

Vet.App. No. 15-3054

**IN THE UNITED STATES COURT
OF APPEALS FOR VETERANS CLAIMS**

PAUL N. MULLIS,
Appellant,

v.

ROBERT A. MCDONALD,
Secretary of Veterans Affairs,
Appellee.

ON APPEAL FROM THE BOARD OF VETERANS' APPEALS

**BRIEF OF THE APPELLEE
SECRETARY OF VETERANS AFFAIRS**

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B. Nature of the Case

Appellant, Paul N. Mullis, appeals from a June 3, 2015, decision of the Board that denied a disability rating in excess of 10 percent for a low back disability for the period prior to June 16, 2014. With that decision, the Board also denied a rating in excess of 20 percent for that disability for the period beginning that date. Insofar as Appellant raises no argument with respect to this issue, it should not be disturbed. See *Pederson v. McDonald*, 27 Vet.App. 276, 285 (2015). Last, the Board remanded the issue of entitlement to a dependency allowance for Appellant's son. That issue is not currently before the Court. *Breeden v. Principi*, 17 Vet.App. 475, 477-78 (2004) (remand orders are not final decisions of the Board, within the meaning of this Court's jurisdictional statute).

C. Statement of Relevant Facts

In March 1996, the Department of Veterans Affairs regional office (RO) awarded Appellant service-connected disability benefits for a low back disability, with a non-compensable disability rating. (R. at 833-35).¹ In May 2002, the RO increased Appellant's rating to 10 percent, effective October 2001, based upon private treatment records and an April 2002 VA examination. (R. at 761-64, 768-71, 777-88).

In August 2008, Appellant contacted the RO, conveying that his back condition had worsened (R. at 503), which the RO construed as a claim for an

¹ References preceded by "R." are to the Record Before the Agency.

increased disability rating. (R. at 489-93). The RO provided Appellant with an examination later that month. (R. at 476-79). The examiner noted Appellant's various complaints, to include constant back pain over the prior three years, muscle spasms, and radiation of pain. (R. at 476). The examiner noted normal range of motion in extension, flexion, right and left lateral flexion, and left and right rotation, with pain occurring at the end points of the various ranges. (R. at 477).

Thereafter, in a November 2008 decision, the RO continued Appellant's 10-percent disability rating. (R. at 431-39). Appellant disagreed with this decision in January 2009. (R. at 422). The RO issued a statement of the case in May of that year (R. at 345-60), and Appellant submitted a substantive appeal to the Board the following July. (R. at 312-36).

Thereafter, on the heels of a June 2014 examination that revealed low-back flexion limited to 60 degrees by pain (R. at 95 (94-101)), the RO increased Appellant's rating to 20 percent, effective June 2014, the date of the examination. (R. at 56-62, 95).

Thereafter, in a June 2015 decision (R. at 2-19), the Board continued Appellant's 10- and 20-percent disability ratings. Appellant now appeals from that decision.

III. SUMMARY OF THE ARGUMENT

The Court should affirm the Board's June 3, 2015, decision because Appellant has failed to carry his burden of demonstrating prejudicial error.

IV. ARGUMENT

A. Appellant has demonstrated no error with respect to the August 2008 examination.

Appellant raises a number of contentions speaking to what he perceives as inadequacies in the August 2008 VA examination. (Appellant's Brief, at 9-15). Those contentions are unavailing.

Generally speaking, to be adequate, an examination must be sufficiently descriptive to enable the Board to make a fully informed evaluation of the claimant's disability. See *Ardison v. Brown*, 6 Vet.App. 405, 407 (1994) (citing *Green v. Derwinski*, 1 Vet.App. 121, 124 (1991)). In the context of musculoskeletal disabilities, an examiner must also endeavor to explain the degree to which pain limits a joint's function, to include during periods of flare-up. See generally *Mitchell v. Shinseki*, 25 Vet.App. 32, 44 (2011); *DeLuca v. Brown*, 8 Vet.App. 202, 206 (1995).

Appellant argues that the August 2008 VA examination is inadequate because the examiner failed to provide any discussion as to the degree of functional loss that Appellant experiences during periods of flare-up. (Appellant's Brief, at 11-12). This argument is not supported by the record.

As a threshold matter, before the examiner can be required to discuss functional loss during flare-ups, there must, of course, be evidence indicating that Appellant experiences flare-ups. In this regard, Appellant asserts that "the examiner noted that [he] experienced flare-ups." (Appellant's Brief, at 12). The

difficulty here is that this statement is untrue. Nowhere in his report did the examiner note that Appellant experiences flare-ups of his back symptoms. To the contrary, the examiner simply relayed Appellant's description of his symptoms, which, critically, contained no allegation of flare-ups. Rather, he complained of "muscle spasms occur[ing] throughout the day," as well as "pain in the back[,] which occurs constantly," and which radiates into the left leg and across the back and which arises due to "physical activity, stress, and sitting or standing too long." (R. at 476). Nothing in this description of his disability picture suggests that the severity of his back symptoms waxes and wanes to such a degree as to cause varying levels of disability from day to day. Rather, his allegations convey a disability picture consisting of generally static symptoms typified by constant pain and regularly occurring spasms. Absent any suggestion or allegation of flaring symptomatology, the examiner was under no obligation to discuss the degree to which flares further inhibit his back function.

Next, Appellant notes that his "pain can be elicited by physical activity, stress[,] and sitting or standing too long." (R. at 476). In this he sees the more general allegation that weight-bearing activities cause him to experience heightened functional loss, and he argues that the examiner failed to make any inquiry into the degree to which his back function is inhibited during weight

bearing.² (Appellant's Brief, at 13-14); see *Correia v. McDonald*, __ Vet.App __, 2016 WL 3591858, at *8 (July 5, 2016). Appellant's argument is unpersuasive.

The examiner inspected Appellant's posture, as well as his gait, both of which obviously involve an assessment of his back disability during a weight-bearing activity. (R. at 476). He also discussed a lack of "evidence of radiating pain on movement" (R. at 476), further suggesting that, contrary to Appellant's assertion, the examiner did indeed "inquire[] into" the degree of Appellant's functional impairment in situations of weight bearing and locomotion. (Appellant's Brief, at 13). Moreover, even setting aside the examiner's specific statements suggesting that he assessed Appellant's back in a weight-bearing position, it is still evident that he did so. Initially, common sense fairly suggests as much. The range-of-motion testing here included measurements of Appellant's thoracolumbar flexion, extension, lateral flexion, and rotation. (R. at 477). In more familiar terms, these tests look to the degree to which Appellant could bend forward, bend backward, lean from side to side, and twist. See 38 C.F.R. § 4.71a (Plate V). It is rather difficult to imagine how this range of tests

² At the outset, assuming *arguendo* that Appellant is correct regarding the examiner's alleged omissions, the Secretary wonders, as a general matter, what remedy Appellant envisions here. If, as he urges, the examiner did not measure his range of motion in a weight-bearing situation or failed to conduct certain other tests, surely those tests cannot be completed on remand. This examination was conducted in 2008. No amount of effort or retrospective analysis can ever reproduce the condition of Appellant's back as it was in August 2008. It would thus seem that any efforts to plug the holes that Appellant sees here would amount to nothing but rank speculation. This is, in any event, of no consequence, in that the errors Appellant asserts are not apparent here.

can be completed with the subject in other than a standing or sitting position, both of which would constitute weight-bearing positions of the back. And, the Secretary's illustration of back motion provided in his regulations bears this out. Each plane of spine motion is illustrated with the subject in the standing position. *Id.* This is also entirely consistent with guidance that the Secretary has provided, in the form of a spinal examination guide, which explains,

It is best to measure range of motion for the thoracolumbar spine from a standing position. Measuring the range of motion from a standing position (as opposed to from a sitting position) will include the effects of forces generated by the distance from the center of gravity from the axis of motion of the spine and will include the effect of contraction of the spinal muscles. Contraction of the spinal muscles imposes a significant compressive force during spine movements upon the lumbar discs.

VA Spinal Examination Guide, *available at* <http://www.benefits.va.gov/predischarge/docs/disexm53a.pdf> (last visited July 21, 2016). When his report is read in context, *see Acevedo v. Shinseki*, 25 Vet.App. 286, 294 (2012) (noting that medical examinations must be read "as a whole"), it is reasonably apparent that, contrary to Appellant's assertion, the examiner did assess Appellant's disability under weight-bearing circumstances.³

The examiner was fully aware of the full range of Appellant's spine complaints, he assessed the effects of his spine disability on his gait, his posture,

³ Appellant also states, as a corollary to his argument regarding weight-bearing, that the examiner provided no guidance as to where pain occurred in his range of motion. The examiner's range-of-motion measurements clearly indicated the point at which pain occurred. (R. at 477).

and the degree to which pain resulted from movement. (R. at 476). He also provided a full array of range-of-motion measurements, which specifically included the point in Appellant's range of motion at which pain occurred. (R. at 477). There is nothing in the examination to suggest that Appellant experiences flares of his symptomatology, and it is fairly apparent that the examiner inquired into the degree of Appellant's difficulties during weight-bearing and locomotion. The examination report provided sufficient detail for the Board to make an informed decision as to Appellant's degree of disability prior to June 2014. That examination was, therefore, adequate. Appellant's contention to the contrary is unpersuasive and should be rejected.

B. Appellant has demonstrated no inadequacy in the Board's statement of reasons or bases.

Appellant also argues that, in a number of respects, the Board provided an inadequate statement of reasons or bases. (Appellant's Brief, at 15-20). In adjudicating a Veteran's appeal, the Board must include, as a part of its decision, a "written statement of . . . the reasons or bases for [its] findings and conclusions, on all material issues of fact and law presented on the record." 38 U.S.C. § 7104(d)(1); see *McDowell v. Shinseki*, 23 Vet.App. 207, 215 (2009). This statement must be sufficiently clear to enable a claimant to fully understand the basis of the Board's decision, as well as to facilitate judicial review. See, e.g., *Allday v. Brown*, 7 Vet.App. 517, 527 (1995). It is thus incumbent upon the Board to "analyze the credibility and probative value of the evidence, account for

the evidence that it finds persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the claimant.” *McDowell*, 23 Vet.App. at 215-16.

First, Appellant generally repeats his contentions regarding the supposed inadequacies in the August 2008 examination. (Appellant’s Brief, at 15-16). For the reasons discussed above, those inadequacies are not borne out by the record. Accordingly, the Board cannot be said to have erred in omitting to “reconcile th[os]e inadequacies.” (Appellant’s Brief, at 15).

Second, Appellant argues that the Board failed to discuss potentially favorable evidence. More specifically, he states, “The Board found that [he] did not experience muscle spasms related to his condition prior to June 16, 2014,” and he argues that, in making this finding, the Board overlooked his allegations of just such spasms during the August 2008 examination. (Appellant’s Brief, at 16, 19 (“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.”)). Appellant’s argument should be summarily rejected, as it is not based on an accurate reading of the record.

Contrary to Appellant’s assertion, the Board unequivocally did not find that he did not experience muscle spasms during the relevant period. He cites page 4 of the record in support of his observation. There, the Board certainly did say, “Prior to June 16, 2014, [his] “low back disability did not . . . cause muscle spasm.” (R. at 4). But, in portraying the Board’s statement here as a finding that

“there was no evidence of muscle spasms for the period on appeal,” Appellant ignores the majority of what the Board actually said. The Board’s full articulation of its finding of fact is,

Prior to June 16, 2014, [Appellant’s] low back disability did not manifest as forward flexion of the thoracolumbar spine greater than 30 degrees but not greater than 60 degrees; or, as a combined range of motion of the thoracolumbar spine not greater than 120 degrees; or, *cause muscle spasm or guarding severe enough to result in an abnormal gait or abnormal spinal contour such as scoliosis, reversed lordosis, or abnormal kyphosis.*

(R. at 4 (emphasis added)). The Board simply did not find that Appellant never experienced muscle spasms prior to June 16, 2014. Rather, the Board found that Appellant did not experience muscle spasms that caused additional functional manifestations, such as abnormal gait or spinal contour, which finding is in keeping with the applicable rating criteria. See 38 C.F.R. § 4.71a (20-percent rating criteria for spinal disabilities). The Board’s findings here are clearly supported by the record. Even though the examiner found that that “[m]uscle spasm [wa]s absent” on examination, he did not question Appellant’s allegation of experiencing spasms at other times and, in any event, regardless of how severe or frequent those spasms were, his “[g]ait was within normal limits” (R. at 476), and “[t]here [wa]s symmetry of spinal motion with normal curves of the spine.” (R. at 477). As the Board noted (R. at 12), a November 2008 record documents “a small curve” of the spine but does not in any way implicate guarding or spasm as its cause. (R. at 425 (425-26)). Appellant raises no objection to the examiner’s findings or to the Board’s discussion of his spasms

vis-à-vis whether they cause gait abnormalities or spinal curvature. Instead, he ignores the Board's discussion altogether and misinterprets the words of its factual finding in an effort to portray its discussion as inadequate. His argument has no merit, and it should be roundly rejected.

Last, Appellant reiterates that he experiences pain due his back disability, and he urges that the Board failed to take into account the functional loss resulting from this pain. (Appellant's Brief, at 19-20). More specifically, he points out that he experiences pain due to various activities, that he cannot "do the normal things one would do in a normal day without being in pain" because of "limited forward and backward motion, bending, standing, or walking around for any length of time." (Appellant's Brief, at 19). He urges that the Board erred by not considering this "functional loss . . . for rating purposes." (Appellant's Brief, at 20). Appellant's argument is unpersuasive.

As Appellant correctly points out, joint pain itself is not disability. Only when that pain results in actual functional impairment does it constitute disability. See *Mitchell*, 25 Vet.App. at 37. As to functional loss, the Secretary has promulgated rating criteria specifying exactly what sort of functional loss he has chosen to use as a proxy to estimate spine disability. The Secretary has specified that loss of range of motion, gait disturbances and spinal contour, and incapacitating episodes are the manifestations that he uses to establish the degree of disability resulting from a spinal disability. See 38 C.F.R. § 4.71a (General Rating Formula for Spinal Disabilities). These manifestations can

themselves be evidenced by a number of factors, to include less/more/weakened movement, excess fatigue, incoordination or an inability to move smoothly, or pain on movement. 38 C.F.R. § 4.45. But, regardless of what indicia are present, the inquiry is whether the functional loss described in the rating criteria is shown.

The Board performed exactly the inquiry that is called for by the rating criteria. The Board looked to the August 2008 VA examination, and it observed that, although Appellant did experience pain on motion, “[h]e had full range of motion of his thoracolumbar spine with pain [only] at the endpoints of motion.” (R. at 10). This observation is perfectly in line with the examiner’s findings, which described normal ranges of motion in all planes, with pain occurring only at the endpoints. (R. at 477); see 38 C.F.R. § 4.71a (Note 2 to the General Rating Formula and Plate V, both describing the range of lumbar spine motion that is considered normal for rating purposes). The Board also looked to whether Appellant experiences abnormal spinal contour or gait disturbances due to muscle spasm or guarding, and it found the evidence lacking in that regard. It directly follows from these factual observations, which are plainly supported by the record, that a 20-percent disability rating is not for application.

Appellant appears to prefer, however, that the objective criteria used by the Secretary be set aside here. As he would have it, the Board should have looked past the Secretary’s criteria and instead awarded a scheduler rating based on purely subjective and nebulous factors, such as his difficulties in doing

“the normal things one would do in a normal day.” (Appellant’s Brief, at 19). That nebulous approach is not the way the Secretary has chosen to rate spinal disabilities, and neither Appellant nor this Court are able to second-guess the Secretary’s chosen approach in this regard. See 38 U.S.C. § 7252(b). The Board looked to the appropriate factors, and its discussion adequately conveyed to Appellant the basis for its determination that a 20-percent disability is unavailable for the period prior to June 16, 2014. Appellant has shown no basis upon which to disturb the Board’s decision.

C. Appellant has abandoned all issues not argued in his brief.

It is axiomatic that issues or arguments not raised on appeal are abandoned. See *Disabled Am. Veterans v. Gober*, 234 F.3d 682, 688 n.3 (Fed. Cir. 2000) (stating that the Court would “only address those challenges that were briefed”); *Pederson v. McDonald*, 27 Vet.App. 276, 284 (2015); *Williams v. Gober*, 10 Vet.App. 447, 448 (1997) (deeming abandoned BVA determinations unchallenged on appeal); *Bucklinger v. Brown*, 5 Vet.App. 435, 436 (1993). Any and all issues that have not been addressed in Appellant’s Brief have therefore been abandoned.

V. CONCLUSION

For the foregoing reasons, Appellee respectfully submits that the June 3, 2015, decision of the Board should be affirmed in all respects.

Respectfully submitted,

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