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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 16-1279

ELLIE A. ROBINSON, JR., 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 Ellie A. Robinson, Jr., appeals through counsel a March 8, 2016, decision of the Board of Veterans' Appeals (Board) that denied a disability rating greater than 20% for a lumbar spine disability prior to July 7, 2009, and denied a disability rating greater than 40% after that.[1] For the following reasons, the Court will set aside the Board's March 2016 decision and remand the matter for further proceedings.

I. ANALYSIS

Mr. Robinson argues that the Board inadequately explained why his functional loss did not warrant a higher schedular or extraschedular rating and, in addition, erred in relying on medical examinations that did not address his condition during a flareup. The Court agrees.

To be adequate to inform the Board's decision regarding musculoskeletal disabilities with limitation of motion, medical examinations must take into account functional loss due to pain,

[1] The Board also denied a disability rating greater than 30% for a respiratory disability prior to June 29, 2007, and a disability rating greater than 60% after that. Mr. Robinson raises no contentions of error with respect to these aspects of the Board's decision, and the Court will not address them. **Error! Main Document Only.***See Pederson v. McDonald*, 27 Vet.App. 276, 283 (2015) (en banc) (stating that "this Court, like other courts, will generally decline to exercise its authority to address an issue not raised by an appellant in his or her opening brief").

including losses experienced during a flareup. *DeLuca v. Brown*, 8 Vet.App. 202, 206-07 (1995); 38 C.F.R. § 4.40 (2016); *accord* 38 C.F.R. § 4.45(a)-(e) (2016). Specifically, 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." *Deluca*, 8 Vet.App. at 206 (internal quotation marks omitted). Depending on the circumstances, it may be necessary to conduct an examination during a flareup. *Compare Ardison v. Brown*, 6 Vet.App. 405, 407 (1994) (concluding that examination during the remission phase did not accurately reflect elements of disability that caused veteran to miss 3 to 4 months of work at a time), *with Voerth v. West*, 13 Vet.App. 117, 122-23 (1999) (condition that becomes inflamed approximately twice a year for a few days does not require an examination during a flareup).

In addition, when evaluating the schedular disability ratings for musculoskeletal disabilities, there must be an assessment of the relevant musculoskeletal DCs in the context of the factors listed in §§ 4.40 and 4.45. *See* 38 C.F.R. § 4.40 ("Functional Loss") (2016); 38 C.F.R. § 4.45(f) ("The Joints") (2016). Although the functional limitations noted in §§ 4.40 and 4.45 need not be related to the criteria of the relevant DC, for ease of assigning a disability evaluation under a particular DC, the functional limitations should be explained in terms of how they are equivalent to the relevant DC, if possible. *DeLuca*, 8 Vet.App. at 206-08 (because DC provides for an evaluation solely on the basis of loss of range of motion, determinations regarding the §§ 4.40 and 4.45 factors should, if feasible, be portrayed in terms of the degree of additional range-of-motion loss due to pain on use, during flareups, weakened movement, excess fatigability, or incoordination).

As with all its material determinations of fact and law, the Board is required to support its disability-rating determinations with a written statement of the reasons or bases that is understandable by the claimant and facilitates review by this Court. *See* 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995). The statement of reasons or bases must explain the Board's reasons for discounting favorable evidence, *Thompson v. Gober*, 14 Vet.App. 187, 188 (2000), discuss all issues raised by the claimant or the evidence of record, *Robinson v. Peake*, 21 Vet.App. 545, 552 (2008), *aff'd*, *sub nom. Robinson v. Shinseki*, 557 F.3d 1335 (Fed. Cir. 2009), and discuss all provisions of law and regulation where they are made "potentially applicable

through the assertions and issues raised in the record," *Schafrath v. Derwinski*, 1 Vet.App. 589, 592 (1991).

Here, the Board stated that it "recognize[d] the [v]eteran's contentions as to the severity of his lumbar spine disability" but found Mr. Robinson was "not competent to provide an opinion requiring medical knowledge, such as whether the current symptoms satisfy diagnostic criteria." Record (R.) at 19. Mr. Robinson's lay statements regarding the severity of his disability, however, include his contentions that his pain was so great that he has had to miss work (R. at 2175), sitting or standing too long was very painful (R. at 1841), using stairs caused severe pain (*Id*.), and his abilities to bend over and brush his teeth, take a bath, and clean himself after a bowel movement were impaired by the pain from his lumbar spine condition (R. at 1845).

Contrary to the Board's statement, Mr. Robinson appears competent to provide lay evidence regarding these matters, which are within his personal knowledge and experience. *See Washington v. Nicholson*, 19 Vet.App. 362, 368 (2005). Furthermore, the Board failed to explain why Mr. Robinson's lay statements were not consistent with the factors set out in §§ 4.40 and 4.45. The Board also did not address the §§ 4.40 and 4.45 factors in the context of the relevant DC and did not explain whether the evidence was the *equivalent* of a higher disability rating, or whether it was necessary to obtain a medical examination that addressed these factors. *See DeLuca*, *supra*. The Board also failed to address whether Mr. Robinson's lay statements as to the severity of his condition warranted a referral for extrschedular consideration under 38 C.F.R. § 3.321(b)(1) (2016). The Board's failure to address these matters renders its statement of reasons or bases inadequate. *See Thompson* and *Schafrath*, both *supra*.

Furthermore, although the Board observed that several medical examinations noted Mr. Robinson suffers flareups, the Board did not address whether the circumstances required an examination to be given during a flareup. *See Ardison* and *Voerth*, both *supra*. Although the Secretary references additional medical examinations that did not note the presence of flareups, it is the Board's responsibility to address this factual matter in the first instance. *Washington*, 19 Vet.App. at 366-67 (Board has the duty to determine the credibility and probative weight of the evidence); *Hensley v. West*, 212 F.3d 1255, 1263 (Fed. Cir. 2000) (stating that "appellate tribunals are not appropriate fora for initial fact finding"). The Board's failure to address these matters in the first instance and provide an adequate statement of reasons or bases warrants remand. *Tucker*

v. West, 11 Vet.App. 369, 374 (1998) (remand is appropriate where the Board has, inter alia, failed to provide an adequate statement of reasons or bases).

Because the claim is being remanded, the Court need not address Mr. Robinson's additional arguments as to other inadequacies in the Board's statement of reasons or bases. *See Mahl v. Principi*, 15 Vet.App. 37, 38 (2001) (per curiam order) ("[I]f the proper remedy is a remand, there is no need to analyze and discuss all the other claimed errors that would result in a remedy no broader than a remand."). However, in pursuing his claim on remand, Mr. Robinson will be free to submit additional argument and evidence as to the remanded matter, and the Board must consider any such evidence or argument submitted. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002).

II. CONCLUSION

Upon consideration of the foregoing, the Board's March 8, 2016, decision is SET ASIDE and the matter is REMANDED for further proceedings.

DATED: May 4, 2017

Copies to:

Robert V. Chisholm, Esq.

VA General Counsel (027)