IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

Vet. App. No. 19-7442

FRED W. FOSTER,

Appellant,

v.

DENIS MCDONOUGH,

Secretary of Veterans Affairs,

Appellee.

APPELLANT'S REPLY BRIEF

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ARGUMENT

I. The Secretary has failed to show that the Board did not err when it adjudicated entitlement to an increased rating and found that the rating reduction was by operation of law.

In the principal brief, Mr. Foster argued that the Court should reverse the Board's decision on appeal because the Board erred as a matter of law by prejudicially adjudicating entitlement to an increased rating for prostate cancer residuals despite finding that it did not have jurisdiction over the issue, Appellant's Brief ("App. Br.") at 7-10, and by finding that the RO's action was a rating reduction by operation of law. App. Br. at 10-18.

First, Mr. Foster argued that the Board prejudicially erred when it adjudicated entitlement to a rating in excess of 10 percent for his prostate cancer residuals despite recognizing that it does not have jurisdiction to decide the issue. App. Br. at 8-10; *see* **R. at 6 (1-14)** ("the Board's jurisdiction does not extend to deciding whether an increased rating is warranted for prostate cancer."); *see also Dofflemyer v. Derwinski*, 2 Vet. App. 277, 279-80 (1992) (holding where a veteran's disability rating is reduced, the Board must determine whether the reduction of the veteran's rating was proper, and not phrase the issue in terms of whether the veteran was entitled to an increased rating); *but see* **R. at 8 (1-14)** ("the Board notes that the Veteran is *properly rated at 10 percent* for his prostate cancer residuals") (emphasis added); **R. at 10 (1-14)** ("Based on review of the cumulative lay and medical evidence, the current 10 percent rating is appropriate.").

As explained *infra*, Part III, the Secretary agrees that the Court should vacate and remand the part of the Board's decision pertaining to entitlement to an increased rating. However, the Secretary acknowledges that the "issue on appeal is not an entitlement to an

increased rating because the rating decision on appeal did not adjudicate an increased rating claim[,]" Secretary's Brief ("Sec. Br.") at 20, but nonetheless, asserts that the "separate" issue of whether the 10 percent rating for residuals is proper was before the Board. Sec. Br. at 21. The Secretary fails to recognize that by finding that the 10 percent rating is appropriate, the Board effectively *denied* entitlement to a rating in excess of 10 percent. *See* **R. at 8-10 (1-14)**. Therefore, the Board did not limit its inquiry to whether the RO's *reduction* from a 100 percent evaluation *was proper*, but rather, also adjudicated the issue of entitlement to a rating in excess of 10 percent. *See* **R. at 9 (1-14)** (noting that Mr. Foster "contends that his prostate cancer residuals necessitate the use of absorbent materials which he much change at least twice daily, *and should be rated higher*.") (emphasis added).

As Mr. Foster explained, he is prejudiced by the Board's adjudication of entitlement to an increased rating because, without notice that the Board would make a final determination on the issue of the appropriate rating, he was deprived of a meaningful opportunity to participate in the claims process, and moreover, the Board used its findings denying an increased rating to support its ultimate finding that a rating reduction was warranted in this case. App. Br. at 9-10. While the Secretary asserts that Mr. Foster was notified that "the issue of whether the 10% rating was proper would be before the Board" by virtue of the March 2019 Statement of the Case, Sec. Br. at 21, the Statement of the Case does not reflect that the propriety of a 10 percent rating was a "separate issue" as the Secretary suggests; rather, it states that the issue is "[w]hether the *reduction* of the disability rating for residuals of prostate cancer from 100 percent disabling to 10 percent effective January 01, 2019 *was proper*." **R. at 33 (29-53)** (emphasis added).

Second, with respect to the rating reduction issue, Mr. Foster explained that the Board erred by finding that Diagnostic Code ("DC") 7528 contains "a temporal element for continuance of a 100 percent rating for prostate cancer residuals[,]" and therefore, that the RO's action was not a rating reduction, because there is no "temporal" or automatic component to DC 7528. **R. at 6 (1-14)**; App. Br. at 10-14; 38 C.F.R. § 4.115b, DC 7528; *see also* 38 C.F.R. § 3.105(e). Consequently, the Board failed to address whether VA satisfied the requirements of 38 C.F.R. §§ 3.343 and 3.344 and otherwise did not make a finding about Mr. Foster's ability to function under the ordinary conditions of life and work. App. Br. at 16; *Faust v. W.*, 13 Vet. App. 342, 349 (2000); *Brown v. Brown*, 5 Vet. App. 413, 420-21 (1993). Moreover, even if Sections 3.343 and 3.344 do not apply to DC 7528, the Board still erred by failing to consider other applicable regulations, including 38 C.F.R. §§ 4.1, 4.2, 4.10, and 4.13. App. Br. at 12-13, 16; *see Brown*, 5 Vet. App. at 420-21 (noting that the Board must comply with "several general VA regulations applicable to all rating reductions regardless of whether" Section 3.344 applies to the reduction at issue) (citing 38 C.F.R. §§ 4.1, 4.2, 4.10, and 4.13).

The Secretary asserts that DC 7528 requires that the 100 percent rating ends once the four elements of DC 7528 have been satisfied, and therefore, "the Board did not err when it found that it was appropriate to discontinue the temporary convalescent rating and rate Appellant's prostate cancer on its residuals . . . ." Sec. Br. at 8-9. The Secretary requests that the Court "hold that *Rossiello* applies because DC 7528 contains temporal language that is like the language of the DC that the Court interpreted in *Rossiello*." Sec. Br. at 9-10; *Rossiello v. Principi*, 3 Vet. App. 430 (1992). While recognizing the critical difference

between DC 7528, which requires compliance with 38 C.F.R. § 3.105(e), and the regulation at issue in *Rossiello*, which did not, Sec. Br. at 11-12, the Secretary's argument rests on the notion that "section 3.105(e) operates independently of sections 3.343 and [3.344], and its application does not mean that those two regulations also apply." Sec. Br. at 12.

As Mr. Foster acknowledged, the Court's jurisprudence is not clear as to the applicability of the provisions of 38 C.F.R. §§ 3.343 and 3.344 in cases where there has been a reduction from a 100 percent evaluation for prostate cancer under DC 7528. App. Br. at 15-16; *see Green v. Nicholson*, 2006 U.S. App. Vet. Claims LEXIS 1345 at 11, 15, 21-22 (rejecting the Secretary's argument that Section 3.344 does not apply, reasoning that "because the requirements of § 3.105(e) must be followed in order for VA to assign a lower evaluation after assigning a 100% disability rating under DC 7528, the matter involved here is a rating reduction matter," and "[b]ecause § 3.344 is a regulation that is generally applicable, it must be considered by rating agencies when revising evaluations."); *but see Lee v. Shinseki*, 2014 U.S. Vet. App. Claims LEXIS 549 at 18-20.

But again, the Court's analysis in *Green* distinguished the regulation at issue in *Rossiello* from DC 7528, whereas the analysis in *Lee* did not account for DC 7528's compliance with 38 C.F.R. § 3.105(e). *Green*, *Lee*, *supra*. While these decisions are not precedent, and Mr. Foster cites to them only for the persuasive value of their logic and reasoning,[1] the Secretary does not address the Court's analysis in either case, to include the distinguishing feature of *Green*. *See Garner v. Tran*, __ Vet. App. __, slip. op. at 14-15,

[1] CAVC Rule 30(a).

18-5865 (Jan. 26, 2021) (noting that the Court surveyed single-judge decisions for "factors that the Court has considered relevant to this determination" where the legal issue presented had not been addressed in a precedential decision). Contrary to the Secretary's assertion that Section 3.105(e) "operates independently" of Sections 3.343 and 3.344, Sec. Br. at 12, the Court's analysis in *Green* indicates that *because* Section 3.105(e) must be followed prior to assigning a lower evaluation under DC 7528, the matter "is a rating reduction matter," triggering the duty to consider generally applicable regulations such as Sections 3.343 and 3.344. *Green*, *supra*. In turn, this analysis indicates that it is inconsequential that VA did not explicitly state that Sections 3.343 and 3.344 would apply when it amended DC 7528, as the Secretary suggests would be expected. *See* Sec. Br. at 11 ("there is no language in DC 7528 stating that 38 C.F.R. §§ 3.343 or 3.344 apply"); Sec. Br. at 12 ("when VA amended DC 7528 . . . it did not state that . . . sections 3.343 or 3.344 would apply"); Sec. Br. at 13 ("the Court should hold that the regulatory history does not show that VA intended to enact procedural requirements beyond those listed in DC 7528's plain language").

While the Secretary emphasizes on the similarity in language in certain provisions of 38 C.F.R. § 4.97, DC 6819 (1991) and C.F.R. § 4.115b, DC 7528, Sec. Br. at 10-11, the language relied upon by the Secretary is not the relevant language for purposes of determining whether the rating reduction regulations apply. Notably, when the Secretary amended DC 6819 to require that the provisions of 38 C.F.R. § 3.105 be followed, the Secretary explained that "the rule requires only an examination, not a reduction," six months following the cessation of treatment. 61 Fed. Reg. 46720 (Sept. 5, 1996). The

Secretary also notes that the Court "cited to *Rossiello* approvingly when discussing another similar diagnostic code for rating tongue cancer" in *Breland v. Wilkie*, 32 Vet. App. 360 (2020). Sec. Br. at 11. But DC 7343, the diagnostic code used to evaluate tongue cancer, as with the diagnostic code at issue in *Rossiello*, contains a temporal element, i.e., "[s]ix months after discontinuance of such treatment, *the appropriate disability rating shall be determined by* mandatory VA examination." 38 C.F.R. § 4.114, DC 7343 (emphasis added); *Breland*, 32 Vet. App. at 366-67. On the other hand, DC 7528 does not contain a temporal element because it states only that the 100 percent rating "shall continue with a mandatory VA examination at the expiration of six months" following cessation of treatment. 38 C.F.R. § 4.115b, DC 7528. Thus, DC 7528 mandates only a VA examination after six months, and while it reflects that VA *may* change the disability rating based upon that examination, it does not *automatically* require VA to determine the "appropriate disability rating" based on the examination. *Compare* 38 C.F.R. § 4.114, DC 7343 *with* 38 C.F.R. § 4.115b, DC 7528.

To the extent that the Secretary asserts that the addition of Section 3.105(e) to DC 7528 "does not eliminate *Rossiello's* holding[,]" Sec. Br. at 12, the Secretary misunderstands Mr. Foster's argument and the regulations on which he relies. *See* App. Br. at 12-13. The holding of *Rossiello* applied to the regulation in effect at the time and Mr. Foster is not requesting that the Court "eliminate *Rossiello's* holding." Sec. Br. at 12-13. Rather, *Rossiello* cannot necessarily apply to the Secretary's amendment to DC 7528, which, critically, explicitly states that "[a]ny change in evaluation based upon [the mandatory VA examination at the expiration of six months] or any subsequent examination

shall be subject to the provisions of Sec. 3.105(e) of this chapter." 38 C.F.R. § 4.115b, DC 7528; *see also* 38 C.F.R. § 3.105(e) (requiring specific procedures where the reduction in evaluation of a service-connected disability is considered warranted). While the Secretary requests that the Court "hold that the regulatory history does not show that VA intended to enact procedural requirements beyond those listed in DC 7528's plain language[,]" Sec. Br. at 13, the Court's focus is on the regulation's plain language, not its regulatory history; and moreover, the regulatory history quoted by the Secretary is not at issue here.

Contrary to the Secretary's assertion that "the total rating under DC 7528 is based on the length of treatment[,]" Sec. Br. at 13, DC 7528 is based on severity, in that there are ongoing "[m]alignant neoplasms of the genitourinary system." 38 C.F.R. § 4.115b, DC 7528. The language regarding length of treatment is in a "Note," not the criteria for a 100 percent evaluation. *Id.*; *see Brown,* 5 Vet. App. at 420-22; *see generally Sweat v. Shinseki,* 2010 U.S. App. Vet. Claims LEXIS 2481 at 6-8[2] (noting that the Board did not explain "whether the September 2003 VA examination . . . was adequate; whether it reflected an overall improvement in his condition; whether such improvement reflected an improvement in his ability to function; or whether his improved condition was likely to continue. This analysis is required in all rating reduction cases.") (citing *Brown,* 5 Vet. App. at 421).

Therefore, the Board erred by finding that "the rating reduction in this case was procedural in nature and by operation of law[,]" **R. at 7 (1-14)**, and by failing to address

[2] Pursuant to CAVC Rule 30(a), Mr. Foster cites to this nonprecedential decision only for the persuasive value of its logic and reasoning.

the pertinent regulations applicable to all rating reductions. These errors prejudice Mr. Foster because if the Board had addressed the rating reduction regulations, it would have found that the July 2017 VA examination is less full and complete than the prior examinations warranting a 100 percent evaluation. *See* App. Br. at 16-17; **R. at 460-61 (459-64)** ("No records were reviewed"); **R. at 744-45 (744-47)** (October 2016 VA examination report showing prostate cancer in active status and current treatment with "[a]ndrogen deprivation therapy (hormonal therapy)"); **R. at 335 (332-35)** (May 2017 VA treatment record noting urinary incontinence within the last 24 months which persisted for over a month); **R. at 888-89 (887-90)** (October 2015 VA examination report showing that voiding dysfunction causes signs or symptoms of obstructed voiding); 38 C.F.R. § 3.105(e); *see also Simon v. Wilkie*, 30 Vet. App. 403, 409 (2018) ("when a new examination shows improvement, VA must review the entire record of medical evidence 'to ascertain whether the recent examination is full and complete' . . . [if it] is 'less full and complete than those on which payments were authorized . . . it will not be used as a basis of reduction.'"); 38 C.F.R. § 3.344(a) ("the rating agency will consider whether the evidence makes it reasonably certain that the improvement will be maintained under the ordinary conditions of life."); *Simmons v. Wilkie*, 30 Vet. App. 267, 282 (2018).

Because the Board failed to observe and address the applicable rating reduction regulations, the decision on appeal should be set aside as not in accordance with the law, and because VA bears the burden to justify the reduction of Mr. Foster's disability rating, but did not meet its burden, reversal is the appropriate remedy. *Hayes v. Brown*, 9 Vet. App. 67, 73 (1996); *Kitchens v. Brown*, 7 Vet. App. 320, 325 (1995); *Dofflemyer*, 2 Vet.

App. at 281-82; *Brown*, 5 Vet. App. at 420-22; *Schafrath v. Derwinski*, 1 Vet. App. 589 (1991).

II. The Secretary has failed to show that the Board provided an adequate statement of reasons or bases.

Mr. Foster also argued, in the alternative to the errors discussed *supra*, Part I, that the Board failed to provide adequate reasons or bases as to how the July 2017 VA examiner's findings accurately account for Mr. Foster's medical history and otherwise fully inform the Board as to his current disability picture. *See* App. Br. at 16-17, 20-21 (citing **R. at 335 (332-35)** (May 2017 VA treatment record noting urinary incontinence within the last 24 months which persisted for over a month); **R. at 153 (152-55)** (medication prescribed for bladder spasms); **R. at 744-45 (744-47)** (October 2016 VA examination report)); *Barr v. Nicholson*, 21 Vet. App. 303, 311 (2007); *Wise v. Shinseki*, 26 Vet. App. 517, 529 (2014). In this regard, the July 2017 VA examination report was not based on review of any evidence of record. **R. at 460 (459-64)**.

The Secretary asserts that the Court should reject Mr. Foster's argument "that the July 2017 examination report is not adequate to rate his residuals because the examiner did not discuss his treatment records." Sec. Br. at 19-20; *see also* Sec. Br. at 15-17. To clarify, Mr. Foster argued that the Board's reasons or bases are inadequate because it failed to address whether the July 2017 VA examination is adequate. App. Br. at 16-17, 20-21. The Secretary acknowledges that the July 2017 VA examiner "did not discuss Appellant's ADT," but reasons that this "failure . . . is at most harmless error" because "there is no evidence that he received ADT after September 2016[.]" Sec. Br. at 19. In the very next

sentence, the Secretary also acknowledges that the October 2016 VA examination report states that Mr. Foster's prostate cancer "was active in October 2016," *id*., but the Secretary fails to address the portion of the report noting that Mr. Foster's androgen deprivation therapy was "current" as of October 2016. **R. at 744-45 (744-47)**. Therefore, contrary to the Secretary's assertion, there *is* evidence that Mr. Foster received ADT after September 2016, and this evidence contradicts the July 2017 VA examiner's finding that prostate cancer "treatment" was completed in 2015. **R. at 461 (459-64)**.

While the Secretary argues that Mr. Foster did not show how the October 2016 VA examination report "undermines the July 2017 examiner's opinion that Appellant's prostate cancer was not active in July 2017[,]" Sec. Br. at 19, the July 2017 VA examination report explicitly states that "[n]o records were reviewed," thereby demonstrating that the basis for the examiner's finding that Mr. Foster's prostate cancer was in remission is, at best, unclear. **R. at 460-61 (459-64)**; *see* App. Br. at 16-17. As Mr. Foster explained, had the July 2017 VA examiner performed a review of Mr. Foster's medical records, the examiner would have addressed the October 2016 VA examination report showing that Mr. Foster's prostate cancer was in active status and that he was currently being treated with "[a]ndrogen deprivation therapy (hormonal therapy)." **R. at 744-45 (744-47)**; *Barr*, 21 Vet. App. at 311; *Stefl v. Nicholson*, 21 Vet. App. 120, 123-25 (2007). Moreover, because the July 2017 VA examiner did not address treatment records showing urinary incontinence and bladder spasms requiring medication, **R. at 335 (332-35); R. at 153 (152-55)**, the Board failed to explain how the examination report adequately address whether

Mr. Foster's prostate cancer has improved under ordinary conditions of life or otherwise cause functional impairment. *See Simon* and *Kitchens*, *supra*.

III. The Secretary agrees that remand is warranted because the Board failed to provide adequate reasons or bases to support its finding that a 10 percent rating is proper.

In the principal brief, Mr. Foster argued that the Board failed to provide an adequate statement of reasons or bases to support its finding that he is properly rated at 10 percent for his prostate cancer residuals because its credibility finding is contradicted by medical evidence of record. App. Br. at 18-20 (citing **R. at 390-91; R. at 245 (245-46); R. at 153 (152-55)**); **R. at 8-10 (1-14)**; 38 C.F.R. § 4.115a. Additionally, with respect to the part of the Board's decision denying entitlement to restoration of special monthly compensation ("SMC"), **R. at 11 (1-14)**, Mr. Foster argued that remand of this issue is warranted because it is inextricably intertwined with the rating for prostate cancer. App. Br. at 21; *Tyrues v. Shinseki*, 23 Vet. App. 166, 177 (2009) (en banc); 38 U.S.C. § 1114(s); 38 C.F.R. § 3.350(i).

The Secretary agrees with Mr. Foster that vacatur and remand of the Board's decision is warranted because the Board failed to provide adequate reasons or bases to support its credibility finding. *See* Sec. Br. at 17-19 ("However, the Board's credibility finding was based on the lack of evidence of 'incontinence,' which the record contradicts."). The Secretary also agrees with Mr. Foster that the issue of entitlement to restoration of SMC is inextricably intertwined with the prostate cancer rating, and thus, that "the Court should remand the issue of SMC[.]" Sec. Br. at 21. Therefore, at a

minimum, the Court should vacate the Board's decision and remand the appeal for readjudication based on these concessions.

CONCLUSION

Therefore, Mr. Foster respectfully requests that the Board's decision of September 5, 2019, be reversed and that the 100 percent disability rating be restored, or that the Court vacate the Board's decision and remand for the reasons and under the authorities discussed in his briefs.

Respectfully submitted,

March 17, 2021

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