IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

LARRY E. GLENN,	)	
	)	
Appellant,	)	
	)	
v.	)	Vet. App. No. 15-4662
	)	
ROBERT A. MCDONALD, Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

JOINT MOTION FOR REMAND

Pursuant to U.S. Vet. App. R. 27 and 45(g)(2), Appellant, Larry E. Glenn, and Appellee, Robert A. McDonald, Secretary of Veterans Affairs ("Secretary"), through undersigned counsel, respectfully move this Court to vacate and remand the September 1, 2015, decision of the Board of Veterans' Appeals ("Board" or "BVA") that denied entitlement to disability ratings in excess of 20 percent for intravertebral disc syndrome (IVDS), characterized as degenerative disc disease L3-L4; and in excess of 20 percent each for radiculopathy of the right and left leg. This Court has proper jurisdiction over this claim as indicated pursuant to 38 U.S.C. § 7252(a), which grants the Court exclusive jurisdiction to review final Board decisions.

BASES FOR REMAND

Board's denial of a disability rating in excess of 20 percent for IVDS

Appellant's IVDS condition is rated under Diagnostic Code (DC) 5243 (Intervertebral Disc Syndrome) as 20 percent disabling. *See* 38 C.F.R. § 4.71a, DC 5243. Pursuant to DC 5243, Intervertebral Disc Syndrome is evaluated either under the General Rating Formula for Diseases and Injuries of the Spine, or on the total duration of incapacitating episodes over the past twelve months, whichever method results in the higher rating. *Id.*

In addition, when evaluating a musculoskeletal disability, evidence of pain, weakened movement, excess fatigability, or incoordination must be considered in determining the level of associated functional loss. 38 C.F.R. §§ 4.40, 4.45; *Mitchell v. Shinseki,* 25 Vet.App. 32 (2011); *DeLuca v. Brown,* 8 Vet.App. 202, 206 (1995) (holding that a medical examination must "express an opinion on whether pain could significantly limit functional ability during flare-ups or when the [joint] is used repeatedly over a period of time").

In the instant case, the Board denied entitlement to a disability rating in excess of 20 percent under the General Rating Formula for Diseases and Injuries of the Spine because a "February 2015 VA examiner reported forward flexion limited to 80 degrees and that there was no ankylosis of the spine." [R. at 10 (1-14)]. It further denied a higher rating under the Formula for Rating Intervertebral Disc Syndrome because Appellant "has never had bedrest prescribed by a

physician nor treatment by a physician for any incapacitating episodes he may have had." [*Id.*].

Review of the February 2015 VA Spine Disability Benefits Questionnaire shows that Appellant reported flare-ups "8-10 times in the past year, pain level goes to 10/10, he takes pain medications for relief, flare-ups last 5-7 days and that he could not do anything during a flare up." [R. at 43-44 (42-52)]. The examiner noted that Appellant was not experiencing a flare-up during the examination. [R. at 45 (42-52)]. The examiner indicated that the exam "neither supports nor contradicts the Veteran's statements describing functional loss during flare-ups." [R. at 45-46 (42-52)]. The examiner was unable to give an opinion as to limitation on functional ability during flare-ups by explaining that she "would need to examine during flare-up to determine functional ability." [R. at 46 (42-52)].

The parties agree that remand is warranted for two reasons. First, the February 2015 VA spine opinion is inadequate. *See Mitchell*, 25 Vet. App. At 44, where the Court reiterated that

> [when an] examiner failed to address any range-of-motion loss specifically due to pain and any functional loss during flare-ups, the examination lacks sufficient detail necessary for a disability rating, and it should have been returned for the required detail to be provided, or the Board should have explained why such action was not necessary.

Id. Here, the February 2015 VA spine opinion "lacks sufficient detail necessary for a disability rating" and thus, the Board erred in relying on this opinion. *See also DeLuca, supra.*

Second, remand is warranted because the Board failed to consider an April 2015 private medical opinion when finding that Appellant had not been prescribed bedrest by a physician. *See Schafrath v. Derwinski,* 1 Vet.App. 589, 593 (1991) (Board is required to consider all evidence of record and to consider, and discuss in its decision, all "potentially applicable" provisions of law and regulation.); *see* 38 U.S.C. § 7104(a); *Weaver v. Principi,* 14 Vet.App. 301, 302 (2001) (per curiam order). Here, the record contains an April 27, 2015, letter by "Maung Tint Wei, MD." [R. at 25]. The letter indicated that "[p]atient's back pain is chronic condition and patient need to take pain medication periodically for his pain. Each episode of pain, patient is incapacitated to do routine activity and needs bed Rest." [*Id.*]. Because this letter appears to address whether Appellant has been prescribed bedrest by a physician, the Board had a duty to analyze this evidence. Its failure to do so amounts to an inadequate statement of reasons or bases. *See Schafrath, supra.*

On remand, the Board must obtain a new medical opinion that complies "with the requirements of § 4.40 and the medical examiner must be asked to express an opinion on whether pain could significantly limit functional ability during flare-ups.'" *Mitchell*, 25 Vet.App. at 43–44 (The examiner should, if feasible, portray any such functional loss during flare-ups "in terms of the degree

of additional range-of-motion loss" or "otherwise explain why such detail feasibly could not be determined."). *Id.* In this regard, the parties direct the Board and the examiner to consider the following additional evidence: In a January 2010 VA Nursing Telephone Encounter Note, Appellant reported that flare ups were becoming "longer" and "more severe," he rated his pain as 10/10, and that he had treated the pain with "bedrest, back brace, heating pad" and medication. [R. at 1017-19]. Private medical records from the Permanente Medical Group, dated January 30, 2010, show that he requested a referral to the Spine Clinic for worsening back problems. [R. at 247 (245-49)]. A February 2010 record from the Permanente Medical Group shows that Appellant reported "…his pain has been a nearly constant 9 out of 10 pain. It can be up to 10 out of 10 pain….[and] … is worsened with any sort of moving and with walking as well as prolonged sitting." [R at 261 (261-62)]. A June 17, 2010, Permanente Medical Group treatment note revealed that Appellant's back "went out again" and that his pain was relieved by lying down. [R. at 333 (332-34)]. In a September 8, 2010, Permanente Medical Group treatment record, Appellant reported "burning back pain" and "reduced range of motion." [R. at 358 (358-61)]. A March 4, 2011, VA treatment note documented Appellant's "chronic back pain" with exacerbations that required him to "stay home from work for a week every couple of months." [R. at 919 (919-21)]. A June 22, 2011, VA treatment noted that Appellant had longstanding low back pain that was made worse with prolonged sitting or

standing. [R. at 924 (924-27)]. At that time, Appellant reported that he was employed as a supervisor for "AC Transit." [R. at 925 (924-27)].

Thereafter, on remand, the Board must analyze all relevant evidence, including Dr. Wei's April 2015 letter, when readjudicating Appellant's claim of entitlement to a disability rating in excess of 20 percent for IVDS.

Board's denial of referral for consideration of an extraschedular rating

In "exceptional case where the schedular evaluations are found to be inadequate," the VA Under Secretary for Benefits or the Compensation Service Director is authorized to approve an "extra-schedular evaluation for impairments that are due to service-connected disability or disabilities." 38 C.F.R. § 3.321(b)(1); *see also Thun v. Peake*, 22 Vet.App. 111, 115 (2008), *aff'd sub nom. Thun v. Shinseki*, 572 F.3d 1366 (Fed. Cir. 2009).

The Board determined that "the rating criteria contemplate [Appellant's] IVDS, lower back pain, limitation of motion and radiculopathy. Therefore, referral for consideration of an extraschedular rating is not warranted." [R. at 11 (1-14)].

The parties agree that remand is necessary because the Board's one-sentence conclusion is not supported by any rationale. *See Anderson v. Shinseki*, 22 Vet.App. 423, 426 (2009) ("As with all matters adjudicated by the Board, a Board decision concerning an extraschedular rating must include a written statement of the reasons or bases for its findings and conclusions on all material issues of fact and law presented on the record; that statement must be

adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate informed review in this Court.").

On remand, the Board, when readjudicating the issue of entitlement to referral for extraschedular consideration, must analyze the credibility and probative value of the evidence, account for the evidence that it finds to be persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the claimant. *See Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table).

Board's denial of entitlement to TDIU

Total disability ratings will be assigned "when there is present any impairment of mind or body which is sufficient to render it impossible for the average person to follow a substantially gainful occupation." 38 C.F.R. § 3.340(a). An award of TDIU does not require a showing of 100 percent unemployability. *See Roberson v. Principi,* 251 F.3d 1378, 1385 (2001). However, an award of TDIU requires that the claimant show an inability to undertake substantially gainful employment as a result of a service-connected disability or disabilities. 38 C.F.R. § 4.16(b) ("[A]ll veterans who are unable to secure and follow a substantially gainful occupation by reason of service-connected disabilities shall be rated totally disabled."). In determining whether a claimant is unable to secure or follow a substantially gainful occupation, the central inquiry is "whether the veteran's service-connected disabilities alone are

of sufficient severity to produce unemployability." *Hatlestad v. Brown,* 5 Vet.App. 524, 529 (1993).

In the instant matter, the Board concluded that "the most probative evidence shows that the Veteran is not unemployable due to his IVDS and radiculopathy" because Appellant "was employed at least as recently as May 2014." [R. at 12 (2-14)]; *see* May 14, 2014, record from The Permanente Medical Group indicating that "[patient] wants letter from [primary care provider] allowing him to not wear a tie at work due to breathing restriction due to asthma." [R. at 826 (826-29)].

The parties agree that remand is warranted because the Board provided an inadequate statement of reasons or bases in denying entitlement to TDIU. *See Beaty v. Brown,* 6 Vet.App. 532, 537 (1994) ("Where the veteran submits a ... claim for a TDIU rating ... the [Board] may not reject that claim without producing evidence, as distinguished from mere conjecture, that the veteran can perform work that would produce sufficient income to be other than marginal.").

Here, the record contains evidence pertaining to the issue of unemployability in relation to his service-connected conditions which the Board failed to discuss. *See, e.g.,* 1981 hearing transcript where Appellant reported difficulty in finding work due to his bad back [R. at 1212 (1212-15)]; 2006 VA medical opinion noting that Appellant "reports he has lost work in the fire department and park districts, and police work because of his back" [R. at 1019 (1019-20)]; 2010 VA opinion where Appellant reported that the back effects his

ability to do his job [R. at 1012 (1012-14)]; and a 2015 VA examiner noted "Veterans states he cannot lift over 20 lbs" [R. at 52 (42-52)]. Because the Board did not analyze the TDIU claim in accordance with prevailing law and regulations, it provided inadequate reasons or bases.

On remand, the Board must adequately explain as to whether or not Appellant's service-connected disabilities prevent substantially gainful employment in addressing entitlement to TDIU.

Appellant is entitled to submit additional evidence and argument on remand, *Kutscherousky v. West*, 12 Vet.App. 369, 372 (1999) (per curiam order), and the Board must "reexamine the evidence of record, seek any other evidence the Board feels is necessary, and issue a timely, well-supported decision in this case." *See Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991). VA will incorporate this joint motion for remand, and the Court's Order with the claims file for consideration in its readjudication of the claim. *See Breeden v. Principi*, 17 Vet.App. 475 (2004). As stated in *Forcier v. Nicholson*, the terms of the joint motion for remand granted by the Court are enforceable. 19 Vet.App. 414, 425 (2006) (Secretary's duty to ensure compliance with the terms of a remand "include[s] the terms of a joint motion that is granted by the Court but not specifically delineated in the Court's remand order"). The Board must set forth an adequate statement of reasons or bases for its findings and conclusions on all material issues of fact and law presented on the record. *See* 38 U.S.C.

§ 7104(d)(1); *Gilbert v. Derwinski,* 1 Vet.App. 49, 56-57 (1990). The Board shall afford Appellant's claim expeditious treatment, as required by 38 U.S.C. § 7112.

WHEREFORE, the parties respectfully move the Court to vacate and remand the September 1, 2015, decision of the Board of Veterans' Appeals that denied entitlement to disability ratings in excess of 20 percent for IVDS, characterized as degenerative disc disease L3-L4; and in excess of 20 percent each for radiculopathy of the right and left leg.

Respectfully submitted,

September 7, 2016
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