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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 17-1624

WILLIAM G. CRAWLEY, APPELLANT,

v.

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

Before MEREDITH, *Judge*.

MEMORANDUM DECISION

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

MEREDITH, *Judge*: The appellant, William G. Crawley, through counsel appeals a May 12, 2017, Board of Veterans' Appeals (Board) decision that denied entitlement to disability compensation for mild dry eyes; labyrinthitis with vestibular dysfunction; lumbar strain with sacroiliac pain; hypertension, obstructive sleep apnea, erectile dysfunction, right leg arterial insufficiency, and chronic renal insufficiency, to include as secondary to service-connected diabetes mellitus; and special monthly compensation based on loss of use of a creative organ. Record (R.) at 1-24. The Board remanded disability compensation claims for glaucoma, cataract of the right eye, pseudophakia of the left eye, and bilateral diabetic retinopathy. The remanded matters are not before the Court. *See Breeden v. Principi*, 17 Vet.App. 475, 478 (2004) (per curiam order) (a Board remand "does not represent a final decision over which this Court has jurisdiction"); *Hampton v. Gober*, 10 Vet.App. 481, 483 (1997) (claims remanded by the Board may not be reviewed by the Court). 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). For the following reasons, the Court will vacate the Board's decision and remand the matters for further proceedings consistent with this decision.

I. BACKGROUND

The appellant served on active duty in the U.S. Army from August 1955 to August 1958 and February 1960 to February 1963, R. at 792-93, and in the U.S. Air Force from August 1963 to August 1977, R. at 3, 796-97. In May 2010, the appellant filed disability compensation claims for diabetes mellitus and mild dry eyes, *see* R. at 1343-68, and in October 2010, the appellant underwent a VA eye examination, R. at 1400-05. The examiner diagnosed bilateral, mild dry eyes, but opined that the dry eyes are "not caused by nor a result of diabetes." R. at 1404-05. In April 2011, a VA regional office (RO) granted the appellant's claim for diabetes mellitus, assigning a 20% disability rating effective May 18, 2010, but denied the claim for mild dry eyes. R. at 1343-68.

In January 2012, the appellant filed disability compensation claims for labyrinthitis with vestibular dysfunction and lumbar strain with sacroiliac pain; hypertension, obstructive sleep apnea, erectile dysfunction, right leg arterial insufficiency, and chronic renal insufficiency, to include as secondary to service-connected diabetes mellitus; and entitlement to special monthly compensation based on loss of use of a creative organ. R. at 1286-1305. With his application, the appellant submitted a lay statement asserting, among other things, that he had experienced dizzy spells with vertigo and low back discomfort since military service, R. at 1306, and an independent medical opinion by a nurse practitioner, R. at 1308-18.

In September 2012, the appellant underwent VA diabetes mellitus, eye, vestibular conditions, and back examinations, R. at 963-1009, 1034-47, and in November 2012, the RO denied the appellant's January 2012 claims, R. at 941-50, 957-61. The appellant perfected an appeal from the April 2011 and November 2012 denials, R. at 842-43, 858-82, 883-86, 888-911, 936-37, and in January 2014, the Board remanded the January 2012 claims for further development, including additional medical opinions addressing whether the appellant had a current diagnosis of right leg arterial insufficiency, hypertension, chronic renal insufficiency, obstructive sleep apnea, and erectile dysfunction, and whether any diagnosed condition was caused or aggravated by service-connected diabetes mellitus. R. at 807-17.

In April 2014, the appellant underwent several additional examinations. R. at 710-61. The Board remanded the matters in August 2015 and September 2016 to schedule the appellant for a hearing. R. at 452-57, 498-503. In June 2016, the appellant was unable to attend the scheduled hearing because of his hospitalization and, in November 2016, he withdrew his hearing request,

R. at 5, 456. However, in November 2016, the appellant through counsel submitted a brief in support of his claims, asserting among other things, that the September 2012 back and vestibular examinations and the April 2014 eye and diabetes mellitus examinations were inadequate. R. at 94-108.

On May 12, 2017, the Board denied entitlement to disability compensation for mild dry eyes; labyrinthitis with vestibular dysfunction; and lumbar strain with sacroiliac pain; hypertension, obstructive sleep apnea, erectile dysfunction, right leg arterial insufficiency, and chronic renal insufficiency, to include as secondary to service-connected diabetes mellitus; and special monthly compensation based on loss of use of a creative organ. R. at 1-24. This appeal followed.

II. ANALYSIS

The appellant argues that the Board (1) relied on inadequate medical examinations to deny his claims and (2) provided inadequate reasons or bases for finding the examinations adequate and for dismissing service medical records concerning his lumbar disability, competent lay evidence, and the independent medical opinion. Appellant's Brief (Br.) at 3-13. The Secretary concedes that the appellant's claim for lumbar strain should be remanded because the Board failed to adequately address the appellant's lay statements regarding his back disability, Secretary's Br. at 3-5, but otherwise asserts that the VA examinations are adequate and that the Board provided adequate reasons or bases for denying the appellant's claims, *id.* at 5-15.

"Whether a medical [examination or] opinion is adequate is a finding of fact, which the Court reviews under the 'clearly erroneous' standard." *D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008) (per curiam). 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 *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990). As with any material issue of fact or law, the Board must provide a statement of the reasons or bases for its determination "adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court." *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); see 38 U.S.C. § 7104(d)(1); *Gilbert*, 1 Vet.App. at 56-57.

In the decision on appeal, the Board determined that VA provided medical examinations that were adequate for adjudication purposes. R. at 8-9. The Board stated:

The [appellant] underwent VA examinations in September 2012, April 2014, and May 2014 to obtain medical evidence regarding the nature and severity of the claimed disabilities. The Board finds the VA examinations and opinions to be adequate for adjudication purposes. The examinations were performed by medical professionals based on review of the claims file, solicitation of history and symptomatology from the [appellant], and examination of the [appellant]. The examination reports are accurate and fully descriptive. Opinion is provided as [to] the nature and etiology of any diagnosed conditions. As such, the Board finds that the [appellant] has been afforded adequate examination[s]. The Board finds that VA's duty to assist with respect to obtaining a VA examination or opinion has been met.

Id.

The appellant argues that the October 2010 eye examination, September 2012 back and vestibular conditions examinations, and the April 2014 diabetes mellitus examination, which addressed whether the appellant suffers from hypertension, obstructive sleep apnea, erectile dysfunction, right leg arterial insufficiency, and chronic renal insufficiency secondary to service-connected diabetes mellitus, are inadequate. Appellant's Br. at 5-9. Unfortunately, the foregoing statement of reasons or bases by the Board fails to (1) make any determination regarding the adequacy of the October 2010 eye examination or (2) address the very fact-specific inadequacies argued by the appellant in his November 2016 brief to the Board and here on appeal. *Compare* R. at 96-106, *with* Appellant's Br. at 5-9; *see Smith v. Derwinski*, 2 Vet.App. 137, 141 (1992) ("The [Board] . . . cannot ignore the assertions made by [an] appellant in support of his appeal before the [Board]."). The Secretary's arguments on appeal amount to improper post hoc rationalizations, which the Court cannot accept. *See Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 156 (1991) ("[A]gency 'litigating positions' are not entitled to deference when they are merely appellate counsel's '*post hoc* rationalizations' for agency action, advanced for the first time in the reviewing court."); *Evans v. Shinseki*, 25 Vet.App. 7, 16 (2011) ("[I]t is the Board that is required to provide a complete statement of reasons or bases, and the Secretary cannot make up for its failure to do so.").

Because the Court is precluded from finding facts in the first instance, *see Hensley v. West*, 212 F.3d 1255, 1263 (Fed. Cir. 2000) (stating that "appellate tribunals are not appropriate fora for initial fact finding"), remand is required for the Board to assess the adequacy of the October 2010 eye examination and to provide an adequate statement of reasons or bases for its determination that the VA examinations are adequate for adjudication purposes, or, if necessary, to obtain new examinations. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) (holding that remand is the

appropriate remedy "where the Board has incorrectly applied the law, failed to provide an adequate statement of reasons or bases for its determinations, or where the record is otherwise inadequate").

Given this disposition, the Court will not now address the remaining arguments and issues raised by the appellant. *Quirin v. Shinseki*, 22 Vet.App. 390, 395 (2009) (noting that "the Court will not ordinarily consider additional allegations of error that have been rendered moot by the Court's opinion or that would require the Court to issue an advisory opinion"); see *Best v. Principi*, 15 Vet.App. 18, 20 (2001) (per curiam order). On remand, the appellant is free to submit additional evidence and argument on the remanded matters, including the specific arguments raised here on appeal, 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 the benefit sought); *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order). 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. § 7112.

III. CONCLUSION

After consideration of the parties' pleadings and a review of the record, the Board's May 12, 2017, decision is VACATED and the matters are REMANDED for further proceedings consistent with this decision.

DATED: December 11, 2017

Copies to:

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