

REPLY BRIEF OF APPELLANT

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

15-3054

PAUL N. MULLIS,

Appellant

v.

ROBERT A. MCDONALD,
SECRETARY OF VETERANS AFFAIRS

Appellee

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APPELLANT'S REPLY ARGUMENT

The Board erred when it relied on the August 2008 VA examination, which provided inadequate information regarding the Veteran's functional loss during flare ups, and when it failed to provide adequate reasons or bases for relying on that examination.

It must be clear from the examiner's findings regarding range of motion "whether and at what point during the range of motion the appellant experienced any limitation of motion that was specifically attributable to pain." *Mitchell v. Shinseki*, 25 Vet.App. 32, 44 (2011). Where an examiner fails to make any findings as to the extent of pain on motion, that examination does not contain sufficient detail to evaluate the claim in light of § 4.40. *Id.* at 37 (citing *DeLuca v. Brown*, 8 Vet.App 202, 206 (1995)). "[T]he medical examiner must be asked to express an opinion on whether pain could significantly limit functional ability during flare ups. . . ." *Id.* Such "determinations should, if feasible, be 'portray[ed] . . . in terms of the degree of additional-range-of-motion loss due to pain on use or during flare ups.'" *Id.* Here, the August 2008 VA examiner failed to comply with the requirements of *Mitchell* because he did not include range of motion numbers which would allow the Board to evaluate the claim based on the *DeLuca* factors.

As Mr. Mullis argued in his opening brief, the examiner acknowledged the Veteran experienced flare ups of pain rated at 9 out of 10, which were elicited with physical activity, stress, or sitting or standing for prolonged periods of time. R-476; *see also* Apa. Open Br. at 9. Nonetheless, the examiner only provided range of motion

measurements during a non-flare-up period, and did not explain whether estimated range of motion measurements during a flare-up were feasible. R-477.

The Secretary asserts that the examiner did not note the Veteran's flare-up, but merely noted a disability picture that "suggested that the severity of [the Veteran's] back symptoms waxes and wanes to such a degree as to cause varying levels of disability from day to day." Sec. Brief at 5. This is unpersuasive. The Secretary misinterprets the purpose of *Mitchell* and *DeLuca* when he emphasizes the lack of the word "flare-up" in the examiner's opinion. *Id.* The mere fact that the examiner did not use the word "flare-up" is not dispositive. A flare-up is defined as "a sudden worsening of the symptoms of a disease or condition." *Flare-up*, <http://medical-dictionary.thefreedictionary.com/flare-ups> (last visited August 11, 2016).

The Veteran clearly described pain that worsened with physical activity and that resulted in muscle spasms and more limited range of motion. R-476. Nonetheless, the examiner only recorded the Veteran's range of motion on the day of the examination, and rendered no opinion on any additional functional loss. R-477. Moreover, the Board acknowledged evidence that the Veteran experienced flare-ups of pain, which required him to lie down to due to pain. R-10; *see also* R-383 (381-87) (December 2007 pain profile). It found Mr. Mullis's competent and credible to describe his limited and painful motion. R-11.

The Secretary is correct that the VA examination was conducted in 2008, but he is incorrect that a retrospective examination "would amount to nothing but rank

speculation.” Sec. Brief at 6. If the Secretary’s argument were accepted, this would essentially preclude the Board from ever correcting an inadequate examination.

Under *Mitchell*, a VA examiner need not *measure* the Veteran’s range of motion during a flare-up, but merely issue an *opinion* about whether the Veteran’s pain during flare-ups would result in more limited range of motion, and if so, estimate the additional limitation in terms of degree of range of motion. *Mitchell*, 25 Vet.App. at 43. A retrospective opinion based on a review of medical evidence and the Veteran’s lay statements, which the Board found competent and credible, would not result in mere speculation. *See Chotta v. Peake*, 22 Vet. App. 80, 85 (2008).

The Board erred when it relied upon an inadequate VA examination. Even if the Secretary is correct that a retrospective examination is not feasible, the Board must still provide adequate reasons or bases for relying solely on an incomplete opinion. Had the Board recognized that the August 2008 VA examination was inadequate, it may have determined that the Veteran’s lay statements regarding his additional functional loss warranted a higher rating. Instead, the Board found the 2008 examination was the only evidence that “contain[ed] range of motion measurements to allow the Board to determine whether [the Veteran’s] combined range of motion of his thoracolumbar spine was not greater than 120 degrees.” R-12. But the Veteran’s clinical range of motion measurements are not the only probative evidence the Board must consider in determining Mr. Mullis’s level of disability.

As the Veteran argued in his opening brief, the Board blatantly ignored favorable, material evidence regarding his functional impairment due to back pain. *See* Apa. Open Brief at 18-20. Although the Board briefly acknowledged the Veteran's and his wife's lay reports, it conducted no real analysis apart from concluding that Mrs. Mullis's assertions "are afforded little probative weight." R-13. This brief conclusion does not explain how the Board weighed the *Veteran's* reports of pain and limited forward and back motion. *See* R-440 (November 2008 statement); R-376 (February 2009 statement). Nor did the Board discuss the Veteran's report that his forward flexion was only limited to 5 degrees. *See* R-312 (July 2009 VA form 9); R-332 (December 2008 private treatment note: "He is extremely limited in both flexion and extension"); *Jandreau v. Nicholson*, 492 F.3d. 1372, 1377 (Fed. Cir. 2007) (noting a lay person is competent to report "a contemporaneous medical diagnosis.").

The Secretary asserts that the "Board performed exactly the inquiry that is called for by the rating criteria" when it relied on the Veteran's normal range of motion measurements to deny a higher rating. Sec. Brief at 12. This argument, however, conflates two separate inquiries: range of motion measurements and functional loss. Contrary to the Secretary's characterization of Mr. Mullis's argument, the Veteran does not "prefer . . . that the objective criteria used by the Secretary be set aside here." *Id.* Rather, the Veteran asserts the Board failed to properly comply with sections 4.40 and 4.45 when it ignored favorable evidence of functional loss.

The Veteran's clinical range-of-motion measurements on the day of the August 2008 VA examination do not sufficiently represent his level of impairment over the course of six years. It is the Board's responsibility "to interpret reports of examination in the light of the whole recorded history, reconciling the various reports into a consistent picture so that the current rating may accurately reflect the elements of disability present." 38 C.F.R. § 4.2 (2016). Rather than merely parrot these range of motion measurements and match them to the rating criteria, the Board should have analyzed the VA examinations within the larger context of the Veteran's lay statements and his private treatment records.

Although Mr. Mullis's range of motion was normal on a single day in August 2008, the rest of the evidence demonstrates "extremely limited" flexion and functional loss. R-332; *see also* R-312. In his opening brief, the Veteran pointed out evidence that the Board overlooked because it focused too narrowly on his range of motion measurements. *See* Apa. Open Brief at 14, 16-20.

Where the Board considers entitlement to a higher rating under section 4.40, it must assign a rating "based on the § 4.71a criteria." *Thompson v. McDonald*, 815 F.3d 781, 785 (Fed.Cir. 2016). This is because "§ 4.40 never explicitly lists any actual disability ratings." *Id.* However, nothing in the section 4.71a rating criteria requires *objective* evidence to demonstrate additional functional loss in range of motion. Apa. Open Brief at 10. In other words, a veteran's range of motion may measure to a

certain degree on objective examination and yet be further limited in his everyday life, due to his ankle weakness and instability. It is not a matter of weighing the medical evidence *against* the lay evidence: it is a matter of viewing the two in tandem. *See* 38 C.F.R. § 4.10 (2015) (“the basis of disability evaluations is the ability of the body . . . to function under the ordinary conditions of daily life . . .”).

This is not, as the Secretary suggests “based on purely subjective and nebulous factors, but rather it is precisely the situation contemplated by sections 4.40 and 4.45. Sec. Brief at 12; *see also* *Apa*. Open Brief at 14. The Board’s focus on the Veteran’s range of motion measurements only on examination is a misinterpretation of these regulations. *See* 38 C.F.R. § 4.71a; *see also* 38 C.F.R. § 4.40 (noting disability “is primarily the inability . . . to perform the normal working movements of the body with normal excursion, strength, speed, coordination and endurance.”). Had the Board addressed this favorable, material evidence of functional loss, and properly interpreted sections 4.40 and 4.45, it may have determined that the Veteran’s low back disability warranted a rating higher than 10 percent for the time period prior to June 16, 2014. Remand is warranted for the Board properly apply the law and provide adequate reasons or bases for its decision.

CONCLUSION

For the time period prior to June 16, 2014, Mr. Mullis suffered from flare-ups of pain that rated at 9 out of 10 in severity and required him to lie down for up to two hours. Private treatment notes and credible lay reports document limited forward

flexion, and functional loss, including muscle spasms and inability to perform normal daily activities. The Board erred when it relied on an inadequate VA examination, which documented normal range of motion but failed to render an opinion regarding additional functional loss during flare ups. The Board also erred when it misinterpreted sections 4.40 and 4.45, failed to consider favorable evidence of functional loss, and provided inadequate reasons or bases for focusing solely on the Veteran's range of motion measurements on a single day.

Had the Board properly interpreted the law, it may have determined that the Veteran was entitled to a higher rating. For the foregoing reasons, along with those presented in his opening brief, Mr. Mullis respectfully requests that the Board's decision be vacated and his appeal remanded so that it may properly adjudicate his entitlement to an increased rating.

Respectfully submitted,

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