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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 16-1697

KENNETH J. JOHNSON, 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. Marine Corps veteran Kenneth J. Johnson appeals through counsel a March 18, 2016, decision of the Board of Veterans' Appeals (Board) that denied entitlement to total disability on the basis of individual unemployability (TDIU). 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. Johnson argues that the Board clearly erred in finding "no evidence of record to indicate that his service-connected disabilities preclude him from sitting for extended periods." Record (R.) at 7. The record includes two examinations that note interference with employment. Because these examinations did not sufficiently describe Mr. Johnson's disability with respect to limitations on sitting, however, or provide a clear rationale for the conclusion that his tinnitus was not sufficiently severe to prevent employment, the Court holds that the Board erred in relying on those opinions to conclude that Mr. Johnson could obtain and maintain substantially gainful employment. *See McKinney v. McDonald*, 28 Vet.App. 15, 31 (2016).

The Secretary's duty to assist includes "providing a medical examination or obtaining a medical opinion when such an examination or opinion is necessary to make a decision on the claim." 38 U.S.C. § 5103A(d). A medical examination is 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. 123, 123 (2007) (quoting *Ardison v. Brown*, 6 Vet.App. 405, 407 (1994)) (internal quotation marks omitted). The report must contain clear conclusions and supporting data, as well as "a reasoned medical explanation" connecting the data and conclusions. *Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 301 (2008).

Whether a medical opinion is adequate is a finding of fact that the Court reviews under the "clearly erroneous" standard. *See* 38 U.S.C. § 7261(a)(4); *D'Aries v. Peake*, 22 Vet.App. 97, 103 (2008). A 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." *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

The Court is not prepared, at this point, to say that the Board clearly erred in finding no evidence of difficulty with prolonged sitting. As Mr. Johnson notes, the record includes a March 2012 VA examination report in which the examiner, with respect to the left knee, checked a box indicating "[i]nterference with sitting, standing[,] and weight bearing." R. at 143. This examination report, however, does not describe the extent of the interference and therefore does not adequately describe the disability to facilitate a fully informed decision of the Board. If there is interference with sitting, the examiner must describe the extent of such interference, because it bears directly on the Board's conclusion that Mr. Johnson is capable of sedentary employment. Because the March 2012 VA examination report requires clarification with respect to interference with sitting, remand is warranted. *See* 38 C.F.R. § 4.2 (2017).

Remand also is warranted because the Board relied on an inadequate 2012 VA audiology examination. The audiologist noted that Mr. Johnson reported that his tinnitus interfered with his concentration in a quiet environment. She then stated that "[t]innitus may cause an individual difficulty with concentration and may seem to interfere with an individual's ability to hear well. However, *generally*, tinnitus does not preclude an individual from obtaining or maintaining employment." R. at 121 (emphasis added). The statement that tinnitus does not generally prevent

gainful employment implies that there are exceptional cases where it could. The VA examiner did not explain what factors may have led to an implied conclusion that Mr. Johnson's case was not among the exceptions. Thus, the opinion lacks a sufficient rationale. *See Nieves-Rodriguez, supra*. The examiner's generalization is no more than a speculative opinion that furnishes no basis for the Board's conclusion. *Cf. Bloom v. West*, 12 Vet.App. 185, 187 (1999) (noting that a medical report's use of the term "could," without other rationale or supporting data, is speculative); *Tirpak v. Derwinski*, 2 Vet.App. 609, 611 (1992) (holding that medical opinions are speculative and of little or no probative value when a physician makes equivocal findings such as "the veteran's death *may or may not* have been averted").

The Board's erroneous reliance on the VA examination reports warrants remand. *Tucker v. West*, 11 Vet.App. 369, 374 (1998). Because the claim is being remanded, the Court need not address Mr. Johnson'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."). In pursuing his claim on remand, Mr. Johnson 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

On consideration of the foregoing, the Board's March 18, 2016, decision is SET ASIDE and the TDIU claim is REMANDED for further adjudication consistent with this opinion.

DATED: July 28, 2017

Copies to:

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