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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 17-3568

ISAAC BROWN, 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*: The appellant, Isaac Brown, appeals through counsel an August 25, 2017, Board of Veterans' Appeals (Board) decision in which the Board denied him entitlement to a disability rating greater than 20% prior to October 3, 2006, for "subluxation of the lumbar spine with degenerative changes" and remanded several other matters for additional consideration. Record (R.) at 2-20. The issues remanded by the Board are not before the Court and the Court may not review them at this time. *See Breeden v. Principi*, 17 Vet.App. 475, 478 (2004); *see also Howard v. Gober*, 220 F.3d 1341, 1344 (Fed. Cir. 2000). This appeal is timely and the Court has jurisdiction over the matter on appeal pursuant to 38 U.S.C. §§ 7252(a) and 7266. Single-judge disposition is appropriate when the issues are 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 Board's conclusion that the appellant is not entitled to a disability rating greater than 20% for his low back disorder prior to October 3, 2006, and it will remand that matter for further proceedings consistent with this decision.

I. BACKGROUND

The appellant served on active duty in the U.S. Army from July 1982 until March 1999. R. at 5982. In August 2000, the VA regional office (RO) granted him entitlement to disability benefits for subluxation of the lumbar spine and assigned his disorder a 10% disability rating effective April 1, 1999. R. at 6157-62. The appellant challenged the disability rating assigned to his disorder. R. at 6088. In August 2003, the RO increased the disability rating assigned to his disorder to 20% effective April 1, 1999. R. at 5729-37. He again disagreed. R. at 5672.

In March 2008, the RO increased the disability rating assigned to the appellant's disorder to 60% effective October 3, 2006. R. at 3396-3413. In June 2016, the Board denied the appellant entitlement to a disability rating greater than 20% for the period presently on appeal. R. at 829-71. He appealed and, in January 2017, the parties filed a joint motion to vacate the portion of the Board's decision denying him a disability rating greater than 20% prior to October 3, 2006, and remand that matter for addition proceedings in accordance with the terms of the motion. R. at 73-80. On February 3, 2017, the Court granted the parties' motion. R. at 70, 81.

On August 25, 2017, the Board issued the decision presently under review. R. at 2-20.

II. ANALYSIS

The Board found early in its decision that "there is *no indication*" that the appellant "had severe, recurrent attacks of [intervertebral disc syndrome (IVDS)] with little intermittent relief, or pronounced IVDS" prior to October 2006. R. at 14 (emphasis added). As it tacitly acknowledged later in its decision, that is, at best, an overstatement. The appellant has repeatedly asserted that his back disorder often or "constant[ly]" produced significant pain and other symptoms that regularly restricted him from doing normal activities and caused him either to miss a substantial amount of work or to perform his occupational duties with extreme difficulty. *See, e.g.*, R. at 4548, 5335, 5890, 5911, 6088, 6106, 6172. As the Board seemed to acknowledge, those statements suggest at least some indication of severe and recurrent or pronounced IVDS.

The Board did not make discernable competency and credibility determinations about the appellant's lay statements. That makes its decision difficult to review. *See Dalton v. Nicholson*, 21 Vet.App. 23, 38 (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). If the appellant is competent to report

that his back disorder caused regular, severe pain and other symptoms that significantly restricted his ability to complete work and recreational activities and he is credible, then the Board should have taken his statements to be established fact. It then should have applied them to the rating criteria to determine whether they constitute evidence of severe and recurrent or pronounced IVDS.

Instead of making clearly stated and well supported competency and credibility determinations, the Board attempted to undermine the appellant's assertions by citing to other evidence in the record. It wrote:

> [T]he objective evidence does not support a finding that the [appellant's] absence from work was due solely to his low back disability. In this regard, in June 2003, [his] private physician certified that [he] would be able to work intermittently or on a less than full-time schedule due to his hypertension. In July 2006, [he] was certified to be incapacitated due to a history of chronic ankle instability and pain. At no time during this period did [his] private physician indicate he would require significant time off work due to his low back disability. Furthermore, statements from the [appellant] submitted throughout the appeal period indicate he frequently missed work due to a combination of his disabilities. . . . Finally, letters submitted on the [appellant's] behalf . . . confirm that he experienced physical limitations due to his low back disability, but also note his employment suffered from numerous other physical and psychiatric disabilities as well. As such, while the [appellant's] low back disability may have resulted in some missed work, the record does not reflect that his extensive absences were due solely to his low back disability or at a level rising to "severe" attacks of IVDS.

R. at 17.

This statement is insufficient for numerous reasons. First, the Board seemed to demand that the appellant submit evidence showing that he missed a significant amount of work and that his absences were attributable only to his back disorder before it would consider deeming his IVDS attacks to be severe or pronounced. Because the Board did not cite to legal or any other authority, it is not clear how it developed that standard or defined words like "severe" and "pronounced."

Second, the Board essentially concluded that if the appellant missed work on a day that an IVDS attack and the symptoms of another disorder were affecting him simultaneously, then his IVDS could not have been severe. That does not follow. More importantly, it is a medical finding that the Board did not support and is not competent to make. *See Kahana v. Shinseki*, 24 Vet.App. 428, 435 (2011) (holding that, when a Board inference "results in a medical determination, the basis for that inference must be independent and it must be cited"); *Colvin v. Derwinski*, 1 Vet.App.

171, 172 (1991) (holding that, when the Board reaches a medical conclusion, it must support its findings with "independent medical evidence"). If the Board intends to review an episode of occupational incapacity and separate the effects of the appellant's low back disorder from the effects of other disorders, it should cite to appropriate medical authority supporting its decision.

Third, the Board discussed the appellant's work history, but did not mention symptomatology attributed to his disorder and its relative severity. Throughout its decision, the Board often focused on whether the appellant's back disorder kept him from work. Although, as the Secretary notes, that is certainly a factor to consider, the analysis should not, as it seemed to be at times, be driven solely by the number of days the appellant did not show up for work. The appellant appears to seek at most a 60% disability rating in this litigation. That alone indicates that he conceded that he was able to complete some occupational tasks during the period on appeal. *See* 38 C.F.R. § 4.1 (2018) ("The percentage ratings represent as far as can practicably be determined the average impairment in earning capacity resulting from such disease and injuries and their residual conditions in civil occupations"). To the extent that the Board demanded complete unemployability, it demanded far too much. *See Pederson v. McDonald*, 27 Vet.App. 276, 286 (2015) (holding that even an award of a total disability rating based on individual unemployability "does not require a showing of 100% unemployability").

Fourth, the Board's facts are not entirely correct or complete. The Board did not acknowledge a June 2003 medical record stating that the appellant's left knee disorder resulted in three days of lost work, his right ankle disorder resulted in two days of lost work, his hypertension "did not result in any time lost from work," and his back disorder "resulted in 2 months of time lost from work." R. at 5889-90. It did not acknowledge that in February 2006, a VA medical examiner seemed to endorse the appellant's assertion that he "is holding down a full-time job but is having extreme difficulty doing so due to the pain in his low back and particularly the right leg pain" and other pieces of similar evidence. R. at 4548; *see also* R. at 5290. Also, in October 1999, a medical examiner wrote that the appellant "states that he has high blood pressure, but this condition had never been diagnosed by anyone. He has never been put on any medication." R. at 6172.

Finally, although the Board found that no private physician stated that the appellant must stay home from work, it cited no evidence indicating that a physician deemed the appellant to have no or few work restrictions. It is unclear from the Board's decision whether a physician opined

about that matter at all or even whether one was asked to do so. *See Fountain v. McDonald*, 27 Vet.App. 258, 272 (2015) (the Board must "establish a proper foundation for drawing inferences against a claimant from an absence of documentation"). If such an opinion does exist, the Board did not identify it or explain whether that opinion is consistent with the work accommodation that the appellant plainly received. R. at 5282. For these reasons, the Court concludes that the Board did not carefully consider all of the pertinent evidence and apply it to a legal standard that the Court and appellant can recognize and review.

The Board's decision contains additional errors that it should correct on remand. First, several rating criteria are potentially applicable to the appellant's claim, including criteria that were revised during the period on appeal. The Board discussed the criteria in a single statement of reasons or bases that can be difficult to follow and seemed to conflate those criteria on occasion.[1] Its decision will be easier to review and its reasons or bases more likely to be adequate if it addresses the rating criteria in a more systematic format.

Second, the record contains, and the Board relied upon, several pieces of medical evidence. The Board did not, however, make any clearly stated and properly supported findings about the adequacy of that medical evidence. *See Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 301 (2008) (holding that a medical opinion must "contain not only clear conclusions with supporting data, but also a reasoned medical explanation connecting the two"); *Stefl v. Nicholson*, 21 Vet.App. 120, 123 (2007) (holding that a medical opinion is adequate "where it is based upon consideration of the veteran's prior medical history and examinations and also describes the disability, if any, in sufficient detail so that the Board's 'evaluation of the claimed disability will be a fully informed one.'") (quoting *Ardison v. Brown*, 6 Vet.App. 405, 407 (1994)).

A finding concerning medical adequacy is particularly important in this case given that the applicable rating criteria are extensive and have been both altered by the Secretary and clarified by the Court. To the extent that the Board believed any argument concerning the adequacy of medical evidence to be waived, it did not make or support that finding.[2] To the extent that the

[1] The Board stated early in its decision that it is acceptable to use "the amended regulations pertaining to range of motion measurements for the spine as guidance in rating spine disabilities under the pervious criteria." R. at 9. The difference between using new criteria as "guidance" to interpret past criteria and using the new criteria as a replacement for the past criteria is slight, if not nonexistent. The Court has no need at present to determine whether the Board's stance is correct. The Board, however, would do well to shore up the legal basis for its position on remand and ensure that it carefully explains how applying new rating criteria as "guidance" operates.

[2] The Secretary asks the Court to ignore the Board's oversight essentially because there is no mention of the

Board relied on adequacy determinations in past remand decisions or prior final decisions that have been vacated without stating its intention to do so, it erred. *See Mathews v. McDonald*, 28 Vet.App. 309, 315 (2016) ("The Court holds that the Board is not permitted to sub silentio incorporate its reasons or bases from a prior remand order in a later decision.").

Although the Court will not make factual findings in the first instance, it notes that there is one examination report that figured prominently in the decision presently on appeal and warrants careful scrutiny on remand. The Board noted that "a June 2003 VA examiner described the [appellant's] IVDS as 'mild.'" R. at 15. That is not the examiner's actual finding. The examiner stated that the appellant's disorder "has progressed to mild degenerative disease of the lumbar spine." R. at 5894. It is unclear from the Board's present decision how that finding fits into the rating criteria for IVDS. More importantly, the examiner based his conclusion in part "on the history." *Id.* The history that the examiner included in the report indicates that the appellant's disorder was sufficient to "result[] in 2 months of time lost from work." R. at 5890. The Board did not review whether that occupational impact is consistent with the mild disorder that the examiner identified.

Moreover, the Board wrote that "although the June 2003 VA examiner opined that the [appellant's] range of motion of the spine is additionally limited by pain, such opinion is not supported by the findings on examination." R. at 15. That certainly reads like a negative adequacy determination. It also suggests that the Board used the portions of the examiner's opinion that supported the decision it wished to reach while negating the portions of the opinion that supported the appellant, a dubious choice indeed, particularly when unacknowledged and unexplained. On remand, the Board should carefully apply the *Nieves-Rodriguez* criteria and determine whether the examiner included in his opinion a clear statement connecting the data that he relied upon and the conclusion that he reached.

Next, the Board concluded that "while a separate evaluation for radiculopathy of the right lower extremity has been awarded as of March 27, 2003, associated neurological symptoms were not persistent during the period prior to October 3, 2006." R. at 16. That's a difficult finding to

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adequacy of medical opinions in the joint motion that he and the appellant submitted in 2016. The Secretary seems to be attempting to have the Court insert into the joint motion a clause waiving future consideration of medical examination adequacy that he did not obtain through bargaining. The Court does not rewrite joint motions, and there is no indication that the parties' motion limited the scope of the remand in the manner that the Secretary suggests. *See Forcier v. Nicholson*, 19 Vet.App. 414, 426 (2006).

accept. Based on the disability benefits that the RO awarded, the appellant must have had sufficient and relatively active neurological symptoms beginning on at least March 27, 2003. Indeed, the RO found that therapy reports from that date reveal "radiation of pain" with "moderate muscle spasm." R. at 5730.

The Board supported its finding with the following factual statement: "For example, private treatment records indicate that, in March 2003, the [appellant] specifically denied radiating pain down his legs, and a June 2003 VA examination found normal motor and sensory functioning upon neurological testing." R. at 16. The Board also should have discussed the appellant's June 2002 assertion that he had "severe back spasms" on a "regular basis," an August 2002 medical report stating that he had "pain traveling to his right hip and leg, which last several weeks if over active," a March 2003 report indicating that he had radicular pain, the February 2006 examiner's notation that he "does have radiation of pain down the right leg many times during the day and particularly when he is sitting down for a while or trying to do heavy lifting," and an October 2004 medical record stating that he "is having back spasms." R. at 4548, 5324, 842, 6088, 6106. Furthermore, in June 2003, the appellant complained about "numbness of the lower extremity" and pain that "travels to the legs." R. at 5890. Although the examiner found no radiculopathy, the examination "reveals complaints of radiating pain on movement. Muscle spasm is present." R. at 5893.

The Board also supported its finding with the observation that "VA treatment records indicate negative straight leg raise testing in July 2004." R. at 17. It did not discuss its observation in the recitation of facts portion of its decision that a January 2004 examination revealed "positive straight-leg raise testing." R. at 12. It plainly should have.

Finally, as the above discussion reveals, the Board routinely picked one or two facts from the extensive record to support a finding and ignored others of equal or greater importance. The Board should conduct a more extensive review of the evidence on remand. When it does, it should be mindful that facts supporting the appellant's claim should receive explicit consideration. *Thompson v. Gober*, 14 Vet.App. 187, 188 (2000) (stating that the Board must provide an adequate statement of reasons or bases "for its rejection of any material evidence favorable to the claimant"). Listing that evidence in the recitation of the evidence section of a decision without further acknowledgement or discussion is not sufficient. *Dennis v. Nicholson*, 21 Vet.App. 18, 22 (2007) ("[M]erely listing the evidence before stating a conclusion does not constitute an adequate statement of reasons or bases") (citing *Abernathy v. Principi*, 3 Vet.App. 461, 465 (1992)).

The evidence that the Court cited in the above analysis is by no means comprehensive. The Board, on remand, should review the large record in this case, create a fully developed disability picture for the period on appeal by making properly supported adequacy, compentency, and credibility determinations, and assign the disability rating that most nearly approximates that picture.

The Court need not at this time address other arguments that the appellant has raised. *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 [her]"). On remand, the appellant 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). Once the Board is prepared to act, it 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

After consideration of the appellant's and the Secretary's briefs and a review of the record, the portion of the Board's August 25, 2017, decision denying the appellant entitlement to a disability rating greater than 20% for subluxation of the lumbar spine with degenerative changes for the period prior to October 3, 2006, is VACATED and that matter is REMANDED for further proceedings consistent with this decision.

DATED: March 29, 2019

Copies to:

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