IN THE

UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

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Vet. App. No. 19-4625

_____

ROBERT J. BRIA,

Appellant,

v.

ROBERT L. WILKIE,
SECRETARY OF VETERANS AFFAIRS,

Appellee.

_____

APPELLANT'S REPLY BRIEF

_____

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REBUTTAL

Robert Bria responds as follows to the arguments raised by the Secretary of Veterans Affairs ("Secretary").

I. NO AUTHORITY SUPPORTS THE SECRETARY'S PROPOSITION THAT A PHYSICAL CAPACITY FOR UNPROTECTED INTERCOURSE, HOWEVER DANGEROUS, PRECLUDES ENTITLEMENT TO SMC(k).

The Secretary posits that Mr. Bria is ineligible for SMC(k) because "there is no evidence that there is anything wrong with his creative organs." [Secretary's Brief ("SB") at 5]. However, the parties *agree* that Mr. Bria relies upon condoms to avoid infecting his partner with service-connected hepatitis C.[1] *See, e.g.,* [Appellant's Brief ("AB") at 9 ("Mr. Bria refrains from sexual intercourse without condoms because he fears transmitting his service-connected hepatitis C infection)]; [SB at 5 ("Rather, he chooses to wear a condom during sex to avoid transmitting hepatitis C to his partner.")]. The Secretary and the Appellant agree that a very specific thing is "wrong" with Mr. Bria's creative organs: as a result of his service-connected infection, the veteran fears that his creative organs will expose his partner to a dangerous illness if he engages in unprotected intercourse.

Appellee urges the Court to hold that the veteran's choice to use condoms cannot support entitlement to SMC(k), because his choice is similar to a post-service elective surgery. Per Appellee, SMC(k) is not available as a result of post-service elective

[1] Throughout this brief, "condoms" refers to male condoms.

surgery:

> "[l]oss or loss use traceable to an elective operation performed subsequent to service, will not establish entitlement to the benefit." 38 C.F.R. § 3.350(a)(1)(iii). So a veteran cannot decide to become infertile by way of a vasectomy, for example, and establish entitlement to SMC(k). While Appellant's decision to use a condom is not precisely analogous to an elective operation, Appellant likewise has made a choice to become infertile when he otherwise retains that ability.
>
> [SB at 10].

The Secretary's argument is flawed. First, the Veteran's infection with hepatitis C was *not* elective. Second, the Secretary's reading of section 3.350(a)(1)(iii) is strangely incomplete. A veteran can decide to lose the use of a creative organ through surgery, and still establish entitlement to SMC(k), "where [an operation] is advised on sound medical judgment for the relief of a pathological condition or to prevent future pathological consequences." 38 C.F.R. § 3.350(a)(1)(iii). Appellant's VA treating nurse-practitioner has cautioned him against behaviors that could spread his hepatitis infection, including unprotected sex. [Record Before the Agency ("R.") at 676 (676-680)]. As noted in the veteran's substantive appeal, VA's pamphlet "Sex and the Hepatitis Virus" also advises condom use to reduce the risk of virus transmission. *See* [R. at 96 (95-96)]. To the extent that section 3.350(a)(1)(iii) is instructive, it *supports* Mr. Bria's entitlement to SMC(k): he has been advised to use condoms to prevent the "future pathological consequences" of disease transmission, and he does so.

Moreover, the plain language of the regulatory framework contradicts Appellee's

assertion that “Appellant’s choice to refrain from sex without a condom is the linchpin.” [SB at 10]; *see also Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) (holding that the Court must give effect to the plain meaning of regulatory language); *Id.* at 2419 (courts "must apply all traditional methods of interpretation to any rule, and must enforce the plain meaning those methods uncover"). The provisions of 38 C.F.R. § 3.350(a)(1)(iii) are narrow, and preclude entitlement to SMC(k) based upon elective surgery only in limited circumstances, as discussed *supra*. No regulatory provision contains an all-encompassing bar on entitlement to SMC(k) when a veteran *opts* to limit or alter sexual activity as a result of a service-connected disorder. This regulatory silence is dispositive, because if the Secretary *had* intended to draft such a rule, he knew how to do so. The provisions of 38 C.F.R. § 3.352(a) stipulate that entitlement to SMC(s) based upon bedridden status will *only* be granted in the presence of a condition “which, through its essential character, actually requires that the claimant remain in bed. The fact that claimant has voluntarily taken to bed […] will not suffice.” The Secretary has not crafted a regulation that limits SMC(k) to instances in which the “essential character” of a disability produces loss of sexual function, with no voluntary component. The Secretary’s omission of this requirement from the regulatory implementation of 38 U.S.C. § 1114(k), when he included it in the implementation of 38 U.S.C. § 1114(s), is presumptively intentional, and must be given effect. *See Jones v. Shinseki*, 26 Vet.App. 56 (2012).

VA’s regulations afford no basis for denying entitlement to SMC(k) because Mr.

Bria *chooses* to use condoms to prevent the transmission of service-connected hepatitis C (which he did not choose to contract). Nor do the provisions of 38 U.S.C. § 1114 contain any such basis. Nor does Appellee offer any authority for his bare assertion that the veteran's condom use breaks the "multi-link causal chain between the service-connected disability and loss of use" that would ordinarily establish entitlement to SMC(k). *See Payne v. Wilkie*, 31 Vet. App. 373, 384 (2019).

In fact, the Secretary's current guidance to adjudicators urges a finding that veterans who have lost their libido or sex drive have lost the use of a creative organ. *See* M21-1, III.iv.4.I.3.b (Entitlement to SMC Associated with ED or Other Sexual Dysfunction). This instruction *expressly contemplates* a grant of SMC(k) for disabilities that produce a choice to alter sexual activity, even if claimants otherwise retain the physical capacity for intercourse. This is analogous to the situation in which Mr. Bria finds himself. He retains the physical capacity for unprotected intercourse, but chooses to refrain from unprotected intercourse *as a result of* his service-connected hepatitis C infection.

Finally, the "choice as linchpin" rule the Secretary proposes would generate absurd results, which the Court has an obligation to avoid. *See Atencio v. O'Rourke*, 30 Vet.App. 74, 83 (2018). The Secretary emphasizes that Mr. Bria remains physically capable of sexual intercourse without a condom. *See, e.g.,* [SB at 12 ("Appellant can remove the condom.")]. However, Appellant and his romantic partner's affidavits

establish that the veteran relies upon condoms because he cares for his partner's welfare, and is unwilling to expose her to a dangerous disease. [R. at 98, 99]. The Secretary proposes a rule that would bar otherwise-eligible veterans from entitlement to SMC(k) because their sexual function would be normal if they risked the health of their partner. It rests upon the *physical* possibility of unprotected intercourse, but ignores the *moral* impossibility of exposing a loved one to peril.

Just as in *Payne v. Wilkie,* "the Secretary has not pointed to any authority to support his argument for a narrow interpretation of section 1114(k)'s causation requirement." 31 Vet. App. 373, 385 (2019). As in *Payne*, the Court should decline to read elements into the statute or regulation that are not present – especially when these elements would produce a facially absurd result.

II. INFERTILITY IS NOT NECESSARY TO ESTABLISH LOSS OF USE OF A CREATIVE ORGAN, AND THE BOARD HAS FOUND THE VETERAN'S CONDOM USE *DOES* PRECLUDE PROCREATIVE INTERCOURSE.

Mr. Bria's principal brief asserted that entitlement to SMC(k) for loss of use of a creative organ requires only a *de minimis* impairment of sexual function, and does not require loss of fertility. *See* [AB at 10-14]. For *decades*, the Department of Veterans Affairs and the Veterans Administration have reiterated that the loss of use of a creative organ does not require any loss of procreative capacity. *See* [AB at 10-13 (reciting the relevant legislative history of current 38 U.S.C. § 1114(k))]. Congress was aware of VA's long-standing interpretation of "loss of use of a creative organ," and therefore accepted

this interpretation when it retained the "loss of use" language within the current section 1114(k). *See* [AB at 13 (citing 2A Norman J. Singer, SUTHERLAND STATUTORY CONSTRUCTION, § 49.09 (5th ed. 1992))]. Appellant argued that his reliance upon condoms to prevent hepatitis C transmission meets the *de minimis* threshold for loss of use of a creative organ, because it constitutes an alteration of his sexual practices. [AB at 14].

The Secretary avers that a veteran has lost the use of a creative organ only if he or she has lost all capacity for procreative intercourse. *See* [SB at 8-10]. In support of this proposition, the Secretary cites the Court's precedents in *Jensen v. Shulkin*, 29 Vet.App. 66 (2017), and *Tucker v. West,* 11 Vet.App. 369 (1998). [SB at 9]. Neither is availing.

Jensen held that a "loss of use" is a "deprivation of a veteran's ability to avail oneself of the anatomical region in question." *Jensen,* 29 Vet.App. at 78. However, the Court emphasized that this definition does not establish the *degree* of deprivation necessary to establish loss of use of an anatomical region. *Id* at 75. Instead, adjudicators must look to the specific statutory or regulatory language at issue to ascertain the degree of deprivation required to establish "loss of use." *Id.* at 78. Thus, the Court in *Jensen* held that loss of use of the lower extremities (for purposes of Special Adaptive Housing) will be shown by the inability to ambulate unaided – *because* the statutory and regulatory language directed this outcome. *Id.*

In *Tucker,* the Court acknowledged that loss of use of a foot is present "when no effective function remains other than that which would be equally well served by an amputation stump with use of suitable prosthesis." 11 Vet.App. at 371. However, the Court's reason for acknowledging this standard was straightforward: this was the specific definition for "loss of use" (of a foot) set forth in 38 C.F.R. § 3.350(a)(2).

No regulatory or statutory provision imposes the narrow definition of "loss of use" of a creative organ that the Secretary - breaking with decades of practice - now proposes. The text of 38 C.F.R. § 3.350(a)(1) provides a narrow definition for the loss of use of a *testicle*, but not for the penis.[2] The text of 38 U.S.C. § 1114(k) specifies that SMC(k) is warranted for blindness in one eye "having only light perception," aphonia that is "complete" and "constant", and loss of 25 percent or more of the tissue of a woman's breast, but does *not* stipulate that loss of use of a creative organ must be complete, or preclude procreation. If Congress had wished to implement such a provision, it clearly knew how to do so. Therefore, Congress presumptively did *not* intend to limit SMC(k) to instances in which the veteran had lost *all* use of a creative organ. *See Russello v. United States*, 464 U.S. 16, 23 (1983).

The Secretary's assertion that loss of use of a creative organ requires the loss of

[2] The penis is a "creative organ" for purposes of entitlement to SMC(k). *See* 38 C.F.R. § 4.115b, Diagnostic Code 7522, Note 1 (directing assessment of entitlement to SMC(k) for penis deformity with loss of erectile power); *see also* 84 FR 55086, 55088 (October 15, 2019) (describing VA's policy of assessing entitlement to SMC(k) for penile disabilities); G.C. PREC. OP. 2-2000 at paragraph 7 (April 3, 2000) (the set of "creative organs" is not limited to the ovaries and testicles).

capacity for procreative intercourse is contrary to the legislative history of section 1114(k), the statutory language, and the Office of General Counsel's own acknowledgment that "from a medical viewpoint, loss of use of a creative organ does not necessarily destroy procreative power." G.C. PREC. OP. 2-2000, at paragraph 10 (April 3, 2000). It is also contrary to the Secretary's current guidance, which directs a finding that a veteran has lost the use of a creative organ even if erectile dysfunction is so mild that intercourse is possible without medication, or the veteran has merely lost sexual drive or libido. *See* M21-1, III.iv.4.I.3.b. The Court should decline to adopt the novel and insupportable standard Appellee proposes in the instant appeal.

Even if loss of fertility *were* a prerequisite for entitlement to SMC(k), Mr. Bria's disability would satisfy this impermissibly high standard. Appellant's principal brief observed that the Board implicitly found his condom use precludes procreative intercourse. [AB at 8]. Appellee's brief does not dispute that the BVA reached this factual finding, and has thereby conceded that the Board found condom use precludes procreative intercourse. *See MacWhorter v. Derwinski*, 2 Vet. App. 655, 657 (1992) (failure to address issues raised in an appellant's brief may result in the Court interpreting such failure to respond as a concession of error). The Court lacks jurisdiction to review, vacate, or reverse the Board's favorable findings. *See Medrano v.*

Nicholson, 21 Vet.App. 165, 170 (2007).[3]

If the inability to engage in procreative intercourse were a requirement for entitlement to SMC(k), Mr. Bria would satisfy that standard. However, neither 38 C.F.R. § 3.350 or 38 U.S.C. § 1114(k) impose this high bar for entitlement to SMC(k). The Court should reject the Secretary's invitation to read an infertility requirement into the regulation or statute that is simply not present. *See Payne*, 31 Vet.App. at 385. The statutory and regulatory language, legislative history, and VA guidance establish that entitlement to SMC(k) is warranted whenever a veteran experiences *any* change in sexual function as the result of a service-connected disability. Mr. Bria's reliance upon condoms to prevent hepatitis C transmission is such a change.

[3] The Secretary urges the Court to take judicial notice that the failure rate for male condoms is 13%, based upon a Centers for Disease Control and Prevention online publication. [SB at 10, footnote 4]. The Court should decline to take judicial notice because the Board's favorable implicit finding that condoms preclude procreation is not reviewable, per *Medrano*. Moreover, judicial notice is only appropriate for "facts not subject to reasonable dispute." *Smith v. Derwinski*, 1 Vet.App. 235, 238 (1991). The efficacy of condoms in preventing pregnancy appears to be disputed *between federal government agencies*. The United States Agency for International Development ("USAID") reports that condoms are 98% effective in preventing pregnancy. *See Condom Fact Sheet*, USAID (April 2015), https://www.usaid.gov/sites/default/files/documents/1864/condom-fact-sheet-January-2015.pdf. The Department of Veterans Affairs "Family Planning" website identifies a failure rate for male condoms ranging from 11% to 16%. *See Women Veterans Health Care*, U.S. DEPARTMENT OF VETERANS AFFAIRS, https://www.womenshealth.va.gov/WOMENSHEALTH/OutreachMaterials/ReproductiveHealth/Contraception.asp (last accessed July 22, 2020).

III. THE BOARD ERRED BY PROVIDING AN INADEQUATE STATEMENT OF REASONS OR BASES FOR DENYING ENTITLEMENT TO A COMPENSABLE RATING FOR HEPATITIS C PRIOR TO MAY 20, 2016, AND IN EXCESS OF 10% THEREAFTER.

As an initial matter, Appellant disagrees with the Secretary's assertion that he has the burden of showing clear error in the Board's determination, where he argued for vacatur of the decision and remand of the claims due to an inadequate statement of reasons or bases by BVA. [SB at 14]. The Court reviews the BVA's factual findings under the clearly erroneous standard of review. *See Hood v. Shinseki*, 23 Vet.App. 295, 299 (2009); *Gilbert v. Derwinski*, 1 Vet.App. 49, 53 (1990). The Court will overturn a factual determination by the BVA if there is no plausible basis in the record for it. *Id.* However, in all of its decisions, the Board must include a statement of the reasons or bases for its findings and conclusions of fact and law that enables an appellant to adequately understand the basis for its decision and facilitate review by this Court. *See* 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995). Where the Board's statement of reasons or bases is inadequate, the appropriate remedy is to vacate the Board's decision and remand the matter. See *Tucker*, 11 Vet.App. at 374.

A. The Board did not adequately respond to Appellant's argument raised below because its conclusion, that the May 20, 2016, VA examination report does not support a finding that the hepatitis C symptomatology worsened prior to May 20, 2016, is based upon the Board's own, unsubstantiated medical conclusion.

Mr. Bria argued below that the May 20, 2016, VA hepatitis, cirrhosis, and other liver conditions C&P examination report constitutes evidence showing his hepatitis C

symptomatology increased in severity prior to May 20, 2016. [R. at 95-96]. He asserted the VA examiner must have arrived at his conclusion that the veteran has "intermittent" symptoms, [R. at 164 (163-67)], from a review of medical records pre-dating the examination, because "intermittent" symptomatology could not, logically, manifest on the date of the examination. [R. at 95-96]. Appellant argued on appeal that the BVA failed to address this argument; therefore, its statement of reasons or bases for denying a compensable rating prior to May 20, 2016, is inadequate. [AB at 15].

The Secretary argued the Board addressed this argument, where it referenced evidence of record and concluded that it does not support a finding of a factually ascertainable increase prior to May 20, 2016. [SB at 13].

The Board's conclusion that the May 20, 2016, VA examination report does not support a finding that the hepatitis C symptomatology worsened prior to May 20, 2016, is nothing more than the BVA's own, unsubstantiated medical conclusion. *See Colvin v. Derwinski*, 1 Vet.App. 171, 175 (1991). As the Secretary noted, "it is the information in a medical opinion, and not the date the medical opinion was provided that is relevant when assigning an effective date." [SB at 14 (quoting *Tatum v. Shinseki*, 24 Vet.App. 139, 145 (2010))]. Nowhere in the record does a medical expert opine that May 20, 2016, is the specific date of worsening. The May 20, 2016, VA examiner's report is based, in part, on a review of the veteran's medical records extant at the time of the examination. [R. 163 (163-67)]. Appellant argued below that VA medical records from October 2014 and

December 2015, record symptomatology of nausea, weight loss, and fatigue. [R. at 95-96]; *see also* [R. at 383-86; 1003-08]. Thus, it is plausible the date of worsening pre-dated May 20, 2016, and the report itself is evidence that supports the assignment of an earlier effective date for the compensable rating.

The BVA could have supplemented the record by seeking an addendum or retrospective medical opinion to clarify this matter. *See Chotta v. Peake*, 22 Vet.App. 80, 85 (2008); *Stegall v. West*, 11 Vet.App. 258, 270-71 (1998). It did not. It did not even discuss the need for one. Rather, the Board, without the aid of independent medical evidence, interpreted the veteran's medical records, and the symptoms noted therein, and concluded they do not constitute a worsening of the hepatitis C symptoms prior to May 20, 2016. Where the Board's conclusion is impermissibly based on its own, unsubstantiated medical finding, the BVA did not adequately respond to the argument Appellant raised below. *See Robinson v. Mansfield*, 21 Vet.App. 545, 552 (2008); *Urban v. Principi*, 18 Vet.App. 143, 145 (2004). This prejudiced the veteran. *See Shinseki v. Sanders,* 556 U.S. 396, 407-10 (2009). Had it done so, it may have granted an earlier effective date for the compensable rating, or remanded the claim for a retrospective opinion addressing the date of worsening. Consequently, vacatur of the denial of a compensable rating prior to May 20, 2016, is warranted, and the claim should be remanded. *See Tucker*, 11 Vet.App. at 374.

B. The Board's finding that a rating in excess of 10% for hepatitis C is not warranted is not supported by an adequate statement of reasons or bases because the Board did not address relevant medical evidence.

Throughout the appeal period, Mr. Bria suffered from near-constant nausea, vomiting, weight loss, and abdominal pain. *See*, *e.g.,* [R. at 184 (183-86), 363 (361-64), 366 (366-69), 384 (383-86), 524 (520-27), 805 (804-09), 951 (947-52), 1250-51]. If attributable to hepatitis C, these symptoms would support a rating of at least 20% pursuant to 38 C.F.R. § 4.114, diagnostic code 7354.

A 2014 medical record states the veteran's chronic abdominal discomfort is due to cirrhosis and hemangioma over the liver. [R. at 520-27]. The BVA did not discuss this medical record. [R. at 8-9 (2-12)]. The Secretary asserted: "Appellant…points to *nothing in the record* that that [sic] attributes any of this symptomatology to hepatitis C…" [SB at 15] (emphasis in original). Appellee argued the veteran's cirrhosis and hemangioma of the liver is not relevant to the issue of the evaluation for hepatitis C. [SB at 16]. The Secretary appears to be unaware that hepatitis C is a liver infection caused by the hepatitis C virus. *Hepatitis C Information*, CENTERS FOR DISEASE CONTROL AND PREVENTION (June 22, 2020), https://www.cdc.gov/hepatitis/hcv/index.htm; *Hepatitis C*, MAYO CLINIC (March 20, 2020), https://www.mayoclinic.org/diseases-conditions/hepatitis-c/symptoms-causes/syc-20354278. Chronic infection can result in problems such as cirrhosis of the liver and liver cancer. *Id*. Appellant asks the Court to take judicial notice of these medical facts. *See Brannon v. Derwinski*, 1 Vet.App. 314, 316 (1991); *see also*

FED. R. EVID. 201(b). Because liver cirrhosis is a complication of chronic hepatitis C, the 2014 medical record constitutes evidence showing attribution of the veteran's near-constant nausea, vomiting, weight loss, and abdominal pain to hepatitis C.

The Secretary defended the Board's denial, asserting that the BVA discussed medical evidence of record showing that the aforementioned conditions are due to conditions other than hepatitis C. [SB at 15-16]. Mr. Bria does not dispute that the Board discussed some relevant evidence of record. Rather, the BVA's error lies in its failure to discuss other relevant evidence of record, thus undermining the adequacy of its statement of reasons or bases. *See Dela Cruz v. Principi*, 15 Vet.App. 143, 149 (2001).

The BVA did not discuss relevant medical records noting that the etiology of the aforementioned symptoms is unclear. *See* [R. at 361-64, 366-69, 380-83]. The Secretary noted that one of these records states the veteran's chronic abdominal pain is "possibly related to gastritis." [SB at 16]; *see also* [R. at 363]. The notation of a "possible" etiology does not provide a sufficient basis for the BVA's adjudication to be fully informed. *See Stefl v. Nicholson*, 21 Vet.App. 120, 123 (2007); *see also*, *Hood*, 23 Vet.App. at 298-99; *Polovick v. Shinseki*, 23 Vet.App. 48, 54 (2009). Appellee stated it is unclear how these records are relevant to the issue of the evaluation of Mr. Bria's hepatitis C. [SB at 16]. Because the Board's denial of entitlement to rating in excess of 20% is premised upon a finding that the above-mentioned symptoms are due to conditions other than hepatitis C, the failure to discuss these medical records, showing that the etiology is

unclear, renders the BVA's statement of reasons or bases for the denial inadequate. *See Dela Cruz*, 15 Vet.App. at 149. This error prejudiced Mr. Bria. *See Shinseki,* 556 U.S. at 407-10. Had the Board considered these records, it may have deemed that a medical opinion addressing the etiology of these conditions is warranted. Therefore, the Court should vacate of the denial of an evaluation in excess of 20% after May 20, 2016, and remand the claim. *See Tucker*, 11 Vet.App. at 374.

CONCLUSION

For the reasons and facts set forth above and in the principal brief, the Board's denial of SMC(k) should be reversed, or, in the alternative, vacated and remanded. Additionally, the BVA's denial of a compensable a rating for hepatitis C prior to May 20, 2016, and in excess of 10% thereafter, should be vacated and remanded.

Respectfully submitted,

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