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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 15-4454

DONALD B. TROSCLAIR, APPELLANT,

v.

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

Before DAVIS, *Chief Judge*.

MEMORANDUM DECISION

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

DAVIS, *Chief Judge*: U.S. Air Force veteran Donald B. Trosclair appeals through counsel from an October 22, 2015, Board of Veterans' Appeals (Board) decision that determined reduction of the disability rating for his service-connected allergic rhinitis from 10% to 0% was proper. For the following reasons, the Court will reverse the Board's October 2015 decision and order reinstatement of the 10% disability rating for the appellant's allergic rhinitis, effective July 1, 2008, pending readjudication.

I. ANALYSIS

In cases where a veteran's disability rating is reduced, the Board must determine whether the reduction was proper. *Dofflemyer v. Derwinski*, 2 Vet.App. 277, 279-80 (1992). A reduction is void ab initio when the Board affirms a reduction of a veteran's disability without observing the applicable laws and regulations. *Tatum v. Shinseki*, 23 Vet.App. 152, 159 (2009).

Regardless of the length of time for which a disability rating has been in effect, the Board is required to observe several general VA regulations applicable to all rating reductions. *See* 38 C.F.R. §§ 4.1, 4.2, 4.10, 4.13 (2016). The Board must determine whether (1) any improvement had actually

occurred, (2) the examination report(s) on which the Board relied were based on thorough examinations, and (3) any improvement found "actually reflected an improvement in the veteran's ability to function under the ordinary conditions of life and work." *Brown (Kevin) v. Brown*, 5 Vet.App. 413, 421 (1993). "These provisions impose a clear requirement that VA rating reductions . . . be based upon review of the entire history of the veteran's disability." *Id.* at 420; *see also Schafrath v. Derwinski*, 1 Vet.App. 589, 594 (1991).

Mr. Trosclair argues that the Board erred in failing to properly determine whether the third requirement was met, that is, whether his allergic rhinitis had improved under the ordinary conditions of life and work. The Court agrees with this argument, and additionally concludes that the Board's analysis was lacking with respect to all three regulatory requirements for rating reductions.

A. Actual Improvement

The Board stated that Mr. Trosclair's rhinitis was consistently rated under 38 C.F.R. § 4.97, Diagnostic Code (DC) 6522 (2016). Record (R.) at 7. This DC provides a 10% disability rating for "greater than 50 [%] obstruction of nasal passage on both sides or complete obstruction on one side." DC 6522. Mr. Trosclair received service connection with a 10% disability rating on the basis of a January 2005 VA medical examination that found 50% obstruction. The examination listed Zyrtec and Flonase as medications that Mr. Trosclair took to control the rhinitis.

In March 2008, however, Mr. Trosclair underwent another VA examination. The examination report found hypertrophy of both turbinates, but only 20% obstruction bilaterally. The examination indicated that Mr. Trosclair's allergies worsen in February and March, and that he had developed constant headaches in the frontal area.

In addition to confirming continued use of Flonase, the examination report indicated that Mr. Trosclair took Singulair once daily, Claritin D once a week, and that he also received weekly allergy injections from a private allergist. Although there are differing statements in the record on the number of weeks Mr. Trosclair received the allergy shots, the record contains a document indicating that Mr. Trosclair was receiving such shots as late as March 2011. *See R.* at 469.

A rating decision issued 11 days after the examination report issued reduced Mr. Trosclair's disability rating to 0% based solely on the March 2008 examination. The rating decision discussed only the findings with respect to the rating criteria.

The March 2008 examination report failed to consider the effects of the medication that Mr. Trosclair was taking for his rhinitis. *See* R. at 581 (December 2013 "Disability Benefits Questionnaire" (DBQ) diagnosing service-connected rhinitis "controlled with medication"). This Court has held that the Board may not deny entitlement to a higher rating on the basis of relief provided by medication when those effects are not specifically contemplated by the rating criteria. *See Jones (David) v. Shinseki*, 26 Vet.App. 56, 63 (2012).

Here, the Board erred in doing exactly that, albeit sub silentio. DC 6522 includes no criteria considering the effects of medication in any of the rating stages. Thus, there is a question whether there was real improvement in Mr. Trosclair's rhinitis as pertaining to the rating criteria, or whether the apparent improvement was an effect of the additional medication administered since the initial disability rating was awarded. *See* R. at 82 (January 2014 DBQ noting 50% obstruction in right nasal passageway). The Board will have to consider whether a medical opinion is required on whether the apparent improvement in the bilateral obstruction would be sustained in the absence of continuing medication.

The effect of multiple medications may also bear on the question whether the improvement found reflects improvement on Mr. Trosclair's ability to function under the ordinary conditions of life and work. It is questionable whether the improvement found in the context of an extensive regimen of drugs reflects *ordinary conditions* of life or work. The Court, however, views this consideration as pertaining more to the question of actual improvement.

B. Thoroughness of Examination

The March 2008 examiner stated that "[t]he C[laims]-file was not made available for my review, but computerized records were available." R. at 1073. The Board made no finding whether the computerized records included the entire history of Mr. Trosclair's rhinitis disability at that time, as required by VA regulations and the precedents of this Court. The content of the computerized records is discussed nowhere in the record, and the accuracy of any scanning operation based on claims file documents is not assessed, either as to what was included or what may have been omitted. *See* VA Fast Letter 11-24 (7/242014 rev.) (VA samples its scanning operation with a goal of 99% accuracy). Therefore, the Court is unable to conclude that the March 2008 examination was conducted on the basis of all the history of Mr. Trosclair's rhinitis condition.

C. Functioning Under Ordinary Conditions of Life and Work

The March 2008 examination did not evaluate the effects of Mr. Trosclair's rhinitis on his ability to function under ordinary conditions of life and work. The Board erred in basing its evaluation of this factor primarily on postreduction medical examinations conducted from 2012 to through 2014. *See, e.g., Hohol v. Derwinski*, 2 Vet.App. 169, 172 (1992) (VA must compare examination on which reduction is based to the last examination supporting the previous disability rating).

The Board suggests that the use of postreduction examinations is proper to determine whether improvement occurred. *See R. at 7* (citing *Dofflemeyer*, 2 Vet.App. at 281-82). The Court does not read the case to support this proposition. In any view of the matter, the issue here is whether the improvement found at the time of the reduction actually improves the veteran's ability to function under ordinary conditions of life and work.

In this respect, the examination reports cited are insufficient to support the Board's conclusion. The Board cites the December 2012, May 2013, and January 2014 examinations for the conclusion that Mr. Trosclair's allergic rhinitis had no functional impact on his ability to work. In the first two reports, these assessments consist of an unexplained checkmark on a questionnaire, entitling them to no probative weight in the Board's determinations. *See R. at 465, 586; Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 304 (2008). In the January 2014 examination report, the response to the inquiry is "no," again without explanation. The difficulty with this lack of explanation is particularly acute in view of the fact that the record shows that Mr. Trosclair retired in 2010. *See R. at 85*. It is therefore entirely unclear how the examiners assessed the impact of Mr. Trosclair's rhinitis on his ability to function in work. Furthermore, it is *improvement* in the ability to function under ordinary conditions of life and work that is at issue.

Moreover, the record is replete with evidence that Mr. Trosclair has developed frontal headaches and nosebleeds as a result of his rhinitis. *See R. at 957* (private medical note indicating that use of Flonase causes nose bleeds, but cessation of use results in headaches and congestion), 1073 (March 2008 examination reports constant headaches in the frontal area). Various VA documents concede a positive association between Mr. Trosclair's service-connected rhinitis and the nosebleeds and headaches. *See R. at 565-66* (Supplemental Statement of the Case describing

disability as allergic rhinitis with intermittent nose bleeds and headaches), 923 (Appeals Management Center medical opinion linking headaches and nosebleeds to rhinitis). The Board discussed these conditions, but its focus was diverted to whether the conditions were independently ratable. The real issue here is that no explanation is offered, either by the examiners or by the Board, how Mr. Trosclair could suffer such conditions without an attenuation or degradation in his ability to function in life and work.

Because this is not a case of a claimant seeking an initial or higher disability level, VA's regulations require more than a rote application of the rating criteria to the objective medical data. *See Brown (Kevin)*, 5 Vet.App. 421; *Dofflemeyer* at 279-80; *Peyton v. Derwinski*, 1 Vet.App. 282, 286 (1991). When the Board reduces a veteran's disability rating without proper regard to the law, the decision is void ab initio. *Schrafath*, 1 Vet.App. at 595. Accordingly, the Court will reverse the reduction of disability rating for the allergic rhinitis, and order reinstatement of the disability rating for that condition pending readjudication. *See Wilson v. West*, 11 Vet.App. 383 (1998); *Schafraath* 1 Vet.App. at 589 (1991).

II. CONCLUSION

The Court REVERSES the Board's October 22, 2015, decision that the rating reduction for allergic rhinitis was proper and ORDERS REINSTATEMENT of the 10% disability rating for that condition effective July 1, 2008.

DATED: March 27, 2017

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