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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 17-0448

JOHN E. STOGDEN, APPELLANT,

v.

ROBERT L. WILKIE,
ACTING 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, John E. Stogden, through counsel appeals a January 5, 2017, Board of Veterans' Appeals (Board) decision that denied entitlement to separate disability ratings for instability of the right and left knees prior to September 14, 2013, and initial disability ratings in excess of 10% for the right and left knees prior to September 14, 2013. Record (R.) at 1-17. The Board also remanded the appellant's claims for entitlement to initial disability ratings in excess of 10% for the right and left knees from September 14, 2013. R. at 13-15. 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).

The appellant limits his arguments on appeal to the Board's decision denying entitlement to separate disability ratings for instability of the right and left knees prior to September 14, 2013, and declining to refer his claims for disability ratings in excess of 10% for the right and left knees prior to September 14, 2013, for extraschedular consideration. *See* Appellant's Brief (Br.) at 1-15; Reply Br. at 1-7. Therefore, the Court finds that he has abandoned his appeal as to the denial of disability ratings in excess of 10% for the right and left knee disabilities prior to September 14,

2013, on a schedular basis. The Court will dismiss the appeal as to the abandoned issues. *See Pederson v. McDonald*, 27 Vet.App. 276, 285 (2015) (en banc) (holding that, where an appellant abandons an issue or claim, the Court will not address it).

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). Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the following reasons, the Court will vacate the Board's January 5, 2017, decision denying entitlement to separate disability ratings for instability of the right and left knees prior to September 14, 2013, including the Board's refusal to refer his claims for disability ratings in excess of 10% for the right and left knees prior to September 14, 2013, for extraschedular consideration, and remand the vacated matters for further proceedings consistent with this decision.

I. BACKGROUND

The appellant served on active duty in the U.S. Navy from April 1987 to April 2007. R. at 1450-53, 1573. In February 2007, the appellant filed for disability compensation, including for bilateral knee osteoarthritis. R. at 1581.

In May 2007, the appellant underwent a VA examination. R. at 1442-49. The appellant reported a normal gait with no functional limitations with standing or walking. R. at 1444. He described "an achy type of pain and stiffness" but denied any "swelling, heat, redness, weakness, instability, giving way[,] locking, or lack of endurance. *Id.* Additionally, the appellant stated that he "occasionally uses a brace on both knees, but [stated that] the brace makes the knees feel tighter and [that he] often . . . does not keep the brace on for the entire day." *Id.* Physical examination revealed normal posture and gait with no ambulatory aids or assistive devices and normal range of motion with no pain on motion. R. at 1445, 1448. Joint stability testing yielded negative results for anterior and posterior drawer signs and normal McMurray's testing. R. at 1448. The examiner diagnosed the appellant with bilateral knee strain. R. at 1449.

In October 2007, a VA regional office (RO) granted disability compensation for multiple disabilities, including for right and left knee disabilities, which were both rated noncompensable, effective May 1, 2007. R. at 1416-35. The appellant perfected his appeal of this decision. R. at 1269-70 (Substantive Appeal), 1271-1309 (Statement of the Case), 1405-06 (Notice of Disagreement).

In September 2011, the appellant underwent another VA examination. R. at 1180, 1194-1207. The appellant reported, among other things, three episodes within the past year of his left knee giving out. R. at 1195. He also stated that he was "doing" physical therapy and received a "hinged brace" in August 2011. *Id.* Physical examination revealed normal results bilaterally for anterior, posterior, and medial-lateral instability, and there was no evidence or history of recurrent patellar subluxation or dislocation. R. at 1200-01.

In April 2013, the appellant testified at a Board hearing. R. at 1634-47. He stated that his knees had worsened since his last VA examination, reported "bouts" during which he fell, and disclosed that he twice had fallen down stairs. R. at 1644, 1646. In August 2013, the Board remanded the appellant's bilateral knee claims for further development. R. at 443-60. In September 2013, the appellant underwent another VA examination. R. at 427-31. The appellant reported increased pain in both knees and also that his left knee feels as though it "buckles at times," which he stated occurs a few times per week. R. at 428. Joint stability testing revealed normal results bilaterally with anterior, posterior, and medial-lateral instability, and there was no evidence or history of recurrent patellar subluxation or dislocation. R. at 430. Regular use of a brace for the left knee was noted. R. at 430-31.

In November 2013, the RO increased the appellant's left and right knee disability ratings to 10% each, effective September 13, 2013.¹ R. at 415-21. In September 2015, the Board denied entitlement to disability ratings in excess of 10% for the right and left knees both prior to and after September 14, 2013. R. at 362-92. The appellant appealed the Board's September 2015 decision, and the Court granted a Joint Motion for Partial Remand that remanded appellant's claims for a disability rating in excess of 10% for the right and left knee disabilities to determine whether separate disability ratings were warranted under 38 C.F.R. § 4.71a, Diagnostic Code (DC) 5257. R. at 40; *see* R. at 35-39.

On January 5, 2017, the Board issued the decision on appeal, which, among other things, denied entitlement to separate disability ratings for instability of the right and left knees prior to September 14, 2013, and declined to refer the claims for disability ratings in excess of 10% for the

¹ The Court notes that the RO assigned a 10% disability rating for each knee effective September 13, 2013, the date of the September VA examination, R. at 415, 422, but that the Board in its January 2017 decision identified the effective date of this increase as September 14, 2013, R. at 2-3. As the effective date of this award is not at issue here, the discrepancy is immaterial to this appeal.

right and left knees prior to September 14, 2013, for extraschedular consideration. R. at 3-12. This appeal followed.

II. ANALYSIS

The appellant argues that the Board misinterpreted the law by requiring objective clinical evidence of instability for the assignment of a separate disability rating under DC 5257 because the rating criteria do not speak to the type of evidence required and because the record contains competent lay evidence of knee instability. Appellant's Br. at 7. The appellant also contends that the Board failed to support with adequate reasons or bases its findings that (1) the probative value of the VA examinations outweighed the appellant's statements of instability and (2) there is "no factual basis for a separate rating for instability or recurrent subluxation." Appellant's Br. at 5, 9 (quoting R. at 12); Reply Br. at 1-2. The Secretary maintains that the Board did not require objective medical evidence for the assignment of a separate disability rating under DC 5257 but instead determined that the more probative evidence of record, the VA examinations, failed to support a finding of lateral instability or recurrent subluxation. Secretary's Br. at 10. The Secretary also asserts that the appellant has failed to point to any lay allegation or evidence of record of recurrent subluxation or lateral instability that the Board should have considered. Secretary's Br. at 9-10. Finally, the Court notes that the parties have also submitted arguments concerning the Board's refusal to refer the appellant's claims for disability ratings in excess of 10% for the right and left knees prior to September 14, 2013, for extraschedular consideration. *See* Appellant's Br. at 9-15; Reply Br. at 4-7; Secretary's Br. at 11-14.

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. *See* 38 U.S.C. § 7261(a)(4); *Smallwood v. Brown*, 10 Vet.App. 93, 97 (1997). 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.

Here, the Board reviewed the reports of the May 2007 and September 2011 VA examiners, as well as that of the September 2013 VA examiner. R. at 9-10, 12. The Board found that "the

objective findings fail to support assignment of a separate rating based on instability of either knee," R. at 10, elaborating as follows:

[F]or the period in question there is no support for assignment of a separate rating for instability of either knee. The [appellant] is competent to report unstable knees, and the Board acknowledges his statements, and use of a brace. However, the consistently normal results upon objective testing outweigh the [appellant's] statements as to the existence of a chronic disability manifested by instability involving either or both knees.

R. at 11. Finally, the Board concluded:

The [appellant's] subjective reports of instability notwithstanding, as earlier noted, the clinical evidence of record does not reflect that either knee has manifested with instability at any time during the initial rating period on appeal. The May 2007 examiner noted that there was some valgus in neutral in the medial and collateral ligaments. However, the knees were normal at 30 degrees of flexion and anterior and posterior drawer signs were negative. Significantly, there was no indication of instability at the [appellant's] September 2011 examination. The VA examiner found no indication of instability at the [appellant's] September 2013 examination. Hence, the Board finds no factual basis for a separate rating for instability or recurrent subluxation [under DC 5257].

R. at 12.

The Court agrees with the appellant that the Board provided inadequate reasons or bases for its evidentiary findings. Appellant's Br. at 5, 9; Reply Br. at 1-2. Although it found the appellant competent to report unstable knees, the Board concluded that the normal results from objective testing of instability "outweigh[ed]" his statements of instability. R. at 11. Additionally, the Board, while acknowledging the appellant's statements of instability, found that the "clinical evidence" did not "reflect that either knee has manifested with instability" during the period on appeal and that there was "no factual basis for a separate rating for instability or recurrent subluxation." R. at 12. However, as the appellant contends, the Board rendered these findings without explicitly addressing the appellant's statements of instability, including his report of knee brace use during the May 2007 VA examination, his report of the left knee giving out three times during 1 year and use of a hinged knee brace during the September 2011 VA examination, his report that he had fallen down stairs twice during the April 2013 Board hearing, and his report of left knee buckling and regular use of a left knee brace during the September 2013 VA examination. Appellant's Br. 7-8; Reply Br. at 3; *see* R. at 428, 431, 1195, 1444, 1646. Because the Board found the appellant competent to report knee instability, the Board's evidentiary findings are unsupported by sufficient reasons or bases to understand why it assigned greater probative value to the VA examinations and

why there was no factual basis for the assignment of a separate disability rating considering the appellant's competent, and presumably credible, statements of knee instability.² *See Allday*, 7 Vet.App. at 527; *see also* 38 U.S.C. § 7104(d)(1); *Gilbert*, 1 Vet.App. at 56-57.

The Secretary's argument that the appellant failed to identify any evidence of record of recurrent subluxation or lateral instability lacks merit, as shown above. Additionally, the Secretary's remaining arguments concerning the denial of a separate rating amount to 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.").

Additionally, the appellant presents arguments with respect to the Board's decision not to refer his claim for consideration of an extraschedular rating. However, given that the schedular rating for the appellant's knee disabilities will be readjudicated, the Court will not, at this time, address any perceived errors in the Board's extraschedular analysis because the first step in analyzing whether referral for extraschedular consideration is warranted necessarily requires "a comparison between the level of severity and symptomatology of the [appellant's] service-connected disability with the established criteria found in the rating schedule for that disability." *Thun v. Peake*, 22 Vet.App. 111, 115 (2008), *aff'd sub nom. Thun v. Shinseki*, 572 F.3d 1366 (Fed. Cir. 2009); *see Barringer v. Peake*, 22 Vet.App. 242, 243 (2008); *Henderson v. West*, 12 Vet.App. 11, 20 (1998) ("[W]here a decision on one issue would have a significant impact upon another, and that impact in turn could render any review by this Court of the decision on the other [issue] meaningless and a waste of judicial resources, the two [issues] are inextricably intertwined." (internal quotation marks and alterations omitted)).

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*,

² Notably, the Board did not assess the credibility of the appellant's lay statements of knee instability.

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 arguments regarding the Board's refusal to refer for extraschedular consideration the claims for disability ratings in excess of 10% for the right and left knees prior to September 14, 2013, 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

The appeal of the Board's January 5, 2017, decision denying disability ratings in excess of 10% for the right and left knee disabilities prior to September 14, 2013, on a schedular basis is **DISMISSED**. After consideration of the parties' pleadings and a review of the record, the Board's decision denying separate disability ratings for instability of the right and left knees prior to September 14, 2013, including the Board's refusal to refer his claims for disability ratings in excess of 10% for the right and left knees prior to September 14, 2013, for extraschedular consideration, is **VACATED**, and the matters are **REMANDED** for further proceedings consistent with this decision.

DATED: April 9, 2018

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