No. 2019-1769

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

ROBERT M. SELLERS,
Claimant-Appellee,

v.

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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BRIEF OF RESPONDENT-APPELLANT

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STATEMENT OF RELATED CASES

Pursuant to Rule 47.5 of this Court's Rules, counsel for respondent-appellant states that he is unaware of any other appeal from this civil action that previously has been before this Court or any other appellate court under the same or similar title. Counsel is aware of one case pending in this Court that may directly affect or be affected by this Court's decision in this appeal: *Shea v. Wilkie*, No. 2018-1735 (petition for rehearing due September 19, 2019).

JURISDICTIONAL STATEMENT

On August 23, 2018, a three-judge panel of the United States Court of Appeals for Veterans Claims (Veterans Court) invoked a new rule of law to set aside a Board of Veteran's Appeals decision denying an earlier effective date of the award of service connection for Mr. Sellers's major depressive disorder. Appx1-9. On November 20, 2018, the panel denied a motion for reconsideration. Appx10. On January 30, 2019, the court denied a motion for full-court review and issued the judgment. Appx12-13. This Court has jurisdiction over this appeal of a Veterans Court decision implementing a new rule of law pursuant to 38 U.S.C. § 7292(a), (c).

STATEMENT OF THE ISSUE

Whether a claimant's general statement requesting benefits on a formal claim form that identifies specific disabilities constitutes a claim for all "reasonably identifiable" diagnoses within the claimant's records.

STATEMENT OF THE CASE SETTING OUT RELEVANT FACTS

I. Nature Of The Case

Respondent-appellant Robert L. Wilkie, Secretary of Veterans Affairs, appeals the decision of the Veterans Court in *Sellers v. Wilkie*, No. 16-2993 (Vet. App. Aug. 23, 2018), which set aside an April 29, 2016 Board of Veterans' Appeals (board) decision assigning an effective date of September 18, 2009, for claimant-appellee Robert M. Sellers's major depressive disorder (MDD) benefits, and remanded the matter for further proceedings. Appx1-9.[1]

II. Statement of Facts and Course of Proceedings Below

A. Mr. Sellers Requests Benefits For Five Specific Disabilities In 1996

Mr. Sellers served on active duty from April 1964 to February 1969 and January 1981 to February 1996. Appx2. In March 1996, he filed with VA a formal application for disability compensation (VA Form 21-526). *Id.*; Appx137-140. In block 17 of the application, which requires an applicant to list the "nature

[1] "Appx__" refers to the joint appendix filed in this case.

of sickness, disease or injuries for which this claim is made," he listed (1) left-knee injury, (2) back injury, (3) right-hand injury, (4) hearing loss, and (5) right-leg numbness. Appx137. He also listed those five conditions in block 12 (date of occurrence of disabilities), and listed treatment dates and locations for three of the conditions in block 19. Appx137-138. In block 40 (entitled "Remarks"), he wrote: "Request s/c [service connection] for disabilities occurring during active duty service." Appx140. The record reflects no further submissions from Mr. Sellers until 2009. Appx38.

In a July 1996 decision, the VA regional office (RO) granted Mr. Sellers disability compensation for left-knee, back, right-hand, hearing-loss, and right-leg disabilities. Appx132-136. Mr. Sellers did not appeal this decision. Appx38.

B. Mr. Sellers Requests Benefits For A Psychiatric Disability In 2009

In September 2009, Mr. Sellers filed a claim for benefits for post-traumatic stress disorder (PTSD). Appx2. In September 2011, VA granted Mr. Sellers a 70% disability rating for a psychiatric disability (diagnosed as MDD), effective May 13, 2011. *Id.* Mr. Sellers appealed, and the board in 2016 granted an earlier effective date of September 18, 2009. Appx3; Appx20-47. The board explained that "VA received no claim (informal or otherwise) for service connection for any

psychiatric disability prior to September 19, 2009." Appx3.

C. The Veterans Court Holds That Mr. Sellers's Generalized Request For Benefits Required VA To Search Mr. Sellers's Service Records For Additional Diagnoses

Mr. Sellers appealed to the Veterans Court, arguing that his effective date should be 1996 because he raised a "valid claim for a psychiatric disability" in 1996. Appx4. VA argued that Mr. Sellers never indicated any intent to apply for benefits for a mental health condition in 1996. Appx97-99.

In the decision on appeal, the Veterans Court emphasized that Mr. Sellers's comment on block 40 of the VA Form 21-526 ("Request s/c for disabilities occurring during active duty service") played a "major role" in this case. Appx2. While "a general statement of intent to seek benefits for unspecified disabilities standing alone is insufficient to constitute a claim," the court stated, "records containing diagnoses that are reasonably identifiable from a review of the record may otherwise cure an insufficient general statement of intent to seek benefits." Appx4-6. Given his general statement in block 40, the court reasoned, Mr. Sellers may have claimed benefits for a psychiatric disability in 1996 if "evidence of reasonably identifiable in-service diagnoses of psychiatric conditions . . . were in the possession of the RO" when it adjudicated the 1996 claim. Appx4.

As to whether a diagnosis is "reasonably identifiable," the court held that the board must "determine, based on the totality of the service medical record, both

qualitatively and quantitatively, whether the condition at issue would be sufficiently apparent to an adjudicator." Appx5. Qualitatively, the board must consider whether the 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." *Id.* Quantitatively, "the sheer volume of medical records may potentially be a factor in determining whether a condition would have been reasonably identifiable to a VA adjudicator." For example, the board "could decide that a single diagnosis reflected in a single page of a 2,000-page service record is not reasonably identifiable." *Id.*

The court summarized its holding ("We hold that a general statement of intent to seek benefits, coupled with reasonably identifiable in-service medical diagnosis reflected in service treatment records in VA's possession prior to the RO making a decision on the claim may be sufficient to constitute a claim for benefits"),[2] set aside the board's decision, and remanded the matter for the board to render this "reasonably identifiable" determination. Appx1; Appx6; Appx9.

On September 13, 2018, VA filed a motion for panel reconsideration or en banc review, arguing that the panel's holding contravened governing precedent,

[2] The court never addressed whether its holding was limited to claims filed before 2015, though it did mention that, as of 2015, "VA no longer recognizes informal claims." *See* Appx3 n.3 (citing Standard Claims and Appeals Forms, 79 Fed. Reg. 57,660 (Dep't of VA 2014) (Standard Forms rule)).

statute, and regulation. Appx124-131. The panel denied reconsideration on November 20, 2018; en banc review was denied on January 30, 2019; and judgment was entered on January 30, 2019. Appx10-13. We timely filed for appeal on March 29, 2019. Appx18.

SUMMARY OF THE ARGUMENT

In his 1996 formal application for benefits, Mr. Sellers requested benefits for five specific physical disabilities unrelated to any mental health condition. However, because Mr. Sellers included in the "Remarks" section of his application a statement requesting service connection for his active-duty disabilities, which would have been consistent with a claim limited to the five identified disabilities, the Veterans Court held that Mr. Sellers may have also raised a psychiatric disability claim—depending on the quality and quantity of his service records. Appx6. With this holding, the Veterans Court announced a new rule of law: if a claimant submits a generalized statement requesting benefits, VA must search through the claimant's records and determine whether additional conditions were claimed based on "reasonably identifiable" diagnoses in the record. The Veterans Court provided no citation to statute, regulation, or judicial precedent as specific authority for its new rule.

The Veterans Court's unsupported new rule conflicts with existing law. Claimants must present claims for benefits in accordance with VA instructions on

content and format. 38 U.S.C. §§ 501(a)(2), 5101(a)(1)(A); *Fleshman v. West*, 138 F.3d 1429, 1431-32 (Fed. Cir. 1998). Since at least 1944, VA's prescribed form, which Mr. Sellers used here, has instructed claimants to identify the nature of the medical conditions being claimed. *See* Appx137 (block 17); Appx142 (block 33). A veteran need only identify claims at a high level of generality (*i.e.*, refer to symptoms or body parts, rather than specific diagnoses), because VA sympathetically reads pro se filings, but this minimal identification requirement serves a vital function. It ensures that both the VA and the claimant understand what issues are to be adjudicated, and it helps direct the VA's inquiry. *See Brokowski v. Shinseki*, 23 Vet. App. 79, 85-86 (2009). This Court has already held that VA's long-standing construction of the statutory scheme as requiring some minimal identification of the conditions being claimed is a permissible one. *Veterans Justice Grp. v. Sec'y of Veterans Affairs*, 818 F.3d 1336, 1354-56 (Fed. Cir. 2016).[3] The Veterans Court's decision ignores the governing statutes, its own precedents, and this Court's approval of VA's construction as reasonable.

No law requires VA to search "through the record to identify all conditions" that a claimant could possibly claim. *Brokowski*, 23 Vet. App. at 86. Similarly, no

[3] *Veterans Justice Grp.* examined the 2014 changes to the claim initiation process, and in particular, the "intent to file" process, which replaced the previous "informal claim" process. 818 F.3d at 1342-43. However, in its analysis, the Court noted that the new "regulations do not substantively diverge from the VA's prior regulation." *Id.* at 1356.

law requires VA to add unrelated conditions to a claim. *Veterans Justice Grp.*, 818 F.3d at 1356. If accepted, the Veterans Court's decision in *Sellers* will make the scope of a claim subject to arbitrary factors, such as the particular VA adjudicator's view of the significance of certain diagnoses, the level of detail provided by a particular doctor in service records, the number of pages in a claimant's service records, or the inclusion or absence of a potential general request for benefits somewhere in a claim form. The scope of the claim should instead reflect the claimant's stated intentions.

ARGUMENT

I. Jurisdiction and Standard of Review

Pursuant to 38 U.S.C. § 7292(a), this Court has jurisdiction to review a Veterans Court's decision with respect to the validity of a decision on a rule of law or to the validity or interpretation of any statute or regulation relied on by the Veterans Court in making that decision. This Court also has jurisdiction to "decide any challenge to the validity of any statute or regulation or any interpretation thereof . . . and to interpret constitutional and statutory provisions, to the extent presented and necessary to a decision." 38 U.S.C. § 7292(c).

In the decision on appeal, the Veterans Court implemented a new rule of law eliminating the long-standing obligation of claimants to identify (even at a high level of generality) the symptoms or medical conditions for which they are

claiming disability compensation. Appx1; *contra Brokowski*, 23 Vet. App. at 85-86; 79 Fed. Reg. at 57,671-72 (noting VA's long-standing position on claimant identification of medical conditions); *Veterans Justice Grp.*, 818 F.3d at 1354-56 (upholding VA's position as a permissive construction of statute). This Court has jurisdiction over the Veterans Court's decision on a rule of law. 38 U.S.C. § 7292(c).

Moreover, while Mr. Sellers's appeal was remanded to the board, this Court has jurisdiction to review the Veterans Court's decision under the exception to the final-judgment rule recognized in *Williams v. Principi*, 275 F.3d 1361, 1364 (Fed. Cir. 2002). *Williams* permits jurisdiction under this exception only if three conditions are satisfied: (1) there is a clear and final decision of a legal issue that will directly govern the remand proceedings or, if reversed, would render the remand proceedings unnecessary; (2) the resolution of the legal issue adversely affects the party seeking review; and (3) there is a substantial risk that the remand proceeding may moot the issue. *Id.*

Here, the *Williams* requirements are met: (1) the Veterans Court implemented a clear rule of law (requiring VA to add "reasonably identifiable" diagnoses in service records to a claim) that will directly govern the remand proceedings before VA, and remand would be unnecessary if the court's decision is reversed by this Court; (2) the Veterans Court's interpretation adversely affects

VA by changing the law of claims initiation to require VA to search service records for—and add to the claim—unrelated diagnoses contrary to its long-standing position on claimant identification of medical conditions; and (3) there is substantial risk that the board will find on remand that an in-service psychiatric diagnosis was reasonably identifiable in 1996, *see* Appx2 (identifying the in-service psychiatric diagnosis), which would moot the legal issue, since VA cannot appeal board decisions to the Veterans Court, *Smith v. Nicholson*, 451 F.3d 1344, 1348 (Fed. Cir. 2006) (noting that 38 U.S.C. § 7252(a) precludes VA from appealing a board decision).

II. No Statute Or Regulation Required VA To Search Service Records And Add To Mr. Sellers's Claim Unrelated Diagnoses He Did Not Identify On His Formal Application

Without citation to statute or regulation, the Veterans Court held that a statement requesting benefits for unspecified disabilities imposes an affirmative duty upon VA to search all of the claimant's service records and add any "reasonably identifiable" disabilities to the claim. Appx4. The applicable statutes and regulations demonstrate that no such affirmative duty exists. When submitting a formal claim, as Mr. Sellers did here, claimants must identify the conditions, with minimal specificity, for which they are seeking benefits.

A. 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

Congress granted to VA the authority to prescribe all necessary or appropriate rules and regulations regarding "the forms of application by claimants." 38 U.S.C. § 501(a)(2); *Mansfield v. Peake*, 525 F.3d 1312, 1317 (Fed. Cir. 2008) ("Congress has provided the VA with authority to establish the requirements for 'claims' for veterans' benefits."). Congress also mandated that claimants must file "a specific claim in the form prescribed by [VA]" for benefits to be paid. 38 U.S.C. § 5101(a)(1)(A); Pub. L. No. 85-857, § 1, 72 Stat. 1105 (1958).[4]

This means that a veteran's claim must not only be *on* VA's prescribed form, but must also "contain[ ] specified information . . . as called for by the blocks on the application form." *Fleshman*, 138 F.3d at 1431-32 (rejecting the argument that the filing of a prescribed form missing critical elements of the information requested on that form satisfies section 5101(a)); *see Rodriguez v. West*, 189 F.3d 1351, 1353 (Fed. Cir. 1999) (claimant "must eventually file a form *providing specified information* that the Secretary has adopted" (emphasis added)).

[4] Congress has also instructed that "a claimant has the responsibility to present and support a claim for [VA] benefits," 38 U.S.C. § 5107(a), though that provision was not added to statute until 2000. Pub. L. No. 106-475, § 4, 114 Stat. 2098 (2000).

Since at least 1944, the prescribed form for claiming disability compensation has been VA Form 526 and its variants. *See Rodriguez*, 189 F.3d at 1353 (VA "has adopted a form providing specified information that must be filed as a formal claim to obtain benefits."); 38 C.F.R. § 2.1026 (1944) (Appx147-148)[5]; Proposed Information Collection Activity, 63 Fed. Reg. 49,155, 49-155 (Dep't of VA 1998) ("Section 5101(a) provides that a specific claim in the form provided by [VA] must be filed in order for benefits to be paid. . . . VA Form 21-526 is the prescribed form for disability claims."); Appx137-140 (VA Form 21-526 (1996)); Appx141-144 (VA Form 8-526 (1946)); https://www.va.gov/disability/how-to-file-claim/ (providing link to Application for Disability Compensation and Related Compensation Benefits, VA Form 21-526EZ) (last visited Sept. 13, 2019).

Since its inception, VA Form 526 has instructed claimants to identify the nature of the symptoms or medical conditions being claimed. *See* Appx142 (block 33 of VA Form 8-526 (1946)) ("[n]ature of disease or injury on account of which

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[5] This provision ("Application for benefits") provided in paragraph (a) that:

> A properly completed and executed Form 526, 526a or 526b . . . constitutes an application for benefits indicated below and will be adjudicated under the applicable laws:
>
> *Form 526*: Veteran's Application for Pension or Compensation for Disability Resulting from Service. . . .

Id.; *see also* 38 C.F.R. § 3.26 (1949) (Appx167) (same).

claim is made"); Appx137 (block 17 of VA Form 21-526 (1996)) ("nature of sickness, disease or injuries for which this claim is made"). If no conditions are identified on the VA Form 526, the application may be considered incomplete. 38 U.S.C. § 5103(a) (1996) (application lacking the "evidence necessary to complete the application" is incomplete); *see* Duty To Assist, 66 Fed. Reg. 45,620, 45,631 (Dep't of VA 2001) (revising 38 C.F.R. § 3.159(a)(3) to define a "[s]ubstantially complete application" as containing, inter alia, "the benefit claimed and any medical condition(s) on which it is based"). Moreover, no provision of law requires VA to add unlisted and unrelated conditions to a properly filed claim. *See Veterans Justice Grp.*, 818 F.3d at 1356 (statute "does not directly address whether the VA must develop evidence outside the scope of a pending claim"); 38 C.F.R. § 3.103(a) (1996) ("[I]t is the obligation of VA to assist a claimant in developing facts *pertinent* to the claim. . . ." (emphasis added)).

B. This Court Has Upheld VA's Long-Standing Position On Claim Identification

As to the specificity required for identifying medical conditions on VA Form 526, VA has a "long-standing practice of accepting claimants' description of observable symptom(s) or experiences or reference to a part of the anatomy" as sufficient. 79 Fed. Reg. at 57,671-72.[6] Because claimants may not be competent

[6] Although this Federal Register notice finalized the Standard Forms rule that postdated and does not apply to Mr. Sellers's claim, it is relevant here because it

to provide a specific medical diagnosis or may not be aware of a technical benefit, VA considers all issues "that logically relate to and arise in connection with a claim pending before VA." *Id*. For example, (1) if "PTSD" is claimed, VA considers the claim to encompass all potential psychiatric disabilities noted in medical records; (2) if "right knee" is claimed, VA considers arthritis, ankylosis, knee locking, etc., depending on the relevant diagnoses in medical records; and (3) if the evidence raises possible entitlement to technical benefits such as special monthly compensation, a total disability rating based on individual unemployability (TDIU), or an educational, housing, or automobile allowance, VA considers those issues as well. *Id*. at 57,672-73.

On the other hand, because claimants are competent to describe the symptoms or body parts ailing them, VA generally does not sua sponte add to a claim "entirely separate conditions never identified" by the claimant. *Id*. at 57,671-72; *see* 38 C.F.R. § 3.103(a) (1996) ("[I]t is the obligation of VA to assist a claimant in developing facts *pertinent* to the claim." (emphasis added)); 66 Fed.

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explains VA's previous position on claimant identification of medical conditions and scope of claims, which was not altered by the rule, *see Veterans Justice Grp.*, 818 F.3d at 1356 (recognizing that the new rule did "not alter the VA's general practice o[n] identifying and adjudicating issues"); 79 Fed. Reg. at 57,672 ("This rule does not alter VA's general practice of identifying and adjudicating issues and claims that logically relate to and arise in connection with a claim pending before VA.").

Reg. at 45,621 (rejecting comment that "it should be VA's burden to determine all the benefits to which a claimant is entitled" and noting that it is the claimant's responsibility to present a claim under 38 U.S.C. § 5107(a)).

This Court sustained VA's long-standing approach to identifying the scope of a claim in *Veterans Justice Grp.*, 818 F.3d at 1354-56. The Court held that the statute does not require VA to develop issues unrelated to the claim presented, and that VA's approach of "requiring that claimants identify symptoms or medical conditions at a high level of generality is a permissible construction of the statute." *Id*. at 1356. Although *Veterans Justice Grp.* reviewed the 2014 Standard Forms rule (which does not apply to Mr. Sellers's 1996 application), the Court also recognized that VA's position on identifying issues had not changed. *Id.* (recognizing that the new rule did "not alter the VA's general practice o[n] identifying and adjudicating issues"); *see supra* at n.3. In sum, this Court's precedent is that VA's long-standing requirement for a minimally specific identification of conditions subject to the claim is a reasonable interpretation of the statutory scheme. 818 F.3d at 1356. The Veterans Court cannot simply ignore this requirement, as it did here.

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. On his claim form, Mr. Sellers identified five claimed disabilities. Mr.

Sellers identified his claimed disabilities by body part and rough date in two separate form sections: block 12 ("If disability occurred during active or inactive duty for training, give branch of service and date") and block 17 ("Nature of sickness, disease or injuries for which this claim is made and date each began"). Appx 137. In block 19, which asks the claimant to identify in-service treatment, he identified treatment for his left knee injury, his back injury, and his finger injuries. Appx138. In block 40 ("Remarks"), Mr. Sellers wrote: "Request [service connection] for disabilities occurring during active duty service." Appx140. This remark does not appear in any of the sections asking the claimant to identify his or her claims.

Given the consistently repeated specificity regarding the extent of his claims throughout the form – back, left knee, right leg, right hand, and hearing – there is no basis to take this statement as referring to anything more than the claims already identified. The specific claims identified also do not "logically relate" to any kind of mental health claim, and neither the board nor the Veterans Court found that they did. Each claim identifies a physical malady by body part or function (hearing), so it certainly appears that Mr. Sellers was capable of meeting VA's minimal identification requirement.

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).

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.

Nor does the Veterans Court grapple with the procedural aspects of revisiting an application form whose scope was inherently interpreted in a final decision. Although before the court as a claim for an earlier effective date, the Veterans Court's decision challenges a 1996 final decision, suggesting error in that decision. Because failure to develop cannot be Clear and Unmistakable Error (CUE), *Cook v. Principi*, 318 F.3d 1334, 1339 (Fed. Cir. 2002), presumably the Veterans Court found an unaddressed pending claim. But it cannot be correct that the Veterans Court can sidestep finality and impose new duties upon the Secretary with regard to a formal application that has already been finally adjudicated.

C. VA's Informal Claims Regulation Has Never Obviated The Requirement For A Formal Application Identifying The Nature Of The Conditions Being Claimed

VA implemented Congress's mandate that "[a] specific claim in the form prescribed by the Secretary [ ] be filed in order for benefits to be paid" at 38 C.F.R. § 3.151(a) (1996); *see also* 38 C.F.R. § 2.1026 (1944) (Appx147-148). As VA has explained, "[r]equiring a specific claim from a claimant promotes a meeting of the minds between the claimant and VA as to what benefits are being sought and what issues adjudicated. . . . [It] avoids unnecessary factual development and

adjudication relating to benefits not actually sought." Entitlement to Chapter 35 Benefits, VAOPGCPREC 12-1992, at ¶ 14 (May 28, 1992).

In accord with the duty to develop a veteran-friendly system, VA also has historically permitted communications indicating an intent to apply for benefits to act as the "date of receipt" for purposes of assigning an effective date for benefits, *if the prescribed form is submitted thereafter*. 38 C.F.R. § 3.155(a) (1996); 38 C.F.R. § 2.1027 (1944) (Appx148). It is important to be clear about the role of this "informal claims" provision in the regulatory scheme.

An "informal claim" under this provision served as an effective-date placeholder[7] and a prompt for VA to forward the formal application to the claimant, *Mansfield*, 525 F.3d at 1318. But it was *not* a substitute for the formal application, VA Form 526. 38 C.F.R. § 3.155(a) (1996) ("Upon receipt of an informal claim . . . an application form will be forwarded to the claimant for execution."); 38 C.F.R. § 2.1027 (1944) (Appx148) ("When an informal claim is received and a formal application is forwarded for execution by the claimant . . . , unless a formal application is received within one year from the date it was

[7] *See* 38 U.S.C. § 5110(a) (effective date based on "the date of receipt of application"); 38 C.F.R. § 3.400 (1996).

transmitted for execution by the claimant, no award shall be made by virtue of such informal claim.").

This Court has acknowledged that, notwithstanding this "informal claims" provision, a claimant "must eventually file a form providing specified information that the Secretary has adopted, which constitutes the formal claim." *Rodriguez*, 189 F.3d at 1353; *see Fleshman*, 138 F.3d at 1432-33 (finding that the appellant's "informal claim never became a valid claim" because the "form prescribed by the Secretary" was not submitted within one year).[8] In sum, § 3.155(a) (1996) could not compel VA adjudication in the absence of a subsequent formal application; and, once a formal application was submitted, the purpose of § 3.155(a) (1996) was fulfilled and it had no further operation. *See also Hartman v. Nicholson*, 483 F.3d 1311, 1315-16 (Fed. Cir. 2007) (describing § 3.155(a) as "merely a housekeeping provision, designed to guide Departmental personnel in their

[8] Pursuant to other regulatory provisions not relevant to Mr. Sellers's case, formal applications were not always required to request increased benefits or the reopening of a claim. *See* 38 C.F.R. § 3.155(c) (1996) ("informal request for increase or reopening" following submission of a formal application "will be accepted as a claim"); 38 C.F.R. § 3.157(b) (1996) ("[o]nce a formal claim . . . has been allowed or . . . disallowed for the reason that the service-connected disability is not compensable in degree," receipt of certain medical evidence "will be accepted as an informal claim for increased benefits or an informal claim to reopen"); 38 C.F.R. § 3.216 (1949) (Appx169-170) (formal application for increased benefits "will not be required" when informal request is accompanied by medical evidence of a changed physical condition).

processing of benefit claims"). Any notion that § 3.155(a) (1996) could serve to create claims (informal or formal) for medical conditions that were not identified on a subsequent formal application is disconnected from the clear import of that provision and inconsistent with the presence of 38 C.F.R. § 3.151(a) in the regulatory scheme. *See Bennett v. Spear*, 420 U.S. 154, 173 (1997) ("It is the cardinal principle of statutory construction . . . to give effect, if possible, to every clause . . . rather than to emasculate an entire section." (internal quotation marks and alterations omitted)); *Mass. Mut. Life Ins. Co. v. United States*, 782 F.3d 1354, 1365 (Fed. Cir. 2015) (court must interpret "the regulation as a whole, reconciling the section in question with sections related to it"); *see also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (courts must interpret statutory provisions "with a view to their place in the overall statutory scheme," assume a "coherent regulatory scheme," and "fit, if possible, all parts into a harmonious whole" (internal quotation marks omitted)).

In 1948, VA added to its informal claims regulation a sentence that, "[t]o constitute an informal claim, the communication must specifically refer to and identify the particular benefit sought." 38 C.F.R. § 3.27 (1949) (Appx168); 38 C.F.R. § 3.155(a) (1996) ("Such informal claim must identify the benefit sought."). At the time, there were three different formal applications for benefits, 38 C.F.R. § 3.26 (Appx167) ("A properly completed and executed VA Form 526 [disability

compensation], 526a [compensation due to VA hospitalization, treatment, or vocational rehabilitation], or 526b [nonservice-connected pension] . . . constitutes an application for benefits. . . ."), and—given the purpose of the "informal claims" provision, 38 C.F.R. § 3.27 (Appx168)—VA needed to know which formal application to forward. *See Mansfield*, 525 F.3d at 1318.

But § 3.155(a)'s identification language has nothing to do with formal applications. *See* 38 C.F.R. §§ 3.151(a), 3.155(a) (1996). As discussed above, § 3.155(a) (1996) preserved an effective date and prompted VA to forward a formal application, but had no continuing role to play once a formal application was filed. Rather, the formal application was solely governed by § 3.151(a) and the instructions of VA Form 526—which explicitly required identification of the nature of the symptoms or medical conditions being claimed. *See Rodriguez,* 189 F.3d at 1353; *Fleshman*, 138 F.3d at 1431-32; Appx137 (block 17); Appx142 (block 33); 79 Fed. Reg. at 57,671-72.

To the extent prior decisions have looked to § 3.155(a) (1996) or its identification language to determine the scope of a *formal* application, *see Lacoste v. Wilkie*, No. 2018-1670, 2019 U.S. App. LEXIS 17026 at *9-*11 (Fed. Cir. June 6, 2019) (non-precedential) (assuming without deciding that § 3.155(a) governed the interpretation of formal applications, but noting the lack of "meaningfully developed" briefing on the issue); *see also Shea v. Wilkie*, 926 F.3d 1362, 1367

(Fed. Cir. 2019) (not final as of the date of this filing), that does not accord with the regulatory scheme. Section 3.155(a) (1996) could not operate to create claims for medical conditions not listed on a formal application without becoming an exception that swallows all other claim presentation and identification rules. *See Abdul-Akbar v. McKelvie*, 239 F.3d 307, 315 (3d Cir. 2001) (en banc) ("Like every other court of appeals . . . , we refuse to conclude that with one hand Congress intended to enact a statutory rule . . .but, with the other hand, it engrafted an open-ended exception that would eviscerate the rule."); *see also Erickson v. United States Postal Serv.*, 759 F.3d 1341, 1349 (Fed. Cir. 2014) (eschewing statutory interpretation that would cause an exception to swallow the rule). Indeed, any holding that a § 3.151(a) formal application listing specific disabilities could contain an "informal claim" for unlisted disabilities would create the absurd procedural result of VA forwarding the claimant a formal application (as required by § 3.155(a)) in response to its receipt of a formal application. It would create a new species of claim: an informal formal claim.

III. VA Must Read An Application Sympathetically, But It Is Not Required To Search Records And Raise Claims For A Claimant

The sympathetic reading doctrine stems from a statement in the legislative history summarizing the general character of the VA benefits system. In passing the Veterans' Judicial Review Act of 1988, Congress emphasized that VA should "fully and sympathetically develop the veteran's claim to its optimum," consistent

with the non-adversarial, paternalistic nature of the system. *Hodge v. West*, 155 F.3d 1356, 1362-63 (Fed. Cir. 1998) (quoting H.R. Rep. No. 100-963, at 13 (1988), reprinted in 1988 U.S.C.C.A.N. 5782, 5794-95). Thus, in a number of decisions, this Court has required VA to consider all relevant issues raised by a claim "regardless of the specific labels" in the claimant's pleading. *Szemraj v. Principi*, 357 F.3d 1370, 1373 (Fed. Cir. 2004).

Specifically, in *Roberson v. Principi*, this Court held that VA must consider 38 C.F.R. § 4.16 (the regulation allowing for TDIU) when a claimant submits evidence of unemployability with his or her claim, because "VA must determine 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 TDIU." 251 F.3d 1378, 1384 (Fed. Cir. 2001). In subsequent decisions, this Court has emphasized that *Roberson* was not limited to its particular facts and that all VA pro se filings must be read liberally. *Harris v. Shinseki*, 704 F.3d 946, 948 (Fed. Cir. 2013); *see Comer v. Peake*, 552 F.3d 1362, 1368 (Fed. Cir. 2008); *Moody v. Principi*, 360 F.3d 1306, 1310 (Fed. Cir. 2004); *Szemraj*, 357 F.3d at 1373.

Despite this expansive doctrine, in *MacPhee v. Nicholson*, this Court rejected an argument that the sympathetic reading doctrine serves to transform medical records on unclaimed conditions into informal claims under 38 C.F.R. § 3.157(b)(1). 459 F.3d 1323, 1327-28 (Fed. Cir. 2006). And this Court has

subsequently described the sympathetic reading doctrine as requiring VA consideration of "*related* claims for service-connected disability," *Scott v. McDonald*, 789 F.3d 1375, 1381 (Fed. Cir. 2015) (emphasis added)—but not "all possible" substantive theories of benefits recovery, *Robinson v. Shinseki*, 557 F.3d 1355, 1361 (Fed. Cir. 2009).[9]

The Veterans Court has issued several decisions that seek to navigate this balance. In *Brannon v. West*, it held that VA must "interpret the appellant's submissions broadly," but was "not required to conjure up issues that were not raised by the appellant." 12 Vet. App. 32, 35 (1998) (citing *Talbert v. Brown*, 7 Vet. App. 352, 356 (1995) (noting that there must be "some indication" that an appellant "wishes to raise a particular issue" and that VA is not required "to conduct an exercise in prognostication")); *see also Clemons v. Shinseki*, 23 Vet. App. 1, 5-7 (2009) (explaining that a claim for PTSD encompasses other mental diagnoses, but not separate conditions). Similarly, in *Criswell v. Nicholson*, the court recognized the sympathetic reading doctrine, but held that a claim does not encompass a particular disability—even if that disability was clearly reflected in service records—unless the claimant indicated an intention to apply for benefits for

[9] The Court's recent decision in *Shea*, which also concerns these issues, is discussed *infra* at Argument IV.

that disability. 20 Vet. App. 501, 504 (2006). This Court did not discern any legal issue in *Criswell*, dismissing a challenge to the Veterans Court's decision on the basis of 38 U.S.C. § 7292(d)(2). *Criswell v. Mansfield*, 250 F. App'x 320, 321 (Fed. Cir. 2007) (nonprecedential).

In *Brokowski*, the Veterans Court explained that "[i]t is the pro se claimant who knows what symptoms he is experiencing and that are causing him disability," while it is VA that "knows the provisions of title 38 and can evaluate whether there is a potential under the law to compensate an averred disability based on a sympathetic reading" of the claimant's submissions. 23 Vet. App. at 85 (quoting *Ingram v. Nicholson*, 21 Vet. App. 232, 256-57 (2007)). The court stated that a claimant is not expected to identify a disability with "any technical precision" beyond the competence of a layperson, but is expected to identify that which he or she is competent to describe: "the nature of the disability for which he is seeking benefits." *Id.* at 85-86; *see Ingram*, 21 Vet. App. at 256 (pleading requirements "must be based on reasonable expectations of a pro se claimant"); *see also Jandreau v. Nicholson*, 492 F.3d 1372, 1377 & n.4 (Fed. Cir. 2007) (laypersons generally competent to identify simple conditions).

Brokowski held that a claimant "referring to a body part or system that is disabled" or "describing symptoms of the disability" constitutes sufficient identification from the claimant. 23 Vet. App. at 86-87 (citing, inter alia, 38

C.F.R. §§ 3.155(a), 3.159(c)(3) and VA Form 21-526). That identification "makes it possible for VA to develop and adjudicate the claim." *Id.* at 88. Otherwise, if claimants could simply request benefits for "all disabilities of record," it would require VA to "conduct an unguided safari through the record to identify all conditions" the claimant could possibly claim—generating uncertainty about the scope of the claim, creating an unreasonable burden on VA, and nullifying the specificity required by VA regulation. *Id.* at 88-89 (citing *Gobber v. Derwinski*, 2 Vet. App. 470, 472 (1992) ("[T]he duty to assist is not a license for a 'fishing expedition' to determine if there might be some unspecified information which could possibly support a claim.")).

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.

This Court's statement in *Roberson* that VA must "determine all potential claims raised by the evidence, applying all relevant laws and regulations" does not support an alternate conclusion here. 251 F.3d at 1384. That statement in

Roberson must be considered within the context of the case, which concerned a "claim" for TDIU, *not* a medical condition unrelated to the claim identified. 251 F.3d at 1384. In this regard, using the word "claim" for TDIU was a misnomer. *See Comer*, 552 F.3d at 1367 ("A claim to TDIU benefits is not a free-standing claim. . . ."); *Rice v. Shinseki*, 22 Vet. App. 447, 452 (2009) (noting cases referring to TDIU as a "claim," but holding that clarification of this parlance was required, since TDIU "is not a separate claim for benefits," but "an attempt to obtain an appropriate rating for a disability"). TDIU is, and *Roberson* was referring to, a rating provided by regulation that could be relevant to a claim, 79 Fed. Reg. at 57,672-73 (noting that VA considers relevant technical benefits like TDIU encompassed in a claim), not a separate medical condition.

In fact, *Roberson*'s specific holding was that a claim for "medical disability" with "evidence of unemployability" compels VA consideration of TDIU. 251 F.3d at 1384.[10] Thus, *Roberson* stands for the proposition that, once a claimant files for benefits for a medical condition, VA must consider all relevant issues; not that a claim for one medical condition requires VA to consider unrelated medical conditions noted in service records. Indeed, if *Roberson* had been referring to

[10] In its holding, *Roberson* employed the "identify the benefit sought" language of § 3.155(a) (2001), since the Veterans Court had denied Mr. Roberson's appeal through reference to that provision. *See* 251 F.3d at 1382.

unrelated conditions, then *Veterans Justice Grp.* could not have upheld VA's position otherwise. 818 F.3d at 1356.

The precedents discussed above confirm that VA must sympathetically read a pro se claimant's pleading, but also that VA is not obligated to search service records and select for the veteran the conditions being claimed. The claimant must identify (at least at a high level of generality) the nature of the symptoms or conditions he or she is claiming. This balance (1) properly takes into account claimant competency, *Jandreau*, 492 F.3d at 1377 & n.4; *see Brokowski*, 23 Vet. App. at 85-86; *Ingram*, 21 Vet. App. at 256-57; (2) ensures a meeting of the minds between the claimant and VA, VAOPGCPREC 12-1992, at ¶ 14; and (3) avoids the inefficiency and uncertainty associated with VA construing and developing a claim based on guess work, *Brokowski*, 23 Vet. App. at 88-89; *Brannon*, 12 Vet. App. at 35. The Veterans Court's decision upsets this balance without basis.

IV. In *Shea*, The Court Did Not Decide The Issue Presented Here And The Two Cases Are Distinguishable On Crucial Facts

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*.[11]

The Court also based its decision largely on the unique facts present in *Shea*. Ms. Shea identified four disabilities in her formal application, the date the disabilities began, her treating physicians, and the three hospitals that treated her disabilities. 926 F.3d at 1365. Ms. Shea's disabilities were the result of an accident, meaning that the records she identified fell into a very narrow date range. *Id.* at 1365. She followed up her application with a submission reiterating where she was treated and requesting that the records be obtained. *Id.* The Court highlighted that her argument was reliant on "the claim-stating documents' concrete references to specified records," and the Court limited its ultimate holding to "only" those filings that "refer[red] to specific medical records." Id. at 1370. In addition, Ms. Shea raised her PTSD symptoms to VA in her Notice of Disagreement (NOD) to the initial claim decision, and she filed a claim for benefits for PTSD only months after filing that NOD. *Id.* at 1365-67.

[11] The Court was aware of *Sellers* when it decided *Shea*. *Sellers* was raised in the briefing and mentioned at oral argument.

Based on those facts, the Court concluded that Ms. Shea's filings raised an informal claim, because the filings referred to "specific medical records." *Id.* at 1370. Thus, the Court applied the informal claim provisions of § 3.155(a) to Ms. Shea's formal application. The Court did not consider 38 U.S.C. § 5101(a)(1), the full regulatory scheme (to include 38 C.F.R. § 3.151(a)), *Fleshman*, or *Veterans Justice Grp.* in its decision. Consideration of these authorities, and the very different facts in *Sellers*, compel a different conclusion here.

Mr. Sellers identified five specific physical conditions in his formal application, provided treatment dates of 1981 to discharge (1996) for his left-knee condition and "1981. 1982. July 1990" to discharge (1996) for his back and right-hand conditions, provided treatment locations of "20th Special Forces[,] Montgomery Al.," and "Maxwell AFB," respectively, and submitted no other correspondence. Appx137-138. Mr. Sellers's general reference to virtually his entire period of service and to the bases where he served does not constitute a "concrete reference[ ] to specified records." 926 F.3d at 1370; s*ee also Lacoste*, 2019 U.S. App. LEXIS 17026, at *3 (though Mr. Lacoste's application named three air force bases where he received treatment, and noted 1969 through 1972 as years of treatment, "he did not refer to or specifically request that VA obtain any particular medical records"), *13 (highlighting again that "the application made no reference" to "Mr. Lacoste's service medical records").

Mr. Sellers also made no effort to challenge VA's decision, which inherently interpreted the scope of his claim by adjudicating only the disabilities identified on the application. Instead, he separately sought a claim for PTSD thirteen years after raising his initial claim for benefits. Appx2. Given that lapse in time, it is difficult to conclude that, with his general statement in block 40, he was conveying an intent to claim benefits for non-specified diagnoses in his medical records, as opposed to simply reiterating his intent to seek benefits for the diagnoses he identified.

To be clear, we are not advocating for the law on claim identification to be based on the specificity of references to medical records in an application. Rather, we are noting that, whereas *Shea* highlighted the issue of specific references to medical records within the context of a live claim for benefits, to include a connection in her NOD between the initially identified physical disabilities and the mental disability, 926 F.3d at 1365, Mr. Sellers's case presents an effort to transform a generalized request for benefits – if that is, in fact, what Mr. Sellers intended in the remarks section of his claim form – into a claim for unlisted conditions thirteen years after the application containing that supposed generalized request was finally decided. As we discuss in greater detail below, any holding elevating general statements in old formal applications into a claim for all "reasonably identifiable" diagnoses in a claimant's records will inject a significant

degree of arbitrariness into the claims process. The fairest and most workable system is the one VA has always maintained: claimants should comply with the requirement to provide a VA Form 526 (as Congress intended) that identifies the conditions, at least at a high level of generality, that they intend to claim. *See Veterans Justice Grp.*, 818 F.3d at 1356.

V. The Veterans Court's Guidance To The Board, And The Facts Of This Case, Reflect The Arbitrariness And Unworkability Of Its New Rule

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.

The facts of this case highlight the arbitrariness and unworkability of this new rule. Mr. Sellers requested benefits for five particular disabilities: (1) left-knee injury, (2) back injury, (3) right-hand injury, (4) hearing loss, and (5) right-leg numbness. Appx137. He wrote these five disabilities out in both block 12 and block 17 of his application. *Id*. While pro se claimants are presumed unfamiliar

with the technicalities of the VA benefits system and complex medical terms, they are certainly competent to refer to a body part or system or symptom for which they desire benefits, and Mr. Sellers demonstrated his competence by listing these five conditions. *See Brokowski*, 23 Vet. App. at 85; *Ingram*, 21 Vet. App. at 256-57. Based on the evidence, there can be no doubt that, if he actually desired benefits for a mental health condition in 1996, Mr. Sellers was capable of noting that as a sixth condition—and he could have done so with language as simple or general as "mental" or "stress" or "PTSD." *Brokowski*, 23 Vet. App. at 85-86. At the very least, if he had intended to raise that claim in 1996, he could have challenged VA's decision immediately, or filed an additional claim for PTSD sooner than thirteen years later.

Under the Veterans Court's interpretation of the law, however, all the specific notations on his application regarding the disabilities "for which this claim is made," and Mr. Sellers's apparent satisfaction at the time with how his application was interpreted and adjudicated, were functionally irrelevant. The only relevant fact to the court was that, in block 40, Mr. Sellers reaffirmed his intention to receive service connection for his disabilities with a general statement. Appx2. That statement, according to the court, triggered a VA duty to search for and add

additional, completely separate disabilities to the claim—even though Mr. Sellers had already told VA exactly which disabilities he wanted to claim.

The Veterans Court does not address what manner of statement can trigger this new duty to search a veteran's records. It also does not address the windfall that will now come to veterans who made general or summary statements in the remarks section, but will not fall to those who did not. The only way around that inequity is to reason that the general statement reflects an intent to seek an additional specific benefit. But, as discussed above, there is no way to support a finding of such intent in the face of a form filled out to completion with other specifically identified disabilities. The Veterans Court's new rule effectively shifts the responsibility to raise a claim for benefits from the veteran to VA. Indeed, this shifting of responsibility appears remarkably similar to the Veterans Court's shifting of the burden to demonstrate harmless error from the veteran to the Secretary in *Mayfield v. Nicholson*, 19 Vet. App. 103 (2005), *rev'd on other grounds*, 444 Fed. Cir. 1328 (Fed. Cir. 2006). In reversing *Mayfield*, the Supreme Court relied upon the common sense approach that the party in the better position to identify the error should be the one to identify it, even in the context of the veterans' benefits system. *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009). Here, Congress, through providing the Secretary with the authority to define what is required to be included on claim forms and placing a responsibility to present a

claim upon the claimant, requires identification of an actual claim, not a request for any benefit that one's service records might support.

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.

CONCLUSION

For the foregoing reasons, we respectfully request that the Court reverse the Veterans Court's decision.

Respectfully submitted,

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September 13, 2019

ADDENDUM

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 16-2993

ROBERT M. SELLERS, APPELLANT,

V.

ROBERT L. WILKIE,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

On Appeal from the Board of Veterans' Appeals

(Argued May 1, 2018 Decided August 23, 2018)

Kenneth M. Carpenter of Topeka, Kansas, with whom *John F. Cameron*, of Montgomery, Alabama, was on the brief for the appellant.

Nathan Paul Kirschner and *Carolyn F. Washington*, Deputy Chief Counsel, with whom *James M. Bryne*, General Counsel, and *Mary Ann Flynn*, Chief Counsel, all of Washington, D.C., were on the brief for the appellee.

Before DAVIS, *Chief Judge*, and SCHOELEN and ALLEN, *Judges*.

ALLEN, *Judge*: U.S. Navy veteran Robert M. Sellers suffers from depression. He appeals through counsel an April 29, 2016, Board of Veterans' Appeals (Board) decision denying an effective date earlier than September 18, 2009, for his service-connected major depressive disorder (MDD) and a higher initial disability rating for MDD.[1] This matter was referred to a panel of the Court, with oral argument, to determine whether a claimant's general statement of intent to seek benefits, combined with in-service medical diagnoses documented in service treatment records, is sufficient to constitute a valid claim for benefits.

We hold that a general statement of intent to seek benefits, coupled with a reasonably identifiable in-service medical diagnosis reflected in service treatment records in VA's possession prior to the RO making a decision on the claim may be sufficient to constitute a claim for benefits.

[1] The Board remanded the issues of increased ratings for spondylolisthesis of the lumbosacral spine, right index and middle finger injuries, and a left knee disability, and service connection for a bilateral ankle disability. Accordingly, these issues are not before the Court. *See Breeden v. Principi*, 17 Vet.App. 475, 478 (2004) (per curiam order). The Board also granted service connection for PTSD and a total disability rating based on individual unemployability. These are favorable factual findings the Court may not disturb. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007). Finally, the Board also denied an earlier effective date for the appellant's 40% lumbosacral disability rating. As the appellant presents no argument as to this issue, the Court deems it abandoned. *See Pederson v. McDonald*, 27 Vet.App. 276, 285 (2015) (en banc).

Whether service treatment records reasonably identify a claimed disability is a fact-specific inquiry. That inquiry was not made here. Accordingly, we set aside the Board's decision and remand this matter for further proceedings.

I. FACTS AND PROCEDURAL HISTORY

The appellant served honorably 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. In November 1993, he was examined by a military psychiatrist to determine fitness for duty. Noting that the appellant had symptoms of depression and "prominent" insomnia for the past 2 to 3 years, Record (R.) at 2930, the psychologist diagnosed dysthymia and concluded that the appellant's psychiatric symptoms were not "severe enough to make him unfit for duty." *Id.*

In April 1995, the appellant's commanding officer recommended that he undergo an involuntary acute emergency mental health evaluation because he threatened to commit suicide and had engaged in other "irrational" behavior. The commanding officer described him as "angry" and a possible threat to himself. R. at 2943. Later that month, the appellant underwent extensive psychological testing. The examiner diagnosed a personality disorder and recommended further examination to rule out dysthymia. R. at 2923. On May 1, 1995, the appellant was admitted to a psychiatric center where he was diagnosed with dysthymia and a personality disorder with obsessive-compulsive traits. R. at 2924.

In March 1996, the appellant filed a formal claim for VA disability benefits, listing various physical injuries as disabilities. He also stated that he had already received in-service treatment for several of those physical injuries. In a section entitled "Remarks," the appellant wrote: "Request [service connection] for disabilities occurring during active duty service." R. at 2687. This statement plays a major role in this appeal. VA adjudicated the appellant's physical disability claims but did not adjudicate any mental health claims at that time.

In September 2009, the appellant filed an informal claim for service connection for PTSD, which the VA regional office (RO) denied in a March 2011 decision. In May 2011, a VA compensation and pension (C&P) examiner diagnosed the appellant with MDD and PTSD. A VA psychiatrist opined in July 2011 that the appellant's MDD began in service. In a September 2011 decision, the RO then granted service connection for MDD at a 70% rating, effective May 13, 2011. In October 2011, the appellant timely disagreed with both the March and September 2011

decisions and ultimately perfected appeals to the Board. A decision review officer then awarded an earlier effective date for the appellant's MDD, September 3, 2010.

On April 29, 2016, the Board issued a decision awarding the appellant an effective date of September 18, 2009 for MDD and a higher initial rating for MDD. Regarding its assignment of September 18, 2009, as the effective date for MDD, the Board stated:

> [A]n effective date of September 18, 2009, and no earlier, is warranted for the grant of service connection for the Veteran's psychiatric disability (major depressive disorder or MDD). The record shows that VA received on September 18, 2009, an informal claim for service connection for psychiatric disability, claimed as PTSD. It is noted that, when a claimant makes a claim, he is seeking service connection for symptoms regardless of how those symptoms are diagnosed or labeled.
>
> However, there is no legal basis for the assignment of an effective date earlier than September 18, 2009 for the award for service connection for MDD because the effective date of the award is the date of receipt of the claim or the date entitlement arose, whichever is later. In this case, the later date is September 18, 2009.
>
> The Board observes that VA received no claim (informal or otherwise) for service connection for any psychiatric disability prior to September 19, 2009. Notably, prior to this date, VA had not received any correspondence from the Veteran or a representative since 1996. Also, although the Veteran had filed an original VA compensation claim in April 1971[2] and a claim for benefits in March 1996, these did not include any claim for psychiatric disorder or problems that could be reasonably construed as a claim for service connection for psychiatric disability.

R. at 20 (citations omitted). This appeal followed.

II. ANALYSIS

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

[2] In June 1971, the appellant was granted service connection for bilateral hearing loss.

[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).

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).

A. March 1996 Claim for Benefits for a Psychiatric Disability

The appellant argues his general statement of an intent to seek "[service connection] for disabilities occurring during active duty service," combined with VA's actual possession of his service treatment records, is sufficient to constitute a valid claim for a psychiatric disability. The Secretary argues in response that the Board properly determined the appellant had not submitted a claim in March 1996 for a psychiatric disability because general statements do not sufficiently "identify the benefit sought" as required under *Brokowski*, 23 Vet.App. at 89.[4]

The Secretary is correct that a general statement of intent to seek benefits for unspecified disabilities standing alone is insufficient to constitute a claim. Yet, the Secretary's argument misses a crucial additional factor present here: evidence of reasonably identifiable in-service diagnoses of psychiatric conditions that predate the appellant's claim were in the possession of the RO before it rendered its rating decision. The disability at issue here was identified in the record by military medical professionals well before the appellant filed his March 1996 claim, R. at 777, 2922-43, and the record was in VA's possession at the time of the initial decision, R. at 2667 (July 1996 rating decision listing "[s]ervice medical records for the period [April 17, 1964,] through [January 22, 1969,] and the period [February 20, 1981,] through [February 26, 1996,] as "Evidence"). Further, the appellant's mental health issues were well documented in those records. They reflect that the appellant's mental health was a subject of serious concern while he was in the military as he was twice diagnosed with dysthymia, subjected to extensive psychological testing, evaluated for retention purposes, and involuntarily hospitalized. It is undisputed on appeal to the Court that the appellant was diagnosed in service with a psychiatric condition. But what is not clear is whether

[4] There is no dispute that the appellant's statement was in writing and clearly expressed an intent to apply for some benefit. The only dispute is whether this written intent sufficiently identified the benefits he asserts now that he sought in 1996.

that diagnosis was reasonably identifiable by VA adjudicators at the time of his putative formal claim in March 1996 or prior to the RO's deciding the claim. As we explain below, whether an in-service diagnosis in a veteran's service records is reasonably identifiable by VA adjudicators at the time a claimant seeks benefits or prior to the RO's deciding the claim is a factual determination for the Board.

As a general principle, VA may not ignore in-service diagnoses of specific disabilities, even those coupled with a general statement of intent to seek benefits, provided those diagnoses are reasonably identifiable from a review of the record.[5] But, we are cognizant of the difficulties that VA adjudicators would face when confronted with a general statement of intent to apply for benefits for conditions experienced in service. Service medical records reflecting such conditions could be voluminous and, even if they are not, the records could reflect numerous conditions. The fact finder must determine, based on the totality of the service medical record, both qualitatively and quantitatively, whether the condition at issue would be sufficiently apparent to an adjudicator.

To assist the Board in this endeavor, we provide the following thoughts on the types of factors that may be relevant to the Board's inquiry. These are not the only factors the Board may find helpful as it makes its assessment on this factual question. They are merely illustrations of factors that may be relevant to the Board's assessment. Qualitatively, for example, service medical records might contain many notes of conditions ranging from descriptions of trivial conditions (a hangnail) to full-blown diagnoses of significant illnesses (PTSD). And the record might describe certain conditions in great detail or, in contrast, in only a passing manner. Or, for example, medical records could contain vague complaints of symptoms regarding a condition but no formal diagnosis.

Quantitatively, the sheer volume of medical records may potentially be a factor in determining whether a condition would have been reasonably identifiable to a VA adjudicator. For example, the Board could decide that a single diagnosis reflected in a single page of a 2,000-page service record is not reasonably identifiable. Whether this is the case here is a factual question that the Board must address in the first instance, and the Board must provide support its determination

[5] Like the *Brokowski* Court, we do not reach the question whether a general statement of intent to seek benefits, standing alone, is sufficient to trigger the Secretary's statutory obligation to notify claimants of the incomplete nature of an application, because the appellant did not argue this theory. *See* 38 U.S.C. § 5102(b) ("If a claimant's application for a benefit . . . is incomplete, the Secretary shall notify the claimant and the claimant's representative, if any, of the information necessary to complete the application.").

with adequate reasons and bases. *See Washington v. Nicholson*, 19 Vet.App. 362, 367-68 (2005) (explaining that it is the Board's duty, as fact finder, to determine the credibility and weight to be given to the evidence).

Because the Board did not assess whether the medical record is such that the disability in question was reasonably identifiable, it did not appropriately consider this issue and, thus, remand is warranted. On remand the Board must determine whether the appellant's in-service records reflect a reasonably identifiable diagnosis of a psychiatric condition given the nature of the records at issue and, if necessary, reconsider its determination concerning the proper effective date of the appellant's MDD accordingly. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) (remand is warranted "where the Board has incorrectly applied the law, failed to provide an adequate statement of reasons or bases for its determinations, or where the record is otherwise inadequate").

In sum, we recognize the Court's warning in *Brokowski* that general statements of intent "cannot be used as a pleading device to require the Secretary to conduct an unguided safari through the record to identify all conditions for which the veteran may possibly be able to assert entitlement to a claim for disability compensation," 23 Vet.App. at 89, and we emphasize that our holding here is a narrow one. Only records containing diagnoses that are reasonably identifiable from a review of the record may otherwise cure an insufficient general statement of intent to seek benefits. To continue *Brokowski*'s metaphor, we caution that VA at most must participate in a fully guided safari.

B. Higher Initial MDD Rating

The appellant also appeals the Board's denial of a higher initial rating for MDD, raising arguments concerning the Board's discounting of a March 2016 vocational expert opinion and its consideration of 38 C.F.R. § 4.130, Diagnostic Code (DC) 9434. Addressing these arguments would be premature, however, and they are better left to the Board in the first instance. The weight to be accorded to the expert opinions of record might change depending on the DC at issue, and the relevant DC depends on what effective date the Board assigns. The DC in effect at the time of the appellant's March 1996 claim required that a claimant show at least one of three different factors for a 100% rating. *See* 38 C.F.R. § 4.132, DC 9411 (1996). This Court held in *Johnson v. Brown* that each of those factors provided an independent basis for the award of a 100% rating. 7 Vet.App. 95, 97 (1994). Additionally, the Court upheld the Secretary's interpretation of DC 9411 to mean that a claimant who was assigned a 70% rating for a psychiatric disability and who was

unable to work would be entitled to a 100% rating. *Id.* Here, the vocational expert opined that the appellant's "psychological disability alone precludes all competitive employment in the national economy," R. at 89, and that the accommodations his psychological disability requires "preclude competitive work of any kind," R. at 90. These findings appear to fall under at least one of DC 9411's factors as they existed in March 1996. *See* 38 C.F.R. § 4.132, DC 9411 (providing for a 100% rating where a claimant shows he or she "was demonstrably unable to obtain or retain employment"). Alternatively, the appellant might be entitled to a 70% rating under the March 1996 version of DC 9411 but be elevated to a 100% rating under *Johnson*. Either way, these determinations are best left to the Board in the first instance. S*ee Washington*, 19 Vet.App. at 367-68.

Finally, we caution the Board that it cannot reject a vocational expert's opinion merely because it is not a medical opinion. Vocational experts can be necessary depending on the facts of a particular case. *See Smith v. Shinseki*, 647 F.3d 1380, 1386 (Fed. Cir. 2011). While the Board is entitled to discount or reject the *medical* conclusions of a vocational examiner, it cannot discount the *vocational* conclusions of a vocational examiner simply because he or she is not a medical professional. No law, regulation, or precedent requires that an examination be conducted by an examiner with a particular expertise or specialty. Instead, an examination must be performed by someone with the "education, training, or experience" necessary to provide an opinion. 38 C.F.R. § 3.159(a)(1).

Thus, because the legal standard the Board may use to analyze the probative value of the vocational opinion may change, the Court holds that the appellant's arguments concerning the March 2016 vocational expert opinion and the correct DC to apply are inextricably intertwined with the issue of an earlier effective date, and the Court and will not address them further. *See Harris v. Derwinski*, 1 Vet.App. 180 (1991).

In pursuing his case on remand, the appellant is free to submit additional evidence and argument, including the arguments raised in his briefs to this Court, in accordance with *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order), and the Board must consider any such evidence or argument submitted, *Kay v. Principi*, 16 Vet.App. 529, 534 (2002). The Court reminds the Board that "[a] remand is meant to entail a critical examination of the justification for the decision," *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991), and the Board must proceed expeditiously, in keeping with 38 U.S.C. §§ 5109B and 7112.

C. Tinnitus Claim

The appellant also argues the Board erred by failing to refer a purportedly pending claim for service connection for tinnitus to an RO for adjudication. He asserts that a May 1996 C&P examiner's note that the appellant reported tinnitus "explicitly raised" a claim for service connection for that condition. The Secretary argues the Board did not err because no evidence of record reasonably raised such a claim. As the appellant's counsel conceded at oral argument, Oral Argument at 30:05-31:20, *Sellers v. O'Rourke*, U.S. Vet. App. No. 16-2993, (oral argument held May 1, 2018), http://www.uscourts.cavc.gov/oral_arguments_audio.php, this Court lacks jurisdiction to decide this issue because there is no final Board decision on the matter and thus the Court will not consider this issue further. *See* 38 U.S.C. §§ 7252(a), 7266(a); *Jarrell v. Nicholson*, 20 Vet.App. 326, 331 (2006) (en banc) (holding that the Court may exercise its jurisdiction only over claims that are the subject of a final Board decision).

Where a claim is "in an unadjudicated state due to the failure of the Secretary to process" it, the claimant's remedy is "to pursue a resolution of the original claim, e.g., to seek issuance of a final RO decision with proper notification or appellate rights and initiate [a Notice of Disagreement]." *DiCarlo v. Nicholson*, 20 Vet.App. 52, 56 (2006). "If the Secretary fails to process the claim, then the claimant can file a petition with this Court challenging the Secretary's refusal to act." *Id.* at 57 (citing *Costanza v. West*, 12 Vet.App. 133, 134 (1999)).

D. Other Issues Raised at Oral Argument

At oral argument, the appellant's counsel advanced an argument that was not presented in the briefing. In the briefs, the appellant seemed to argue that his March 1996 claim included an informal claim for MDD. *See, e.g.*, Appellant's Reply Brief at 2-4. But at oral argument, counsel made very clear that he was raising an alternative argument for the first time, Oral Argument at 4:30-4:53, 26:45-27:22, 43:46-43:55, even stating that the arguments made in the briefs concerning informal claims were incorrect, Oral Argument at 38:57-39:20, 41:00-41:16.

The Court generally will not entertain arguments raised by counsel at oral argument for the first time. *See, e.g.*, *McFarlin v. Conseco Servs., L.L.C.*, 381 F.3d 1251, 1263 (11th Cir. 2004) ("A party is not allowed to raise at oral argument a new issue for review."); *Pieczenik v. Dyax Corp.*, 265 F.3d 1329, 1332-33 (Fed. Cir. 2001) (finding that "[i]t is well settled that an appellant is not permitted to make new arguments that it did not make in its opening brief" and not addressing arguments presented for the first time at oral argument); *Tarpley v. Greene*, 684 F.3d 1, 7 n.17

(D.C. Cir. 1982) ("Clearly, oral argument on appeal is not the proper time to advance new arguments or legal theories.").

Moreover, "[t]his Court and the U.S. Court of Appeals for the Federal Circuit have repeatedly discouraged parties from raising arguments that were not presented in an initial brief to the Court." *Norvell v. Peake*, 22 Vet.App. 194, 201 (2008); *see also Carbino v. West*, 168 F.3d 32, 34 (Fed. Cir. 1999) ("Improper or late presentation of an issue or argument . . . ordinarily should not be considered."), *aff'd sub nom. Carbino v. Gober*, 10 Vet.App. 507, 511 (1997); *Fugere v. Derwinski*, 1 Vet.App. 103, 105 ("Advancing different arguments at successive stages of the appellate process does not serve the interests of the parties or the Court. Such a practice hinders the decision-making process and raises the undesirable specter of piecemeal litigation."). "[T]he practice of presenting new issues and arguments during oral argument is even more objectionable." *Norvell*, 22 Vet.App. at 202. Though the Court is aware that the appellant's counsel who presented oral argument was not the same counsel who wrote the briefs, counsel could have alerted the Court and the Secretary's counsel to the new argument. We strongly urge counsel to avoid this approach to oral argument in the future. To be clear, the Court will not consider the arguments the appellant's counsel advanced for the first time at oral argument in his matter.

III. CONCLUSION

After consideration of the parties' briefs, oral arguments, the record on appeal, and the governing law, the Board's April 29, 2016, decision denying an effective date earlier than September 18, 2009, for the award of service connection for MDD is SET ASIDE and the matter REMANDED for further proceedings consistent with this decision.

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 13th day of September, 2019, a copy of the foregoing BRIEF OF RESPONDENT-APPELLANT was filed electronically.

_X_ This filing was served electronically to all parties by operation of the Court's electronic filing system.

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To the following address:

_/s/ David R. Pehlke____

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Circuit Rule 32(a). The brief contains 8,802 words. This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(6). It has been prepared in a proportionally spaced typeface using Microsoft Word Times New Roman, 14-point font.

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