

*Designated for electronic publication only*

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

NO. 15-3127

MAURICIO TAPIA, APPELLANT,

V.

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

Before HAGEL, *Senior Judge*.<sup>1</sup>

**MEMORANDUM DECISION**

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

HAGEL, *Senior Judge*: Mauricio Tapia appeals through counsel a June 17, 2015, Board of Veterans' Appeals (Board) decision that denied entitlement to an initial disability rating in excess of 30% from April 1, 2006, for left knee degenerative joint disease, status post-total knee replacement.<sup>2</sup> Mr. Tapia's Notice of Appeal was timely, and the Court has jurisdiction to review the Board decision pursuant to 38 U.S.C. § 7252(a). The parties neither requested oral argument nor identified issues that they believe require a precedential decision of the Court. Because Mr. Tapia has not carried his burden of demonstrating error in the Board's denial of a higher schedular disability rating, the Court will affirm that portion of the June 2015 Board decision. Because, however, the Board failed to adequately explain its determination that referral for consideration of entitlement to an extraschedular disability rating was not warranted, the Court will vacate that

---

<sup>1</sup> Judge Hagel is a Senior Judge acting in recall status. *In re: Recall of Retired Judge*, U.S. VET. APP. MISC. ORDER 09-16 (Oct. 13, 2016).

<sup>2</sup> The Board also remanded the matter of entitlement to a total disability rating based on individual unemployability for further development; accordingly, that matter is not before the Court at this time. *See* 38 U.S.C. § 7266(a) (stating that the Court reviews only final decisions of the Board); *see also Howard v. Gober*, 220 F.3d 1341, 1344 (Fed. Cir. 2000) (Board remand does not constitute a final decision that may be appealed (citing 38 C.F.R. § 20.1100(b) (1999))).

portion of the June 2015 Board decision and remand the matter for readjudication consistent with this decision.

## **I. FACTS**

Mr. Tapia served on active duty in the U.S. Marine Corps from October 1960 to October 1964. In November 1969, a VA regional office granted him benefits for residuals of in-service fractures of the left tibia and fibula with malunion and moderate ankle degenerative joint disease and assigned a 20% disability rating.

In February 2005, Mr. Tapia underwent a left knee replacement. In April 2005, he filed a claim for benefits for his left total knee replacement secondary to his already service-connected left leg disability. In July 2005, the regional office assigned a temporary total disability rating, effective April 25, 2005, and a 30% disability rating from April 1, 2006, for left knee degenerative joint disease, status post-total left knee replacement. Mr. Tapia filed a Notice of Disagreement with that decision.

In July 2006, Mr. Tapia underwent a VA joints examination, conducted by nurse practitioner Laine Keltner. Mr. Tapia reported that walking caused swelling and pain in his left knee. He stated that he always used orthotic inserts, corrective shoes, a cane, and two crutches to assist him in walking. After a physical examination, Ms. Keltner noted that Mr. Tapia had an antalgic gait and swelling in the knee joint. Range of motion testing revealed 10 degrees of extension and 105 degrees of flexion. Ms. Keltner's diagnosis was status post left knee replacement with residual scarring that had moderate effects on Mr. Tapia's ability to shop, exercise, and bathe; had severe effects on his ability to do chores; and prevented him from participating in sports or recreation.

In December 2006, a decision review officer found clear and unmistakable error in the July 2005 rating decision and assigned an earlier effective date of February 25, 2005, for the temporary total disability rating and reinstated the 30% disability rating from April 1, 2006. Mr. Tapia perfected his appeal to the Board.

In June 2010, Mr. Tapia underwent a VA joints examination, conducted by Thuy Keriakes, M.D. He reported pain, stiffness, weakness, and decreased joint speed in the left knee, but no instability, giving way, incoordination, locking, effusion, dislocation, or subluxation. He stated that

he could stand for up to one hour, but also always used a brace and two crutches. Dr. Keriakes described Mr. Tapia's gait as "poor propulsion." R. at 1695. Range of motion testing revealed extension of 10 degrees and flexion of 130 degrees. Dr. Keriakes found no objective evidence of pain or additional limitation of motion on repetitive testing. He diagnosed left knee degenerative disc disease, status post total replacement, and stated that the condition had no effect on Mr. Tapia's daily activities. Dr. Keriakes opined that Mr. Tapia's condition rendered him unemployable "for any gainful work because of limited motion/pain" in his left lower extremity, as well as swelling in the extremity due to poor circulation. R. at 1699. More specifically, Dr. Keriakes stated, "It is at least as likely as not [Mr. Tapia's] service-connected disabilities (left knee degenerative joint disease, status post total knee replacement and ankle degenerative joint disease[]), without regard to his nonservice-connected disabilities, or his age, render him unable to secure and follow a substantially gainful occupation." R. at 1700-01.

In November 2012, the Board denied entitlement to a disability rating in excess of 30% for Mr. Tapia's left knee disability from April 1, 2006, and remanded the newly raised issue of entitlement to a total disability rating based on individual unemployability. Mr. Tapia appealed the Board's denial to the Court, which granted the parties' July 2013 joint motion for remand. In particular, the parties agreed that the Board failed to adequately explain whether the evidence of Mr. Tapia's use of a brace and two crutches, antalgic gait, and reports of functional stiffness and weakness supported a finding of severe weakness under 38 C.F.R. § 4.71a, Diagnostic Code 5055. The parties also agreed that the Board should consider whether staged ratings were appropriate for Mr. Tapia's left knee condition.

In November 2014, Mr. Tapia underwent another VA joints examination, conducted by physician's assistant Neal O'Callaghan. Mr. Tapia reported that he used crutches to walk at all times outside of his house, could walk for only two blocks before having to stop, and could only stand for 15 minutes before having to sit due to knee pain. He was unable to kneel or squat. Although Mr. Tapia reported no pain on range of motion testing, test results were "[a]bnormal or outside normal range." R. at 87. Mr. O'Callaghan noted that Mr. Tapia's limited range of motion contributed to functional loss, particularly an inability to kneel or squat. Mr. O'Callaghan found no objective evidence of pain on weight bearing or of localized tenderness or pain on palpation. Mr. Tapia was

able to perform repetitive motion testing without additional loss of flexion, but Mr. O'Callaghan recorded additional functional loss after repetitive testing in the form of pain. Joint stability tests were normal. Mr. O'Callaghan also found "additional contributing factors of disability," namely, "Less movement than normal due to ankylosis, adhesions, etc., Interference with standing." R. at 90. Finally, Mr. O'Callaghan opined:

[Mr. Tapia's] left lower extremity conditions of left knee degenerative joint disease with total knee replacement prosthesis, left leg status-post tibial-fibula fracture, left ankle degenerative joint disease secondary to left ankle pinning, and left lower leg residuals of cellulitis and stasis dermatitis render him unable to do gainful employment.

[He] is unable to perform work of a physical nature and even very light work that requires standing for more than 15 minutes or walking with crutches more than 2 blocks due to above noted conditions. In this evaluator's opinion, this would disqualify him from performing any gainful employment.

R. at 84.

In June 2015, the Board issued the decision on appeal, denying entitlement to a disability rating in excess of 30% from April 1, 2006, for Mr. Tapia's left knee disability. The Board also declined to refer Mr. Tapia's claim for consideration of entitlement to an extraschedular disability rating. This appeal followed.

## **II. ANALYSIS**

### **A. Schedular Disability Rating**

On appeal, Mr. Tapia first argues that the Board failed to account for favorable evidence of severe painful motion or weakness in his left knee that warrants a 60% disability rating under Diagnostic Code 5055. The Court disagrees.

Mr. Tapia's argument is nothing more than a disagreement with the way the Board weighed the medical evidence of record. Mr. Tapia simply lists bits and pieces of information contained in the three medical examination reports and asserts that it was error for the Board not to specifically account for that evidence. In large part, the evidence he cites concerns his ability to work or complete daily living activities. He does not explain, however, how evidence that he is limited in those areas is evidence specifically of severe pain or weakness, as required for a higher disability

rating under Diagnostic Code 5055. Similarly, evidence of swelling or poor propulsion is not evidence of pain or weakness.

In recounting the VA examination reports, the Board noted all of the evidence that Mr. Tapia cites. It is clear from the Board's summaries of those reports, however, that it found especially relevant that the examiners generally found no objective evidence of pain or weakness and that stability and strength tests were normal. It is further clear that the Board, as is its duty, weighed all of the medical and lay evidence of pain or weakness and concluded that it was not indicative of severe painful motion or weakness. *See Owens v. Brown*, 7 Vet.App. 429, 433 (1995).

After reviewing Mr. Tapia's argument and the Board's decision on the matter of the proper schedular disability rating for the left knee disability, the Court concludes that Mr. Tapia has not carried his burden of demonstrating error. *See Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (holding that the appellant has the burden of demonstrating error), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000) (table). Accordingly, the Court will affirm the portion of the Board decision that denied entitlement to a disability rating in excess of 30% for the period beginning April 1, 2006.

#### B. Referral for Consideration of Entitlement to an Extraschedular Disability Rating

Mr. Tapia argues, and the Secretary concedes, that the Board failed to adequately explain its determination that referral for consideration of entitlement to an extraschedular disability rating was not warranted. The Court agrees.

The Secretary states that the Board failed to consider Mr. Tapia's collective disability picture, despite medical evidence that all of his service-connected disabilities contribute to his difficulty or inability to work. Moreover, the Secretary concedes that the Board did not explain why, in light of its remand of the matter of entitlement to a total disability rating based on individual unemployability for further development, a remand was not also necessary on this issue. Finally, the Secretary notes that the Board failed to account for particular evidence that appeared to be outside the scope of the disability rating schedule. For these reasons, remand is warranted.

On remand, Mr. Tapia is free to submit additional evidence and argument in accordance with *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order). *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002). "A remand is meant to entail a critical examination of the justification for the decision" by the Board. *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991). In addition, the

Board shall proceed expeditiously, in accordance with 38 U.S.C. § 7112 (expedited treatment of remanded claims).

### **III. CONCLUSION**

Upon consideration of the foregoing, that portion of the June 17, 2015, Board decision that declined to refer Mr. Tapia's claim for consideration of entitlement to an extraschedular disability rating is VACATED, and the matter is REMANDED for further adjudication consistent with this decision. The remainder of the June 2015 Board decision on appeal is AFFIRMED.

DATED: December 21, 2016

Copies to:

Elizabeth E. Olien, Esq.

VA General Counsel (027)