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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 15-4125

CHARLES A. THORNBROUGH, APPELLANT,

v.

DAVID J. SHULKIN, M.D.,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before BARTLEY, *Judge*.

MEMORANDUM DECISION

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

BARTLEY, *Judge*: Veteran Charles A. Thornbrugh appeals through counsel a September 16, 2015, Board of Veterans' Appeals (Board) decision that determined that the veteran's disability evaluation for bilateral hearing loss was properly reduced from 70% to 40% effective February 1, 2010. Record (R.) at 2-16.¹ Single-judge disposition is appropriate in this case. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). This appeal is timely and the Court has jurisdiction to review the Board decision pursuant to 38 U.S.C. § 7252(a) and 7266(a). For the reasons that follow, the Court will set aside the portion of the September 2015 Board decision regarding reduction and remand that matter for readjudication consistent with this decision.

I. FACTS

Mr. Thornbrugh served on active duty in the U.S. Army from December 1968 to April 1970, with active duty for training from March 1964 to September 1964. R. at 311-12. In January

¹ The Board remanded the issue of entitlement to a total disability evaluation based on individual unemployability (TDIU) from February 1, 2010. R. at 13-16. Because a remand is not a final decision of the Board subject to judicial review, the Court does not have jurisdiction to consider that issue at this time. *See Howard v. Gober*, 220 F.3d 1341, 1344 (Fed. Cir. 2000); *Breeden v. Principi*, 17 Vet.App. 475, 478 (2004) (per curiam order); 38 C.F.R. § 20.1100(b) (2016).

1991, he filed a claim for service connection for bilateral hearing loss, R. at 1100-05, 1114, which was granted by a VA regional office (RO) in January 1992 and evaluated as noncompensable, R. at 1006-07.² The veteran did not appeal that decision, and it became final. In August 2004, Mr. Thornbrugh filed a claim for increased compensation, R. at 894-95, and, three months later, he was awarded a 10% evaluation effective August 13, 2004, R. at 860-68. The veteran did not challenge that decision, and it too became final.

Mr. Thornbrugh subsequently requested an increased evaluation for bilateral hearing loss in April 2006, R. at 850-52, and underwent a VA contract audiology examination in June 2006, R. at 834-35. The veteran complained of difficulty hearing and understanding speech in various settings and his wife reported that he could not hear the television unless it was "very loud." R. at 834. Audiometric testing revealed the following puretone thresholds, in decibels (db):

	1000 Hz	2000 Hz	3000 Hz	4000 Hz	Average
Right Ear	95	95	105	110	101.25
Left Ear	85	90	95	100	92.5

Id. Speech recognition under the Maryland CNC test was 56% in the right ear and 64% in the left ear. R. at 835. Based on those test results, the RO in June 2006 awarded an increased 70% evaluation for bilateral hearing loss effective April 12, 2006, the date of the claim. R. at 824-32.

In August 2006, Mr. Thornbrugh filed an application for TDIU, asserting that hearing loss prevented him from understanding and communicating with supervisors. R. at 818-21. The next month, the RO denied entitlement to TDIU and continued the 70% evaluation for bilateral hearing loss. R. at 786-92. Mr. Thornbrugh timely disagreed with that decision, R. at 780-81, and subsequently perfected an appeal to the Board, R. at 712-13. In his Substantive Appeal, the veteran indicated that he had difficulty understanding his employer. R. at 712.

Mr. Thornbrugh was afforded another VA contract audiology examination in January 2009 and complained of difficulty understanding speech in quiet and noisy environments, without functional impairment. R. at 698. On audiometric testing, his puretone thresholds were:

² The RO initially assigned an effective date of March 25, 1991, the date it received Mr. Thornbrugh's formal claim for VA benefits. R. at 1006-07, 1100-05. However, in February 2002, the RO issued a rating decision finding that its effective date determination was clearly and unmistakably erroneous and assigned an effective date of January 14, 1991, the date of his informal claim for VA benefits. R. at 999-1000, 1114.

	1000 Hz	2000 Hz	3000 Hz	4000 Hz	Average
Right Ear	75	85	100	105	91.25
Left Ear	50	75	85	95	76.25

Id. Speech recognition was 88% in the right ear and 92% in the left ear. R. at 698-99. The audiologist diagnosed bilateral sensorineural hearing loss and opined that it caused the functional limitation of difficulty communicating, which could be lessened with hearing aids. R. at 699.

Given the "discrepant" test results from the January 2009 examination, R. at 656, VA ordered another VA audiology examination in May 2009, R. at 475-81. At that examination, Mr. Thornbrugh reported difficulty hearing in all environments, particularly in group conversations. R. at 475, 478. Audiometric test results were as follows:

	1000 Hz	2000 Hz	3000 Hz	4000 Hz	Average
Right Ear	75	75	95	100	86.25
Left Ear	30	65	80	80	63.75

R. at 478. Speech recognition was 84% in the right ear and 92% in the left ear. *Id.* The audiologist diagnosed bilateral sensorineural hearing loss, R. at 478-79, and stated that the condition had "significant effects" on the veteran's occupation, including difficulty following instructions and difficulty hearing generally, but that it did not affect his usual daily activities, R. at 481.

In June 2009, the RO proposed to reduce the veteran's 70% evaluation for bilateral hearing loss to 10% based on the results of the January and May 2009 VA audiology examinations. R. at 652-59. Mr. Thornbrugh did not respond to that notification, so in November 2009, the RO implemented the proposed reduction effective February 1, 2010. R. at 639-45. He filed a timely Notice of Disagreement as to that decision later that month. R. at 626-27.

Also in November 2009, Mr. Thornbrugh submitted statements from friends and family regarding his hearing loss. Notably, the veteran's wife indicated that her husband could only watch television at a very high volume, could not hear while in the car, and had general difficulty communicating. R. at 617. A friend who had known Mr. Thornbrugh for four years asserted that the veteran's hearing had not improved over that time and it remained extremely difficult to converse with him. R. at 615. Another friend who owned a trucking company echoed that sentiment and added that she thought the veteran's hearing loss would prevent him from meeting her company's safety standards for a long-haul truck driver. R. at 614. Mr. Thornbrugh also

submitted a private audiogram diagnosing bilateral hearing loss based on speech discrimination scores of 90% in the right ear and 85% in the left ear and the following audiometric test results:

	1000 Hz	2000 Hz	3000 Hz	4000 Hz	Average
Right Ear	70	80	95	100	86.25
Left Ear	60	70	90	90	77.5

R. at 619; *see also* R. at 621 (private audiologist's July 2009 letter).

In July 2011, the Board remanded the reduction issue for the RO to provide a Statement of the Case (SOC). R. at 550-52. Two months later, Mr. Thornbrugh underwent another VA audiology examination and reported communication difficulties in all listening environments, particularly in group situations. R. at 472-73. Speech recognition scores were 72% in the right ear and 76% in the left ear and his puretone thresholds were as follows:

	1000 Hz	2000 Hz	3000 Hz	4000 Hz	Average
Right Ear	65	90	105	105	91.25
Left Ear	45	80	95	90	77.5

R. at 469. The audiologist explained that the audiometric test results showed an increase in hearing loss in the left ear and "a significant change" in speech discrimination bilaterally since the May 2009 VA audiology examination. R. at 473; *see also* R. at 464, 466 (January 2012 addendum).

In August 2012, the RO issued an SOC determining that the reduction of the veteran's bilateral hearing loss evaluation from 70% to 10% effective February 1, 2010, was proper. R. at 439-63. The RO also issued a rating decision retroactively increasing the 10% evaluation to 40% effective February 1, 2010, based on evidence obtained after the reduction had been implemented. R. at 435-38.

The case was returned to the Board and, in March 2015, it denied "restoration" of the 70% evaluation. R. at 396. Mr. Thornbrugh appealed to this Court, which, in July 2015, granted a joint motion for remand stipulating that the Board had mischaracterized the issue as entitlement to restoration of a 70% evaluation and failed to address whether there had been improvement in the veteran's hearing under the ordinary conditions of life and work. R. at 374-82.

In September 2015, the Board issued the decision currently on appeal, which determined that the reduction of Mr. Thornbrugh's 70% evaluation for bilateral hearing loss was proper. R. at 2-16. The Board explained:

The objective medical evidence clearly shows an improvement in [the veteran's] audiological test results, and thus an improvement in his bilateral hearing loss disability. This also occurred under the ordinary conditions of life, as the [v]eteran's description of the perceived impact of his hearing loss has remained consistent over time. Prior to, during and subsequent to the reduction period, the [v]eteran has complained of difficulty with communication. There is no indication that he changed his life style in any manner or that any change in his life style had any impact on his hearing acuity.

R. at 13. This appeal followed.

II. ANALYSIS

Mr. Thornbrugh argues that the Board misinterpreted the law and provided inadequate reasons or bases for its determination that the reduction of his 70% bilateral hearing loss evaluation was proper because it relied solely on objective audiometric test results and failed to adequately consider evidence regarding his functioning under the ordinary conditions of life. Appellant's Brief (Br.) at 6-11. He asserts that the RO's and the Board's failure to consider that subjective evidence rendered the reduction void ab initio, and he therefore requests that the Court reverse the Board decision and order that his 70% evaluation be reinstated retroactive to February 1, 2010. *Id.* at 11. The Secretary disputes these contentions and argues for affirmance because the Board plausibly found that the VA audiologists fully described the veteran's functional impairment and the Board adequately considered the lay evidence of such impairment. Secretary's Br. at 10-20. The Secretary also avers that the puretone threshold and speech discrimination measurements reflect an actual improvement in Mr. Thornbrugh's hearing and that the veteran repeatedly ignored the audiologists' recommendations to use hearing aids to improve his hearing. *Id.* Mr. Thornbrugh responds that both the Board and the Secretary have misunderstood the relevant reduction inquiry because, to justify a reduction, VA must establish not only an actual improvement, but also an improvement under the ordinary conditions of life, which the VA failed to do in this case. Reply Br. at 1-4. The Court agrees with the veteran that the Board erred in finding that the reduction was proper, but disagrees as to the appropriate remedy for that error.

In *Brown v. Brown*, 5 Vet.App. 413, 421 (1993), the Court held that "in any . . . reduction case[,] not only must it be determined that an improvement in a disability has actually occurred[,] but also that that improvement actually reflects an improvement in the veteran's ability to function

under the ordinary conditions of life and work." See 38 C.F.R. 4.2 (2016) (directing that "[e]ach disability must be considered from the point of view of the veteran working or seeking work"); 38 C.F.R. § 4.10 (2016) (stating that "[t]he basis of disability evaluations is the ability of the body as a whole, or of the psyche, or of a system or organ of the body, to function under the ordinary conditions of daily life, including employment"). Since deciding *Brown*, the Court has made clear that VA errs when it reduces an evaluation without complying with the "general VA regulations applicable to all [r]eduction cases, regardless of the [evaluation] level or the length of time that the [evaluation] has been in effect," including the specific requirements of §§ 4.2 and 4.10. *Faust v. West*, 13 Vet.App. 342, 349 (2000); see *Murphy v. Shinseki*, 26 Vet.App. 510, 517 (2014) (holding that the Board erred in effectively reducing the veteran's 30% sinusitis evaluation to 10% because it "did not make the findings that an AOJ [(agency of original jurisdiction)] would be required to make to justify a reduction in a disability evaluation," including whether any improvement in sinusitis "indicated an improvement, if it existed, in his ability to function under the ordinary conditions of life and work"). Therefore, VA may not reduce a veteran's disability evaluation without first finding, inter alia, that the veteran's service-connected disability has improved to the point that he or she is now *better* able to function under the ordinary conditions of life and work. See *Murphy*, 26 Vet.App. at 517; *Faust*, 13 Vet.App. at 349; *Brown*, 5 Vet.App. at 421.

In the instant case, the RO did not expressly find that any improvement in Mr. Thornbrugh's hearing resulted in an increased ability to function under the ordinary conditions of life and work. Rather, the RO based its finding that there was an actual improvement in the veteran's hearing solely on the puretone threshold and speech discrimination measurements from the January and May 2009 audiology examinations, without discussing the veteran's complaints of functional impairment recorded therein. R. at 655-59 (June 2009 rating decision proposing reduction), 642-45 (November 2009 rating decision implementing the reduction); see R. at 698 (January 2009 complaints of difficulty understanding speech in quiet and noisy environments), 475, 478 (May 2009 complaints of difficulty hearing in all environments, particularly in group conversations). Given that VA audiologists conducting hearing examinations are required to "fully describe the functional effects caused by a hearing disability" because merely "dictating objective test results" does not adequately "describe the effect of a hearing disability on a claimant's occupational functioning and daily activities," *Martinak v. Nicholson*, 21 Vet.App. 447, 455 (2007), the RO's

focus on the January and May 2009 audiometric test results makes it unclear to what extent, if at all, it considered the veteran's hearing under the ordinary conditions of life and work, as required by *Brown* and its progeny. See *Murphy*, 26 Vet.App. at 517; *Faust*, 13 Vet.App. at 349; *Brown*, 5 Vet.App. at 421; see also *Dofflemyer v. Derwinski*, 2 Vet.App. 277, 281-82 (1992) (rejecting the Secretary's argument "focusing solely on the veteran's improvement from a medical perspective," which failed to account for the lay evidence of record regarding a lack of improvement under the ordinary conditions of life and work).

The Board's analysis does not sufficiently elucidate this issue. Although the Board addressed Mr. Thornbrugh's functioning under the ordinary conditions of life and work and found evidence of hearing improvement under those circumstances, R. at 13, the Board's reasons or bases for that finding are inadequate. Specifically, the Board explained that the evidence of record established an improvement in the veteran's hearing under the ordinary conditions of life and work because "the perceived impact of his hearing loss has remained consistent over time"; "[p]rior to, during and subsequent to the reduction period, the [v]eteran has complained of difficulty with communication"; and "[t]here is no indication that he changed his life style in any manner or that any change in his life style had any impact on his hearing acuity." *Id.* The foregoing reasons or bases suggest that the veteran's hearing under the ordinary conditions of life and work remained static over the relevant period or, at the very least, did not improve. *Id.*; see also R. at 615 (November 2009 statement from the veteran's friend that she had known him for four years and "his hearing has not gotten any better in th[at] time"). That explanation, which appears inconsistent with the Board's finding that the veteran's hearing improved under the ordinary conditions of life and work, prevents Mr. Thornbrugh from understanding the precise basis for the Board's decision and frustrates judicial review. The Court therefore concludes that the Board provided inadequate reasons or bases for its decision in that regard. See *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990).

Having found error, the Court must now address Mr. Thornbrugh's argument that the proper remedy in this case is reversal of the Board decision and reinstatement of the 70% evaluation retroactive to February 1, 2010. Appellant's Br. at 11. Although the Court has held that reinstatement of a pre-reduction evaluation is warranted "[w]hen the issue raised is a rating reduction and the Court determines that the reduction was made without observance of law," *Schafrath v. Derwinski*, 1 Vet.App. 589, 596 (1991), the Court has also held that the remedy of

reversal and reinstatement is not appropriate where, as here, VA complied with the relevant procedural protections for reducing an evaluation, the Board applied the correct burden of proof, and the Board erred only in failing to provide adequate reasons or bases for its decision regarding the propriety of a reduction. *See Faust*, 13 Vet.App. at 352-53 (concluding that reinstatement of TDIU was not appropriate even though the Board committed reasons-or-bases errors in failing to discuss all applicable regulations); *Peyton v. Derwinski*, 1 Vet.App. 282, 286-87 (1991) (remanding where the Board provided inadequate reasons or bases in a reduction case); *see also Murincsak v. Derwinski*, 2 Vet.App. 363, 369 (1992) (same).

This case is factually distinguishable from cases cited by the veteran that ordered reversal of a Board decision and reinstatement of a reduced or discontinued evaluation because Mr. Thornbrugh's case does not involve VA's failure to abide by procedural protections for reductions and discontinuations set forth in statute or the Board's failure to apply the proper burden of proof. *See, e.g., Murphy*, 26 Vet.App. at 517 (reversing a Board decision and declaring a reduction void ab initio where VA failed to comply with 38 C.F.R. §§ 3.105(e), 4.1, 4.2, 4.10, and 4.13); *Greyzck v. West*, 12 Vet.App. 288, 292 (1999) (failure to comply with 38 C.F.R. § 3.344); *Dofflemyer*, 2 Vet.App. at 282 (failure to comply with 38 C.F.R. §§ 3.343 and 3.344); *Schafrath*, 1 Vet.App. at 596 (failure to comply with 38 C.F.R. §§ 3.344, 4.2, 4.10, 4.40, and 4.45). Accordingly, the Court concludes that Mr. Thornbrugh's case is more akin to *Peyton*, making remand the appropriate remedy. *See* 1 Vet.App. at 286-87; *see also 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").

On remand, Mr. Thornbrugh is free to present to the Board any additional arguments and evidence pertaining to the propriety of reduction of the 70% evaluation for bilateral hearing loss 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). The Court reminds the Board that "[a] remand is meant to entail a critical examination of the justification for the [Board's] decision," *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991), and must be performed in an expeditious manner in accordance with 38 U.S.C. § 7112.

III. CONCLUSION

Upon consideration of the foregoing, the portion of the September 16, 2015, Board decision regarding the propriety of the reduction of the 70% bilateral hearing loss evaluation effective February 1, 2010, is SET ASIDE and the matter is REMANDED for readjudication consistent with this decision.

DATED: February 17, 2017

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