IN THE

UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

Vet. App. No. 19-1413

SUSAN R. JOHNSTON,

Appellant,

v.

ROBERT L. WILKIE,
SECRETARY OF VETERANS AFFAIRS,

Appellee.

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Regulations

REBUTTAL

Susan R. Johnston responds as follows to the arguments raised by the Secretary of Veterans Affairs ("Secretary").

I. THE SECRETARY IMPERMISSIBLY OFFERS *POST HOC* RATIONIZATION IN HIS DEFENSE OF THE BOARD'S DENIALS.

A. The Secretary's defense for the Board's denial a rating in excess of 70% for depression is premised upon impermissible *post hoc* rationalization.

Appellant argued the Board's denial of a rating in excess of 70% for depression is not supported by an adequate statement of reasons or bases, where the BVA failed to explain its rationale for evaluating the condition based on factors not listed in the schedular rating criteria; and where the Board did not address the veteran's suicidal ideation, risk of harming others, and hallucination symptomatology. *See* Appellant's Brief ("AB") at 9-10.

In response, the Secretary reasoned:

> 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.'

Secretary's Brief ("SB") at 13. The Secretary's rationale is impermissible *post hoc* rationalization of the Board's inadequate statement of reasons or bases. *See Lockelear v. Nicholson*, 20 Vet.App. 410, 416 (2016) (holding that the Court will not entertain underdeveloped arguments); *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."). While the term "such symptoms as" in section 4.130, General Rating Formula for Mental Disorders, indicates the list of symptoms is not exhaustive, nowhere in its decision did the BVA provide an explanation for its selection of non-enumerated symptoms and criteria. The absence of a statement of reasons or bases for its selection of these symptoms and criteria as a basis for evaluating the veteran's psychiatric condition hinders understanding of the BVA's denial of a 100% rating, and frustrates judicial review of it. *See* 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995).

The Secretary was clearly mistaken when alleging that Appellant provided no support for the argument that the ability to manage daily activities cannot be a measure of occupational and social impairment. *See* SB at 14. Mrs. Johnston cited such authority: 38 C.F.R. § 4.130; *Vazquez-Claudio v. Shinseki*, 713 F.3d 112, 118 (Fed. Cir. 2013); *Mauerhan v. Principi*, 16 Vet.App. 436, 440 (2002); and *Bankhead v. Shulkin*, 29 Vet.App. 10, 22 (2017). *See* AB at 9. This authority states that VA must evaluate veterans' psychiatric conditions based on the level of occupational and social impairment caused by their symptoms, not the level of impairment to the management of daily activities. The Board provided no explanation for selecting a different standard by which the veteran's psychiatric condition should be measured.

The Secretary argued that the Board's failure to address the veteran's suicidal ideation, risk of harming others, and visual hallucinations is excusable because the evidence noting this symptomatology merely reflects isolated incidents, not "persistent"

symptomatology. *See* SB at 16. This is another impermissible *post hoc* rationalization. *See Lockelear*, 20 Vet.App. at 416; *Martin*, 499 U.S. at 156. The BVA did not make this finding; the Secretary advances it for the first time on appeal.

The BVA's errors prejudiced the veteran. *See Shinseki v. Sanders*, 556 U.S. 396, 407-10 (2009). Had the Board adequately evaluated Mr. Johnston's symptomatology, it may have concluded that a rating in excess of 70% was warranted during the appeal period, or during a part of it. *See Fenderson v. West*, 12 Vet.App. 119 (1999) (discussing the applicability of staged ratings). For these reasons, the denial of a rating in excess of 70% should be vacated, and the claim remanded. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998).

B. The exhaustion of administrative remedies doctrine does not apply in this case, and the Secretary's defense for the Board's denial an effective date earlier than March 17, 2014, for the 30% rating for sinusitis is premised upon *post hoc* rationalization.

Appellant argued that the Board erred by providing an inadequate statement of reasons or bases for denying an effective date earlier than March 17, 2014, for the 30% rating for sinusitis, where it did not discuss whether remand is warranted to seek additional information regarding the onset of the non-incapacitating episodes prior to the May 2014 DBQ examination report. *See* AB at 11-12. In response, the Secretary asserted that the exhaustion of administrative remedies doctrine bars the Court from considering this argument, and that the Board did provide an adequate statement of reasons or bases for denying the claim. *See* SB at 18-23.

The exhaustion of administrative remedies doctrine is case specific; it applies

where an appellant was represented by the same counsel throughout the appeals process, appellant provides no justification at Court for not presenting a theory of entitlement below, and the theory of entitlement presented to the Court is unique. *See Massie v. Shinseki*, 25 Vet.App. 123 (2011). Whether VA complied with its duty to assist and whether the Board provided an adequate statement of reasons or bases for its decision are not unique legal issues; the Secretary conceded that the issue here is not unique. *See* SB at 21. Therefore, the exhaustion of administrative remedies doctrine does not apply.

The May 2014 DBQ examination report indicates that the veteran met the criterion for a 30% rating at some point during the year prior to the May 2014 DBQ examination. The Secretary concedes this. *See* SB at 21. The Board did not discuss whether, in light of VA's duty to assist, remand of the claim was warranted to seek additional information regarding the onset of the non-incapacitating episodes prior to the May 2014 DBQ examination report. The Secretary argued the record shows a remand would serve no purpose, where there is no indication of episodes or complaints of sinusitis in the record between March 2013 and May 2014. *See* SB at 22. This argument is impermissible *post hoc* rationalization. *See Lockelear*, 20 Vet.App. at 416; *Martin*, 499 U.S. at 156. The Board did not reach this finding regarding the value of a remand – the Board did not discuss whether VA complied with the duty to assist at all. The Secretary advances this argument for the first time on appeal.

The Board's failure renders inadequate its statement of reasons or bases for denying an effective date earlier than March 17, 2014, for the 30% percent rating for sinusitis. *See* 38 U.S.C. § 7104(d)(1); *Allday*, 7 Vet.App. at 527. This prejudiced the

veteran. *See Shinseki*, *supra*. Had the BVA considered the May 2014 DBQ examination report in light of 38 U.S.C. § 5110(b)(2) and 38 C.F.R. § 3.400(o)(2), it may have determined that the claim should have been remanded for further development. Therefore, the denial should be vacated, and the claim remanded. *See Tucker*, 11 Vet.App. at 374.

CONCLUSION

For the reasons and facts set forth above and in his principle brief, Appellant respectfully requests that the Court vacate the denials of a rating in excess of 70% for depression and an effective date earlier than March 17, 2014, for the assignment of a 30% rating for sinusitis, and remand the claims for further development and readjudication.

Respectfully submitted,

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