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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 16-0055

GERALD S. SMITH, 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 Gerald S. Smith appeals through counsel a November 25, 2015, Board of Veterans' Appeals (Board) decision denying an evaluation in excess of 20% for right heel calcaneal bursitis with calcaneal spur. Record (R.) at 2-23.¹ 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 November 25, 2015, Board decision and remand the matter for readjudication consistent with this decision.

I. FACTS

Mr. Smith served on active duty in the U.S. Army from September 1974 to September 1977, November 1990 to May 1991, March 1992 to July 1992, and August 1992 to August 1993, with additional service in the Army National Guard. R. at 109-111; *see* R. at 3. In January 2008,

¹ The Board remanded for additional development claims for service connection for a left heel disability, sleep disturbance to include sleep apnea, right inguinal hernia, left hip disability, and an acquired psychiatric disability to include post-traumatic stress disorder (PTSD). R. at 2, 14-23. Because a remand is not a final decision of the Board subject to judicial review, the Court does not have jurisdiction to consider those matters 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).

a VA regional office (RO) granted service connection for right heel calcaneal bursitis, evaluated as 10% disabling. R. at 1523. In August 2009, Mr. Smith sought an increased evaluation for that condition. R. at 1376.

An October 2009 VA medical record indicated that the veteran reported pain and numbness in the feet. R. at 1286-87. During an October 2009 VA examination, Mr. Smith reported the following right foot symptoms: pain while standing, walking, and at rest; swelling while walking; redness while standing, walking, and at rest; stiffness while walking and at rest; fatigability while standing and walking; weakness while standing and walking; and lack of endurance while standing and walking. R. at 1271-72. The examiner noted that flare-ups precipitated by excessive walking occurred 1 to 3 times per month, lasting 1 to 2 weeks, and were treated with cortisone shots and medication. R. at 1272-73. The flare-ups caused the veteran to be "off balance" and walk on the balls of his feet to keep pressure off his heels. R. at 1273. Other functional impairment included the ability to stand only one hour and walk only a quarter of a mile. The examiner noted that corrective shoes were prescribed. *Id.*

Upon physical examination, objective evidence indicated right foot painful motion and tenderness. R. at 1274-75. The examiner opined that the veteran's right heel disability caused significant effects on occupation, including decreased mobility, problems lifting and carrying, weakness or fatigue, decreased strength in the lower extremity, and pain, and as a result he had been assigned different duties at work. R. at 1276. The examiner noted that the right heel disability prevented exercise, severely affected driving, and moderately affected chores, shopping, and recreation. *Id.*

In January 2010, the RO denied an evaluation in excess of 10% for the veteran's right heel condition. R. at 1244-46. Mr. Smith filed a Notice of Disagreement (NOD) later that month. R. at 1233. In February 2010, the veteran submitted a statement that his right heel condition had worsened and his VA doctor advised him to seek an increase in benefits. R. at 1228. In February 2014, the RO issued a Statement of the Case (SOC) continuing to deny an evaluation in excess of 10% for the service-connected right heel condition. R. at 964-65. In March 2014, the veteran perfected his appeal. R. at 923.

During an October 2014 VA examination, Mr. Smith reported sharp right heel pain that felt like stepping on a nail, a burning sensation, swelling, flare-ups that caused him to feel unbalanced and his feet to throb when walking, a loss of balance after sitting, and difficulty

climbing stairs. R. at 870, 872. The examiner indicated moderate severity of the right heel condition and that the disability chronically compromised weight bearing. R. at 873. The examiner noted that the veteran regularly used a cane and was treated with medication, corticosteroid injections, mentholated ointment, and corrective shoes with heel pads. R. at 871, 875.

The examiner noted pain on physical examination and opined that it caused less movement than normal. R. at 874. The examiner also noted short stride length, slight shuffling, pronated gait, tender palpitation over the plantar aspect of the right heel, dorsiflexion to 5 degrees and plantar flexion to 40 degrees, and decreased range of motion. R. at 875. The examiner stated that during flare-ups and after repetitive and extended use, the veteran had difficulty with weight bearing due to pain. R. at 874-75. The examiner opined that the veteran's right heel condition impacted his ability to complete occupational tasks because the disability interfered with extended weight bearing activities such as walking more than a quarter of a mile, climbing stairs, or standing for over an hour. R. at 876.

In November 2015, the Board issued the decision on appeal, granting a 20% evaluation for the veteran's service-connected right heel condition, evaluated under 38 C.F.R. § 4.71a, Diagnostic Code (DC) 5284 (foot injuries, other). R. at 10. The Board stated that DC 5284 provides for evaluations based on overall severity—moderate, moderately severe, severe, and actual loss of use—but does not define these terms, and that it would evaluate all evidence of record rather than apply a mechanical formula. *Id.* The Board found that, overall, the veteran's symptoms more nearly approximated that of a moderately severe disability, stating that Mr. Smith experienced constant foot pain not alleviated by sitting, regular flare-ups resulting in chronically abnormal weight bearing, and decreased functional abilities such as standing or walking for prolonged periods of time and use of a cane for ambulation. *Id.* The Board found that an evaluation in excess of 20% was not warranted because the veteran's right heel condition did not require medical intervention aside from shoe modifications and corticosteroid injections, neither VA examiner had found that the disability resulted in severe functional impairment, and the condition was not analogous to actual loss of use because "it is clear that the [v]eteran's right foot is functional." *Id.*

The Board also found that an evaluation in excess of 20% was not warranted under the provisions of 38 C.F.R. §§ 4.40, 4.45, and 4.59, on the basis of functional loss due to pain or weakness, because the veteran's right heel condition is contemplated by his current 20% evaluation

under DC 5284 and because his complaints do not tend to establish weakened movement, excess fatigability, or incoordination to a degree commensurate with a higher evaluation. R. at 11. The Board stated that, in fact, the evidence indicates that the veteran does not have limitation of motion or weakness. *Id.* This appeal followed.

II. ANALYSIS

Mr. Smith argues that the Board failed to provide (1) the standard applied in evaluating his entitlement to a higher evaluation under DC 5284 and (2) adequate reasons or bases in support of its decision. Appellant's Brief (Br.) at 4-8. Specifically, the veteran asserts that the Board did not explain how it determined that a particular degree of medical intervention was required for finding a condition severe and that the Board did not discuss how chronic difficulty with weight bearing, altered gait, and limited dorsiflexion did not reflect a severe disability, particularly because the Board overlooked evidence of motion limitation. *Id.* The Secretary disputes the veteran's arguments and urges the Court to affirm the November 2015 Board decision. Secretary's Br. 5-10. The Court agrees that the Board provided inadequate reasons or bases for denying an evaluation in excess of 20% for the veteran's right heel condition.

With any findings on a material issue of fact and law presented on the record, the Board must support its determinations with an adequate statement of reasons or bases that enables the claimant to understand the precise basis for that determination and facilitates review in this Court. 38 U.S.C. § 7104(d)(1); *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990). To comply with this requirement, the Board must analyze the credibility and probative value of evidence, account for evidence that it finds persuasive or unpersuasive, and provide reasons for its rejection of 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).

DC 5284 applies to "Foot injuries, other," and provides for 10%, 20%, and 30% evaluations for moderate, moderately severe, and severe disabilities, respectively. 38 C.F.R. § 4.71a, DC 5284 (2016). As the Board stated, the rating schedule does not define moderate, moderately severe, or severe. Although the reasons or bases requirement does not mandate that the Board provide precise definitions for such undefined terms in the rating schedule, it does require that the Board provide a statement of reasons or bases sufficiently detailed to enable Mr. Smith and the Court to understand how the Board applied these terms. *See Gilbert*, 1 Vet.App. at 57; *see also Caluza*, 7

Vet.App. at 506; *Hood v. Brown*, 4 Vet.App. 301, 302 (1993) (holding that "the Board did not provide reasons or bases to explain why appellant's impairment is 'definite' and not 'considerable,' 'severe,' or 'total,'" and remanding the matter "for the Board to explain why appellant's symptoms do not fit the criteria for a higher rating").

Here, the Board found that Mr. Smith's symptoms more nearly approximated a moderately severe disability because he experienced constant foot pain, regular flare-ups resulting in chronically abnormal weight bearing, and decreased functional abilities such as standing or walking for prolonged periods and use of a cane. R. at 10. The Board found that a higher evaluation was not warranted because the veteran's condition did not require medical intervention aside from shoe modifications and corticosteroid injections and because neither VA examiner found severe functional impairment. The Board's analysis is problematic for several reasons.

First, the Board did not explain why the veteran's symptoms, such as constant pain and chronic abnormal weight bearing, did not indicate a severe disability warranting a 30% evaluation. *See Gilbert*, 1 Vet.App. at 57.

Second, it is unclear from the Board's statement what type and level of medical intervention would be required for a disability to be characterized as severe rather than moderately severe. Aside from summarily stating that corticosteroid injections are a type of medical intervention indicating a moderately severe disability, the Board does not explain why such injections do not warrant a 30% evaluation or what degree of intervention is necessary to meet that evaluation. *See Dennis v. Nicholson*, 21 Vet.App. 18, 22 (2007) ("merely listing evidence before stating a conclusion does not constitute an adequate statement of reasons and bases"); *see also Gilbert*, 1 Vet.App. at 57. The Board's rationale is not sufficiently detailed to enable Mr. Smith to understand how the Board applied the terms severe and moderately severe, and the requirements it seemingly associated with those terms, to the veteran's right heel condition. *See id.*

Finally, although the October 2014 VA examiner noted moderate severity of the right heel condition, the October 2009 VA examiner did not make any severity determination and the Board's implication that the 2009 examiner found the disability less than severe is unfounded. R. at 10. In addition, in finding that neither VA examiner found severe functional impairment, the Board did not discuss the October 2009 examiner's opinion that the veteran's disability caused significant effects on occupation or that the condition severely affected driving and prevented exercise. *See R. at 1274-76; Caluza*, 7 Vet.App. at 506.

Moreover, the Board failed to discuss Mr. Smith's symptoms of weakness and limited motion in its determination that his right heel condition more nearly approximated a moderately severe, rather than a severe, disability. *See* R. at 10. During the October 2009 VA examination, the veteran reported weakness while standing and walking and, although the examiner did not find weakness on physical examination, he opined that the veteran's disability caused significant effects on occupation, including weakness or fatigue. R. at 1274-76. The October 2014 VA examiner noted decreased range of motion, dorsiflexion to 5 degrees,² short stride length, and slight shuffling as to the veteran's right heel condition. R. at 875. The Board did not reference this favorable evidence nor provide reasons or bases for rejecting it. *See Caluza*, 7 Vet.App. at 506. In addition, the Court notes that, analyzing whether an increased evaluation was warranted under 38 C.F.R. § 4.40 (functional loss), § 4.45 (joints), and § 4.59 (painful motion), the Board stated that evidence, in fact, indicated no limitation of motion or weakness. R. at 11. The October 2009 and October 2014 VA examination reports clearly contradict this finding, R. at 875, 1274-76, and the Board's statement is thus indicative at least of a reasons or bases inadequacy, *see Caluza*, 7 Vet.App. at 506 (the Board must analyze the probative value of evidence and account for evidence it finds unpersuasive).

Therefore, because the Board failed to provide adequate reasons or bases for rejecting favorable evidence of limited motion and weakness and because the Board's analysis provides no insight into why Mr. Smith's right heel symptoms are not commensurate with a severe disability or what degree of medical intervention is required for a higher evaluation, a remand is warranted. *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).

III. CONCLUSION

Upon consideration of the foregoing, the appealed portion of the November 25, 2015, Board decision is SET ASIDE and the matter is REMANDED for readjudication consistent with this decision.

DATED: February 28, 2017

² Normal dorsiflexion is to 20 degrees. 38 C.F.R. § 4.71a, Plate II.

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