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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 17-0075

ANDREW L. MARSHALL, APPELLANT,

v.

ROBERT L. WILKIE,
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, Andrew L. Marshall, through counsel appeals a November 30, 2016, Board of Veterans' Appeals (Board) decision that denied entitlement to benefits for a back disorder, including as secondary to a service-connected left ankle disability. Record (R.) at 1-12. On January 25, 2018, the Court stayed proceedings in this matter pending the resolution of *Ward v. Wilkie*, No. 16-2157, by a panel of the Court. The Court issued its decision in *Ward* on June 14, 2019. *Ward v. Wilkie*, __ Vet.App. __, U.S. Vet. App. No. 16-2157, 2019 WL 2491552 (June 14, 2019). On June 19, 2019, the appellant filed an opposed motion to lift the stay; the same day, the Secretary filed his opposition, noting that the time to seek reconsideration of or to appeal the Court's decision in *Ward* had not expired. The Court will grant the appellant's motion, lift the stay of proceedings, and consider the merits of this appeal.

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 decision and remand the matter for further proceedings consistent with this decision.

I. BACKGROUND

The appellant served on active duty in the U.S. Navy from November 1968 to August 1970. R. at 1777. His service medical records reveal that he injured his left ankle in October 1969 while playing football. R. at 1824. In April 1970, he was treated for a contusion of the right foot. R. at 1827. His July 1970 separation examination reveals that his feet, lower extremities, and spine were evaluated as "[n]ormal." R. at 1831.

In September 1978, the appellant filed a claim for benefits for a "[b]roken [a]nkle and [i]njury to [f]oot." R. at 1814. In January 1979, a VA regional office (RO) granted his claim for benefits for residuals of a left ankle fracture and assigned a noncompensable disability rating. R. at 1784. The RO did not address entitlement to benefits for a foot injury. *See id.* The appellant did not appeal that decision, and it became final.

The record contains a December 2005 report of a private orthopedist. The orthopedist stated that the appellant had sought treatment from him for "pain, swelling[,] and stiffness[,] as well as weakness in his left ankle," which the appellant reported he had experienced for "a long time" but which had worsened over the previous several months. R. at 1332. The orthopedist recorded the appellant's reports that standing and walking made his symptoms worse, that the pain caused him to start limping, and that the pain had begun to radiate to his hip. *Id.*

At a December 2005 VA joints examination, the examiner acknowledged the appellant's in-service ankle injury but found that his complaints and physical examination "point[ed] more to plantar fasciitis, pes planus Grade-II with pronation" than to any residual of the in-service injury. R. at 1740.

In September 2007, the appellant advised VA that he had begun using an ankle brace and orthotics to treat his ankle condition and that his physician had ordered a magnetic resonance image (MRI) to evaluate his back because of his limp. R. at 1579. In October 2007, he advised VA of the medications he was taking to treat his service-connected ankle condition. R. at 1553.

The appellant submitted a statement in support of his claim in February 2008 in which he reported that he was experiencing pain, swelling, and stiffness in his left ankle. R. at 1433. He reported that the pain had begun to go up his left leg and into his left hip. *Id.* He further stated that he was experiencing increased back pain and pain in both legs and feet. *Id.* He had been directed to wear a "short leg walker boot" on his left foot, use crutches to avoid bearing weight on the left foot, and stop working. R. at 1433-34.

Six months later, the RO denied the appellant's claim for benefits for a back condition, finding that there was no evidence that the condition was related to service or to his service-connected left ankle disability. R. at 1277. The appellant filed a Notice of Disagreement with that decision, R. at 1132, and ultimately appealed to the Board, R. at 1031.

At a September 2011 hearing before a Board member, the appellant testified that his personal physician had told him that his gait was "off" because he favored his left ankle, which put more pressure on his "knee and right foot." R. at 892. The appellant's wife testified that she attended that appointment and heard the doctor tell the appellant that, "when he walks[,] because of the severe pain in his left ankle[,] he's putting all the pressure on his right side and that's making his right knee hurt and also that's throwing his back out because his gait is off." R. at 893.

Shortly after the hearing, the Board remanded the appellant's claim for benefits for a back disability for further development, including a medical examination to assess whether his condition was at least as likely as not secondary to his service-connected left ankle disorder. R. at 862. Specifically, the Board directed:

Provide a diagnosis with regard to all current disabilities manifested by pain involving the lower back[, t]hen indicate whether the diagnosed condition(s) is/are at least as likely as not secondarily related to the [appellant's] service-connected left ankle disorder. The VA examiner should consider whether the left ankle disorder was the initial cause of the diagnosed back condition(s), as well as whether the left ankle disorder has chronically aggravated the diagnosed condition(s). The examiner should consider the theory of whether the [appellant] has an altered gait due to his left ankle condition which brought upon the back problems. (Chronic aggravation for this purpose is defined as *a permanent worsening of the nonservice connected disability not otherwise attributable to the natural disease process*).

Id. (emphasis added).

The appellant underwent a VA "Back (Thoracolumbar Spine) Conditions" examination in February 2012. R. at 367-76. The examiner diagnosed degenerative disc disease with foraminal and canal stenosis. R. at 367. The examiner recorded the appellant's report that he started to notice low back pain in 2000 while working at a distribution center and that the pain had increased in the years since. *Id.* The appellant stated that his back pain did not affect his daily activities, although his wife sometimes assisted him in dressing. R. at 368. The examiner noted that the appellant used a walker and that his ability to stand was limited to one hour. *Id.*; *see* R. at 374. The appellant reported that he generally experienced foot and knee pain before the back pain began and that he experienced pain that radiates down his left leg. R. at 368. After range of motion testing, the

examiner noted that the appellant experienced functional loss or impairment in the nature of less movement than normal; pain on movement; and interference with sitting, standing, or weight-bearing. R. at 370. The examiner noted that imaging studies of the spine revealed arthritis. R. at 375. The examiner opined that the appellant's low back disability was not directly related to military service and was not secondary to the service-connected left ankle condition. R. at 376. The examiner explained:

There is nothing in the currently accepted, peer reviewed, credible, and authoritative orthopedic lit[e]rature demonstrating that in[tr]insic conditions of an ankle (including a healed non[displaced fracture in the remote past) with or without altered gait will cause intrinsic conditions of the spine. It is this examiner's opinion that the [appellant's] current spine condition is not secondary to the service[-]connected healed left ankle fracture.

Id.

In December 2012, the Board denied the appellant's claim for benefits for a low back disability secondary to his service-connected left ankle disorder. R. at 652-96. The appellant appealed that decision to the Court, which granted the parties' joint motion for remand in September 2013. R. at 598-605. In the joint motion, the parties agreed that the February 2012 VA examination "was inadequate in its discussion of aggravation." R. at 600. Accordingly, the parties agreed that a new examination was necessary. R. at 603.

The appellant underwent a VA back conditions examination in May 2014. R. at 184-93. The examiner diagnosed lumbar degenerative disease with bilateral radiculopathy. R. at 185. The appellant reported the onset of back pain 10 to 15 years earlier while he was working in a warehouse. *Id.* He complained of bilateral lumbar pain that was worse with standing, walking, bending, or lifting, along with bilateral radiating pain to the buttocks, thighs, and knees. R. at 186. After range of motion testing, the examiner determined that the appellant experienced functional loss or impairment in the nature of less movement than normal; pain on movement; disturbance of locomotion; and interference with sitting, standing, and weight-bearing. R. at 188. The examiner also noted the appellant's "constant" use of a wheelchair. R. at 191. The examiner indicated that x-rays revealed arthritis and that an MRI revealed degenerative disc disease and degenerative joint disease. R. at 191-92. Finally, the examiner found that the appellant's low back disability was not related to his service-connected left ankle disability. *Id.* He explained:

I know of no medical authority or peer reviewed medical literature which supports the contention that lumbar degenerative disease can be caused by or aggr[a]vated

by a remote healed fracture of the ankle with residual osteoarthritis. Antalgic gait has never been shown medically to be causative to or aggra[]vate lumbar degenerative disease. Lumbar degenerative disease is the result of chronic weight bearing on the lumbar disc mechanism over extended time and is caused by gravitational effects[,] not by variations in gait. The [appellant's] current lumbar degenerative disease is no worse tha[n] anticipated based on age alone.

Id.

Nearly a year later, the Board again remanded the appellant's claim, finding that the May 2014 VA examiner did not address the appellant's contentions that his service-connected left ankle disability aggravates his low back condition. R. at 84. Accordingly, the Board ordered either an addendum opinion from the May 2014 examiner or a new examination that specifically addressed "whether it is at least as likely as not (50[%] or greater likelihood) that the [appellant's] back disability is aggravated (*permanently worsened*) by his service-connected left ankle disability." R. at 85 (emphasis added). The Board directed the examiner to consider "a) the [appellant's] report that pain from his left ankle goes up his leg into his back; [and] b) the testimony at the September 2011 hearing that the [appellant] has thrown his back out because of his altered gait." *Id.*

In June 2015, the May 2014 VA examiner provided an addendum opinion based on a records review. R. at 79-80. He again concluded that it was not at least as likely as not that the appellant's current low back disability "was caused by, aggr[a]vated by[,] or the result of" the appellant's service-connected left ankle condition. R. at 80. He provided the following rationale:

See previous rationale dated 21 May 2014. The [appellant's] left [lower extremity] radiated symptoms, pain[,] and paresthesias are the result of his lumbar radiculopathy. Localized ankle conditions do not cause retrograde transmission of pain up to the back. This pain is the result of nerve root irritation by the [appellant's] lumbar degenerative disease. Altered gait has never been shown to aggravate or cause lumbar degenerative disease. Lumbar degenerative disease is *caused by* chronic weight bearing on the lumbar disc mechanism over a lifetime. "Throwing out" one's back *does not cause* lumbar degenerative disease. The [appellant] clearly engaged in manual labor over the 30 years following discharge from service and was able to tolerate the work. [He] reports the onset of lumbar symptoms starting 30 years after discharge from service. Normal age[-]related lumbar degenerative disease is generally found on x[-]ray imaging by age 40 years, and progresses thereafter. I find no medical evidence that the [appellant's] current lumbar condition was aggravated by his service[-]connected left ankle injury.

Id. (emphases added).

In November 2016, the Board issued the decision on appeal, denying the appellant entitlement to benefits for a low back disability, including as secondary to a service-connected left

ankle disability. The Board found that the December 2005 and February 2012 VA medical opinions related the appellant's back pain to his foot disabilities, for which he is not service connected. R. at 9-10. The Board also determined that the June 2015 VA addendum provided "a reasoned medical opinion" that the appellant's low back disability "was not caused by or chronically aggravated beyond its natural progression" by his left ankle disability. R. at 9. The Board further explained that "[c]hronic aggravation is defined as a permanent worsening of a nonservice-connected disability not otherwise attributable to the natural disease process." *Id.* This appeal followed.

II. ANALYSIS

On appeal, the appellant argues that the Board erred in finding the June 2015 VA opinion adequate. Appellant's Brief (Br.) at 7-20. More specifically, the appellant contends that the examiner, as directed by the Board in its prior remand, used an improper legal standard for aggravation—permanent worsening—in reaching the conclusion that his back disability was not aggravated by his service-connected left ankle disability. *Id.* at 7-16. The appellant also asserts that, even assuming the aggravation standard was not improper, the opinion does not adequately address the issue of aggravation because the examiner focused on causation. *Id.* at 16-20. The Secretary disputes these arguments and urges the Court to find no clear error in the Board's determination that the June 2015 VA medical opinion was adequate. Secretary's Br. at 9-25.

"[O]nce the Secretary undertakes the effort to provide an examination [or opinion] when developing a service-connection claim, . . . he must provide an adequate one." *Barr v. Nicholson*, 21 Vet.App. 303, 311 (2007). A medical examination or opinion is adequate "where it is based upon consideration of the veteran's prior medical history and examinations," *Stefl v. Nicholson*, 21 Vet.App. 120, 123 (2007), "describes the disability, if any, in sufficient detail so that the Board's 'evaluation of the claimed disability will be a fully informed one,'" *id.* (quoting *Ardison v. Brown*, 6 Vet.App. 405, 407 (1994)) (internal quotation marks omitted), and "sufficiently inform[s] the Board of a medical expert's judgment on a medical question and the essential rationale for that opinion," *Monzingo v. Shinseki*, 26 Vet.App. 97, 105 (2012) (per curiam). The law does not impose any reasons-or-bases requirements on medical examiners and the adequacy of medical reports must be based upon a reading of the report as a whole. *Id.* at 105-06.

Establishing that a disability is service connected for purposes of entitlement to VA disability compensation generally requires medical or, in certain circumstances, lay evidence of (1) a current disability, (2) incurrence or aggravation of a disease or injury in service, and (3) a nexus between the claimed in-service injury or disease and the current disability. *See* 38 U.S.C. § 1110; *Shedden v. Principi*, 381 F.3d 1163, 1166-67 (Fed. Cir. 2004); *see also Davidson v. Shinseki*, 581 F.3d 1313, 1316 (Fed. Cir. 2009); 38 C.F.R. § 3.303 (2018). Service connection may be established on a secondary basis for a current disability that is either proximately caused by or aggravated by a service-connected disability. *See Allen v. Brown*, 7 Vet.App. 439, 448 (1995) (en banc); 38 C.F.R. § 3.310(a), (b) (2018). Section 3.310(b), which pertains to aggravation of non-service-connected disabilities, provides: "Any increase in severity of a nonservice-connected disease or injury that is proximately due to or the result of a service-connected disease or injury, and not due to the natural progress of the non-service-connected disease, will be service connected." 38 C.F.R. § 3.310(b) (emphasis added).

The questions of whether a medical examination or opinion is adequate and whether service connection is warranted are findings of fact that the Court reviews under the "clearly erroneous" standard of review. *D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008) (per curiam); *Russo v. Brown*, 9 Vet.App. 46, 50 (1996). The appellant's arguments regarding the proper standard for determining whether a service-connected condition "aggravated" a non-service-connected condition under § 3.310(b) is a legal question, which the Court recently answered in *Ward*.

In that case, the Court unequivocally held that "the 'permanent worsening' standard has no application in cases involving an incremental increase in disability of a non-service-connected condition proximately due to or the result of a service-connected disease or injury." *Ward*, __ Vet.App. at __, 2019 WL 2491552, at *6. The Court concluded instead that "compensation was due for any incremental increase in disability . . . in non-service-connected disabilities resulting from service-connected conditions, above the degree of disability existing before the increase—regardless of its permanence." *Id.* at *5.

Here, the Board relied primarily on the June 2015 VA addendum opinion to find that the appellant's low back disability was not aggravated by his service-connected left ankle disability. *See R.* at 9. In so doing, the Board itself relied on the more stringent "permanently worsened" standard of aggravation. *R.* at 9 ("Chronic aggravation is defined as a permanent worsening of a nonservice-connected disability not otherwise attributable to the natural disease process."). The

Secretary asserts that the June 2015 VA examiner found no worsening of the appellant's disability, permanent or otherwise, and therefore any error in the Board's definition of the aggravation standard is harmless. Secretary's Br. at 10-12. It is not possible to say, however, whether the Board would have viewed the medical evidence differently had it used the proper legal definition of aggravation under § 3.310(b). Accordingly, the Court finds the Board's error in this matter prejudicial. *See Arneson v. Shinseki*, 24 Vet.App. 379, 389 (2011) (finding prejudice when an error "could have altered" the Board's determination).

Remand is thus warranted for VA to readjudicate the matter using the appropriate legal standard. On remand, the appellant is free to submit additional evidence and argument on the remanded matter, including the specific arguments raised here on appeal, 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 appellant's motion to lift the stay of proceedings in this matter is granted. After consideration of the parties' pleadings and a review of the record, the Board's November 30, 2016, decision is VACATED and the matter is REMANDED for further proceedings consistent with this decision.

DATED: June 28, 2019

Copies to:

Linden K. Nash, Esq.

VA General Counsel (027)