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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 13-1998

WILLIAM C. SEWELL II, APPELLANT,

v.

ERIC K. SHINSEKI,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before LANCE, *Judge*.

MEMORANDUM DECISION

*Note: Pursuant to U.S. Vet. App. R. 30(a),
this action may not be cited as precedent.*

LANCE, *Judge*: The appellant, William C. Sewell II, served in the U.S. Army from June 4, 1981, to November 20, 1985. Record (R.) at 301. He appeals, through counsel, a May 16, 2013, Board of Veterans' Appeals (Board) decision that denied his claim for entitlement to a disability rating greater than 10% for a right knee disability under 38 C.F.R. § 4.71a, diagnostic code (DC) 5257.¹ Record (R.) at 2-21. Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). This appeal is timely, and the Court has jurisdiction over the case pursuant to 38 U.S.C. §§ 7252(a) and 7266. For the reasons that follow, the Court will vacate the May 16, 2013, decision and remand the matter for further proceedings consistent with this decision.

On appeal, the appellant contends that the Board failed to provide an adequate statement of reasons or bases for its decision that he was not entitled to a disability rating greater than 10% for his right knee disability. Appellant's Brief (Br.) at 4-7. Specifically, he argues that the Board failed to account for lay evidence detailing frequent episodes of "giving way." *Id.* at 5-6. The appellant

¹ In addition, the Board remanded the issue of entitlement to a total disability rating based on individual unemployability (TDIU). R. at 17-19. The Court lacks jurisdiction over that matter, and it will not be addressed further. *See* 38 U.S.C. §§ 7252(a), 7266(a); *Howard v. Gober*, 220 F.3d 1341, 1344 (Fed. Cir. 2000). The Board's grant of an additional 10% disability rating for the appellant's right knee disability under DC 5010 is a favorable finding that the Court cannot review. R. at 16-17; *see Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007).

also asserts that the Board erred when it determined that he was not entitled to referral for extraschedular consideration for his right knee disability. *Id.* at 7-9. The Secretary generally disputes the appellant's contentions. Secretary's Br. at 5-15. The Court agrees that the Board failed to provide an adequate statement of reasons or bases. *See* 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995).

The record contains a lay statement from the appellant that he suffers "a lot of difficulty with [his] right knee such as locking up, tenderness[,] and it gives out a lot." R. at 154. In addition, a February 2008 VA compensation and pension (C&P) examination opinion notes the appellant's complaints of "intermittent giving way as a result of pain." R. at 144. Similarly, a May 2009 C&P examination opinion states that the appellant "experiences 3 to 4 'give-way' episodes daily, and notes that he has fallen on a number of occasions." R. at 78.

Although the Board "note[d] the [appellant]'s contentions of feelings of instability and falls," it found that "there is no indication that this is the result of moderate instability, as substantiated by objective testing." R. at 13. As the appellant correctly argues, however, the Board did not make a determination that the appellant was *incompetent* to report instability, Appellant's Br. at 6, and so it is not clear to the Court why the Board required "objective" medical evidence of instability to warrant a higher rating. *See Davidson v. Shinseki*, 581 F.3d 1313, 1316 (Fed. Cir. 2009); *Jandreau v. Nicholson*, 492 F.3d 1372, 1377 (Fed. Cir. 2007); *Buchanan v. Nicholson*, 451 F.3d 1331, 1334-37 (Fed. Cir. 2006); *see also* R. at 12 ("In addition to the medical evidence, the [appellant] has provided lay statements relating his symptoms of right knee pain and feelings of instability.").

As the Board's statement of reasons or bases is not adequate "to facilitate review in this Court," *Allday*, 7 Vet.App. at 527, the Court will vacate the Board's decision. On remand, the Board must adequately address the appellant's lay statements, including whether he is competent to report instability and, if competent, whether those statements are credible. *See Layno v. Brown*, 6 Vet.App. 465, 469 (1994) ("Competency . . . must be distinguished from weight and credibility. The former is a legal concept determining whether testimony may be heard and considered . . . , while the latter is a factual determination going to the probative value of the evidence to be made after the evidence has been admitted."). If competent and credible, the Board must reassess whether the appellant's lay

evidence entitles him to an increased disability rating. *See Owens v. Brown*, 7 Vet.App. 429, 433 (1995) (it is the province of the Board to weigh and assess the evidence of record).

Given this outcome, the Court will not address the appellant's remaining arguments. *See Quirin v. Shinseki*, 22 Vet.App. 390, 396 (2009) (holding that "the Court will not ordinarily consider additional allegations of error that have been rendered moot by the Court's decision or that would require the Court to issue an advisory opinion"). The appellant is free to raise those arguments on remand, as well as any additional evidence and argument, 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. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002). The Board shall proceed expeditiously, in accordance with 38 U.S.C. §§ 5109B, 7112 (requiring Secretary to provide for "expeditious treatment" of claims remanded by Board or Court).

After consideration of the parties' briefs and a review of the record, the Board's May 16, 2013, decision is VACATED, and the matter is REMANDED to the Board for further proceedings consistent with this decision.

DATED: May 13, 2014

Copies to:

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VA General Counsel (027)