United States Court of Appeals for Veterans Claims

Vet. App. No. 19-3227

WENDELL ANDREWS,

Appellant,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,

Appellee.

REPLY BRIEF FOR APPELLANT

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INTRODUCTION

The appellant, Wendell Andrews, appeals the part of the January 17, 2019, decision of the Board of Veterans' Appeals ("Board") that denied him entitlement to increased ratings in excess of 10 percent for chondromalacia of the right patella with degenerative joint disease (DJD) and 10 percent for DJD of the left knee. *See* Record Before the Agency ("R.") 1-24. He filed his initial brief ("App. Br.") on April 24, 2020. He files this reply brief to respond to the arguments advanced by the appellee, Secretary of Veterans Affairs, in his brief ("Sec. Br.") filed on June 23, 2020.

The parties agree that the Board erred in denying the aforementioned claims in multiple respects. The parties agree that the Board erred when it found 38 C.F.R. § 4.71a, Diagnostic Code (DC) 5259, inapplicable because that DC requires complete removal of the meniscus and Mr. Andrews only had partial meniscectomies. *See* Sec. Br. at 10. The Secretary argues that remand is appropriate relief for this error. Mr. Andrews concedes that remand is warranted for the Board to address whether he has symptoms attributable to his partial meniscectomies that are not already compensated under different DCs.

The parties also agree that with respect to the parts of the Board's decision denying entitlement to increased ratings for Appellant's service-connected chondromalacia of the right patella with DJD and left knee DJD based on limitation of motion, the Board erred by not ensuring that the VA complied with its statutory duty to assist, because the September 2017 VA examination was inadequate for rating purposes. As discussed below in Argument IV, the Secretary did not address one of the errors Appellant identified with that examination report, thus implicitly conceding that error.

The primary remaining area of disagreement between the parties in this case, however, is with respect to Appellant's rights and the Board's obligations during remand proceedings. Sections I-III of this reply brief address these disagreements.

I. Whether the Court Should Order the Secretary to Provide Appellant with the Opportunity to Submit Additional Evidence to the Board on Remand Is Ripe for Judicial Resolution.

Appellant's claims are subject to the appeals system created by the Veterans Appeals Improvement and Modernization Act of 2017 ("AMA"), Pub. L. No 115-44, 131 Stat. 1105 (2017). In his opening brief, Appellant asked the Court, if it vacates the Board's decision and remands his claims for further proceedings, to order the Board to expedite proceedings under 38 U.S.C. § 7112;[1] provide Appellant with an opportunity for a hearing before the Board;[2] provide Appellant with an opportunity to submit additional evidence to the Board under *Kutscherousky v. West*, 12 Vet. App. 369, 372 (1999); and conduct a critical examination of the justification for its decision under *Fletcher v. Derwinski*, 1 Vet. App. 394, 397 (1991). App. Br. 15-16.

The Secretary argues that Appellant's request is not ripe for judicial review or intervention. Sec. Br. at 16. This argument has no merit. Appellant has asked the Court to include in its remand Order language requiring the Board to allow him to submit additional evidence to the Board and to reexamine the evidence of record, as mandated

[1] The Secretary concedes that claims governed by the AMA, including Appellant's, that are remanded by the Court, are entitled to expeditious treatment by the Board. Sec. Br. 24-25; *see* 38 U.S.C. § 7112; 38 C.F.R. § 20.800(d) (2020).

[2] Appellant has reconsidered and decided that he does not intend to request a hearing before the Board if his case is remanded by the Court. Accordingly, Appellant hereby withdraws his request for the Court to order the Secretary to provide Mr. Andrews with an opportunity for a hearing before the Board in the remand proceedings.

by *Kutscherousky* and *Fletcher*. Appellee contends that it would be inappropriate to include these provisions in the Court's Order because the Board's decision was made under the AMA and *Kutscherousky* and *Fletcher* are inconsistent with the AMA. With this reply brief, the issues have been fully briefed and are ripe for judicial resolution.

It would not be premature for the Court to address these issues, as there is a substantial controversy between the parties "of sufficient immediacy and reality" to justify a judicial resolution. *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941). If the Court agrees with the parties that remand of the issue of Appellant's entitlement to separate ratings for his knee disabilities under DC 5259 is warranted for the Board to address whether Mr. Andrews has symptoms attributable to his partial meniscectomies for which he is not already compensated under different DCs, the parties additionally agree that Board may decide that issue without further remanding to the agency of original jurisdiction.[3] Appellant represents to the Court that he has evidence that is not currently of record that shows he has symptoms attributable to his partial meniscectomies for which he is not already compensated under different DCs. The Secretary contends that because Appellant's claim was controlled by the AMA during the proceedings leading to the Board decision, Mr. Andrews cannot submit this evidence to the Board as part of his Court-Ordered remand. *See* Sec. Br. at 18, 20-24. This is an immediate and real issue.

[3] The Secretary concedes that on remand, the "Board may . . . determine the record is sufficient to decide the issue . . . [of] entitlement to separate ratings under DC 5259." Sec. Br. at 18, n.3. Appellant agrees with the Secretary that the Board may do this.

Mr. Andrews will be harmed if the Court does not resolve now whether he has the right to submit additional evidence to the Board in a Court-Ordered remand proceeding. As the Secretary promises, the Board will deny him the opportunity to submit the additional evidence he has that he believes would establish that he has symptoms associated with his partial meniscectomies that do not overlap with symptoms for which he is compensated under other DCs. *See Lyles v. Shulkin*, 29 Vet. App. 107, 118 (2017). Thus, his chance of prevailing at the Board on remand will be adversely affected. The end result is either that he will never receive a separate rating under DC 5259 or, if he does later prevail, his receipt of such benefits will be significantly delayed.

Mr. Andrews will also be harmed if the Court does not instruct the Board that its prior holding in *Fletcher*, requiring the Board to conduct a critical examination of the justification for its decision by reexamining the evidence of record, seeking any other evidence the Board feels is necessary, and issuing a timely, well-supported decision, is controlling law for cases subject to the AMA. *See Fletcher*, 1 Vet. App. at 397; *Kahana v. Shinseki*, 24 Vet. App. 428, 437 (2011). Without such an instruction from the Court, on remand, the Board could simply rewrite its prior decision to superficially comply with its duty to provide an adequate statement of its reasons or bases for its findings and conclusions under 38 U.S.C. § 7104(d)(1). *See Fletcher*, 1 Vet. App. at 397.

In summary, the interests of justice support resolving this issue now, rather than kicking the can down the road for resolution in the future, as the Secretary requests. The Secretary has already informed the Court that the Board will not consider any additional evidence Mr. Andrews submits during Court-Ordered remand proceedings and will not

apply the precedential holdings in *Kutscherousky* and *Fletcher*. There is no valid reason to avoid judicial resolution now, given the Court's standard practice when it remands claims of providing direction in the Court's remand Order regarding the appellant's rights and the Board's obligations in the Court-Ordered remand proceeding. *See, e.g.*, *Smiddy v. Wilkie*, No. 16-2333, 2020 U.S. App. Vet. Claims LEXIS 994, at *23-24 (May 28, 2020) (stating that, on remand, the appellant was free to submit additional evidence on the remanded matter, which the Board was required to consider in accordance with *Kay v. Principi*, 16 Vet. App. 529, 534 (2002) and *Kutscherousky*; and that a remand is meant to entail a critical examination of the justification for the decision, as required by *Fletcher*).

II. The Court Should Hold that Appellant Has the Right to Submit Additional Evidence for Consideration by the Board During a Court-Ordered Remand Proceeding.

The Secretary argues that the controlling statutory and regulatory provisions prohibit Mr. Andrews from submitting additional evidence to the Board between the date of the Court's remand to the Board and the date of the Board's decision on remand. Sec. Br. at 18-19. The Secretary contends that when claims subject to the AMA during the proceedings leading to the Board decision are appealed to the Court and then are remanded by the Court to the Board, they should return to the same lane the veteran chose when appealing from the agency of original jurisdiction (AOJ) to the Board, which in Appellant's case was the direct review lane. Sec. Br. at 19. The Secretary argues that because the direct review lane does not allow for the submission of evidence to the Board when the claim is on appeal from the AOJ, it follows that Appellant does not have a right to submit evidence to the Board between the date of the Court's remand to the Board and

the date of the Board's decision on remand. *Id.* In other words, the veteran is stuck with the lane he chose at an earlier point in the process when he appealed from the AOJ to the Board. The Secretary also argues that *Kutscherousky* and *Fletcher* are not controlling because they were processed and adjudicated in the legacy appeals system. Sec. Br. at 20.

The Secretary asserts that the statutory and regulatory provisions of the AMA "clearly address when the record is open for the submission of additional evidence … *to include following a Court remand*." Sec. Br. at 21 (emphasis added). He similarly alleges that "any order by the Court directing the Secretary to afford Appellant the opportunity to submit additional evidence . . . would be in direct contravention of the controlling statutory and regulations provisions. *See* 38 U.S.C. § 7113(a); 38 C.F.R. § 20.301." Sec. Br. at 20.

The Secretary's allegations are inaccurate. Neither the AMA, nor any regulation promulgated under the AMA, including 38 U.S.C. § 7113(a) and 38 C.F.R. § 20.301, addresses the rights of a claimant after an appeal to the Court results in a remand to the Board. The one document the Secretary cites that discusses this issue is the non-regulatory comment written in the Federal Register stating that "such appeals would be placed upon on the same docket that the veteran was on previously." VA Claims and Appeals Modernization, 84 Fed. Reg. 138, 159 (Jan. 18, 2019). Thus, contrary to the Secretary's argument, a Court order providing Mr. Andrews with an opportunity to submit additional evidence on remand would not contradict any AMA statutory or regulatory provisions. *See* Sec. Br. at 20, 23.

Rather than statute or regulation, an appellant's right to submit additional evidence for consideration by the Board following remand from this Court stems from case law, namely *Kutscherousky*. In *Kutscherousky*, the Court held that

> in every case in which the Court remands to the Board a matter for adjudication or readjudication . . . . an appellant is entitled . . . to submit . . . additional evidence and argument . . . .

12 Vet. App. at 372. *Kutscherousky* is still binding authority and should apply to any of Appellant's claims that are remanded by the Court.

The Secretary concedes that, "in *Kutscherousky*, the Court determined that an appellant was entitled, as an absolute matter of right, to submit additional evidence and argument or to request a hearing upon remand by the Court." Sec. Br. at 20-21 (citing *Kutscherousky*, 12 Vet. App. at 372). The Secretary contends that this ruling should not apply to cases decided by the Board under the AMA for essentially two reasons.

First, the Secretary contends that the Court's absolute right holding was based on an internal Board memorandum—Board Chairman Memorandum 01-95-06. Sec. Br. at 21. That contention is not accurate. The Court's ruling that an appellant is entitled, as an absolute matter of right, to submit additional evidence upon remand by the Court is *judicially* made law. 38 U.S.C. § 7252(a) provides, in pertinent part, that the "Court shall have the power to affirm modify, or reverse a decision of the Board or *to remand the matter, as appropriate*." (Emphasis added). No authority issued by the Board or the Secretary can limit the authority of the Court to tailor its remand Orders as it deems appropriate. The Board Chairman Memorandum cited by the Board did not bestow appellants with the absolute right to submit additional evidence to the Board on remand

from the Court. That Memorandum simply permitted appellants to submit additional evidence to the Board upon remand from the Court as a matter of right "only 'if the Court's remand permits the appellant to submit additional evidence.'" *Kutscherousky*, 12 Vet. App. at 371 (citing Board Chairman Memorandum 01-95-06, Pt. 4). The Court explained that its holding was "consistent with the shift of the claim upon remand by the Court from the Court's adversarial process back to the nonadversarial, ex parte adjudication process carried out on behalf of the Secretary." *Id*.

Next, the Secretary contends that *Kutscherousky* does not apply here because

> under the legacy system, the appeal of the final Board decision to the Court . . . marked the closing of the record and the reopening of the record upon remand from the Court. Under the AMA, however, this shift is no longer the determinative factor as to when the record open and closes in a particular appeal. Instead, when and whether the record is open or closed at the Board is based on which review lane the veteran selects as articulated in his or her NOD.

Sec. Br. at 21-22. This contention looks at the AMA from a skewed perspective. The Secretary overlooks that veterans appealing an AMA claim have the absolute right to submit additional evidence to the Board in an appeal from the AOJ to the Board. All they must do to preserve this right is to choose the "hearing" or "evidence" docket. Thus, it is wrong to state that appeals from the AOJ to the Board inherently involve a closed record.

What the Secretary is attempting here—without statutory or regulatory authority—is to bind a veteran who had the absolute right to an open record at the Board, but chose the direct lane, to be stuck with that choice in an entirely different setting: when the Court remands an appeal to the Board to correct error. Why should Mr. Andrews be stuck with

his choice of the direct (closed record) lane, made months or years earlier when he appealed to the Board, at the later point when the Court remands his case to the Board to correct error? The Secretary's answer is revealing: Mr. Andrews "explicitly chose to have his appeal reviewed by the Board under the direct review docket, which does not allow for the submission of evidence or a hearing request, *a matter he was aware of when he selected the docket review option*." Sec. Br. at 19 (emphasis added).

The truth is that Mr. Andrews was aware that his choice of docket prevented him *from submitting additional evidence to the Board in his appeal from the AOJ to the Board*. But he was completely unaware—because the Secretary never told him—that his choice of docket in this setting would prevent him years later, following any judicial appeal of the resulting Board decision that results in a judicial remand to the Board, from submitting additional evidence to the Board.

The issue of a separate rating under DC 5259 in this case illustrates how unfair the rule the Secretary seeks to impose would be to veterans. The AOJ decision appealed to the Board in this case never addressed whether Mr. Andrews was entitled to a separate rating under DC 5259. R. 49-51, 269-82. Thus, when he filed his NOD and chose the direct review lane, he had no idea that this separate rating issue would become relevant. The first time the Secretary addressed this issue was when the Board erroneously held that DC 5259 was inapplicable to Appellant's claim because that DC requires complete removal of the meniscus and Mr. Andrews only had partial meniscectomies. *See* Sec. Br. at 10. If the Court remands for correction of this error, as both parties request, he will know, *for the first time*, that the issue the Board will decide on remand is whether he has

symptoms attributable to his partial meniscectomies for which he is not already compensated. Because of this new knowledge, he now believes he has relevant evidence that he wants to submit to the Board on remand to help substantiate these claims.

The Court should not accept the Secretary's invitation to set such an unfair procedural trap for the unwary. To prohibit Mr. Andrews from submitting new evidence to the Board in this situation would violate the Due Process Clause of the Fifth Amendment to the U.S. Constitution and Mr. Andrews's right to fair process as discussed in *Thurber v. Brown*, 5 Vet. App. 119 (1993) and its progeny (*see, e.g.*, *Smith v. Wilkie*, 32 Vet. App. 332, 337-38 (2020)). Appellant's entitlement to VA disability benefits is a property interest protected by the Due Process Clause. *Cushman v. Shinseki*, 576 F.3d 1290, 1298 (Fed. Cir. 2009). An essential principle of procedural due process is that deprivation of a protected interest must 'be preceded by notice and opportunity for hearing *appropriate to the nature of the case*.'" *Noah v. McDonald*, 28 Vet. App. 120, 129 (2016), quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) (emphasis added). Although Mr. Andrews knowingly chose to have his appeal reviewed by the Board under the direct review docket based on the nature of his claim at the time he made that election (*see* Sec. Br. at 19), the posture of Mr. Andrews's case would change following a remand by the Court. The Court has noted that the focus of a claim may change or evolve between the Board's initial consideration of an appeal and the Board's consideration of that claim following remand from the Court, "which often directs additional development *or directs the Board's attention to statutes, regulations, directives, or facts it earlier may have missed*." *Cook v. Snyder*, 28 Vet. App. 330, 342

(2017) (emphasis added). Constitutionally adequate procedure appropriate to this changed nature of the case must include the opportunity to submit new evidence during remand proceedings. The position taken here by the Secretary on AMA cases remanded by the Court to the Board does not provide Mr. Andrews with this opportunity and violates his procedural due process rights and rights to fair process.

The three factors for determining the amount of process that is constitutionally due which were set forth by the U.S. Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), all weigh in favor of Mr. Andrews's argument. Those factors are: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews*, 424 U.S. at 335.

Applying those factors to the present case, first, Mr. Andrews's private interest that would be negatively be affected if he were denied the process requested herein are nondiscretionary, statutorily mandated VA disability benefits—a private interest that is "significant." *Noah*, 28 Vet. App. at 130. Second, the risk of an erroneous deprivation of Mr. Andrews's VA disability benefits under the procedures the Secretary currently uses are high, as Mr. Andrews does not have the opportunity to submit additional evidence that could establish his entitlement to a separate rating under DC 5259. The value of allowing Mr. Andrews to submit new evidence to the Board would be of high value, as the new evidence could be tailored to the changed post-Court remand posture of the case

and result in the grant of the benefits. Third, it is difficult to conceive of a significant fiscal and administrative burden on the VA by allowing Mr. Andrews to submit new evidence for consideration by the Board. While it would undoubtedly require the VA to spend a small amount of time in processing and reviewing the new evidence, this burden is surely outweighed by the VA's interests in having a more complete evidentiary record upon which to base its decision and ensuring that our nation's veterans are properly compensated for disabilities that result from their service as quickly as possible.

For all of the foregoing reasons, if the Court remands Mr. Andrews's claims, the Court should hold that he has the right to submit additional evidence for consideration by the Board during remand proceedings.

III. The Court Should Hold that the Board Must Conduct a Critical Examination of the Justification for its Decision.

Although the Secretary argues generally that the Court should find that *Fletcher* is not controlling in this case because the decision was borne out of considerations under the legacy appeals system (Sec. Br. at 20, 23), the Secretary's argument focuses on whether Mr. Andrews has the right to submit additional argument and request a hearing upon remand by the Court. *See* Sec. Br. 18-23. The Secretary does not directly respond to Appellant's argument that the Court should order the Board to conduct a critical examination of the justification for the decision by reexamining the evidence of record, seeking any other evidence the Board feels is necessary, and issuing a timely, well-supported decision, as required by *Fletcher*, 1 Vet. App. at 397. App. Br. at 16. Because the rationale behind the Court's holding in *Fletcher* is equally applicable to appeals in the

legacy system and the AMA system, the Court should hold that *Fletcher* is binding on the Board for appeals subject to the AMA.

The rationale for the Court's holding in *Fletcher* was that it did not want to imply that a remand is "merely for the purposes of rewriting the opinion so that it will superficially comply with the "reasons or bases" requirement of 38 U.S.C. § 7104(d)(1)." 1 Vet. App. at 397. Because 38 U.S.C. § 7104(d)(1) applies to the Board under both the legacy appeals system that governed the claim before the Court in *Fletcher* and the AMA appeals system that governs Appellant's claims, the Court's rationale for its holding in *Fletcher* is equally applicable to appeals in both systems. Thus, the Court should find that its holding in *Fletcher* that the Board must conduct a critical examination of the justification for its decision is binding on the Board if it remands Appellant's claims.

IV. The Secretary Did Not Contest Appellant's Argument that the September 2017 VA Examination Report was Inadequate with Respect to Flare-Ups.

In his brief, the Secretary agreed with Mr. Andrews that the Court should vacate and remand the parts of the Board's decision that denied him entitlement to increased ratings for chondromalacia of the right patella with DJD and left knee DJD, because the Board erred by not ensuring that the VA complied with its duty to assist. The Secretary conceded that the September 2017 VA examiner's rationale for his inability to say without mere speculation whether pain, weakness, fatigability, or incoordination significantly limit functional ability with repeated use over a period of time ran afoul of the Court's holding in *Sharp v. Shulkin*, 29 Vet. App. 26, 35-36 (2017). Sec. Br. at 14. "As such," the Secretary argued, "the Court should remand Appellant's claims so that the

Board can ensure that Appellant is provided with a new VA examination and/or clarifying medical opinion that properly addresses the issue of the nature and extent of additional functional loss, if any, Appellant experiences during repeated use over time, consistent with the Court's holding in *Sharp*." *Id.* The Secretary did not, however, address Appellant's argument that the September 2017 VA examination report was also inadequate because the examiner failed to adequately address limitations of functional ability during flare-ups of knee pain. *See* App. Br. at 12-14. The Secretary's silence should be construed as a concession of error. *MacWhorter v. Derwinski*, 2 Vet. App. 655, 656 (1992) (holding that the Secretary's failure to respond to an appellant's arguments will be construed as a concession of error).

Appellant acknowledges that the September 2017 VA examination report notes that he did not report flare-ups. But it is unclear whether the examiner asked Mr. Andrews if he had flare-ups and Mr. Andrews denied having them, or whether the examiner did not ask Mr. Andrews if he had flare-ups and Mr. Andrews was simply silent regarding flare-ups. *See* R. 969 (968-78). Additionally, the examiner's inadequate opinions in the section of his report on repeated use over time for each knee specifically references flare-ups twice. The examiner wrote:

> *Flare-up* of the Veteran's XXXX condition was not present at the time of examination. In absence of the Veteran's *flare-up* at examination, or after repeated use over time, it would be mere speculation to express in terms of the degrees of additional ROM loss due to pain, weakness, fatigability, or incoordination.

R. 971, 972 (968-78) (emphasis added). In light of these facts and the argument Mr. Andrews raised in his initial brief (App. Br. at 12-14), as well as the Secretary's failure to

provide argument to the contrary, the Court should find that the September 2017 VA examination report is inadequate with respect to the examiner's findings regarding functional ability not only after repeated use over time, but also during flare-ups.

CONCLUSION

For the foregoing reasons, and those set forth in his initial brief, Appellant respectfully requests that the Court vacate the Board's January 17, 2019, decision; reverse the Board's finding that there was nothing in the record to indicate that his menisci were removed and that DC 5259 was inapplicable to his case; remand for the Board to address whether he has symptoms of his partial meniscectomies for which he is not compensated under other DCs; and remand for the Board to ensure that the Secretary provides him with a medical examination that adequately addresses the functional loss he experiences in his knees after repeated use over time and during flare-ups. Mr. Andrews also requests that the Court hold that he is entitled to submit additional evidence to the Board for consideration during remand proceedings and that the Board must conduct a critical examination of the justification for its decision consistent with *Fletcher*.

Respectfully submitted,

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