IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

PAUL G. WAIT, Appellee,	)	
v.	)	Vet. App. No. 18-4349
ROBERT L. WILKIE, Secretary of Veterans Affairs, Appellant.	)	

SECRETARY'S RESPONSE TO APPELLANT'S MOTION FOR THE COURT TO TAKE JUDICIAL NOTICE OF THE SECRETARY'S CONCESSION

Pursuant to U.S. Vet.App. R. 27(b), Appellee, Secretary of Veterans Affairs (Secretary), hereby responds in opposition to the Appellant's Motion For The Court To Take Judicial Notice of the Secretary's Concession (Motion). The Secretary opposes the Motion for the following two reasons.

First, Appellant's citation to select portions of the oral argument from the case of *Martinez-Boden v. Wilkie*, U.S. Vet.App. Docket # 18-3721, omits the context in which those answers were given and ignores the U.S. Court of Appeals for the Federal Circuit's (Federal Circuit) discussion in *Saunders v. Wilkie*, 886 F.3d 1356 (Fed. Cir. 2018).

In relevant part, in *Martinez-Boden*, Chief Judge Bartley asked, "[w]ould you agree with me that this rule that you're saying exists for the mental disorders rating schedule does not exist as to physical conditions? Would you be in agreement with me on that? That a veteran does not need a diagnosis of a

physical condition?" *Martinez-Boden v. Wilkie*, 18-3741, oral argument at (32.29-32:59). In response, the Secretary's counsel replied, "Judge Bartley, I would not go so far as to say that and the reason why is because *Saunders* is not a – I understand that the point of this discussion is the application and the potential expansion of the holding in *Saunders* – however, the *Saunders* Court analysis is not a one size fits all. Simply because the way the [Federal Circuit] did the analysis the first section of the *Saunders* decision acknowledged that impairment must reach the level of functional impairment of earning capacity under § 1110, but then the second portion, which actually dealt with whether that veteran's pain could be could be considered a disability, is not applicable to every single thing that's every potential condition. The *Saunders* Court actually recognized that there is a unique relationship between pain and the Secretary's regulations as far as the rating criteria in the schedule and pointed out the fact that the regulations actually treat pain as functional impairment in several regulations. So, to the extent it does not appear and we would not concede that *Saunders* can necessarily be applied to every other potential disability or impairment or condition that may be raised by a veteran." *Id*. at (33:02-34:56).

Later, Judge Allen asked, "...the Federal Circuit in *Saunders* though reached its conclusion by interpreting a particular word in § 1110, right. And so, it's difficult to read *Saunders* as saying that whatever it said about what a disability is under § 1110 doesn't apply across the board. Because of the way in which the Federal Circuit engaged in statutory interpretation, you're right that it

looked to whether pain was included elsewhere but it actually specifically was defining disability so I wondered if you could react to that in terms of your answer to Judge Bartley about the potential "my word not yours" limitations on the *Saunders* analysis." *Id*. at (37:55-38:56). The Secretary's counsel replied, "Sure. I apologize because apparently I confused you. We don't disagree with the Court with the Federal Circuit's conclusion regarding what the definition of a disability is. My response was simply to illustrate the fact that the case as a whole – regarding the analysis as far as pain as being functional impairment – does not necessarily apply to every other possible condition that one could conceive of. That is simply because pain has, as the [Federal Circuit] discussed in its analysis, pain has a unique relationship with the regulations as far as VA's disability rating regulations treat pain as a form of functional impairment. That is a unique situation for that particular issue as far as pain. I can't offhand even think of another symptom or condition that VA treats the same in the regulation such that this analysis that the Federal Circuit performed would wholesale be applicable to it." *Id*. at (38.57-40.25).

Once these quotes are read in context of the entirety of the answers and the questions posed, it becomes clear that Appellant ignores that the Secretary's counsel in *Martinez-Boden* did not make a broad proclamation that the mere presence of pain equates to functional impairment of earning capacity in every circumstance sufficient to meet the definition of a disability under 38 U.S.C. § 1110. Rather, the Secretary was relating the discussion from the Federal

Circuit's decision in *Saunders*. In *Saunders*, the Federal Circuit concluded that VA recognizes pain is a form of functional impairment after discussing how VA's regulations are relevant to the question of whether pain can be a disability. 886 F.3d at 1364-65. Nonetheless, a point that Appellant again misses the Federal Circuit still included an important caveat that a veteran could not establish a disability with just subjective pain. *Id*. at 1367. Instead, "a veteran will need to show that her pain reaches the level of a functional impairment of earning capacity." *Id*. at 1367-68. Nothing that the Secretary stated in *Martinez-Boden* regarding pain's unique relationship with VA's regulations and recognition that it is a form of functional impairment is inconsistent with the Federal Circuit's discussion of the role of pain or its requirement that the veteran still bears the burden of showing pain that reaches a level of a functional impairment of earning capacity.

Thus, other than through Appellant's creative and selective reading, this cannot be inconsistent with the Secretary's position in *Wait* that the mere presence of pain does not automatically equate to a functional impairment of earning capacity sufficient to constitute a disability under § 1110 as a matter of law. It also cannot be inconsistent with the Federal Circuit's mandate that the veteran show pain resulting in functional impairment of earning capacity for it to suffice as a disability under § 1110. And therefore, it cannot be inconsistent with the Secretary's request for the Court to affirm the Board decision in *Wait* because the Board considered the assertions of hip pain and found that they did not cause

functional impairment of earning capacity, a finding that is plausibly supported by the evidence of record.

Second, while Appellant attempts to assert that the Secretary has presented inconsistent litigation positions – which is unpersuasive for the reasons discussed above – such assertion is irrelevant because the Secretary is not asking for deference in an area where the law is unclear. Rather, the Secretary is asking for the Court to determine and apply the clear meaning of the law and regulations at issue.

This is in contrast to the case in *Correia v. Wilkie*, 38 Vet.App. 158 (2016), which Appellant also cites in his motion. Motion at 2-3. At issue in *Correia* was whether the Secretary should be afforded deference for his proffered interpretation of 38 C.F.R. § 4.59. The pertinent part of *Correia* that Appellant cites in his motion is where the Court declined to strike the citations to non-precedential decisions, noting that it could just as easily take judicial notice of the Secretary's contrary positions in rendering a decision. *Correia*, 38 Vet.App. at 163, n.3 *citing Smith v. Derwinski*, 1 Vet.App. 235, 238 (1991) ("Courts may take judicial notice of *facts* not subject to reasonable dispute." (citing FED. R. EVID. 201(b))) (emphasis added); *Brannon v. Derwinski*, 1 Vet.App 314, 316-17 (1991).

But here, the Secretary did not ask for deference in *Wait* or *Martinez-Boden*. Nor are non-precedential decisions at issue. Instead, and as discussed above, Appellant misinterprets and takes out of context the Secretary's words to attempt to foist a "concession" on the Secretary. But no such concession was

made. Instead, the Secretary in *Martinez-Boden* was relating the Federal Circuit's discussion in *Saunders*. And, here, in the *Wait* case, the Secretary did not, and need not, ask for deference. The Secretary is simply asking for the Court to apply the Federal Circuit's decision and holdings in *Saunders*, and recognize that the Board made the plausible factual finding that hip pain was not shown to cause functional impairment of earning capacity – a finding of fact that Appellant fails to show is clearly erroneous and produces prejudicial error.

WHEREFORE, the Secretary opposes Appellant's Motion For The Court To Take Judicial Notice of the Secretary's Concession and respectfully requests that the Court deny the Motion.

Respectfully submitted,

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