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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 18-0088

DAVID S. HYDE, APPELLANT,

V.

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

Before SCHOELEN, *Judge*.

MEMORANDUM DECISION

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

SCHOELEN, *Judge*: The appellant, through counsel, appeals a September 20, 2017, Board of Veterans' Appeals (Board) decision that denied entitlement to a disability rating higher than 20% for right knee chondromalacia patella, denied a disability rating higher than 10% for right knee degenerative arthritis from July 23, 2007, denied a disability rating higher than 10% for left knee degenerative changes, and denied entitlement to a total disability rating based on individual unemployability (TDIU). Record of Proceedings (R.) at 2-27. For the following reasons, the Court will vacate the Board's decision and remand the matters for further proceedings consistent with this decision.

I. FACTS

The appellant served on active duty in the U.S. Coast Guard from February 1977 to December 1978. R. at 6307.

A February 1998 rating decision granted service connection for chondromalacia, right knee, and assigned an initial 0% disability rating effective May 21, 1997. R. at 6765. A March 2001 rating decision assigned a 20% disability rating for chondromalacia, right knee, effective November 4, 1999. R. at 6384. The rating decision also granted service connection for

degenerative changes, left knee, and assigned an initial 10% disability rating effective September 24, 1999. *Id*.

A September 2003 VA treatment record noted that the appellant was not currently employed and last worked as a salesman a few years ago. R. at 5040. According to the record, the appellant reported that he had completed 3 years of college. *Id*.

A July 2007 VA examination report shows that the appellant complained of right knee pain, weakness, stiffness, and fatigability with daily flareups of pain that resulted in the inability to walk. R. at 6177. He stated that he was not working at the time because of his knees. *Id*. The appellant further reported left knee weakness; instability; and occasional locking and fatigability with daily flareups of pain precipitated by standing for more than 20 minutes, walking for more than half a mile, attempting to climb stairs, or weather changes. *Id*. Right knee flexion ranged from 0 to 120 degrees with extension to -10 degrees. R. at 6178. Left knee flexion ranged from 0 to 120 degrees with extension to 0 degrees. *Id*. Repetitive range of motion testing revealed extension from 0 to -10 degrees in the right knee with pain in the last 20 degrees of extension. R. at 6179.

In an October 2007 rating decision, the regional office (RO) reduced the appellant's disability rating for chondromalacia patella, right knee, from 20% to 10%, effective July 23, 2007, granted an initial 10% disability rating for degenerative arthritis of the right knee, effective July 23, 2007, and continued the 10% disability rating for degenerative changes, left knee. R. at 5750. The appellant filed a Notice of Disagreement with the decision. R. at 5729.

In April 2008, the appellant reported that he last worked the previous year, but that he had to quit because he was required to stand and walk for 4 hours per day. R. at 5688.

In a 2009 work history report for Social Security Administration (SSA) disability benefits, the appellant stated that he had worked as a grocery store clerk in 2006, and prior to 2006, he worked in car sales from 1984 to 2001. R. at 3170. He stated that he was paid $6 per hour as a grocery store clerk, and worked 3 hours per day, 4 days per week. R. at 3171. He reported that at his sales job, he had an annual salary of $20,000. R. at 3172.

In August 2010, he testified before a Board member that his last job was more than a year and a half ago. R. at 5607.

In September 2010, the Board remanded the appellant's claims for higher disability ratings for additional development and determined that a claim for entitlement to TDIU had been reasonably raised by the record. R. at 5581-86.

In October 2010, the appellant was provided a VA examination for his knees. R. at 5567-68. He complained of left and right knee pain, stiffness, and dysfunction, and that his left knee gave way, on average, about once a day. R. at 5567. He stated that he had last worked in 2008, at a fish market, and only lasted 2 weeks because of his inability to stand for long periods. *Id*. He reported experiencing flareups about once a week and that he was about 25% functional during the flareups. *Id*. On examination, left knee flexion was 110 degrees with pain and right knee flexion was 115 degrees with pain. R. at 5568. The examiner stated that the appellant was worsened by 75% of his normal self during a flareup. *Id*.

In April 2012, the Board restored the appellant's 20% disability rating for chondromalacia patella, right knee, effective July 23, 2007. R. at 4042-53. The Board remanded the appellant's claims for higher disability ratings for his knee disabilities and remanded the issue of entitlement to a TDIU to provide a VA notice letter. R. at 4053-56.

A December 2013 VA treatment record shows that the appellant had graduated from high school, but dropped out of college in his junior year. R. at 2399. He and a girlfriend ran a business selling trophies and pins from 1987 to 1994, and after 1994, he worked as a car salesman, but generally had no steady jobs. *Id*.

In September 2014, the appellant was provided a VA examination for his knees. R. at 1844-54. He reported flareups and his right knee flexion was 70 degrees with objective evidence of painful motion beginning at 70 degrees. R. at 1846. His left knee flexion was 80 degrees with objective evidence of painful motion beginning at 80 degrees. *Id*. The appellant did not experience additional limitation of motion following repetitive testing. R. at 1847. The appellant had functional loss after repetitive testing, including less movement than normal, pain on movement, disturbance of locomotion, and interference with sitting. R. at 1848. He reported that he worked in sales most of his life, which involved desk work. R. at 1852.

A July 2016 rating decision denied entitlement to TDIU. R. at 3423-25. The RO denied the claim because the appellant had not returned a completed VA Form 21-8940, Veteran's Application for Increased Compensation Based on Individual Unemployability. R. at 3424-25.

The September 20, 2017, Board decision denied increased disability ratings for right knee chondromalacia patella, right knee degenerative arthritis, left knee degenerative changes, and denied TDIU. R. at 2-27. The Board found the July 2007, October 2010, and September 2014 VA examinations adequate for evaluating the appellant's service-connected right and left knee disabilities. R. at 7. The Board denied entitlement to TDIU because the appellant had not returned a completed VA Form 21-8940 concerning his occupational history, educational history, and finances. R. at 24. This appeal followed.

II. ANALYSIS

A. Increased Disability Ratings

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). A VA joints examination that fails to account for the factors listed in 38 C.F.R. §§ 4.40 and 4.45, including those experienced during flareups, is inadequate for evaluation purposes. *DeLuca v. Brown*, 8 Vet.App. 202, 206-07 (1995).

For an examination 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." *Sharp v. Shulkin*, 29 Vet.App. 26, 34 (2017). It is anticipated that "examiners will offer flare opinions based on estimates derived from information procured from relevant sources, including the lay statements of veterans," *id*. at 35, and 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," *DeLuc*a, 8 Vet.App. at 206 (internal quotation marks and alteration omitted); *see Mitchell v. Shinseki*, 25 Vet.App. 32, 44 (2011) (explaining that it is important for a medical examiner to note "whether and at what point during the range of motion the [veteran] experience[s] any limitation of motion that [is] specifically attributable to pain").

Further, 38 C.F.R. § 4.59 (2019) concerns painful motion of the musculoskeletal system, and the last sentence of that regulation states that the "joints involved should be tested for pain on both active and passive motion, in weight-bearing and nonweight-bearing and, if possible, with the range of the opposite undamaged joint." The Court has held that the testing listed in the final sentence of § 4.59 is required unless the medical examiner determines that it cannot or should not be done. *Correia v. McDonald*, 28 Vet.App. 158, 169-70 (2016).

"Whether a medical opinion is adequate is a finding of fact, which this Court reviews under the 'clearly erroneous' standard." *D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008); *see also Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990). 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); *see also Gilbert*, 1 Vet.App. at 52.

The appellant argues that the Board clearly erred by relying on inadequate VA examinations. Appellant's Brief (Br.) at 16-20. He first asserts that the September 2014 VA examination is inadequate because the examiner failed to ask about his functional ability during repeated use and flareups, failing to comply with *Sharp v. Shulkin*, 29 Vet. App. 26 (2017). Appellant's Br. at 17. Additionally, he argues that the Board erred by relying on an inadequate medical record because *none* of the VA examinations of record provided the requisite testing required by *Correia*, 28 Vet.App. at 169-70. *Id*. at 19.

The Secretary concedes that the October 2010 and September 2014 VA examinations were inadequate because neither examination complied with the Court's holding in *Correia*, 28 Vet.App. at 169-70. Secretary's Br. at 13-14. The Secretary states that the VA examinations were inadequate because the appellant did not undergo weight-bearing testing. *Id*. In addition, the Secretary concedes that the September 2014 VA examination failed to comply with *Sharp*, 29 Vet.App. at 35, because the examiner found it infeasible to render an opinion regarding loss of motion during flareups, but the examiner did not elicit information regarding flareups or estimate the appellant's functional loss due to flareups based on the entirety of evidence of record. R. at 14-15. The Secretary asks the Court to vacate the Board's decision to provide the appellant a new VA examination for his knees. Secretary's Br. at 15.

The Court finds that the Board clearly erred when it determined that the July 2007, October 2010, and September 2014 VA examinations were adequate. *See* 38 U.S.C. § 7261(a)(4);

D'Aries, 22 Vet.App. at 103; *Gilbert*, 1 Vet.App. at 52. It does not appear that the VA examiners tested the appellant's knees in weight-bearing and non-weight-bearing functional capacity, nor did the examiner explain why such testing could not or should not be done. *See Correia*, 28 Vet.App.at 169-70. In addition, the Court agrees with the Secretary that the September 2014 VA examination failed to comply with *Sharp*, 29 Vet.App. at 35. Though the September 2014 VA examiner expressed that because of insufficient information it was not feasible to render an opinion concerning range of motion loss during flareups, there is no indication that the examiner elicited information from the appellant regarding his functional ability during flareups. R. at 3517.

Having found that the Board clearly erred when finding the VA examinations adequate, the Court will address the remedy. The appellant requests reversal and asks the Court to assign a minimum 20% disability rating for each knee from October 25, 2010, and assign a minimum 30% disability rating for his left knee from December 13, 2016. Appellant's Br. at 28. Reversal is warranted only when the Board has performed the necessary factfinding and explicitly weighed the evidence, and the Court is left with the definite and firm conviction that a mistake has been committed. *Deloach v. Shinseki*, 704 F.3d 1370, 1380 (Fed. Cir. 2013); *see Gutierrez v. Principi*, 19 Vet.App. 1, 10 (2004) ("[R]eversal is the appropriate remedy when the only permissible view of the evidence is contrary to the Board's decision."). Because the Court has found the VA examinations inadequate and is remanding the matters for a new VA examination, this action will require the Board to weigh evidence and make factual findings. Therefore, remand and not reversal is the proper remedy. *See Bankhead v. Shulkin*, 29 Vet.App. 23 (2017) (concluding that "remand, not reversal, is the appropriate remedy where . . . the Board has provided inadequate reasons or bases for its decision and additional fact finding and weighing of the evidence are necessary to make a decision on the claim").

Accordingly, the matters of entitlement to higher disability ratings for right knee chondromalacia patella, right knee degenerative arthritis, and left knee degenerative changes, must be remanded for a new VA examination that complies with *Correia* and *Sharp*. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) (holding that remand is the appropriate remedy "where the Board has incorrectly applied the law, failed to provide an adequate statement of reasons or bases for its determinations, or where the record is otherwise inadequate"); *Hicks v. Brown*, 8 Vet.App. 417, 421 (2005) (holding that the Board's reliance on an inadequate medical examination is cause for remand).

B. Extraschedular Consideration

The appellant argues that the Board erred in failing to consider whether he was entitled to extraschedular consideration for his service-connected bilateral knee disabilities. He asserts that the record reasonably raised the issue because the appellant's bilateral knee disabilities manifested in muscular atrophy, disjointed bone, raised nodule, altered moods, and sleep disturbances. Appellant's Br. at 25 (citing R. at 5407, 5567-68, 5604, 5605-06). He contends that these manifestations are not contemplated by the relevant rating criteria, warranting referral for extraschedular consideration. *Id*.

The Secretary contends that "[n]othing in the record reasonably raised the issue of entitlement to an extraschedular consideration for [a]ppellant's knee conditions and as a result, the Board was not required to consider the theories." Secretary's Br. at 17-18. The Secretary asserts that the appellant attempts to "conflate the effects of his bilateral knee disabilities – i.e., sleep disturbance and muscle atrophy – with the arthritis and limitation of motion, for which [a]ppellant is compensated under the assigned diagnostic codes," and even assuming that the claimed conditions were secondary to the appellant's bilateral knee conditions, the conditions would be claims for secondary service connection and not increased disability ratings. Secretary's Br. at 20-21. He argues that because the appellant did not seek secondary service connection or explicitly assert that his disability picture was exceptional or unusual, there was no basis for the Board to consider extraschedular evaluation. *Id*. at 21.

Because the claims for higher disability ratings for the appellant's bilateral knee disabilities will be readjudicated by the Board, the Court need not address any perceived errors with respect to extraschedular consideration. *See Barringer v. Peake*, 22 Vet.App. 242, 243 (2008); *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 quotation marks and alterations omitted)). However, the Court points out that the Board's readjudication of the claims for higher schedular ratings invokes the duty to maximize benefits and that the Board must *first* exhaust all schedular alternatives for rating a disability *before* the extraschedular analysis is triggered. *See Morgan v. Wilkie*, 31 Vet.App. 162 (2019). In light of the remand necessary in this case, the Court will not address this issue, but directs the Board on remand to address the appellant's contentions in light of *Morgan*. *See Quirin*

v. Shinseki, 22 Vet.App. 390, 395 (2009) (noting that "the Court will not ordinarily consider additional allegations of error that have been rendered moot by the Court's opinion or that would require the Court to issue an advisory opinion"); *Best v. Principi*, 15 Vet.App. 18, 20 (2001) (per curiam order).

C. TDIU

TDIU is awarded when a veteran is "unable to secure or follow a substantially gainful occupation as a result of service-connected disabilities" and meets certain evaluation requirements. 38 C.F.R. § 4.16(a) (2019) (if there is one service-connected disability, it must have a rating of 60% or higher, and if there are two or more disabilities, at least one must have a rating of 40% or higher, and the combined rating must be 70% or higher). Where the veteran's service-connected disabilities do not meet the requirements for TDIU set forth in § 4.16(a), the veteran may be granted TDIU on an extraschedular basis. 38 C.F.R. § 4.16(b).

As with any finding on a material issue of fact and law presented on the record, the Board must support its TDIU 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,* 1 Vet.App. at 52. 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).

The appellant contends that the Board failed to provide adequate reasons or bases for denying TDIU. Appellant's Br. at 27. He states that the Board denied the claim because he did not complete a VA Form 21-8940, but that the evidence of record described his educational and occupational history (the information solicited by the form). *Id.* (citing R. at 2399, 4722-23, 5040). He notes that he submitted financial information about his previous employment, including salaries, to SSA, whose records were included in the claims file. *Id.* (citing R. at 3170-77). The appellant asserts that the Board should have discussed this evidence of record. *Id.*

The Secretary asserts that the appellant stated that he was not pursuing a claim for "100%" following the solicitation of a VA Form 21-8940, which was not returned, and consequently there was no basis for VA to consider such a claim. Secretary's Br. at 22 (citing R. at 3623, 3402). The appellant responds that to the extent that the Secretary cites the statement that he requested that

VA not adjudicate a claim, the Board did not address the appellant's statement or find that the appellant withdrew the issue of entitlement to a TDIU. Appellant's Reply Br. at 1-27 (citing R. at 3402).

Here, the Board did not deny entitlement to a TDIU on the merits, but because the appellant "did not provide a VA Form 21-8940, Veterans Application for Increased Compensation Based on Unemployability, or *equivalent* and did not provide the requested financial information." R. at 4 (emphasis added). The Board stated that the appellant was sent a VA notice letter in February 2013, which included a VA Form 21-8940, but that the appellant "did not return this form to VA and did not respond to the request for financial information." R. at 24.

The Court finds that the Board failed to provide an adequate statement of reasons or bases for denying TDIU by not discussing favorable evidence of record that discussed his educational history, occupational history, and financial information concerning his prior employment. *See Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *see also Pederson v. McDonald*, 27 Vet.App. 276, 286 (2015) (en banc) ("When the Board conducts a TDIU analysis, it must take into account the individual veteran's education, training, and work history."); *Rice v. Shinseki*, 22 Vet.App. 447, 453-54 (2009) (holding that "a request for TDIU, whether expressly raised by a veteran or reasonably raised by the record, is not a separate claim for benefits, but rather involves an attempt to obtain an appropriate rating for a disability or disabilities," including as "part of a claim for increased compensation"); R. at 2399, 3170-72, 4722-23, 5040, 5607, 5688. To the extent that the Secretary asserts that regardless of any reasons-or-bases error, the appellant withdrew his claim for TDIU because he informed VA that he did not seek "100%," this is a post hoc rationalization that the Court may not accept. Secretary's Br. at 22; *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 156 (1991) ("[A]gency 'litigating positions' are not entitled to deference when they are merely appellate counsel's 'post hoc rationalizations' for agency action, advanced for the first time in the reviewing court."); *Evans v. Shinseki*, 25 Vet.App. 7, 16 (2011) ("[I]t is the Board that is required to provide a complete statement of reasons or bases, and the Secretary cannot make up for its failure to do so."). Further, the Secretary is essentially asking the Court to make a factual finding, which the Court is not permitted to assess in the first instance. *See Washington v. Nicholson*, 19 Vet.App. 362, 369 (2005); *Owens v. Brown*, 7 Vet.App. 429, 433 (1995). The Court finds that remand of this issue is warranted for the Board to address the evidence

of record concerning the appellant's educational history, occupational history, and financial information. *See Tucker*, 11 Vet.App. at 374.

Given this disposition, the Court will not now address the remaining arguments and issues raised by the appellant. *See Best*, 15 Vet.App. at 20. On remand, the appellant is free to submit additional evidence and argument on the remanded matters, 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

After consideration of the parties' pleadings and a review of the record, the Board's September 20, 2017, decision is VACATED and the matters are REMANDED for further proceedings consistent with this decision.

DATED: July 31, 2019

Copies to:

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