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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 18-0291

NYIKA A. STERN, 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 Nyika A. Stern appeals through counsel a November 8, 2017, Board of Veterans' Appeals (Board) decision denying an evaluation in excess of 20% for service-connected lumbosacral strain, entitlement to service connection for a left ankle disability, and entitlement to a total disability evaluation based on individual unemployability (TDIU). Record (R.) at 2-16.[1] For the reasons that follow, the Court will set aside these portions of the November 2017 Board decision and remand the matters for further development and readjudication consistent with this decision. The balance of the appeal will be dismissed.

I. FACTS

Mr. Stern served on active duty in the U.S. Army from November 1995 to December 1999. R. at 1122. Upon separation, he filed claims for entitlement to service connection for, inter alia, bilateral ankle disability and low back disability, R. at 2711-14, which a VA regional office (RO)

[1] The Board also denied entitlement to service connection for bilateral leg disability and bilateral foot disability, including as secondary to service-connected disabilities. R. at 6-7. Because Mr. Stern has not challenged these portions of the Board decision, the appeal as to those matters will be dismissed. *See Pederson v. McDonald*, 27 Vet.App. 276, 281-85 (2015) (en banc) (declining to review the merits of an issue not argued on appeal and dismissing that portion of the appeal); *Cacciola v. Gibson*, 27 Vet.App. 45, 48 (2014) (same).

denied in January 2000, R. at 2704-09. In an April 2002 rating decision, the RO granted service connection for lumbosacral strain, assigning a 10% evaluation, and denied service connection for a left ankle condition. R. at 2644-55.

In September 2007, Mr. Stern applied for an increased evaluation for service-connected lumbosacral strain and reopening of the claim for service connection for left ankle condition. R. at 2212-15. A March 2008 VA back examination noted that the veteran reported low back flare-ups at least once or twice a week, and as often as three to four times a day, that last for hours. R. at 370. The examiner noted that the flare-ups cause "moderate additional limitation of motion and moderate functional impairment" and that the veteran "does not tolerate" excessive, repetitive, or prolonged use of the low back or prolonged standing or walking. *Id.*

In a May 2008 rating decision, the RO denied an increased evaluation and determined that the veteran failed to submit new and material evidence to reopen his left ankle claim. R. at 2457-71. Mr. Sterns filed a timely Notice of Disagreement (NOD), R. at 2439-44, and the RO issued a Statement of the Case, R. at 2353-84. In a September 2008 decision review officer decision, the RO granted a 20% evaluation for lumbosacral strain, effective January 30, 2008. R. at 2400-05. The veteran timely perfected his appeal to the Board. R. at 2281-82.

In an April 2009 VA examination, the veteran again noted flare-ups during which "he has further limitation in active range of motion." R. at 339. The examiner noted that "[d]uring flare-ups of strain [Mr. Stern] may have further decrease in active range of motion of the back . . . but the degree will depend on how much discomfort [he] feels at that time." R. at 441-42.

In August 2011, the Board issued a decision reopening Mr. Stern's left ankle disability claim and remanding to obtain an examination and linkage opinion. R. at 1897. The Board also remanded the claim for an increased evaluation for lumbosacral strain to obtain additional treatment records and VA examination to address Mr. Stern's statement that his condition had become more severe in that, after repetitive use, his range of motion was "significantly" reduced due to pain, soreness, and stiffness and he had increased radiation of pain to his hips, groin, legs, and feet. R. at 1898.

In a January 2015 ankle examination, a VA examiner noted Mr. Stern's reports of "twisting his ankle since the military," R. at 185, and opined that his left ankle condition was less likely than not incurred in or caused by service because there was "[n]o chronicity or continuity while on active duty," R. at 182. In a VA back examination the same month, the examiner noted that the

examination was being conducted during a flare-up, but that she was unable to say without mere speculation whether the flare-up significantly limited functional ability because of the veteran's "stiffness and pain." R. at 194.

In June 2016, Mr. Stern requested entitlement to TDIU. R. at 1463-64. In an April 2017 VA back examination, he reported severe flare-ups that occurred weekly lasting from 30 minutes to hours, constant low back pain, and intermittent back spasms, but in response to the examiner's direct question as to whether he had "functional loss" or "functional impairment" due to his back condition he answered "no." R. at 794. The examiner determined that the examination was not conducted during a flare-up, the examination results were neither medically consistent nor inconsistent with the veteran's statements describing functional loss during a flare-up, and that she was unable to say without mere speculation whether pain, weakness, fatigability, or incoordination significantly limited functional ability because "[t]here is no conceptual or empirical basis for making such a determination without directly observing function under the flare[-]up condition." R. at 796.

In November 2017, the Board issued its decision on appeal denying an evaluation in excess of 20% disabling for lumbosacral strain and denying entitlement to service connection for a left ankle disability and TDIU. R. at 2-16. The Board determined that the VA medical examinations and opinions were adequate and the duty to assist satisfied. R. at 6. As to lumbosacral strain, the Board found that the evidence did not support an increased evaluation or staged ratings. R. at 13. As to the left ankle disability, the Board found that the January 2015 medical opinion was probative and contained sufficient rationale to support the examiner's conclusion that the condition was less likely than not incurred in or caused by service. R. at 7. This timely appeal followed.

II. JURISDICTION AND STANDARD OF REVIEW

Mr. Stern's appeal is timely and the Court has jurisdiction to review the November 2017 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 determinations of the appropriate degree of disability and the adequacy of a medical examination or opinion are findings of fact subject to the "clearly erroneous" standard of review set forth in 38 U.S.C. § 7261(a)(4). *See D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008); *Smallwood v. Brown*, 10 Vet.App. 93, 97 (1997). "A factual finding 'is "clearly erroneous" when

although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Hersey v. Derwinski*, 2 Vet.App. 91, 94 (1992) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

As with any finding on a material issue of fact and law presented on the record, the Board must support its factual determinations 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 evidence, account for evidence that it finds persuasive or unpersuasive, and provide reasons for its rejection of 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).

III. ANALYSIS

A. Service Connection for Left Ankle Disability

Mr. Stern argues that the Board erred in relying on the January 2015 examination in denying service connection for a left ankle disability because the examiner provided an inadequate rationale. Appellant's Brief (Br.) at 20-23. The Secretary concedes that the examiner failed to consider the veteran's lay statements regarding continuing symptoms since service. Secretary's Br. at 11-12. The Court agrees.

When the Secretary undertakes to provide a veteran with a VA medical examination or opinion, he must ensure that the examination or opinion is adequate. *Barr v. Nicholson*, 21 Vet.App. 303, 311 (2007). In general, a VA 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 . . . 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)), 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). *See also Acevedo v. Shinseki*, 25 Vet.App. 286, 293 (2012) ("[A]n adequate medical report must rest on correct facts and reasoned medical judgment so as [to] inform the Board on a medical question and facilitate the Board's consideration and weighing of the report against any contrary reports."); *Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 301 (2008) ("[A]

medical examination report must contain not only clear conclusions with supporting data, but also a reasoned medical explanation connecting the two.").

The Court agrees with the Secretary that a new medical opinion is warranted to address the left ankle disability. *See* Secretary's Br. at 11-12. The January 2015 examiner, after noting Mr. Stern's report of "twisting his ankle since the military," R. at 185, proceeded to opine that "there is no evidence of chronicity or continuity while on active duty," R. at 182. In rendering this conclusion, however, the examiner failed to address the veteran's competent lay statement and impermissibly provided a rationale based solely on a lack of objective evidence. *See Buchanan v. Nicholson*, 451 F.3d 1331, 1336 (Fed. Cir. 2006) (finding medical opinions inadequate due to the examiner's reliance solely on the absence of objective documentation without consideration of a claimant's lay statements); *Dalton v. Nicholson*, 21 Vet.App. 23, 39 (2007) (same). Therefore, remand is warranted for the Board to obtain an adequate medical opinion addressing service connection for left ankle disability. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) (holding that remand is the appropriate remedy where the record is inadequate).

B. Increased Evaluation for Lumbosacral Strain

Mr. Stern argues that the Board clearly erred in relying on the March 2008, April 2009, January 2015, and April 2017 VA examinations to deny an increased lumbosacral strain evaluation because those examinations were inadequate. Appellant's Br. at 10-19. Specifically, he contends that the examiners failed to adequately address functional loss due to pain on flare-ups and to comply with the Court's holding in *Sharp v. Shulkin*, 29 Vet.App. 26 (2017). Appellant's Br. at 13-16; Reply Br. at 7-9. The Secretary argues that the Board provided adequate reasons or bases for relying on an adequate April 2017 VA examination and urges affirmance. Secretary's Br. at 6-11.

As relevant here, the General Rating Formula for Diseases and Injuries of the Spine provides a 20% evaluation when there is evidence of, inter alia, forward flexion of the thoracolumbar spine greater than 30 degrees but not greater than 60 degrees; combined range of motion of the thoracolumbar spine not greater than 120 degrees; or, muscle spasm or guarding severe enough to result in an abnormal gait or abnormal spinal contour such as scoliosis, reversed lordosis, or abnormal kyphosis. 38 C.F.R. § 4.71a (2019). A 40% evaluation is warranted for, inter alia, forward flexion of the thoracolumbar spine 30 degrees or less, or favorable ankylosis of the entire thoracolumbar spine. *Id.* A 50% evaluation requires evidence of unfavorable ankylosis of

the entire thoracolumbar spine, and a 100% evaluation requires evidence of unfavorable ankyloses of the entire spine. *Id*.

However, a veteran may be entitled to a higher disability evaluation than that supported by mechanical application of the rating schedule where there is evidence that his or her disability causes "additional functional loss—i.e., 'the inability . . . to perform the normal working movements of the body with normal excursion, strength, speed, coordination[,] and endurance'—including as due to pain and/or other factors" or "reduction of a joint's normal excursion of movement in different planes, including changes in the joint's range of movement, strength, fatigability, or coordination." *Lyles v. Shulkin*, 29 Vet.App. 107, 117-18 (2017) (quoting 38 C.F.R. § 4.40 and citing 38 C.F.R. § 4.45); *see Sharp*, 29 Vet.App. at 31-32; *Mitchell v. Shinseki*, 25 Vet.App. 32, 36-37 (2011); *DeLuca v. Brown*, 8 Vet.App. 202, 205-07 (1995).

In particular, a VA joints examination that fails to take into account the factors listed in §§ 4.40 and 4.45, including those experienced during flare-ups, is inadequate for evaluation purposes. *DeLuca*, 8 Vet.App. at 206-07. For an examination not conducted during a flare-up to comply with § 4.40, the examiner must obtain information about the severity, frequency, duration, precipitating and alleviating factors, and extent of functional impairment of flares from the veteran and offer a flare opinion based on an estimate derived from information procured from relevant sources, including the lay statements of the veteran. *Sharp*, 29 Vet.App. at 34-35. The examiner's determination in that regard "should, if feasible, be portrayed in terms of the degree of additional range-of-motion loss due to pain on use or *during flare-ups*." *DeLuca*, 8 Vet.App. at 206 (emphasis added) (internal quotation marks and alteration omitted). When an examiner states that he or she cannot offer a flare opinion without resort to speculation, that opinion is adequate only when it is "clear that [it] is predicated on a lack of knowledge among the 'medical community at large' and not the insufficient knowledge of the specific examiner." *Sharp*, 29 Vet.App. at 36 (quoting *Jones v. Shinseki*, 23 Vet.App. 382, 390 (2010)).

Contrary to the Secretary's arguments, the Court concludes that the VA examinations are inadequate for evaluation purposes. In the April 2017 VA examination, the examiner described Mr. Stern's current symptoms as "constant low back pain and intermittent back spasms" and noted that the veteran reported "severe" weekly flare-ups lasting from 30 minutes to hours which he described as "muscle spasms and stiffness in the morning [e]specially in cold weather." R. at 794. The examiner further noted the examination was not conducted during a flare-up, concluded in

response to a DBQ question that the examination was "neither medically consistent or inconsistent with the veteran's statements describing functional loss," and determined that she was unable to say without mere speculation whether pain significantly limited functional ability with flare-up because "there is no conceptual or empirical basis for making such a determination without directly observing function under th[o]se conditions." R. at 796.

As noted, when an examination is not conducted during a flare-up, like the April 2017 examination, the examiner must offer a flare opinion based on an estimate derived from information procured from relevant sources, including the lay statements of the veteran, after asking the veteran to describe functional loss. *See Sharp*, 29 Vet.App. at 34-35. But that procedure was not followed by the April 2017 examiner or by any VA examiner in this case. In a January 2015 examination, Mr. Stern reported flare-ups that impact thoracolumbar spine function and described the flares as "excru[c]iating" where he "can't do anything." R. at 193. The examiner noted that the examination was conducted during a flare-up, but paradoxically was still unable to provide an opinion as to the level of functional impairment in terms of range of motion without "mere speculation" because of "stiffness and pain." R. at 194. In April 2009, the examiner concluded that the veteran "may have further decrease in active range of motion of the back" during a flare-up, "but the degree will depend on how much discomfort [he] feels at that time." R. at 341-42. In a March 2008 VA examination, Mr. Stern reported experiencing flare-ups once or twice a week to as often as three to four times a day lasting hours that "cause moderate additional limitation of motion and moderate functional impairment." R. at 370. As the examiners were required to, but did not, provide an opinion regarding the functional impairment experienced by Mr. Stern during flares, including attempting to quantify any additional range-of-motion loss in terms of degrees, the VA examinations are inadequate. *See Sharp*, 29 Vet.App. at 34-35; *Mitchell*, 25 Vet.App. at 44; *DeLuca*, 8 Vet.App. at 206-07.

The foregoing error is prejudicial because a new, adequate VA medical examination and opinion that complies with *Sharp* may entitle Mr. Stern to a higher schedular lumbar spine evaluation. *See* 38 C.F.R. § 4.71a (2019) (providing a 40% evaluation for, inter alia, forward flexion of the thoracolumbar spine 30 degrees or less); *see also* 38 U.S.C. § 7261(b)(2) (requiring the Court to "take due account of the rule of prejudicial error"). Accordingly, the Court concludes that remand is warranted for the Board to obtain a medical examination and opinion that adequately addresses the lumbosacral spine disorder. *See Tucker*, 11 Vet.App. at 374.

In addition, remand will provide the Board the opportunity to address another troubling aspect of the flawed April 2017 examination—that, in denying an increased evaluation based on *DeLuca* factors, the Board relied on Mr. Stern's "no" response to the question whether he experienced functional loss or functional impairment, notwithstanding that he had reported severe flare-ups, constant low back pain with intermittent spasms, and a range of motion significantly reduced due to pain, soreness, and stiffness. R. at 794, 1898. Although VA regulations define functional loss as "primarily the inability . . . to perform the normal working movements of the body with normal excursion, strength, speed, coordination, and endurance," including as "due to pain," 38 C.F.R. § 4.40 (2019), functional loss and functional impairment have been revealed as relatively complex concepts that this Court has had to decipher in multiple precedential decisions. It is beyond the Court's comprehension that, given Mr. Stern's reported back symptoms, the Board accepted his denial of functional loss and functional impairment without considering whether he understood the concepts he purported to deny experiencing.

Because the Court is remanding the claims for service connection for left ankle disability and for an increased evaluation for service-connected lumbosacral strain, which may ultimately lead to an award of an increased rating evaluation, which, in turn, may entitle Mr. Stern to TDIU, the Court finds that the issues are inextricably intertwined. *Cf. Holland v. Brown*, 6 Vet.App. 443, 446 (1994) (holding that the issue of entitlement to TDIU "predicated on a particular service-connected condition is 'inextricably intertwined' with a rating increase claim regarding the same condition"); *Begin v. Derwinski*, 3 Vet.App. 257, 258 (1992) (acknowledging that entitlement to TDIU may be "inextricably intertwined with the degree of impairment that is ultimately adjudicated"). The Court therefore concludes that the issue of entitlement to TDIU must be returned to the Board to be readjudicated with that claim. *See Henderson v. West*, 12 Vet.App. 11, 20 (1998) ("[W]here a decision on one issue would have a significant impact upon another, and that impact in turn could render any review by this Court of the decision on the other [issue] meaningless and a waste of judicial resources, the two [issues] are inextricably intertwined." (internal quotations and alterations omitted)).

The veteran is free on remand to present additional arguments and evidence to the Board on remand 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). Further, "[a] remand is meant to entail a critical examination of the justification for [the Board's] decision," *Fletcher v. Derwinski*,

1 Vet.App. 394, 397 (1991), and must be performed in an expeditious manner in accordance with 38 U.S.C. § 7112.

IV. CONCLUSION

Upon consideration of the foregoing, those portions of the November 8, 2017, Board decision that denied an evaluation in excess of 20% for service-connected lumbosacral strain, entitlement to service connection for a left ankle disability, and entitlement to TDIU are SET ASIDE and the matters are REMANDED for further development and readjudication consistent with this decision. The balance of the appeal is DISMISSED.

DATED: July 8, 2019

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