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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 16-2628

GEORGE KEMP, 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*: The appellant, U.S. Army veteran George Kemp, Jr., appeals through counsel a June 30, 2016, Board of Veterans' Appeals (Board) decision that denied entitlement to special monthly compensation (SMC) for the loss of use of both feet. Record (R.) at 3-19. The parties neither requested oral argument nor identified issues that they believe require a precedential decision of the Court. For the reasons that follow, the Court will set aside the Board's June 2016 decision and remand the matter for readjudication consistent with this decision.

I. BACKGROUND

Mr. Kemp is in receipt of VA disability compensation benefits for pes planus, rated 10% disabling prior to April 27, 2007, and 30% disabling thereafter.¹ He seeks SMC, alleging that his pes planus is so severe that "no effective function remains other than that which would be equally well served by an amputation stump at the site of election below [the] . . . knee with use of a suitable prosthetic appliance." 38 C.F.R. § 4.63 (2017).

¹ Mr. Kemp also receives benefits for degenerative disc disease of the lumbar spine, rated 40% disabling, and for radiculopathy, rated 20% disabling, and has been assigned a total disability rating based on individual unemployability (TDIU).

The Board originally denied entitlement to SMC in March 2015. In December 2015, the Court granted the parties' joint motion for remand (JMR) in which they agreed that the Board provided inadequate reasons or bases for its denial. Specifically, the parties stated:

Although the Board found that the test for determining SMC in the case of a foot disability was not met pursuant to [38 C.F.R. §] 3.350 and *Tucker [v. West*, 11 Vet.App. 369 (1998)], the recitation of the evidence by the Board paints a rather bleak picture of Appellant's ability to ambulate. In other words, the Board's conclusion is at odds with the evidence of record. . . . [T]he Board posited that Appellant's representative had focused "wholly on the Veteran's balance and propulsion problems." In making this determination[,] the Board found that[,] while balance and propulsion were specific examples of measuring effective function, that they were "not the sole indicators listed." The Board then went on to note [§] 3.350(a)(2)(i)(a) and (b), that discuss extremely unfavorable ankylosis and paralysis of the external popliteal nerve, and found that Appellant did not have these conditions. However, the error in the Board's decision is that [§] 3.350(a)(2)(i)(a) and (b) are examples of conditions where a grant of SMC would be appropriate, due to problems with balance and propulsion That is, [§] 3.350(a)(2)(a) and (b) are not criteria themselves.

Yet, because Appellant didn't have the same extant symptomatology and functioning as [§] 3.350(a)(2)(i)(a) and (b), the Board denied a grant of SMC. In doing so, the Board . . . abrogated its duty to consider the very problems with balance and propulsion that the evidence has shown Appellant to have, and conduct an analysis [of whether] Appellant is as well served by amputation with prosthetics. . . . [T]he inability to stand for more than a few minutes or walk more than a few yards is patently indicative of severe symptomatology, and the Board makes no attempt to compare this to amputation with prosthetics, which is particularly egregious in context of the advances that prosthetics for amputees have taken.

R. at 1795-97 (record citations omitted).

In the June 2016 decision on appeal, the Board again denied SMC, and this appeal followed.

II. ANALYSIS

A veteran is entitled to special monthly compensation if, "as a result of service-connected disability, [the veteran] has suffered the anatomical loss of use of" one foot or both feet. 38 U.S.C. § 1114(k), (l). Loss of use of a foot exists "when no effective function remains other than that which would be equally well served by an amputation stump at the site of election below . . . [the] knee with use of a suitable prosthetic appliance." 38 C.F.R. § 3.350(a)(2)(i) (2017). That

determination "will be made on the basis of the actual remaining function of the . . . foot, whether the acts of . . . balance and propulsion, etc., in the case of the foot, could be accomplished equally well by an amputation stump with prosthesis." *Id.*

Here, the Board found

that there is myriad evidence demonstrating decreased effective functioning of the feet due to his service-connected disabilities. The Board, however, does not find that the evidence shows no effective remaining function other than that which would be equally well served by an amputation stump with the use of a suitable prosthetic appliance. The Veteran's representative has cited to evidence showing that the Veteran uses a cane, has an antalgic gait, requires shoe inserts, is unable to stand for more than a few minutes or walk more than a few yards, and is unsteady even with the use of a cane. The foregoing evidence certainly shows decreased effective functioning, but does not represent no effective remaining function, as would be necessary to grant entitlement to SMC based on the loss of use of one or both feet. The lay and medical evidence clearly demonstrates that the Veteran is able to walk, stand, and balance for limited periods of time, but not for no effective periods of time. The phrase "no effective function remains other than that which would be equally well served by an amputation stump . . . with the use of a suitable prosthetic appliance" in 38 C.F.R. § 3.350(a)(2) clearly contemplates the absence of effective functioning in the acts of "balance, propulsion, etc.[" and not simply limitation (even severe limitation) of those actions. . . . Moreover, the Board finds it extremely significant that multiple findings have noted normal or only slightly decreased muscle strength in the ankles and toes. These findings indicate that the Veteran is able to use the ankles, feet, and toes in close to a normal manner, to include duration of use, and, in fact, does so. *See* 38 C.F.R. § 4.40 (noting that "[a] little used part of the musculoskeletal system may be expected to show evidence of disuse, either through atrophy, the condition of the skin, absence of normal callosity or the like["). In this case, there is no evidence of atrophy or callouses to support a finding of no effective functioning of the ankles, feet, and toes.

The Board also has considered the statement in the JMR that[] "the inability to stand for more than a few minutes or walk more than a few yards is patently indicative of severe symptomatology, and the Board makes no attempt to compare this to amputation with prosthetics, which is particularly egregious in context of the advances that prosthetics for amputees have taken.["]. Again, the Board recognizes that the Veteran has severe symptomatology due to his service-connected disabilities; however, the Veteran already receives compensation for these symptoms in his current individual disability ratings and overall TDIU award. The evidence, by contrast, does not show that no effective function remains in either foot other than that which would be equally well served by an amputation stump with the use of a suitable prosthetic appliance.

. . .

Again., the Board acknowledges significant problems with balance and propulsion affecting the feet due to the Veteran's service[-]connected disabilities. That said, the Veteran has no muscle atrophy in the feet, toes, or ankles[,] or callosities indicative of decreased, abnormal, or loss of functioning of the feet. Moreover, as a prosthetic or amputated foot would not retain effective reflex, sensory, or circulatory functioning, as contemplated by the relevant laws and regulations, and the evidence demonstrates that the Veteran retains some or all of such functioning in the feet, ankles, and toes, the evidence of record shows that there is some measure of effective functioning of the bilateral feet and that he would not be equally well served by an amputation stump at the site of election below the knee with use of a suitable prosthetic appliance. Finally, as discussed above, the Veteran retains some effective functioning in his ankles, feet, and toes that permit him to walk, stand, and balance for limited periods of time/distances.

R. at 14-16. The Board's analysis is based on a misunderstanding of VA regulations.

First, and most egregiously, the Board clearly and repeatedly stated that Mr. Kemp could have no effective function remaining in his feet to establish entitlement to SMC. R. at 14-15 ("The foregoing evidence certainly shows decreased effective functioning, but does not represent *no* effective remaining function, as would be necessary to grant entitlement to SMC based on the loss of use of one or both feet."), 15 ("The lay and medical evidence clearly demonstrates that the Veteran is able to walk, stand, and balance for limited periods of time, but not for *no* effective periods of time."), ("The phrase "no effective function remains other than that which would be equally well served by an amputation stump . . . with the use of a suitable prosthetic appliance" . . . clearly contemplates the absence of effective functioning in the acts of 'balance, propulsion, etc.'"), 16 ("[T]he Veteran retains some effective functioning in his ankles, feet, and toes that permit him to walk, stand, and balance for limited periods of time/distances."). This is not the standard. The question is, given the current level of effective function of Mr. Kemp's feet, would he be *at least as well* served by prosthetics? See *Jensen v. Shulkin*, __ Vet.App. __, __, No. 15-4788, 2017 WL 3997274, at *6 (Sept.12, 2017) ("Loss of use under § 3.350(a)(2)(i) contemplates 'balance and propulsion' equivalent to that provided by a prosthetic devi[c]e."). Accordingly, SMC is not limited to those veterans who have "*no*" (to use the Board's repeated emphasis) remaining effective functioning of the feet.

Second, the Board acknowledged the parties' agreement in the December 2015 JMR that Mr. Kemp's effective function was severely diminished and their statement that the Board had failed to compare his functioning to that he might expect with amputation and prosthetics. Rather than conduct such a comparison, however, the Board simply stated that Mr. Kemp was already

compensated for his severe symptoms by his current disability ratings and TDIU. R. at 15. This is not the analysis required by the remand, and the Court concludes that the Board erred in failing to ensure substantial compliance with that remand. *See Stegall v. West*, 11 Vet.App. 268, 271 (1998); *see also Dymont v. West*, 13 Vet.App. 141, 146-47 (1999) (holding that there was no *Stegall* violation when the examiner made the ultimate determination required by the Board's remand, because such determination "more than substantially complied with the Board's remand order").

To the extent that the Board intended such a comparison by its statement that Mr. Kemp's feet "retain effective reflex, sensory, or circulatory functioning" that would be absent were his feet amputated, and therefore he would not be as well served by prosthetics, R. at 16, this runs afoul of the Court's guidance in *Tucker v. West* by essentially requiring Mr. Kemp to show that his feet *should* be amputated. 11 Vet.App. 369, 373 (1998) ("[T]he relevant inquiry concerning an SMC award is not whether amputation is warranted but whether the appellant has had effective function remaining other than that which would be equally well served by an amputation with use of a suitable prosthetic.").

Third, the Board offered nothing more than its own medical conclusion that, because the medical evidence shows that Mr. Kemp's muscle strength is only slightly decreased, he is able to use his feet "in close to a normal manner, to include duration of use, and, in fact, does so." R. at 16; *see Tucker*, 11 Vet.App. at 373-74 (holding that the Board improperly relied on its own medical speculation in concluding that the fact that the appellant was able to ambulate on a limited basis very likely demonstrated the functions of balance and propulsion). The record is replete with evidence contrary to this finding, not the least of which is that Mr. Kemp must use orthotics and a cane and requires steroid injections to do what little walking he can. *See, e.g.*, R. at 820, 1077-78, 2233, 2235. The Board did not adequately address any of this favorable evidence. *See Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table).

Finally, the Board relied on 38 C.F.R. § 4.40 for the proposition that, because Mr. Kemp's feet do not show atrophy or callosities, they are likely used in a normal manner. The Board places too much weight on this regulation, which states only that disuse "may" result in atrophy or absence of callouses. 38 C.F.R. § 4.40 (2017). Further, the Board's statement that Mr. Kemp's feet lack callouses actually *supports* Mr. Kemp's assertion that he is unable to ambulate normally. *See id.* ("A little used part of the musculoskeletal system may be expected to show evidence of

disuse, either through atrophy, the condition of the skin, *absence of normal callosity* or the like. (emphasis added)).

In light of this discussion, the Court concludes that the Board provided inadequate reasons or bases for its conclusion that Mr. Kemp is not entitled to SMC for the loss of use of the feet. *See* 38 U.S.C. § 7104(d)(1); *Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990). The Court will therefore set aside the Board decision on appeal and remand this matter for "a critical examination of the justification for the decision." *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991). On remand, Mr. Kemp is free to submit additional evidence and argument in accordance with *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order). The Board must consider any such evidence and argument. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002).

III. CONCLUSION

After consideration of the appellant's and the Secretary's briefs, and a review of the record on appeal, the Board's June 30, 2016, decision is SET ASIDE, and the matter is REMANDED for readjudication consistent with this decision.

DATED: October 4, 2017

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