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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 16-1468

GEORGE JONES, 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, George Jones, served in the U.S. Army from November 1986 to November 1989, from March 1991 to March 1992, and from July 1992 to June 2008. *See* Record (R.) at 47, 1421. He appeals, through counsel, a March 25, 2016, Board of Veterans' Appeals (Board) decision that denied an initial disability rating in excess of 10% for hypercoagulable state status-post left deep vein thrombosis (DVT) with factor V deficiency prior to October 2, 2013, and denied a rating in excess of 40% thereafter.¹ R. at 1-12. Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). This appeal is timely, and the Court has jurisdiction over the case pursuant to 38 U.S.C. §§ 7252(a) and 7266. For the reasons that follow, the Court will vacate the March 25, 2016, decision and remand the matter for further proceedings consistent with this decision.

The appellant argues that the Board erred when it failed to adequately address his symptoms prior to October 2, 2013, and whether they more nearly approximated the criteria for a 40% disability rating for that period. Appellant's Brief (Br.) at 6-10. He also contends that the

¹ The Board's award of a 40% disability rating for hypercoagulable state status-post left DVT with factor V deficiency since October 2, 2013, is a favorable determination, which the Court may not disturb. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007).

Board misapplied 38 C.F.R. § 4.104, diagnostic code (DC) 7121, by reading an additional requirement into the 40% rating criteria. *Id.* He next contends that the Board erred when it relied on an October 2013 VA examination report that was inadequate for rating purposes in denying a rating in excess of 40% since October 2, 2013. *Id.* at 10-12. The Secretary disputes the appellant's contentions. Secretary's Br. at 4-10.

The appellant's hypercoagulable state status-post left DVT with factor V deficiency is currently evaluated under DC 7121 ("Post-phlebotic syndrome of any etiology"), and is rated as 10% disabling prior to October 2, 2013, and 40% disabling since that time. Under DC 7121, a 10% rating applies where there is intermittent edema of the extremity or aching and fatigue in the leg after prolonged standing or walking, with symptoms relieved by elevation of the extremity or by compression hosiery. 38 C.F.R. § 4.104, DC 7121 (2017). A 20% rating applies where there is persistent edema, incompletely relieved by elevation of the extremity, with or without beginning stasis pigmentation or eczema. *Id.* A 40% rating applies where there is persistent edema and stasis pigmentation or eczema, with or without intermittent ulceration. *Id.* A 60% rating applies where there is persistent edema or subcutaneous induration, stasis pigmentation or eczema, and persistent ulceration. *Id.* A 100% rating applies where there is massive board-like edema with constant pain at rest. *Id.*

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). In support of its decision, the Board must include a written statement of the reasons or bases for its findings and conclusions on all material issues of fact and law presented on the record adequate to enable an appellant to understand the precise basis for the Board's decision and to facilitate informed review in this Court. 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995).

In the decision on appeal, the Board determined that, prior to October 2, 2013, the appellant's hypercoagulable state status-post left DVT with factor V deficiency was "manifested by edema that [was] not persistent and which [was] relieved completely with elevation of the lower extremity, persistent discoloration, and mild venous stasis dermatitis." R. at 3-4. In reaching this finding, the only evidence that the Board discussed was a VA examination report from April 2008²

² Although the Board, at times, references an "August 2008" report in its decision, the Secretary clarifies that the record reflects that this examination occurred in April 2008. See Secretary's Br. at 3, fn. 1. As the appellant makes no argument on this point, the Court need not further address this oversight. See *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) (noting that "the burden of showing that an error is harmful normally falls upon the party attacking the

and another from July 2009. R. at 7. The Board noted that the former report found no swelling present on examination and the latter report found that the appellant's edema was not persistent and was relieved completely with elevation of the lower extremity. *See* R. at 7. For the period since October 2, 2013, the Board found that the appellant's disability was "manifested by persistent edema, stasis dermatitis, and discoloration," R. at 4, based on findings from April 2008, July 2009, and October 2013 VA examination reports, R. at 8.

The Board's rating analysis is problematic in two respects, each relating to one of the rating periods on appeal. First, for the period prior to October 2, 2013, the Board failed to address potentially favorable evidence. *See Thompson v. Gober*, 14 Vet.App. 187, 188 (2000) (the Board must provide an adequate statement of reasons or bases "for its rejection of any material evidence favorable to the claimant"). Specifically, in a December 2009 Substantive Appeal, the appellant reported that he was unable to stand or sit for long periods of time without his legs swelling and he also described cramps and pain in his left leg that stayed "continuously." R. at 144. He also reported that his veins were swollen and tender. *Id.* This Substantive Appeal is dated several months after the July 2009 VA examination report, which had previously concluded that his edema was not persistent. *See* R. at 144, 249.

In August 2013, the Board remanded the appeal because, among other things, the claims file did not include any medical evidence dated after July 2009. R. at 111. The Board also ordered a new VA examination to assess the current severity of the appellant's disability, noting his report that his legs would "swell, cramp, and [were] painful on a constant basis." R. at 113. The Board's remand resulted in a VA examination conducted in October 2013 and, in the decision on appeal, the Board awarded a 40% disability rating since October 2, 2013, based on the findings from that report. R. at 8. However, the Board's analysis for the period prior to October 2, 2013, did not consider the appellant's lay statement as to the severity of his symptoms; instead, the Board tersely concluded that a higher rating was not warranted based on April 2008 and July 2009 examination report findings. *See* R. at 7. Although the Board was not required to find the appellant's report of his symptoms dispositive, it was nonetheless obligated to address the evidence in its decision. *See Thompson*, 14 Vet.App. at 188.

agency's determination").

Given that the appellant's December 2009 Substantive Appeal referred to continuous symptoms of leg swelling, cramps, and pain, and given that the Board appeared to reference this statement in its August 2013 remand as a basis for obtaining updated information as to the severity of the appellant's disability, the Board's failure to address this evidence in its March 2016 decision renders its statement of reasons or bases inadequate. *See* 38 U.S.C. § 7104(d)(1); *Allday*, 7 Vet.App. at 527.

As for the rating period since October 2, 2013, the appellant disputes the adequacy of the October 2013 VA examination report on the basis that it does not provide any findings related to the appellant's skin—particularly, whether ulcerations were present. Appellant's Br. at 10. The Secretary responds that the appellant has not offered any evidence of ulceration and, moreover, that the examination report's notation that there were no other "pertinent physical findings, complications, conditions, signs or symptoms related to" his disability meant that no ulcerations were present. Secretary's Br. at 8-9 (quoting R. at 64).

However, the Board decision on appeal explicitly notes that "[t]he October 2013 examination however does not provide findings in relation to the [appellant's] skin." R. at 8. After acknowledging this deficiency in the report, the Board awarded a disability rating of 40% as of October 2, 2013, based on the prior examination reports of record. *Id.* The inconsistency of the Board's position with regard to the adequacy of the October 2013 report—on the one hand, finding that it did not provide any findings concerning the appellant's skin, but on the other hand, denying a rating in excess of 40% because the report did not indicate persistent ulceration—frustrates judicial review and renders the Board's statement of reasons or bases inadequate. *See* 38 U.S.C. § 7104(d)(1); *Allday*, 7 Vet.App. at 527. On remand, the Board should either obtain a clarifying VA medical opinion (with additional examination, if necessary) or explain why the October 2013 examination report is adequate despite its failure to explicitly address any skin symptoms. *See Bowling v. Principi*, 15 Vet.App. 1, 12 (2001) (emphasizing the Board's duty to return an inadequate examination report).

The Court need not at this time address any other arguments that the appellant has raised. *See Best v. Principi*, 15 Vet.App. 18, 20 (2001) (per curiam order) (holding that "[a] narrow decision preserves for the appellant an opportunity to argue those claimed errors before the Board at the readjudication, and, of course, before this Court in an appeal, should the Board rule against him"). On remand, the appellant is free to submit additional evidence and argument, including the

arguments raised in his briefs to this Court, in accordance with *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order), and the Board must consider any such evidence or argument submitted. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002). The Board shall proceed expeditiously, in accordance with 38 U.S.C. §§ 5109 and 7112 (requiring the Secretary to provide for "expeditious treatment" of claims remanded by the Board or the Court).

After consideration of the parties' briefs and a review of the record, the Board's March 25, 2016, decision denying an initial disability rating in excess of 10% for hypercoagulable state status-post left DVT with factor V deficiency prior to October 2, 2013, and denying a rating in excess of 40% thereafter, is VACATED, and the matter is REMANDED for further proceedings consistent with this decision.

DATED: August 7, 2017

Copies to:

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