

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

JEFFREY SCOTT FELDMAN,)

Appellant,)

v.)

ROBERT A. MCDONALD,)

Secretary of Veterans Affairs,)

Appellee.)

Vet. App. No. 16-1706

JOINT MOTION FOR PARTIAL REMAND

Pursuant to U.S. Court of Appeals for Veterans Claims Rules 27(a) and 45(g), Appellant, Jeffrey Scott Feldman, and Appellee, Robert A. McDonald, Secretary of Veterans Affairs, by and through their respective counsel, respectfully move this Court to issue an order vacating the part of the February 18, 2016, Board of Veterans' Appeals (BVA or Board) decision that denied: 1) an initial compensable disability rating for pes planus; 2) initial ratings in excess of 10 percent each for left and right calcaneal spurs; 3) an initial compensable rating for hemorrhoids; and 4) an initial rating in excess of 10 percent for irritable bowel syndrome (IBS) with diverticulitis. [Record (R.) at 2-21].

The Board decision also granted increased initial ratings, to 10 percent each, for Appellant's left and right calcaneal spurs and IBS with diverticulitis; these are favorable findings that this motion does not disturb. *Medrano v.*

Nicholson, 21 Vet.App. 165, 170-71 (2007) (noting that the Court is not permitted to reverse Board's favorable findings of fact).

BASES FOR REMAND

The parties agree that vacatur and remand of the Board's decision are required because the Board erred provided an inadequate statement of reasons or bases, in violation of 38 U.S.C. § 7104(d)(1), in its determinations providing compensable ratings for bilateral calcaneal spurs, but not for bilateral pes planus, represented the most beneficial outcome for Appellant, and that no evidence demonstrated that a compensable rating was warranted for hemorrhoids. The parties also agree that the Board also erred in relying on an inadequate medical examination for his service-connected IBS. *Barr v. Nicholson*, 21 Vet.App. 303, 311 (2007).

A. Reasons or Bases

Under 38 U.S.C. § 7104(d)(1), a "decision of the Board shall include . . . a written statement of the Board's findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented on the record." *Reyes v. Nicholson*, 21 Vet.App. 370, 377 (2007); *Gilbert v. Derwinski*, 1 Vet.App. 49, 56 (1990). The Board is required to consider, and discuss in its decision, all "potentially applicable" provisions of law and regulation. *Roper v. Nicholson*, 20 Vet.App. 173, 181-82 (2006); 38 U.S.C. § 7104(a). Deficiencies in the BVA's analysis preclude effective judicial review, warranting remand. See *Simington v. West*, 11 Vet.App. 41, 45 (1998).

The parties agree that vacatur and remand are required because the Board erred when it provided an inadequate statement of reasons or bases, in violation of 38 U.S.C. § 7104(d)(1), for two specific findings. First, the Board determined that because Appellant had overlapping symptomatology relating to his feet, he could only receive compensation for one of his two conditions to avoid pyramiding, and that ratings for calcaneal spurs were more beneficial to Appellant than a single rating for bilateral pes planus. [R. at 9-14]; see *a/so* 38 C.F.R. § 4.14. Second, the Board determined that no evidence existed throughout the entire rating period to show that a compensable rating would be warranted for hemorrhoids. [R. at 14-15].

Calcaneal spurs and pes planus

The parties agree that the Board's explanation regarding the appropriate ratings for Appellant's foot conditions was inadequate. In discussing Appellant's bilateral pes planus, the Board found that his symptoms were moderate, which would only warrant a single 10 percent rating. See [R. at 9-11]. In making this finding, the Board noted that Appellant did have symptoms such as pain, fatigue, weakness, and stiffness in his feet, but noted that those symptoms were the same as the ones that would be considered for calcaneal spurs. [R. at 11]. The Board determined that while Appellant did have documented pes planus, which in 2009 had been noted to be severe, evidence showed that his symptoms were alleviated with the use of orthotics. [R. at 11]. Thus, the Board determined that associating the shared symptomatology with calcaneal spurs, where Appellant could be

awarded separate 10 percent ratings for each foot, would be more beneficial to him. See [R. at 11, 13].

The parties agree, however, that it is not evident that the Board reviewed and considered all relevant evidence prior to issuing the instant decision. Specifically, the parties note that a disability benefits questionnaire (DBQ) from March 2015 specifically states that orthotics provided to Appellant by VA in 2010 did not help. [R. at 227 (227-30)]. While the Board is not required to discuss all evidence of Record, *Newhouse v. Nicholson*, 497 F.3d 1298, 1302 (Fed. Cir. 2007), if it intends to reject materially favorable evidence, it must explain why, *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995). In the instant case, the parties note that the Board did not discuss the 2015 DBQ. Even without consideration of the 2015 DBQ, however, it is not evident how the Board determined that orthotics alleviated Appellant's symptoms. See [R. at 11]. While the 2009 VA examination report states that arch supports are the treatment for Appellant's pes planus, it also states that he does not use any such treatment. See [R. at 783, 788 (783-90)]. A VA treatment note from January 2010 noted that orthotics had been helpful with military boots while on active duty, but had not been helpful since Appellant's discharge. [R. at 453 (453-54)]. Thus, it is unclear how the Board determined that Appellant's pes planus was successfully treated with orthotics. The parties note that appropriate consideration of Appellant's condition must be given on remand, as the fact that Appellant's pes planus has not successfully

been treated with orthotics since discharge may warrant a rating higher than that provided for his calcaneal spurs.

Hemorrhoids

In determining that a compensable rating was not warranted, throughout the rating period, for hemorrhoids, the Board discussed evidence of Record from 2009 through 2011. [R. at 14-15]. The parties note that the Board's discussion was highly confusing, and demonstrated that the Board appeared unaware of the procedural history of this claim. In September 2012, the Regional Office granted an increased rating to 20 percent, effective May 2010, for his hemorrhoids. [R. at 458-69, 478-80]. As the Board's discussion in the instant decision clearly did not consider the entirety of the evidence of record, or the complete procedural disposition of this claim, Appellant is unable to understand why an increased rating was not granted. *Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990) (the Board must provide an explanation of its material findings and conclusions sufficient to enable the claimant to understand the basis of its decision). On remand, the Board must adequately consider whether an increased initial rating, from September 2009, is warranted, for Appellant's service-connected hemorrhoids, and provide adequate reasons or bases for any determination made.

B. Inadequate Medical Examination Report

The Secretary is required to provide an examination or medical opinion when such service "is necessary to make a decision on the claim." 38 U.S.C. § 5103(d). A medical examination is intended to provide the rating specialist with

the etiological, anatomical, pathological, laboratory and prognostic data required for ordinary medical classification, as well as a full description of the effects of the disability upon the veteran's ordinary activity. 38 C.F.R. § 4.10. Thus, in the context of determining the appropriate disability evaluation, the medical examiner is to provide the necessary underlying medical information upon which the evaluation of the level of impairment caused by the claimant's disability will be made. See 38 C.F.R. § 4.1 (providing that "accurate and fully descriptive medical examinations are required, with emphasis upon the limitation of activity imposed by the disabling condition"). The "mere passage of time" since an examination has last been provided for a service-connected condition is not a sufficient reason for a new examination to be provided. *Palczewski v. Nicholson*, 21 Vet.App. 174, 182-83 (2007). When a veteran alleges that his condition has worsened since his last examination, however, a new examination should be provided unless sufficient evidence exists in the record to establish the appropriate rating. *Id.*

In the instant case, the Board determined that the examinations provided to Appellant in 2009 were sufficient for current review, as there had been no allegations of worsening of his conditions since 2009. [R. at 6]. The parties, however, disagree with the Board as the evidence of record does demonstrate that Appellant has alleged, through both his statements and the submission of medical records, that his IBS has worsened over the appeal period. For example, treatment records from March 2015 show that Appellant was experiencing

symptoms such as diarrhea and constipation multiple times per week. [R. at 223]. Additionally, in a statement submitted on behalf of Appellant in February 2015, by his former representative, he stated that his IBS symptoms were “frequent, persistent, and a major source of agony . . . [that] affects his daily living.” [R. at 244 (241-45)]. The representative noted that these statements were a repeat of earlier statements made by Appellant in 2011 and 2012. [*Id.*]; see also [R. at 418] (December 2012 notice of disagreement); [R. at 508-10] (March 2011 intestines examination). These statements are supported by medical records that have been submitted on Appellant’s behalf. See e.g., [R. at 499-504] (Medical records from the U.S. Embassy at La Paz, Bolivia from 2010 and 2011). As it is evident that Appellant has asserted that his condition worsened since his last VA examination was provided, on remand, a new examination must be provided to assess the current severity of Appellant’s service-connected IBS.

On remand, Appellant is entitled to submit additional evidence and argument, *Kutscherousky v. West*, 12 Vet.App. 369, 372 (1999) (per curiam order), and VA is obligated to conduct a critical examination of the justification for the decision, *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991). In any subsequent decision, the Board must set forth adequate 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*, 1 Vet.App. 49. As stated in *Forcier*, the terms of a joint motion for remand granted by the Court are enforceable. *Forcier v. Nicholson*, 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”). Further, the Board shall obtain copies of the Court’s Order, and this motion, and incorporate them into Appellant’s claims folder for appropriate consideration in subsequent decisions on this claim.

WHEREFORE, the parties respectfully move this Court to issue an order vacating the part of the February 18, 2016, Board decision that denied: 1) an initial compensable disability rating for pes planus; 2) initial ratings in excess of 10 percent each for left and right calcaneal spurs; 3) an initial compensable rating for hemorrhoids; and 4) an initial rating in excess of 10 percent for IBS with diverticulitis.

Respectfully submitted,

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