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

No. 16-1869

CHARLES W. RAYBURN, 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, Charles W. Rayburn, through counsel, appeals an April 26, 2016, Board of Veterans' Appeals (Board) decision in which the Board denied a disability rating in excess of 10% for lumbar spondylosis prior to July 12, 2009. Record of Proceedings (R.) at 2-33. The appellant does not challenge the portion of the Board decision that denied entitlement to service connection for hypertension and right ear hearing loss, and a disability rating in excess of 20% for left lower extremity radiculopathy. R. at 26. The appellant has, therefore, abandoned his appeal of these issues, and the Court will dismiss the appeal as to these issues. *See Pederson v. McDonald*, 27 Vet.App. 276, 285 (2015) (en banc). The Board remanded the issues of service connection for a sleep disorder, urinary incontinence, fecal incontinence, erectile dysfunction, and a disability rating in excess of 10% after July 12, 2009. R. at 26-31. The remanded matters are not before the Court. *See Hampton v. Gober*, 10 Vet.App. 481, 483 (1997) (claims remanded by the Board may not be reviewed by the Court).

The Court may not disturb that portion of the Board's decision that granted service connection for bilateral wrist and knee disorders, an ankle disorder, bilateral plantar fasciitis with metatarsal phalangeal joint osteoarthritis, left ear hearing loss, and tinnitus. *Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007) ("The Court is not permitted to reverse findings of fact favorable to

a claimant made by the Board pursuant to its statutory authority." ). 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's decision and remand the vacated matter for readjudication.

## **I. BACKGROUND**

The appellant served in the U.S. Navy from November 1985 to November 1989 and from October 2005 to August 2006. R. at 180, 1324. During service, he was diagnosed with spondylolisthesis. R. at 347.

In May 2009, the appellant submitted a claim for a low back disability. R. at 1326-43. In a July 2009 VA examination, the appellant complained of constant, sharp low back pain that radiated down his left leg. R. at 1093. The examiner noted a history of fatigue, decreased motion, stiffness, weakness, and daily pain. R. at 1094. The appellant had flexion to 75 degrees and there was objective evidence of pain on active range of motion and following repetitive motion. R. at 1099-1100. The examiner noted that the appellant's back disability had significant effects on his ability to work as a police officer, because, for example, he experienced decreased mobility, problems with lifting and carrying, and pain. R. at 1102.

In July 2009, the regional office (RO) granted service connection for lumbar spondylosis and assigned a 10% disability rating effective May 2009. R. at 989-1000. In July 2010, the appellant submitted a Notice of Disagreement. R. at 942. In January 2012, the appellant perfected his appeal to the Board and testified at a Board hearing in September 2015. R. at 831.

In the April 26, 2016, decision here on appeal, the Board denied a disability rating in excess of 10% for lumbar spondylosis prior to July 12, 2009. R. at 2-33. This appeal followed.

## **II. ANALYSIS**

The assignment of a disability rating is a factual finding that the Court reviews under the "clearly erroneous" standard of review. *Johnston v. Brown*, 10 Vet.App. 80, 84 (1997). 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); *see also Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990).

A claimant may be entitled to a higher disability evaluation than that supported by mechanical application of a relevant DC where there is evidence that his or her disability causes functional loss, that is, "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 disability evaluation 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).

A VA medical examination that fails to take into account the factors listed in §§ 4.40 and 4.45, including those experienced during flareups, is inadequate for evaluation purposes. *DeLuca v. Brown*, 8 Vet.App. 202, 206-07 (1995). 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 (internal quotation marks and brackets omitted).

In *Mitchell v. Shinseki*, the Court reinforced the principle that the examiner must address range-of-motion loss specifically due to pain and any functional loss during flare-ups, and held that if the examiner does not do so, the examination report should be returned for the required detail to be provided or the Board must explain why such action was not necessary. 25 Vet.App. 32, 44 (2011).

The appellant argues that the Board erred in relying upon the July 2009 VA examination to deny a higher rating for lumbar spondylosis prior to July 12, 2009. Appellant's Brief (Br.) at 4-6. He asserts that it was error for the examiner not to note at what point the appellant's painful motion began or at what point functional loss due to painful motion began. *Id.* at 4. The appellant contends that the examiner should have discussed whether his pain, weakness, or lack of endurance caused functional loss and, if so, at what point in his range of motion that functional loss began. *Id.* at 5-6. He further argues that the Board failed to discuss the sufficiency of the examination or how the Board had concluded the examination provided enough information to determine the extent of the appellant's functional loss. *Id.* at 6. The appellant requests that the Court remand the matter with instructions to obtain a retrospective medical opinion that adequately discusses the extent of his functional loss. *Id.* at 7-8.

The Secretary concedes that the July 2009 examination report did not meet the *Mitchell* requirements because it did not discuss the appellant's functional loss. Secretary's Br. at 5-6. However, the Secretary argues, the Court should not remand the issue for a retrospective medical opinion because an opinion as to the limitation of motion the appellant experienced "nearly 8 years ago would be based solely on speculation and thus would not be evidence upon which an award could be based." *Id.* at 6-7. The Secretary asserts that the Board gave an adequate statement of reasons or bases for its conclusion and that this statement should be sufficient. *Id.* at 7.

The Court accepts the Secretary's concession and agrees with the appellant's contentions. The July 2009 examiner noted that the appellant had a history of fatigue, decreased motion, stiffness, weakness, and daily pain, and that there was objective evidence of pain on motion and following repetitive motion. R. at 1094, 1099-1100. However, the examiner did not detail the limitation of motion as required by *Mitchell*. See *Mitchell*, 25 Vet.App. at 44 (stating that "such determinations should, if feasible, be portrayed . . . in terms of the degree of additional range-of-motion loss due to pain on use or during flareups"). The July 2009 examiner's assessments are too vague to adequately portray the appellant's degree of functional loss and painful motion and allow the Board to make an informed decision. See *Deluca* and *Mitchell*, both *supra*.

As for the remedy, the Court concludes that remand is warranted. In the decision on appeal, the Board did not explain why the examination report was adequate despite missing details about whether and when functional loss occurred and when painful motion began. Therefore, the Court will remand the issue for the Board to discuss whether a retrospective medical opinion filling in those blanks is warranted and, if so, the Board must obtain the opinion. If the Board determines that a medical opinion is not required, it must adequately explain that decision. See *Mitchell*, *supra*; see also *Chotta v. Peake*, 22 Vet.App. 80, 85 (2008) (recognizing that a retrospective medical opinion may be necessary and helpful in the absence of medical records). Further, if a retrospective opinion would be too speculative, as the Secretary argues, the Board is free to state that conclusion, but it must adequately explain why.

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).

### **III. CONCLUSION**

The appeal of the Board's April 26, 2016, decision with respect to the appellant's claims for service connection for hypertension and right ear hearing loss, and a disability rating in excess of 20% for left lower extremity radiculopathy is **DISMISSED**. After consideration of the appellant's and the Secretary's pleadings, and a review of the record, the Board's April 26, 2016, decision to the extent that it denied a disability rating in excess of 10% for lumbar spondylosis prior to July 12, 2009, is **VACATED** and the matter is **REMANDED** to the Board for readjudication consistent with this decision.

DATED: June 8, 2017

Copies to:

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