IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

Vet. App. No. 17-2083

LARRY E. ENGLISH
Appellant,

v.

DAVID J. SHULKIN, M.D.,
Secretary of Veterans Affairs,
Appellee.

ON APPEAL FROM THE BOARD OF VETERANS' APPEALS

BRIEF OF APPELLEE

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Appellant,	)	
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v.	)	Vet. App. No. 17-2083
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Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

ON APPEAL FROM THE BOARD OF VETERANS' APPEALS

BRIEF OF THE APPELLEE SECRETARY OF VETERANS AFFAIRS

I. ISSUE PRESENTED

Whether the Court of Appeals for Veterans Claims (Court) should affirm the May 17, 2017, Board of Veterans' Appeals (Board) decision which denied entitlement to an initial rating in excess of 10% for Appellant's patellofemoral syndrome (PFS) of the right knee, from January 15, 2008, to April 14, 2010.

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

This Court's jurisdiction over the case at bar is predicated on 38 U.S.C. § 7252(a).

B. Nature of the Case

Appellant, Larry E. English, appeals the May 17, 2017, Board decision that denied entitlement to an initial rating in excess of 10% for his PFS of the right knee, from January 15, 2008, to April 14, 2010.

C. Statement of Pertinent Facts and Proceedings Below

Appellant served in the United States Army from June 1976 to June 1979 and from February 1991 to October 1991. (Record Before the agency (R.) at 1524, 1556).

He filed a claim for service connection for his right knee condition in January 2008, (R. at 1449-50), and was afforded a VA examination the next month. (R. at 1320-25). The examiner noted Appellant's reports that he had flares in his right knee "all the time," depending on weather and his work, and that "flares [occur] every 1-2 weeks" with moderate pain which lasts all day. *Id.* at 1321. Appellant reported that the limitation of motion (LOM) or other functional impairment from his flares was that they "further limit[ed]" his walking. *Id.* at 1322. The examiner noted the symptoms of Appellant's condition, *inter alia*, his right knee giving way, pain, weakness, and instability. *Id.*

As to Appellant's range of motion (ROM) on flexion, the examiner noted that active ROM was from 0 to 105 degrees, with pain beginning at 90 degrees and ending at 105 degrees, and passive ROM was from 0 to 110 degrees, with pain beginning at 90 and ending at 110. *Id.* at 1323.

There was no additional LOM on repetitive use. *Id.* Testing on extension revealed active and passive ROM from 90 to 0 degrees with no pain. *Id.* A physical examination found that there was no instability. *Id.* at 1323-24.

The next month, in March 2008, the Department of Veterans Affairs (VA) regional office (RO) granted Appellant service connection for PFS, right knee, with an evaluation of 10%, effective January 2008. (R. at 1311-12 (1304-07, 1310-14)). Appellant filed a notice of disagreement (NOD) with this rating in June 2008, (R. at 1271), and an appeal to the Board in July 2008. (R. at 1279). The Board remanded Appellant's claim December 2009, ordering that the RO issue a statement of the case (SOC), obtain a VA examination, readjudicate the claim and issue a supplemental SOC (SSOC) if required. (R. at 1055-56 (1052-57)).

Consequently, Appellant was afforded another VA examination in August 2009. (R. at 1103-06). The examiner noted Appellant's symptoms of instability, pain, weakness, popping, and severe flare-ups, which Appellant reported caused a significant limp, slowed him down, and limited walking. *Id.* at 1104. However, a physical examination found no instability. *Id.* at 1105. ROM testing revealed pain on active motion, with flexion ROM from 0 to 90 degrees on active and 105 on passive, and normal extension. *Id.*

An SOC issued in January 2010 continued to deny an evaluation greater than 10% from January 2008 to April 2010. (R. at 519-20 (494-

521)). Appellant filed an NOD with this decision the same month. (R. at 1024-26).

Appellant was afforded another VA joints examination in April 2010. (R. at 862-66 (860-73)). A physical examination of his right knee found, *inter alia*, no instability. *Id.* at 865. In June 2010, the RO increased rating for Appellant's right knee PFS to 40%, effective April 2010, but continued to deny a rating higher than 10% from January 2008 to April 2010. (R. at 855-56 (847-51, 854-59)).[1] Appellant appeared before the Board for a hearing in October 2015, (R. at 316-25), and in December 2015, the Board denied a rating higher than 10% for right knee PFS from January 2008 to April 2010. (R. at 302-09 (300-10)).

Appellant appealed to the Court, and the Court granted the parties' joint motion for remand (JMR) in August 2016. (R. at 168-74). The parties agreed that the Board provided inadequate statement of reasons or bases for denying higher ratings because it (1) did not address evidence of functional loss as reported in Appellant's February 2008 and August 2009 VA examinations, and (2) did not state why Appellant's lay statements of instability were not sufficient to support a rating under Diagnostic Code

[1] The issue of 40% rating effective April 2010 is not on appeal.

(DC) 5257. *Id.* at 169, 170-71.[2] Consequently, in October 2016, the Board remanded Appellant's claim for further development, to include obtaining a retrospective evaluation of Appellant's right knee PFS to determine its condition from January 2008 to April 2010. (R. at 154 (154-58)).

Appellant was afforded another VA examination and a retrospective medical opinion in November 2016. (R. at 95-118). The examiner conducted an in-person examination, reviewed Appellant's VA folder and electronic records, and listed evidence from his February 2008, August 2009, and April 2010 VA examinations. *Id.* at 95-97, 101. As to retrospective evaluation, the examiner opined that standards for rating had changed over the past years; for instance, measurement of passive ROM has "come, gone, and come back again" and in past, examiners have been required to note at what number of degrees ROM pain occurs but at other times, 'yes' or 'no' answers have sufficed. *Id.* at 100. Consequently, he explained that "[i]t would be mere speculation for any medical provider to 'fill in the blanks' so far as missing information from the 2008, 2009 and 2010 exams for rating is concerned." *Id.* He added that rendering an

[2] Appellant mischaracterizes the parties' JMR agreement. He suggests that the parties agreed that the February 2008 and August 2009 VA examiners "did not make objective medical findings of instability upon examination." (App. Br. at 6). This is incorrect. Instead, the parties specifically noted that the two examinations specifically made findings of "no instability" upon examination. (R. at 170 (168-74)).

opinion on what Appellant's retrospective ROM would have been in today's rating criteria would "not be medically valid for any provider." *Id.* at 100. The examiner then noted Appellant's ROM, the point in ROM where pain started, additional LOM after repetitions, and functional loss due to pain as reported in the previous VA examinations. *Id*. at 101-02.

In May 2017, the Board issued the decision presently on appeal. (R. at 2-13).

III. SUMMARY OF ARGUMENT

The Court should affirm the Board's May 2017 decision denying entitlement to an initial rating in excess of 10% for his PFS of the right knee, from January 2008 to April 2010. Appellant makes three general allegations of error on appeal. *See* (App. Br. at 10-20). First, he argues that the Board provided inadequate reasons or bases for rejecting his lay statements because it erroneously required objective evidence of instability and did not consider evidence of functional loss in determining whether a rating higher than 10% was warranted. (App. Br. at 10-17). Second, he argues that the November 2016 VA examination was inadequate because the examiner failed to consider the functional loss due to pain in his previous VA examinations, and determine how it affected ROM. *Id.* at 18-20.

However, the Board fully complied with the parties' August 2016 JMR because it provided sufficient reasons for denying a rating higher

than 10% for right knee PFS, and properly found that the November 2016 VA examination adequately addressed its remand inquiry. *See* (R. at 2-13); *D'Aires v. Peake*, 22 Vet.App. 97, 105 (2008) (holding that substantial compliance, not strict compliance, is required under *Stegall*); *Stegall v. West*, 11 Vet.App. 268, 271 (1998) (a remand imposes upon the Secretary a duty to ensure compliance with the terms of the remand). Therefore, Appellant has not carried his burden of demonstrating prejudicial error, and the Court must affirm. *See Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (holding that appellant has the burden of demonstrating error), *aff'd*, 232 F.3d 908 (Fed. Cir. 2000) (table).

IV. ARGUMENT

The Board's decision 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; the statement must be adequate to enable an appellant to understand the precise basis for the Board's decision, and to facilitate informed review in this Court. *See* 38 U.S.C. § 7104(d)(1); *Allday v. Brown,* 7 Vet.App. 517, 527 (1995); *Gilbert v. Derwinski,* 1 Vet.App. 49, 57 (1990). To comply with this requirement, the Board must analyze the credibility and probative value of the evidence, account for the evidence it finds persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the

claimant. *Caluza v. Brown,* 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table).

The determination of whether an appellant is entitled to an increased rating is a question of fact subject to the "clearly erroneous" standard of review. *See* 38 U.S.C. § 7261(a)(4); *see also Smallwood v. Brown,* 10 Vet.App. 93, 97 (1997). Disability evaluations are based upon the average impairment of earning capacity as contemplated by the schedule of rating disabilities. 38 U.S.C. § 1155.

A. The Board Provided Adequate Reasons or Bases for Denying Initial Rating Higher than 10% for PFS of Right Knee from January 15, 2008, to April 14, 2010

Title 38, Section § 4.71a of the Code of Federal Regulations, DC 5257 provides the following ratings for impairment of the knee, which requires subluxation or lateral instability: 10% for slight, 20% for moderate, and 30% for severe. The Board's determination of the proper disability rating is a finding of fact that the Court reviews under the "clearly erroneous" standard of review set forth in 38 U.S.C. § 7261(a)(4). *See Hanson v. Brown, 9* Vet.App. 29, 32 (1996).

Appellant argues that the Board failed to comply with the parties' August 2016 JMR, and provided inadequate statement of reasons or bases for denying a separate rating under DC 5257, because it did not explain why his lay statements as to instability were less probative. *See*

(App. Br. at 10-12). He cites to his own complaints of instability in the February 2008 and August 2009 VA examinations, and relies on non-precedential decisions, to argue that the Board "failed to explain why it found that the medical evidence of no instability outweighed [his] statements regarding his knee instability." *Id.* at 13-14.

In August 2016, this Court granted the parties' JMR, for the Board to explain why Appellant's lay statements of right knee instability were not sufficient to support a rating under DC 5257. (R. at 170-71 (168-74)). The Board was required to only substantially comply with this JMR. *See D'Aires*, 22 Vet.App. at 105. Consequently, the Board explained that "if the evidence reflected that [Appellant] had severe, moderate, or slight recurrent subluxation or lateral instability," he could be entitled to a rating under DC 5257. (R. at 10 (2-13)). However, the Board determined, that evidence *did not* reflect that. *Id.* As basis for its determination, the Board reasoned that compared to Appellant's lay assertions of knee instability, several VA medical examinations found *no* instability on physical examination. *See id.* Therefore, the latter evidence outweighed Appellant's lay assertions. *See id.* The Board's findings are supported by the record.

Appellant asserted knee instability during three VA examinations, but none of those found any instability on physical examination. Specifically, *first*, during a February 2008 VA examination, Appellant

complained of left knee instability. (R. at 1322 (1320-25)). However, upon physical examination, the examiner noted that Appellant did not have knee instability. *Id.* at. 1324. *Second*, in August 2009, Appellant again complained of knee instability. (R. at 1104 (1103-06)). However, upon physical examination, the examiner again found no instability. *Id.* at 1105. *Third*, Appellant's April 2010 VA examination likewise found no knee instability on physical examination. (R. at 865 (860-73)).

Therefore, after relying on three VA examinations, the Board adequately explained that joint instability can be diagnosed upon clinical examination, and here, "even if [Appellant] sincerely believes that his knee experiences [in]stability," other overwhelming evidence showed exactly the opposite–that Appellant's condition of his right knee ***did not*** present any instability. *See* (R. at 10 (2-13)); *Caluza,* 7 Vet.App. at 506. Therefore, the Board was not required to further determine whether Appellant was credible or competent to report instability. Even assuming credibility, in light of overwhelming medical evidence *against* instability, the Board properly fulfilled its fact-finding role by weighing the evidence to make a factual finding that there was no knee instability. *See* (R. at 10 (2-13)); *Deloach v. Shinseki*, 704 F.3d 1370, 1380 (Fed. Cir. 2013) ("The Court of Appeals for Veterans Claims, as part of its clear error review, must review the Board's weighing of the evidence; it may not weigh any evidence itself."). Such assignment of weight is entitled to deference and may not

be disturbed by this Court unless clearly erroneous. *See* 38 U.S.C. § 7261(a)(4); *Gilbert*, 1 Vet.App. at 52. Therefore, Appellant's arguments are unavailing, and there is no error in the Board's analysis.

Appellant also argues that the Board provided inadequate reasons or bases because it failed to consider functional loss under 38 C.F.R. §§ 4.40 and 4.45, or explain how it factored such loss into its evaluation under DC 5260. (App. Br. at 14-17). In support of his argument, he cites to evidence of flare-ups in his knee, which limited his ability to walk and stand, and of his knee giving way, popping, and being weak. *Id.* at 16. He avers that the Board should have addressed whether this evidence warranted higher rating under 38 C.F.R. §§ 4.40, 4.45, and DC 5260. Appellant's argument is once again meritless.

The Board provided ample explanation on this issue:

> "The Board acknowledges [Appellant's] functional limitations on **standing, walking, and the effect on his occupation** due to the pain associated with his right knee disability. However, pain alone does not constitute a functional loss under the VA regulations that evaluate disability based upon range-of-motion loss. Pain may cause a functional loss but itself does not constitute functional loss; rather, pain must affect some aspect of "the normal working movements of the body" such as "excursion, strength, speed, coordination, and endurance," in order to constitute functional loss. *Mitchell v. Shinseki*, 25 Vet.App. 32, 33, 43 (2011). In this case both the February 2008 and August 2009 VA medical examinations note [Appellant's] right knee disability functional effect as decrease mobility. However, limited mobility/decrease range of motion is appropriately contemplated within the criteria. As such, the Board does not find that an increased rating is warranted for [Appellant's] noted functional loss in excess of

> the provided 10[%] already granted for painful and limited motion."

(R. at 11 (2-13)) (emphasis added). This explanation is sufficiently detailed to enable Appellant to understand the precise basis for the Board's decision, and to facilitate informed review in this Court. *See* 38 U.S.C. § 7104(d)(1); *Allday,* 7 Vet.App. at 527. The Board's findings had plausible basis. Both, the February 2008 and August 2009 VA medical examinations noted that the functional effect from Appellant's right knee PFS was decreased mobility. *See* (R. at 1325 (1320-25) (February 2008 VA examination noting functional effect as *decreased mobility* and pain); 1106 (1103-06) (August 2009 VA examination noting functional effect as *decreased mobility* and pain)). Therefore, the inquiry that Appellant seeks was readily provided by the Board on the basis of evidence of record. *See id.;* (App. Br. at 16-17). Once again, the Board adequately explained that since the functional loss of decreased mobility and limitation in ROM, as evidenced by VA examinations, is already "appropriately contemplated within the criteria [under DC 5260]," Appellant's pain did not cause functional loss to warrant a higher rating under 38 C.F.R. §§ 4.40 and 4.45. *See* (R. at 11 (2-13)); *Mitchell*, 25 Vet.App. at 33, 43; *see also Caluza,* 7 Vet.App. at 506. Appellant's argument is nothing but a disagreement with the Board's factual finding. However, in light of the Board's thorough analysis and reliance on several VA examinations, such

disagreement is unavailing as an allegation of error. *See Owens v. Brown,* 7 Vet.App. 429, 433 (1995) (holding that the Board's assessment of the weight to be accorded evidence will be overturned only if it is clearly erroneous).

B. The Board Was Not Clearly Erroneous in Relying on the November 2016 VA Opinion

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. 120, 123 (2007). "A medical examination report must contain not only clear conclusions with supporting data, but also a reasoned medical explanation connecting the two." *Nieves-Rodriguez v. Peake,* 22 Vet.App. 295, 301 (2008).

To be adequate to inform the Board's decision regarding musculoskeletal disabilities with LOM, medical examinations must take into account functional loss due to pain, including losses experienced during a flare-up. *DeLuca v. Brown*, 8 Vet.App. 202, 206-07 (1995); 38 C.F.R. § 4.40; *accord* 38 C.F.R. § 4.45(a)-(e). Specifically, the examiner must "express an opinion on whether pain could significantly limit functional ability during flare ups or [on repetitive use] over a period of time," and the examiner's determination in that regard "should, if feasible,

be portrayed in terms of the degree of additional range-of-motion loss due to pain on use or during flare-ups." *DeLuca*, 8 Vet.App. at 206 (internal quotation marks omitted).

Here, the November 2016 VA opinion was the product of "all assembled and procurable data" because the examiner performed an in-person examination and reviewed Appellant's medical history. (R. at 95-97 (95-118)); *see Jones v. Shinseki*, 23 Vet.App. 382, 390 (2010). In his retrospective medical opinion, the examiner directly opined that standards for rating had changed over the past years; for instance, measurement of passive ROM has "come, gone, and come back again" and in past, examiners have been required to note at what number of degrees ROM pain occurs but at other times, 'yes' or 'no' answers have sufficed. (R. at 100 (95-118)). He explained that therefore, "[i]t would be mere speculation for **any medical provider** to 'fill in the blanks' so far as missing information from the 2008, 2009 and 2010 exams for rating is concerned." *Id.* (emphasis added). He also added that rendering an opinion on what Appellant's ***retrospective ROM would have been*** in today's rating criteria would "not be medically valid **for any provider**." *Id*. (emphasis added). The examiner then listed Appellant's ROM, at what point pain started in ROM, additional loss of motion after repetitions, and functional loss due to pain as reported in the February 2008, August 2009, and April 2010 VA examinations. *Id*. at 101-02.

Appellant's allegation of inadequacy, (App. Br. at 18-20), rests on his argument that the examiner did not provide a retrospective opinion about "what [his] functional loss would be during a flare-up occurring within the appeal period." *Id.* at 18. This argument is unpersuasive. Under *Sharp v. Shulkin*, an examiner must "obtain information about the severity, frequency, duration, precipitating and alleviating factors, and extent of functional impairment of flares from the veteran[]," and "offer [a] flare opinion[] based on [an] estimate[] derived from information procured from relevant sources, including the lay statements of [the] veteran[]." 29 Vet.App. 26, 34-35 (2017). However, this Court explained that when an examiner concludes that an opinion cannot be provided without resorting to speculation, "it must be clear that this is predicated on a lack of knowledge among the "medical community at large" and not the insufficient knowledge of the specific examiner." *Id.* at 35-36; *see also Jones*, 23 Vet.App. at 390.

In compliance of *Sharp* and *Jones*, here, the November 2016 VA examiner specifically recorded Appellant's descriptions of his pain during flare-up and repetitive motion during his previous VA examinations, the frequency and duration of those manifestations, and the extent to which they interfered with or precluded his various activities. (R. at 95-97, 101-02 (95-118)). Specifically, the November 2016 VA examiner noted Appellant's reports from his February 2008 VA examination that he had

flare-ups every 1-2 weeks, with moderate pain, lasting all day, and that Appellant's own impression on extent of effects from flare-ups was that they caused a significant limp, slowed him down, and limited walking. *Id.* at 95-97. Similarly, the examiner noted that in Appellant's August 2009 VA examination, he reported severe flare-ups which occurred which occurred two to three times per week and lasted 24-48 hours. *Id.* at 97. Therefore, the examiner summarized that Appellant's functional loss due to pain in his February 2008 VA examination was that it decreased walking, the functional loss in his August 2009 VA examination was that it decreased walking and standing, and in April 2010, there was no functional loss noted. *Id.* at 102. After considering such data, the examiner explained that "[i]t would be mere speculation for any medical provider to 'fill in the blanks' so far as missing information from the 2008, 2009 and 2010 exams for rating is concerned" because rendering an opinion on what Appellant's retrospective ROM would have been in today's rating criteria would "not be medically valid for **any provider**." *Id.* at 100 (emphasis added). Further, while on Appellant's contemporaneous examination, the examiner did comment that flare-ups were "[n]ot observed," *id.* at 111, Appellant fails to show how this is relevant to determine his disability level from *January 2008 to April 2010*, the issue on appeal, and as to which the examiner opined much earlier, in his retrospective opinion. *Id.* at 95-102. *See* (App. Br. at 18-20) (relying on "R-111" to argue that the November 2016 VA

examination was inadequate because of the examiner's comment that flare-ups were not observed); *Hilkert*, 12 Vet.App. at 151. Appellant's attempts to confuse this Court regarding the November 2016 VA examiner's two separate opinions--one as to Appellant's current disability and the other as to his retrospective disability--should be rejected by this Court. *Compare* (R. at 95-102 (95-118)) (retrospective opinion) *with id.* at 103-18 (contemporaneous examination).

It is clear that, in opining retrospectively on Appellant's disability from January 2008 to April 2010, the examiner considered all procurable and assembled data, the severity, frequency, duration, and extent of functional impairment of flare-ups *as reported by Appellant*, and that his subsequent comment on speculation was based not on insufficient knowledge or lack of expertise, but on a "lack of knowledge among the "medical community at large." *Sharp*, 29 Vet.App. at 34-36 ("The critical question in assessing the adequacy of an examination not conducted during a flare is whether the examiner was sufficiently informed of and conveyed any additional or increased symptoms and limitations experienced during flares."); *Jones*, 23 Vet.App. at 390; *see also DeLuca*, 8 Vet.App. at 206. Consequently, the November 2016 VA examination complied with the parties' August 2016 JMR, and the Board's reliance on the examination was not clearly erroneous. *See* (R. at 168-74); *Nieves-Rodriguez,* 22 Vet.App. at 301; *D'Aires*, 22 Vet.App. at 105; *Stefl,* 21

Vet.App. at 123. Appellant's arguments are unavailing and must be rejected.

In light of the Board's thorough analysis, and three contemporaneous and one retrospective VA examination to determine Appellant's disability from January 2008 to April 2010, vacating and remanding the Board's decision would serve no purpose, except to perpetuate the "hamster wheel" reputation of veterans' benefits law. *Massie v. Shinseki*, 25 Vet.App. 125, 128 (2011); *see Allen v. Nicholson*, 21 Vet.App. 54, 62 (2007) (holding that "judicial review of agency's action should not be converted into a 'ping-pong game' where remand is 'an idle and useless formality'" (quoting *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766 (1969))).

The Secretary has limited his response to only those arguments raised by Appellant in his brief, and, as such, urges this Court to find that Appellant has abandoned all other arguments not specifically raised in his opening brief. *See Norvell v. Peake,* 22 Vet.App. 194, 201 (2008). The Secretary, however, does not concede any material issue that the Court may deem Appellant adequately raised and properly preserved, but which the Secretary did not address, and requests the opportunity to address the same if the Court deems it to be necessary.

IV. CONCLUSION

In view of the foregoing arguments, Appellee, the Secretary of Veterans Affairs, respectfully requests that the Court affirm the May 2017 Board decision.

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