

BRIEF OF APPELLANT

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

15-4436

Elmer D. Catlin

Appellant

v.

ROBERT A. MCDONALD,
SECRETARY OF VETERANS AFFAIRS,

Appellee.

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ISSUE PRESENTED FOR REVIEW

The Board found that range of motion measurements in the May 2010 VA examination warranted a rating reduction without discussing Mr. Catlin's continued painful motion, based on which the RO had previously granted him a higher rating. The Board also required him to meet the criteria for a rating increase, even though a rating reduction case places the burden of proof on the RO. Did the Board commit prejudicial legal error when it failed to explain how his continued painful motion reflected the requisite improvement for a rating reduction, and placed the burden on him to establish a rating increase?

STATEMENT OF THE CASE

Elmer D. Catlin served honorably in the United States Marine Corps on active duty from January 2004 to January 2008. R-20. He filed a claim for service connection and compensation for his right shoulder condition, in January 2007. R-640 (636-44).

Mr. Catlin underwent a VA examination for his right shoulder in February 2007. R-616-25. He rated his pain "a 7 on a scale of 1 to 10." R-617. His pain was associated with stiffness and giving way, as well as weakness, swelling, lack of endurance and dislocation. *Id.* He had difficulty with pushing, pulling and lifting. *Id.* The examiner described his limited range of motion due to pain. R-620. He exhibited flexion, abduction and external rotation to 90 degrees with pain, as well as internal rotation to 80 degrees with pain. *Id.* The examiner also noted pain having

the major functional impact on his range of motion after repetitive use. *Id.* His range of motion was not limited by fatigue, weakness, or lack of endurance after repetitive use. *Id.* The examiner opined that his functional limitations included avoiding the use of ladders, overhead reaching and crawling. R-622.

In February 2008, VA granted Mr. Catlin entitlement to service connection for his right shoulder condition. R-574-75 (567-71, 574-79). VA assigned a 20 percent rating effective January 28, 2008, based on “objective evidence of painful motion of the right shoulder (dominant) with limited motion in flexion (90/180 degrees) and in abduction (90/180 degrees) along with incoordination after repetitive use with pain having the major functional impact.” R-575.

Mr. Catlin’s right shoulder prevented him from performing his prior construction work by March 2008. R-663 (661-67). He underwent surgery for his right shoulder in March 2009. R-424-28. The next month, Mr. Catlin’s private surgeon noted that he was doing very well and his physical therapy was progressing nicely. R-461 (461-62). In March 2010, he filed a claim for a temporary total disability rating due to his right shoulder surgery. R-552-55.

Mr. Catlin underwent a VA examination for his right shoulder in May 2010. R-514-18. He experienced residual symptoms of pain, stiffness and limited range of motion. R-516. He rated his pain level at “6-7/10,” which was “daily and constant.” *Id.* The examiner noted that “reaching overhead and extension will cause pain and instability.” *Id.* Mr. Catlin could lift no more than 50 pounds with both arms. *Id.*

His pain and decreased range of motion with overhead extension and “crawling in tight spaces” would impede his usual occupation. R-515. His range of motion was limited due to pain, with flexion to 140 degrees and abduction to 120 degrees. R-517.

In August 2010, VA denied Mr. Catlin’s claim for temporary total disability and decreased his rating to 10 percent for his right shoulder disability effective March 29, 2010. R-447-48 (433-49).

In October 2010, Mr. Catlin’s private surgeon indicated that he healed uneventfully from surgery and did not have any problems at a follow-up visit in May 2010. R-429 (429-30). In February 2011, a VA physician noted pain on movement in the right shoulder, as well as recent increased pain despite improved dislocation. R-659-60 (657-61). In August 2013, the same VA physician noted some limited movement and mild pain in the right shoulder, with minimal complaints during the visit. R-649 (647-50).

Mr. Catlin filed a timely notice of disagreement in August 2011, challenging “[t]he propriety of reduction for [his] right shoulder condition.” R-416-17. In November 2013, VA issued a statement of the case, which continued the 10 percent rating for his right shoulder disability. R-360-61 (348-61). He perfected his appeal to the Board by filing a timely VA Form 9, in January 2014, in which he indicated “[p]lease I ask that you do not reduce my rating.” R-346 (345-47). He also stated that his right shoulder discomfort affected his work. *Id.*

In November 2015, the Board issued the decision now on appeal, which found VA's rating reduction proper, and denied Mr. Catlin entitlement to a rating in excess of 10 percent for his right shoulder disability. R-4-8 (1-11). The current appeal followed.

SUMMARY OF THE ARGUMENT

The RO previously granted Mr. Catlin a 20 percent rating for his right shoulder disability based on painful motion. The Board failed to explain how continued painful motion in his right shoulder reflected an improvement in Mr. Catlin's ability to function under the ordinary conditions of life and work. Rather, the Board only relied on range of motion measurements during the May 2010 VA examination when it determined that the rating reduction was proper. The Board also erroneously required that Mr. Catlin meet the criteria associated with a rating in excess of 10 percent. Given that the RO bears the burden of proof in a rating reduction case, the Board committed prejudicial legal error when it required him to demonstrate entitlement to a rating increase.

STANDARD OF REVIEW

A determination regarding the degree of impairment for purposes of rating a disability is an issue of fact. *Hayes v. Brown*, 9 Vet.App. 67, 72 (1996). The Board's answer to that question is subject to review under the clearly erroneous standard. *Davis v. West*, 13 Vet.App. 178, 184 (1999).

However, the Court reviews claimed legal errors by the Board under the *de novo* standard, under 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 the Board's conclusion of law 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. Mr. Catlin respectfully requests that the Court determine whether the Board's decision is not in accordance with the law.

ARGUMENT

The Board failed to explain how continued painful motion reflected an improvement in the ability to function under the ordinary conditions of life and work, and erroneously required Mr. Catlin to meet the criteria for an increased rating in a rating reduction case.

The Board erroneously disregarded without explanation Mr. Catlin's continued painful motion, based on which the RO originally granted him a 20 percent disability rating, and only relied on range of motion measurements during the May 2010 VA examination.

38 C.F.R. §§ 4.1, 4.2 (2015) "impose a clear requirement that VA rating reductions, as with all VA rating decisions, be based upon review of the entire history of the veteran's disability." *Brown v. Brown*, 5 Vet.App. 413, 420 (1993). When combined with 38 C.F.R. § 4.10 (2015), "in any rating-reduction case not only must it be determined that an improvement in a disability has actually occurred but also that

that improvement actually reflects an improvement in the veteran's ability to function under the ordinary conditions of life and work." 5 Vet.App. at 421.

Here, the Board found that "he has consistently demonstrated near full range of motion in his right shoulder." R-7. The Board also noted that "his reviewing medical professionals have consistently noted his condition was improved and well-healed." *Id.* However, the RO did not base Mr. Catlin's prior 20 percent rating on range of motion alone. Rather, his 20 percent rating also contemplated "objective evidence of *painful motion*" and "incoordination after repetitive use with pain having the major functional impact." R-575 (emphasis added). Had the Board considered Mr. Catlin's continued painful motion, the Board may have determined that his range of motion measurements did not reflect "an improvement in the veteran's ability to function under the ordinary conditions of life and work." 5 Vet.App. at 421.

The RO relied on the findings of the February 2007 VA examination when it previously granted Mr. Catlin a 20 percent rating for his right shoulder disability. R-575. His constant pain level of 7 out of 10 in February 2007 continued at "6-7/10" during the May 2010 VA examination. R-617; R-516. Both VA examinations show the continuation of functional limitations, which impeded his ability to work in his prior construction job. He could not reach overhead, crawl, lift and extend without pain, decreased range of motion, or instability. R-515-16; R-617; R-622. Moreover, VA treatment notes after the May 2010 VA examination show that he continued to exhibit painful motion in his right shoulder. R-659-60; R-649.

The Board relied on Mr. Catlin’s “near full range of motion” without discussing how the continuation of his painful motion factored into its analysis. R-7. The fact that his right shoulder disability improved after surgery is irrelevant in a rating reduction case, unless “the improvement actually reflects an improvement in the veteran’s ability to function under the ordinary conditions of life and work.” R-7; 5 Vet.App. at 421. Because the RO based his prior disability rating on painful motion and the record shows the continuation of his painful motion, the Board erred when it only relied on range of motion measurements during the May 2010 VA examination.

In addition, the Board’s finding that Mr. Catlin “did not meet the criteria associated with a rating in excess of 10 percent” is inapposite. R-8. The Board committed prejudicial legal error when it erroneously placed the burden of proof on Mr. Catlin to demonstrate entitlement to a 20 percent rating because the RO bears the burden in a rating reduction case.

“Because the issue in this case is whether the RO was justified in reducing the veteran’s [disability] rating, rather than whether the veteran was entitled to ‘reinstatement’ of the [disability] rating, the Board was required to establish, by a preponderance of evidence . . . that a rating reduction was warranted.” *Brown*, 5 Vet.App. at 421. “The Board’s inversion of the applicable standard of proof is particularly grievous in this case, which ‘is a rating reduction case, not a rating increase case.’” *Id.*

The Board relied on “evidence [that] reflects he was able to raise his arm well above shoulder level throughout the period on appeal.” R-8. In *Brown*, the Court rejected the Board’s application of the standard of proof “by requiring the claimant to prove by a preponderance of evidence that he was entitled to a [higher] rating.” 5 Vet.App. at 421. Similarly, the issue in this case is whether the reduction of Mr. Catlin’s disability rating was warranted. As a result, the Board erred in requiring him to “meet the criteria associated with a rating in excess of 10 percent.” *See Pernorio v. Derwinski*, 2 Vet.App. 625, 628 (1992) (“In using a standard that exceeded that found in the regulation, the Board committed legal error.”).

The Board’s reduction of a disability rating without regard to the law is *void ab initio*. *See Schfrath v. Derwinski*, 1 Vet.App. 589, 595 (1991); *see also Kitchens v. Brown*, 7 Vet.App. 320, 325 (1995). Mr. Catlin respectfully requests that the Court order reinstatement of his prior rating. *See Schfrath*, 1 Vet.App. at 595. In the alternative, the Board’s decision should be vacated and the appeal remanded, in order for the Board to adjudicate his claim consistently with applicable law.

CONCLUSION

In view of the foregoing, Mr. Catlin respectfully requests the Court to find the Board’s decision that reduced his disability rating *void ab initio* and to remand his claim in order to restore his prior rating. In the alternative, Mr. Catlin requests the Court to vacate the Board’s decision and remand his claim, with instructions for the Board to adjudicate the propriety of the rating reduction consistently with applicable law.

Respectfully submitted,

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