

**IN THE UNITED STATES COURT
OF APPEALS FOR VETERANS CLAIMS**

GRACIE M. KNOX WALKER,
Appellant,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,

Appellee.

**ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS**

**BRIEF OF THE APPELLEE
SECRETARY OF VETERANS AFFAIRS**

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**IN THE UNITED STATES COURT OF APPEALS
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GRACIE M. KNOX WALKER,)	
)	
Appellant,)	
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v.)	Vet.App. No. 19-6189
)	
ROBERT L. WILKIE,)	
Secretary of Veterans Affairs)	
)	
Appellee.)	

**ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS**

**BRIEF OF THE APPELLEE
SECRETARY OF VETERANS AFFAIRS**

I. ISSUE PRESENTED

Whether the Court should vacate and remand the July 5, 2019, decision of the Board of Veterans' Appeals (Board) denying an evaluation higher than 20% for degenerative facet and disc disease of the lumbar spine (low back condition), because the Board relied on inadequate examination reports

II. STATEMENT OF CASE

A. Jurisdictional Statement

The United States Court of Appeals for Veterans Claims (Court) has jurisdiction over this appeal under 38 U.S.C. § 7252(a), which grants the Court exclusive jurisdiction to review final Board decisions.

B. Nature of the Case

Appellant, who is proceeding *pro se*, appeals the Board's July 5, 2019, decision denying an evaluation higher than 20% for a low back condition. (Record Before the Agency (R.) at 4-15).

C. Statement of Facts

Appellant served on active duty with the United States Army from March 1986 to July 1995. (R. at 1381-82) (December 1985 enlistment examination); (R. at 1586-87) (April 1995 separation orders).¹

Appellant filed a claim with the Veterans Administration (VA) in August 1995 for a back condition.² (R. at 1362-63). The VA Regional Office (RO) granted service connection for a lumbosacral strain with degenerative joint disease of the lumbar spine and it assigned a 10% rating effective July 18, 1995. (R. at 1355-60). Appellant filed various claims for increased ratings over the years, which the

¹ Appellant's DD 214 is not of record, but her service and dates of service are not in dispute.

² On March 15, 1989, the Agency became the Department of Veterans Affairs (VA).

Department of Veterans Affairs (also VA) RO denied. *See, e.g.* (R. at 1307-10) (October 1996 rating decision); (R. at 1297) (September 2001 increased rating claim); (R. at 1261-65) (March 2002 rating decision); (R. at 1247) (September 2007 increased rating claim);

During this period, Appellant underwent VA exams in February 2002, (R. at 1266-69), and April 2008, (R. at 1216-18).

In January 2010, Appellant filed another increased rating claim, (R. at 1210), and, in April 2010, the RO increased the rating for the low back condition to 20% effective September 25, 2007. (R. at 1165-73) (April 2010 rating decision recharacterizing the claim as degenerative facet disease with degenerative disc disease, multi-levels of the lumbar spine). Appellant filed a Notice of Disagreement (NOD) with the assigned rating in December 2010. (R. at 1149). The RO continued the 20% rating in an October 2011 Statement of the Case (SOC). (R. at 1128 (1109-29)). Appellant perfected her appeal in January 2012. (R. at 1107).

Appellant filed another increased rating claim in September 2012, (R. at 1054), and the RO continued the 20% rating for a low back condition in a May 2013 rating decision. (R. at 993-999). Appellant filed statements in July 2013 and January 2014 attesting to back pain, (R. at 963, 991), along with an NOD in October 2014 (R. at 778-80).

Appellant underwent a VA back conditions exam in January 2013 where she was diagnosed with degenerative disc disease/degenerative joint disease of the L3-L4. (R. at 1029 (1028-1040)). Appellant reported that she experienced

stiffness in her right lower lumbar area every two to three months that she associated with her lower back locking up. (R. at 1030). Appellant did not report any flare-ups that impacted the function of her back. *Id.* Range of motion (ROM) testing revealed that flexion was to 90 degrees, with extension to 30 degrees. (R. at 1031). Right and left lateral flexion were to 30 degrees while right and left lateral rotation were to 30 degrees. (R. at 1031). Appellant was able to perform repetitive use testing with at least three repetitions. (R. at 1032). Her flexion was to 90 degrees, with extension to 30 degrees. *Id.* Her right and left lateral flexion were to 30 degrees while right and left lateral rotation were to 30 degrees. *Id.* She had a functional loss described as pain on movement. (R. at 1033). She did not have radicular pain or any other signs or symptoms due to radiculopathy. (R. at 1036-37). Appellant did not have any other neurologic abnormalities or findings related to her back condition (such as bowel or bladder problems/pathologic reflexes. (R. at 1037). She did not have IVDS of the back. *Id.* The examiner opined that Appellant's low back condition impacted her functional ability because it had caused her to miss five to six days of work in the last year. (R, at 1040).

Appellant underwent another VA examination in April 2014 where she was diagnosed with degenerative facet disease with degenerative disc disease, multi-levels of the lumbar spine. (R. at 907 (907-15)). She reported the onset and progression of back pain in 1987 and that she takes Tramadol as needed daily. (R. at 907). Appellant stated that her back became stiff and achy when she stood or sat too long with each flare-up lasting an hour or so with up to 60 flare-ups per

year. (R. at 907). ROM testing showed flexion to 75 degrees with evidence of pain at 55 degrees. (R. at 908). Extension was to 20 degrees with evidence of pain at 10 degrees. *Id.* Appellant performed repetitive use testing with at least three repetitions with flexion to 75 degrees and extension to 20 degrees. (R. at 909). She had a functional loss described as pain on movement, less movement than normal, interference with sitting, standing, and/ or weightbearing, and alternating sitting and standing. *Id.* She did not have radicular pain or any other signs or symptoms due to radiculopathy. (R. at 912). The examiner opined that the Appellant's condition impacted her ability to work because she could not lift more than 35 pounds and she was only able to stand and/or sit at a maximum of 4 hours a day. (R. at 914).

In August 2014, the RO proposed to reduce the rating for the low back condition from 20% to 10%. (R. at 838 (832-45)). Appellant filed a statement in opposition to the proposed reduction and submitted various treatment records. (R. at 784-825).

The RO held an informal hearing in June 2015 on the proposed reduction of the rating for the low back condition. (R. at 727), (R. at 730) (May 2015 Notice Letter for hearing). That same month, the RO decreased the rating for the low back condition from 20% to 10% effective September 1, 2015, (R. at 724-26), and Appellant filed an NOD, (R. at 673-75). The RO continued the 10% rating in an April 2017 SOC, (R. at 431 (406-34)), and Appellant filed a VA Form 9 in May 2017, (R. at 389-90).

Appellant complained of increased back pain, (R. at 384), and she underwent another VA examination in November 2017, where she was diagnosed with degenerative facet disease with degenerative disc disease, multi-levels of the lumbar spine, (R. at 339 (338-50)). Appellant reported flare-ups and described them as a sharp, radiating pain. (R. at 339). Appellant reported functional loss consisting of being unable to bend, stand, or walk for long periods of time. *Id.* ROM testing revealed that flexion was to 50 degrees, extension was to 10 degrees, right and left lateral flexion was to 10 degrees, and right and left lateral rotation was to 10 degrees. (R. at 340). The examiner indicated that Appellant had a functional loss in which she had difficulty bending. *Id.* There was pain noted on the examination which caused a functional loss. *Id.* Appellant showed pain in forward flexion, extension, right/left lateral flexion, and right/left rotation. (R. at 341). She had pain, weakness, fatigability, or incoordination that significantly limited her functional ability with repeated use over time. (R. at 342). Appellant had pain, fatigue, and lack of endurance that caused a functional loss. *Id.* The examiner noted that Appellant had increased pain and decreased ROM. *Id.* Appellant had muscle spasms that resulted in an abnormal gait or abnormal spine contour. *Id.* Appellant had additional factors contributing to her disability described as instability, disturbance of locomotion, and interference with sitting and standing. (R. at 343). The examiner opined that Appellant's condition impacted her ability to work. (R. at 348). The examiner explained that Appellant had decreased productivity due to acute chronic pain in her lower back. *Id.* Appellant was not able

to lift heavy things, walk, or stand for long periods of time. *Id.* The examiner noted that Appellant did not have objective evidence of pain on non-weight bearing. (R. at 349). The examiner noted that passive ROM for the back could not be performed or was not medically appropriate. *Id.*

Based on the results of the November 2017 VA examination, the RO increased the rating for the low back condition to 20% effective November 9, 2017. (R. at 284 (282-91)). The RO issued a December 2017 Supplemental SOC (SSOC) that continued the reduction for the low back condition from 20% to 10%, effective September 1, 2015, and denied a rating higher than 20% for the period from November 9, 2017. (R. at 278 (267-81)). Appellant filed a statement disagreeing with the December 2017 SSOC. (R. at 243). Appellant filed a VA Form 9 in April 2018 with various attachments. (R. at 188 (165-88)).

In February 2019, the Board restored the 20% rating for the low back condition from the date of the reduction and remanded the issue of a rating higher than 20%. (R. at 145 (141-49)). The Board remanded the claim for a new examination and in so doing, it found the November 2017 VA examination report inadequate because the examiner indicated he could not describe functional loss due to flare-ups or repeated use over time in terms of range of motion. (R. at 145).

Appellant underwent that examination in March 2019. (R. at 102-11). She reported that her back condition started with stiffness in the morning and would progressively get worse. (R. at 103). She noted that she was treated in the past with medication, physical therapy, and chiropractic treatment. *Id.* She currently

took Naproxen and Tramadol and used an A-slim, hot/cold packs, and a lumbar pillow. *Id.* She indicated that her flare-ups were very painful and sometimes her back would lock up. *Id.* Her flare-ups occurred when the weather was very cold or when she was tired. *Id.* Her flare-ups lasted 3 to 4 days. *Id.* Appellant reported that she was unable to sit, stand, or walk too long. She sometimes lost strength and flexion in her back. *Id.* She indicated that she had low endurance. *Id.*

Initial ROM testing revealed that flexion was to 55 degrees, extension was to 25 degrees, right and left lateral flexion was to 20 degrees, and right and left lateral rotation was to 30 degrees. (R. at 104). Appellant was able to perform repetitive use testing with no additional loss of function or ROM. *Id.* Appellant's ROM itself did not contribute to a functional loss. *Id.* Pain was noted on examination, which caused a functional loss in Appellant's forward flexion, right lateral rotation, and left lateral rotation. *Id.* There was no evidence of pain with weight-bearing. *Id.*

She had pain, weakness, fatigability or incoordination significantly limit functional ability with repeated use over a period of time. *Id.* The examiner was not able to describe the disability in terms of ROM. (R. at 105). She explained that she was unable to determine ROM without mere speculation. *Id.* The examiner opined that the Appellant's condition impacted her ability to work. (R. at 110). The examiner explained that Appellant's condition reduced the capacity for tasks that required heavy lifting, prolonged walking, or standing, and bending,

climbing, or squatting. *Id.* The examiner remarked that there was no evidence of pain on passive ROM testing and nonweight bearing. *Id.*

The RO implemented the Board's decision in an April 2019 rating decision and restored the 20% rating for the low back condition from September 1, 2015, and it continued that the current rating of 20% for the low back condition in an April 2019 SSOC. (R. at 72 (56-74)).

The claim for an increased rating returned to the Board, and in July 2019, the Board denied an evaluation higher than 20% for a low back condition. (R. at 5 (4-15)). This appeal followed.

III. SUMMARY OF THE ARGUMENT

The Secretary concedes that the Court should vacate and remand the Board's July 2019 decision denying an evaluation higher than 20% for a low back condition, because the Board erred when it did not ensure that VA fulfilled its duty to assist in this case by providing Appellant with an adequate VA medical examination.

IV. ARGUMENT

A. Standard of Review

The Board's decision regarding the degree of disability under the rating schedule is a finding of fact subject to the deferential clearly erroneous standard of review set forth in 38 U.S.C. § 7261(a)(4). *Locklear v. Shinseki*, 24 Vet.App. 311, 319 (2011). Whether a medical examination is adequate is also a finding

subject to this deferential standard. *D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008).

B. Remand is warranted so that VA may provide an examination that adequately assesses the severity of Appellant's low back condition

Pursuant to VET.APP. R. 28(b)(2), the Secretary concedes that the Board erred when it did not ensure that VA fulfilled its duty to assist in this case by providing Appellant with an adequate VA medical examination. 38 U.S.C. § 5103A. Appellant's low back condition is rated under 38 C.F.R. § 4.71a, Diagnostic Code 5242. The General Rating Formula for Diseases and Injuries of the Spine provides a 20% rating for forward flexion of the thoracolumbar spine greater than 30 degrees but not greater than 60 degrees; or, the combined range of motion of the thoracolumbar spine not greater than 120 degrees; or, muscle spasm or guarding severe enough to result in an abnormal gait or abnormal spinal contour such as scoliosis, reversed lordosis, or abnormal kyphosis. A 40% rating is assigned where forward flexion of the thoracolumbar spine is to 30 degrees or less, or if there is favorable ankylosis of the entire thoracolumbar spine. A 50% rating is warranted for unfavorable ankylosis of the entire thoracolumbar spine, while a 100% rating is warranted for unfavorable ankylosis of the entire spine. 38 C.F.R. § 4.71a, General Rating Formula.

Principally relying on VA examination reports from January 2013, April 2014, November 2017, and March 2019, the Board found that the evidence does not show flexion to 30 degrees or less, to include as a result of pain, weakness, or other similar factors. (R. at 11). Generally, a VA medical examination or

opinion is adequate when it is based on a review of the veteran's medical history and describes the disability in enough detail that the Board can issue a fully informed decision regarding the claim. *Sharp v. Shulkin*, 29 Vet.App. 26, 31 (2017). When VA provides a claimant with an examination, regardless of whether the examination is necessary, the VA must ensure that the examination is adequate. *Barr v. Nicholson*, 21 Vet.App. 303, 311 (2007).

An examiner evaluating certain musculoskeletal conditions must “obtain information about the severity, frequency, duration, precipitating and alleviating factors, and extent of functional impairment of flares from the veterans themselves.” *Sharp v. Shulkin*, 29 Vet.App. 26, 34 (2017). After ascertaining adequate information, the examiner must “offer flare opinions based on estimates derived from information procured from relevant sources, including the lay statements of veterans,” or explain why she cannot do so. *Id.* at 35. To be adequate for rating purposes, an examination must express an opinion on whether pain could significantly limit functional ability during flareups or upon repetitive use. *DeLuca v. Brown*, 8 Vet.App. 202, 206 (1995); *Mitchell v. Shinseki*, 25 Vet.App. 32, 44 (2011). The examiner should express the limitation of functional ability in terms of the degree of additional range-of-motion loss during flareups or upon repetitive use. *Id.* If the examiner cannot provide this information, the examiner should explain why the determination could not be made. *Id.*

The November 2017 VA examination report is inadequate because it does not comply with the requirements set forth above, which provide that an examiner

specify at what point during range of motion pain results in additional functional loss regularly and during flare-ups.³ When the November 2017 provided initial range of motion measurements, he noted pain on examination that caused functional loss, but he failed to specify at what point during range of motion pain resulted in additional functional loss. (R. at 340). Additionally, he noted that pain, weakness, fatigability or incoordination significantly limit functional ability with flare-ups, but he failed to describe the functional loss in terms of range of motion. (R. at 342). Instead, he simply noted that Appellant experienced “[i]ncreased pain and decreased ROM.” (R. at 342). *Sharp v. Shulkin*, 29 Vet.App. at 35.

The March 2019 VA examination report is inadequate because the examiner refused to provide an opinion of increased functional loss during flare-ups or following repeated use over time because the examiner did not directly observe Appellant under those circumstances. (R. at 105, 110). The Court has held that this rationale is inadequate, because direct observation and “objective” findings are not required; instead, lay testimony can be the basis of an examiner’s opinion. *Sharp v. Shulkin*, 29 Vet.App. 26, 34–35 (2017). See also *Lyles v. Shulkin*, 29 Vet.App. 107, 120 (2017) (making clear that the holding in *Sharp* applies to opinions about repeated use over time, in addition to flare-ups).

³ The Board previously found the November 2017 VA examination report inadequate because the examiner indicated he could not describe functional loss due to flare-ups or repeated use over time in terms of range of motion. (R. at 145).

Like the examiner in *Sharp*, the August 2017 VA examiner indicated that he could not quantify the extent of any additional functional limitation during flare-ups because he had not observed a flare-up during the examination. R. at 621 (618-26), 631 (629-41). As in *Sharp*, the examiner's statements in this case may reflect reluctance to offer the medical opinions necessary for proper evaluation of a musculoskeletal disability in accordance with *DeLuca*, rather than a limitation of knowledge in the medical community at large. 29 Vet.App. at 36 (explaining that, "before the Board can accept an examiner's statement that an opinion cannot be provided without resort to speculation, it must be clear that this is predicated on a lack of knowledge among the 'medical community at large' and not the insufficient knowledge of the specific examiner" (quoting *Jones v. Shinseki*, 23 Vet.App. 382, 390 (2010))).

The January 2103, April 2014, and November 2017 VA examiners also failed to include the testing required under 38 C.F.R. § 4.59, as discussed in *Correia v. McDonald*, 28 Vet.App. 158, 169-70 (2016). The Court held in *Correia* that the proper evaluation for musculoskeletal conditions requires that an examiner test for pain throughout range of motion in various ways—"in both active and passive motion, in weight-bearing and nonweight-bearing and, if possible with the range of the opposite undamaged joint." See *Correia*, 28 Vet.App. at 168-70. The Court held that such testing is required unless a medical examiner determines that it cannot or should not be conducted. See *Correia*, 28 Vet.App. at 168-70.

However, the Board provided the remedy in the March 2019 VA examination report which provided the testing required under *Correia*. (R. at 104, 110).

The January 2013 and April 2014 VA examination reports, which predate *Correia*, do not include any of the required testing, and the November 2017 examiner simply indicated that passive range of motion for the back cannot be performed or is not medically appropriate. (R. at 1028-1040) (January 2013 VA examination report); (R. at 907-15) (April 2014 VA examination report); (R. at 349) (November 2017 VA examination report); see *Monzingo v. Shinseki*, 26 Vet.App. 97, 107 (U.S. 2012) (explaining that VA is not permitted to completely ignore even an inadequate opinion or examination, whether it is in favor or against a veteran's claim, but even if a medical opinion is inadequate to decide a claim, it does not necessarily follow that the opinion is entitled to absolutely no probative weight).

Although the Secretary concedes that remand is warranted, he will address Appellant's argument where she apparently asserts a higher rating is warranted for Intervertebral Disc Syndrome (IVDS). Appellant's Brief (AB at 11); see 38 C.F.R. § 4.71, DC 5243. Appellant has been diagnosed with degenerative changes at L3-L4 and with degeneration of the lumbar and lumbosacral intervertebral disc and a disc bulge at L3-L4 without spinal canal involvement. See, e.g. (R. at 339) (November 2017 VA examination report). As the Board noted, there is no evidence that Appellant has required bed rest during any period on appeal and that the absence of prescribed bed rest precludes a rating under the IVDS criteria. (R. at 7). While there is evidence of multilevel degenerative changes

because of a loss of disc space, there is no evidence of IVDS in the medical evidence of record. See, e.g. (R. at 1037) (January 2013 VA examination report); (R. at 913) (April 2014 VA examination report); (R. at 346) (November 2017 VA examination report); (R. at 108) (March 2019 VA examination report).

V. CONCLUSION

Wherefore, for the foregoing reasons, Appellee, Secretary of Veterans Affairs, respectfully urges the Court to vacate and remand the Board's July 5, 2019 decision that denied a rating higher than 20%, so that Board may provide an examination that adequately assess the severity of the low back condition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify, under penalty of perjury under the laws of the United States of America that on March 26, 2020, a copy of Appellee's brief was mailed, postage prepaid, to:

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