REPLY BRIEF OF APPELLANT

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

17-2083

LARRY E. ENGLISH,

Appellant,

v.

ROBERT L. WILKIE,
ACTING SECRETARY OF VETERANS AFFAIRS,

Appellee.

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APPELLANT'S REPLY ARGUMENTS

I. The Board misinterpreted and misapplied the law and failed to comply with the Court's remand order when it denied a higher rating based on instability or based on functional loss.

a. The Board erroneously required objective evidence to grant a rating under DC 5257 and failed to provide adequate reasons and bases for its denial.

The parties to the August 2016 Joint Motion for Remand agreed that "[t]he Board . . . did not state why Appellant's statements were not sufficient to support a rating under DC 5257; the parties note that DC 5257 does not state that objective evidence is required to satisfy that DC's criteria and there was no assessment of the Appellant's credibility with regard to his statements about instability." R-171. Despite the parties' agreement, the Board again failed to explain why Mr. English's statements regarding his right knee instability did not amount to evidence that would provide for compensation under DC 5257. R-1-13.

The Board's reasoning for denying a rating under DC 5257 was that "even if the Veteran sincerely believes that his knee experiences stability [sic], instability itself can be tested for and diagnosed." R-10. The Secretary contends that "[t]he Board was required only to substantially comply with this JMR." Secretary's Br. at 9. He alleges that the Board did so by finding "that compared to Appellant's lay assertions of knee instability, several VA medical examinations found no instability in physical examination." *Id.* This is unpersuasive.

The Board found "the objective testing reflecting no instability or subluxation, more probative than the Veteran's lay statements in this regard." R-10. But the Board's determination that the Veteran's competent and credible lay statements were less probative was based solely on the fact that there was no objective medical evidence supporting the Veteran's statements. *Id.* This was inappropriate. *Petitti v. McDonald,* 27 Vet.App. 415, 427 (2015) (Where "[t]he regulation does not speak to the type of evidence required . . . [it] certainly does not, by its own terms, restrict evidence to 'objective' evidence."). And lay evidence is not inherently less credible than objective medical evidence. *See Caluza v. Brown*, 7 Vet.App. 498, 511 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table) (holding that the credibility of a witness can be impeached "by a showing of interest, bias, inconsistent statements, or, to a certain extent, bad character").

The Secretary contends that because the Board found that the VA examinations did not reveal objective evidence of instability, "the Board was not required to further determine whether Appellant was credible or competent to report instability." Secretary's Br. at 10. He adds that "[e]ven assuming credibility, in light of the 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." *Id.*

But the Secretary fails to truly consider the terms the August 2016 JMR. The JMR noted that "there was no assessment of the Appellant's credibility with regard to

his statements about instability." R-171. The parties agreed that in "remanding the matter for re-adjudication consistent with the content of this motion, applicable statutory and regulatory provisions" should be considered. R-173. The Court remanded the matter "for action consistent with the terms of the joint motion." R-174.

The Board's failure to make clear "why Appellant's statements were not sufficient to support a rating under DC 5257" violated the JMR. R-171. Further, the Board's decision that Mr. English's statements were less probative than objective testing completed during the VA examinations relies solely on the lack of objective testing to support Mr. English's statements. *Id.* Again, this is inappropriate because Mr. English's statements should have been considered independently from the objective medical evidence. *Petitti,* 27 Vet.App. at 427.

Contrary to the Secretary's assertion, the Veteran does not merely disagree with how the Board weighed the evidence because the Board did not truly weigh the Veteran's lay statements *at all.* Secretary's Br. at 10-11. Rather, as Mr. English argued in his opening brief, "[t]he Board failed to explain why the Veteran's lay reports that his knee gave way were not sufficient to establish recurrent lateral stability, as required by the DC 5257." Appellant's Br. at 13. This was required by both the August 2016 JMR and 38 U.S.C. § 7104(d)(1) (2017).

The Board's conclusion that Mr. English's statements were not sufficient because objective evidence did not support his statement is unsubstantiated. R-10.

The record made clear that Mr. English at least suffered slight recurrent instability. R-1104; R-1322; Appellant's Br. at 14. Had the Board considered this evidence independently of the VA examinations, and whether the Veteran's lay statements alone showed instability, Mr. English may have been rated under DC 5257. *Wagner v. United States*, 365 F.3d 1358, 1365 (Fed. Cir. 2004) ("Where the effect of an error on the outcome of a proceeding is unquantifiable, however, we will not speculate as to what the outcome might have been had the error not occurred."). For this reason, remand is appropriate in order for the Board to comply with the August 2016 JMR and to provide adequate reasons and bases for its determination. *See Tucker v. West,* 11 Vet.App. 369, 374 (1998) ("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, a remand is the appropriate remedy.").

b. The Board failed to analyze whether the Veteran's functional loss more nearly approximated a higher rating for the time period from January 15, 2008 and April 14, 2010.

The Secretary also contends that there is "ample explanation" regarding Mr. English's functional loss from his right knee disability. Secretary's Br. at 11. He recognizes that the Veteran "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," but he argues that these symptoms were addressed by the Board's decision. *Id.* at 11-12. However, as noted in the Appellant's brief, the Board failed to adequately address Mr. English's right knee pain on walking and standing, weakness, decreased speed of

joint motion, limited flexibility, and popping. R-1-13; Appellant's Br. at 14-17. The Secretary's conclusion that the Board's analysis considered these various forms of functional loss is incorrect.

The Board did "acknowledge[ ] [Appellant's] functional limitations on standing, walking, and the effect on his occupation due to the pain associated with his right knee disability." R-11. However, the Board inaccurately linked these symptoms of functional loss solely to pain and found "pain alone does not constitute a functional loss under the VA regulations that evaluate disability based upon range-of-motion loss." *Id.*

Contrary to the Board's finding, and to the Secretary's repetition of that finding, the evidence shows that Mr. English's right knee causes "'[w]eakened movement,' '[e]xcess fatigability,' '[i]ncoordination,' 'disturbance of locomotion,' and 'interference with sitting, standing and weight-bearing.'" Appellant's Br. at 16. The Secretary argues that the Board found that "limited mobility/decrease range of motion is appropriately contemplated within the criteria." Secretary's Br. at 11. However, this finding does not consider all of the listed symptoms of functional loss noted within the record. R-1104; R-1321-22.

The Veteran's contention is more than "a disagreement with the Board's factual finding." Secretary's Br. at 12. Instead, the Veteran contends that the Board failed to analyze whether Mr. English's functional loss approximated a higher rating during the time period between January 15, 2008 and April 14, 2010. Appellant's Br. at 14. In

fact, the Board made a finding of fact that "prior to April 15, 2010 the Veteran's patellofemoral syndrome of the right knee was manifested by subjective complaints of pain, stiffness, weakness, decreased speed, and limited flexibility." R-4.

However, the Board did not consider whether all of these functional limitations warranted a higher rating. The Board's analysis focused solely on functional loss due to *pain*. R-11. This is not the proper analysis of Mr. English's claim. Appellant's Br. at 1 (citing *DeLuca v. Brown*, 8 Vet.App. 202, 208 (1994); *see Buczynski v. Shinseki*, 24 Vet.App. 221, 224 (2011)). Had the Board considered the full spectrum of Mr. English's functional limitations caused by his right knee, it may have compensated Mr. English at a higher rating. *See Wagner*, 365 F.3d at 1365. By failing to adequately consider the Veteran's functional loss, the Board erred and remand is therefore required. *See Tucker,* 11 Vet.App. at 374.

II. The Board failed to comply with the duty to assist when it relied on an inadequate November 2016 VA examination, as the examiner did not comply with *Sharp*.

The Secretary contends that "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." Secretary's Br. at 14 (citing R-95-97; *Jones v. Shinseki,* 23 Vet.App. 382, 390 (2010)). However, the examiner failed to provide his own opinion about what the Veteran's functional loss would be during a flare-up occurring within the appeal period.

The examiner's lamentation about the changing standards for rating an orthopedic disability is irrelevant to the question he was asked: "the past level of severity" of the Veteran's right knee disability. R-100. And it is likewise unclear why the Secretary now relies on the examiner's complaint. Secretary's Br. at 14. While he characterizes this complaint as a direct opinion, this is not persuasive. *Id.* Rather, the examiner explicitly took issue with his duties under *Sharp* and refused to answer a question that the Board needed to adjudicate the Veteran's claim. R-100

The Secretary relies on the VA examiner's explanation that "[t]he information is just not there, and we would be making guesses about things." Secretary's Br. at 14. But this is incorrect. The examiner was not requested to "fill in the blanks," R-100, he was requested to review the evidence in the record to provide a reasonable estimate based on his medical knowledge and experience. R-156-57.

Moreover, the examiner's opinion that *no provider* could provide missing information in the record does not satisfy his requirements under *Jones* and *Sharp.* Secretary's Br. at 15. Contrary to the Secretary's suggestion, the examiner did not opine that the "medical community at large" would never be able to provide a retrospective opinion on functional loss. *See id* (*citing v. Shulkin*, 29 Vet.App. 26, 34 (2017) and *Jones v. Shinseki*, 23 Vet.App. 382, 390 (2010)). Instead, he incorrectly opined that because range of motion measurements during flare-ups and on passive testing were not conducted in the past, there was no way to estimate those measurements. In other words, the examiner demonstrated a "general aversion to

offering opinion on issues not directly observed." *Sharp*, 29 Vet.App. at 33. Therefore, the Secretary's argument that this examiner's opinion complied with *Sharp* must fail. In *Sharp*, the Court explicitly "anticipated that examiners would need to estimate functional loss that would occur during flares." *Sharp*, 29 Vet.App. at 34; *see* Appellant's Br. at 19. Whether a flare-up took place in the past or is likely to take place in the future is irrelevant; the fact remains that an examiner may estimate functional loss despite not being to observe a flare-up at the time of examination. *Sharp*, 29 Vet.App. at 33.

In fact, the November 2016 examiner's own findings belie his contention that he was "missing information." R-100. The Secretary acknowledges that "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." Secretary's Br. at 16. This is precisely the information the examiner was meant to consider when making an estimate in degrees of range of motion and functional loss. *Sharp*, 29 Vet.App. at 34; R-156-57. While the Veteran may not be competent to estimate his precise range of motion loss, he is competent to describe his functional impairment which the examiner could then translate into an estimate. *Sharp*, 29 Vet.App. at 34

Finally, although counsel incorrectly cited to the November 2016 examiner's contemporaneous examination, this does not change the substance of the Veteran's

argument. *See* Secretary's Br. at 17; Appellant's Br. at 19. It remains true that the examiner "failed to make any attempt at estimating the Veteran's functional loss during a flare-up from all the evidence of record." Appellant's Br. at 19. As discussed above, the examiner avoided opining on the relevant question. And the fact that the examiner determined that it would be speculation to estimate functional loss during flare-ups in his contemporaneous opinion merely highlights his misunderstanding of his duties under *Sharp*. R-110-11. *See* 29 Vet.App. at 34. Nonetheless, counsel apologizes to the Court and to the Secretary for any inadvertent confusion this miscite may have caused. *See* Secretary's Br. at 17; *see also* Appellant's Br. at 18-20.

CONCLUSION

Mr. English is competent to report his feelings of right knee instability and the parties previously agreed the Board needed to consider the credibility of these lay statements. Rather than comply with this Court's prior remand order, the Board committed the same error by outright rejecting the Veteran's lay statements simply because they were not corroborated by objective medical evidence. But Diagnostic Code 5257 does not require objective evidence of instability and thus, the Board was required to analyze the credibility of the Veteran's lay statements and weigh that evidence in making its decision. Had the Board found the Veteran's statements credible, it may have found that he warranted at least a 10 percent rating for slight recurrent instability.

The Board also erred when it failed to adequately consider the Veteran's functional impairment for the time period from January 2008 to April 2010. Although the Veteran's range of motion measurements may not warrant a rating in excess of 10 percent, he may still be entitled to a higher rating if his right knee pain, weakness, incoordination, and excess fatigability more nearly approximate the functional equivalent of more limited range of motion. The Board provided no analysis besides summarily concluding that decreased range of motion was contemplated by a 10 percent rating.

Finally, the Board failed to comply with VA's duty to assist when it relied on an inadequate VA examination. Rather than comply with the Board's remand order and this Court's direction in *Sharp*, the examiner abdicated his medical responsibility. Contrary to the examiner's characterization, the Board did not request the examiner to fill in the blanks or make a guess. Instead, as discussed in *Sharp*, the examiner should have estimated the Veteran's functional loss based on his lay reports and the information provided in the previous VA examinations.

Based on the foregoing, as well as the arguments presented in the Veteran's opening brief, the Court should vacate the Board's decision and remand the Veteran's claim for the Board to properly apply the law, comply with VA's duty to assist, and provide adequate reasons or bases for its decision.

Respectfully submitted,

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