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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 15-3957

JOE D. KIRKPATRICK, APPELLANT,

v.

DAVID J. SHULKIN, M.D.,
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, Joe D. Kirkpatrick, through counsel, appeals a September 4, 2015, Board of Veterans' Appeals (Board) decision in which the Board denied service connection for cervical and thoracic spine disorders, to include as secondary to a service-connected lumbar spine disability, and radiculopathy of the bilateral upper extremities as secondary to a service-connected cervical or thoracic spine disorder. Record of Proceedings (R.) at 2-17. 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 Board decision and remand the vacated matters for further proceedings consistent with this decision.

I. BACKGROUND

The appellant served on active duty in the U.S. Army from October 1974 to October 1978 and from November 1990 through June 1991. R. at 3, 94.¹ He injured his back in 1991, while in the military, after sustaining a fall. R. at 321, 2336. In November 1991, the regional office (RO)

¹ The Court notes that the DD Form 214 for the first period was not in the Record of Proceedings.

granted the appellant service connection for a low back (lumbar spine) disability at a noncompensable rating. R. at 2348-53. In July 2007, the RO granted a rating increase for his lumbar spine disability to a 20% disability rating, effective March 1999, and 40% effective March 2006. R. at 1737-42. In September 2007, the appellant filed a claim for service connection for a thoracic spine disability and radiculopathy of the lower extremities. R. at 1649.

In December 2007, the appellant reported to a VA examiner that his cervical and thoracic back pain began 6 years prior. R. at 1636. That same month, a private physician, Dr. Reddy, noted that although degenerative changes "occur with aging, they are not common at age 52 with severe symptoms" and opined that "[i]t is more likely than not that past trauma is contributing to his symptoms." R. at 1357.

In June 2008, the RO denied service connection for a thoracic spine disability and bilateral upper extremity radiculopathy. R. at 1397-1404. The appellant filed a timely Notice of Disagreement (NOD) with this decision and, in January 2009, perfected his appeal to the Board. R. at 1304-13, 1373. At a July 2010 hearing before the Board, the appellant testified that his mid and upper back problems began 4 to 5 years after he injured his lower back. R. at 849. He stated that he never had problems with his back until after that incident. *Id.*

In February 2012, the Board remanded the appellant's claims for a new VA examination. R. at 348-56. In a March 2012 VA examination, the examiner opined that the appellant's thoracic and cervical spine conditions were less likely than not caused or aggravated by his service-connected lumbar spine disability. R. at 330. In September 2014, the Board again remanded the appellant's claim for an addendum opinion to address whether the appellant's cervical and thoracic spine disorders were caused by or aggravated by his military service or his service-connected lumbar spine disability. R. at 115-18. The Board further requested an explanation for all opinions expressed. R. at 116.

In an October 2014 addendum opinion, the examiner again opined that it was less likely than not that the appellant's thoracic and cervical spine conditions were caused by or aggravated by service or his service-connected lumbar spine disability. R. at 72. The examiner reasoned that the appellant's service treatment records and separation examination did not mention mid-back or neck problems at all. *Id.* The examiner further stated that degenerative disc disease (DDD) was "not at all uncommon for a patient at age 49." *Id.* The examiner noted that all prior medical records from 1991 onward only mention the lower back and lower extremities, including his

September 1991 disability examination and multiple civilian medical records from 1992 through 1994. R. at 72-73. The examiner further took exception to the private physician's 2007 opinion and instead opined that it is "very common to see patients in their 40s and 50s with severe lumbar disc and spine pathology." R. at 73. As to the appellant's testimony that he only experienced upper back problems after his lower back injury, the examiner stated "I can only comment on what has been noted prior in the C file, that he only began complaining of chronic upper back problems in 2007." *Id.* Further, the examiner noted, the appellant's 1991 separation examination and his first VA disability examination "make no mention whatsoever" of cervical or thoracic spine problems. *Id.*

In the September 2015 decision here on appeal, the Board denied the appellant's claims for service connection for cervical and thoracic spine disorders and radiculopathy of the bilateral upper extremities. R. at 2-17. The Board determined that the probative evidence did not show that the appellant injured his thoracic or cervical spine in service, and VA examiners opined that the disorders are not secondary to or aggravated by his service-connected lumbar spine disorder. R. at 11. This appeal followed.

II. ANALYSIS

Because the appellant only challenges the Board's finding on a secondary service connection theory, the Court will limit its analysis to that basis. A finding of service connection, or no service connection, is a finding of fact reviewed under the "clearly erroneous" standard in 38 U.S.C. § 7261(a)(4). *See Swann v. Brown*, 5 Vet.App. 229, 232 (1993). "A factual finding 'is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Hersey v. Derwinski*, 2 Vet.App. 91, 94 (1992) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)). Additionally, conditions other than those directly attributable to in-service causes may result in awards of secondary service connection. *See* 38 U.S.C. § 3.310(a) (2016) (secondary service connection is granted for disability proximately due to or result of service-connected condition); *see also Allen v. Brown*, 7 Vet.App. 439, 448 (1995) (en banc) (allowing secondary service connection for disability aggravated by service-connected condition).

A. October 2014 Addendum

"[O]nce the Secretary undertakes the effort to provide an examination when developing a service-connection claim, he must provide an adequate one." *Barr v. Nicholson*, 21 Vet.App. 303, 311 (2007). A medical examination is considered adequate "where it is based upon consideration of the veteran's prior medical history and examinations and also describes the disability, if any, in sufficient detail so that the Board's "evaluation of the claimed disability will be a fully informed one."" *Stefl v. Nicholson*, 21 Vet.App. 120, 123 (2007) (quoting *Ardison v. Brown*, 6 Vet.App. 405, 407 (1994) (quoting *Green v. Derwinski*, 1 Vet.App. 121, 124 (1991))). Additionally, the opinion "must support its conclusion with an analysis that the Board can consider and weigh against contrary opinions." *Id.* at 124-25; *see also Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 301 (2008) (noting that "a medical examination report must contain not only clear conclusions with supporting data, but also a reasoned medical explanation connecting the two"). The Court reviews the Board's determination that a medical examination or opinion was adequate under the "clearly erroneous" standard of review set forth in 38 U.S.C. § 7261(a)(4). *See D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008).

A remand by the Board "confers on the veteran, as a matter of law, the right to compliance with the remand orders," and the Board itself errs when it fails to ensure compliance with the terms of such a remand. *See Stegall v. West*, 11 Vet.App. 268, 271 (1998); *see also Dymont v. West*, 13 Vet.App. 141, 147 (1999) (Board must ensure substantial compliance with remand orders). As with any finding on a material issue of fact and law presented on the record, the Board must support its finding with an adequate statement of reasons or bases that enables the claimant to understand the precise basis for that finding and facilitates review in this Court. *See* 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990).

The appellant argues that the October 2014 addendum opinion is inadequate because the examiner failed to provide a rationale for his conclusion that the appellant's thoracic and cervical spine conditions were not caused or aggravated by his service-connected lumbar spine disability. Appellant's Brief (Br.) at 6-7. Specifically, he asserts that the opinion did not adequately address the issue of aggravation, and that VA failed in its duty to assist by relying upon this opinion to deny him service connection for the two back conditions. *Id.* The appellant argues that the examiner's rationale only addressed whether the appellant had a diagnosed, noted injury of the cervical and thoracic spine in service, rather than whether these conditions are secondarily service

connected to his lumbar spine disability. *Id.* at 9-10. Additionally, he contends the Board did not provide adequate reasons or bases for its denial and that it did not ensure substantial compliance with its September 2014 remand. *Id.* at 11-12.

The Secretary responds that the examiner specifically opined that it was less likely as not that the appellant's thoracic or cervical spine disorders were aggravated by either military service or his lumbar spine disorder and provided thorough rationale, including a discussion of relevant medical records. Secretary's Br. at 5. The Secretary further argues that the appellant's attempts to "frame the examiner's rationale as only pertaining to causation" are based on his own lay analysis that should be dismissed as an "uninformed and skewed reading of [the examiner's] rationale." *Id.* He contends that the examiner applied valid medical analysis to significant facts of the case and that his aggravation opinion substantially complied with the Board's September 2014 remand order. *Id.* at 6.

In the decision on appeal, the Board found the October 2014 addendum adequate and afforded the examiner's opinion substantial probative weight. In reaching this conclusion, the Board noted that the examiner based his opinion on "a review of the claims file, a discussion of the evidence . . . and a supporting rationale." R. at 6.

The Court agrees with the appellant's contention that the October 2014 addendum is inadequate because it does not adequately address whether the appellant's cervical and thoracic spine conditions were aggravated by his service-connected lumbar disability. Although the examiner did state that the conditions were less likely than not caused or aggravated by a lumbar spine disability, he did not support his conclusion with any rationale. The examiner noted that the appellant's service medical records only mentioned low back problems rather than cervical and thoracic spine problems. R. at 72-73. In regard to the appellant's hearing testimony that he only began experiencing upper back pain after his low back injury, the examiner stated that he could only comment on what had been noted prior in the appellant's file: "that he only began complaining of chronic upper back problems in 2007." R. at 73. None of this discussion addresses whether the appellant's thoracic or cervical spine condition was aggravated by his service-connected lumbar spine disability. In fact, the examiner fails to discuss *any* impact the lumbar spine disability could have had upon the appellant's cervical and thoracic spine.

Because the examiner's report failed to comply with the Board's remand instructions, it is inadequate, and the Board clearly erred when it relied on the examination to deny the appellant's

claim. *See D'Aries, supra*. Remand is therefore required to obtain a medical examination supported by adequate rationale. *See Bowling v. Principi*, 15 Vet.App. 1, 12 (2001) (citing 38 C.F.R. § 19.9(a) (2000) when holding that the Board has a duty to remand a case "[i]f further evidence or clarification of the evidence or correction of a procedural defect is essential for a proper appellate decision"); *see also Green, supra*; 38 C.F.R. § 4.2 (2016). Additionally, the Board's reliance upon the flawed opinion for its decision renders its statement of reasons or bases inadequate. This frustrates judicial review and remand is warranted. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) (remand is appropriate "where the Board has . . . failed to provide an adequate statement of reasons or bases for its determinations, or where the record is otherwise inadequate"); *Allday, supra*.

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).

B. Radiculopathy

The appellant also argues that because the Board erred in denying service connection for his cervical and thoracic spine disabilities, its denial of service connection for bilateral upper extremity radiculopathy was also in error. Appellant's Br. at 15. The Secretary responds that the appellant has not established prejudicial error as it relates to his cervical spine disability claim, therefore remand is not required for his radiculopathy claim. Secretary's Br. at 10.

Two claims are inextricably intertwined where a decision on one issue would have a "significant impact" on another, and that impact in turn "could render any review by this Court of the decision [on the other claim] meaningless and a waste of judicial resources." *Harris v. Derwinski*, 1 Vet.App. 180, 183 (1991), *overruled on other grounds by Tyrues v. Shinseki*, 23 Vet.App. 166 (2009) (en banc); *see also Gurley v. Nicholson*, 20 Vet.App. 573, 575 (2007) (recognizing the validity of remands based on judicial economy when issues are inextricably

intertwined). The Court agrees that the issue of service connection for a thoracic or cervical spine disability and service connection for bilateral upper extremity radiculopathy are inextricably intertwined. The Board found that the appellant's radiculopathy is secondary to his cervical spine disorder. R. at 14. If, on remand, the Board grants service connection for the appellant's cervical spine disorder, the decision would significantly affect whether the appellant is granted service connection for radiculopathy. Therefore, the Court finds it necessary to remand the appellant's claim relating to bilateral upper radiculopathy.

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*, 16 Vet.App. at 534. The Board must proceed expeditiously. *See* 38 U.S.C. §7112.

III. CONCLUSION

After consideration of the appellant's and the Secretary's pleadings, and a review of the record, the Board's September 4, 2015, decision is VACATED and the matter is REMANDED to the Board for further proceedings consistent with this decision.

DATED: April 14, 2017

Copies to:

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