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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 16-3549

JAMES GARRETT, APPELLANT,

v.

DAVID J. SHULKIN, M.D.,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before ALLEN, *Judge*.

MEMORANDUM DECISION

*Note: Pursuant to U.S. Vet. App. R. 30(a),
this action may not be cited as precedent.*

ALLEN, *Judge*: Appellant James Garrett appeals through counsel a September 21, 2016, Board of Veterans' Appeals (Board) decision denying him service connection for right and left knee disabilities. Record (R.) at 1-11. This appeal was timely filed on October 20, 2016, and the Court has jurisdiction pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). For the reasons discussed below, the Court will set aside the Board's September 21, 2016, decision and remand the matter for further proceedings.

I. FACTS AND PROCEDURAL HISTORY

Appellant served honorably in the United States Marine Corps from 1960 to 1964. R. at 1112. During service, appellant injured his knees on three separate occasions. R. at 1798, 1832, 1834, 1835. In 2010, appellant sought service connection for both left and right knee disabilities, which a VA regional office (RO) denied in 2011. R. at 1643-51, 1532-41. He then timely disagreed with the RO's decision later that year and the RO continued its denial of service connection. R. at 1516-20, 1313. The RO again continued its denial in 2014. R. 1183-85.

The Board remanded the matter in 2015, instructing the RO to obtain additional private medical records and a compensation and pension (C&P) opinion "regarding whether it is at least

as likely as not . . . that any left or right knee disorder is of service onset . . . , particularly the complaints of right knee pain and left knee locking noted by [appellant] Lay statements must be considered and discussed." R. at 1107. The 2015 VA C&P examiner reviewed appellant's service treatment records, private medical records, and Veterans Benefits Management System (VBMS) file and concluded that it was less likely than not that appellant's knee disabilities were service connected. R. at 33-34.

The RO issued a Supplemental Statement of the Case in October 2015 that considered the C&P opinion and the additional private records and again denied service connection. R. at 843-57. On appeal from the RO in September 2016, the Board also continued denial of service connection. This appeal followed.

II. ANALYSIS

Appellant argues that the Court should remand the Board's decision in this matter on several grounds. The Court need reach only one of those issues to grant appellant the relief he seeks. The Court will remand the Board's decision because of its failure to ensure compliance with its 2015 remand order. "[A] remand by this Court or the Board confers on the veteran or other claimant, as a matter of law, the right to compliance with the remand orders." *Stegall v. West*, 11 Vet.App. 268, 271 (1998). When a medical examiner fails to comply with a Board remand order, the Board errs in failing to ensure compliance. *Id.* Given this disposition, the Court need not address the remaining arguments and issues raised by appellant at this time. *See Best v. Principi*, 15 Vet.App. 18, 20 (2001) (noting that the factual and legal context of an appeal may change following a remand to the Board and explaining 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 [or her].").

The Board erred by relying on a 2015 VA medical opinion that failed to comply with its 2015 remand order requiring the examiner to address "complaints of right knee pain and left knee locking noted by [appellant] Lay statements *must* be considered and discussed." R. at 1107 (emphasis added). On remand, the examiner indicated that he reviewed appellant's service treatment records (STRs), civilian medical records, and VBMS records. R. at 1040. In restating his opinion, the examiner only noted that "VMBS/STR show no evidence of chronic knee pathology during active duty" and noted instances in the STRs regarding several in-service knee

injuries. R. at 1041. No mention of appellant's complaints of right knee pain, left knee locking, or lay statements was made. *Id.* The Court can fathom no reason for the Board and the Secretary's overlooking of such glaring noncompliance with a Board remand order that is as clear as this one. It is true that it is substantial, not strict, compliance with a remand order that the law requires. *See D'Aries v. Peake*, 22 Vet.App. 97, 105 (2008). But this examination report fails under any standard of compliance, even a minimal one.

The Secretary argues that the examiner complied with the Board's remand order because the "examiner indicated that he reviewed all of [a]ppellant's STRs, and the examiner is not required to restate every fact, even pertinent facts, to render an adequate examination report" Secretary's Brief at 17. While this may be true in some abstract legal sense, it is not true here. The examiner failed to address the explicit instructions of the Board and the Board failed to ensure substantial compliance with its own remand order, therefore remand is warranted. *See Stegall*, 11 Vet.App. at 271.

On remand, 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), and the Board must consider any such evidence or argument submitted. *Kay v. Principi*, 16 Vet.App. 529, 534 (2002). The Court reminds the Board 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), and the Board must proceed expeditiously, in accordance with 38 U.S.C. §§ 5109B and 7112.

III. CONCLUSION

After consideration of the parties' briefs, and a review of the record, the Board's September 21, 2016, decision denying appellant service connection for right and left knee disabilities is SET ASIDE and REMANDED for further proceedings consistent with this decision.

DATED: November 9, 2017

Copies to:

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