No. 2019-1769

In the

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR CLAIMANT-APPELLEE,

Re

ROBERT M. SELLERS,
Claimant-Appellee,

versus

ROBERT L. WILKIE,
Secretary of Veterans Affairs,
Respondent-Appellant.

Appeal from the United States Court of Appeals for Veterans Claims in Case No. 16-2993, Chief Judge Davis and Judges Schoelen and Allen.

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

SELLERS V. DVA, No. 2019-1769

Certificate of Interest

Counsel for the Claimant-Appellee certifies the following:

1. The full name of every party or *amicus* represented by me is:

   Robert M. Sellers.

2. The name of the real party in interest (include any real party in interest NOT identified in Question 3) represented by me is:

   Robert M. Sellers.

3. Parent corporations and any publicly held companies that own 10 percent or more of the stock of the party:

   None.

4. The names of all law firms and the partners or associates that appeared for the party or *amicus* now represented by me in the trial court or agency or are expected to appear in this Court (and who have not or will not enter an appearance in this case) are:

   None

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be affected by this court's decision in the pending appeal. *See* Fed.Cir.R. 47.4(a)(5) and 47.5(b). (The parties should attach continuation pages as necessary):

None

Date: January 3, 2020

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Statement of Related Cases

Pursuant to Federal Circuit Rule 47.5, counsel for claimant-appellee is unaware of any other appeal in or from this action that previously was before this Court or any other appellate court under the same or similar title.

Undersigned counsel further states that he is unaware of any cases pending before this Court which would directly affect this Court's decision in this appeal.

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Statement of Jurisdiction

Mr. Sellers agrees with the Secretary that this appeal falls within the exception to the finality rule announced by this Court in *Williams v. Principi*, 275 F.3d 1361, 1364 (Fed. Cir. 2002). The decision to remand by the U.S. Court of Appeals for Veterans Claims ("Veterans Court") clearly and finally decides a legal issue, adversely affects the Secretary, and there is a substantial risk that the remand proceeding may moot the issue. *See id.*

Statement of the Issue

Whether the Veterans Court applied the controlling jurisprudence of this Court in determining that Mr. Sellers had reasonably raised a claim for service connection for his psychiatric disorders based on his service medical records?

Statement of the Case

The Secretary of Veterans Affairs, Robert L. Wilkie, has appealed the Veterans Court decision in *Sellers v. Wilkie*, 30 Vet.App. 157 (2018), which, in pertinent part, held, (1) a claimant's general statement of intent to seek benefits, coupled with a reasonably identifiable in-service medical diagnosis reflected in service treatment records in the Department of Veterans Affairs' ("VA") possession prior to the VA regional office ("RO") making a decision on the claim, may be sufficient to constitute a claim for benefits; (2) whether an in-service diagnosis in a claimant's service records is reasonably identifiable by VA adjudicators at the time the claimant seeks benefits or prior to the RO's deciding the claim, constitutes a factual determination for the

Board to address; and (3) respondent/appellant's argument concerning the higher initial rating for his service-connected major depressive disorder ("MDD") is inextricably intertwined with the issue of the effective date for MDD and the Court would not address them further. Appx1-2 and Appx7.[1]

Course of Proceedings Below

A. Introduction

This appeal involves the distinction at law between a formal claim for VA benefits and the procedure and requirements of an informal claim for VA benefits as previously set out in the Secretary's prior version of 38 C.F.R. § 3.155(a). The Secretary's regulations also include a statement of policy in the provisions of 38 C.F.R. § 3.103(a) which explicitly provides that it is the obligation of VA to assist a claimant in developing the facts pertinent to the claim and to render a decision which grants every benefit that can be supported in law while protecting the interests of the Government. This obligation is triggered by the Secretary's receipt, in this case, of a completed VA Form 21-526. Whereas, the prior version of the provisions of 38 C.F.R. § 3.155(a) defined an informal claim as any communication or action indicating an intent to apply for one or more benefits under the laws administered by the Secretary and required the Secretary upon receipt to provide a claimant with an appropriate VA form to complete the claim.

[1] References to the joint appendix to be filed in this case by the Appellant are cited herein as "Appx___."

Thus, in accordance with the prior (pre-2015) version of § 3.155(a) informal claims are filed in anticipation of the filing of a formal claim. In other words, the filing of a VA Form 21-526, which "formalizes" the claim, encompasses the informal claim and protects the effective date from the date of the informal claim. A formal claim, in this case made through the claimant's filing of a VA Form 21-526, negates the need for the filing of an informal claim under the prior version of § 3.155(a). In this case, it is the Secretary's obligation to assist a claimant in developing the facts pertinent to a formal claim which controls.

As a result, the reliance of the Veterans Court on the pleading requirements of the prior version of 38 C.F.R. § 3.155(a) to trigger the Secretary's obligation to develop the reasonably raised claim for his mental disorder was misplaced. The decision of the Veterans Court should be affirmed but modified to clarify that it is not the provisions of the prior version of § 3.155(a) which triggered the Secretary's duty to develop Mr. Sellers's reasonably raised claim for his mental disorder. Rather, because Mr. Seller's duty had already been fulfilled when VA received his completed VA Form 21-526 it was the provisions of § 3.103(a) which obligated the Secretary to assist Mr. Sellers in developing the facts pertinent to all claims raised by his filing of a completed VA Form 21-526. This assistance included the Secretary's obligation to review all relevant evidence, to include his service treatment records, and to render a decision which grants every benefit that can be supported in law while protecting the interests of the Government.

B. The Veterans Court Decision.

In its decision now on appeal the Veterans Court began its legal analysis in the case with the following discussion:

> Generally, the effective date of a claim for benefits is the date VA received the claim or the date on which entitlement arose, whichever is later. *See* 38 U.S.C. § 5110(a). The elements of any claim, formal or informal,[3] are "(1) an intent to apply for benefits, (2) an identification of the benefits sought, and (3) a communication in writing[.]" *Brokowski v. Shinseki*, 23 Vet.App. 79, 84 (2009); *see also MacPhee v. Nicholson*, 459 F.3d 1323, 1325 (Fed. Cir. 2006); *Criswell v. Nicholson*, 20 Vet.App. 501, 504 (2006); *Brannon v. West*, 12 Vet.App. 32, 35 (1998). A veteran's identification of the benefits sought does "not require any technical precision" and VA "must fully and sympathetically develop a veteran's claim to its optimum before reaching the claim on its merits." *Brokowski*, 23 Vet.App. at 85; *see also Ingram v. Nicholson*, 21 Vet.App. 232, 256-57 (2007). In *Brokowski*, the Court held that VA "is not required to anticipate a claim for benefits for disabilities *that have not been identified in the record by medical professions* or by competent lay evidence at the time a claimant files a claim or during the claim's development." 23 Vet.App. at 88 (emphasis added). But "the Board is not required to conjure up issues that were not raised by the appellant." *Brannon*, 12 Vet.App. at 35; *see also Criswell*, 20 Vet.App. at 503-04 (same).

Sellers, 30 Vet.App. at 162. The footnote to this discussion added:

> [3] As of September 25, 2015, VA no longer recognizes informal claims. *See* 79 Fed. Reg. 57,660-01 (2015). In their place, VA recognizes "an intent to file a claim," which may be submitted electronically, on a prescribed intent-to-file-a-claim form, or through an oral communication to certain VA employees that is later recorded in writing. 38 C.F.R. §§ 3.155(b)(1)(i)-(iii) (2018).

The Veterans Court employment of the holding in *Brokowski* for how VA

should identify claims is misplaced. The holding in *Brokowski* that VA is not required to anticipate a claim for benefits was premised upon the prior version of § 3.155(a)'s requirement that the benefit sought must be identified. In Mr. Sellers case, unlike in *Brokowski*, VA was required to anticipate all claims reasonably raised by the evidence in a claim for service-connected compensation made using a VA Form 21-526. The Veterans Court characterized the issue to be decided by the panel as "to determine whether a claimant's general statement of intent to seek benefits [in his initial application and not in an informal claim], combined with in-service medical diagnoses documented in service treatment records, **is sufficient to constitute a valid claim for benefits**." *See Sellers*, 30 Vet.App. at 160-161 (emphasis added).

Summary of the Argument

The Secretary's choice to appeal the Veterans Court's decision in Mr. Seller's case contradicts the VA's own statement of policy as set out in 38 C.F.R. § 3.103(a). Section 3.103(a) provides that VA is obligated to assist a claimant in developing the facts pertinent to the claim. Further, this regulation also requires VA to render a decision which grants every benefit that can be supported in law while protecting the interests of the Government. Consistent with the VA's own policy described in § 3.103(a), the Veterans Court in the decision on appeal determined that VA was bound by this policy. That is, upon receipt of an initial application for VA benefits, the Secretary must review all of the veteran's service treatment records to determine whether a claim for service-connected compensation is reasonably raised by this evidence regardless of whether the veteran has identified a specific or particular

disability. The position taken by the Secretary in his opening brief seeks permission from this Court to evade his own published policies and obligations under § 3.103(a) and the controlling jurisprudence of this Court.

The Secretary's complaint with the decision on appeal is that there is no statute or regulation requiring VA to search service records for the purpose of adding to Mr. Sellers's claim unrelated diagnoses he did not explicitly identify on his formal application. The Secretary is both right and wrong in this complaint. He is correct that there is no statute or regulation that requires him to search a claimant's service records. However, he is incorrect regarding what this Court's jurisprudence requires of him, as well as the jurisprudence of the Veterans Court, concerning "diagnoses" that are not explicitly identified on an application for VA benefits.

Overlooked or misunderstood by the Secretary is that an application for VA benefits on a prescribed form is not equivalent to a claim reasonably raised by the record or by a claimant. This Court has consistently held that *pro se* filings must be read liberally by the Secretary. The Secretary's position in this appeal relies upon his regulatory elimination of informal claims to permit VA to now read *pro se* filings in a narrow fashion adverse to claimants. The Secretary has misread, as well as reads into the Veterans Court decision the imposition of burdens beyond those which exist at law. The decision on appeal does nothing more than require the Secretary to do the job that Congress has always instructed him to do.

Mr. Seller agrees that his case is distinguishable on crucial facts from the facts in this Court's recent decision in *Shea*. Nonetheless, both cases rely on the Secretary's

existing obligations imposed by Congress and the jurisprudence of both this Court as and the Veterans Court. The guidance provided by the Veterans Court to the Board in this case is neither arbitrary nor an unworkable new rule. The guidance provided was in accord with the Secretary's policy statement describing his obligation under both the provisions of 38 C.F.R. § 3.103(a) and the jurisprudence of this Court.

Arguments

I.

The Secretary's appeal seeks to evade his own statement of policy in 38 C.F.R. § 3.103(a) and the jurisprudence of this Court.

The Secretary, since at least 1972, has had a regulation which provides the following statement of policy:

> Every claimant has the right to written notice of the decision made on his or her claim, the right to a hearing, and the right of representation. **Proceedings before VA are ex parte in nature, and it is the obligation of VA to assist a claimant in developing the facts pertinent to the claim and to render a decision which grants every benefit that can be supported in law while protecting the interests of the Government. The provisions of this section apply to all claims for benefits and relief, and decisions thereon, within the purview of this part 3**.

See 37 Fed.Reg. 14780 (July 25, 1972) (emphasis added). This unambiguous statement of policy requires in the context of an initial application for service- connected compensation that VA assist a claimant in developing the facts pertinent to such a claim and obtain and review all of the veteran's service records. Only by doing so can the Secretary "render a decision which grants every benefit that can be supported in law while protecting the interests of the Government." *Id.*

This Court in *Hodge v. West*, 155 F.3d 1356, 1362-63 (Fed. Cir. 1998), quoted H.R. Rep. No. 100-963, at 13 (1988), reprinted in 1988 U.S.C.C.A.N. 5782, 5794-95), as the clear expression of Congressional intent that the Secretary "'fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits.'" The Veterans Court has concluded that it is axiomatic that a record must be properly developed before a claim can legitimately be denied. *See Douglas v. Shinseki*, 23 Vet.App. 19, 22 (2009) ("[T]he duty to properly develop a claim is inherent in the responsibilities of the Secretary to execute and administer the laws applicable to the Department of Veterans Affairs."). In the same vein, this Court in *Skoczen v. Shinseki*, 564 F.3d 1319, 1329 (Fed. Cir. 2009), also observed that it is the Secretary's "primary responsibility of obtaining the evidence it reasonably can to substantiate a veteran's claim for benefits." In light of this jurisprudence, the Secretary's assertion in his brief that there is no statute or regulation which requires VA to search service records and add to Mr. Sellers's claim any unrelated diagnoses he did not explicitly identify on his formal application is simply wrong. *See* Secretary's Brief at 10-23 (hereinafter cited to as "Sec.Brf. at xx.").

A. An application for benefits from VA on a prescribed form is not equivalent to a claim "reasonably raised" by the record or by a claimant.

The Secretary essentially asserts that a claim reasonably raised by the record or by a claimant must comply with the requirement that an application for benefits must always be presented on the form prescribed by VA. The Secretary states the thesis for this argument as follows: "Under The Governing Law, Claimants Must Present

Claims In Accordance With VA's Prescribed Form, Which Has Always Required The Claimant To Identify The Nature Of The Conditions Subject To The Claim." Sec.Brf. at 11-13. The Secretary's requirement in regulation that a claimant must always present claims on VA prescribed forms, so as to precisely identify the nature of the conditions subject to a claim eviscerates the notion that the VA must liberally construe a claimant's submissions to identify reasonably raised claims. Therefore, the Secretary's argument must fail. Requiring a claimant to use a "prescribed form" in no way relieves the Secretary of his obligation to assist the claimant in developing the facts pertinent to the claim and to render a decision which grants every benefit that can be supported in law while protecting the interests of the Government. For the same reasons, neither does VA's use of prescribed forms, which require identification of the nature of the conditions subject to a claim, relieve the Secretary of his obligation to render his decisions in accordance with the jurisprudence of this Court and the Veterans Court.

The Secretary's reliance on this Court's decision in *Fleshman v. West*, 138 F.3d 1429 (Fed. Cir. 1998), also is misplaced. This Court's holding in *Fleshman* was to affirm the determination of the Veterans Court that an application for benefits not made "in the form prescribed by the Secretary," as required by 38 U.S.C. § 5101(a), could not have an effect on establishing an earlier entitlement date for receipt of VA benefits. Thus, the holding in *Fleshman* does not support the Secretary's assertion in Mr. Seller's case that there is no regulation to require VA to search service records to identify and add diagnoses to his claim that he did not identify on his formal

application. The same is true for the Secretary's reliance on this Court's decision in *Rodriguez v. West*, 189 F.3d 1351, 1353 (Fed. Cir. 1999).

Likewise the Secretary's reliance on the provisions of 38 U.S.C. § 5107(a) as support for his argument also is misplaced. Contrary to the Secretary's assertions, the decision on appeal does not relieve Mr. Sellers or any other claimant of the responsibility to present and support a claim for VA benefits. The decision below merely requires the Secretary to comply with his own statement of policy in § 3.103(a), to act in accordance with the intent of Congress, and to apply the law as interpreted by this Court and the Veterans Court. The decision below does not relieve claimants from their responsibility to file claims on the forms prescribed by the Secretary. Clearly misunderstood by the Secretary is that when VA receives an application for benefits from a claimant on a VA prescribed form, as occurred in this matter, he always is subject to the obligation to review all the service records in the case to determine whether this evidence reasonably raises a claim for benefits not otherwise identified in the claimant's formal application on the prescribed VA Form 21-526.

Further, the Secretary also overlooked ~~is~~ this Court's holding in *Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009), which serves to further undermine his arguments. In *Robinson*, this Court noted:

> In various decisions we have made clear that the Board has a special obligation to read *pro se* filings liberally. *See, e.g., Comer v. Peake*, 552 F.3d 1362, 1368 (Fed. Cir.2009); *Andrews*, 421 F.3d at 1282-84; *Roberson v. Principi*, 251 F.3d 1378, 1380-84 (Fed. Cir. 2001). This obligation applies both to proceedings appealing a decision of the RO to the

> Board ("direct appeals") and to proceedings alleging a clear and unmistakable error ("CUE") in a final decision of the Board. *See Comer*, 552 F.3d at 1367-68; *Andrews*, 421 F.3d at 1282-84. In *Andrews*, however, we held that this obligation does not extend to filings by counsel in CUE proceedings. 421 F.3d at 1283-84. **This case presents the question whether the obligation to liberally read filings applies to filings by counsel in the direct appeal phase of proceedings before the Board. We hold that the Board must read such filings liberally because this obligation is expressly imposed by the VA's own regulations**.

See Robinson, 557 F.3d at 1358-59 (emphasis added). In this case, Mr. Sellers filed a claim on the prescribed VA Form 21-256. Appx137-140. In accordance with this Court's decision in *Robinson* the Secretary was obligated to read this filing liberally, and not narrowly, as he claims in his brief.

Furthermore, in accordance with this Court's decision in *Szemraj v. Principi*, 357 F.3d 1370, 1373 (Fed. Cir. 2004), this Court's decision in *Roberson v. Principi*, 251 F.3d 1378, 1384 (Fed. Cir. 2001), was not "limited to its particular facts." This Court explained in *Szemraj* that "*Roberson* requires, with respect to all *pro se* pleadings, that VA give a sympathetic reading to the veteran's filings by 'determin[ing] all potential claims raised by the evidence, applying all relevant laws and regulations.'" *Id.* (quoting *Roberson* at 1384). Thus, in this case, as a matter of law, the Secretary is required with respect to all *pro se* pleadings to give a sympathetic reading to the veteran's filings by determining all potential claims raised by the evidence, and apply all relevant laws and regulations. Specifically, VA was required to read and review all of Mr. Sellers's service treatment records because only by doing so could the Secretary determine "all potential claims raised by the evidence."

Contrary to the foregoing case law, and the clear mandate that the Secretary must liberally construe the veteran's submissions, the Secretary would have this Court rule that the law and the claimant-friendly benefits system are of no consequence. The Secretary makes clear this goal because through his appeal in Mr. Seller's case he seeks permission from this Court to evade these obligations simply because Mr. Seller's did not "identify" in his VA Form 21-526 the specific condition of an acquired psychiatric disability. The Secretary's efforts to achieve this outcome in this appeal must be soundly rejected by this Court because it is at odds with this Court's jurisprudence and the pro-claimant, veteran friendly adjudication system intended by Congress.

B. This Court has not upheld any purported longstanding position on claim identification.

In further support of his effort to secure reversal of the Veterans Court's decision the Secretary asserts the unfounded contention that "This Court Has Upheld VA's Long-Standing Position On Claim Identification." Sec.Brf. at 13-18. Quite to the contrary, this Court in its rulemaking decision in *Veterans Justice Grp. v. Sec'y of Veterans Affairs*, 818 F.3d 1336 (Fed. Cir. 2016), did not uphold VA's position on claim identification. Rather, this Court's holding in *Veterans Justice Grp.* was far more limited. This Court narrowly held that the Final Rule as published by the Secretary was valid because it accorded with applicable rulemaking procedures and was not arbitrary, capricious, an abuse of discretion, or otherwise contrary to law. This Court did not reach, and thus did not uphold, VA's position on claim identification. In fact a word search of the Court's opinion in *Veterans Justice Grp.* for the words "claim" and

"identification" found the word "claim" used once in the opening paragraph but nowhere else in the decision. The word "identification", which is essential to the Secretary's argument, was not found at all.

C. Claim identification is not required where an additional claim has been reasonably raised by the evidence.

The Secretary's arguments also include the assertion that "VA's Informal Claims Regulation Has Never Obviated The Requirement For A Formal Application Identifying The Nature Of The Conditions Being Claimed." Sec.Brf. at 18-23. The need for a claimant to identify the benefit or benefits sought on an application for service-connected compensation is a separate requirement from the Secretary's obligation under the provisions of 38 C.F.R. § 3.103(a). Under § 3.103(a), the Secretary is obligated to assist a claimant in developing the facts pertinent to the claim and to render a decision which grants every benefit that can be supported in law while protecting the interests of the Government. Therefore the Secretary's premise that the claimant must always explicitly identify the claimed disability is flawed. There is no claim identification requirement when a claimant has filed a complete claim on a prescribed VA form. Inherent to the VA claims process is that once VA has received an application for service-connected compensation, as occurred in this case, the Secretary has a duty to fully develop any filing made by a *pro se* veteran by determining all potential claims raised by the evidence. *See Harris v. Shinseki*, 704 F.3d 946, 948 (Fed. Cir. 2013). Mr. Seller's February 1996 application on a VA Form 21-526, *see* Appx137-140, was a filing by a *pro se* veteran. Mr. Sellers served on active duty in the U.S. Navy from April 1964 to February 1969, and in the U.S. Army from January

1981 to February 1996. Appx2. Mr. Sellers's application was filed in March 1996, within one year of his discharge from active duty service. As a result, there was no informal claim ever filed and the provisions of 38 C.F.R. § 3.155(a) were never implicated.[2] *See* 38 U.S.C. § 5110(b)(1) (The effective date of an award of disability compensation to a veteran shall be the day following the date of the veteran's discharge or release if application therefor is received within one year from such date of discharge or release.).

This Court in *Shea*, *supra.*, citing *Reeves v. Shinseki*, 682 F.3d 988, 993 (Fed. Cir. 2012) and *Rodriguez v. West*, 189 F.3d 1351, 1353–54 (Fed. Cir. 1999), indicated that "any communication can qualify as an informal claim if it" contains the requisite factors to make it so. These factors are that the informal claim "(1) is in writing; (2) indicates an intent to apply for veterans' benefits; and (3) identifies the particular benefits sought." *Shea, supra.* In fact, the prior version of § 3.155(a) discusses these same requirements as the predicate for mandatory action to be undertaken by the Secretary. The plain language of the prior version of § 3.155(a) unambiguously mandates as follows:

> **Upon receipt of an informal claim, if a formal claim has not been filed, an application form will be forwarded to the claimant for execution. If received**

[2] As the Veterans Court noted in footnote 3 of its decision, Appx3, as of September 25, 2015, VA no longer recognizes informal claims. *See* 79 Fed. Reg. 57,660-01 (2015). In their place, VA recognizes "an intent to file a claim," which may be submitted electronically, on a prescribed intent-to-file-a-claim form, or through an oral communication to certain VA employees that is later recorded in writing. 38 C.F.R. §§ 3.155(b)(1)(i)-(iii) (2018). Nevertheless, at all times pertinent to this matter the prior version of 38 C.F.R. § 3.155(a) was in effect.

> **within 1 year from the date it was sent to the claimant, it will be considered filed as of the date of receipt of the informal claim**.

See 38 C.F.R. § 3.155(a) (2014) (emphasis added).

Therefore, when § 3.155(a) is read as a whole, it is clear that when the Secretary receives "[a]ny communication or action, indicating an intent to apply for one or more benefits," the Secretary must, "if a formal claim has not been filed", forward to the claimant an application for execution. *See Jones v. Wilkie*, 918 F.3d 922 (2019). Based on the record of proceedings in this matter, on March 12, 1996, VA processed Mr. Sellers's application on a VA Form 21-526. Appx137. Consequently, since a formal application had been received by VA, no application would have or should have been sent to Mr. Sellers. In this circumstance the prior version of § 3.155(a) had no role in the case. Thus, the Secretary is correct as he argues in his brief that the claim identification requirement in a formal application, in this matter a VA Form 21-526, is not obviated by his informal claim regulation.

However, that is not the end of the matter. The Secretary's reliance on his assertion that there is a long-standing claim identification requirement to trigger his obligation to examine a veteran's service records to identify reasonably raised claims is unavailing and must be rejected by this Court. As has been discussed herein, such a constraint or limitation on the Secretary's obligation to fully and sympathetically develop the record to its optimum before deciding a claim on its merits is contrary to his own statement of policy in § 3.103(a), the clear intent of Congress, and the jurisprudence of this Court. Therefore, assuming without conceding that it has been

a long-standing practice of VA to limit its development of an application for benefits to only those conditions explicitly identified by the veteran, such a practice is not in accordance with law. The Secretary's statement of policy in § 3.103(a), the clear intent of Congress, and the jurisprudence of this Court require a more robust development of all reasonably raised claims whether identified as such or not.

Despite the foregoing, the Secretary asserts:

> The example of Mr. Sellers's claim underscores the reasonableness of VA's long-standing approach, and the unreasonableness of the Veterans Court's new rule.

Sec.Brf. at 15. It is evident by this assertion that the Secretary misapprehends the scope of his own statement of policy in § 3.103(a). To reiterate, the Secretary's statement of policy provides in pertinent part:

> Proceedings before VA are ex parte in nature, and it is the obligation of VA to assist a claimant in developing the facts pertinent to the claim and to render a decision which grants every benefit that can be supported in law while protecting the interests of the Government. The provisions of this section apply to all claims for benefits and relief, and decisions thereon, within the purview of this part 3.

38 C.F.R. § 3.103(a). Thus, the Secretary by his own regulation has imposed on himself the "obligation of VA to assist a claimant in developing the facts pertinent to the claim." In the context of an initial application for service-connected compensation submitted on a VA Form 21-526, as in this case, the Secretary's receipt of Mr. Sellers's application triggered this "obligation of VA to assist a claimant in developing the facts pertinent to the claim."

The Secretary correctly points out that Mr. Seller's application identified five

physical disabilities for which he sought compensation benefits. Sec.Brf. at 15. However, the Secretary is wrong to essentially assert that as a result of Mr. Sellers only identifying five disabilities on his application form that this "underscores the reasonableness of VA's long-standing approach." To the contrary, the Secretary fails to reconcile his purported "long-standing approach" with his self-imposed regulatory "obligation of VA to assist a claimant in developing the facts pertinent to the claim." More importantly, the actual effect of the Secretary's "long-standing approach" is to **limit** the "obligation of VA to assist a claimant in developing the facts pertinent to the claim." Nevertheless, the Secretary implicitly acknowledges that he must fully develop the five disabilities Mr. Seller's identified on the application form by obtaining and reviewing all of his service medical records pertaining to these five disabilities. Yet, incongruously, the Secretary asserts at the same time that VA need **not** read and review all of Mr. Sellers's service medical records **unless** he has first identified all potential disabilities for which he might be entitled to compensation. This position is untenable. The Secretary cannot have it both ways.

Indeed, such a practice by the Secretary is contrary to Congress's clarification of VA's duty to assist as codified in 38 U.S.C. 5103A.[3] In this statute, Congress made clear that

> The Secretary shall make reasonable efforts to assist a

[3] Prior to Congress's clarification and codification of the scope of the Secretary's duty to assist, the Veterans Court in *EF v. Derwinski*, 1 Vet. App. 324 (1991), held that the VA's statutory "duty to assist" extended to liberally reviewing the record, to include identifying issues raised in all documents or oral testimony submitted prior to the Board decision.

> claimant in obtaining evidence necessary to substantiate the claimant's claim for a benefit under a law administered by the Secretary.

38 U.S.C. 5103A(a)(1). In addition, Congress further made clear that

> In the case of a claim for disability compensation, the assistance provided by the Secretary under this section shall include obtaining the following records if relevant to the claim:
>
> The claimant's service medical records and, if the claimant has furnished the Secretary information sufficient to locate such records, other relevant records pertaining to the claimant's active military, naval, or air service that are held or maintained by a governmental entity.

38 U.S.C. 5103A(c)(1)(A).

The Secretary's "long-standing approach", which is contrary to the foregoing statutory provisions, appears to be premised on the assumption that if a potential disability or condition is not identified in a VA Form 21-526, such an omission relieves the Secretary from his obligation to review the veteran's service records. This would be so because the Secretary apparently believes records of an unidentified disability would not be relevant. Such a conclusion by the Secretary is mistaken. The Secretary's "long-standing approach" must be held invalid. Otherwise, contrary to the duty-to-assist statute, VA would be allowed to only review the veteran's service medical records for the disabilities explicitly identified in a VA Form 21-526. As well, alternatively, despite the fact that all the service medical records are obtained, the Secretary would also believe that he need not examine the evidence of record for any reasonably raised claim.

The Secretary's purported "long-standing approach" is completely at odds

with the Secretary's statutory "duty to assist", which this Court and the Veterans Court have held must extend to a liberal reading of the record in any application for service connection. This liberal reading of the record includes identifying any issues raised in all documents or oral testimony submitted prior to the Board decision. In this case, the issue of Mr. Sellers's entitlement to service-connected compensation for a mental disorder was raised in his service records which had been submitted prior to the Board's decision.

Nonetheless, the Secretary's appeal essentially demonstrates his willingness to disregard his statutory duty to assist Mr. Sellers. The Secretary articulates this position in the following passage in his opening brief:

> If Mr. Sellers also desired benefits for a mental health condition, he was required to inform VA, at least at a high level of generality, that such a condition was part of his claim, "as called for by the blocks on the application form." *Fleshman*, 138 F.3d at 1431-32. He could have done so with language as simple or general as "mental" or "stress." But he did not indicate any intent to pursue benefits for a mental health condition until 2009, Appx38; and no statute or regulation required VA in 1996 to search service records and add to the claim an unrelated condition that Mr. Sellers expressed no intent to claim. *See Veterans Justice Grp.*, 818 F.3d at 1356; Appx137 (listing with precision, twice, the five conditions for which he desired benefits).

Sec.Brf. at 16-17. Thus, it is obviously the position of the Secretary that the burden was on Mr. Sellers to inform VA—in some "high level of generality"—about what to look for in his service records. The Secretary's position is unsupportable. It essentially amounts to a **conditional** "duty to assist." Congress has never expressed its intent that the duty to assist is conditional upon a claimant first asking VA for

assistance with some "high level of generality."

The Secretary contends further that

> The Veterans Court bases its decision to the contrary entirely upon the language in block 40. But its decision, premised on no cited authority, presents more questions than answers. On what basis should the RO take such a statement in the remarks section to be a general request for any and all reasonably identifiable benefits? When a claimant specifically and repeatedly identifies certain disabilities, on what basis should the RO effectively assume that the veteran is incapable of identifying the basic specifics of his claims (despite having already done so)? And, as the Veterans Court never addresses in its opinion, what constitutes a general request for benefits to trigger a full record search for additional disabilities? Is it enough for a claimant to write "I am seeking benefits" somewhere on a formal application? What if such a statement were not on an application? The Veterans Court's decision replaces a requirement approved by this Court, which properly balances the duty to assist veterans with the need for fair and consistent standards, with an arbitrary invention.

Sec.Brf. at 17-18. Mr. Sellers acknowledges that the Veterans Court based its decision on the content of block 40 of his VA Form 21-526. Appx140. However, Mr. Sellers rejects the Secretary's assertion, in effect, that the Veterans Court was required to cite to some legal authority approved by the Secretary to justify its decision. Of course, such authority would include the Secretary's own statement of policy clearly articulated in the provisions of 38 C.F.R. § 3.103(a). Such an assertion not only indicates hubris on the part of the Secretary, it also suggests that the Secretary is unaware of his own regulatory statement of policy and as such must have it explicitly cited to him in order to be obligated by it.

An explanation for the lack of citation to authority by the Veterans Court may

have been its reliance upon its decision in Brokowski, supra. The holding in *Brokowski* relied upon the provisions of the prior version of 38 C.F.R. § 3.155(a). In Mr. Seller's case, on February 27, 2018, the Veterans Court issued its Order in response to the Secretary's unopposed motion for clarification of the issues to be addressed at oral argument. This Order reads as follows:

> The Court will grant the motion. While the parties should be prepared to address any issue argued in their briefs, the Court particularly directs the parties to discuss the following issues at oral argument:
>
> (1) Whether a general statement of intent to seek benefits for all service-connected disabilities is sufficient under *Brokowski v. Shinseki*, 23 Vet.App. 79 (2009), to constitute an informal claim; and
>
> (2) If it is, whether the statement of intent must be accompanied by the submission of pertinent medical records or may the informal claim be made without the submission of records when the records are already in VA's possession or soon will be.

Appx171. It is evident from the analysis provided by the Veterans Court that its decision on appeal relied almost entirely upon the holding in *Brokowski*.

That the Veterans Court did rely on its holding in *Brokowski* to reach its decision in Mr. Seller's case is shown by the following discussion in the decision on appeal:

> Generally, the effective date of a claim for benefits is the date VA received the claim or the date on which entitlement arose, whichever is later. *See* 38 U.S.C. § 5110(a). The elements of any claim, formal or informal,[] are "(1) an intent to apply for benefits, (2) an identification of the benefits sought, and (3) a communication in writing[.]" *Brokowski v. Shinseki*, 23 Vet.App. 79, 84 (2009);

> *see also MacPhee v. Nicholson*, 459 F.3d 1323, 1325 (Fed. Cir. 2006); *Criswell v. Nicholson*, 20 Vet.App. 501, 504 (2006); *Brannon v. West*, 12 Vet.App. 32, 35 (1998). A veteran's identification of the benefits sought does "not require any technical precision" and VA "must fully and sympathetically develop a veteran's claim to its optimum before reaching the claim on its merits." *Brokowski*, 23 Vet.App. at 85; *see also Ingram v. Nicholson*, 21 Vet.App. 232, 256-57 (2007). In *Brokowski*, the Court held that VA "is not required to anticipate a claim for benefits for disabilities *that have not been identified in the record by medical professions* or by competent lay evidence at the time a claimant files a claim or during the claim's development." 23 Vet.App. at 88 (emphasis added). But "the Board is not required to conjure up issues that were not raised by the appellant." *Brannon*, 12 Vet.App. at 35; *see also Criswell*, 20 Vet.App. at 503-04 (same).

See Appx3-4 (internal footnote omitted). The foregoing discussion reveals that the holding in the *Brokowski* case was essential to the Veterans Court's decision. However, in relying upon the above analysis, the Veterans Court made the correct decision, but for the wrong reasons. The reasoning of the Veterans Court was flawed for its reliance on *Brokowski*, as well as for its reliance on the provisions of the prior version of § 3.155(a). This is so because neither of these legal authorities actually applied to the disposition of Mr. Sellers's case.

The prior version of 38 C.F.R. § 3.155(a) and its requirement that the claimant ~~to~~ identify the benefit sought is not the prerequisite to trigger the Secretary's duty to develop and clarify the scope of a claim for service-connected compensation. Rather, as already established, *supra*, the Secretary's obligation to assist a claimant in developing the facts pertinent to the claim and to render a decision which grants every benefit that can be supported in law while protecting the interests of the

Government, derives from the provisions of 38 C.F.R. § 3.103(a). The Secretary's obligation pursuant to § 3.103(a) arises in Mr. Sellers's case because the Secretary had received a completed VA Form 21-526. The Secretary having received a completed VA Form 21-526, the need for VA's compliance with the provisions of the prior version of § 3.155(a) was negated. Why would Mr. Sellers communicate an intent to apply for one or more VA benefits under § 3.155(a), when he had already filed a completed VA Form 21-526? Thereafter, the Secretary having received from Mr. Sellers a completed VA Form 21-526, was obligated to assist him pursuant to § 3.103(a). This assistance included developing the facts pertinent to the claim and rendering a decision which granted him every benefit that could have been supported in law. And, only by obtaining and reading all of a veterans service treatment records to determine the presence of a reasonably raised claim could VA have granted Mr. Sellers entitlement to every benefit supported in law.

In both *Brokowski* and in this case, the Veterans Court's also relied upon its holding in *Ingram v. Nicholson*, 21 Vet.App. 232 (2007). Although there are references in *Ingram* to both an informal claim and § 3.155(a), that decision in substance rested upon this Court's jurisprudence regarding the pending claim doctrine. With respect to the pending claim doctrine, the Veterans Court concluded in *Ingram*

> . . . that the Federal Circuit has neither overruled the pending claim doctrine articulated in *Norris* nor created a general doctrine of *sub silentio* denials that supplants the pending claim doctrine. We conclude *Deshotel* and *Andrews* stand for the proposition that, where an RO decision discusses a claim in terms sufficient to put the claimant on notice that it was being considered and rejected, then it constitutes a denial of that claim even if the formal

> adjudicative language does not "specifically" deny that claim.

Ingram, 21 Vet.App. at 255. In this case, as in *Shea*, VA never discussed a claim which had been reasonably raised by the service records in any terms which would have put Mr. Sellers on notice that it was being considered and was rejected.

In *Ingram*, the Veterans Court also correctly noted the following:

> As the Federal Circuit explained in *Hodge v. West*, 155 F.3d 1356, 1362–63 (Fed.Cir.1998), when it announced the sympathetic-reading requirement based on the legislative history of the Veterans' Judicial Review Act and Veterans' Benefits Improvement Act of 1988, **Congress intended to preserve the nonadversarial nature of the VA system wherein the Secretary provides claimants with assistance in submitting and substantiating claims. Although there is no statutory or regulatory definition of "sympathetic reading," it is clear from the purpose of the doctrine that it includes a duty to apply some level of expertise in reading documents to recognize the existence of possible claims that an unsophisticated *pro se* claimant would not be expected to be able to articulate clearly**.

See id. (emphasis added). The foregoing passage from *Ingram* clearly articulates the correct underlying legal doctrine that controls the outcome of Mr. Seller's appeal, i.e., ~~is~~ the sympathetic-reading requirement and the Secretary's claim identification requirement. The sympathetic-reading requirement of *pro se* filings is premised on the presumption that the Secretary and his trained adjudicators possess a level of expertise in reading documents necessary to recognize the existence of possible claims. This presumption includes the assessment that an unsophisticated *pro se* claimant should not be expected by the Secretary to be able to identify or articulate clearly the existence of all possible claims in the record.

The Veterans Court in *Brokowski* also correctly cited to this Court's case law for the following proposition:

> Developing a claim to its optimum requires that, . . . , the Secretary give a sympathetic reading to a pro se veteran's filings by "determin[ing] all potential claims raised by the evidence, applying all relevant laws and regulations, regardless of whether the claim is specifically labeled as a claim for [a particular benefit]." *Roberson v. Principi*, 251 F.3d 1378, 1384 (Fed.Cir.2001); *Szemraj v. Principi*, 357 F.3d 1370, 1373 (Fed.Cir.2004); *see also Robinson v. Shinseki*, 557 F.3d 1355, 1361 (Fed.Cir.2009) (holding that "[i]n direct appeals, all filings must be read 'in a liberal manner' whether or not the veteran is represented").

Brokowski at 85. It is **this** reasoning that provides the legal basis upon which the decision of the Veterans Court in Mr. Sellers's case should have been anchored. By relying on *Brokowski* the Veterans Court in its decision on appeal correctly reasoned that

> A veteran's identification of the benefits sought does "not require any technical precision" and VA "must fully and sympathetically develop a veteran's claim to its optimum before reaching the claim on its merits."

Appx3-4. This is a correct statement of the law. Conversely, the Secretary's purported "long-standing approach" that would require claimants to explicitly identify claims, the failure of which the Secretary asserts would relieve him of his obligation to ~~and~~ sympathetically develop a veteran's claim to its optimum before reaching the claim on its merits, is not a correct statement of the law.

II.

The Secretary misapprehends his obligation to determine whether the evidence of record reasonably raises a claim.

The Secretary includes in his arguments the assertion that: "VA Must Read An Application Sympathetically, But It Is Not Required To Search Records And Raise Claims For A Claimant." *See* Sec.Brf. at 23-29. The Secretary is half right. The VA must read all applications for benefits sympathetically. However, the Secretary is wrong when he states that he is not required to search records and raise claims for a claimant that are reasonably identifiable from the record. To the contrary, in accordance with § 3.103(a) and the jurisprudence of this Court and the Veterans Court, he is required to obtain all of a veteran's service records pursuant to the statutory duty to assist **and** review them. It is incorrect that the Secretary is only obligated to read the veteran's service records for just those disabilities explicitly identified in the application for compensation. Absent the Secretary's review of the entire set of service records, how else would the Secretary be able to grant every benefit that can be supported in law? The Secretary's argument to the contrary ignores the rule of law established by this Court that the Secretary must determine all potential claims raised by the evidence, apply all relevant laws and regulations, regardless of whether the claim is specifically labeled as a claim for a particular benefit. *See Roberson, supra*; *Szemraj v. Principi*, 357 F.3d 1370, 1373 (Fed.Cir.2004); *see also Robinson, supra.*

Curiously, the Secretary cites to all of the cases from this Court upon which Mr. Sellers relies and upon which the Veterans Court should have relied. However, the Secretary relies upon these case for what Mr. Sellers believes are incorrect bases. The cases cited by the Secretary simply do not support the Secretary's position. Illustrative of this fact is the Secretary's representation in his opening brief as follows:

> In nonprecedential decisions, this Court has characterized the *Brokowski* holding on the nature of the identification expected from the claimant as "correctly interpreting this court's precedent," *Pacheco v. Shinseki*, 453 F. App'x 995, 997 (Fed. Cir. 2011) (nonprecedential). It has found no legal error in a standard requiring, in order to raise a claim for a medical problem, an application that "directly or indirectly indicates an intent to seek benefits based on that problem," *Lacoste*, 2019 U.S. App. LEXIS 17026, at *12.

Sec.Brf. at 27. The Secretary's representation of what occurred in the *Pacheco* case is misleading.

What this Court actually said in *Pacheco* was:

> The Veterans Court properly interpreted 38 C.F.R. § 3.155, which requires a claim for benefits to "identify the benefit sought." Contrary to Pacheco's contention, the Veterans Court did not require Pacheco to provide a specific medical diagnosis in order to identify the benefit sought. In fact, the Veterans Court explicitly acknowledged that a "claimant may satisfy [the identification] requirement by referring to a body part or system that is disabled or by describing symptoms of the disability." *Pacheco*, 2011 WL 835521 at *3 (quoting *Brokowski v. Shinseki*, 23 Vet.App. 79, 86 (Vet.App. 2009)). Thus, the Veterans Court correctly interpreted this court's precedent as requiring the VA to consider all potential claims supported by the evidence in the record, including claims which may be based on symptoms described by the veteran.

Pacheco, 453 F. App'x at 997. This Court indicated only that "the Veterans Court

[had] explicitly acknowledged that a 'claimant may satisfy [the identification] requirement [under the provisions of § 3.155] by referring to a body part or system that is disabled or by describing symptoms of the disability.' *Pacheco*, 2011 WL 835521 at *3 (quoting *Brokowski v. Shinseki*, 23 Vet.App. 79, 86 (Vet.App. 2009))." More significant was this Court's reiteration that the "Veterans Court correctly interpreted this court's precedent as requiring VA to consider **all** potential claims supported by the **evidence in the record**, including [and thus not limited to] claims which may be based on symptoms described the veteran." *See id.* (emphasis added).

The Secretary also misrepresented what this Court said in is decision in *Lacoste*, alleging it held the following:

> It has found no legal error in a standard requiring, in order to raise a claim for a medical problem, an application that "directly or indirectly indicates an intent to seek benefits based on that problem," *Lacoste*, 2019 U.S. App. LEXIS 17026, at *12.

Sec.Brf. at 27. What this Court actually said in *Lacoste* was:

> On the assumption described above, and the limited scope of the arguments presented, we affirm. We have explained on several occasions that *pro se* filings must be read liberally to determine what claims they contain. "[W]ith respect to all *pro se* pleadings," we have noted, VA must "give a sympathetic reading to the veteran's filings by 'determin[ing] all potential claims raised by the evidence, applying all relevant laws and regulations.'" *Szemraj v. Principi*, 357 F.3d 1370, 1373 (Fed. Cir. 2004) (quoting *Roberson v. Principi*, 251 F.3d 1378, 1384 (Fed. Cir. 2001)); *see also Moody v. Principi*, 360 F.3d 1306, 1310 (Fed. Cir. 2004); *Harris v. Shinseki*, 704 F.3d 946, 948 (Fed. Cir. 2013). But those cases are not in-consistent with a standard under which an application will not be read to include an informal claim for compensation for a problem unless the application, sympathetically read, directly or indirectly

> indicates an intent to seek benefits based on that problem. On the premise we have identified above about the scope of § 3.155 (1972), which was not challenged in this case, and where the formal application is the sole document asserted to contain the claim at issue, such an intent standard properly implements the language of "benefit sought" (emphasis added).

Lacoste v. Wilkie, 775 Fed.Appx. 1007, 1011-1012 (Fed. Cir. 2019). Because this Court's decision in *Lacoste* was based on the limited scope of the arguments presented it does not support the Secretary's position in this appeal.

The Secretary, as did the Veterans Court in its decision, confuses the line of cases interpreting the specific pleadings requirements of § 3.155(a) with the line of cases from this Court dealing with *pro se* pleadings. In the latter type of pleadings, of course, the VA, as well as the Board, are required to sympathetically read such filings to determine all potential claims raised by the evidence. The Secretary's attempts to distinguish this Court's holding in *Roberson* is futile in light of this Court's decision in *Szemraj*, *supra*. In *Szemraj* this Court held that "*Roberson* is not limited to its particular facts." 357 F.3d at 1373. In this case the Court unambiguously explained that "*Roberson* requires, with respect to **all pro se pleadings**, that the VA give a sympathetic reading to the veteran's filings by 'determin[ing] all potential claims raised by the evidence, applying all relevant laws and regulations.'" *See id.* (quoting *Roberson*, 251 F.3d at 1384) (emphasis added). Although pursuant to this obligation the Board was required to sympathetically read Mr. Sellers's *pro se* pleading submitted on VA Form 21-526, Appx137-140, to determine all potential claims raised by the evidence, the Board did not do so. In Mr. Sellers's case, the evidence to be reviewed

was his complete set of service records. The Board was obligated to review this evidence to determine whether it presented a potential claim for service-connected compensation for his in- service treatment for a mental disorder because this condition and treatment were clearly documented therein.

The Secretary asserts that requiring the VA to sympathetical read all the evidence of record in a case in which a *pro se* pleading, such as a VA Form 21-526, has been filed, "would create a new species of claim: an informal formal claim." Sec.Brf. at 23. This assertion is contrary to this Court's line of cases dealing with the Secretary's duty to read all *pro se* pleadings sympathetically to determine all potential claims raised by the evidence. Such an assertion also is at odds with the Secretary's own definition of a claim extant at the time Mr. Sellers filed his VA Form 21-526. This definition provided as follows:

> Application means a formal or informal communication in writing requesting a determination of entitlement or evidencing a belief in entitlement, to a benefit.

38 C.F.R. § 3.1(p)(1996). The Secretary's definition encompasses both formal and informal claims. Mr. Sellers's filing of a VA Form 21-526 in March 1996, Appx137-140, constituted a formal claim for compensation benefits. Therefore, it neither was, nor could it have been, an informal claim for benefits under § 3.155(a). Both the Secretary as well as the Veterans Court incorrectly considered, and attempted to apply, the specific pleading requirement set out in § 3.155(a) to Mr. Sellers's March 1996 VA Form 21-526. *Id.* This approach was error because what he actually filed at this time indisputably was a *pro se* formal claim.

III.

The Secretary misunderstands the holding made by this Court's in *Shea*.

The Secretary cites to this Court's holding *Shea, supra,* in support of his appeal, but his reliance on this authority is unavailing. The Secretary's description of this Court's holding in *Shea* reads s follows:

> In *Shea*, this Court held that, "where a claimant's filings refer to specific medical records, and those records contain a reasonably ascertainable diagnosis of a disability, the claimant has raised an informal claim for that disability under § 3.155(a)." 926 F.3d at 1370. The Court also explicitly stated that it was not deciding "whether the § 3.155(a) standard can be met by the existence of a diagnosis in claimant's medical records, without more, or in conjunction with a generalized request for all benefits that are supported in all medical records that VA would gather in the ordinary course." *Id.* at 1370. In other words, *Shea* explicitly intimated that it was not deciding the propriety of the Veterans Court's decision in *Sellers*.

Sec.Brf. at 29-30. This description of the holding in *Shea* simply is not accurate. **Nowhere** in *Shea* did this Court explicitly state that it was not deciding "whether the § 3.155(a) standard can be met by the existence of a diagnosis in claimant's medical records, without more, or in conjunction with a generalized request for all benefits that are supported in all medical records that VA would gather in the ordinary course." *See Shea* at 1370.

What this Court did in *Shea* merely was to make the following observation:

> Although the Veterans Court stated that "medical records alone are not sufficient to raise an initial claim for benefits," J.A. 10, **Ms. Shea has been explicit that she is not arguing otherwise. She relies on the claim- stating documents' concrete references to specified records. We thus do not have before us a question whether the**

> **§ 3.155(a) standard can be met by the existence of a diagnosis in a claimant's medical records, without more, or in conjunction with a generalized request for all benefits that are supported in all medical records that VA would gather in the ordinary course**.

See Shea, 926 F.3d at 1370 (emphasis added). Therefore, it is an untenable stretch for the Secretary to represent that "*Shea* explicitly intimated that it was not deciding the propriety of the Veterans Court's decision in *Sellers*." The Secretary's footnote 11 at page 30 of his brief is an attempt to attribute more substance to *Shea* than is actually warranted by that decision. Here the Secretary states that the "Court was aware of *Sellers* when it decided *Shea*. *Sellers* was raised in the briefing and mentioned at oral argument." Sec.Brf. at 30, fn 11. However, the mere fact of this in *Shea* does nothing to lessen the untenable stretch of the Secretary's characterization of this point.

More importantly, the Secretary failed to acknowledge this Court's analysis of the controlling case law upon which this Court's holding in *Shea* actually was based. *See Shea*, 926 F.3d at 1367-1369. Omitted from the Secretary's brief was any reference to, or discussion of *Roberson v. Principi*, *supra*; *Hodge v. West*, *supra*; *Szemraj v. Principi*, supra; *Moody v. Principi*, 360 F.3d 1306 (Fed. Cir. 2004); *Harris v. Shinseki*, 704 F.3d 946, 948 (Fed. Cir. 2013); *Comer v. Peake*, 552 F.3d 1362, 1368 (Fed. Cir. 2009); *Robinson v. Shinseki, supra*; and *Scott v. McDonald*, 789 F.3d 1375, 1381 (Fed. Cir. 2015). **This** body of court decisions is the case law upon which this Court relied to support its holding in *Shea*. The Secretary's utter failure to reference or discuss any of these cases thoroughly undermines his reliance upon this Court's holding in *Shea*.

Mr. Sellers agrees with the Secretary that this Court did apply the informal claim provisions of § 3.155(a) to Ms. Shea's formal application. However, overlooked or misunderstood by the Secretary is the precise issue actually presented and decided by this Court in *Shea*. This was that the Veterans Court had not applied the proper legal standard in determining whether the veteran presented a valid informal claim for psychiatric-disability benefits, but **did so in the context of a formal claim**. *Shea*, 926 F.3d at 1362 (emphasis added).

In this regard, Ms. Shea's case and Mr. Sellers case are not distinguishable on what Mr. Sellers considers to be the crucial fact underpinning his appeal; that being, in both cases the Secretary's receipt of a completed VA Form 21-526 was a formal claim. Mr. Sellers, as did Ms. Shea, presented an original formal claim for service-connected compensation on the form proscribed by the Secretary. Appx137-140. Mr. Sellers's VA claims file, as did Ms. Shea's, contained service records which reasonably raised the existence of a psychiatric disability which was present while he was on active duty. In both cases, the Veterans Court relied upon the pleading requirements of § 3.155(a) to determine whether a valid informal claim for psychiatric-disability benefits had been presented by the veteran's original formal claim. Thus, the Secretary's assertion that these two cases are distinguishable on crucial facts is unavailing and should be rejected.

Furthermore, this Court's holding in *Shea* was that "where a claimant's filings refer to specific medical records, and those records contain a reasonably ascertainable diagnosis of a disability, the claimant has raised an informal claim for that disability

under § 3.155(a)." *Shea*, 926 F.3d at 1370. This holding defeats the Secretary's appeal as a matter of law. This is so because Mr. Sellers's in fact filed a completed VA Form 21-526, Appx137-140, which included his general statement of an intent to seek "[service connection] for disabilities occurring during active duty service." *Id.* Further, Mr. Seller's service treatment records, which already had been obtained by the Secretary, contained an ascertainable diagnosis of a psychiatric disability. Thus, contrary to the Secretary's appeal, the Veterans Court was correct in determining that a claimant's general statement of intent to seek benefits in a VA Form 21-526, coupled with a reasonably identifiable in-service medical diagnosis reflected in service treatment records in the possession of VA prior to the VA making a decision on the claim, may be sufficient to constitute a claim for benefits.

However, Mr. Sellers is compelled to ask this Court to consider whether there is a distinction at law between the formal claims filed by Ms. Shea and Mr. Sellers using VA Form 21-526, and informal claims, under the prior version of 38 C.F.R. § 3.155(a). As indicated earlier in Mr. Sellers's brief, the plain language of the pre-2015 version of § 3.155(a) was ultimately a regulation which required action by the Secretary, as shown by the following:

> **Upon receipt of an informal claim, if a formal claim has not been filed, an application form will be forwarded to the claimant for execution. If received within 1 year from the date it was sent to the claimant, it will be considered filed as of the date of receipt of the informal claim**.

38 C.F.R. § 3.155(a) (2014) (emphasis added). To date, unfortunately, the case law of both this Court and the Veterans Court has focused on the specific pleading

requirements needed to constitute the presentation of an informal claim to the Secretary Mr. Sellers would respectfully submit that the focus of both courts has been too narrow.

The obvious intent of the pre-2015 regulation at § 3.155(a) was to protect the effective date of an informal claim. Neither Ms. Shea nor Mr. Sellers needed such protection since they both filed original claims for service-connected compensation within one year of discharge from service. Thus, the mandate of § 3.155(a) that upon receipt of an informal claim, the Secretary will forward an application form for execution would not apply because both Ms. Shea and Mr. Sellers already had filed a formal claim. Therefore, the Secretary had received a formal claim which protected their effective dates.

As this Court correctly analyzed in *Shea*, *supra.,* this Court held in *Szemraj* that "*Roberson* is not limited to its particular facts." *Szemraj*, 357 F.3d at 1373. This Court made clear that "*Roberson* requires, with respect to **all** *pro se* pleadings, that the VA give a sympathetic reading to the veteran's filings by 'determin[ing] all potential claims raised by the evidence, applying all relevant laws and regulations.'" *Id.* (quoting *Roberson*, 251 F.3d at 1384). It follows that when the *pro se* filing is an original formal claim, or any other formal claim, as occurred in the case of both Ms. Shea and Mr. Sellers, the requirements of the pre-2015 version of § 3.155(a) are surplus.

Going forward, particularly in light of the Secretary's amendment to § 3.155, the requirement to file the form indicating an intent to file a claim,[4] mandates that a

[4] *See* VA Form 21-0966.

formal claim be filed within one year. Thus, there is no longer an obligation for the Secretary to forward an application form for execution. The burden to file a formal claim now is placed on the claimant. Going forward all claims will be formalized with a VA Form 21-526. Therefore, there should be no ambiguity concerning the Secretary's duty under the provisions of 38 C.F.R. § 3.103(a) with respect to **all** *pro se* pleadings. The Secretary must give a sympathetic reading to the veteran's filings by determining all potential claims raised by the evidence, applying all relevant laws and regulations. Mr. Sellers believes that in the interest of judicial economy, this Court would be well served, as would the Secretary, by the Court clarifying that the Secretary's duty to sympathetically review all submissions from claimants is not predicated or dependent upon such submissions meeting the requirements of an informal claim.

IV.

There is nothing new, arbitrary nor unworkable in the decision on appeal.

The Secretary argues further in error that the "Veterans Court's Guidance To The Board, And The Facts Of This Case, Reflect The Arbitrariness And Unworkability Of Its New Rule." Sec.Brf. at 33-37. In support of this argument the Secretary submits the following discussion:

> Recognizing that its new rule might present difficulties to implement, particularly because it appears to command exhaustive hunts through a veteran's records whenever a general statement of intent to seek benefits is made, the Veterans Court provided guidance to the board. Appx5. First, to determine whether a diagnosis is "reasonably identifiable" in service records, and therefore must be added to the claim, the court instructed the board to

> consider whether service records note "trivial conditions" or "significant illnesses," and whether the records "describe certain conditions in great detail or, in contrast, in only a passing manner." Appx5. This guidance highlights one aspect of the arbitrariness of the court's new rule, because it ultimately bases the scope of a claim on a particular VA adjudicator's view of the significance of a certain diagnosis or the level of detail provided by a particular doctor in service records. For example, if two claimants complete an application for benefits in the exact same way, and their service records both reflect a knee diagnosis, only one of the two might have claimed a knee disability under the court's holding, because one's knee disability was addressed in six pages of records and the other's knee disability was addressed on only two pages; or because one's knee disability seemed "significant" to the VA adjudicator and the other's seemed relatively trivial. An adjudicator's view of "significant" and a doctor's predilection for or against detail do not help illuminate which disabilities a claimant intends to claim.
>
> Second, the court instructed the board to consider the "sheer volume of medical records," noting that the "[b]oard could decide that a single diagnosis reflected in a single page of a 2,000-page service record is not reasonably identifiable." *Id.* Again, this guidance points to inherent arbitrariness in the rule. For example, if two claimants complete an application for benefits in the exact same way, and their service records both reflect a knee disability, only one of the two might have claimed a knee disability under the court's holding, because one had 80 pages of service records and the other had 180 pages. That page difference does not at all illuminate which disabilities these claimants intended to claim.

Sec.Brf. at 33-34. Contrary to the Secretary's protestations and how he characterizes the Veterans Court's decision, it did not produce a new, arbitrary nor unworkable rule of law.

Indeed, the Secretary's assessment of what he describes as the "difficulties" he anticipates from this decision in Mr. Sellers's case are in utter disregard of his

statutory duty to assist under 38 U.S.C. § 5103A(a). By statute, the Secretary already is required to make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate his or her claim. These efforts unquestionably include a complete and thorough review of the veteran's service records—regardless of how many pages there may be of those records. The Secretary's supposed "difficulties" with this decision are also in complete disregard of the regulatory duty he has imposed upon himself under 38 C.F.R. § 3.103(a). To reiterate, this regulation requires the Secretary to assist a claimant in developing the facts pertinent to the claim and to render a decision which grants every benefit that can be supported in law while protecting the interests of the Government. Finally, the Secretary's complaints about the burdens imposed by this decision are totally contrary to the express intent of Congress that the Secretary fully and sympathetically develop a claim to its optimum before deciding the claim on its merits. *See* H.R. Rep. No. 100-963, at 13 (1988), reprinted in 1988 U.S.C.C.A.N. 5782, 5794-95).

Furthermore, the Secretary overlooks and misunderstands that the Veterans Court decision simply requires him to do what the law already requires under the unique statutory scheme designed by Congress for the adjudication of veterans benefits claims. In *Harris*, *supra.*, this Court explicitly noted that the duty articulated in *Moody*, *supra.*; *Szemraj*, *supra.*; and *Roberson*, *supra.*, was separate and distinct from the statutory benefit-of-the- doubt requirement under 38 U.S.C. § 5107(b). *Harris*, 704 F.3d 948. The duty articulated in *Moody*, *Szemraj*, and *Roberson* stems from the "uniquely pro-claimant" character of the veterans' benefits system and requires VA

"to fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits." *Roberson*, 251 F.3d at 1384 (citing *Hodge v. West* at 1362).

In this same vein the Secretary also overlooks his own adjudication manual, which unambiguously instructs his adjudicators to liberally construe all submissions from a claimant. More precisely, pursuant to the adjudication manual, when preparing a rating decision the Rating Veterans Service Representative (RVSR) must recognize, develop, clarify and/or decide all issues and claims, **whether they are**

- **expressly claimed**
- **reasonably raised**, or
- unclaimed subordinate issues and ancillary benefits.

See M21-1MR, ADJUDICATION PROCEDURE MANUAL, Part III, subpt. IV, ch. 6.B.1.a (emphasis added). In this case, as in *Shea*, VA's original decision **did not** recognize, develop, or make any attempt to clarify all of the claims which were "reasonably raised" by a reading of all of the veteran's service records. Yet, the Secretary complains to the contrary that the "Veterans Court does not address what manner of statement can trigger this new duty to search a veteran's records." Sec. Brf. at 36.

It is difficult for Mr. Sellers to comprehend that the Secretary imagines that, prior to the decision in Mr. Sellers's case now on appeal, that he was unaware that the "trigger" for his "duty to search a veteran's records" is his receipt from the veteran of a VA Form 21-526. Equally incomprehensible is that the Secretary did not know that his duty to search for and review records to aid in the substantiation of a veteran's

claim flows from § 5103A(a), § 3.103(a) of the VA's regulations, and the "uniquely pro-claimant" character of the veterans' benefits system created by Congress. This latter factor, of course, requires the Secretary "to fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits."

Thus, what the Veterans Court has held in Mr. Sellers's case is not the creation of a "new duty to search a veteran's records." This particular "duty" is a duty which existed prior to the enactment of § 5103A(a). This duty has always existed by regulation at § 3.103(a) and is consistent with the well-established intent of Congress. The Secretary's fixation on his inapposite authority "to define what is required to be included on claim forms" demonstrates a total misunderstanding of his clear and long established duty "to fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits."

The Secretary's appeal of the Veterans Court decision demonstrates that he has lost sight of his duty "to fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits." That duty includes his obligation to obtain and review all of a veteran's service records. This has always been the Secretary's duty because it is these records which document the injuries and diseases that a veteran incurs and is treated for while on active duty. This Court must state with certainty that it is the Secretary's responsibility, upon receipt of a claim for benefits, to obtain **all** the veteran's service records, and further that the Secretary must review all of them to determine whether in those records a claim for VA benefits has been reasonably raised, regardless of whether such a condition was

explicitly identified in the application received.

The Secretary concludes his brief with the following assertions:

> Finally, this rule deprives claimants of control over their own claims. Claimants who do not wish to claim a disability for a variety of reasons—they know it was not incurred in service (and thus do not wish to exploit taxpayers), they know that a condition diagnosed in service did not result in any current disability, they do not want government recognition of a particular disability (for employment or personal reasons), they are waiting for certain evidence that will substantiate a claim for that particular disability—are deprived of the ability to make this simple but important choice for themselves. Under the court's new rule, the Secretary will be required to expend the resources to develop and adjudicate disabilities that claimants never intended to—and never did—claim.

Sec. Brf. at 37. It is hard to imagine a less persuasive argument than the Veterans Court erred because its decision creates a rule which "deprives [other] claimants of control over their own claims." This argument, that the Secretary has taken up this appeal in order to protect other veterans from being "deprived of the ability to make this simple but important choice for themselves," is unpersuasive and unavailing. Because the Secretary provides veterans with notice of which claims they are adjudicating, any veteran who conceivably might find him or herself in the situation the Secretary's argument describes will always have multiple opportunities to withdraw any claims that veteran does not wish to pursue.

Finally, the Secretary's contention that he "will be required to expend the resources to develop and adjudicate disabilities that claimants never intended to—and never did—claim," is a gross distortion of the Veterans Court holding. The Court's holding in *Sellers* **does not** require the Secretary "to expend the resources to develop

and adjudicate disabilities that claimants never intended to—and never did—claim." The holding in this case requires nothing more than the Secretary's compliance with his statutory duty under § 5103A(a), his regulatory duty under § 3.103(a), and his duty to fully develop a claim before denying it as mandated by Congress.

Conclusion

Wherefore, the Veterans Court's decision should be affirmed but modified to clarify that the pleading requirements of the prior version of 38 C.F.R. § 3.155(a) are not a prerequisite to the Secretary's duty to read *pro se* pleadings to determine all potential claims raised by the evidence. The Secretary's duty to read *pro se* pleadings when he receives a completed VA Form 21-526 to determine all potential claims raised by the evidence follows from the Secretary's statement of policy in 38 C.F.R. § 3.103(a) and this Court's case law establishing that rule of law.

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Certificate of Service

I certify that on the 3rd day of January, 2020, the foregoing brief was electronically filed through CM/ECF system with the Clerk, United States Court of Appeals for the Federal Circuit. Copies of the document were served through the Court's CM/ECF system via the Notice of Docket Activity to:

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Certificate of Compliance

Pursuant to Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure, Claimant-Appellee's counsel certifies that this Brief complies with the Court's type-volume limitation rules. This brief was printed in Garamond font at 14 points. According to the word-count calculated, using WordPerfect v.11, this Brief contains a total of 12,144 words, which is within the 14,000 word limit.

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