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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 15-0979

RICHARD E. GRIFFITH, APPELLANT,

V.

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

Before DAVIS, *Chief Judge*.

MEMORANDUM DECISION

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

DAVIS, *Chief Judge*: U.S. Marine Corps veteran Richard E. Griffith appeals through counsel from a January 29, 2015, Board of Veterans' Appeals (Board) decision that denied entitlement to a disability rating in excess of 40% for an undiagnosed illness, as well as separate disability ratings for irritable bowel syndrome (IBS), headaches and painful joints.[1] For the following reasons, the Court will set aside the Board's January 2015 decision and remand the matter for further proceedings.

I. ANALYSIS

Mr. Griffith is currently rated at 40% for symptoms arising from his service in Saudi Arabia, which include chest pain, joint pain, muscle aches, fatigue, sleep disturbance, headaches, and irritable bowel symptoms. These were regarded as symptoms of an undiagnosed illness, and rated

[1] The Board also denied a disability rating in excess of 50% prior to September 29, 2006, and in excess of 70% thereafter; entitlement to a total disability rating based on individual unemployability; and a separate disability rating for chronic fatigue syndrome. Mr. Griffith raised no contentions of error with respect to these matters, and the Court will therefore not address them. *See Pederson v. McDonald*, 27 Vet.App. 276, 283 (2015) (en banc) (stating that "this Court, like other courts, will generally decline to exercise its authority to address an issue not raised by an appellant in his or her opening brief").

by analogy to fibromyalgia. *See* 38 C.F.R. § 4.71a, Diagnostic Code (DC) 5025 (2016) (providing for a maximum disability rating of 40%).

Mr. Griffith argues before the Court that the Board erred in denying him separate disability ratings for IBS and headaches under 38 C.F.R. § 4.114, DC 7319 and 38 C.F.R. § 4.124a, DC 8100 respectively, and in failing to consider separate ratings for each painful joint under 38 C.F.R. § 4.59. He asserts that the Board's statement of reasons or bases is insufficient, and he also takes issue with the Board's exclusive reliance on a 2012 VA examination report, asserting that the VA examiner did not appropriately assess diagnostic criteria against the facts in his medical history.

The Board is required to support its decision with a written statement of the reasons or bases that is understandable by the claimant and facilitates review by this Court. *See* 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995). The statement of reasons or bases must explain the Board's reasons for discounting favorable evidence, *Thompson v. Gober*, 14 Vet.App. 187, 188 (2000), discuss all issues raised by the claimant or the evidence of record, *Robinson v. Peake*, 21 Vet.App. 545, 552 (2008), *aff'd sub nom Robinson v. Shinseki*, 557 F.3d 1335 (Fed. Cir. 2009), and discuss all provisions of law and regulation where they are made "potentially applicable through the assertions and issues raised in the record," *Schafrath v. Derwinski*, 1 Vet.App. 589, 592 (1991).

A. Irritable Bowel Syndrome

1. Reasons or Bases

The Court agrees with Mr. Griffith that the Board's statement of reasons or bases was inadequate to support its decision to deny entitlement to a separate rating for IBS or other bowel condition. Apart from its reliance on the 2012 VA examination report, the Board failed to give a suitable explanation on two critical issues.

At the outset, the Board failed to provide any explanation for obtaining the 2012 VA medical examination with respect to the IBS issue. The record contains an August 2010 Compensation and Pension (C&P) examination report listing Mr. Griffith's bowel-related symptoms, and rendering a diagnosis of IBS. Record (R.) at 679. The examiner listed the symptoms supporting the diagnosis as "intermittent diarrhea, constipation, bloating, foul smelling gas, symptoms relieved by bowel movement, crampy abdominal pain." *Id.* The examiner further commented that Mr. Griffith "meets

the criteria for IBS," noting two previous medical notes in support of that conclusion. *Id.* Later in the report, the examiner stated:

> I conclude, after a review of medical records, taking a history, performing a physical examination and a review of medical literature the Veteran's IBS is at least as likely as not a result of Gulf War exposures. The Veteran meets the diagnostic criteria for [IBS] and there is documentation in the SMR [service medical record] where the veteran was treated for GI [gastrointestinal] complaints that is consistent with IBS.

R. at 680.

A previous 2012 Board decision did not find that this examination report was unsatisfactory in any way, merely noting that "no attempt to separately rate the [IBS] was made by the RO then or later." R. at 471-72. Nevertheless, the 2012 Board remanded the IBS condition, along with others, with instructions to "obtain a more current and comprehensive examination." R.at 472. In the decision here on appeal, the Board characterized all previous diagnoses of IBS as "not supported by a rationale." R. at 35. Based on a review of the August 2010 examination report, the Court finds that this Board determination was clearly erroneous as it applies to that report.

Ordinarily, it is left to the Secretary's discretion as to how much development is necessary in a given case. *See Shoffner v. Principi*, 16 Vet.App. 208, 213 (2002). Nevertheless, "[b]ecause it would not be permissible for VA to undertake . . . additional development if [the] purpose was to obtain evidence against an appellant's case, VA must provide an adequate statement of reasons or bases for its decision to pursue further development where such development reasonably could be construed as obtaining additional evidence for that purpose." *Mariano v. Principi*, 17 Vet.App. 305, 312 (2003); *see also Douglas v. Shinseki*, 23 Vet.App. 19, 26 (2009) ("[T]he duty to gather evidence sufficient to render a decision is not a license to continue gathering evidence in the hopes of finding evidence against the claim"). The evidentiary posture after the August 2010 C&P examination report calls for an explanation of the Board's decision to undertake further development with respect to the IBS issue and neither the 2012 Board decision nor the Board decision here on appeal provides such an explanation.

Furthermore, the Court agrees with Mr. Griffith that the Board should have explained why his bowel symptoms should not be rated by analogy to DC 7319 or another DC associated with the digestive system. *See Yancy v. McDonald*, 27 Vet.App. 484, 493 (2016). While the 2012 VA

examiner rejected previous diagnoses of IBS, he nevertheless diagnosed "functional bowel dysfunction," an unlisted condition. R. at 420. The 2012 VA examiner did not address the issue of nexus with service for this condition. Thus, the August 2010 examiner's conclusion that Mr. Griffith's bowel symptoms are service connected is uncontroverted in the record.

In his response to this point, the Secretary asserts:

> Given that these [bowel] symptoms did not support IBS, there would be no benefit to Appellant in a remand for the Board to address whether Appellant's symptoms of functional bowel dysfunction could be rated by analogy to a condition which the Board and the highly probative medical evidence of record concluded the Appellant did not have.

Secretary's Brief (Br.) at 14. It would seem that the Secretary is arguing that an unlisted condition cannot be rated by analogy to a condition that a veteran does not have. Rating an unlisted condition by analogy to listed conditions, however, is the essence of rating by analogy. *See* 38 C.F.R. § 4.20 (2016). In sum, the Board did not discuss whether Mr. Griffith's unlisted condition might be rated by analogy to DC 7319, or any other DC related to bowel disorders, and its failure to do so renders its statement of reasons or bases inadequate, requiring remand. *See Yancy*, 27 Vet.App. at 493.

2. Adequacy of 2012 VA Examination

In the decision here on appeal, the Board found the 2012 VA examination report to be "highly probative because it provided a detailed rationale that is consistent with the record." R. at 35. The Court agrees with the former premise, but has questions with regard to the latter.

The examiner made a commendable effort to explain his reasoning, offering detailed diagnostic criteria and supplying references to medical literature. Nevertheless, an examiner's analysis must be based on a correct view of the factual basis for an opinion, that is, the test results, observations made during examination, and the medical history. The examiner noted that no tests were made with respect to the IBS analysis. R. at 425. Thus, the medical assessments made in the 2012 VA examination depend largely on the medical history, augmented by any observations made during examination. "Thus, the Secretary, when he undertakes to provide a medical examination or obtain a medical opinion, must ensure that the examiner providing the report or opinion is fully cognizant of the claimant's past medical history." *Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 301 (2008).

Although there is no requirement that an examiner comment on every favorable piece of evidence in a claims file, *Monzingo v. Shinseki*, 26 Vet.App. 97, 105 (2012), the examiner's report raises questions whether he fulfilled the fundamental requirement to consider Mr. Griffith's medical history. *See Green v. Derwinski*, 1 Vet.App. 121, 124 (1991). While the examiner indicated that he had reviewed the claims file (R. at 385), he included a more limited list of the documents he presumably viewed as constituting pertinent medical history. R. at 391. *See Nieves-Rodriguez*, 22 Vet.App. at 304 (a recitation of the medical information on which a medical opinion is based may aid the Board's evaluation of the sufficiency of the opinion). In this list, the examiner acknowledged the August 2010 VA examination only insofar as it recorded no current symptoms or residuals of West Nile virus, failing to mention the IBS diagnosis in that examination report. *Id*. The list does not include the March 2006 and April 2007 VA reports referenced in the August 2010 report as supporting the diagnosis of IBS. Several other medical reports that deal with bowel symptoms and IBS are not listed. The examiner failed to indicate that Mr. Griffith *had ever* (previously) *been diagnosed* with IBS. R. at 420. He also did not indicate that Mr. Griffith had experienced any signs or symptoms of diarrhea, or alternating episodes of constipation and diarrhea (R. at 422), when the record is replete with complaints of both. *See* R. at 255, 361, 660, 679, 1957, 2158, 2363, 3218.

The Board emphasized the examiner's use of diagnostic criteria in finding that examination to be highly probative. *See* R. at 35. The Court agrees with Mr. Griffith, however, that the examiner provided a list of criteria without adequately discussing his symptoms relative to those criteria. *See* Appellant's Br. at 15.

The examiner first referred to the Manning criteria, a list of six diagnostic criteria for IBS: (1) Pain relieved with defecation; (2) more frequent stools at onset of pain; (3) looser stools at onset of pain; (4) visible abdominal distention; (5) passage of mucus; and (6) sensation of incomplete evacuation. R. at 421. The examiner stated that "the likelihood of [IBS] is proportional to the number of Manning criteria that are present." *Id.* The examiner then recorded "0 positive–low probability." *Id.* The Court notes, however, that the medical history includes records that, on their face, seem to pertain to at least three of these Manning criteria. *See* R. at 22 (Board recognition of reported relief with defecation), 679 (relief with defecation), 660 (passage of mucus and sensation of incomplete evacuation). The examiner did not offer any medical explanation why he did not regard these records as establishing those Manning criteria.

The examiner also invoked another set of diagnostic tools, the Rehm III criteria. The examiner stated that these criteria require recurrent abdominal pain or discomfort at least 3 days per month for a period of 3 months *plus* 2 or more of the following: (1) Improvement with defecation; (2) onset associated with a change in frequency of stools; or (3) onset associated with a change in form (appearance) of stool. R. at 421. The examiner further explained that these criteria must be fulfilled for the previous 3 months, with onset at least 6 months prior to diagnosis. *Id.* These requirements appear to call for a 3-month study of a patient's symptoms during a period of active symptoms. In this instance, however, the examiner concluded his discussion of the Rehm criteria by stating "not diagnostic of IBS," without further elaboration. R. at 422. It is not at all clear how the examiner made this assessment on the basis of a 1-day examination and Mr. Griffith's medical history. Furthermore, the examiner did not evaluate the medical history of previous diagnoses to determine whether they would have satisfied the Rehm criteria.

Thus, the record raises questions with regard to both the examiner's command of the facts in the medical history and his application of those facts to the chosen diagnostic criteria. *See Nieves-Rodriguez*, 22 Vet.App. at 302 (Board must assure not only that an examiner is qualified, and employing reliable medical principles, but also that those principles have been reliably applied to the facts of the case). Furthermore, the examiner must include an explanation of how he reached his conclusions given the facts of the matter and the principles and methods applied. *Id.* at 304. Here, the examiner's explanation breaks down at the point of application of the facts to the diagnostic criteria.

Thus, the Court concludes that the Board erred in its reliance on the 2012 VA medical examination. This error also counsels a remand. *Ardison v. Brown*, 6 Vet.App. 405, 407 (1994).

B. Migraine Headaches

The Board denied a compensable rating for Mr. Griffith's headaches, finding that the headaches occured less than once every 2 months. *See* 38 C.F.R. § 4.124a, DC 8100 (requiring "characteristic prostrating attacks averaging one in two months" for a minimum compensable rating). The Board defined "prostrating" as productive of "extreme exhaustion or powerlessness." R. at 35 (quoting DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1531 (32d ed. 2012)). The Board further found that a prostrating headache is one that "would impair occupational functioning if it occurred on a workday," and limited its consideration of headaches reported in the record evidence to those

that caused Mr. Griffith to miss work. R. at 36. Finding no record evidence of headaches preventing Mr. Griffith from reporting for work more than once every 2 months, the Board denied a separate rating for headaches.

Mr. Griffith argues that the Board erred in adopting this working definition of "prostrating," noting that this requirement is not found in the rating criteria. He points out that a headache need not prevent him from reporting to work in order to "impair occupational functioning." Appellant's Br. at 23. The Secretary counters that the Board's reasoning is a logical progression from the definition of "prostrating." Secretary's Br. at 19.

The Court need not resolve this definitional dispute, because the Court agrees with Mr. Griffith that the Board erred in failing to consider a statement in a medical document that affects the analysis under its own definition. It is undisputed in the record that Mr. Griffith takes a drug known as butalbital for his headaches, at a frequency varying from 2 per month to 2 per week. R. at 3574. In an addendum to earlier medical notes, a VA examiner opined that "if [Mr. Griffith] takes butalbital for a headache it is a headache severe enough to cause him to stop work." R. at 3579.

This Court has held that the Board errs when it denies entitlement to a higher disability rating based on the ameliorative effects of medication when the rating criteria does not provide for such consideration. *Jones (David) v. Shinseki*, 26 Vet.App. 56, 63 (2012). The above-cited medical evidence indicates that the Board may be doing just that, albeit *sub silentio*. According to a VA examiner, Mr. Griffith would be experiencing headaches of sufficient severity to miss work at a frequency in excess of that required for a compensable rating under or by analogy to DC 8100, *but for* the ameliorative effects of butalbital. Thus, under its own criteria, the Board was required to address this evidence, which it did not do.

C. Painful Joints

Mr. Griffith argues that the Board erred in failing to consider whether he was entitled to a minimum compensable disability rating for each painful joint. *See* 38 C.F.R. § 4.59 (2016). The Secretary responds that the Board was not required to consider that regulation because there was no

"objective evidence of pain upon movement."[2] Secretary's Br. at 21. The Secretary cites *Pettiti, supra* n.2, in support of this argument.

As the *Pettiti* Court explained, however, "[o]bservations from a lay person who witnesses a veteran's painful motion satisfies the requirement of objective and independent verification of a veteran's painful motion." 27 Vet.App. at 427. In this instance, the record contains independent lay evidence confirming Mr. Griffith's description of his joint pains. As the Board noted, his joint pain was observed by both his coworkers (R. at 12), and his wife (R. at 19). The Board made no credibility finding with respect to these lay statements, and therefore the Court must treat them as both competent and probative. *See Fortuck v. Principi*, 17 Vet.App. 173, 179 (2003) (it is incumbent on the Board to "analyze the credibility and probative value of the [material] evidence . . . and provide reasons for its rejection of any material evidence favorable to the claimant").

Therefore, the Board was required to consider rating Mr. Griffith's joint pain under 38 C.F.R. § 4.59 and DC 5002; its failure to do so also requires remand. *See Robinson*, 21 Vet.App. at 552 (Board is required to consider all issues raised either by the claimant or by the evidence of record); *Schafrath v. Derwinski*, 1 Vet.App. at 592.

For the foregoing reasons, the Court will set aside the Board's January 2015 decision and remand the matter for further proceedings. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) (remand is appropriate "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 pursuing his claim on remand, Mr. Griffith will be free to submit additional argument and evidence as to the remanded matters, and the Board must consider any such evidence or argument submitted. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002).

II. CONCLUSION

On consideration of the foregoing, the Court SETS ASIDE the Board's January 29, 2015, decision and REMANDS the matter for further proceedings consistent with this decision.

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[2] Because the minimum disabilities described in 38 C.F.R. § 4.59 are rated under DC 5002, which requires "objective confirmation" of satisfactory evidence of painful motion, the Secretary is correct that objective evidence is required. *Pettiti v. McDonald*, 27 Vet.App. 415, 427 (2015).

DATED: November 23, 2016

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