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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 16-0497

SALVADOR ROMO, APPELLANT,

v.

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

Before LANCE, *Judge*.

MEMORANDUM DECISION

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

LANCE, *Judge*: The appellant, Salvador Romo, served in the U.S. Army from October 1984 to April 1985 and from November 1990 to March 1991. *See* Record (R.) at 1264, 1484. He appeals, through counsel, a December 29, 2015, Board of Veterans' Appeals (Board) decision that, in part, denied entitlement to a disability rating in excess of 10% for left knee arthralgia and denied service connection for right ear hearing loss.¹ R. at 1-26. Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). This appeal is timely, and the Court has jurisdiction over the case pursuant to 38 U.S.C. §§ 7252(a) and 7266.

For the reasons that follow, the Court will vacate that part of the December 29, 2015, decision denying entitlement to a disability rating in excess of 10% for left knee arthralgia and remand the matter for further proceedings consistent with this decision. As the appellant presents no argument concerning the Board's denial of service connection for right ear hearing loss, the Court

¹ The Board also assigned a separate 10% disability rating for left knee instability, which is a favorable determination that the Court cannot disturb. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007). In addition, the Board remanded the appellant's claims for entitlement to an initial compensable rating for left ear hearing loss, an initial rating in excess of 40% for urethral stricture, and an effective date earlier than August 13, 2015, for the award of service connection for erectile dysfunction and special monthly compensation based on loss of use of a creative organ. As the Court lacks jurisdiction over these remanded claims, it will not address them further. *See* 38 U.S.C. §§ 7252(a), 7266(a); *Howard v. Gober*, 220 F.3d 1341, 1344 (Fed. Cir. 2000).

holds that he has abandoned that matter and will, accordingly, dismiss the appeal as to that issue. *See Pederson v. McDonald*, 26 Vet.App. 276, 285 (2015) (en banc).

The appellant presents five arguments on appeal. First, he contends that the Board misinterpreted the law when it failed to address the effects of his left knee flare-ups and whether they resulted in additional functional loss that would warrant a higher disability rating. Appellant's Brief (Br.) at 8-10. Relatedly, he argues that the Board failed to consider the impact of weakened movement and pain on his functional ability and instead limited its analysis to range-of-motion testing. *Id.* at 11-13. Next, the appellant asserts that the Board provided an inadequate statement of reasons or bases to support its determination that a disability rating in excess of 10% required a level of impairment significantly more limited than his "reasonable hypothetical additional impairment on prolonged repetitive use." *Id.* at 13 (quoting R. at 19); 13-15. Fourth, he contends that the Board erred when it determined that a July 2015 VA examination satisfied VA's duty to assist and erred by relying on the examination report's findings. *Id.* at 15-17. Fifth, he argues that the Board failed to provide an adequate statement of reasons or bases to support its determination that extraschedular referral of his case was not warranted. *Id.* at 18-21. The Secretary disputes the appellant's contentions. Secretary's Br. at 7-22.

In its decision, the Board relied on findings contained in September 2013 and July 2015 VA examination reports to deny a disability rating in excess of 10% for left knee arthralgia. R. at 17-20. According to the September 2013 examination report, the appellant reported flare-ups causing pain that "prevent[ed] him from running or walking very long." R. at 521. After conducting range-of-motion testing, the examiner affirmed that "pain, weakness, fatigability, or incoordination significantly limit[ed] functional ability during flare-ups or when the joint [was] used repeatedly over time," and that, during flare-ups, "[p]ain prevent[ed] the [appellant] from running or walking." R. at 523-24. According to the July 2015 VA examination report, the appellant was able to perform repetitive-use testing with no additional loss of function or range of motion after three repetitions, although the examiner left blank the boxes for recording range of motion after three repetitions. R. at 2284. The examiner noted that he was unable to provide the degree of additional loss of motion resulting from repeated use over time because the appellant reported that his flare-ups were not always of the same intensity. R. at 2285. The examiner indicated that, based on the appellant's reports, his flare-ups could "range from a mild to severe magnitude," and that "[t]heoretically, a very

mild flare up may not reduce range of motion at all while an extremely severe flare up may prevent any movement whatsoever." *Id.*

In denying a disability rating greater than 10% for limitation of motion of the left knee, the Board discussed the appellant's range-of-motion findings throughout the appeal period and noted that "[a]lthough examiners predicted that there would be additional loss of function on very prolonged use, none were able to quantify the additional loss of function." R. at 19. The Board then concluded that the rating criteria for the next higher rating under 38 C.F.R. § 4.71a, diagnostic code (DC) 5260² (limitation of flexion), would require a level of impairment "significantly more limiting than a reasonable hypothetical additional impairment on prolonged repetitive use." *Id.*

The Board's analysis is problematic in two respects. First, in its discussion of whether VA had satisfied its duty to assist the appellant, the Board did not address whether the July 2015 examiner's omission of range-of-motion measurements after repetitive-use testing, or his inability to estimate additional loss of motion during flare-ups, rendered the examination report inadequate. *See* R. at 8-9; *see also* 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995) (holding that the Board's statement of reasons or bases for its decision "must be adequate to enable a claimant to understand the precise basis for the Board's decision, as well as facilitate review in this Court").

Second, the Board essentially dismissed the additional functional impairment resulting from flare-ups on the basis that the impairment could not be precisely quantified. *See* R. at 19. In doing so, the Board failed to discuss the September 2013 examiner's finding that, during flare-ups, "pain prevent[ed] the [appellant] from running or walking." R. at 523-24; *see Thompson v. Gober*, 14 Vet.App. 187, 188 (2000) (the Board must provide an adequate statement of reasons or bases "for its rejection of any material evidence favorable to the claimant"). The Board also failed to explain how it determined that "reasonable hypothetical additional impairment" caused by prolonged repetitive use would not warrant a higher rating under DC 5260, given its apparent inability to otherwise describe that additional impairment. *See* R. at 19; *see also Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990) (Board decisions "must contain clear analysis and succinct but complete

² The Board's reference to DC "6260" appears to be a typographical error, as that DC relates to tinnitus. *See* R. at 19.

explanations"). Given these deficiencies, the Court holds that the Board's statement of reasons or bases is inadequate, and it will therefore vacate and remand the Board's decision. *See* 38 U.S.C. § 7104(d)(1); *Allday*, 7 Vet.App. at 527.

In light of this outcome, the Court will not consider the appellant's remaining arguments. *See Quirin v. Shinseki*, 22 Vet.App. 390, 396 (2009) (holding that "the Court will not ordinarily consider additional allegations of error that have been rendered moot by the Court's opinion or that would require the Court to issue an advisory opinion"). On remand, the appellant is free to submit additional evidence and argument, including the arguments raised in his briefs to this Court, in accordance with *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order), and the Board must consider any such evidence or argument submitted. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002). The Board shall proceed expeditiously, in accordance with 38 U.S.C. §§ 5109B and 7112 (requiring the Secretary to provide for "expeditious treatment" of claims remanded by the Board or the Court).

After consideration of the parties' briefs and a review of the record, that part of the Board's December 29, 2015, decision denying entitlement to a disability rating in excess of 10% for left knee arthralgia is VACATED and the matter is REMANDED to the Board for further proceedings consistent with this decision. The appeal is otherwise DISMISSED.

DATED: April 7, 2017

Copies to:

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