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

NO. 15-2973

LEOPOLDO FLORES, APPELLANT,

V.

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

Before SCHOELEN, *Judge*.

**MEMORANDUM DECISION**

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

SCHOELEN, *Judge*: The appellant, Leopoldo Flores, through counsel, appeals a June 23, 2015, Board of Veterans' Appeals (Board) decision in which the Board denied his increased-rating claim for low back intervertebral disc syndrome (IVDS) with degenerative joint disease (DJD). Record of Proceedings (R.) at 1-18. Additionally, the Board remanded an initial disability compensation claim for a cervical spine disability, to include as secondary to the appellant's service-connected low back IVDS with DJD. R. at 14-16. The remanded claim is not before the Court. *See Hampton v. Gober*, 10 Vet.App. 481, 483 (1997) (claims remanded by the Board cannot be reviewed by the Court); *Bond v. Derwinski*, 2 Vet.App. 376, 377 (1992) (per curiam order) ("This Court's jurisdiction is confined to the review of final [Board] decisions which are adverse to a claimant."). This appeal is timely, and the Court has jurisdiction to review the Board's decision pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the following reasons, the Court will vacate the decision and remand the matter for further proceedings consistent with this decision.

## **I. BACKGROUND**

The appellant served in the U.S. Army from May 1973 to July 1980. R. at 1064. In April 1985, the appellant filed a disability compensation claim for a low back condition. R. at 1012-15. In May 1988, the regional office (RO) granted the appellant's low back claim and assigned a 10% disability rating, with an effective date of April 12, 1985. R. at 802.

In July 2005, the appellant filed an increased-rating claim for his service-connected low back condition. R. at 702. In November 2006, the RO increased the appellant's low back disability rating to 20%, with an effective date of July 18, 2005. R. at 626-28, 650-53.

In November 2009, the appellant again filed for a rating increase, indicating that his low back disability had worsened. R. at 557. The following month, the appellant underwent a VA medical examination. R. at 596-99. The examiner noted that "[d]uring flare[ups], [the appellant] experiences functional impairment[,] which is described as pain, weakness[,] and limitation of motion of the joint[,] which is described as painful to bend down." R. at 596.

A January 2010 rating decision continued the 20% disability rating for the appellant's low back disability. R. at 563-64, 569-75. Another rating decision was issued in March 2010 continuing the appellant's 20% disability rating, and in July 2010, the appellant filed a Notice of Disagreement. R. at 540-42. In November 2010, the appellant perfected his appeal to the Board. R. at 486-87.

A March 2011 VA treatment note indicated that the appellant had exacerbated back pain with stiffness, and trouble walking and standing. R. at 220-22. Another treatment note from that same month indicated the appellant experienced a flareup and was using a back brace. R. at 222-24. Additionally, an October 2011 treatment record described the appellant's low back pain as "aching, needle[-]like, sharp, . . . throbbing," and "tight[.]" R. at 337.

A 2012 treatment note indicated that the appellant was forced to miss work because of his back disability. R. at 303-05. In April 2013, the appellant submitted a statement declaring that he was forced to retire from the U.S. Postal Service because "all that stooping, bending, lifting[,] and stress . . . became too aggravating for my lower back." R. at 357.

In May 2014, the appellant underwent a VA examination. R. at 224-30. The examiner noted that the appellant had degenerative arthritis and IVDS. R. at 225. The examiner also noted that the appellant reportedly experienced flareups affecting the thoracolumbar spine: "Flares and repetitive

use cause increased low back pain, no fatigue, incoordination[, ] or further loss of [range of motion]." R. at 226.

In October 2014, the Board remanded the matter for further development. R. at 173-76. In March 2015, the appellant testified before the Board, stating that he retired because he was unable to perform his duties with the U.S. Postal Service. R. at 105-06.

In June 2015, the Board issued the decision on appeal, denying the appellant's increased-rating claim for low back IVDS with DJD. R. at 1-18. This appeal followed.

## II. ANALYSIS

The appellant argues that the Board erred by relying on inadequate medical examinations from December 2009 and May 2014 that failed to provide the Board with information regarding whether, and at what point, there was painful motion and functional loss after repetitive use. Appellant's Brief (Br.) at 11-21. The Secretary argues that the 2009 and 2014 medical examinations are adequate and the Board did not err in relying upon them. Secretary's Br. at 5-6.

Pain on motion must be taken into account when rating a disability based on limitation of motion, even where there is compensable loss as a result of limitation of motion. *DeLuca v. Brown*, 8 Vet.App. 202, 205-06 (1995). However, to receive disability compensation for painful motion, that pain must result in functional loss – i.e., limitation in the ability "to perform the normal working movements of the body with normal excursion, strength, speed, coordination[, ] and endurance." 38 C.F.R. § 4.40 (2016); see *Mitchell v. Shinseki*, 25 Vet.App. 32, 38 (2011). In other words, "although pain may cause functional loss, pain itself does not constitute functional loss" that is compensable for VA benefits purposes. *Mitchell*, 25 Vet.App. at 37.

The Board's assignment of a disability rating is a finding of fact subject to the "clearly erroneous" standard of review. 38 U.S.C. § 7261(a)(4); *Smallwood v. Brown*, 10 Vet.App. 93, 97 (1997). A finding of fact is clearly erroneous when the Court, after reviewing the entire evidence, "is left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948); see also *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990). As with any determination, the Board must provide a statement of the reasons or bases adequate to enable an appellant to understand the precise basis for the Board's decision as well as

to facilitate review in this Court. 38 U.S.C. § 7104(d)(1); *see Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Gilbert*, 1 Vet.App. at 56-57. To comply with this requirement, the Board must analyze the credibility and probative value of the evidence, account for the evidence it finds persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the claimant. *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table).

The Court agrees with the appellant's contention that the December 2009 examination is inadequate because it does not adequately address the appellant's functional impairment due to flareups. Appellant's Br. at 18-19. Regarding the appellant's flareups, the examiner noted that "[d]uring flare[ups], he experiences functional impairment[,] which is described as pain, weakness[,] and limitation of motion of the joint[,] which is described as painful to bend down." R. at 596. Further, regarding the appellant's repetitive use claims, a range of motion chart detailing the appellant's thoracolumbar spine noted that there was no additional limitation of the appellant's range of motion between his initial range of motion and his range of motion on repetitive use. R. at 598. The examiner then stated that "[t]he joint function of the spine is additionally limited by the following after repetitive use: [P]ain[,] and pain has the major functional impact. It is not additionally limited by the following after repetitive use: [F]atigue, weakness, lack of endurance, and incoordination." *Id.*

The 2009 examination purports to address both the appellant's flareups and limitations of motion from repetitive use, but the examination does not detail limitation of motion during flareups as required by this Court's holding in *Mitchell*; the examiner only opines that there is no additional limitation stemming from repetitive use. *See Mitchell*, 25 Vet.App. at 44 (finding a medical opinion inadequate for not discussing whether any functional loss was attributable to pain during flareups).

As for the May 2014 examination, the examiner stated that "flares and repet[i]t[i]ve use cause increased low back pain, no fatigue, incoordination[,] or further loss of [range of motion]." R. at 226. The appellant asserts that this statement is inconsistent with the examiner's notes indicating that the appellant has functional loss described as "[p]ain on movement" and "[l]ess movement than normal." Appellant's Br. at 19 (citing R. at 226-27). The Court agrees.

The examiner's responses are internally inconsistent; it is impossible to determine whether the examiner intended to indicate that the appellant experienced additional functional impairment as a *result* of repetitive use, or whether the appellant had the same pain on movement and less movement than normal during nonrepetitive use. Stated differently, the examination is ambiguous as to whether the appellant's functional impairment is now his "normal" level of impairment, or whether the functional impairment is exacerbated by repetitive use.

Because the Board relied on the inadequate December 2009 and May 2014 medical examinations for the proposition that "there is no evidence that flareups limit flexion to 30 degrees or less," the Board clearly erred and the Court will remand the matter in order for VA to obtain a new examination. R. at 12; *see Tucker v. West*, 11 Vet.App. 369, 374 (1998) (holding that remand is the appropriate remedy "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"); *see also Chotta v. Peake*, 22 Vet.App. 80, 85 (2008) (stating that a retrospective medical opinion may be necessary and helpful in the absence of medical records). In addition to obtaining a retrospective medical opinion, the Board should carefully consider whether staged ratings are appropriate. *See Chotta*, 22 Vet.App. at 85 (holding that staged ratings may be appropriate in a claim challenging the effective date of a 50% disability rating prior to January 1999); *Hart v. Mansfield*, 21 Vet.App. 505, 510 (2007) (stating that the Board's consideration of a staged rating is triggered "when the factual findings show distinct time periods where the service-connected disability exhibits symptoms that would warrant different ratings").

Given this disposition, the Court will not, at this time, address the other arguments and issues raised by the appellant. *See Best v. Principi*, 15 Vet.App. 18, 20 (2001) (per curiam order) (holding that "[a] narrow decision preserves for the appellant an opportunity to argue those claimed errors before the Board at the readjudication, and, of course, before this Court in an appeal, should the Board rule against him"). On remand, the appellant is free to submit additional evidence and argument on the remanded matters, and the Board is required to consider any such relevant evidence and argument. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002) (stating that, on remand, the Board must consider additional evidence and argument in assessing entitlement to benefit sought); *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order). The Court has held that

"[a] remand is meant to entail a critical examination of the justification for the decision." *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991). The Board must proceed expeditiously, in accordance with 38 U.S.C. § 7112 (requiring Secretary to provide for "expeditious treatment" of claims remanded by the Court).

### **III. CONCLUSION**

After consideration of the appellant's and the Secretary's pleadings, and a review of the record, the Board's June 23, 2015, decision is VACATED and the matter is REMANDED to the Board for further proceedings consistent with this decision.

DATED: December 22, 2016

Copies to:

Robert V. Chisholm, Esq.

VA General Counsel (027)