IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-2303

BOBBY E. BENSON,

Appellant,

v.

ROBERT L. WILKIE,

Secretary of Veterans Affairs,

Appellee.

APPELLANT'S REPLY BRIEF

Glenn R. Bergmann, Esq.
David S. Ames, Esq.
Bergmann & Moore, LLC
7920 Norfolk Ave., Suite 700
Bethesda, MD 20814
(301) 290-3160

Counsel for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

OTHER AUTHORITIES

TABLE OF CITATIONS TO THE RECORD BEFORE THE AGENCY

ARGUMENT

I. The Parties Agree That Some of Appellant's Claims Should Be Remanded.

Appellant appreciates the Secretary's acknowledgment that the Board erred by not providing adequate reasons or bases with respect to Appellant's right ankle arthritis, back disability, pain and swelling of the bilateral lower extremities, and left foot drop claims; as well as that his dermatitis and right foot disability claims are intertwined with other claims that warrant remand. Sec. Br. at 10-11, 23; *see also* App. Br. at 15-16, 28-29. As the parties agree on these issues, the Court should vacate the Board's decision and remand for readjudication based on this agreement if the Court does not agree that greater relief is warranted as argued in Appellant's principal brief and below.

Appellant also appreciates the Secretary's acknowledgment that the Board erred by not providing and adequate hearing with respect to Appellant's right ear hearing loss claim. Sec. Br. at 11-12; *see also* App. Br. at 17-19. Accordingly, should the Court find that reversal of the Board's finding that the duty to assist was not satisfied is not appropriate with respect to Appellant's right ear hearing loss claim, the Court should vacate the Board's decision with respect to that claim and remand for readjudication based on the parties' agreement.

II. The Board's Finding That the Duty to Assist was Satisfied with Respect to In-service Clinical Records Should be Reversed.

The Secretary provides several arguments as to why the Court should not reverse the Board's factual finding that the duty to assist was satisfied with respect to in-service clinical records. Secretary's Brief (Sec. Br.) at 12-14. All of these arguments should be disregarded.

A. VA has not Requested Appellant's In-Service Clinical Records.

The Secretary first argues that reversal is not appropriate because "VA requested complete medical and dental records and Appellant's entire personnel file from [the National Personnel Records Center (NPRC)] in Sep. 2016, and NPRC responded with 'all available requested records.'" Sec. Br. at 13 (quoting **R. at 941**). However, this request for records was done using Personnel Information Exchange System (PIES) request code "O50." **R. at 941**. As noted in Appellant's Brief (App. Br.), the M21-1 Adjudication Procedures Manual (M21-1) provides for separate procedures for obtaining clinical records independent of the normal service treatment records (STRs) request process and states that requests for those records should use PIES request code "C01" or "C01-V," depending on whether the claim was processed in VBMS. *See* App. Br. at 13-14; M21-1, pt. III, subp. iii, ch. 2, § B.4.e. The Secretary does not dispute Appellant's recitation of VA's own procedures for requesting in-service clinical records. Sec. Br. at 13-14. Accordingly, the Court should disregard the Secretary's argument and hold that the Board erred by not remanding for VA to attempt to obtain Appellant's in-service clinical treatment records from NPRC.

B. Appellant's In-Service Clinical Records are not in the Claims File.

The Secretary also argues that reversal is not appropriate because "it is not clear that the records in question are not in Appellant's claims file . . . ." Sec. Br. at 13. This argument is unavailing for two reasons. First, as noted in Appellant's Brief and Argument I.A above, clinical records are not stored with out-patient service treatment records and VA has never submitted a specific request for the in-service clinical records. App. Br. at 13-14. The Secretary does not even argue that the referenced documents *are* the in-service clinical records, only that it is "not clear" that they are not. Sec. Br. at 13. It is clear that they are not, as the records are

standard service out-patient records which make no references to hospital admission and care. **R. at 3144-47, 3154 (3154-55)**.

Second, the Court should reject this argument as a post hoc rationalization as the Board did not provide any such reasoning. To the contrary, the Board repeatedly found that the records in question "may be outstanding." **R. at 10, 14, 17, 19, 22, 24, 27 (5-38)**. Accordingly, the Board did not find that Appellant's in-service clinical records were already associated with the claims file, and the Secretary's argument that they may be cannot now be appended to the Board decision. "[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); *see also Frost v. Shulkin*, 29 Vet.App. 131, 140 (2018).

C. The Failure to Obtain the In-Service Clinical Records is Prejudicial.

Finally, the Secretary argues that reversal is not appropriate because "the Board repeatedly found that even if these hospitalization records existed, they would not affect the outcome of Appellant's claims. . . . Appellant does not challenge the Board's finding." Sec. Br. at 13-14 (citations omitted). This argument should be disregarded for three reasons. First, while Appellant did not specifically quote that precise section of the Board decision, in his brief Appellant argued that, if the Board had adequately addressed the duty to assist, it may have decided the claims differently. App. Br. at 22.

Second, the Board could not possibly know how it would have adjudicated the claims had it obtained the missing in-service clinical treatment records. The Board repeatedly stated that there was "no evidence of any complaints, symptoms, or treatment of [the various disabilities in question] at any time during service, including following the reported in-service

accident." **R. at 14, 17, 19, 26 (5-38)**. The Board also found that there was "no evidence of left foot drop or abnormal gait during service," **R. at 21 (5-38)**, and "no evidence of a right foot disability during service," **R. at 24 (5-38)**. Based on these findings, it is clear that the Board denied Appellant's claims, at least in part, based on a lack of medical evidence of in-service symptomatology. If the Board found the lack of such evidence as weighing sufficiently against the claims to warrant discussing in this manner, it may have weighed the case differently had such evidence been present and showed symptomatology the Board claimed was missing. The Board's findings to the contrary are nothing more than adjudicatory clairvoyance and are not worthy of the Court's deference. *Cf. Moore v. Shinseki*, 555 F.3d 1369, 1375 (Fed. Cir. 2009).

Third, the Court itself cannot know that the Board's analysis would have produced the same result if the Board had Appellant's missing in-service clinical records to review. Thus, the Court cannot find the Board's failure to ensure that VA complied with the duty to assist was harmless. *See Wagner v. United States*, 365 F.3d 1358, 1365 (Fed. Cir. 2004) ("Where the effect of an error on the outcome of a proceeding is unquantifiable, however, we will not speculate as to what the outcome might have been had the error not occurred."); *Arneson v. Shinseki*, 24 Vet.App. 379, 389 (2011) (finding prejudice when error "could have altered" the Board's determination).

III. The Board's Finding That the Duty to Assist was Satisfied with Respect to Providing VA Medical Opinions Should be Reversed.

The Secretary concedes that the Board erred by failing to provide adequate reasons or bases for is determination that Appellant was not entitled to VA examinations with respect to his right ankle arthritis, back disability, bilateral leg pain and swelling, and left foot drop claims. Sec. Br. at 10-11. While the Secretary does not directly argue that reversal of this duty to assist

finding is not warranted, the Secretary's general approach to his concession of the reasons or bases error indicates that his position is that the Board must first make a credibility determination before a direct duty to assist violation can be found. *See* Sec. Br. at 10-11.

However, the Secretary's argument is directly undermined by this Court's recent holding in *Miller v. Wilkie*, ___ Vet.App. ___, No. 18-2796, 2020 U.S. App. Vet. Claims LEXIS 64 (Jan. 16, 2020). As the Board did not explicitly find Appellant's statements non-credible or incompetent, the Board implicitly found those statements credible. *Id.* at *22. As such, the Secretary's implied argument that the Board could have found Appellant's statements non-credible should be discarded as the Board implicitly found him credible and the Secretary cannot undo that finding. To the extent that the Secretary's argument urges the Court to do just that, Appellant notes that the Court "cannot disturb a factual finding that is favorable to the appellant." *Sheets v. Nicholson*, 20 Vet. App. 463, 466-67 (2006). The Secretary's argument would also be tantamount to appealing his own decision, which he cannot do. 38 U.S.C. § 7252(a) ("The Secretary may not seek review of any [Board] decision.").

IV. The Board's Adequacy Finding with Respect to the VA Opinions Provided for his Right Ear Hearing Loss Should be Reversed.

The Secretary provides several arguments as to why the Court should not reverse the Board's finding that the right ear hearing loss medical opinions are adequate to satisfy the duty to assist. Secretary's Brief (Sec. Br.) at 15-17. All of these arguments should be disregarded.

A. Whether Appellant Experienced a Significant Threshold Shift is a Fact, not an Inference.

The Secretary first argues that the VA medical opinions are adequate because the examiners' opinions do not constitute an inaccurate factual premise under *Reonal v. Brown*, 5 Vet.App. 458, 460-61 (1993), because that term "involves an examiner's reliance on a

claimant's recitation of his medical history . . .; here, the underlying facts reviewed and addressed by the examiners are accurate; the alleged error relates not to the fact themselves but to inferences drawn from those facts." Sec. Br. at 16 (citation omitted). The Secretary's argument is flawed for two reasons. First, whether there has been a change in Appellant's auditory thresholds is a fact, not an inference. As relevant, a fact is "something that actually exists; an aspect of reality" or "[a]n actual or alleged event or circumstance, as distinguished from its legal effect, consequence, or interpretation." BLACK'S LAW DICTIONARY 735 (11th ed. 2019). In turn, an inference is a "conclusion reached by considering other facts and deducing a logical consequence form them." BLACK'S LAW DICTIONARY 930 (11th ed. 2019).

As applied to this case, the Secretary does not dispute that there was a 15 decibel change in Appellant's auditory thresholds between his pre-induction examination, **R. at 3143 (3142-43)**, and his separation examination, **R. at 3137 (3136-37)**. Accordingly, the existence of this shift, and its significance, is uncontested fact. *Hensley v. Brown*, 5 Vet.App. 155, 164 (1993).

Second, even if the Secretary is correct that the statements at issue are inferences and not facts, the Court should find that an inference is itself a factual determination. "The evaluation and weighing of evidence *and the drawing of appropriate inferences from it are factual determinations* . . . ." *Bastien v. Shinseki*, 599 F.3d 1301, 1306 (Fed. Cir. 2010) (emphasis added). Accordingly, if the VA examiner has drawn an erroneous inference from the evidence, it constitutes an inaccurate factual premise for the purposes of *Reonal*, 5 Vet.App. at 460-61.

B. The Mar. 2017 VA Examiner Clearly Erred in Stating that the Threshold Shift was Not Significant.

The Secretary also argues that the Mar. 2017 VA examiner did not find that there was no threshold shift in service, "but was instead acknowledging that such a shift was not

significant in the context of the other evidence of record." Sec. Br. at 16. Appellant notes that no such statement was made by the Apr. 2015 VA examiner, nor does the Secretary argue otherwise. Accordingly, this argument does not apply to the Apr. 2015 VA medical opinion.

Furthermore, the Mar. 2017 VA examiner's statement was that Appellant's hearing during service was "with out significant shift/decrease outside of normal test/re[t]ested variance." **R. at 716 (713-18)**. As noted in Argument III.A, above, the Secretary does not dispute that there was a 15 decibel change in Appellant's auditory thresholds during service, or that this Court has established that such a change is significant. Sec. Br. at 15 (citing *Hensley*, 5 Vet.App. at 164). In *Hensley* the Court specifically found that the evidence of the threshold shift was "'significant evidence' supporting his claim of service connection for a right ear hearing disability . . . ." 5 Vet.App. at 164. Accordingly, the Court itself has already defined a 15- to 30-decibel shift as "significant" and the VA examiner clearly erred in stating otherwise.

V. The Board did not Provide Appellant with an Adequate Hearing.

The Secretary concedes that the Board erred by failing to Appellant with an adequate hearing with respect to his right ear hearing loss claim. Sec. Br. at 11-12. However, he argues that the hearing was adequate with respect to all other issues. Sec. Br. at 14-15. First, the Secretary states that, with respect to the unobtained in-service clinical records, the Board did not err because a hearing officer has no duty to preadjudicate a claim and the Veterans Law Judge (VLJ) suggested evidence to substantiate the claim. Sec. Br. at 14. Appellant does not dispute either point raised by the Secretary, but contends instead that these points do not rectify the VLJ's error or otherwise make the hearing adequate. While the VLJ did suggest the submission of alternate evidence, he mislead Appellant into thinking that nothing further

could be done with respect to the in-service clinical records themselves. In a recent oral argument, the Secretary conceded that a VLJ cannot mislead a veteran during a hearing. Oral Argument at 30:09-30:36, *Adanich v. Wilkie*, U.S. Vet. App. No. 18-4199 (oral argument held Feb. 6, 2020), https://www.youtube.com/watch?v=szswPAP5gzU&t=1809.

The fact that alternate sources of evidence were suggested does not ameliorate the VLJ's error in the hearing because lay evidence is not categorically equivalent to medical evidence. *See*, e.g., *Davidson v. Shinseki*, 581 F.3d 1313, 1316 (2009); *Jandreau v. Nicholson*, 492 F.3d 1372, 1376-77 (Fed.Cir.2007); *Barr v. Nicholson*, 21 Vet.App. 303, 307-08 (2007). The Board denied Appellant's claims, in part, because despite his lay report of experiencing symptoms during service, "the Board [found] significant the fact that he did not report such symptoms during service . . . ." **R. at 15, 20 22, 25, 27 (5-38)**. These phrases demonstrate that the Board found that Appellant's lay statements on their own were not sufficient and that corroborating in-service medical records were necessary. Accordingly, the VLJ mislead Appellant into thinking that the evidence the Board found was necessary to substantiate the claim could not be obtained, and instead directed him to submit alternative evidence that could not provide the corroborating evidence which the Board found was most significant.

Second, the Secretary argues that the VLJ's failure to instruct Appellant to submit evidence of a nexus between any of his current disabilities and military service was not an error because the Board did not deny the claims due to lack of the nexus element. Sec. Br. at 14-15. The Secretary's argument is undermined by the Board decision itself, which repeatedly stated that it was denying the claims, in part, based on lack of a nexus:

> Given the lack of competent evidence in support of the claim, the evidence is against a finding of a nexus between the Veteran's current [disabilities] and

> [service or a service-connected disability]. Accordingly, the Board must conclude that the preponderance of the evidence is against the claim, and it is, therefore, denied.

R. at 15, 17, 20, 23, 25, 28, 31, 34, 36 (5-38). The Board therefore explicitly denied Appellant's claims, in part, due to a lack of nexus evidence and the Secretary cannot undo that finding.

VI. The Board did not Provide Adequate Reasons or Bases.

A. Failure to Discuss the July 2015 VA Medical Record.

The Secretary presents two arguments as to why the Board's reasons or bases are adequate with respect to the claim of entitlement to service connection for an acquired psychiatric disability. Sec. Br. at 17-19. First, he argues that the July 2015 VA medical record, **R. at 1134 (1134-36)**, is "questionably relevant" because it is unclear whether the term "anxious" was used in a "clinical" or "colloquial" sense. Sec. Br. at 18. Appellant notes that the Secretary does not actually argue that the record is non-relevant, only that it is potentially non-relevant. Sec. Br. at 17-18. Accordingly, the Secretary argument should be interpreted to also concede that the record is potentially relevant, and thus potentially favorable. This Court has made clear that the Board has an obligation to specifically address material evidence that has the *potential* to be favorable to a claim. *See Todd v. McDonald*, 27 Vet.App. 79, 86 (2014) ("[T]he Board is required to specifically address material record evidence that is potentially favorable to the claim."); *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995). If the record is potentially relevant, the Board's failure to address it renders all the Secretary's arguments regarding its meaning impermissible post hoc rationalizations. *See Smith*, 19 Vet. App. at 73; *Frost*, 29 Vet.App. at 140. The Board's failure to do so thus renders inadequate its reasons or bases for denying Appellant's acquired psychiatric disorder claim. *See Todd*, 27 Vet.App. at 87.

Even if the Secretary's argument does not concede the record's potential relevance, the statement in question was made by a medical professional in a medical record created for the purposes of providing medical treatment. The record shows that Appellant explicitly asked for a "follow up app[ointment] asap for . . . anxiety[,]" and the medical professional gave Appellant the VA suicide hotline number. **R. at 1136 (1134-36)**. Under these circumstances, the medical professional's words should be presumed to use a medical, not a colloquial, definition. Additionally, to the extent that it was unclear whether the reference was medical or colloquial, the proper response from the Board would have been to remand for clarification, not to completely ignore the document. *See Savage v. Shinseki*, 24 Vet.App. 259, 272 (2011).

Second, the Secretary argues that Appellant has not demonstrated prejudice because he has not demonstrated that he has a current diagnosis of a psychiatric disorder. Sec. Br. at 18-19. Appellant does not dispute that there is no current diagnosis of a psychiatric disorder currently of record, but that is not the same as Appellant not having a psychiatric disorder which is diagnosable. At his Oct. 2018 hearing, Appellant only stated that had never been diagnosed with a psychiatric disorder and did not see a mental health professional. **R. at 56-57 (41-69)**. At no point did Appellant state that he did not experience psychiatric symptoms. Furthermore, even if a diagnosis is required to receive *service connection* for a psychiatric disability, a diagnosis is *not* required to trigger VA's duty to assist in providing Appellant with a medical examination, only "persistent or recurrent symptoms of disability[.]" *See* 38 U.S.C. § 5103A(d)(2)(A); 38 C.F.R. § 3.159(c)(4)(i)(A); *McLendon v. Nicholson*, 20 Vet.App. 79, 83 (2006). Appellant has not been provided with a VA medical examination with respect to his acquired psychiatric disability claim. The Board may have found that the July 2015 VA medical

record constitutes evidence that Appellant has psychiatric symptomatology which is potentially related to service-connected disabilities, and that a VA examination was necessary to determine whether Appellant has a diagnosis of a psychiatric disability, and whether such a diagnosis was related to a service-connected disability.

B. Improper Weighing of the Evidence with Respect to Appellant's Left Tibia Fracture Claim.

The Secretary provided three arguments for why the Board did not err when it found that Appellant did not have an in-service left tibia fracture. Sec. Br. at 19-20. All three should be disregarded. First, the Secretary argues that it is clear that the Board reviewed the separation examination because the Board explicitly stated that a "separation examination noted [Appellant's] reports of a left tibia fracture." Sec. Br. at 19. However, the Secretary incompletely quotes the Board, and the omitted language is critical. The Board's complete statement was "Moreover, while the Dec. 1967 separation examination noted the Veteran's reports of a left tibia fracture *one month prior*, the service treatment records do not demonstrate clinical evidence of such a fracture." **R. at 29 (5-38)** (emphasis added). The Board's use of the words "one month prior" clearly demonstrates that it was referring to Appellant's Dec.1967 separation report of medical history (ROMH), not his report of medical examination (ROME). *Compare* **R. at 3139 (3138-39)** (Dec.1967 separation ROMH stating "Broken bones – fractured left tibia on[e] mo[nth] ago."), *with* **R. at 3136 (3136-37)** (Dec.1967 separation ROME noting on physical examination of Appellant's lower extremities there was "Healed [fracture] [left] tibia. No D/U/[limitation of motion]").

Second, the Secretary stated that the Board "found that Appellant's STRs did not show clinical evidence of such a fracture, a conclusion which is supported by the STRs." Sec. Br. at

19. However, the Dec.1967 separation report of medical examination explicitly notes that a healed fracture of the left tibia was found on physical examination. **R. at 3136 (3136-37)**. This document is clinical evidence of a left tibia fracture in a STR, and the Secretary does not provide any explanation for why it is not such.

Third, the Secretary argues that Appellant has not demonstrated prejudicial error because he does not dispute the Board's finding that there is no residual disability related to an in-service tibia fracture. Sec. Br. at 20. However, the Secretary agrees that the Board explicitly found that Appellant has current left leg disabilities. Sec. Br. at 10-11; **R. at 18-19, 21 (5-38)**. Accordingly, there is no dispute over whether Appellant has medically documented findings of left leg disability. Appellant's claims before this Court also include multiple left leg disabilities, namely pain/swelling of the leg and left foot drop, to include abnormal gait. Appellant explicitly claims that he experiences these current disabilities from the in-service accident that resulted in the left tibia fracture. *See*, *e.g.*, **R. at 48 (41-69)**. The nature of Appellant's claims and statements throughout the record make it clear that he is, and has always been, seeking service connection for all residuals of his in-service fall, whatever they may be. *See* **R. at 41-69, 784, 980-81, 1965 (1964-67), 1973 (1972-75), 2676, 2769-76**. Accordingly, Appellant's left leg claims should be viewed as related, and the functional impairments and symptoms he reports as relevant to the other left leg claims should also be viewed as applicable to the residuals of a left tibia fracture claim. *See Clemons v. Shinseki*, 23 Vet. App. 1, 4 (2009) ("multiple medical diagnoses or diagnoses that differ from the claimed condition do not necessarily represent wholly separate claims").

C. The Board's Finding that the Presumption of Soundness Does Not Apply to Appellant's Allergic Condition Should be Reversed.

The Secretary provided two arguments for why the Board did not err when it found that the presumption of soundness does not apply to Appellant's allergic condition. Sec. Br. at 20-22. First, the Secretary argues that the notation on the report of medical history labeled "physician's summary" was completed by a physician, and therefore may be considered an examination report. Sec. Br. at 21-22. However, as noted in Appellant's brief, the Court has already rejected this argument in *Crowe v. Brown*, 7 Vet.App. 238, 245 (1994). App. Br. at 2627. The Secretary does not acknowledge this case or otherwise explain why it is not applicable.

Second, the Secretary argues that even if the presumption of soundness applies, the error was harmless because "[t]he Board also found that Appellant's STRs were negative for any complaints symptoms, or treatment of any allergic conditions at any time during service, and that Appellant reported he did not receive treatment for his allergic condition during service. This conclusion is supported by the record." Sec. Br. at 22 (citations omitted). However, the Board explicitly found that the "evidence shows that the Veteran did experience allergies during service . . . ." **R. at 33 (5-38)**. This is a factual finding favorable to Appellant, and the Secretary cannot undo it before this Court. *See Sheets*, 20 Vet. App. at 466-67.

Furthermore, the Secretary attempts to transplant analysis from the Board's non-hay fever reasoning into its hay fever rationale. Sec. Br. at 22 ("Because hay fever is another form of allergic condition, the Board's reasoning regarding the lack of relationship between an allergic condition and service would apply to hay fever even if it was subject to the presumption of soundness."). The Board, however, explicitly stated that its analysis in this regard was for "a current allergic condition, *other than hay fever* . . . ." **R. at 33 (5-38)** (emphasis added). The Board clearly intended its analysis on the nexus aspect of the claim to not apply

to the hay fever aspect of the claim, and the Secretary cannot "rewrite the Board's decision through his pleadings filed in this Court." *Smith*, 19 Vet. App. 63, 73 (2005). The Board explicitly denied Appellant's general allergic condition claim by analyzing the hay fever and non-hay fever aspects of Appellant's claim separately, and it gave entirely separate rationales for each aspect. The Secretary's speculation that the Board would also have applied the non-hay fever analysis to the hay fever analysis is directly contradicted by the Board's own statements, and should also be rejected as a post hoc rationalization. *Frost*, 29 Vet.App. at 140.

VII. Appellant's Psychiatric and Allergy Claims are Intertwined with Other Claims.

The Secretary argues that Appellant's acquired psychiatric condition claim is not intertwined with other claims because the evidence is "tenuous at best; he does not even allege a specific condition with which the claim is inextricably intertwined." Sec. Br. at 24. However, as explained in Appellant's brief, the medical record in question explicitly states that Appellant reported his anxiety was due to "healthcare and multiple problems." App. Br. at 29; **R. at 1134 (1134-36)**. As this appeal includes claims for 12 separate disabilities, it is reasonable to conclude that at least some of those disabilities are the "healthcare and multiple problems" to which the July 2015 VA medical record refers. *See* **R. at 1134 (1134-36)**. Furthermore, while the Secretary attempts to diminish the significance of the July 2015 VA medical record by noting that it was "a single medical emergency department record where Appellant was admitted after dropping a glass on his foot," Sec. Br. at 24, the record shows it was specifically an injury to his *right* foot. **R. at 1134 (1134-36)**. The Secretary has already conceded that Appellant's claim for service connection for a right foot disability warrants remand. Sec. Br.

at 23. Accordingly, the psychiatric condition claim is intertwined with his general medical conditions, and specifically intertwined with his right foot disability claim.

Furthermore, he Secretary's only argument for why Appellant's asthma claim does not warrant remand is that the claim with which it is intertwined does not warrant remand. Sec. Br. at 23-24. Accordingly, should the Court find that Appellant's allergy disorder claim warrants remand, the Court should also vacate the Board's decision with respect to his asthma disorder claim and remand for readjudication based on Appellant's uncontested argument that the claims are intertwined. *See MacWhorter v. Derwinski*, 2 Vet.App. 133, 136 (1992).

CONCLUSION

For the reasons articulated in his principal brief and herein, Appellant respectfully requests that the Court reverse the Board's findings that VA satisfied the duty to assist, that Appellant did not experience an in-service left tibia fracture, and that the presumption of soundness does not apply to Appellant's allergic condition, vacate the remainder of the Board's decision, and remand the issues for readjudication.

Respectfully submitted,

/s/ Glenn R. Bergmann
Glenn R. Bergmann

April 6, 2020

/s/ David S. Ames
David S. Ames
Bergmann & Moore, LLC
7920 Norfolk Ave., Suite 700
Bethesda, MD 20814
(301) 290-3160

Counsel for Appellant