the evidence of record does not demonstrate active suicidal intent and harm to others. Appellant's Brief (App. Br.) at 8–10. The Board's assessment of the Veteran's symptoms and their impact on his ability to function was factually accurate and intelligible. *See Gilbert*, 1 Vet.App. at 57 (requiring the Board's statement of reasons or bases simply to be sufficient for the claimant to understand and the Court to review). The Court should affirm that part of the Board's decision.

Psychiatric disabilities, such as the Veteran's depression, are rated under diagnostic code (DC) 9434 and the General Rating Formula for Mental Disorders. 38 C.F.R. § 4.130. Section 4.130 assigns compensable evaluations based on "objectively-observable symptomatology" and "as the ratings increase from 10 to 100 percent, the associated symptoms become noticeably severe."

Vazquez-Claudio v. Shinseki, 713 F.3d 112, 115 (Fed. Cir. 2013). When deciding the propriety of a particular evaluation of a mental health disorder under § 4.130, "symptomatology should be the fact-finder's primary focus." *Id.* at 118. If the veteran is shown to experience the particular symptoms listed in the diagnostic criteria or symptoms of similar severity, frequency, and duration, then the inquiry turns to whether and to what degree those symptoms result in social and occupational impairment. *Id.* at 117–118. The symptoms listed in the general rating formula for mental disorders "are not intended to constitute an exhaustive list, but rather to serve as examples of the type and degree of the symptoms, or their effects, that would justify a particular rating." *Mauerhan v. Shinseki,* 16 Vet.App. 436, 442 (2002).

As with any findings on a material issue of fact and law presented on the record, the Board must support its determination of the appropriate rating with an adequate statement of reasons or bases that enables the claimant to understand the precise basis for that determination and facilitates review in this Court. 38 U.S.C. § 7104(d)(1); *Gilbert*, 1 Vet.App. 52. To comply with this requirement, the Board must analyze the credibility and probative value of evidence, account for evidence it finds persuasive or unpersuasive, and provide reasons for rejecting material evidence favorable to the claimant. *Frost v. Shulkin*, 29 Vet.App. 131, 139 (2017). Beyond that, the Board's statement of reasons or bases must simply be sufficient to enable the claimant to understand the basis of

its decision and to permit judicial review of the same. *Gilbert*, 1 Vet.App. at 57. This Court must apply the rule of prejudicial error, remanding only when the remand might benefit the veteran. 38 U.S.C. § 7261(b)(2); *see Lamb v. Peake*, 22 Vet.App. 227, 234 (2008) (noting that remand is not warranted where it "would serve no useful purpose").

The Board's reliance on the Veteran's ability to verbally communicate and manage his daily affairs and his lack of psychosis in denying a 100% rating was not in error. The Board denied entitlement to a 100% rating, in part, based on the Veteran's ability to efficiently converse, generally manage his daily activities, his lack of psychosis, and not being out of touch with reality. (R. at 15). Appellant argues that the ability to efficiently converse, lack of psychosis, and not being out of touch with reality are not among the factors contemplated by the 100% rating criteria, and it was error to rely on factors not contemplated by the criteria. Nor, according to Appellant, did the Board explain how it selected these symptoms, which frustrates judicial review.

It was not error for the Board to cite these capacities because, although the precise choice of words is not found in the General Rating Formula, the concepts plainly relate to symptoms found there. The relevant symptoms that are indicative of a higher 100% rating include gross impairment in thought processes or communication; persistent delusions or hallucinations and grossly inappropriate behavior; and intermittent inability to perform activities of daily

living. *See* 38 C.F.R. § 4.130. Furthermore, entitlement to a 100% rating requires that such symptoms result in "[t]otal occupational and social impairment." *Id*. In this context, it is apparent why the ability to effectively communicate, manage daily life, and an absence of psychosis are relevant. The ability to effectively communicate shows that there is no gross impairment in communication; similarly, an ability to manage daily life suggests that total occupational and social impairment is not present; and an absence of psychosis is entirely inconsistent with "persistent delusions or hallucinations." So the Board's statement of reasons or bases was adequate. *See Gilbert*, 1 Vet.App. at 57 (requiring the Board's statement of reasons or bases simply to be sufficient for the claimant to understand and the Court to review). Furthermore, the list of symptoms included in the General Rating Formula is not exhaustive. *See Mauerhan,* 16 Vet.App. at 442 (holding that the symptoms listed in the general rating formula for mental disorders "are not intended to constitute an exhaustive list, but rather to serve as examples of the type and degree of the symptoms, or their effects, that would justify a particular rating."). It would be a poor use of judicial and agency resources to remand for the Board to use certain, specific words to talk about the issues, if it is clear what those issues are. *See Lamb*, 22 Vet.App. at 234 (noting that remand is not warranted where it "would serve no useful purpose"). For this reason, remand would be inappropriate.

The Board also properly relied on the Veteran's ability to manage his daily affairs as a factor in denying entitlement to a 100% rating. The Board denied a 100% rating because, in part, the veteran could "generally manage his daily activities." (R. at 15). Appellant argues that the Board provided an inadequate statement of reasons or bases because the Board should have evaluated the Veteran's psychiatric condition based on the level of occupational and social impairment caused by their symptoms, not the level of impairment to the management of daily activities. Inasmuch as Appellant is arguing that an ability to manage daily activities cannot, as a categorical matter, be a measure of occupational and social impairment, her brief cites no support for this counterintuitive proposition. On the contrary, the Board's analysis on this point is rational and intelligible. *See Gilbert*, 1 Vet.App. at 57 (requiring the Board's statement of reasons or bases simply to be sufficient for the claimant to understand and the Court to review). In any case, the Board, in applying the General Rating Formula, was required to evaluate whether the Veteran experienced intermittent inability to perform activities of daily living, as that is a symptom indicative of a 100% rating. *See* 38 C.F.R. § 4.130; *see also Vazquez-Claudio v. Shinseki,* 713 F.3d 112, 118 (Fed. Cir. 2013) (noting that, in rating disabilities under § 4.130, "symptomatology should be the fact-finder's primary focus"). So the Board did not err in considering this aspect of the case.

The Board also did not err in not addressing the single report of a suicide attempt in its analysis. The Board's noted the report by the Veteran's attorney of an event of "passive suicidal ideation" in which he stopped taking medication. (R. at 13). Appellant argues that the Board erred in not explaining why the Veteran's suicide attempt does not constitute active suicidal ideation and evidence of self-harm, which falls under the 100% rating criteria. Her argument relies on *Bankhead v. Shulkin*, 29 Vet.App. 10, 21 (2017), wherein the Court found error in the Board's denial of a 70% rating, despite the presence of passive suicidal ideation, because in the absence of plan or intent the ideation did not present a high enough risk of self-harm.

To begin, both the Veteran's attorney and the mental health care provider who first recorded the event called it "passive suicidal" ideation or gesture. (R. at 825); (R. at 2461). As such, this is not a *Bankhead* error because suicidal ideation is a 70% symptom, not a 100% symptom, and so it is not apparent why it would matter whether the Board properly identified it as such. *See* 38 C.F.R. § 4.130; *see also Bankhead*, 29 Vet.App. at 21. Nor was it error for the Board not to address the symptom as evidence of "persistent danger of hurting self or others," which is the relevant 100% rating symptom. *See* 38 C.F.R. § 4.130. The Board referred to a note by the Veteran's attorney that refers, in turn, to an incident in November 2003. (R. at 825); (R. at 2461). Otherwise, the Veteran denied suicidal ideation. *See*, *e.g.*, (R. at 1603, 1634–35, 1657, 1681 (1680-81),

1817, 2006, 2294, 2766 (2764–66)). In this context, this report of a single suicide attempt in 2003 does not provide evidence that the Veteran faced a "persistent" risk of hurting himself, so the Board was not required to address it. *See Frost*, 29 Vet.App. at 139.

The Board also was not required to explain why the Veteran's nearly killing his dog in anger did not constitute a risk of hurting others. "[P]ersistent danger of hurting self or others" is among the symptoms indicative of a 100% rating. *See* 38 C.F.R. § 4.130. The Board noted that Appellant nearly killed his dog during a period of anger. (R. at 13); citing (R. at 561). There is no reason that the Board should have explained why a single report of violence towards an animal in 2003 indicated the Veteran was in persistent danger of hurting others. *See Frost*, 29 Vet.App. at 139.

Finally, the Board was not required to explain why the Veteran's reported hallucinations did not warrant a 100% rating. The Board noted evidence of visual hallucinations. (R. at 14). Among the 100% symptoms are "persistent delusions and hallucinations." 38 C.F.R. § 4.130. The medical records indicate indorsement by Appellant of visual hallucinations in August 2013 (R. at 1078 (1077–80)) interspersed among frequent denials in October 2002 (R. at 597 (596–97)), October 2003 (R. at 458), September 2011 (R. at 1679 (1679–80)), June 2013 (R. at 1217 (1216–22)), and May 2015 (R. at 2383 (2382–88)). Further, the Board specifically found that the Veteran was neither psychotic nor

out of touch with reality, which is supported by the evidence cited above. *See* (R. at 15). The record does not provide any basis to support a finding of persistent delusions or hallucinations, so the Board was not required to specifically address the report of hallucination in its analysis. *See Frost*, 29 Vet.App. at 139.

In sum, the Board's analysis of the Veteran's depression was adequate. It addressed the relevant symptoms and their severity with an accurate and comprehensible discussion. The Court should this affirm this part of the Board's decision.

II. The Board Provided an Adequate Statement of Reasons or Bases for Denying an Earlier Effective Date for Sinusitis

The Board provided an adequate statement of reasons or bases with regards with entitlement to an effective date before March 2014 for the 30% rating for the Veteran's sinusitis. Appellant argues that the Board erred by failing to discuss why the May 2014 examination report, which documented that the Veteran had more than seven non-incapacitating episodes of sinusitis over the previous twelve months, did not warrant an earlier effective date or, at a minimum, why the claim should not be remanded for further development. (App. Br. at 11–12). The Board did not err because no entitlement could be factually ascertainable in the year before the date of the claim in March 2014.

Diagnostic code (DC) 6513, under which the Veteran's sinusitis was rated, provides for a 30% rating for three or more incapacitating episodes per year requiring prolonged antibiotic treatment, or more than six non-incapacitating episodes per year of sinusitis characterized by headaches, pain, and purulent discharge or crusting. 38 C.F.R. § 4.97. Generally, the effective date of the award of an increase in compensation is either the date of claim or the dated entitlement arose, whichever is later. 38 U.S.C. § 5110(a); 38 C.F.R. § 3.400(o)(1). If, however, it is factually ascertainable that an increase in disability occurred within a year of the date a claim was received, that earlier date will be the effective date. 38 U.S.C. § 5110(b)(3); 38 C.F.R. § 3.400(o)(2); *Hart v. Mansfield,* 21 Vet.App. 505, 509 (2007). This Court must apply the rule of prejudicial error, remanding only when the remand might benefit the veteran. 38 U.S.C. § 7261(b)(2); *see Lamb v. Peake*, 22 Vet.App. 227, 234 (2008) (noting that remand is not warranted where it "would serve no useful purpose").

Where an appellant raises an issue before the Court that was not raised below, the Court has discretion to determine whether to hear the argument in the first instance. *Maggitt v. West,* 202 F.3d 1370, 1377 (Fed. Cir. 2002). Facing arguments raised for the first time before it, the Court may choose to apply the exhaustion doctrine, requiring an appellant to exhaust administrative remedies. *Id*. Whether to apply the exhaustion doctrine is a case-specific question. *Id*. The test is whether the interests of the individual weigh heavily against the

institutional interests the doctrine exists to serve. *See id*. Those institutional interests are, in the main, to protect agency administrative authority and to promote judicial efficiency. *Id*. (citing *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992)). One specific expression of the interest in judicial efficiency is the interest in limiting piecemeal litigation. *See Fugere v. Derwinski*, 1 Vet.App. 103, 105 (1990) (noting that "[a]dvancing different arguments at successive stages of the appellate process does not serve the interests of the parties or the Court" because piecemeal litigation hinders the decision making process).

This Court applied the test laid out in *Maggit* in its decision in *Massie v. Shinseki*, 25 Vet.App. 123 (2011). In that case, the Court found that the exhaustion doctrine warranted its refusal to hear new arguments. *Id*. at 127. First, the appellant in that case was represented by his current counsel throughout the appeals process, such that "the Federal Circuit's concerns regarding the potentially harsh result of applying the exhaustion of remedies doctrine against a party who was not represented by an attorney while before VA has no bearing upon this appeal." *Id*. Second, the appellant provided no justification for not presenting his theory to VA in the first case. *Id*. Third, the theory itself was relatively unique. *Id*. In such circumstances, the Court found that the Secretary's "interest in having a fair and full opportunity" outweighs Appellant's "interest in having his argument heard for the first time on appeal to

this Court," and that the "interests of judicial efficiency weigh in favor of invoking the exhaustion doctrine" against him. *See Massie,* 25 Vet.App.at 127-28.

Appellant argues that, as the report indicated that the Veteran met the criteria for a higher rating during the year before the May 2014 VA examination, within a year of his increased rating claim, he was entitled an effective date based on that examination report. In other words, Appellant argues for the first time now that VA failed to consider the significance of evidence in existence since 2014. The Court should decline to entertain this argument based on the exhaustion doctrine.

After the June 2014 rating decision, in which the RO assigned a 30% rating for the Veteran's sinusitis effective March 17, 2014, the Veteran filed an NOD disputing the effective date. (R. at 2637–39). At that time, the Veteran was represented by his current counsel *Id*. The Veteran then filed a VA Form 9, in which he argued that he was entitled to an earlier effective date for the assignment of the 30% rating for sinusitis and a rating in excess of 50% for depression. (R. at 2448). The arguments did not include the argument made on appeal, that the May 2014 VA examination supported entitlement to an earlier effective date. *Id*. Again, at that time, the Veteran was represented by his current counsel. (R. at 2446).

While Appellant was not represented by counsel for the entire case, he had the benefit of counsel at a time when all the necessary information was

available, and the same issue was under scrutiny and failed to raise the issue. To raise it now is the definition of piecemeal litigation. *See Fugere*, 1 Vet.App. at 105 (noting that "[a]dvancing different arguments at successive stages of the appellate process does not serve the interests of the parties or the Court" because piecemeal litigation hinders the decision-making process). And while the issue is not unique, there is no reason why it could not have been raised at some point during the pendency of the case. *Cf. Massie*, 25 Vet.App. at 127 (noting as one factor to consider that Appellant gave no reason why the issue was first raised on appeal). The Court should decline to consider the argument.

Even if the Court decides to consider the argument, it should not grant any relief. The problem with the argument is that, although Appellant met the criterion for a 30% rating at some point during the year before the May 2014 VA examination, there is no factually ascertainable date that the entitlement arose. Appellant filed the increased ratings claim in March 2014. (R. at 3394–95). The Board granted that increased rating claim based on the contents of the May 2014 VA examination report. (R. at 9). The examination report, in turn, noted that the veteran had seven or more non-incapacitating episodes of sinusitis characterized by headaches, pain and purulent discharge over the past twelve months. (R. at 2701). It did not, however, indicate when in that twelve-month period the Veteran experienced the seventh non-incapacitating episode. *Id*. While, the Board did not consider the possible of application of 38 C.F.R. §

3.400(o), *see* (R. at 25–27), the record does not contain the information the Board would need to assign an earlier effective date under that provision—the date of the seventh episode. *See Hart,* 21 Vet.App. 509 ("When a claim for an increased rating is granted, the effective date assigned may be up to one year prior to the date that the application for increase was received if it is factually ascertainable that an increase in disability had occurred in that timeframe."). So this oversight is of no consequence.

Finally, Appellant argues that the Board should have at least explained why a retrospective opinion was not necessary to ascertain this missing information; but the record shows that such a remand would serve no purpose. In its decision, the Board pointed out that the Veteran's treatment records from December 2011 to March 2014 did not indicate any worsening of his sinusitis, the VA treatment records from that time relate primarily to other conditions, and the April and June 2013 VA treatment records show no discharge or sinusitis. (R. at 27). This is an accurate assessment of the records from December 2011 to March 2014. *See* (R. at 1049–1678); (R. at 1757–2010). And in June and April 2013 the Veteran reported no discharge. (R. at 1264, 1460, 1488). Most importantly, however, this dearth of relevant notations means that from March 2013 to May 2014 there is no indication of any episode or complaint or report or discussion of sinusitis. (R. at 1049–1541); (R. at 1800–2010). For that reason, the Court should not find error in the Board's reliance on the May

2014 opinion to establish entitlement to the higher rating and denial of an earlier effective date.

III. Any Arguments Not Made Are Abandoned

The Secretary has limited his response to only those arguments reasonably construed to have been raised by Appellant in her opening brief and submits that any other arguments or issues should be deemed abandoned. *See Pieczenik v. Dyax Corp.*, 265 F.3d 1329, 1332-33 (Fed. Cir. 2001); *Norvell v. Peake*, 22 Vet.App. 194, 201 (2008).

CONCLUSION

WHEREFORE, in light of the foregoing reasons, the Court should affirm appeals that portion of the November 9, 2018, Board decision that denied a 100% rating for depression; and an effective date earlier than March 17, 2014, for the 30% rating for sinusitis.

Respectfully submitted,

WILLIAM A. HUDSON, JR.
Acting General Counsel

MARY ANN FLYNN
Chief Counsel

/s/ Anna Whited
ANNA WHITED
Deputy Chief Counsel

/s/ Stuart J. Anderson
STUART J. ANDERSON
Appellate Attorney
U.S. Department of Veterans Affairs
Office of General Counsel (027F)
810 Vermont Avenue, N.W.
Washington, D.C. 20420