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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 15-4074

SERGIO J. CRUZ, APPELLANT,

V.

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

Before GREENE, *Senior Judge*.[1]

MEMORANDUM DECISION

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

GREENE, *Senior Judge*: The appellant, Sergio J. Cruz, through counsel, appeals an August 21, 2015, Board of Veterans' Appeals (Board) decision that, inter alia, denied him VA disability ratings higher than 20% for lumbar spondylosis prior to October 2010, and above 10% for right and left lower extremities radiculopathy of the sciatic nerve associated with lumbar spondylosis and declined to refer the matters for extraschedular consideration under 38 C.F.R. § 3.321(b)(1). Record (R.) at 2-21. This appeal is timely, and the Court has jurisdiction to review the Board's decision pursuant to 38 U.S.C. § 7252(a). Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). Mr. Cruz, through counsel, expresses a desire not to present any argument concerning the Board's denial of a rating above 40% for his lumbar spondylosis from October 2010. Accordingly, issues involving this matter are deemed abandoned and will be dismissed. *See Pederson v. McDonald*, 27 Vet.App. 276, 285 (2015) (en banc). For the reasons that follow, the Court will vacate the Board's decision, and remand the matter for readjudication.

[1]Judge Greene is a Senior Judge acting in recall status. *In re: Recall of Retired Judge*, U.S. VET.APP. MISC. ORDER 13-16 (Dec. 21, 2016).

I. BACKGROUND

Mr. Cruz served on active duty in the U.S. Army from March 1984 to May 1987. R. at 2908. In October 1987, he was granted service connection for lumbar spondylosis and assigned a 10% rating. In September 2005, he sought an increased rating for his lumbar spondylosis, R. at 2429, and, during a January 2006 examination of his lumbar spine, reported that his flare-ups caused him to have decreased ambulation and difficulty getting out of bed, R. at 2393.

Mr. Cruz's increased rating claim was denied in February 2006, R. at 2357-76, and, after he appealed to the Board, it was remanded for additional development, R. at 2241-44. During an August 2008 lumbar spine examination, Mr. Cruz reported weekly flare-ups of pain lasting hours and causing him "severe difficulty" performing his job as a letter carrier for the postal service. R. at 2138. Later that month, the VA granted Mr. Cruz a 20% rating for his lumbar spondylosis, effective August 2008. R. at 2061-65. This rating was later amended to 20% from September 2005 to October 2010 and to 40% thereafter. R. at 877-78.

Mr. Cruz underwent an additional VA examination of his back in August 2014. R. at 705-14. The examiner noted that Mr. Cruz experienced decreased strength in his ankles and great toes, decreased reflexes in his knees and ankles, and decreased light touch sensation in the lower extremities. R. at 709. During that examination, Mr. Cruz reported that he had experienced severe intermittent pain, paresthesias/dysesthesias, and numbness due to radiculopathy. R. at 709. Ultimately, the examiner diagnosed Mr. Cruz with having "mild" radiculopathy of the bilateral lower extremities. R. at 18-19, 711.

In its decision on appeal, the Board, relying, in part, on the January 2006 and August 2008 VA examinations, denied Mr. Cruz a higher rating than 20% before October 2010 for his lumbar spondylosis. R. at 17. Further, the Board awarded Mr. Cruz service connection for right and left lower extremity radiculopathy associated with the service-connected lumbar spondylosis, under 38 C.F.R. § 4.124a, diagnostic code (DC) 8620, corresponding to "mild" incomplete neuritis of the sciatic nerve. 38 C.F.R. § 4.124a, DC 8620 (2016); R. at 19. The Board determined that "[b]ased on the [v]eteran's complaints of pain and the August 2014 VA examiner's description of the [v]eteran's radiculopathy as 'mild,'" his neurological manifestations "can best be described as mild, [and] there is no indication that moderate neurological manifestations exist." R. at 19.

In its analysis of Mr. Cruz's radiculopathy of the sciatic nerve disability, the Board acknowledged Mr. Cruz's "multiple complaints of radiating pain," and his August 2014 documented report of "severe pain, paresthesias/dysesthesias, and numbness in the bilateral lower extremities." R. at 18. However, the Board also noted that the record "does not indicate that the [v]eteran experiences significant light touch, pinprick, or positional sensory impairment," as would be required for a 20% or "moderate" rating under 38 C.F.R. § 4.124a, DC 8520. R. at 19. And, the Board added that Mr. Cruz's symptoms did not meet the criteria for a 60% or an 80% rating, because there was no evidence of atrophy, foot drop, or muscle impairment of the knee. R. at 19.

Addressing Mr. Cruz's entitlement to extraschedular consideration under 38 C.F.R. § 3.321(b)(1), the Board found that the evidence "does not show such an exceptional disability picture that the available schedular evaluations for lumbar spondylosis are inadequate." R. at 20. Rather, the Board found that the rating schedule contemplates his symptoms of pain with limitation of motion and associated radiculopathy, R. at 20, and that there were no "combined effects" of his disabilities that would warrant extraschedular consideration, R. at 20 (citing *Johnson v. McDonald*, 762 F.3d 1362 (Fed. Cir. 2014)). Nevertheless, the Board determined that additional development was required to determine Mr. Cruz's entitlement to a rating of total disability based on individual unemployability (TDIU) under 38 C.F.R. § 4.16. R. at 21. Therefore, the Board remanded Mr. Cruz's claims for VA to schedule a social and industrial survey "to ascertain the impact of his service-connected disabilities on his ordinary activities, to include his employability." R. at 22.

On appeal, Mr. Cruz first argues, and the Secretary concedes, that the January 2006 and August 2008 examinations relied upon by the Board in denying a rating in excess of 20% for his service-connected lumbar spondylosis prior to October 2010 were inadequate because the examiners did not provide an opinion as to the extent of the functional loss caused by his flare ups. Appellant's Brief (Br.) at 7-9; Secretary's Br. at 11-12; R. at 12-13.

Next, Mr. Cruz argues that the Board's denial of a rating in excess of 10% for his right and left lower extremities radiculopathy of the sciatic nerve lacks adequate reasons or bases. Appellant's Br. at 9-12. Specifically, he contends that the Board erred by relying on the August 2014 examiner's characterization of his radiculopathy as "mild," without analyzing evidence showing that Mr Cruz exhibited "severe pain, severe numbness, severe paresthesias, decreased reflexes, decreased sensory

perception, and decreased strength." Appellant's Br. at 9-11 (citing R. at 709-11; 1351-52). Moreover, he alleges that the Board erred in misapplying the rating criteria for this disability. Appellant's Br. at 11-12 (citing 38 C.F.R. § 4.124a, DC 8520).

Finally, he asserts that the Board erred by not referring his claims for extraschedular consideration under § 3.321(b)(1) even though it remanded the issue of entitlement to TDIU under 38 C.F.R. § 4.16, in violation of *Todd v. McDonald*, 27 Vet.App. 79 (2014), and *Brambley v. Principi*, 17 Vet.App. 20 (2003). Appellant's Br. at 12-14; Reply Br. at 3-6. Similarly, Mr. Cruz contends that the Board erred by not considering the collective impact of all his service-connected disabilities when making the decision to refer the matters for extraschedular consideration. Appellant's Br. at 13-14; Reply Br. at 4. The Secretary disputes Mr. Cruz's arguments and asks the Court to affirm these parts of the Board decision.

II. ANALYSIS

A. Inadequate Medical Examination

A VA medical examination or opinion is adequate "where it is based upon consideration of the veteran's prior medical history and examination," *Stefl v. Nicholson*, 21 Vet.App. 120, 123 (2007), "describes the disability . . . in sufficient detail so that the Board's 'evaluation of the claimed disability will be a fully informed one,'" *id.* (quoting *Ardison v. Brown*, 6 Vet.App. 405, 407 (1994)), and "sufficiently inform[s] the Board of a medical expert's judgment on a medical question and the essential rationale for that opinion," *Monzingo v. Shinseki*, 26 Vet.App. 97, 105 (2012).

A veteran may be entitled to a higher disability rating than that supported by mechanical application of the rating schedule where there is evidence that his or her disability causes additional functional loss—*i.e.*, "the inability . . . to perform the normal working movements of the body with normal excursion, strength, speed, coordination[,] and endurance"—including as due to pain. 38 C.F.R. § 4.40 (2016). A higher rating may also be awarded where there is a reduction of a joint's normal excursion of movement in different planes, including changes in the joint's range of movement, strength, fatigability, or coordination. 38 C.F.R. § 4.45 (2016). As the Court explained in *DeLuca v. Brown*, 8 Vet.App. 202, 206–07 (1995), a VA joints examination that fails to take into account the factors listed in §§ 4.40 and 4.45, including those experienced during flareups, is

inadequate for rating purposes. Specifically, for an examination to comply with § 4.40, the examiner must "express an opinion on whether pain could significantly limit functional ability during flare-ups or [on repetitive use] over a period of time," and the examiner's determination in that regard "should, if feasible, be portrayed in terms of the degree of additional range-of-motion loss due to pain on use or during flare-ups." *Id.* at 206 (citing *Voyles v. Brown*, 5 Vet.App. 451, 453 (1993); 38 C.F.R. § 4.40 (1994)) (internal quotation marks and alteration omitted); *see Mitchell v. Shinseki*, 25 Vet.App. 32, 44 (2011) (summarizing *DeLuca* and concluding that an examination was inadequate because it "did not discuss whether any functional loss was attributable to pain during flare-ups, despite noting the appellant's assertions [thereof]"). The Court reviews for clear error the Board's determination that a medical examination or opinion was adequate. *D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008).

In this case, the Court agrees with the parties that the January 2006 and August 2008 examinations relied upon by the Board in denying a rating in excess of 20% for service-connected lumbar spondylosis prior to October 2010 were inadequate because neither examiner provided an opinion regarding the extent of the functional loss caused by Mr. Cruz's flare ups. Appellant's Br. at 7-9; Secretary's Br. at 11-12; R. at 12-13. During both examinations, Mr. Cruz reported that he experienced flare-ups and, during the January 2006 examination, he reported that his flare-ups decreased his range of motion R. at 2393; 2138. However, neither examiner attempted to quantify any functional loss during flare-ups or explained why such an assessment was not feasible. *See* R. at 2387-2401; 2135-54. The examiners' failure to do so renders both examinations inadequate to evaluate the effect of Mr. Cruz's disability before October 2010. *See Mitchell*, 25 Vet.App. at 44 (holding that a VA examination that "fail[s] to address any range-of-motion loss specifically due to pain and any functional loss during flare-ups . . . lacks sufficient detail necessary for a disability rating" and "should [be] returned for the required detail to be provided, or [for] the Board [to] explain[ ] why such action was not necessary"); *DeLuca*, 8 Vet.App. at 206-07 (holding that a VA joints examination that fails to take into account the disabling effects of pain during flareups is inadequate for evaluation purposes).

Remand is, therefore, required to ensure that Mr. Cruz is afforded an examination that provides a medical opinion, with supporting rationale for any conclusions, regarding the extent of any functional loss during flare-ups, or explains why such an assessment is not possible. *See Jones v.*

Shinseki, 23 Vet.App. 382, 393–94 (2010) (holding that an inconclusive medical opinion is nevertheless adequate as long as the examiner provides a rationale for his or her determination that an opinion cannot be rendered without resorting to speculation); *see also Barr v. Nicholson*, 21 Vet.App. 303, 311 (2007) ("[O]nce the Secretary undertakes the effort to provide an examination, . . . he must provide an adequate one."); *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").

B. Inadequate Reasons or Bases

Mr. Cruz's neurological symptoms in his right and left lower extremities are rated under DC 8520, found at 38 C.F.R. § 4.124a (paralysis of the sciatic nerve). The rating criteria for disabilities of the sciatic nerve are as follows:

8520 Paralysis of:	
Complete; the foot dangles and drops, no active movement possible of muscles below the knee, flexion of knee weakened or (very rarely) lost	80
Incomplete: Severe, with marked muscular atrophy	60
Moderately severe	40
Moderate	20
Mild	10

38 C.F.R. § 4.124a, DC 8520 (2016).

The Board's assignment of a disability rating to a veteran's disability is a finding of fact subject to the "clearly erroneous" standard of review. 38 U.S.C. § 7261(a)(4); *Smallwood v. Brown*, 10 Vet.App. 93, 97 (1997). 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." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948). When making factual determinations, the Board must provide a statement of the reasons or bases for its

determinations, 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 v. Derwinski*, 1 Vet.App. 49, 56-57 (1990). 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). Further, the Board must address all relevant law and regulations when they are made applicable by the evidence of record. *Schafrath v. Derwinski*, 1 Vet.App. 589, 593 (1991). The failure to provide an adequate statement of reasons or bases warrants remand. *Stegall*, 11 Vet.App. at 271; *Tucker*, 11 Vet.App. at 374.

In this case, the Court holds that the Board failed to provide an adequate statement of reasons or bases to support its determination that Mr. Cruz's right and left lower extremities radiculopathy of the sciatic nerve associated with lumbar spondylosis did not warrant a rating greater than 10%. The Board did not discuss the relevant regulations it considered, or provisions of VA's Adjudication Procedures Manual (M21-1MR), to the extent that they were applicable. *See Schafrath*, 1 Vet.App. at 593; *see also Patton v. West*, 12 Vet.App. 272, 282 (1999) ("The [Board] cannot ignore provisions of the Manual M21–1 . . . that are favorable to a veteran when adjudicating that veteran's claim.") (internal citations omitted)). The Secretary's argument that remand is not warranted, because the Board's analysis comports with § 4.124a and the M21-1MR, is merely a post-hoc explanation for the Board's finding, and does not supplant the requirement that the Board provide an adequate statement of reasons or bases to support its determination *See Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 156 (1991) (VA's "litigating position" is not entitled to deference when it is merely counsel's "post hoc rationalization" for VA's action, advanced for the first time on appeal).

Further, as Mr. Cruz contends, the Board did not address evidence in the record of Mr. Cruz's decreased strength in his ankles and great toes, and decreased reflexes in his knees and ankles, *see* R. at 15; 19; 709-11; 1351-52, which may support a higher rating for his sciatic nerve disability. *See* 38 C.F.R. § 4.124a; 38 C.F.R. § 4.7 (2016) ("Where there is a question as to which of two evaluations shall be applied, the higher evaluation will be assigned if the disability picture more

nearly approximates the criteria required for that rating."); *see also Caluza*, 7 Vet.App. at 506 (the Board must provide the reasons for its rejection of any material evidence favorable to the claimant). The Board's failure to address all applicable regulations and all material facts renders its statement of reasons or bases inadequate and warrants remand. *See Tucker*, 11 Vet.App. at 374; *Allday*, 7 Vet.App. at 527; *Schafrath* , 1 Vet.App. at 593*; Gilbert,* 1 Vet.App. at 56-57.

Finally, the Court notes the potential applicability of an October 2016 amendment to M21-1MR, issued subsequent to the Board decision here on appeal, which provides additional "general guidelines" for evaluating a disability of the sciatic nerve. *See* M21–1MR, pt. III, subpt. iv, ch. 4, § G(4)(c) (2016) ("moderate" ratings should be assigned when the veteran exhibits "combinations of significant sensory changes and reflex or motor changes of a lower degree, or motor and/or reflex impairment such as weakness or diminished or hyperactive reflexes (with or without sensory impairment) graded as medically moderate."); M21–1MR, pt. III, subpt. iv, ch. 4, § G(4)(d) (counseling rating specialists not to "base the entries solely upon the examiner's assessment of the level of incomplete paralysis," and, even if an examiner assesses a peripheral nerve disability as "mild" incomplete paralysis, the rating specialist should assign a "moderate" evaluation if "the [Disability Benefits Questionnaire] shows muscle weakness, atrophy, and diminished reflexes, which are clearly demonstrative of more than mild incomplete paralysis"). Remand is required for consideration of the amended M21-1MR in the first instance by the Board. *See* 38 U.S.C. § 7152 (Court may remand as appropriate); *Maggitt v. West*, 202 F.3d 1370, 1377-78 (Fed. Cir. 2000).

Because the Court is remanding the matter, it will not address Mr. Cruz's remaining arguments. *See Dunn v. West,* 11 Vet.App. 462, 467 (1998). In pursuing the matter on remand, Mr. Cruz 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). "A remand is meant to entail a critical examination of the justification for the decision. The Court expects that the [Board] will reexamine the evidence of record, seek any other evidence the Board feels is necessary, and issue a timely, well-supported decision in this case." *Fletcher v.*

Derwinski, 1 Vet.App. 394, 397 (1991). The Board must proceed expeditiously, in accordance with 38 U.S.C. §§ 5109B and 7112.

III. CONCLUSION

Based on the foregoing analysis, the appellant's and the Secretary's briefs, and a review of the record on appeal, the issues from the Board's August 21, 2015, decision involving Mr. Cruz's disability rating higher than 40% from October 2010 for his lumbar spondylosis are abandoned. Therefore, the appeal as to those issues is DISMISSED. The remaining part of the Board decision is VACATED and the matter is REMANDED for readjudication consistent with this decision.

DATED: May 1 2017

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