

BRIEF OF APPELLANT

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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

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15-3054

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PAUL N. MULLIS,

Appellant

v.

ROBERT A. MCDONALD,  
SECRETARY OF VETERANS AFFAIRS

Appellee

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## **STATEMENT OF THE ISSUE**

The Board relied on an August 2008 VA examination to deny Appellant a rating in excess of 10 percent, prior to June 16, 2014, for his service-connected back disability under 38 C.F.R. § 4.71a (2015). However, the examination did not provide sufficient information as to Appellant's symptoms and limitations due to pain, muscle spasms, functional loss, and effects on weight-bearing activities. Did the Board fail to ensure satisfaction with the duty to assist and provide inadequate reasons or bases for its decision?

## **STATEMENT OF THE CASE**

Mr. Mullis served on active duty in the United States Air Force from August 1990 to August 1995. R-35 (35-36). He was awarded the National Defense Service Medal, the Air Force Longevity Service Award, the Air Force Training Ribbon, and the Air Force Good Conduct Medal. *Id.*

In September 1995, the Veteran filed an application for compensation and sought service connection for a spine condition and other disabilities. R-1234-39. In March 1996, the RO issued a rating decision and granted service connection for lumbar spine condition at zero percent, effective August 5, 1995. R-834-35 (830-35). A May 2002 rating decision increased the Veteran's assigned rating from zero to 10 percent, effective October 12, 2001. R-761 (758-65); *see also* R-766-72 (April 2002 VA spine examination).

In August 2008, the Veteran underwent a VA QTC spine examination. R-475-82. The Veteran reported being previously diagnosed with a lumbar strain. R-476. The examiner noted that this condition existed for over 14 years. *Id.* Symptoms associated with the Veteran's lumbar condition included, stiffness, weakness, numbness, and headaches. *Id.* The Veteran reported he experienced pain in his back, which was "constant" and existed for approximately three years. *Id.* Mr. Mullis also stated that the sensation of pain traveled down his left leg, up into his shoulders and across his lower back. *Id.* He described the pain as aching, sharp, and cramping. *Id.* Pain level was noted as a 9 out of 10. *Id.* The examiner indicated that the pain was "elicited by physical activity, stress and sitting or standing too long." *Id.* Relief from pain was achieved with the use of Vicodin, Percocet, and Xodol, as well as by constantly changing position. *Id.* Mr. Mullis reported that he experienced limited range of motion, muscle spasms that occurred throughout the day, which brought on tension headaches, and his "entire back knots up." *Id.*

The examiner noted that there was no evidence of pain on movement or muscle spasm that day. *Id.* Also, no tenderness was noted, there was a positive straight leg raising test on the right and left, and ankylosis of the lumbar spine was absent. *Id.* Range of Motion ("ROM") for extension, right lateral flexion, right lateral flexion, left lateral flexion, right rotation and left rotation were all noted as normal. R-477. Flexion demonstrated pain at 90 degrees. Additionally, extension, right lateral

flexion, right lateral flexion, left lateral flexion, right rotation and left rotation demonstrated pain at 30 degrees. *Id.*

The examiner also opined that on the day of examination, the joint function of the spine was not additionally limited by pain, fatigue, weakness, lack of endurance, or incoordination after repetitive use. *Id.* Inspection of the spine demonstrated normal head position with symmetry in appearance and there was symmetry of spinal motion with normal curves of the spine. *Id.* There was evidence of Intervertebral Disc Syndrome. *Id.* Additionally, an attached MRI showed degenerative arthritis. *Id.* The examiner provided a diagnosis of lumbar strain with bulging disc L4-5, status post left hemilaminectomy/diskectomy with residual paraspinal muscle spasm. *Id.*

In November 2008, the Veteran submitted a statement in support of his claim and requested an increased rating due to the severity of his lumbar condition. R-440-58. The Veteran also included medical reports from the Virginia Spine Institute where he sought outside care. R-450-58. Mr. Mullis reported that the pain he experienced had increased since 2000, and he now took “heavy pain and muscle relaxing medications.” R-440. The Veteran also stated, “I can’t do the normal things one would do in a normal day without being in pain. From limited forward and backward motion, bending, standing, or walking around for any length of time.” *Id.* Additionally, a November 2008 Virginia Spine Institute new patient examination revealed that Mr. Mullis’s chief complaint was pain in the lumbar region, with symptoms that were worse in the morning. R-211 (211-13). “Lumbar flexion [was]

fingers to the ground with increased pain.” R-212. Symptoms were “best relieved by lying on the left side, lying on the right side and lying on the back with knees up.” R-211. Symptoms were made worse “by lying flat [on the] back, standing and sitting.” *Id.* The doctor also noted that recreation was the activity prevented by the symptoms. *Id.*

That same month, in November 2008, the RO issued a rating decision and continued the Veteran’s 10 percent rating for his service-connected lumbar strain with bulging disc, L4-L5. R-432 (429-39).

In January 2009, the Veteran filed a notice of disagreement. R-422-23. The Veteran also submitted a statement in support of his claim in March 2009, and attached additional treatment records for his spine from Loudoun Rehabilitation. R-376-404; *see also* R-409-10 (February 2009 doctor’s statement describing surgical procedure and patient history). The Veteran reported that he had undergone spinal surgery in February 2009, and within 9 to 10 months from that date, he would need to have another surgery performed, which would be the fourth to date, in order to adjust the “cages and screws that were installed into [his] spine.” R-376. His activities were limited due to his spine, and he could not bend “above or below without significant increased pain.” *Id.*

The RO issued a May 2009 statement of the case and rating decision and continued the Veteran’s assigned 10 percent rating for his lumbar condition. R-359 (342-60); R-1447 (1447-50). Thereafter, in July 2009, the Veteran filed a VA Form 9

and perfected his appeal to the Board. R-312 (312-336). The Veteran also attached new clinical information from a private provider, which pertained to treatment for his back condition. R-315-335. The Veteran requested a rating of no less than 40 percent due to the severity of his lumbar condition. R-312. He stated that he experienced incapacitating episodes of more than 4 weeks, nerve root compression, disk height loss of 50 percent or more, 5 degrees of lumbar flexion, and that he had another spine surgery in November 2009. *Id.*; *see* R-316-22 (February 2009 Reston Hospital operative report and discharge note); R-323-24 (November 2008 Reston Hospital operative report); R-328-29 (November 2008 lumbar views report); R-332-34 (December 2008 Virginia Spine Institute lumbar examination); R-335 (February 2009 lumbar diagnostic study).

The Veteran's wife submitted a statement in March 2010, and requested reconsideration of the Veteran's increased rating claim. R-239 (239-49). The Veteran's representative submitted documents in September 2011, in support of the Veteran's request for a temporary 100 percent rating due to multiple back surgeries. R-231, 233-34 (208-34). In January 2012, the Veteran submitted multiple statements and attached documents in support his claim for a temporary 100 percent rating due to surgery. R-173-80. The following month, the RO issued a rating decision and denied a temporary 100 percent rating. R-146 (143-51).

In June 2014, the Veteran was afforded a VA spine examination. R-93-101. In August 2014, the RO issued a rating decision and granted the Veteran a 20 percent

rating for his lumbar disability effective June 6, 2014. R-1334 (1333-48). That same month, the RO issued a supplemental statement of the case and denied the Veteran a rating in excess of 10 percent prior to June 16, 2014, and in excess of 20 percent thereafter. R-89 (63-92). Additionally, in August 2014, the RO certified the Veteran's appeal to the Board. R-198 (198-99).

The Veteran's representative submitted a brief in support of his claim in March 2015. R-22-24. Thereafter, in a June 2015 decision, the Board denied the Veteran a rating in excess of 10 percent prior to June 16, 2014. R-18 (1-21). This appeal followed.

### **SUMMARY OF THE ARGUMENT**

Remand is required because the Board erred when it relied on the August 2008 VA examination to deny the Veteran a rating in excess of 10 percent prior to June 16, 2014. Despite noting Mr. Mullis's reports of constant pain, daily muscle spasms, and effects on weight-bearing activities, the examiner did not express an opinion if Mr. Mullis experienced functional loss due to pain during flare-ups. *See Mitchell v. Shinseki*, 25 Vet.App. 32, 44 (2011); *see also DeLuca v. Brown*, 8 Vet.App. 202, 206-07 (1995). Because this information was not provided by the examiner and since he did not provide an explanation for why the information could not be provided, the examination report was inadequate for rating purposes. *See Mitchell*, 25 Vet.App. at 32. Accordingly, the Board failed to ensure satisfaction with the duty to assist and

committed prejudicial legal error when it relied on the August 2008 VA examination report to deny an increased rating prior to June 6, 2014.

In addition, the Board provided inadequate reasons or bases when it denied the Veteran a rating in excess of 10 percent prior to June 16, 2014. The Board's finding that even when considering the Veteran's functional loss a rating in excess of 10 percent was not warranted was not adequately supported. R-12. Despite the Board's repeated references to the rating criteria based on limitation of motion and the need to evaluate functional loss in addition to pain, it is unclear how the Board found that it was fully informed on the Veteran's claim in light of the examination report's inadequacies. Furthermore, the Board did not adequately support its findings when considering the lay evidence of record and Mr. Mullis's reports of constant pain, daily muscle spasms, and significant effects on walking, standing and sitting. This is especially true as the Veteran's assigned rating allows for an increased rating based on functional loss due to pain in addition to limitation of motion. The Board needed to explain its finding that the August 2008 VA examination was adequate for rating purposes.

Accordingly, remand is warranted as the Board provided inadequate reasons or bases for its decision and did not ensure satisfaction with the duty to assist, which was prejudicial to the Veteran in adjudication of his claim.

## **STANDARD OF REVIEW**

The Court reviews the Board's decisions regarding claims increased initial ratings under the clearly erroneous standard. *Hayes v. Brown*, 9 Vet.App. 67, 72 (1996). A determination regarding the degree of impairment for purposes of rating a disability is an issue of fact. *Francisco v. Brown*, 7 Vet.App. 55, 57-58 (1994). The Board's answer to that question is subject to review for clear error. *Davis v. West*, 13 Vet.App. 178, 184 (1999).

However, the Court reviews claimed legal errors by the Board under the *de novo* standard, by which the Board's decision is not entitled to any deference. 38 U.S.C. § 7261(a)(1); see *Butts v. Brown*, 5 Vet.App. 532, 538 (1993) (*en banc*). The Court will set aside a conclusion of law made by the Board when that conclusion is determined to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Butts*, 5 Vet.App. at 538. The scope of the duty to assist is a question of law. *Beasley v. Shinseki*, 709 F.3d 1154, 1157 (Fed. Cir. 2013). The Court should determine whether the Board's decision, which did not ensure satisfaction with the duty to assist and failed to provide adequate reasons and bases for its decision, is not in accordance with the law.

## ARGUMENT

**The Board erred when it relied on the August 2008 VA examination, which was inadequate for rating purposes, and committed prejudicial legal error when it failed to ensure the duty to assist was satisfied.**

**A. The August 2008 VA examination report was inadequate for rating purposes.**

Remand is warranted as the August 2008 VA examination was inadequate for rating purposes. *See* R-476-78. Mr. Mullis reported that he experienced constant back pain, which had existed for three years. R-476. His pain traveled down his left leg, up into the shoulders, and across his lower back. *Id.* He also described this pain as aching, sharp and cramping. *Id.* The Veteran rated the pain as a 9 out of 10 (10 being the worst). *Id.* The examiner also noted that pain was elicited by physical activity, stress and sitting or standing too long. *Id.* When Mr. Mullis experienced pain, he could only function with medication. *Id.* Symptoms associated with pain included limited range of motion, muscle spasms that occurred throughout the day and brought on tension headaches, and Mr. Mullis's entire back knotted up. *Id.* Additionally, over the past 12 months, Mr. Mullis reported two incapacitating episodes, which had a duration of four to five days. *Id.*

Although the examiner noted all this information and Mr. Mullis's lay statements, in his opinion, objective examination that day revealed "no evidence of radiating pain on movement[,] and muscle spasms [were] absent." *Id.* The examiner did however opine that the "effect of the condition on the claimant's daily activity is

difficulty walking.” R-477. Diagnosis remained unchanged and was noted as, “lumbar strain with bulging disc L4-5, status post left hemilaminectomy/diskectomy with residual paraspinal muscle spasm.” *Id.*

The August 2008 VA examination opinion is inadequate for disability rating purposes. Specifically, because the examiner did not discuss whether any functional loss was attributable to pain during flare-ups, despite noting Mr. Mullis’s assertions that he experienced constant back pain, which was elicited by physical activity, stress and sitting or standing too long, and included symptoms such as limited range of motion and muscle spasms that occurred throughout the day. R-476.

The Court has held that examinations provided to evaluate the extent of a veteran’s functional loss under the musculoskeletal rating codes based on limitation of motion, *such as here*, must determine whether any pain found to be present could significantly limit functional ability during flare-ups or upon repetitive motion. *See Mitchell*, 25 Vet.App. at 44; *see also DeLuca*, 8 Vet.App. at 206-07; 38 C.F.R. § 4.40 (2015). These determinations, should, if feasible, be portrayed in terms of the additional range-of-motion loss due to pain on use or during flare-ups. *See id.* Where this information is not provided in an examination report, or the report does not include an explanation for why the information could not be provided, the examination report is inadequate for rating purposes. *See Mitchell*, 25 Vet.App. at 32.

Notably, a claimant may be entitled to a higher disability evaluation than that supported by mechanical application of relevant Diagnostic Codes where there is

evidence that his or her disability causes functional loss, that is, “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 (2015). A higher disability evaluation may also be awarded where there is a 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. 38 C.F.R. § 4.45 (2015). Further “[i]nquiry will be directed to” considerations including “[p]ain on movement, swelling, deformity or atrophy of disuse. Instability of station, disturbance of locomotion, interference with sitting, standing and weight-bearing are [also] related considerations.” 38 C.F.R. § 4.45(f) (2015).

Here, the August 2008 VA examiner failed to address whether Mr. Mullis experienced any functional loss due to pain during flare-ups. Thus, the examination lacks sufficient detail necessary to fully inform the Board for a disability rating. The examination should have been returned for the required detail to be provided, or the Board should have explained why such action was not necessary. *See Bowling v. Principi*, 15 Vet.App. 1, 12 (2001). As noted above, in order for an examination to comply with § 4.40, the examiner must “express an opinion on whether pain could significantly limit functional ability during flare-ups,” 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.” *Deluca*, 8 Vet.App. at 206 (internal quotation marks and alteration omitted). Where this

information is not provided in an examination report, or the report does not include an explanation for why the information could not be provided, the examination report is inadequate for rating purposes. *See Mitchell*, 25 Vet.App. at 32.

Although the examiner noted that Mr. Mullis experienced flare-ups and constant pain, the examiner did not conduct any additional testing or express an opinion as to whether Mr. Mullis experienced additional range-of-motion loss due to pain on use or significantly limited Mr. Mullis's functional ability during flare-ups. *Deluca*, 8 Vet.App. at 206; *see also Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 301 (2008) (an examination report must contain "clear conclusions," "supporting data" and well-reasoned medical explanation connecting the two."); *see R-476-77*. The examination report is also inadequate because the examiner did not include an explanation for why the information could not be provided. *See Mitchell*, 25 Vet.App. at 32. This information was necessary in order to inform the Board as to whether or at what point Mr. Mullis experienced any additional functional loss associated with pain during flare-ups. *See id.*; 38 C.F.R. § 4.40; *see, e.g.*, 38 C.F.R. § 4.2 (2015).

The evidence also indicated that Mr. Mullis's back disability impacted weight-bearing activities. Yet, as discussed below, the examiner did not provided any findings in terms of loss of range of motion due to factors such as excess fatigability, disturbance of locomotion, interference with sitting, standing and/or weight-bearing. *See* 38 C.F.R. §4.45(f); R-476. As noted above, a higher disability evaluation may also be awarded where there is a 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. See 38 C.F.R. § 4.45. Inquiry may include “[p]ain on movement, swelling, deformity or atrophy of disuse. Instability of station, disturbance of locomotion, interference with sitting, standing and weight-bearing are [also] related considerations.” 38 C.F.R. § 4.45(f); see also 38 C.F.R. § 4.40.

During the August 2008 VA examination, the examiner noted the Veteran's reports that “pain can be elicited by physical activity, stress and sitting or standing too long.” R-476. In order to properly evaluate for these considerations, VA regulations specifically provide that on examination, the “joints involved should be tested for pain both on active and passive motion, in weight-bearing and non-weight-bearing, and, if possible, with the range of the opposite undamaged joint.” 38 C.F.R. § 4.59 (2015). Recently, in litigating *Petitti v. McDonald*, 27 Vet.App. 415 (2015), the Secretary conceded that section 4.59 requires that VA examinations include range of motion testing for the joint in question in both active and passive motion and in weight-bearing and nonweight-bearing. See *Petitti*, Vet.App. No. 13-3469, Sec. Supp. Memo of Law at 10 (Jan. 21, 2015) and Oral Argument at 39:09 - 40:40 (May 5, 2015).

The August 2008 VA examiner did not conduct any range-of-motion testing in regard to pain and weight-bearing despite noting the Veteran's assertions that weight-bearing activities were impacted. R-476. Thus, it is not clear at what point pain began or ended for weight-bearing. In other words, weight-bearing range of motion was not “inquired into” as VA's regulations require. See 38 C.F.R. §§ 4.45(f), 4.59; see also

*Burton v. Shinseki*, 25 Vet.App 1 (2011). This oversight on the examiner's part was significant because the Veteran reported that he did in fact experience pain and functional limitations with weight-bearing activities. See R-476.

A medical examination is adequate "where it is based upon consideration of the veteran's prior medical history and examinations and also describes the disability, if any, in *sufficient detail* so that the Board's 'evaluation of the claimed disability will be a fully informed one.'" *Stefl v. Nicholson*, 21 Vet.App. 120, 123 (2007) (quoting *Ardison v. Brown*, 6 Vet.App. 405, 407 (1994)) (emphasis added). If Mr. Mullis had been provided an adequate examination, it may have been demonstrated that he had experienced pain on motion, functional loss with range of motion, instability on motion, or any number of other symptoms listed under 38 C.F.R. §§ 4.40 and 4.45. Accordingly, because there is evidence that the severity of his condition was not properly evaluated, Mr. Mullis was prejudiced by the Board's reliance on an examination that did not comply with VA regulations.

For the above-stated reasons, the August 2008 VA examination should be deemed inadequate as a matter of law, and therefore, remand is warranted. Once the Secretary undertakes the effort to provide an examination when developing a claim of service connection, even if not statutorily obligated to do so, the Secretary must provide an adequate examination or notify the claimant why one will not or cannot be provided. *Barr v. Nicholson*, 21 Vet.App. 303, 311-12 (2007); see also *Holland v. Brown*, 6 Vet.App. 443, 448 (1994). "If a diagnosis is not supported by the findings on the

examination report or if the report does not contain sufficient detail, it is incumbent upon the rating board to return the report as inadequate for rating purposes.” *Nieves-Rodriguez*, 22 Vet.App. at 301 (citation omitted).

**B. The Board provided inadequate reasons or bases when it found that an increased rating was not warranted.**

Remand is also warranted because the Board failed to provide adequate reasons or bases when it denied the Veteran an increased rating for his service-connected back disability prior to June 16, 2014. As noted above, several issues exist with respect to the examination of record. *See Bowling*, 15 Vet.App. at 12 (emphasizing the Board’s duty to return inadequate examination report); *Ardison*, 6 Vet.App. at 407. However, the Board expressly found that VA fulfilled its duty to assist Mr. Mullis in development of his claim. R-5. The Board’s finding demonstrates its misinterpretation of law and further shows that its reasons or bases for denial of service connection were inadequate. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) (“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, a remand is the appropriate remedy”). Deficiencies in the Board’s analysis in the instant case preclude effective judicial review. *See Simington v. West*, 11 Vet.App. 41, 45 (1998).

Importantly, the Board failed to reconcile the inadequacies of the August 2008 examination report with the contemporaneous evidence of record. Instead, the Board

stressed that although it “considered” Mr. Mullis’s functional loss due to factors “set forth in 38 C.F.R. §§ 4.40 and 4.45, the medical evidence of record prior to June 16, 2014 does not show that the 20 percent criteria are more closely approximated.” R-12 (citing to 38 C.F.R. § 4.71a). The Board misinterpreted the law when did not recognize that the VA examiner failed to describe in sufficient detail whether Mr. Mullis experienced additional range-of-motion loss due to pain, flare-ups, or functional loss, and the effects on weight-bearing activities. *See* R-476-77; R-11-14. Because the examination report lacked sufficient detail, it was nearly impossible for the Board to adequately relate Mr. Mullis’s disability to the rating criteria without clinical evidence to support its findings. *See Colvin v. Derwinski*, 1 Vet.App. 171, 175 (1991).

Remand is also warranted because the Board did not adequately consider or discuss the lay evidence of record. *See* R-11-12. The Board found that the Veteran did not experience muscle spasms related to his condition prior to June 16, 2014. R-4. However, the August 2008 VA examiner specifically noted that Mr. Mullis described “symptoms as range of motion limited, muscle spasms occur throughout the day brining on tension migraines, [and] entire back knots up.” R-476. The examiner even confirmed the Veteran’s diagnosis as “lumbar strain with bulging disc L4-5, status post left hemilaminectomy with residual *paraspinal muscle spasm*, there is no change in diagnosis.” R-477 (emphasis added).

Rather than adequately explain why it discounted the Veteran's lay reports, the Board couched its decision on a lack of medical evidence and never explained why the lay evidence in addition to the other clinical evidence of record was not sufficient for an increased rating. R-11; *see Shoemaker v. Derwinski*, 3 Vet.App. 248, 253 (1992)(explaining "it is well established that the Board is required to provide an adequate statement of reasons or bases to explain why the Veteran's disability picture does not fit the criteria for a higher rating").

Also, because the August 2008 VA examiner failed to adequately account for pain or flare-ups with additional range-of-motion testing, or to sufficiently describe the Veteran's condition if it was not feasible to test, it is unclear how the Board determined that the Veteran's range-of-motion measurements were accurately described. *See* R-12; *Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990); *see also Mitchell*, 25 Vet.App. at 44; *see also Stefl*, 21 Vet.App. at 124 (explaining "without a medical opinion that clearly addresses the relevant facts and medical science, the Board is left to rely on its own lay opinion, which it is forbidden from doing.") (emphasis added).

The Board must analyze the credibility and probative value of evidence, account for the persuasiveness of evidence, and provide reasons for rejecting material evidence favorable to the claimant. *See Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996). Here it did not. *See* R-11-12. The Board should have explained why the Veteran's reports, which were included in the August 2008 VA examination report, that he experienced constant pain, with daily muscle

spasms, limited motion and ability to perform activities such as walking or standing for prolonged periods of time during these episodes was not sufficient for a higher rating. *See Dela Cruz v. Principi*, 15 Vet.App. 143, 149 (2001) (finding that the Board is not required to discuss all evidence of record, but must discuss relevant evidence). The Board found Mr. Mullis competent and credible to describe his symptoms of limited and painful motion, but did not adequately address his lay reports of flare-ups, pain, effects on weight-bearing activities and functional loss. *See* R-11-14; *compare to* R-376; 440; 476; *see also* R-211-12. Without a discussion in this regard, the Board's reasons or bases were inadequate. *See* 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995).

Moreover, had the Board adequately considered or discussed the Veteran's reports of constant pain with muscle spasms and the effects on weight-bearing activities, it may have determined that the August 2008 VA examination was not an accurate reflection of the Veteran's condition. The Court has held an examination to be inadequate when it did not occur during an active period. *See Ardison*, 6 Vet.App. 405 (holding an examination to be inadequate since it did not occur during an active period of the disease and remanded the case so the RO could provide him with an examination during an active period of his condition.).

The Board should have explained why, despite not demonstrating muscle spasms during the August 2008 VA examination, Mr. Mullis should not have been afforded an examination during a flare-up period. The Board must consider and

discuss all the relevant evidence in the record, as well as provide adequate reasons and bases when rejecting material evidence that is favorable to the veteran. *Thompson v. Gober*, 14 Vet.App. 187, 188 (2000) (The Board has a duty to provide reasons or bases for the rejection of any material evidence favorable to the claimant). Here it did not. In fact, it specifically found there was no evidence of muscle spasms for the period on appeal without explaining why the Veteran's lay reports were not sufficient. R-4. The Board needed to provide such a discussion in light of the fact that rating criteria does not call for objective evidence of muscle spasms. *See* 38 C.F.R. § 4.71a. This error was prejudicial as the evidence may have helped substantiate the Veteran's claim.

Furthermore, while it is true that pain does not automatically equate to functional loss, in this case, Mr. Mullis reported daily pain that was constant in duration and rated as a 9 out of 10. R-476. This pain was elicited by physical activity, stress, and sitting or standing for too long. *Id.* In a November 2008 statement, Mr. Mullis reported that since 2000, his pain had increased to the point he now took "heavy pain and muscle relaxing medications." R-440. The Veteran elaborated, "I can't do the normal things one would do in a normal day without being in pain. From limited forward and backward motion, bending, standing, or walking around for any length of time. *Id.* In March 2009, the Veteran also reported that he had undergone spinal surgery in February 2009, and that his activities were limited due to his spine condition and could not bend "above or below without significant increased pain." R-376; *see also* R-211-12 (November 2008 private report indicating that Mr. Mullis's

pain was made worse by sitting and standing). Again, this functional loss must be considered for rating purposes. *See Mitchell*, 25 Vet.App. at 37-38 (while the existence of pain alone is not a basis for a higher rating, functional loss due to pain can give rise to a higher rating and an examiner must determine whether there is any functional loss resulting from pain); R-11-14.

The August 2008 VA examiner did not fully take into account the factors listed in § 4.40, § 4.45, and § 4.59, including those experienced during flare-ups and pain, and on weight-bearing activities. The Board should have concluded the examination was inadequate for evaluation purposes. *See Deluca*, 8 Vet.App. at 206-07. Had the Board been adequately informed, and considered or discussed whether Mr. Mullis's lumbar condition warranted a higher rating due to functional loss, he may have been awarded an increased rating. *See* 38 U.S.C. § 5107(b); 38 C.F.R. § 4.7 (2015). Without such a discussion the Veteran was prejudiced and cannot ascertain the Board's precise reasons or bases for not awarding a rating in excess of 10 percent prior to June 16, 2014. At a minimum, the Board should be required to provide adequate reasons or bases as to why a new examination should not be afforded to the Veteran in light of the above noted deficiencies. *See* 38 U.S.C. § 7104(d)(1); *Wood v. Peake*, 520 F.3d 1345 (Fed. Cir. 2008).

### **CONCLUSION**

Based on the foregoing, this Court should conclude that the Board the August 2008 VA examination was not sufficient to provide the Board with the necessary

information on the claim. Therefore, the Board erred and did ensure satisfaction with the duty to assist, which was prejudicial error. Additionally, remand is warranted because the Board did not adequately consider or discuss the lay evidence of record and did not provide adequate reasons and bases as to why the Veteran was not entitled to an increased rating for his lower back disability.

Respectfully submitted,  
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