

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

ELMER D. CATLIN,
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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**IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS**

ELMER D. CATLIN,)	
)	
Appellant,)	
)	
v.)	Vet. App. No. 15-4436
)	
ROBERT A. MCDONALD,)	
Secretary of Veterans Affairs,)	
)	
Appellee.)	

ON APPEAL FROM THE BOARD OF VETERANS' APPEALS

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

I. ISSUES PRESENTED

Whether the Court of Appeals for Veterans Claims (Court or CAVC) should affirm the October 15, 2015, Board of Veterans' Appeals (Board or BVA) decision that determined a rating reduction, from 20 percent to 10 percent, was proper for service-connected status post right shoulder trauma with tear of the anterior glenoid labrum and hill-sachs deformity (right shoulder disability).

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

The Court has jurisdiction over this appeal pursuant to 38 U.S.C. § 7252(a), which grants the Court of Appeals for Veterans Claims exclusive jurisdiction to review final decisions of the Board.

B. Nature of the Case

Elmer D. Catlin (Appellant) seeks the Court's review of the October 15, 2015, Board decision. In that decision, the Board determined that the rating reduction, from 20 percent to 10 percent, for Appellant's right shoulder disability was proper. [Record Before the Agency (R.) at 2-9]. Appellant asserts that the Board failed to adequately consider painful motion in the ordinary conditions of life and work, and otherwise erroneously required him to meet the rating criteria for an increased rating, rather than for a rating reduction. *See generally* [Appellant's Brief (AB) at 5-8]. The Secretary contends that Appellant's arguments are meritless as the Board adequately considered Appellant's symptoms in determining the propriety of the reduction, and appropriately applied the laws, and thus, the Court should affirm the Board's decision as to Appellant's claim on appeal.

The Secretary also notes that Appellant has provided no argument that he finds any error in the Board's denial of entitlement to a rating in excess of 10 percent for his service-connected right shoulder disability. *See generally* [AB at 1-9]. As no argument was raised regarding this finding by the Board, this claim should be considered abandoned. *See Ford v. Gober*, 10 Vet.App. 531, 535-36 (1997) (claims not addressed by the appellant in pleadings before the Court found to be abandoned); *see also Grivois v. Brown*, 6 Vet.App. 136, 138 (1994) (issues or claims not argued on appeal are considered abandoned).

C. Statement of Relevant Facts

Appellant had active duty service in the United States Marine Corps from January 2004 to January 2008. [R. at 20].

In February 2008, Appellant was granted service-connection for his right shoulder disability with a 20 percent rating. [R. at 567-71, 574-79]. In March 2010, he filed for a temporary 100 percent rating for his shoulder disability, due to a previous surgery from March 2009. [R. at 552-56]. VA provided him with a Compensation and Pension (C&P) examination in May 2010. [R. at 515-18].

In August 2010, the Montgomery Regional Office (RO) issued a rating decision denying entitlement to a temporary 100 percent rating, and additionally reducing Appellant's rating from 20 percent to 10 percent, effective March 2010, as his shoulder disability had improved since surgery. [R. at 433-49]. Appellant filed a timely notice of disagreement (NOD) as to the propriety of the rating reduction, [R. at 416], and in November 2013, VA issued a statement of the case (SOC) continuing the 10 percent rating, [R. at 348-61]. He filed a timely Form 9 appeal, [R. at 345-46], and his then-representative submitted argument on his behalf, [R. at 12-16].

On October 15, 2015, the Board issued a decision in which it determined that the rating reduction was proper. See [R. at 2-9]. More specifically, the Board explained why the procedural notice requirements of 38 C.F.R § 3.105(e) did not apply in this case and why the date assigned was correct, [R. at 5-6], and then addressed the medical evidence of Record, explaining why such evidence

warranted the reduction, and thus, why the reduction was proper. [R. at 6-8]. This appeal ensued.

III. SUMMARY OF ARGUMENT

Contrary to Appellant's assertions, the Board did consider painful motion in determining the appropriate rating for Appellant's right shoulder disability. Additionally, the Board did not require Appellant to meet the criteria for an increased rating when discussing a rating reduction, rather, the Board was addressing both an increased rating and a rating reduction, and thus, both standards were discussed. As such, the Board's decision should be affirmed.

IV. ARGUMENT

A. **Appellant fails to demonstrate that the Board disregarded the appropriate law in determining that the rating reduction was proper**

A reduction in disability evaluation is warranted if the evidence shows "that an improvement in disability has actually occurred" and that the "improvement actually reflects an improvement in the veteran's ability to function under the ordinary conditions of life and work." *Brown v. Brown*, 5 Vet.App. 413, 421 (1993). If an evaluation has continued for a period of 5 or more years, it cannot be reduced without evidence of sustained material improvement under the ordinary conditions of life as shown by full and complete examinations. 38 C.F.R. § 3.344(a). If an evaluation has continued for less than 5 years, a reduction may be implemented upon reexaminations disclosing physical or mental improvement. 38 C.F.R. § 3.344(c). Regardless of the amount of time a particular

evaluation has been assigned, a reduction must be based upon a review of the entire history of the veteran's disability. *Faust v. West*, 13 Vet.App. 342, 349 (2000). The burden is on the Secretary to show that a reduction is warranted. *Brown*, 5 Vet.App. at 421.

Disability awards made under the rating schedule are based as far as practical on the average impairment in earning capacity due to such disability in civil occupations. 38 U.S.C. § 1155; 38 C.F.R. §§ 4.1, 4.2, 4.10. Where a disability improves, average impairment in earning capacity lessens, and a reduction in the award of benefits may be warranted. Disabilities that have been rated at the same level for at least five years, however, are considered unlikely to improve. 38 C.F.R. § 3.344(c). Subsection (c) makes clear, however, disabilities that have not been rated at the same level for at least five years are presumed to be likely to improve and that the provisions of the regulation applicable to stabilized disabilities do not apply. 38 C.F.R. § 3.344(c).

In the instant case, Appellant contends that the Board disregarded, without providing any explanation, his complaints of pain in his shoulder, only relying on his range of motion to justify the validity of the rating reduction. [AB at 5-8]. More specifically, he asserts that because his initial 20 percent rating considered evidence of painful motion, the rating reduction should consider that as well. [AB at 6]. Additionally, he asserts that the Board erred placing the burden on him to show entitlement to a 20 percent rating, instead of putting the burden on VA. [AB at 7]. The Secretary avers that the Board, contrary to Appellant's contentions, did

consider painful motion, and additionally notes that it is Appellant, not the Board, who is conflating the standards of a rating reduction and a rating increase; as the Board was required to discuss both an increase and a reduction in the instant decision, Appellant cannot hold against the Board that it required, at all, in the decision, that Appellant be held to the standard of proving entitlement to a rating increase.

Initially, Appellant contends that the Board erred in relying on range of motion findings, but ignoring reports regarding painful motion. See [AB at 6]. The Secretary disagrees. Initially, the Secretary notes that Appellant's rating for his right shoulder initially has always been based on limitation of motion due to pain. See [R. at 447-48, 575]. As such, it was not inherently an error for the Board to discuss the medical records showing Appellant's range of motion, and what any limitation of such would be. See [R. at 6-8]. As Appellant's limitation of motion is due to pain, see e.g. [R. at 517], the Board's discussion of range of motion did include discussion of functional limitation due to pain, in addition to the Board's explicit mentions of Appellant's continued shoulder pain. See [R. at 5-8].

Appellant's discussion of the evidence suggests a selective recitation of the evidence of Record, which is merely a disagreement with the Board's weighing of the evidence, an argument that is insufficient to demonstrate prejudicial error. See *Washington v. Nicholson*, 19 Vet.App. 362, 367-368 (2005); e.g., *Madden v. Gober*, 125 F.3d 1477, 1481 (Fed. Cir. 1997) (noting that it is the Board's duty "to analyze the credibility and probative value of evidence"); *Owens*

v. Brown, 7 Vet.App. 429, 433 (1995) (Board must weigh and assess evidence of record). While Appellant suggests that the Board failed to factor painful motion into its analysis, [AB at 7], the Secretary avers that the Board's discussion, which specifically notes that Appellant continued to experience painful motion after surgery, see [R. at 7], considers the totality of the evidence, showing that Appellant's shoulder condition no longer warranted a rating in excess of 10 percent, see [R. at 7-8].

Appellant asserts that the Board erroneously placed the burden on him to demonstrate that his condition warranted a rating in excess of 10 percent, rather than appropriately placing the burden on the Secretary to show that the reduction was proper. [AB at 7]. The Secretary disagrees. The Board, in the instant decision, was tasked with discussing both the propriety of a rating reduction and entitlement to a rating increase for Appellant's right shoulder disability. See [R. at 2]. While the Board could have chosen to separate the discussion of the two issues, it did not, and Appellant has not asserted that the Board erred in that determination. See *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) (holding that the appellant bears the burden of demonstrating prejudicial error). As the Board was tasked with discussing a potential increased rating, in addition to the propriety of the rating reduction, the Secretary avers that the Board did not err in discussing Appellant's shoulder disability, in part, in terms relating to a rating increase. See [R. at 7-8]. It is wholly unclear how the Board was expected to address entitlement to an increased rating without addressing whether Appellant

had met his burden of showing that he was entitled to such an increase; as Appellant failed to provide any argument in his brief to this Court related to the Board's denial of entitlement to a rating increase, the Secretary, as stated above, asserts that this Court should hold that he has abandoned said claim.

In the instant case, the Board relied on evidence showing that Appellant's right shoulder disability was not causing him significant impairment, such that a rating in excess of 10 percent would be warranted. See [R. at 5-8]. In its discussion, the Board explicitly noted that medical records stated that after shoulder surgery, which describes the entirety of the period on appeal, "medical professionals have consistently noted his condition was improved and well-healed." [R. at 7]. The Board further elaborated, showing that after surgery, Appellant's doctor reported that he was having no problems with his shoulder. [*Id.*]; [R. at 461 (459-64)]. The Board also discussed the findings of the May 2010 VA C&P examiner, who found that Appellant did have some functional limitation due to pain. [R. at 7]; [R. at 515-18]. The Board also discussed other medical records showing that Appellant's complaints regarding his shoulder were minimal. [R. at 7], [R. at 647-50]. As the Board's discussion clearly was based on medical evidence from multiple sources that discussed both range of motion and continued pain, it is entirely unclear to the Secretary how Appellant is asserting that the Board "only relied on range of motion measurements during the May 2010 VA examination" in concluding that the rating reduction was proper. See [AB at 7].

The Secretary notes that Appellant, in his brief to this Court, asserts that the reduction was improper because both the February 2007 and May 2010 VA examinations demonstrate that he had functional limitations that impacted his ability to work in construction, and that the May 2010 examination report showed continued painful motion in his shoulder. [AB at 6]. The Secretary disagrees with Appellant's characterization of the evidence. The February 2007 examination report did, in fact, note limitation of motion due to pain as Appellant's most significant functional limitation in his shoulder, see [R. at 620 (616-27)], and noted that he "should avoid using ladders, overhead reaching[,] and crawling[.]" [R. at 622]. The May 2010 examination report did state that Appellant had "[r]ight shoulder pain and decreased [range of motion] with overhead extension and crawling in tight spaces" [R. at 515-16]. The Board, however, discussed these findings. See [R. at 5-7].

Appellant further states that VA treatment records demonstrate continued painful motion in his shoulder, [R. at 649, 659-60], and thus, a reduction was improper. [AB at 6]. The Secretary, however, notes that even the evidence to which Appellant refers does not actually demonstrate that a reduction was improper. For example, Appellant refers to part of an August 2013 VA treatment record; a review of that entire treatment record shows that Appellant's shoulder was "essentially asymptomatic[.]" [R. at 647], and while he did have "[s]ome limited movement and mild pain[.]" he had "minimal complaints" regarding his right shoulder, [R. at 649]. A nurse's note, from that same day, shows that

Appellant's pain level was at a 1 out of 10, [R. at 651 (650-54)], that pain would be alleviated by stretching, and that it was aggravated by sleep positioning, [R. at 653]. Appellant also referred to a February 2011 VA treatment record. [AB at 6]. That record states that his shoulder pain was "improved with surgery[.]" [R. at 658 (657-61)], and that despite some recent increase in the pain, his pain level was still minimal, [R. at 660].

Appellant, tellingly, fails to discuss any of the private treatment records that the Board reviewed, which showed that the private physician had found significant improvement. See [R. at 7]; [R. at 419-29, 459-64]. As the Board noted, in April 2009, six weeks post-surgery, Appellant's private physician noted that he was having no problems at all with his shoulder, to include having success with physical therapy. [R. at 7]; [R. at 461]. The Board also noted that the doctor later stated Appellant's recovery was "uneventful" and his condition had greatly improved. [R. at 7]. More specifically, in May 2010, just three days after his VA examination, Appellant had a one year follow-up with his private physician, who noted that he had "no complaints" regarding his right shoulder; the physician also made a note that, on objective testing, Appellant had full range of motion in his shoulder. [R. at 459]. His private physician wrote a letter in October 2010, outlining Appellant's medical history, which explained that Appellant's occupational limitations due to his shoulder surgery should only have lasted six weeks, and that as of May 2010, he had no limitations. [R. at 429]. The

doctor also noted that he should have been able to return to work after one month. [*Id.*].

The Secretary avers that the Board did not err in determining that the rating reduction was proper. In the alternative, the Secretary asserts that Appellant has failed to adequately meet his burden of demonstrating that any such error was prejudicial, *see Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (appellant bears the burden of demonstrating error), as evidence shows that the reduction was based on evidence showing that while Appellant did still have minimal limitation of motion due to pain, his surgery resulted in sustained improvement in his condition in the “ordinary conditions of life and work.” *See Brown v. Brown*, 5 Vet.App. 413, 421 (1993).

Because Appellant has limited his allegations of error to those noted above, Appellant has abandoned any other arguments, and therefore, it would be unnecessary for this Court to consider any other error not specifically raised. *See Disabled Am. Veterans v. Gober*, 234 F.3d 682, 688 n.3 (Fed. Cir. 2000); *Degmetich v. Brown*, 8 Vet.App. 208, 209 (1995); *Williams v. Principi*, 15 Vet.App. 189, 199 (2001) (“ordinarily this Court will not review issues that are not raised to it.”).

V. CONCLUSION

Based upon the foregoing, the Secretary respectfully submits that the Court should affirm the October 15, 2015, decision of the Board.

Respectfully submitted,

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Dated: August 4, 2016