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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 16-3203

BARRY D. COOPER, 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, Barry D. Cooper, served in the U.S. Navy from September 1970 to October 1982 and from April 1983 to April 1990. Record (R.) at 188-92. He appeals, through counsel, an August 17, 2016, Board of Veterans' Appeals (Board) decision that denied entitlement to initial ratings in excess of 20% for a service-connected low back disability and in excess of 10% for a service-connected left knee disability, and denied entitlement to a total disability rating based on individual unemployability (TDIU). R. at 1-38. 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 August 17, 2016, decision and will remand the matter for further proceedings consistent with this decision.

I. ANALYSIS

A. Low Back Disability Rating

The appellant argues that the Board failed to adequately explain its determination that a higher rating for his low back disability was not warranted, as the Board relied on a September 2015 VA examination report that failed to account for functional loss during flare-ups. Appellant's

Brief (Br.) at 9-13. He also contends that the Board misinterpreted the term "functional loss" to include only lost range of motion shown on VA examination. *Id.* at 13-15. The Secretary concedes that remand is required for the Board to obtain an adequate medical opinion discussing whether the appellant experiences additional functional loss or limitation of motion during flare-ups as a result of pain from his service-connected low back disability. Secretary's Br. at 14-16.

According to the September 2015 VA examination report in question, the examiner stated that she was unable to opine without resorting to mere speculation whether pain, weakness, fatigability, or incoordination significantly limited functional ability during flare-ups. R. at 129. She stated that, as there was no "current scientific way . . . based on [her] experience and clinical acumen [] to objectively measure or evaluate the degrees of additional [range of motion] loss due to pain on use or during the [appellant's] experienced 'flare-ups', . . . any attempt to provide this data would be mere speculation." *Id.* As the parties note, the examiner did not adequately address why she could not render an opinion regarding functional loss by addressing evidence in the record, as her only stated reason was that any attempt to estimate would be speculative based on her experience. *See* Reply Br. at 1-2, Secretary's Br. at 14-16.

Under *DeLuca v. Brown*, a medical examiner must provide an opinion regarding the additional functional limitation, if any, of a disability during flare-ups and estimate the functional limitation during flare-ups or explain why an estimate cannot be provided. 8 Vet.App. 202, 206-07 (1995). "Before the Board can rely on an examiner's conclusion that an etiology opinion would be speculative, the examiner must explain the basis for such an opinion or the basis must otherwise be apparent in the Board's review of the evidence." *Jones v. Shinseki*, 23 Vet.App. 382, 389 (2010); *see also Sharp v. Shulkin*, 29 Vet.App. 26, 32 (2017) (applying *Jones* and *DeLuca* and finding an examination inadequate because the examiner failed to estimate the possible functional limitation during flare-ups). In this case, the Court agrees with the parties that a remand is required for the Board to obtain an adequate medical opinion that complies with the Court's holdings in *DeLuca* and *Jones*.

In light of this outcome, the Court will not address the appellant's remaining argument concerning the Board's denial of a higher rating for his low back disability. *See Best v. Principi*, 15 Vet.App. 18, 20 (2001) (noting that the factual and legal context 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.").

B. Left Knee Disability Rating

The appellant argues that the Board misinterpreted diagnostic code (DC) 5257 to require objective evidence of knee instability and inadequately explained why it rejected favorable lay evidence when it denied a separate rating for instability. Appellant's Br. at 15-18; 38 C.F.R. § 4.71a, DC 5257(2017). The Secretary responds that the Board provided an adequate statement of reasons or bases to support its determination, as the Board explained that the appellant's subjective reports of instability were inconsistent with objective findings noted in VA examination reports from April 2009, September 2012, and September 2015. Secretary's Br. at 6-9.

In support of its decision, the Board must include a written statement of reasons or bases for its findings and conclusions on all material issues of fact and law; this statement must be adequate to enable the appellant to understand the precise basis for the Board's decision and to facilitate informed review by this Court. 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995). The Board must analyze the credibility and probative value of the evidence, account for its persuasiveness, and provide reasons for rejecting 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); *see Thompson v. Gober*, 14 Vet.App. 187, 188 (2000) (holding that the Board must provide an adequate statement of reasons or bases "for its rejection of any material evidence favorable to the claimant").

Diagnostic Code 5257 pertains to "[r]ecurrent subluxation or lateral instability" of the knee. 38 C.F.R. § 4.71a, DC 5257. The evaluation depends upon the severity of the subluxation or instability. A VA General Counsel Precedent Opinion authorizes a separate rating for knee instability under DC 5257 even if a claimant is already receiving a compensable rating for arthritis of the knee under a different DC. VA Gen. Coun. Prec. 23–97 (July 1, 1997).

In finding that a separate rating for knee instability was not warranted in this case, the Board stated:

> The [appellant] has given subjective reports about his right knee "giving out" or similar statements indicating left knee instability or subluxation. He is competent to report such symptoms. However, the Board does not find his reports convincing as they are not consistent with the clinical findings of record . . . . The presence of

> instability and subluxation can be detected on objective testing, such as joint stability tests.

R. at 28.

The Board then noted that VA examination reports from April 2009, September 2012, and September 2015 did not confirm symptoms of subluxation or instability of the knee. *Id.*

Although the Board acknowledged the appellant's subjective complaints of left knee instability and found him competent to report that his knee was unstable, the Board offered a confusing explanation as to why the medical evidence showing a lack of instability or subluxation outweighed the competing lay evidence of record. *See id.* The Board stated that the appellant's lay reports were not "convincing" because they were "not consistent with the clinical findings of record." *Id.* It is not clear whether the Board intended to find that the appellant was simply not credible in his reports of knee instability and accordingly reject the lay evidence entirely, or instead find that the medical evidence outweighed his credible lay reports. *See Dalton v. Nicholson*, 21 Vet.App. 23, 41 (2007) (holding that, when lay evidence is submitted, a credibility determination is "necessary" and the Board acts "prematurely" when it decides a case without assessing the credibility of the claimant's lay statements).

Additionally, although the Board did not explicitly require objective medical evidence of subluxation or instability to meet the requirements for a separate rating under DC 5257, it seemed to implicitly require such evidence, given that the only basis it provided for rejecting the lay evidence was its inconsistency with the medical evidence. R. at 28. The Board stated that the medical evidence was highly persuasive because it was objective and reflected the examiners' medical expertise. *Id.* However, this reasoning appears to be incompatible with the Board's finding that the appellant was competent to report that his knee was unstable, as this type of lay observation did not require medical expertise. *Id.* Further, the Board was not permitted to summarily reject otherwise competent and credible lay evidence solely because it was not "objective" in nature. *See* 38 U.S.C. § 5107(b) (requiring the Secretary to "consider all information and *lay* and medical evidence of record in a case" (emphasis added)); *Buchanan v. Nicholson*, 451 F.3d 1331, 1335 (Fed. Cir. 2006) (explaining that "lay evidence is one type of evidence that must be considered, if submitted, when a veteran's claim seeks disability benefits" and holding that, in certain situations, "competent lay evidence can be sufficient in and of itself" to establish entitlement to such benefits).

The Board's failure to adequately explain whether it found the appellant's lay reports to lack credibility or how it otherwise weighed the competing evidence of record prevents the appellant from understanding the precise basis for the Board's rejection of the favorable lay evidence of instability and frustrates judicial review of this issue. *See Allday*, 7 Vet.App. at 527; *Caluza*, 7 Vet.App. at 506. The Court therefore concludes that the Board provided inadequate reasons or bases for denying a separate rating under DC 5257 and that a remand is warranted. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998).

C. Entitlement to TDIU

As the adjudication of the appellant's increased initial rating claims for his low back and left knee disabilities could significantly impact the disposition of whether he is entitled to TDIU, the Court holds that the claims are inextricably intertwined. *See Harris v. Derwinski*, 1 Vet.App. 180, 183 (1991) (holding that, where a decision on one issue could have a "significant impact" on another, the two claims are inextricably intertwined), *overruled on other grounds by Tyrues v. Shinseki*, 23 Vet.App. 166 (2009) (en banc), *aff'd*, 631 F.3d 1380, 1383 (Fed. Cir. 2011), *vacated and remanded for reconsideration*, 132 S.Ct. 75 (2011), *modified*, 26 Vet.App. 31 (2012) (en banc). Accordingly, the Court will vacate and remand the Board's decision.

On remand, the appellant is free to submit additional evidence and argument 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 must proceed expeditiously, in accordance with 38 U.S.C. § 7112 (requiring the Secretary to provide for "expeditious treatment" of claims remanded by the Court).

II. CONCLUSION

After consideration of the parties' briefs and a review of the record, the Board's August 17, 2016, decision is VACATED, and the matter is REMANDED for further proceedings consistent with this decision.

DATED: March 23, 2018

Copies to:
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