REPLY BRIEF OF APPELLANT

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

18-7385

ALBERT JENKINS,

Appellant,

v.

ROBERT L. WILKIE,
SECRETARY OF VETERANS AFFAIRS,

Appellee.

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APPELLANT'S REPLY ARGUMENTS

I. The Secretary's defense of the Board's finding that Mr. Jenkins's GAD did not cause reduced reliability and productivity is based on a misunderstanding of the record and the law.

The Secretary is mistaken that the Board required "*symptoms* more generalized and continuous" than Mr. Jenkins's. *Contra* Secretary's Br. at 12 (emphasis altered). Instead, the Board declined to find reduced reliability and productivity because "[t]he number and timing of both his counselor meetings and the personnel actions show[] they were infrequent and discrete in nature, and had only an acute—as opposed to residual or lasting impact—on his work." R-19. It demanded *documented events*—"counselor meetings and . . . personnel actions"—that were more frequent and "had . . . [a] residual or lasting impact" on Mr. Jenkins's work. *Id.* Doing so was both legally and factually erroneous.

First, it was legally erroneous to use the number of documented counseling sessions or personnel actions as a proxy for the frequency, severity, and duration of Mr. Jenkins's symptoms. *See* Appellant's Br. at 11. A VA rule prohibits the Board from assigning a rating based solely on symptoms observed at VA examinations. *See* 38 C.F.R. § 4.126(a) (2019). Instead, the Board must consider the entire history of the disability. *Id.*; *see also* 38 C.F.R. § 4.2 (2019). Similarly, assessing the number of documented events is not a substitute for considering the frequency, severity, and duration of a veteran's symptoms and their impact. *But see* R-19. As Mr. Jenkins argued in his opening brief, being absent, disciplined, or unemployed are not the only ways a disability can impact

reliability and productivity—the impact can be through errors, underperformance, and interpersonal friction, too. Appellant's Br. at 11. Those facts, furthermore, need not be corroborated by medical or other records. *See Buchanan v. Nicholson*, 451 F. 3d 1331, 1337 (Fed. Cir. 2006) (citing 38 U.S.C. § 5107(b)); *see also* 38 U.S.C. § 7104(a).

The Secretary is also incorrect that the Board considered Mr. Jenkins's "symptomatology . . . as reflected in . . . [this] documentation." Secretary's Br. at 12. The Board did not discuss that Mr. Jenkins's counseling and discipline records showed repeated errors and ongoing goals to improve his productivity and relationships. Rather, it erroneously used the number of times he was counseled or was written up as a proxy for the frequency, severity, duration, and overall impact of his symptoms, equating those documented events in themselves with "manifestations" of his GAD. R-19-20.

Second, the Board's reliance on documented events was factually unsupported because there was no plausible basis for finding that Mr. Jenkins's symptoms only impaired his occupational functioning on those occasions when he was attending counseling or receiving discipline. *See Gilbert v. Derwinski*, 1 Vet.App. 49, 53 (1990). The other facts the Board found or accepted demonstrate that Mr. Jenkins's symptoms were present and impairing more often than this. He had "difficulty establishing and maintaining work relationships" and "difficulty adapting to stressful circumstances, like dealing with a supervisor [or] work guidelines." R-18. Also, the Board did not question that he was "tired and anxious, and that this affected his ability to concentrate at work." R-21; *see Miller v. Wilkie*, __Vet.App.__, No. 18-2796, 2020 WL 236755, at *7 (Jan. 16,

2020) ("[A]bsent an indication that the Board found that lay evidence not credible, or had a reason not to address its credibility . . . we will conclude that the Board found the lay evidence credible."). None of these symptoms is event-specific, and they all correlate with at least reduced reliability and productivity. *See* 38 C.F.R. § 4.130 (2019).

In addition, although there was "only a single documented personnel action for work performance," the report of that action shows that "a generally reduced level of reliability or productivity" had existed prior to Mr. Jenkins's being reprimanded. R-19. That document specifically reports that Mr. Jenkins had made eight errors in the preceding month alone and that he and his supervisor "ha[d] spoken regarding [his] errors on numerous [prior] occasions." R-2784. The credibility of that report is unquestioned. Further, the number of times he was counseled notwithstanding, his counseling was related to persistent problems on the job: improving productivity and building appropriate relationships with coworkers and supervisors were "ongoing" and "continued" objectives. R-2780; *see also* Appellant's Br. at 19.

Moreover, the record that was before the Board did not provide a foundation for drawing a negative inference about Mr. Jenkins's occupational impairment solely from the *number* of documented personnel actions that occurred. To make such an inference, "the Board must find that the [records in question] appear to be complete, at least in relevant part" and that the events in question "would ordinarily have been recorded had they occurred"; if not, then silence in the records is just silence, instead of unfavorable evidence. *Kahana v. Shinseki*, 24 Vet.App. 428, 440 (2011) (Lance, J., concurring); *see also*

Buczynski v. Shinseki, 24 Vet.App. 221, 224 (2011). Here, the Board admitted it did not have a full copy of the Veteran's personnel file. R-6. Additionally, Mr. Jenkins testified that most issues with his supervisor were not recorded. R-1373 (the Veteran's testimony that he "had a lot of friction" with his supervisor, but, "in most cases . . . she didn't write [it] down"); *see also* Appellant's Br. at 10, 13. Neither the Board nor the Secretary disputes that testimony. *See* Secretary's Br. at 12-13; *Miller*, 2020 WL 236755, at *7.

Accordingly, the Board clearly erred in equating the number of documented events with the frequency, severity, and duration of the Veteran's symptoms and the impairment they caused. *See* Appellant's Br. at 19. The Secretary is mistaken that the operative question is limited to whether the evidence "can only plausibly be interpreted in [one] manner." Secretary's Br. at 13. Clear error also exists when the evidence fails to provide a plausible basis for the Board's finding. *Gilbert*, 1 Vet.App. at 53. The lack of more than "a single documented personnel action for work performance" was not a foundation to infer that Mr. Jenkins was generally reliable and productive. *See* R-20 (finding that "only a single documented personnel action for work performance" is "contrary to a finding of overall reduced reliability or productivity"). Absent a factual foundation, that inference did not support the Board's determination that Mr. Jenkins only "had decreases in work efficiency and periods of inability to perform his occupational tasks that occurred at irregular and infrequent intervals." R-19-20.

Additionally, the Court should reject the Secretary's argument that the Board could cherry-pick the Veteran's favorable self-assessments to make a finding about his

level of functioning that is factually unsupported on the record as a whole. *See* Secretary's Br. at 15; *see also* Appellant's Br. at 12. The problem is not simply that "the Board did not adequately consider" certain of the Veteran's statements, as the Secretary contends. Secretary's Br. at 15. The Board's findings that Mr. Jenkins received "positive performance reviews" and had "no difficulty arriving to work on time" are so factually incomplete as to be incorrect, considering the credible, contrary evidence. R-20; *see* Appellant's Br. at 12-13.

The Board "must take into account evidence indicating that the claimant's true functional ability may be substantially less that the claimant asserts or wishes." *Hutsell v. Massanari*, 259 F.3d 707, 713 (8th Cir. 2001). Although *Hutsell* concerns the duties of Social Security Administration adjudicators, 38 U.S.C. § 7104(a) requires no less of the Board. Here, even though Mr. Jenkins reported that he could arrive for work on time, he also stated that he occasionally left work early in frustration. R-52. Additionally, although he reported that reviews of his performance were favorable, he also stated that he was marked down for mistakes. *Id.* In each case, the Board did not deem the report showing greater impairment less credible. The Court can therefore "reasonably conclude that it implicitly found the veteran credible" in reporting that he left early and received bad marks for mistakes. *Miller*, 2020 WL 236755, at *8. Absent a negative credibility finding, the Board was precluded from "rel[ying], selectively, only on those portions of each . . . statement which supported its conclusions." *Cosman v. Principi*, 3 Vet.App. 503, 506 (1992); *see* R-20.

Finally, the Court should decline the Secretary's invitation to find inconsistencies in the record that the Board did not find in its decision. *See* Secretary's Br. at 18. Absent real inconsistencies between Mr. Jenkins's earlier and later reports of his symptoms, the Board erred in discounting the 2015 and 2016 expert opinions as based on his later reports. *See Cantrell v. Shulkin*, 28 Vet.App. 382, 393 (2017); Appellant's Br. at 21. "Speculation isn't substantial evidence." *Biestek v. Berryhill*, 139 S. Ct. 1148, 1159 (2019) (Gorsuch, J., dissenting). Nor can it supply a basis for a Board finding of fact: "It is the Board's task to make findings based on evidence of record—not to supply missing facts." *Beaty v. Brown*, 6 Vet.App. 532, 537 (1994); *see* 38 U.S.C. § 7104(a). Here, instead of pointing to real inconsistencies between the bases of the favorable 2015 and 2016 opinions and the rest of the record, the Board speculated that it was "possible" that Mr. Jenkins's recollection of his symptoms to those examiners "may not" have remained consistent with his earlier reports to VA examiners and providers. R-22, R-34; *see* Appellant's Br. at 21. On the contrary, the 2016 examiner noted that Mr. Jenkins's reports in 2007 "were some of the same complaints he registered in his interview with me." R-1162.

The Secretary points to various evidence the Board referenced and findings it made, concluding that it did find real inconsistencies. *See* Secretary's Br. at 18. However, "[i]t is not the task of the Secretary to rewrite the Board's decision through his pleadings filed in this Court." *Smith v. Nicholson*, 19 Vet.App. 63, 73 (2005) (rejecting Secretary's rationale for Board decision because "the Board did not set forth any such rationale"),

rev'd in part on other grounds, 451 F.3d 1344 (Fed. Cir. 2006). It is one thing to read the Board's decision as a whole, *Janssen v. Principi*, 15 Vet.App. 370, 379 (2001); it is another for the Secretary, in his brief, to piece together scattered references and findings from the decision and point to that assembly as proof that the Board "explicitly found" inconsistencies, Secretary's Br. at 18.

II. The Secretary misinterprets 38 C.F.R. § 4.130 to argue that the Board applied the correct standards for assessing occupational and social impairment.

A. The Secretary is incorrect that the Board appropriately added a "generalized and continuous" requirement to "reduced reliability and productivity" in the 50 percent criteria.

The standard the Board imposed for a 50 percent rating—that "reduced reliability and productivity" be "generalized and continuous"—was too high. R-17; *see* Appellant's Br. at 14-16. What "reduced reliability and productivity" means must be determined considering related provisions, including both the criteria for 70 and 100 percent ratings in section 4.130 and 38 C.F.R. § 4.16 (2019). *See Vazquez-Claudio v. Shinseki*, 713 F.3d 112, 115 (Fed. Cir. 2013) ("In construing regulatory language, we must read the disputed language in the context of the entire regulation as well as other related regulatory sections in order to determine the language's plain meaning."). By the Secretary's reasoning, absent "continuous" impairment, the Board can find that there is only "infrequent" and "episodic" impairment or "discrete exceptions" to satisfactory functioning. *See* Secretary's Br. at 19-20 (quoting R-17). On the contrary, there are severity levels between infrequent and continuous. *Cf. Hood v. Brown*, 4 Vet.App. 301, 303 (1993).

The Board's interpretation of "reduced reliability and productivity" renders other, related provisions superfluous by conditioning a 50 percent rating under section 4.130 on unemployability. *See* Appellant's Br. at 15. A "generalized and continuous" reduction of reliability and productivity, R-17, is more severe impairment than an intermediate step between occasional problems working and deficiencies in work, *see* 38 C.F.R. § 4.130. Instead, it equates to inability to maintain substantially gainful work. Appellant's Br. at 16; *see Ray v. Wilkie*, 31 Vet.App. 58, 73 (2019).

The Secretary is mistaken that the issue is whether SSA regulations were "binding" on the Board when it decided what reduced reliability and productivity means. Secretary's Br. at 21. A 50 percent rating under section 4.130 must require a lesser level of occupational impairment than section 4.16 requires. SSA regulations help to show what the inability to maintain substantially gainful work means in section 4.16, as this Court recognized in *Ray*. 31 Vet.App. at 73; *see* Appellant's Br. at 15-16. So what it means to be unable to maintain substantially gainful work—as guided by SSA's understanding of what work requires—is relevant to what reduced reliability and productivity means. And § 7104(a) obligates the Board to consider all relevant rules. *See McGee v. Peake*, 511 F.3d 1352, 1356 (Fed. Cir. 2008) ("[T]he ordinary, contemporary, common meaning of 'applicable provision of law' is a provision that has reference to, or places something into practical context with, the Board's decision." (quoting 38 U.S.C. § 7104)); *but see* Secretary's Br. at 27.

Additionally, the Secretary is incorrect that Mr. Jenkins is challenging the diagnostic code itself. *See* Secretary's Br. at 21. There is no "generalized and continuous" requirement in the regulation itself for him to challenge. *Compare* R-17, *with* 38 C.F.R. § 4.130. It was the Board who improperly engrafted this requirement onto the rating criteria, demanding that there be not just reduced reliability and productivity, but rather "reduced reliability and productivity that manifests as more generalized and continuous in nature." R-17; Appellant's Br. at 14-16. The Board's addition of that extraneous factor is what Mr. Jenkins challenges. *See Massey v. Brown*, 7 Vet.App. 204, 208 (1994) ("The Board's consideration of factors which are wholly outside the rating criteria provided by the regulations is error as a matter of law.").

Because the Board imported an unemployability requirement into the 50 percent criteria, the Court should hold that it erred by requiring that reduced reliability and productivity be "generalized and continuous." R-17.

B. The Secretary misunderstands the record in arguing that the Board did not interpret the 70 percent criteria to require total deficiencies in most areas of occupational and social functioning.

Given the Board's findings and what that 2010 examination report showed, the Board's conclusion that Mr. Jenkins was unentitled to a higher rating proves that it engrafted a requirement of total deficiency onto the criteria for a 70 percent rating. *See* R-18-23; Appellant's Br. at 17. The Board found that Mr. Jenkins had "difficulty . . . dealing with a supervisor [and] work guidelines." R-18. The Board also found the 2010 VA examination "highly probative of the Veteran's overall disability profile." R-23. The 2010 examiner explained that Mr. Jenkins's symptoms resulted in deficiencies in

judgment, in that he had outbursts of verbal anger; thinking, in that he engaged in obsessive checking, occasional homicidal thoughts, and frequent worrying; family relations, in that he subjected family members to his verbal outbursts; work, in that he relied on a counselor to help mediate disputes with his supervisor; and mood, in that he was worried daily, angry frequently, and "down" occasionally. R-2213; *see* R-31. To nevertheless deny a higher rating, the Board required more than some deficiencies in all these areas. *See* Appellant's Br. at 16-20.

The Court should reject the Secretary's argument that "Appellant fails to point to anywhere that the Board says it is requiring such total deficiency." Secretary's Br. at 22. By finding that "the overall impairment shown"—which included some deficiency in every area of Mr. Jenkins's occupational and social functioning—was insufficient to "more closely approximate the higher ratings," the Board required more. R-19; *see* Appellant's Br. at 17. This is further illustrated by the Board's using the Veteran's ability to "enjoy[]" or "engage in" social activities *at all* as evidence against him. R-20. The Court should hold that the Board erred by adding a requirement of total deficiency to the 70 percent criteria. R-18-19.

III. The Secretary misidentifies the appropriate standard of review, misunderstands the standard for entitlement to TDIU, and misreads the Board's decision.

As an initial matter, deferential review for clear error is not appropriate here. The Secretary misinterprets Mr. Jenkins's argument that the Board misunderstood "the requirements of work" as an argument about the Board's "interpretation of the

evidence." Secretary's Br. at 27. On the contrary, at issue is whether the Board applied the wrong legal standard, Appellant's Br. at 24-27, and failed to support its decision with adequate reasons or bases, *id.* at 27-29. Therefore, the Court should review the Board's decision without deference. *See Butts v. Brown*, 5 Vet.App. 532, 539 (1993) (en banc).

Regarding the merits, the abilities on which the Board relied do not demonstrate Mr. Jenkins's capacity for substantially gainful employment, so the Court should reject the Secretary's argument that the Board applied the proper standard for entitlement to TDIU. Secretary's Br. at 26. The Board recited a list of facts about Mr. Jenkins purporting to support its conclusion that his "symptoms are not severe enough" to show entitlement to TDIU. R-32. However, the facts in the Board's list show an inquiry into whether Mr. Jenkins was totally socially impaired, not whether he was socially equipped to maintain substantially gainful work. R-32; *compare* 38 C.F.R. § 4.130 (100 percent rating criteria), *with* 38 C.F.R. § 4.16; *see also Roberson v. Principi*, 251 F.3d 1378, 1385 (Fed. Cir. 2001) ("Requiring a veteran to prove that he is 100 percent unemployable is different than requiring the veteran to prove that he cannot maintain substantially gainful employment.").

Facts like whether Mr. Jenkins "required hospitalization," "garden[s] and car[es] for animals," or "enjoy[ed] his birthday party," and the other, similar facts in the Board's list, R-32, do not explain how Mr. Jenkins had "the ability to perform the requisite acts day in and day out, in the sometimes competitive and stressful conditions in which real people work in the real world," *Thomas v. Sullivan*, 876 F.2d 666, 669 (8th Cir. 1989); *see*

Ray, 31 Vet.App. at 71-73. VA itself recognizes that "a person may be too disabled to engage in employment although he or she is up and about and fairly comfortable at home or upon limited activity." 38 C.F.R. § 4.10 (2019); *see* Appellant's Br. at 25-26. The Court should reject the Secretary's invitation to find that the Board applied the correct standard and "explained that the records demonstrated that [the Veteran] experienced a social ability that would permit him to secure and follow substantially gainful employment." Secretary's Br. at 25.

The Board's analysis was not "in line with *Ray*" by virtue of its "specifically discuss[ing]" Mr. Jenkins's "social skills and ability to adapt to workplace stress." *Contra* Secretary's Br. at 27. Its discussion of his social skills was legally infirm, as argued above. Additionally, its discussion of his difficulty adapting to stress suffered from some of the same flaws as its schedular analysis. It again used documented discipline as a proxy for occupational impairment, overlooking Mr. Jenkins's ongoing problems following rules and making mistakes. R-32. And it again cherry-picked his favorable self-assessment "that he always did well on performance reviews." *Id.*

In any case, discussing non-work social interactions and problems dealing with stress was not a complete analysis under *Ray*. *But see* Secretary's Br. at 27. The Board favorably found that Mr. Jenkins had problems getting along with others in the workplace and problems concentrating and working accurately. R-21, R-31-32. His anger and concentration problems persisted after he retired. *See* Appellant's Br. at 27. To nevertheless conclude that he was unentitled to TDIU, the Board failed to recognize

that substantially gainful work demands "memory, concentration, [and] ability to . . . get along with coworkers[] and demonstrate reliability and productivity." *Ray*, 31 Vet.App. at 73; *see* R-31-35; Appellant's Br. at 26-27.

Further, the Board's repetition of its schedular analysis under section 4.130 was not a legally proper analysis of Mr. Jenkins's entitlement to TDIU, even setting aside the flaws in the schedular analysis. *But see* Secretary's Br. at 26-27. The inquiries are different. "[T]he rating schedule is based on the average impairment in earning capacity caused by a disability, whereas entitlement to TDIU is based on an individual's particular circumstance." *Rice v. Shinseki*, 22 Vet.App. 447, 452 (2009) (internal quotation marks omitted). Here, the Board failed to recognize that, repeatedly referencing "the severity of the Veteran's mental health symptoms" or his "symptoms" without going on to compare those limitations to the requirements of substantially gainful work. R-32. Treating a veteran's schedular rating as conclusive of entitlement to TDIU improperly renders section 4.16 superfluous. *See* Appellant's Br. at 24.

Regarding the Board's undue emphasis on its inference that Mr. Jenkins "retir[ed] due to age" because he "certainly could have" told a medical provider that he was retiring because of his GAD but "did not," R-33-34, the Secretary argues that "the Board . . . was just addressing Appellant's counsel's argument," Secretary's Br. at 27. He contends that the Board therefore did not rely on this to deny TDIU. *Id.* at 28. However, nor did the Board discuss Mr. Jenkins's worsening impairment since his retirement, an omission the Secretary does not dispute. *See* Appellant's Br. at 29; Secretary's Br. at 28.

Finally, on the ultimate question of whether Mr. Jenkins was entitled to TDIU, the Board erred in deeming VA examiners' opinions dispositive. *See* Appellant's Br. at 27. It noted that the 2007 examiner "opined there was no evidence of occupational or social impairment," R-31, and eventually concluded "the medical evidence overwhelmingly indicates the Veteran's service-connected disabilities do not prevent him from obtaining or maintaining substantially gainful employment." R-35. Medical evidence can help show the intensity of symptoms and what tasks they preclude, but the determination of entitlement to TDIU "is not medical in nature, and it is not the province of medical examiners to opine on whether a veteran's service-connected disabilities preclude substantially gainful employment." *Delrio v. Wilkie*, __Vet.App.__, No. 17-4220, 2019 WL 6907193, at *6 (Dec. 19, 2019).

Although the Board should consider an examiner's findings regarding the manner and extent to which a veteran's symptoms affect his ability to perform work-related tasks, it "cannot uncritically adopt an examiner's assessment of the veteran's level of disability as its own without reconciling that assessment with the other evidence of record," nor can it "outsource to a medical examiner its independent responsibility to make an adjudicative determination as to entitlement to a claimed disability evaluation, including TDIU." *Id.* That includes competent, credible lay evidence as well as medical evidence. *But see* R-35. The Court should hold that the Board erred in limiting its inquiry to the medical evidence. *Id.*; *see* Appellant's Br. at 27.

CONCLUSION

The Board accepted that Mr. Jenkins had difficulty getting along with supervisors, concentrating, remembering, and dealing with stress as a result of his service-connected GAD. In denying him entitlement to a higher schedular rating, the Board clearly erred when it found his symptoms did not result in reduced reliability and productivity, improperly required a higher level of impairment than the rating criteria do, and did not adequately address favorable evidence or the Veteran's arguments. Because the Board had no plausible basis to conclude a 50 percent rating was not warranted, the Court should reverse its denial of that rating and remand for further consideration of entitlement to a 70 percent rating and TDIU.

The Board also misinterpreted the law when it found that Mr. Jenkins' schedular rating demonstrated he was not entitled to TDIU. It failed to sufficiently explain its reliance on his work history and retirement as evidence against the claim and did not adequately discuss his functional limitations or explain how he was nevertheless able to meet the mental requirements of substantially gainful employment. Therefore, the Court should vacate the Board's decision and remand with instructions to readjudicate the claim under the proper interpretation of the law, address all of his arguments, and provide sufficient reasons or bases to support its conclusions.

Respectfully submitted,

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