# REPLY BRIEF OF APPELLANT

---

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

---

19-7775

---

CALVIN B. JOHNSTON,

Appellant

v.

DAT P. TRAN,
ACTING SECRETARY OF VETERANS AFFAIRS

Appellee.

JENNA E. ZELLMER
CHISHOLM CHISHOLM & KILPATRICK
321 S MAIN ST #200
Providence, Rhode Island 02903
(401) 331-6300
(401) 421-3185 Facsimile

Counsel for Appellant

# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

## Cases



## Statutes



## Record Before the Agency ("R") Citations

## APPELLANT'S REPLY ARGUMENTS

**The Court should reject the Secretary's attempt to insulate the Board from judicial review by invoking the Board's fact-finding discretion and find that the Board erred when it denied TDIU without properly applying the law.**

Repeatedly throughout his brief, the Secretary refers to the Board's "wide latitude when it comes to deciding matters of fact." *See* Secretary's Br. at 7, 14, 16. But Mr. Johnston did not simply disagree with the Board's fact-finding; he asserted that the Board committed legal errors when it failed to analyze his service-connected limitations under the framework laid out in *Ray v. Wilkie*, 31 Vet.App. 58 (2019). *See* Appellant's Br. at 8-17. Contrary to the Secretary's argument, the Board's discretion to find facts does not relieve it of its duty to properly apply the law. *See* 38 U.S.C. § 7261(a)(3)(D). Moreover, the Secretary's reliance on the Board's general ability to find facts is misplaced because the Board conducted none of its own fact-finding in this instance; instead, it regurgitated the evidence, adopted non-competent medical opinions regarding employability, and relied on non-dispositive factors such as the Veteran's reasons for retiring. *See* Appellant's Br. at 6-7.

In defending the Board's decision, the Secretary fails to show where in its decision the Board conducted the necessary analysis under *Ray*, and instead merely repeats the Board's listing of the facts. For example, the Secretary asserts that the Board "discussed favorable evidence within [the VA medical opinions] and reconciled it with the other evidence." Secretary's Br. at 10. But he fails to show *where* the Board

evaluated this evidence. *See generally id.* at 10-17. The pages on which the Secretary relies show nothing more than a summary of the evidence and a conclusion. *See* R-7-10. And as the Secretary later recognizes, "[m]erely listing the evidence before stating a conclusion does not constitute an adequate statement of reasons or bases." Secretary's Br. at 13 (citing *Dennis v. Nicholson*, 21 Vet.App. 18, 22 (2007)).

In fact, the Secretary proves Mr. Johnston's point when he quotes the Board's finding that "the level of severity *found by the examiners*" does not support entitlement to TDIU. Secretary's Br. at 11 (citing R-9-10) (emphasis added). Contrary to the Secretary's argument, there is no indication that the Board "independently concluded" anything. Secretary's Br. at 10. As Mr. Johnston argued in his opening brief, the Board may not merely adopt examiners' ultimate conclusions about the severity of a veteran's symptoms. *See* Appellant's Br. at 9-11. By simply stating that the examiner's conclusions were persuasive, the Board failed to show its work or analyze the limitations noted in those examinations in accordance with *Ray*. R-10.

Had the Board provided the analysis required by *Ray*, it likely would have found that Mr. Johnston was entitled to TDIU. While the Secretary claims that the Veteran's disabilities had only a "minor effect," neither the Board's decision nor the record bear this out. *See* Secretary's Br. at 12; R-7-10; *see also* Appellant's Br. at 12-15. Notwithstanding their conclusions about the mild to moderate nature of the Veteran's disabilities, the examiners provided significant information about his inability to respond appropriately to supervisors, ask for help, or accept instructions. R-649; R-

655. He also suffered from concentration and memory problems, as well as dissociative flashbacks. R-642; R-423; R-818-20. He lacked motivation and the ability to cope with workplace stress. R-649-50; R-818. The Court has made clear that these limitations are relevant factors in determining a veteran's ability to obtain and maintain substantially gainful employment. *Ray*, 31 Vet.App. at 73. But the Board provided no analysis regarding these issues. R-7-10; *see* Appellant's Br. at 12-15.

The examiners' *medical* conclusions about the severity of the Veteran's disabilities cannot substitute for the vocational analysis required of the Board. *See Delrio v. Wilkie*, 32 Vet.App. 232, 242 (2019). Like the Veteran here, Mr. Delrio experienced significant interpersonal difficulties, which the Board failed to analyze under *Ray*. *See id* at 238. Rather than independently analyze these limitations, the Board in *Delrio* "uncritically adopt[ed] an examiner's assessment of the veteran's level of disability as its own." *See id* at 243. This is precisely what the Board did here. R-9-10. Therefore, the Secretary's attempt to distinguish the holding in *Delrio* from this case must fail. *See* Secretary's Br. at 11-12.

Apart from adopting the VA examiner's conclusions, the Board based its denial on the Veteran's reason for retirement and the fact that he denied poor work performance in the past. R-10. The Secretary's assertion that the Board "plainly did not rely on [the Veteran's reasons for retirement]" is both incorrect and circular. Secretary's Br. at 16. The Secretary seems to argue that because the Board acknowledged that it could not consider the Veteran's non-service-connected seizure

disorder (which was the reason for his retirement), its reliance on that evidence "was not a determining factor in [its] TDIU analysis." *Id.* This is plainly not the case when the Board's decision is read as whole. Immediately after stating that "the record *does not support*" entitlement to TDIU, the Board noted that, "*[r]ather*," the Veteran retired due to his seizure disorder. R-10 (emphasis added). The word "rather" in this context is meant to introduce a statement that is contrary to the previous statement. *See Rather*, Merriam-Webster, https://www.merriam-webster.com/dictionary/rather (last accessed Jan. 30, 2021). The Secretary's argument would essentially allow the Board to consider unlawful factors in its analysis as long as it prefaced that analysis with a statement that it was not allowed to do so. Secretary's Br. at 16.

Moreover, the Secretary's argument raises the question: why would the Board note the Veteran's reason for retirement if not as a reason to deny entitlement to TDIU? "Common sense would dictate that the Board, as busy as it is, would not include a reason for declining to take an action when, in reality, that reason was not a reason at all." *King v. Shulkin*, 29 Vet.App. 174, 182 (2017). At a minimum, the Court should remand the Veteran's claim because "there is no way to disentangle this reasoning from the Board's decision." *Id.*

Finally, the Secretary does not dispute that the Board erroneously relied on the Veteran's denial of past problems with employment to deny entitlement TDIU. *See* Secretary's Br. at 15-17. *See also MacWhorter v. Derwinski*, 2 Vet.App. 133, 136 (1992) (holding that when "the Secretary has failed to respond appropriately" to the

appellant's arguments, the Court may assume "the points raised by appellant, and ignored by the General Counsel, to be conceded."). As Mr. Johnston noted in his opening brief, his past ability to perform substantially gainful employment is not dispositive of his current ability to do so. Appellant's Br. at 16. Since he last worked, his service-connected disabilities have worsened. *Id.* (citing R-171, R-180; R-818; R-843); *see also* R-847. It is, therefore, unclear how the Board concluded that the Veteran's denial of "any negative work performance" in the past lessened the current effects of his inability to interact appropriately with supervisors and co-workers, his concentration and memory problems, and his incapacity to learn and remember new material. *See* R-10; R-423; R-644-49; R-818-20; *Ray*, 31 Vet.App. at 73.

## CONCLUSION

The Board's analysis of the Veteran's entitlement to TDIU failed to comply with this Court's framework in *Ray v. Wilkie* and *Delrio v. Wilkie* because it did nothing more than list relevant evidence and conclude that that evidence did not support entitlement to TDIU. In defending the Board's decision, the Secretary repeats the Board's mistake by reiterating the evidence and attempting to defer to the Board's fact-finding duties. Mr. Johnston does not take issue with the Board's fact-finding but rather with the Board's failure to properly apply the law. The Board's summary conclusion that the evidence did not support entitlement to TDIU without more is insufficient and legally incorrect. Had the Board properly applied the law, it may have

found that the Veteran's non-exertional interpersonal difficulties precluded him from obtaining and maintain substantially gainful employment. Remand is, therefore, necessary for the Board to analyze the evidence and properly apply the framework laid out in *Ray v. Wilkie*.

Respectfully submitted,

*/s/ Jenna E. Zellmer*
Jenna E. Zellmer
Chisholm Chisholm & Kilpatrick
321 S Main St #200
Providence, RI 02903
(401) 331-6300
(401) 421-3185 Facsimile

Counsel for Appellant