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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 17-0693

KARINA G. SANCHEZ, APPELLANT,

v.

ROBERT L. WILKIE,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before BARTLEY, *Judge*.

MEMORANDUM DECISION

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

BARTLEY, *Judge*: Veteran Karina G. Sanchez appeals, through counsel, a November 17, 2016, Board of Veterans' Appeals (Board) decision denying entitlement to a compensable evaluation for costochondritis. Record (R.) at 2-14. For the reasons that follow, the Court will set aside the November 2016 Board decision and will remand the matter for readjudication consistent with this decision.

I. FACTS

Ms. Sanchez served on active duty in the U.S. Army from October 2001 to July 2004. R. at 3324. In July 2004, the VA regional office (RO) granted service connection for, *inter alia*, costochondritis and assigned a noncompensable evaluation. R. at 3306-22. In January 2007, she sought an increased evaluation. R. at 2614. In September 2007, the RO denied entitlement to a compensable evaluation, R. at 2504, and Ms. Sanchez timely appealed, R. at 2418-19.

In February 2008, Ms. Sanchez reported chest pain and shortness of breath. R. at 4938. In October 2008, she reported chest wall muscle soreness. R. at 2410. In April 2009, she continued to experience chest pain and shortness of breath with constant burning, tingling, and stabbing pain. R. at 4126-27. Specifically, she experienced new bilateral midsternal chest pain associated with

body position and not exertion that occurred suddenly as an intense pressure then dissipated within seconds. R. at 4130. She received a trigger point injection in the right levator scapula/thoracic paraspinal muscles, R. at 4123, to treat, inter alia, right first rib syndrome and thoracic rib dysfunction and to assist with mobilization of right rib dysfunction to reduce midsternal pain. R. at 4131. The post-procedure examiner noted that the veteran "still has quite a bit of mechanical asymmetry" after in-service rib cage blunt trauma and that the prior trauma likely contributed to her right thoracic rib cage being more posterior than her left side with sternal tenderness and that she likely has mechanical restrictions of the thoracic rib cage with pain exacerbations with certain movements, especially deep inhalation and exhalation. R. at 4124.

In April 2010, Ms. Sanchez reported to a private emergency room with intermittent chest pain lasting 3 or 4 days, fatigue, and acute pain. R. at 1087-97. In March 2011, the RO issued a Statement of the Case continuing the noncompensable evaluation for costochondritis, R. at 2161, and the veteran timely appealed, R. at 2115-16. In February 2013, a VA examiner noted tenderness of the chest wall at about the ninth rib junction. R. at 596.

In April 2014, an examiner evaluated Ms. Sanchez's costochondritis using a muscle injury disability benefits questionnaire (DBQ). R. at 3466-80. The veteran reported a history of chest wall pain near the lower left side sternocostal junction with pain in the lateral floating rib, occasional pain with deep inspiration twice a month, sudden pain with deep inspiration, and continued pain in the floating rib. R. at 3467. The examiner diagnosed the veteran with a non-penetrating muscle injury in muscle group XXI, the thoracic muscle group, and noted normal muscle strength and no evidence of muscular atrophy. R. at 3469-70. The examiner determined that the veteran had no known pulmonary conditions and that the sporadic costochondrial pain did "not significantly limit[] respiration, chest wall expansion." R. at 3471.

In March 2015, Ms. Sanchez testified at a Board hearing that her costochondritis manifested with muscle spasms with severe pain that was treated with physical therapy with mobilization for four years. R. at 280-81. In June 2015, the Board issued a decision denying an increased evaluation for costochondritis. R. at 82-90. Ms. Sanchez appealed to this Court and, in June 2016, the Court vacated and remanded the matter pursuant to the parties' joint motion for partial remand. R. at 48, 43-47. The parties agreed that the Board provided inadequate reasons or bases because it failed to address the symptoms of shortness of breath during periods of pain and the April 2009 treatment note stating that the veteran likely would "experience mechanical

restriction of thoracic rib cage," and, though the Board concluded that she suffered no limitation of function of the chest, the April 2014 VA examiner noted that pain was "not significantly" limiting respiration and chest wall expansion. R. at 46.

In November 2016, the Board issued the decision on appeal denying entitlement to a compensable evaluation for costochondritis. R. at 2-15. Specifically, the Board noted that the rating schedule does not include criteria for an evaluation of costochondritis and determined that costochondritis may be rated analogously as a musculoskeletal disability under 38 C.F.R. § 4.71a or alternatively as a muscle disability under 38 C.F.R. § 4.73a. R. at 7-8. The Board concluded that "because of the similar anatomical location and symptomatology," "the most appropriate" Diagnostic Code (DC) for Ms. Sanchez's costochondritis was DC 5320 for muscle group XX, spinal muscles of the thoracic region. *Id.* The Board also considered DC 5297 for removal of ribs and determined that, because no lay or medical evidence demonstrated the removal of the ribs associated with service-connected costochondritis, the DC did not apply. R. at 13. This timely appeal followed.

II. JURISDICTION AND STANDARD OF REVIEW

Ms. Sanchez's appeal is timely and the Court has jurisdiction to review the November 2016 Board decision pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). Single-judge disposition is appropriate in this case. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990).

The Board's selection of a DC for the purposes of evaluating a service-connected condition is reviewed under the "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" standard of review. *Butts v. Brown*, 5 Vet.App. 532, 539 (1993) (en banc). As with any finding on a material issue of fact and law presented on the record, the Board must support its appropriate-DC determination with an adequate statement of reasons or bases that enables the claimant to understand the precise basis for that determination and facilitates review in this Court. 38 U.S.C. § 7104(d)(1); *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990). When assigning a DC by analogy for a disability not listed in the rating schedule, the Board's reasons-or-bases requirement is "heightened." *Suttmann v. Brown*, 5 Vet.App. 127, 134 (1993).

III. ANALYSIS

Ms. Sanchez argues that the Board provided inadequate reasons or bases for its determination that every manifestation of her costochondritis disability was contemplated by a noncompensable evaluation under DC 5320 and that extraschedular referral was not warranted. Appellant's Brief (Br.) at 6-14. The Secretary argues that the November 2016 Board decision provided adequate reasons or bases and urges the Court to dismiss the appeal. Secretary's Br. at 6-27.

Service-connected disabilities are evaluated using the criteria set forth in VA's schedule for rating disabilities. *Buczynski v. Shinseki*, 24 Vet.App. 221, 223 (2011). When a condition is specifically listed in the rating schedule, VA must apply the DC that specifically pertains to the listed condition to determine the appropriate disability evaluation. *Copeland v. McDonald*, 27 Vet.App. 333, 337 (2015). On the other hand, when a condition is unlisted, VA evaluates disabilities by analogizing them to listed disabilities. *Lendenmann v. Principi*, 3 Vet.App. 345, 351 (1992); *see* 38 C.F.R. § 4.20 (2018). Unlisted conditions should be rated "under a closely related disease or injury in which not only the functions affected, but the anatomical localization and symptomatology are closely analogous." 38 C.F.R. § 4.20.

Except as otherwise provided in the rating schedule, all disabilities, including those arising from a single disease entity, are to be evaluated separately. 38 C.F.R. § 4.25(b) (2018). However, "[t]he evaluation of the same disability under various diagnoses," a practice called pyramiding, "is to be avoided." 38 C.F.R. § 4.14 (2018). The rationale for the prohibition on pyramiding is that "the rating schedule may not be employed as a vehicle for compensating a claimant twice (or more) for the same symptom[s]; such a result would overcompensate the claimant for the actual impairment" suffered. *Brady v. Brown*, 4 Vet.App. 203, 206 (1993); *see Amberman v. Shinseki*, 570 F.3d 1377, 1380 (Fed. Cir. 2009) ("VA regulations caution against making multiple awards for the same physical impairment simply because that impairment could be labeled in different ways."). When determining whether separate evaluations are warranted, "[t]he critical element is that none of the symptom[s] for any . . . conditions is duplicative of or overlapping with the symptom[s] of the other . . . conditions." *Esteban v. Brown*, 6 Vet.App. 258, 262 (1994). In other words, "[i]f the appellant's symptoms are 'distinct and separate,' then the appellant is entitled to separate disability ratings for the various conditions." *Murray v. Shinseki*, 24 Vet.App. 420, 423 (2011) (quoting *Esteban*, 6 Vet.App. at 262).

VA evaluates all muscle disabilities pursuant to 38 C.F.R. § 4.56. The "cardinal signs and symptoms" of muscle disabilities are loss of power, weakness, lowered threshold of fatigue, fatigue-pain, impairment of coordination, and uncertainty of movement. 38 C.F.R. § 4.56(c) (2018). A slight muscle injury, evaluated as noncompensable, is a simple wound of muscle without debridement or infection that displays no cardinal signs or symptoms of muscle disability; a minimal scar; no evidence of fascial defect, atrophy, or impaired tonus; and no impairment of function or metallic fragments retained in the muscle tissue. 38 C.F.R. §§ 4.56(d)(1), 4.73. A moderate muscle disability is a through and through or deep penetrating wound without residuals of debridement or prolonged infection that displays one or more of the cardinal signs and symptoms of muscle disability, particularly lowered threshold of fatigue after average use; and objective findings will include entrance or exit scars; some loss of deep fascia or muscle substance; impairment of muscle tonus and loss of power; or a lowered threshold of fatigue when compared to the sound side. 38 C.F.R. § 4.56(d)(2).

In its November 2016 decision of appeal, the Board noted that the rating schedule does not include criteria for costochondritis and that rating by analogy was appropriate. R. at 7-8. The Board defined costochondritis as an "inflammation and associated tenderness of the cartilage (i.e., the costochondral joints) that attached the front of the ribs to the breastbone" and determined that the condition may be rated as a musculoskeletal disability or a muscle disability. R. at 8 (quoting GALE ENCYCLOPEDIA OF MEDICINE (4th ed. 2010) (internal quotations omitted)). The Board concluded that "[a]s such, the most appropriate" DC for Ms. Sanchez's costochondritis is 5320, for muscle group XX, spinal muscles of the thoracic regions, "because of the similar anatomical location and symptomatology." *Id.*

The Court finds that the Board failed to satisfy its obligation to provide heightened reasons or bases for its determination that DC 5320 is the most appropriate DC for evaluating the veteran's unlisted condition, costochondritis, in several regards. *See Suttman*, 5 Vet.App. at 134. The Board's determination that muscle group XX, thoracic spinal muscles, was a similar anatomical location to costochondritis is contrary to the evidence of record. In April 2014, a VA medical examiner identified muscle group XXI, muscles of respiration and thoracic muscle group, as the muscle group that affects Ms. Sanchez's service-connected costochondritis. R. at 3468. The Court notes that VA evaluates group XXI muscle injuries under DC 5321, not DC 5320. 38 C.F.R. § 4.73, DCs 5320, 5321. To the extent that the Board determined that costochondritis, a condition that

affects the ribs and breastbone, was more appropriately evaluated as a spinal muscle condition rather than a respiratory muscle condition, the Court finds it provided woefully inadequate reasons or bases for that determination. *See Suttman*, 5 Vet.App. at 134; *Gilbert*, 1 Vet.App. at 57 ("A bare conclusory statement, without both supporting analysis and explanation, is neither helpful to the veteran, nor clear enough to permit effective judicial review, nor in compliance with statutory requirements." (internal quotations omitted)). Furthermore, in determining that DC 5320 was the proper DC to evaluate Ms. Sanchez's costochondritis, the Board failed to discuss the functions affected by her condition or her symptoms. *See* 38 C.F.R. § 4.20.

Second, the Board failed to provide adequate reasons or bases for whether a separate evaluation was warranted for manifestations of Ms. Sanchez's costochondritis not addressed under DC 5320. *See Lyles v. Shulkin*, 29 Vet.App. 107, 113 (2017) (holding that, when evaluating a knee disability, manifestations of pain and swelling were not compensated under DC 5257 for recurrent subluxation and lateral instability); *Esteban*, 6 Vet.App. at 262. The Board considered DC 5297, which provides rating for the removal of ribs, and determined that, because no lay or medical evidence demonstrated that the veteran underwent rib removal, DC 5297 did not apply. R. at 13; *see* 38 C.F.R. § 4.71a, DC 5297. However, when VA evaluates an unlisted condition using analogous rating principles, VA may not require that the unlisted condition have all the characteristics of the analogous condition because that would not make sense. *See Green v. West*, 11 Vet.App. 472, 475-76 (1998). On the other hand, the Board did not discuss whether a separate evaluation may be warranted for her shortness of breath, mechanical asymmetry, and trigger point injection to assist with rib mobilization. R. at 4123-24, 4938; *see Thompson v. Gober*, 14 Vet.App. 187, 188 (2000) (per curiam order) (holding that the Board must address all potentially favorable evidence).

Third, the Board provided inadequate reasons or bases for its determination that a noncompensable evaluation for a muscle injury contemplated Ms. Sanchez's costochondritis disability. The Board noted that the veteran's costochondritis manifested with chest wall muscle soreness, first rib tightness, chest pain, mechanical restriction with certain movements, and fatigue, but concluded that such symptoms "do not rise to the frequency, severity, and duration of a moderate muscle disability." R. at 12. However, a slight muscle disability has *no* cardinal symptoms of muscle disability, including fatigue-pain or impairment of movement, and *no* impairment of function. 38 C.F.R. § 4.56(d)(1). A moderate muscle disability has *one or more*

cardinal signs and symptoms of muscle disability and *some* impairment. 38 C.F.R. § 4.56(d)(2). The Board further erred when it required objective evidence to demonstrate entitlement to an increased evaluation for a muscle injury. R. at 13. When rating by analogy, the Board must consider the function affected, anatomical location, or symptoms of an unlisted condition rather than objective evidence. *See Stankevich v. Nicholson*, 19 Vet.App. 470, 472-73 (2006) (holding that the Board's application of the arthritis DC, which requires x-ray evidence, to an undiagnosed illness was arbitrary and capricious "because the analogy [was], at best, illusory").

The Court, therefore, concludes that the Board failed to provide adequate reasons or bases for its determination that Ms. Sanchez's costochondritis condition was fully contemplated by a noncompensable evaluation as a muscle injury under DC 5320. *See* 38 U.S.C. § 7104(d)(1); *Gilbert*, 1 Vet.App. at 52. Accordingly, the Court will remand for readjudication. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) (holding that remand is the appropriate remedy where the Board has, *inter alia*, failed to provide an adequate statement of reasons or bases for its determinations).

On remand, the veteran is free to submit additional evidence and argument in accordance with *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order). *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002). "A remand is meant to entail a critical examination of the justification for the decision" by the Board. *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991). In addition, the Board shall proceed expeditiously, in accordance with 38 U.S.C. § 7112 (expedited treatment of remanded claims).

IV. CONCLUSION

Upon consideration of the foregoing, the November 17, 2016, Board decision denying entitlement to a compensable evaluation for costochondritis is SET ASIDE and the matter is REMANDED for readjudication consistent with this decision.

DATED: February 27, 2019

Copies to:

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