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

NO. 15-3530

LAWRENCE J. COLLINS, APPELLANT,

V.

ROBERT A. McDONALD,  
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before KASOLD, *Judge*.

**MEMORANDUM DECISION**

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

KASOLD, *Judge*: Veteran Lawrence J. Collins appeals through counsel that part of a July 24, 2015, decision of the Board of Veterans' Appeals (Board) that denied (1) referral for extraschedular consideration as to the entire rating period, and (2) a rating in excess of 20% for a lumbar-spine disability prior to November 21, 2012. Mr. Collins argues that the Board erred by (1) failing to ensure that the Board hearing officer (BHO) complied with his duties, (2) relying on medical reports that were inadequate for rating purposes, and (3) adjudicating entitlement to extraschedular consideration and providing inadequate reasons or bases in support of its decision. The Secretary disputes these arguments. Single-judge disposition in this case is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the reasons discussed below, that part of the Board decision on appeal will be set aside and the matters remanded for further adjudication.

*Hearing Officer Duties*

Mr. Collins contends that the BHO failed to explain what outstanding elements were needed to substantiate the matters on appeal or suggest the type of evidence that was required to substantiate those elements. Hearing officers, however, are not required to pre-adjudicate a claim; rather, they are to explain the issues on appeal and suggest the submission of evidence that may have been overlooked. *See Bryant v. Shinseki*, 23 Vet.App. 488 (2010); 38 C.F.R. § 3.103(c)(2) (2016). Here,

the record reflects that the only matter relevant to this appeal that was before the BHO was entitlement to an increased rating, and that issue was noted by the BHO. The BHO also discussed Mr. Collins's condition and problems with an examination report. Although the BHO did not suggest the submission of evidence, Mr. Collins fails to demonstrate that any evidence had been overlooked. See *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (appellant bears burden of demonstrating error on appeal), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000) (table). Succinctly stated, Mr. Collins fails to demonstrate BHO error. See *Bryant* and *Hilkert*, both *supra*.

#### *Inadequate Medical Reports*

Mr. Collins contends that the Board erred by relying on April 2008, June 2008, and August 2010 medical reports because they did not state where pain on motion resulted in functional loss during use or flareups. At the outset it is noted that, even assuming, *arguendo*, that the noted test reports failed to identify specifically where pain on motion resulted in functional loss, testing today for functional loss due to pain many years ago is not a realistic option. See *Chotta v. Peake*, 22 Vet.App. 80, 85-86 (2008) (retrospective medical opinion may be helpful under certain circumstances but must not resort to speculation). Here, the record reflects that pain on movement during the relevant period in question was expressed in lay testimony and recorded to some degree in the noted reports. Moreover, reading the Board's statement as a whole, see *Janssen v. Principi*, 15 Vet.App. 370, 379 (2001) (rendering a decision on the Board's statement of reasons or bases "as a whole"), reflects that the Board weighed the record evidence in rendering its decision. Mr. Collins fails to demonstrate that the Board's assignment of weight to the evidence concerning his range of motion on use is clearly erroneous. See *Hilkert*, *supra*; *Wood v. Derwinski*, 1 Vet.App. 190, 192-93 (1991) (Board's credibility and weight assignments are reviewed under the "clearly erroneous" standard); *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990) ("A finding is "clearly erroneous" when . . . the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948))).

As to functional loss during flareups, however, the reports noted that Mr. Collins reported having additional functional loss during weather-related flareups. The Board, however, failed to develop this issue or address how it assessed this information, and, given that weather changes often,

it is not clear what changes in weather caused the flareups, or, more specifically, how frequent the flareups might be. Although testing today for functional loss due to pain during flareups many years ago also is not a realistic option, Mr. Collins, subject to his own recollections and credibility, is competent to explain the frequency of his flareups, which could affect the assigned disability rating. The Board's failure to develop this issue or address how it assessed this information frustrates judicial review. *See Allday v. Brown*, 7 Vet.App. 517, 527 (1995) (holding that the Board's statement "must be adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court"). Remand is warranted. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) ("[W]here 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, a remand is the appropriate remedy.").

#### *Extraschedular Consideration*

Mr. Collins correctly asserts that the Board prematurely adjudicated whether his lumbar-spine disability should be referred for extraschedular consideration in light of the fact that the Board remanded entitlement to a total disability based on individual unemployability (TDIU) rating for further development on how his disabilities affect employment. *See Brambley v. Principi*, 17 Vet.App. 20, 24-25 (2003) (stating that adjudications of both extraschedular consideration and TDIU "require a complete picture of the appellant's service-connected disabilities and their effect on his employability" and concluding that "it was premature for the Board to [find that the appellant's service-connected disabilities do not show a marked interference with employment] where the record was significantly incomplete in a number of relevant areas probative of the issue of employability" (internal quotation marks, emphasis, and citations omitted)).

Although the Secretary contends that remand is not warranted because the Board found that the rating schedule fully contemplated Mr. Collins's complaints of limited and painful motion, he fails to appreciate that it is Mr. Collins's disability picture that must be fully contemplated, not just his limited and painful motion. *Id.* Succinctly stated, if Mr. Collins's disability picture was incomplete with regard to whether his service-connected disabilities were rendering him unemployable, it is difficult to understand how his disability picture was sufficiently complete to assess whether his disabilities were markedly interfering with his employment. *Id.* Remand is

warranted. *See Tucker, supra.*

*Remand and Conclusion*

On remand, Mr. Collins may present any additional evidence and arguments in support of the remanded matters, and the Board must consider any evidence and argument so presented. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002). This matter is to be provided expeditious treatment on remand. *See* 38 U.S.C. § 7112.

Upon consideration of the foregoing, that part of the July 24, 2015, Board decision on appeal is SET ASIDE and the matter REMANDED for further adjudication.

DATED: November 1, 2016

Copies to:

Robert V. Chisholm, Esq.

VA General Counsel (027)