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**UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS**

NO. 16-0670

RAY CLARK, APPELLANT,

V.

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

Before PIETSCH, *Judge*.

**MEMORANDUM DECISION**

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

PIETSCH, *Judge*: The appellant, Ray Clark, appeals through counsel a December 16, 2015, decision of the Board of Veterans' Appeals (Board) that, for the rating periods prior to October 9, 2009, and since July 8, 2013, denied entitlement to a disability rating in excess of 20% for sacralization of traverse process with low back pain and hypertrophic degenerative changes (back condition).<sup>1</sup> Record (R.) at 3-13. This appeal is timely, and the Court has jurisdiction pursuant to 38 U.S.C. § 7252(a). Both parties submitted briefs, and the appellant submitted a reply brief. A single judge may conduct this review. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the reasons set forth below, the Court will vacate the Board's decision as to denial of a disability rating in excess of 20% for the appellant's back condition for the rating period beginning on July 8, 2013, and remand the matter for further proceedings consistent with the following decision.

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<sup>1</sup>The Board also remanded for additional development the issue of a total disability rating based upon individual unemployability (TDIU). R. at 12-13. The Court does not have jurisdiction to address the remanded matter. *See* 38 U.S.C. § 7266(a); *Breeden v. Principi*, 17 Vet.App. 475 (2004). The appellant does not challenge the Board's denial of entitlement to a disability rating in excess of 40% for his back condition, for the period from October 9, 2009, to July 8, 2013, or the Board's denial of entitlement to an extraschedular evaluation. Therefore, the Court holds that he has abandoned his appeal as to these matters. *See Pederson v. McDonald*, 27 Vet.App. 276, 285 (2015) (en banc).

## I. FACTS

Mr. Clark served on active duty in the U.S. Air Force from July 1968 to May 1972. R. at 106. He was first awarded service connection for a low back condition in August 1973. R. at 532-33.

After further development, in March 2007, Mr. Clark submitted a claim for an increased rating for his low back disability. R. at 350. During an April 2007 VA examination, Mr. Clark reported constant pain that traveled to both legs. R. at 316. He measured his pain level at 10 out of 10 but stated he could function with medication. *Id.* The examiner found Mr. Clark had "pain with prolonged standing, walking, lifting and bending." R. at 317. Objective range of motion testing revealed flexion to 70 degrees with pain beginning at 50 degrees. R. at 316. The examiner noted additional limited function after repetitive use due to pain, fatigue, and lack of endurance; reported that weakness and incoordination did not result in additional limited motion after repetitive use; and stated that "[t]he above additionally limit the joint function by 0 degrees." R. at 317.

In August 2007, a VA regional office (RO) granted an increased rating of 20%, effective March, 21 2007. R. at 305. Mr. Clark filed a Notice of Disagreement (NOD) in July 2008. R. at 297. In June 2009, the RO issued a Statement of the Case (SOC). R. at 167-85. In August 2009, Mr. Clark perfected his appeal. R. at 85.

The Board issued a decision in November 2012 remanding Mr. Clark's low back disability so he could undergo a new VA examination. R. at 65. In July 2013, he underwent the requested examination. R. at 851-58. The examiner found forward flexion was limited to 60 degrees, extension was limited to 20 degrees, right and left lateral flexion were 15 degrees, and right and left lateral rotation were 20 degrees, all measurements with no objective evidence of painful motion. R. at 853. There was no additional limitation of motion following repetitive use testing. R. at 853-54. Functional impairment included less movement than normal. R. at 854. X-rays revealed degenerative disc disease and degenerative arthritis of the lumbar spine. R. at 858.

In February 2014, the RO issued a Supplemental SOC continuing Mr. Clark's 20% rating. R. at 45-50. Mr. Clark thereafter submitted a May 2015 private disability benefits questionnaire, in which the examiner noted that Mr. Clark's initial forward flexion was limited to 35 degrees. R. at 837. The examiner also noted functional loss including less movement than normal, weakened

movement, excess fatigability, pain on movement, disturbance of motion, and interference with standing. R. at 839.

In December 2015, the Board issued the decision currently on appeal. R. at -13. The Board found:

During the appeal periods prior to October 9, 2009 and since July 8, 2013, the April 2007 VA examiner noted the [v]eteran's complaint of ongoing pain and additional limitation by pain, fatigue, and lack of endurance following repetitive use. The [v]eteran complained of pain during VA and private treatment sessions. Moreover, the July 2013 VA examiner noted the [v]eteran's complaint of stiffness and functional loss and/or impairment of less movement than normal following repetitive use. The evidence shows that the functional equivalent of a limitation of forward flexion to 30 degrees or less or ankylosis due to lumbar sacralization of traverse process with pain, and hypertrophic degenerative changes, was never shown during these periods, even when considering the April 2007 and July 2013 VA examination findings. The [v]eteran's service-connected low back disability picture, when viewed in conjunction with the medical evidence, preponderates against finding weakened movement, excess fatigability, or incoordination to the degree that would warrant an evaluation in excess of 20 [%].

R. at 8-9. This appeal followed.

## II. ANALYSIS

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.'" *Steff v. Nicholson*, 21 Vet.App. 120, 123 (2007) (quoting *Ardison v. Brown*, 6 Vet.App. 405, 407 (1994)). 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"). However, the law does not impose any reasons-or-bases requirements on medical examiners and the adequacy of medical reports must be based upon a reading of the report as a whole. *Monzingo v. Shinseki*, 26 Vet.App. 97, 107 (2012); *Acevedo v. Shinseki*, 25 Vet.App. 286, 293 (2012).

When a claim involves a musculoskeletal disability, the examiner and rating specialist must consider the effects of pain on the veteran's range of motion. *DeLuca v. Brown*, 8 Vet.App. 202, 206 (1995); 38 C.F.R. § 4.40 (2016) (requiring an evaluation of "functional loss . . . due to pain supported by adequate pathology and evidenced by the visible behavior of the claimant undertaking the motion"). Although pain itself does not rise to the level of functional loss, when evaluating disabilities of the musculoskeletal system under Diagnostic Codes that are based upon limitation of motion, the medical examiner must consider pain that results in functional loss. *Mitchell v. Shinseki*, 25 Vet.App. 32, 43 (2011); see *DeLuca*, 8 Vet.App. at 206. A functional loss results when the ability "to perform the normal working movements of the body with normal excursion, strength, speed, coordination [, or] endurance" is inhibited. 38 C.F.R. § 4.40.

Therefore, the evaluation of functional loss due to pain must include evaluation of functional loss during flare-ups. See *Mitchell*, 25 Vet.App. at 43-44 ("[W]hen pain is associated with movement, . . . 'the medical examiner must be asked to express an opinion on whether pain could significantly limit functional ability during flare-ups.'" (quoting *DeLuca*, 8 Vet.App. at 206)). The examiner should, if feasible, portray any such functional loss during flare-ups "in terms of the degree of additional range-of-motion loss" or "otherwise explain why such detail feasibly could not be determined." *Mitchell*, 25 Vet.App. at 43-44.

"Whether a medical opinion is adequate is a finding of fact, which this Court reviews under the 'clearly erroneous' standard." *D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008). A finding of fact is "clearly erroneous" when the Court, after reviewing the entire evidence, "is left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948); *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990). As always, the Board must provide a statement of the reasons or bases for its determination, adequate to enable an appellant to understand the precise basis for the Board's decision as well as to facilitate review in this Court. 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Gilbert*, 1 Vet.App. at 56-57. To comply with this requirement, the Board must analyze the credibility and probative value of the evidence, account for the evidence it finds persuasive or unpersuasive, and provide the reasons for its rejection of any 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).

#### A. Rating Period Prior to October 9, 2009

Prior to October 2009, the appellant's low back condition was rated as 20% disabling, pursuant to 38 C.F.R. § 4.71a, Diagnostic Code (DC) 5242. R. a 8. The appellant first argues that the April 2007 VA examination was inadequate—and that the Board therefore erred in relying upon it – because the examiner noted that, upon repetitive use, the appellant had additional limitation of motion due to pain but did not adequately note the degree at which his motion was limited. Appellant's Brief (App. Br.) at 6-9. The appellant notes that the April 2007 examiner reported:

The joint function of the spine is additionally limited by the following after repetitive use: pain, fatigue, lack of endurance and pain has [sic] the major functional impact. It is not additionally limited by the following after repetitive use: weakness and incoordination. The above additionally limit the joint function by 0 degrees.

R. at 317. The appellant then contends that "[i]t is unclear from the examiner's last sentence whether he is stating that [] weakness and incoordination limit the joint function by 0 degrees on repetitive use or if the [] pain, fatigue, and lack of endurance limit joint function by 0 degrees on repetitive use." App. Br. at 7. He further argues that "[i]f the examiner meant the former, th[e]n he failed to opine on the additional loss of range of motion due to pain, fatigue, and lack of endurance[,] and [a]lthough [the examiner] stated that these symptoms limit the [] range of motion, under *Mitchell*, the examiner must express that limitation in terms [of] degrees." *Id.* The Secretary maintains that a plain reading of the examination report reveals that the appellant had no additional limitation of motion due to repetitive use. Secretary's (Sec'y) Br. at 8-11.

Although the appellant's argument highlights the symptomatology following repetitive use, because the last line of the examiner's report quoted above clearly states that the appellant does not have additional limitation of motion due to repetitive use, the Court agrees with the Secretary that, viewed as a whole, the examination report is adequate. *See Monzingo*, 26 Vet.App. at 167; *Acevedo*, 25 Vet.App. at 293.

Further, a review of the record shows that the Board discussed that the April 2007 examiner "noted the [appellant's] complaint of ongoing pain and additional limitation by pain, fatigue, and lack of endurance following repetitive use." R. at 8. The Board then explained that the appellant's "service-connected low back disability picture, when viewed in conjunction with the medical

evidence, preponderates against finding weakened movement, excess fatigability, or incoordination to the degree that would warrant an evaluation in excess of 20[%]." R. at 9.

Therefore, the Court concludes that, as required, the Board accounted for all evidence of the disabling effects of pain on motion and during flare-ups so that such evidence is reflected in the rating. *See DeLuca*, 8 Vet.App. at 43; *Mitchell*, 25 Vet.App. at 435; *see also Tucker v. West*, 11 Vet.App. 369, 373 (1998) (the Board is required to consider the impact of pain in making its determination and to articulate how pain on use was factored into its decision); 38 C.F.R. §§ 4.40, 4.45 (2016).

#### B. Rating Period Since July 8, 2013

The Board determined that, pursuant to DC 5242, the appellant's low back condition was properly rated as 20% subsequent to July 2013. R. at 8-9. In so determining, the parties are in agreement that the Board failed to adequately consider the findings reported in the May 2015 private disability benefits questionnaire. *See App. Br. at 8-10; Sec'y Br. at 12-14.*

In the May 2015 private report, the examiner noted that the appellant's initial forward flexion was limited to 35 degrees and that he had functional loss including less movement than normal, weakened movement, excess fatigability, pain on movement, disturbance of motion, and interference with standing. R. at 837, 839. The Board held these findings "have no relevance to the rating" because the examiner "found evidence of an intervertebral disc syndrome," a condition for which the appellant is not service connected. R. at 9. However, as the parties note, the May 2015 examiner also diagnosed mechanical back pain syndrome, degenerative joint disease of the lumbosacral spine, and degenerative disc disease, while also noting the presence of intervertebral disc syndrom (IVDS). *App. Br. at 8-10; Sec'y Br. at 12-14; see R. at 843.*

The Court agrees with the parties that the Board's statement of reasons or bases for rejecting the May 2015 VA examination is inadequate. As the Secretary concedes, "without more, the Board's statement of reasons or bases for rejecting the May 2015 VA examination is inadequate because the examination report may contain evidence that is relevant to [the appellant's] claim for an evaluation in excess of [20%], for the period from July 8, 2013, for his service-connected back disability." *Sec'y Br. at 13 (citing R. at 8-9).* The Secretary further explains that "[p]ursuant to VA's Adjudication Procedures Manual, M21-1MR, Part III, Subpart iv, Chapter 4, Section A(3)(a), IVDS

should be evaluated under the same Diagnostic Code as [the] [a]ppellant's service-connected back disability" and that "the pertinent Manual provision notes that IVDS should be treated as interchangeable with degenerative disc disease." *Id.* at 13-14 (citing M21-1MR, Part III, Subpart iv, Chapter 4, Section A(3)(a)). Therefore, the Secretary concedes that "the conditions diagnosed during the May 2015 examination report and the symptoms of such diagnosed conditions may be relevant to the appellant's claim." *Id.* at 14.

Accordingly, the Court will vacate the Board's decision as to denial of a disability rating in excess of 20% for sacralization of traverse process with low back pain and hypertrophic degenerative changes for the rating period beginning on July 8, 2013, and remand the matter for further proceedings consistent with this decision. *See Tucker*, 11 Vet.App. at 374 ("Where the Board has . . . failed to provide an adequate statement of reasons or bases for its determinations . . . a remand is the appropriate remedy."). In pursuing the matter on remand, the appellant is free to submit additional evidence and argument on the remanded matter, 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 the 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 the Secretary to provide for "expeditious treatment" of claims remanded by the Court).

### **III. CONCLUSION**

After consideration of the appellant's and Secretary's briefs, and a review of the record on appeal, the Board's December 16, 2015, decision as to its denial of a disability rating in excess of 20% for sacralization of traverse process with low back pain and hypertrophic degenerative changes for the rating period prior beginning on July 8, 2013, is VACATED and the matter is REMANDED for further proceedings. The remainder of the Board's decision is AFFIRMED.

DATED: April 21, 2017

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