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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 17-1645

SCOTT E. REMILLARD, APPELLANT,

v.

ROBERT L. WILKIE,
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*: Scott E. Remillard appeals through counsel a May 5, 2017, Board of Veterans' Appeals (Board) decision that denied entitlement to disability ratings in excess of 60% for left lower extremity radiculopathy, 40% for right lower extremity radiculopathy, and 40% for a back disability on an extraschedular basis. Mr. Remillard does not raise any argument as to the disability rating assigned for his back condition, and the Court deems any appeal of that matter abandoned. *See Ford v. Gober*, 10 Vet.App. 531, 535 (1997) (arguments not raised before the Court are considered abandoned on appeal). The Board also remanded the issue of entitlement to special monthly compensation, and the Court does not have jurisdiction over that matter. *See Breeden v. Principi*, 17 Vet.App. 475, 477 (2004) (the Court lacks jurisdiction to review Board remands).

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 as the issue is of "relative simplicity" and "the outcome is not reasonably debatable." *Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the reasons that follow, the Court will vacate the parts of the May 5, 2017, Board decision that denied entitlement to disability ratings in excess of 60% for left lower extremity radiculopathy and in excess of 40% for right lower extremity radiculopathy. The Court

will remand those matters for readjudication consistent with this decision.

I. FACTS

Mr. Remillard served on active duty in the U.S. Army from February 1993 to February 1997. During service, he worked as a parachute jumper and sustained a low back injury. He is service connected for a low back disability.

At a February 2007 VA examination, Mr. Remillard was diagnosed with radiculopathy of the right lower extremity. He subsequently filed a claim for VA benefits for this condition claimed as secondary to his service-connected low back disability. At a September 2007 examination, Mr. Remillard reported missing three days of work since April 2007 as a result of his condition. The examiner noted that his condition had a significant effect on work involving missed work, late arrivals, and early departures. A November 2007 VA examination reflects that Mr. Remillard reported transient numbness and was diagnosed with radiculopathy of the right lower extremity.

While receiving treatment in September 2009, Mr. Remillard reported that he worked as a manager, spending half his time on his feet and half his time behind a desk. At a December 2009 VA examination, he was diagnosed with peripheral neuropathy and radiculopathy of the left lower extremity secondary to central disc herniation. The examiner noted that Mr. Remillard's condition had a significant effect on his occupation, noting problems with lifting and carrying, decreased strength, lower extremity pain, and pain in sedentary positions. In January 2010, a VA regional office (RO) granted VA benefits for left lower extremity peripheral neuropathy and assigned a 10% disability rating for that condition.

At a November 2010 hearing before the Board, Mr. Remillard reported experiencing constant shooting pain in his right leg with numbness and paralysis at times. He also reported a loss of feeling in his right foot. He stated that his pain interfered with his ability to sleep as well as his daily activities. He stated that he had two back surgeries and had missed months of work that resulted in him losing jobs.

In a January 2011 decision, the Board granted Mr. Remillard VA benefits for right lower extremity radiculopathy. The RO later assigned a 10% disability rating for that condition. During a March 2011 examination, he reported experiencing pain in his lower back and legs, as well as numbness in both feet. He described his leg pain as frequent and sometimes remaining constant

for a while. The examiner diagnosed him with multilevel disk disease of the lumbar spine with multilevel foraminal encroachment both right and left and moderate spinal stenosis. The examiner indicated that his condition had a moderate effect on his employment.

Mr. Remillard underwent another VA examination in November 2013, at which the examiner noted that he had severe intermittent pain and mild numbness in both legs and a moderate severity of radiculopathy on both sides. On examination, the examiner found incomplete paralysis of the sciatic nerve with moderate severity bilaterally. However, the examiner stated that there was no paresthesias or dysesthesias. The examiner opined that Mr. Remillard's disability negatively impacted his ability to work as a result of recurrent absences from work due to the increasing frequency and severity of his back and sciatic pain.

In June 2014 and May 2015, Mr. Remillard reported working full-time at the VA medical center in Manchester, New Hampshire. In December 2014, the Board increased the disability ratings for Mr. Remillard's lower extremities to 20% each. The Board determined that extraschedular consideration was not warranted for his lower extremities, but referred his central disc herniation condition for extraschedular consideration.

In May 2015, the RO determined that extraschedular consideration was not warranted for his central disc herniation, finding no evidence of an unusual or exceptional disability pattern or frequent periods of hospitalization that would make such a rating appropriate. The RO also noted that, although Mr. Remillard's condition caused interference with work, the evidence did not show that he missed more than four weeks of work per year, and thus there was not marked interference with employment beyond that considered by the rating schedule.

In August 2015, Mr. Remillard stated that he almost lost his job at the VA medical center in 2013 as a result of missing work repeatedly, reporting that he was put on a six-month probation period. The Board remanded the issue for consideration by the Director of Compensation Services (Director) of whether a collective extraschedular rating was warranted.

In February 2016, Mr. Remillard reported experiencing severe pain in both lower extremities, which usually lasted for three to four days, but sometimes lasted for two to three weeks. At an examination that month, the examiner stated that Mr. Remillard's bilateral numbness, paresthesias, and intermittent pain were severe. The examiner stated that Mr. Remillard had an awkward gait because he put less weight on his right leg. The examiner also noted that Mr.

Remillard had normal strength in his right knee extension and left ankle plantar flexion, and active movement against some resistance in the left knee extension, right ankle plantar flexion, and ankle dorsiflexion bilaterally. The examiner found normal reflexes bilaterally in Mr. Remillard's knee and absent reflexes bilaterally in his ankles. On sensory examination, the examiner noted normal sensation of the thigh and knee bilaterally and of the left lower leg and ankle, but decreased sensation in the right lower leg and ankle and the feet and toes bilaterally.

The February 2016 examiner found that Mr. Remillard had incomplete paralysis of the sciatic nerve that was moderately severe on the right and severe with muscular atrophy on the left. The examiner also opined that Mr. Remillard's right lower extremity radiculopathy included partial paralysis, not complete paralysis, and neuritis that was moderately severe and not wholly sensory. The examiner opined that his left lower extremity radiculopathy included partial paralysis, not complete paralysis, and neuritis, that is severe with two centimeters of marked muscular atrophy. The examiner noted active movement of the muscle below the right and left knees with marked muscular atrophy of the left calf, which he opined was at least as likely as not related to Mr. Remillard's abnormal gait, noting that flare-ups could include foot dragging. The examiner also noted that Mr. Remillard had functional impairment as a result of his bilateral radiculopathy, including limitations on lifting and carrying, being on his feet, and sitting extensively.

An April 2016 VA treatment note reflects that Mr. Remillard was employed at Brady Sullivan Center. In July 2016, the Director evaluated the case and found that "[e]ntitlement to an increased evaluation for the right and left lower extremity radiculopathy is warranted, under the current rating schedule criteria and on an extraschedular basis." R. at 235. The Director found that there was evidence "of an exceptional or unusual disability picture, such as, marked interference with employment or frequent periods of hospitalization that would render application of the current rating schedular criteria inadequate." *Id.* The Director assigned a 40% schedular disability rating for left lower extremity radiculopathy and an additional 10% evaluation on an extraschedular basis for the right lower extremity radiculopathy. In August 2016, VA increased Mr. Remillard's disability rating for left lower extremity radiculopathy to 40% and his disability rating for right lower extremity radiculopathy to 30% based on the Director's July 2016 opinion. This resulted in a total combined rating of 80%.

In May 2017, the Board issued the decision on appeal, increasing Mr. Remillard's disability ratings to 60% for left lower extremity radiculopathy and 40% for right lower extremity radiculopathy. However, the Board found that these individual ratings, as well as his combined 90% disability rating, fully compensated him for his average impairment in earning capacity, and that the criteria for an extraschedular rating had not been met.

On appeal, Mr. Remillard argues that the Board failed to provide adequate reasons or bases for discontinuing the 10% extraschedular disability rating assigned to his service-connected right lower extremity radiculopathy. He argues that, in awarding that rating, the Board already conceded that the rating schedule did not adequately contemplate his symptoms and that there was evidence of marked interference with employment. He asserts that the Board failed to explain how his demonstrated marked interference with employment is incorporated into his now 40% schedular disability rating for right lower extremity radiculopathy. He also argues that the Board erred by denying him a disability rating in excess of 60% for his left lower extremity radiculopathy. He contends that the record contains evidence of limited knee flexion and no active movement of the muscles below the knee during flare-ups, which would entitle him to a higher rating.

The Secretary argues that the Board was not clearly erroneous in finding that Mr. Remillard was not entitled to extraschedular consideration for his right lower extremity and provided adequate reasons or bases for that determination. The Secretary states that the Board was not bound by the Director's determination and engaged in a thorough discussion explaining why an extraschedular rating was not warranted. The Secretary also argues that the Board did not err in finding that Mr. Remillard was not entitled to a disability rating greater than 60% for his left lower extremity. The Secretary notes that the Board fully discussed all of Mr. Remillard's symptoms, including those during flare-ups, as well as his lay statements, in assigning his disability rating and did not misinterpret the rating criteria for that condition.

II. ANALYSIS

A. Right Lower Extremity

After referral for extraschedular consideration, "[t]he Board reviews the entirety of the Director's decision de novo" and is authorized to "assign an extraschedular [evaluation] when appropriate." *Kuppamala v. McDonald*, 27 Vet.App. 447, 458 (2015). Extraschedular

consideration is a question of fact that requires "assessing a veteran's unique disability picture and whether that picture results in an average impairment in earning capacity significant enough to warrant an extraschedular rating." *Id.*

As with any finding on a material issue of fact and law presented on the record, the Board must support its extraschedular-evaluation 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, 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).

Mr. Remillard argues that the Board "provided no analysis for its determination that [his] assigned rating now contemplates [his] partial paralysis and neuritis with loss of ankle reflex and sensory disturbance or his problems lifting, carrying, standing, and sitting." Appellant's Brief (Br.) at 11. The Board centered its analysis on 38 U.S.C. § 1155, which provides that the assigned disability rating must be based on the average impairment in earning capacity. *See Kuppamala*, 27 Vet.App. at 458. The Board found that Mr. Remillard's combined 90% disability rating adequately compensated him for the average impairment in earning capacity caused by his disabilities.

Mr. Remillard argues that, in making its determination, the Board failed to consider his partial paralysis, neuritis with loss of ankle reflex, and sensory disturbance or functional problems. The Board discussed those symptoms in assigning schedular disability ratings for Mr. Remillard's conditions, but ignored them when considering whether an extraschedular rating was appropriate.

In the extraschedular part of its decision, the Board relied on Mr. Remillard's employment history, specifically how much time he missed from work. The Board focused on the average amount of time Mr. Remillard missed from work on a yearly basis, based on all of his disabilities, to determine that the rating schedule contemplated his level of disability.

In conducting this analysis, the Board did not discuss the specific symptoms associated with Mr. Remillard's right lower extremity radiculopathy. The Board also failed to consider the other effects of that disability on his employment, including being placed on probation for 6 months as a result of his frequent absences from work. Because the Board did not focus on Mr.

Remillard's right lower extremity radiculopathy in denying an extraschedular rating for that condition, the Court is unable to discern the reasons or bases for the Board's decision. Accordingly, the Court finds that remand is required. *See Gilbert*, 1 Vet.App. at 57.

B. Left Lower Extremity

Under 38 C.F.R. § 4.124a, diagnostic code (DC) 8620, Mr. Remillard is in receipt of a 60% disability rating for his left lower extremity radiculopathy, which contemplates incomplete paralysis that is severe with marked muscular atrophy. He argues that he is entitled to an 80% disability rating under that provision, which contemplates complete paralysis, "the foot dangles and drops, no active movement possible of muscles below the knee, flexion of knee weakened or (very rarely) lost." 38 C.F.R. § 4.124a, DC 8620 (2018).

The assignment of a disability rating is a factual finding that the Court reviews under the "clearly erroneous" standard of review. *Johnston v. Brown*, 10 Vet.App. 80, 84 (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); *Gilbert*, 1 Vet.App. at 52. As always, the Board must provide a statement of the reasons or bases for its determination, adequate to enable an appellant to understand the precise basis for the Board's decision as well as to facilitate review in this Court. 38 U.S.C. § 7104(d)(1); *see Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Gilbert*, 1 Vet.App. at 56-57.

Mr. Remillard argues that the Board erred in failing to assign an 80% disability rating because the record contains evidence that he suffers complete paralysis during flare-ups, as well as weakened knee flexion and loss of movement in the muscles below his knee during flare-ups. Alternatively, he argues that the Board erred by relying on the November 2013 and February 2016 VA medical examinations, neither of which tested knee flexion.

The Board found that the evidence did not show complete paralysis of the sciatic nerve. The Board discussed Mr. Remillard's medical history, including his reports that he drags his leg when he walks during flare-ups and the February 2016 VA examiner's opinion that it was at least as likely as not that flare-ups could include foot dragging. The Board noted the findings of the November 2013 and February 2016 VA examiners, including muscle strength test results. Specifically, the Board noted that, although Mr. Remillard's left knee's flexion was not measured,

the extension of his knee was only one rating below the normal value at 4 out of 5. The Board also noted that the February 2016 examiner found that Mr. Remillard's left ankle plantar flexion strength was normal and ankle dorsiflexion had active movement against some resistance. The Board stated that the November 2013 VA examiner found normal left knee extension, ankle dorsiflexion, and active movement against some resistance on left ankle plantar flexion. Thus, the Board found that Mr. Remillard did not have weakness or loss of knee flexion.

As noted above, an 80% disability rating under DC 8620 is appropriate where there is complete paralysis with three scenarios provided, including where the foot dangles and drops, where there is no active movement possible of muscles below the knee, and where flexion of knee is weakened or lost. 38 C.F.R. § 4.124a, DC 8620. Although the Board concluded that Mr. Remillard did not have loss of knee flexion, it is not clear how the Board reached that conclusion. As noted by the Board, neither the November 2013 or February 2016 examiners tested his knee flexion. Accordingly, the Court finds that the Board provided inadequate reasons or bases for its decision. *See Gilbert*, 1 Vet.App. at 56-57. On remand, the Board should also discuss whether a new medical examination is necessary to test Mr. Remillard's left knee flexion.

The Court need not at this time address the other arguments raised by Mr. Remillard concerning his left lower extremity radiculopathy. *See Best v. Principi*, 15 Vet.App. 18, 20 (2001) (per curiam order) (holding 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 [or her]").

On remand, he is free to submit additional evidence and argument on the remanded matters, and the Board is required to consider any such relevant evidence and argument. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002); *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order). The Court has held 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). 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).

III. CONCLUSION

Upon consideration of the foregoing analysis, the record of proceedings before the Court, and the parties' pleadings, that part of the May 5, 2017, Board decision that denied entitlement to a disability rating in excess of 60% for left lower extremity radiculopathy and a disability rating in excess of 40% for a right lower extremity radiculopathy is VACATED and the matters are REMANDED for readjudication consistent with this decision.

DATED: March 11, 2019

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