BRIEF OF APPELLANT

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

16-48

OTHA STEWART, JR.,

Appellant,

v.

ROBERT A. MCDONALD,
SECRETARY OF VETERANS AFFAIRS,

Appellee.

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STATEMENT OF THE ISSUES

I. The Board found that an opinion from the Acting Chief of the VA Prosthetics Treatment Center on the Veteran's entitlement to a clothing allowance was more probative than lay statements submitted by the Veteran without providing adequate reasons or bases for this decision. Did the Board commit prejudicial legal error?

II. The Chief of the Prosthetics Treatment Center did not consider the Veteran's assertions regarding damage to his clothing in rendering her opinion. Because her opinion was in response to an effective "regional office" decision and a subsequent notice of disagreement, it is held to the same standards as that of a medical examiner in the same situation. Did the Board commit prejudicial legal error and fail to ensure satisfaction of the duty to assist the Veteran when it relied on this inadequate opinion that failed to acknowledge or consider material lay evidence?

STATEMENT OF THE CASE

Otha Stewart, Jr. served on active duty in the United States Army from July 1980 through June 1998. R-1502. He is service-connected for low back pain due to back injury, rated as 40 percent disabling, and patellofemoral syndrome of the bilateral knees, each rated as 10 percent disabling. R-985 (983-88). (December 2008 rating decision). He requested braces for his knees and back in December 2010. R-1642

(1642-44). The same month, he was awarded a clothing allowance for the use of a back brace and a separate allowance for the use of a knee brace. R-1683; R-1684.

Mr. Stewart again sought a clothing allowance for the year 2014, and his request was denied in February of that year by the Acting Chief of the Prosthetics Treatment Center of the VA North Texas Health Care System ("Chief") on the grounds that his braces did not have exposed metal hinges that would cause irreparable damage to clothing. R-1678. The Veteran filed a timely notice of disagreement with the Chief's decision later that month. R-1685. He stated that the braces he wore irritated his skin after prolonged wear, and to prevent the irritation he began wearing his back and knee braces on top of his clothing. *Id.* Wearing them in this manner caused wear and tear on his clothing and wore a large hole in the driver's seat of his vehicle. *Id.*

In March 2014, the Chief issued a Statement of the Case which continued to deny the Veteran entitlement to a clothing allowance for the year 2014. R-1682 (1679-82). The stated reason for continuing the denial was that the Veteran's back and knee braces did not have exposed rigid panels or exposed metal hinges that would cause irreparable damage to clothing. *Id.*

On November 24, 2015, the Board issued the decision presently on appeal. R-1-10. The Board denied Mr. Stewart entitlement to a clothing allowance for the year 2014 on the grounds that the Chief's opinion outweighed the Veteran's lay assertions, and the Chief did not certify that the Veteran's braces tended to wear or tear clothing. R-7-8. This appeal ensued.

SUMMARY OF THE ARGUMENT

The Veteran was denied entitlement to a clothing allowance for the year 2014 by the Prosthetics Treatment Center of the VA North Texas Health Care System. He filed a timely notice of disagreement with this denial, in which he stated that braces worn for his service-connected knee and lower back disabilities caused wear and tear of his clothing because he needed to wear the braces outside his clothing due to skin irritation. The Acting Chief of the Prosthetics Treatment Center then issued a statement of the case in which she continued to deny entitlement to a clothing allowance on the grounds that the Veteran's braces did not contain exposed rigid panels or exposed metal hinges. This statement gave no consideration whatsoever to the Veteran's lay statements submitted in his notice of disagreement.

Nevertheless, the Board determined that the Chief's opinion was more probative than the Veteran's lay assertions, and denied entitlement to a clothing allowance based on the statement of the case. In doing so, it failed to provide adequate reasons or bases for finding the Chief's opinion more probative. To the extent it was required to rely on the statement of the case by applicable regulations, it failed to ensure that VA's duty to assist was satisfied because its decision was effectively the same as relying on a medical examination that failed to consider material lay statements. This resulted in the Board rendering a decision as if the Veteran's lay statements were never made. Remand is the appropriate remedy.

STANDARD OF REVIEW

The Court reviews the Board's decisions regarding claims for either increased ratings or for service connection under the clearly erroneous standard. A determination regarding service connection or 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 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 legal obligation imposed upon VA by its 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, in which the Board failed to properly interpret and apply the law, failed to ensure the satisfaction of VA's duty to assist, and failed to provide adequate reasons and bases for its decision, is not in accordance with the law.

ARGUMENT

I. The Board failed to provide adequate reasons or bases for its conclusion that an opinion from the Chief of the Prosthetic Treatment Center was more probative than the Veteran's lay assertions that braces worn due to his service-connected disabilities caused wear and tear of his clothing.

The Board erred when it determined that the Veteran was not entitled to a clothing allowance for the year 2014. Specifically, the Board failed to provide adequate reasons or bases for its decision because it relied on the opinion of the Chief of the Prosthetics Treatment Center that did not adequately consider the issue in light of the Veteran's statements that he wore braces for his service-connected knee and back disabilities over his clothing to prevent irritation of his skin. Under 38 U.S.C. § 7104(d)(1), a decision of the Board shall include a written statement of the Board's findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented on the record. *Gilbert v. Derwinski*, 1 Vet.App. 49, 56 (1990). Deficiencies in the Board's analysis in the instant case preclude effective judicial review. *See Simington v. West*, 11 Vet.App. 41, 45 (1998).

38 U.S.C. § 1162 provides that VA will pay an annual clothing allowance to a Veteran who meets either of the following two criteria: (1) because of a service-connected disability wears or uses a prosthetic or orthopedic appliance which VA determines tends to wear out or tear his clothing, or (2) uses medication prescribed for a skin condition due to a service-connected disability that VA determines causes irreparable damage to his outer garments. With regard to both criteria, the Chief

Medical Director or his designee must certify that because of such disability a prosthetic or orthopedic device is worn or used that tends to wear or tear the applicant's clothing, or that because of the use of a physician-prescribed medication for a skin condition that is due to a service-connected disability, irreparable damage is done to the applicant's outer garments. 38 C.F.R. § 3.810(a)(2) (2015).

In this case, Mr. Stewart began wearing braces for his service-connected back and knee disabilities in December 2010. R-6; R-1642-44. Also in December 2010, he was awarded a clothing allowance for each. R-1683, R-1684. In February 2014, the Veteran was denied entitlement to a clothing allowance for that year for his knee and back braces on the grounds that the braces used did not have exposed metal hinges that would cause irreparable damage to clothing. R-1678. The Veteran filed a notice of disagreement later that month in which he indicated that he began wearing his knee and back braces on the outside of his clothing to prevent skin irritation after prolonged wear. R-1685. He stated that wearing the braces in this manner caused more wear and tear than usual on his clothing and wore a large hole in the driver's seat of his vehicle. *Id.* The following month, the Chief issued a statement of the case in which she denied the Veteran's entitlement to a clothing allowance for 2014, based on the following reasoning:

> Mr. Stewart's back brace does not have exposed rigid panels that would cause irreparable damage to clothing as VA regulations require for entitlement to annual clothing allowance. Mr. Stewart's bilateral knee braces don't have exposed metal hinges that would cause irreparable

> damage to clothing as VA regulations require for entitlement to annual clothing allowance.

R-1682. The Board in turn relied on this conclusion to uphold the decision that the Veteran was not entitled to a clothing allowance for 2014, finding that it "outweighs the Veteran's lay assertions." R-7-8.

The Board's conclusion that the Chief's opinion outweighed the Veteran's lay assertions lacked adequate reasons or bases. Both the statement of the case and the Board's decision failed to properly consider the Veteran's statements that his need to wear the braces on the outside of his clothing to prevent skin irritation caused increased wear and tear on his clothing. R-1685. The Board noted that the Veteran made these statements, but failed to adequately consider them in its analysis. R-6-7. It simply found the Chief's opinion to be more probative, noting that the Chief "based the determination that braces do not tend to wear or tear clothing . . . upon her knowledge and familiarity with the specific back and knee braces utilized by [the] Veteran." R-7.

First and foremost, the Board is legally required to 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. *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); *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). Furthermore, lay statements may be competent to support a claim by supporting the occurrence of lay-observable events or the presence of disability or symptoms of disability subject to lay observation. *See Jandreau v. Nicholson,* 492 F.3d 1372 (Fed. Cir. 2007); *see also Buchanan v. Nicholson,* 451 F.3d 1331(Fed. Cir. 2006).

To the extent that the Board failed to adequately consider the Veteran's lay statements, it erred. Simply because it noted the Veteran made the statements does not mean it properly considered them. As discussed *supra*, the Board simply found that his statements were outweighed by the Chief's opinion, relying only on the Chief's knowledge and familiarity with the specific braces. R-7. This limited inquiry did not properly address the basis for the Veteran's claim. The Court has held that when the record does not adequately reveal the current state of a claimant's disability, the fulfillment of the statutory duty to assist requires a thorough and contemporaneous medical examination. *Palczewiski v. Nicholson*, 21 Vet.App. 174, 181 (2007); *see Caluza v. Brown*, 7 Vet.App. 498, 505-06 (1995). Mr. Stewart never contended that exposed panels or metal hinges on his braces lead to damage to his clothing. He specifically stated that it was his need to wear his braces *over* the clothing due to skin irritation that led to the damage. R-1685. Accordingly, because the Board did not acknowledged that the statement of the case failed to address the proper inquiry based on the Veteran's claim and failed to address the proper inquiry itself, it

failed to adequately explain why the Chief's opinion was entitled to greater probative weight than the Veteran's lay statements.

II. To the extent that the Board was required by statute to rely on the Chief of the Prosthetic Treatment Center's opinion in reaching its decision, it failed to ensure compliance with VA's duty to assist the Veteran by not remanding the issue for a new opinion which adequately considered the Veteran's lay statements.

A veteran is entitled to the assistance of VA in developing the facts pertinent to his or her claim. 38 U.S.C. § 5103A(a)(1). VA's duty to assist a veteran requires VA, *inter alia*, to obtain a medical opinion "when such an . . . opinion is necessary to make a decision on the claim." 38 U.S.C. § 5103A(d)(1); *see Charles v. Principi*, 16 Vet.App. 370, 375 (2002) (Board erred in failing to obtain medical nexus opinion necessary to make decision on claim); 38 C.F.R. § 3.159(c)(4)(i)(C) (2015). The duty applies to the Board as well as the regional office. *Holland v. Brown*, 6 Vet.App. 443, 448 (1994). However, VA's duty to assist a veteran in developing a claim is not necessarily discharged simply by conducting a medical examination; the examination must be adequate for adjudication purposes. *See*, *e.g.*, 38 C.F.R. § 4.2 (2015) ("[I]t is incumbent upon the rating board to return [a] report as inadequate for evaluation purposes [if it does not contain sufficient detail]."); *see Bowling v. Principi*, 15 Vet.App. 1, 12 (2001).

Here, although the Board noted that the Veteran was capable of observing wear and tear of his clothing, it gave greater probative weight to the Chief of Prosthetics' opinion that the Veteran's knee and back braces do not tend to wear or tear clothing because they lacked exposed metal hinges. R-7; *see* R-1682. To the

extent that the Board looked to the Chief's opinion for certification that the Veteran's braces had exposed hinges, it was following the provisions of 38 C.F.R. § 3.810(a)(2). The problem, however, is that the Chief's opinion gave no indication whatsoever that she gave any consideration to the Veteran's lay statements that his need to wear his braces over his clothing caused significant the wear and tear on his clothes. R-1679-82.

Although the Chief's opinion is not a medical examination, it is relevant that the Court has held it is impermissible for an examiner to ignore a veteran's lay assertions. *Dalton v. Nicholson*, 21 Vet.App. 23, 39 (2007). In this case, the Chief was effectively acting as a medical examiner would in reviewing the evidence and providing an opinion for the Board to consider in determining the Veteran's entitlement to a clothing allowance. The Veteran had already been denied benefits at the "regional office" level and filed a timely notice of disagreement. R-1678; R-1685. The Chief ignored the Veteran's lay statements in the statement of the case which followed the notice of disagreement, and certified only that the Veteran's braces lacked exposed rigid panels or metal hinges. R-1682. However, as discussed *supra*, the Veteran did not contend that his braces damaged his clothing due to exposed rigid panels or metal hinges. He stated only that he needed to wear his braces on the outside of his clothing due to skin irritation from the braces, and that because of this his clothing was damaged. R-1685. The question of whether his braces would cause damage to clothing when worn on the outside of clothing materially changes the

inquiry, yet the Chief made no effort to adapt her opinion in light of the Veteran's statements regarding the manner in which he used the braces.

Importantly, the Board noted that the Chief's opinion was more probative than the Veteran's lay statements because the Chief had knowledge and familiarity with the specific braces used by the Veteran. R-7. While that may be true, she did nothing more than certify that those braces did not contain exposed panels or metal hinges. R-1682. Because the Board found the Chief's opinion to be the most probative evidence, and the opinion failed to consider the Veteran's statements and was based on nothing more than the fact that the Veteran's braces lacked exposed rigid panels or metal hinges, the Board effectively rendered a decision *as if the Veteran's lay statements were never made*. The Board's reliance on an examination that failed to consider material lay assertions would be a clear violation of the duty to assist in the context of a medical examination. *See Dalton*, 21 Vet.App. at 39. The same logic must apply here. Otherwise, it is as if the Veteran's statements regarding the damage caused by his braces had never been made, and his claim is undoubtedly prejudiced by the effective removal of this favorable material evidence from the Board's consideration.

Accordingly, the Board failed to ensure compliance with its duty to assist the Veteran when it relied on the Chief's opinion which failed to consider favorable material evidence in the form of the Veteran's lay statements. Remand is necessary to ensure that the Board properly addresses the Veteran's lay statements regardless of

the Chief of Prosthetics' opinion; or alternatively, to order the Chief to produce a new opinion which adequately considers the Veteran's statements.

CONCLUSION

The Board's statement of reasons or bases both for finding the Chief's opinion more probative than the Veteran's lay statements and for determining that the Veteran was not entitled to a clothing allowance were inadequate. The Board failed to adequately explain why the Chief's opinion was entitled to greater probative weight than the Veteran's lay assertions. To the extent that the Board was compelled by the relevant regulations to rely upon the Chief's opinion in reaching its conclusion, it failed to ensure that the duty to assist the Veteran was satisfied because it relied on an opinion that ignored favorable material lay statements and instead addressed an issue that was irrelevant in light of the Veteran's claim. This error was prejudicial to Mr. Stewart's claim, because had the Board properly addressed his lay statement that wearing the braces on the outside of his clothing caused significant wear and tear on his clothes, R-1685, it may have determined that a clothing allowance was warranted. The Court should remand the appeal with instructions for the Board to ensure the duty to assist is satisfied and to readjudicate the Veteran's claim in accordance with the law.

Respectfully Submitted,

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