

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

DOUGLAS M. BERKOWITZ,
Appellant,

v.

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

**ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS**

**BRIEF OF APPELLEE
SECRETARY OF VETERANS AFFAIRS**

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DOUGLAS M. BERKOWITZ,)
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Appellant,)
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v.)
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ROBERT A. MCDONALD,)
Secretary of Veterans Affairs,)
)
Appellee.)

Vet. App. No. 15-3125

**ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS**

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

I. ISSUE PRESENTED

Whether the Court should affirm the portion of the Board of Veterans' Appeals ("BVA" or "Board") June 25, 2015 decision, which denied entitlement to a disability rating in excess of 20 percent, from April 20, 2011 to March 31, 2015, for degenerative disc disease (DDD), L5-S1.

II. STATEMENT OF THE CASE

A. Jurisdictional statement.

This Court has jurisdiction under 38 U.S.C. § 7252(a) to review final Board decision. However, the Court does not have jurisdiction over the matters that the Board remanded. *Breeden v. Principi*, 17 Vet.App. 475, 477 (2004).

B. Nature of the Case

Appellant, Douglas M. Berkowitz, appeals the Board's decision denying a rating greater than 20% for DDD. Record Before the Agency [R. at 3-25].

C. Statement of Relevant Facts

Appellant, Douglas M. Berkowitz, had active duty service in the United States Air Force from June 1960 to June 1980. [R. at 2066]. In July 1980, Appellant filed a claim for disability compensation for his low back condition. [R. at 2064-65]. In September 1990, the Department of Veterans Affairs Regional Office (RO) granted entitlement to service connection for DDD at a 10 percent rating effective July 1, 1980. [R. at 588 (587-88)].

In October 2005, Appellant applied for an increased rating for his low back disability. [R. at 2008-09]. In February 2007, the RO continued the Appellant's 10 percent evaluation for his low back condition. [R. at 1438-52]. In January 2009, Appellant filed a claim for entitlement to an increased rating for his DDD based on convalescence due to surgery. [R. at 1209-10]. In April 2009, Appellant was granted a temporary total evaluation for convalescence from January 7, 2009, to March 1, 2009. [R. at 1192 (1188-95)]. In May 2010, a

hearing was conducted. [R. at 1118-27]. In March 2011, the Board remanded Appellant's claim for a new examination because Appellant alleged that his condition had increased in severity. [R. at 1114-15 (1112-17)].

In April 2011, an examination was conducted. [R. at 1046-54]. Appellant complained of pain across the lower part of his back which radiated down to his groin and both legs. [R. at 1046 (1046-54)]. Appellant reported having difficulty walking, sitting and getting up from a chair. *Id.* He indicated that the pain was always severe and that he was unable to sleep even with pain medication. *Id.* It was noted that Appellant had surgery for a spinal stenosis in 2009. *Id.* Appellant reported having urinary urgency, urinary frequency from 1-2 hours, nocturia twice per night, numbness, paresthesias, and falls. *Id.* The examiner opined that the etiology of these symptoms was unrelated to Appellant's DDD. *Id.* Appellant reported that he had fallen 4 or 5 times in the last few months but it was difficult to say if this was caused by either his back or knees. *Id.* Appellant walked with a cane and a brace, but was unable to walk more than a few yards. [R. at 1047 (1046-54)]. His gait was antalgic. *Id.* Although Appellant had abnormal spinal curvature, there was no gibbus, kyphosis, lumbar lordosis, lumbar flattening, reverse lordosis, list, or thoracolumbar spine ankylosis. *Id.* No spasm or atrophy was noted but there was guarding on the right and left, pain with motion, tenderness, and weakness. *Id.* The examination noted muscle spasm, localized tenderness, or guarding was severe enough to be responsible for Appellant's abnormal gait or abnormal spinal contour. *Id.* Thoracolumbar spine range of

motion as flexion 0 to 80 degrees, right lateral flexion 0 to 20 degrees, left lateral flexion 0 to 25 degrees, right lateral rotation 0 to 15 degrees, and left lateral rotation 0 to 20 degrees. *Id.* There was objective evidence of pain on active range of motion and following repetitive motion. *Id.* There was no additional limitation after three repetitions of range of motion. *Id.*

In April 2011 x-rays were taken which showed no fracture or acute bony abnormality. [R. at 1049 (1046-54)]. The report noted that there was loss of disc space at L3-L4, L4-L5, and L5-S1 with vacuum disc at L4-L5 and endplate changes at L3-L4 and L4-L5. *Id.* Remaining levels showed mild disc space narrowing with anterior osteophytes. *Id.* Front view showed mild scoliotic curvature of the lumbar spine convexity towards the left. *Id.* Pedicles appeared intact and the bones were demineralized. *Id.* There was heavy vascular calcification noted as well as post-surgical changes of laminectomy at L3-L4 and L5. *Id.* The examiner's impression was marked degenerative changes of the lumbar spine great in the lower lumbar spine with grade 1 to 2 anterolisthesis of L4 on L5. *Id.* No acute bony abnormality identified. Appellant had mild scoliotic curvature of the lumbar spine and changes of laminectomy. *Id.*

In August 2014, another examination was conducted in which Appellant was diagnosed with degenerative changes, lumbar spine status post laminectomies L3-5. [R. at 90-128]. Appellant reported that he did not experience flare-ups that impacted the function of his thoracolumbar spine but complained of constant aching, dull pain in his back, occasional sharp pain in his

legs, and that his feet were numb all of the time. [R. at 92 (90-128)]. Appellant had forward flexion of the thoracolumbar spine to 75 degrees with objective evidence of painful motion beginning at 30 degrees, extension to 25 degrees with objective evidence of painful motion beginning at 20 degrees, and right and left lateral rotation to 30 degrees or greater with objective evidence of painful motion beginning at 30 degrees or greater. [R. at 92-93 (90-128)]. Appellant was able to perform repetitive use testing with three repetitions. [R. at 94 (90-128)]. Posttest forward flexion ended at 90 degrees or greater, post-test extension ended at 25 degrees, post-test right and left lateral flexion ended at 30 degrees or greater, and posttest right and left lateral rotation ended at 30 degrees or greater. *Id.* Appellant had no additional limitation in range of motion of the thoracolumbar spine, but had functional loss and/or functional impairment including less movement than normal and pain on movement. [R. at 94-95 (90-128)]. Appellant had mild localized tenderness or pain to palpation in his right L1 paraspinal. [R. at 95 (90-128)]. Appellant had no muscle spasm resulting in abnormal gait or abnormal spinal contour, no muscle spasms not resulting in abnormal gait or abnormal spinal contour, no guarding of the thoracolumbar spine resulting in abnormal gait or abnormal spinal contour, and no guarding of the thoracolumbar spine not resulting in abnormal gait or abnormal spinal contour. *Id.* He had no ankylosis of the spine, no other neurologic abnormalities, and did not have IVDS. [R. at 98-100 (90-128)]. It was noted that Appellant had a scar related to his thoracolumbar condition that was not painful, and/or unstable, and was less than

39 square centimeters. [R. at 100 (90-128)]. Appellant had a scar that was 12 centimeters by 0.2 centimeters located on the midline of his lumbar spine that was linear, without elevation, depression, tissue loss, color difference, or adherence. *Id.* It was noted that it was not tender. *Id.* Diagnostic imaging studies were performed and no arthritis was documented. *Id.*

X-rays were conducted which noted moderate to severe multilevel degenerative changes in the lumbar spine with disc height loss, facet hypertrophy, and disc bulges at L3-L4, L4-L5, and L5-S1 resulting in severe bilateral neural foraminal stenosis. [R. at 102 (90-128)]. X-rays revealed no fracture or dislocation. [R. at 103 (90-128)]. The examiner noted that Appellant's thoracolumbar spine condition would impact his ability to work in that it would limit heavy and some moderate duty physically demanding occupations. [R. at 104 (90-128)]. The examiner opined that Appellant was capable of sedentary work based on his lumbar spine alone. *Id.*

In September 2014, the Board denied entitlement to an increased rating for Appellant's low back disability for any period. [R. at 64-65 (61-85)]. In January 2015, the RO decreased Appellant's low back disability to 10 percent effective April 1, 2015. [R. at 3107 (3104-10)]. Appellant appealed this decision and in March 2015 the Court issued an order granting a joint motion for partial remand. [R. at 3507, *see also* R. at 3508-12].

In the June 25, 2015, Board decision, the Board denied entitlement to a disability rating in excess of 20 percent, from April 20, 2011, to March 31, 2015,

for DDD, L5-S1. [R. at 3-25]. The Board also remanded the following issues: entitlement to a disability rating in excess of 10 percent, after March 31, 2015, for DDD L5-S1; whether the RO's rating reduction from 20 percent to 10 percent disabling for service-connected DDD, L5-S1, effective March 31, 2015, was proper; whether the RO's rating reduction from 40 percent to 10 percent disabling for service-connected right lower lumbar radiculopathy, effective March 31, 2015, was proper; and whether the RO's rating reduction from 40 percent to 10 percent disabling for service connected left lower lumbar radiculopathy, effective March 31, 2015, was proper. *Id.*

III. SUMMARY OF THE ARGUMENT

The Court should affirm the Board's decision because the Board did not err in relying on the medical evidence of record and its factual determinations based on the medical evidence were neither clearly erroneous nor inconsistent with the governing case law. The Board provided an adequate explanation of why it did not refer the case for extraschedular consideration because the symptomatology is contemplated by the rating schedule. The issue of whether there was a collective impact of separate service-connected disabilities was not raised by Appellant or by the record. Accordingly, the Court should reject Appellant's arguments.

IV. ARGUMENT

The Court should affirm the portion of the June 25, 2015, Board decision, which denied entitlement to disability rating in excess of 20 percent, from April

20, 2011 to March 31, 2015 because the Board's findings were plausibly based upon the evidence of record and are not clearly erroneous. See *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990) (recognizing that Court applies clearly erroneous standard of review to BVA decisions and if Board findings are plausibly based on record of evidence then Court will defer to Board as finder of fact). Appellant has not demonstrated the Board committed prejudicial error that would warrant any action by the Court other than affirmance. See *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (holding that an appellant has the burden of demonstrating error on appeal), *aff'd*, 232 F.3d 908 (Fed. Cir. 2000) (table); see also *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009) (explaining that the burden of demonstrating prejudice normally falls upon the party attacking the agency's determination).

Pursuant to 38 U.S.C. § 7104(d)(1), the Board is required to provide a written statement of reasons or bases explaining its findings of fact and conclusions of law to enable Appellant to understand the basis for the decision and to facilitate judicial review. To comply with this requirement, the Board must consider all applicable provisions of law and regulation, analyze the credibility and probative value of evidence, account for evidence it finds to be persuasive or unpersuasive, and provide reasons for rejecting material evidence favorable to the claim. *Tatum v. Shinseki*, 23 Vet.App. 152, 155 (2009). If it is clear to the Court from the text of the decision how the Board reached the unchallenged, plausible conclusions that it did, the Board has satisfied the reasons or bases

requirement despite Appellant's contentions otherwise, and the Court must affirm. *Cf. Mayfield v. Nicholson*, 19 Vet.App. 103, 129 (2005) (where judicial review is not hindered by deficiency of reasons or bases, a remand for reasons or bases error would be of no benefit to the appellant and would therefore serve no useful purpose).

Appellant initially, argues that the Board did not provide an adequate statement of reasons or bases for its determination that Appellant was not entitled to an increased rating for a back disability, evaluated as 20 percent disabling from April 20, 2011 to March 31, 2015. Appellant's Brief (AB at 6-9). Specifically, Appellant argues that because Appellant experiences painful motion beginning at 30 degrees a 40 percent rating is warranted. However, Appellant's argument is contrary to Diagnostic Code 5234. 38 C.F.R. § 4.71a, Diagnostic Code 5234.

Pursuant to the General Rating Formula for disease and injuries of the spine Appellant's DDD may be rated in accordance with Diagnostic Codes 5235-5243. A 20 percent rating is warranted for forward flexion of the thoracolumbar spine 30 degrees but not greater than 60 degrees; or, forward flexion of the cervical spine greater than 120 degrees; or combined range of motion of the cervical spine not greater than 170 degrees; or, muscle spasm or guarding severe enough to result in an abnormal gait or abnormal spinal contour such as scoliosis, reversed lordosis, or abnormal kyphosis. *Id.* A 40

percent rating is warranted for forward flexion of the thoracolumbar spine 30 degrees or less; or favorable ankylosis of the entire thoracolumbar spine. *Id.*

In *Mitchell v. Shinseki*, the Court reinforced the principle that:

[when an] examiner failed to address any range-of-motion loss specifically due to pain and any functional loss during flare-ups, the examination lacks sufficient detail necessary for a disability rating, and it should have been returned for the required detail to be provided, or the Board should have explained why such action was not necessary.

25 Vet.App. 32, 44 (2011).

In this case, the Board found that, for the period on appeal, April 20, 2011, to March 31, 2015, Appellant's service-connected back disability did not warrant a disability rating in excess of 20 percent. The Board explained that a 40 percent rating was warranted when forward flexion of the thoracolumbar spine was 30 degrees or less; or favorable ankylosis of the entire thoracolumbar spine and in this case a 40 percent rating was inapplicable because the April 2011 examination found that Appellant had forward flexion of the thoracolumbar spine to 80 degrees and did not have thoracolumbar spine ankylosis. [R. at 16]. The Board also noted that the August 2014 examination found that Appellant had forward flexion of the thoracolumbar spine to 75 degrees and did not have thoracolumbar spine ankylosis. [R. at 16-17]. The Board provided an adequate written statement of reasons of bases for its determination. Because the Board's findings are plausibly based on the extensive evidence of record and the Board explained how it reached the conclusions that it did, the Board's findings of fact

should not be disturbed by the Court. *Gilbert v. Derwinski*, 1 Vet.App. 49 (1999). AB at 17-19. To the extent Appellant argues that the fact that Appellant experiences painful motion beginning at 30 degrees supports a 40 percent rating, DC 5234 is clear that a 40 percent rating is warranted when the forward flexion is 30 degrees or less, which as the Board explained is not the case here. The idea that any pain equals limitation of motion was argued by the appellant in *Mitchell*, but the Court refused to adopt that rule. 25 Vet.App. at 39-43.

Appellant also argues that the April 2011 examination is inadequate because it fails to provide an opinion as to the additional limitation due to pain on motion. Appellants Brief (AB) at 10-11. To the contrary, the April 2011 examiner considered and discussed Appellant's additional limitation. Moreover, to an extent there was a deficiency in the 2011 examination this was cured by the August 2014 examination which Appellant has not alleged was inadequate. See AB at 11.

Appellant's assertion of error is incongruent with one of the central principles of *Mitchell v. Shinseki*, 25 Vet.App. 32 (2011): when evaluating functional loss in the musculoskeletal system under DCs based upon limitation of motion, such as 38 C.F.R. § 4.71a, DCs 5235 – 5243, an examiner is to determine functional loss by assessing a claimant's range of motion loss due to pain, to include during any flare-ups, and during repetitive use. See *id.*; 25 Vet.App. at 43-44. In other words, provided such an assessment has been made by an examiner, he or she has made the requisite determination with respect to

functional loss; certainly a claimant may experience pain or weakness not affecting range of motion but nevertheless resulting functional loss – to be qualified by the examiner and considered by the Board – but as clearly held by this Court, pain or weakness on motion, which has been determined not to limit the range of that motion, may not, absent further impact upon a claimant’s activities, constitute said loss. See *Mitchell*, 25 Vet.App. at 38-39, 43-44; see also *Moore v. Nicholson*, 21 Vet.App. 211, 218 (2007) (holding that “[t]he medical examiner provides a disability evaluation and the rating specialist interprets medical reports in order to match the rating with the disability.”).

This Court has expressly ruled that under VA regulations that evaluate disability based upon range-of-motion loss – including, 38 C.F.R. § 4.71a, DCs DCs 5235-5243 – pain alone cannot constitute a functional loss. *Mitchell*, 25 Vet.App. at 38-39. Although a claimant may allege that pain upon range of motion, repetitive or otherwise, has led to a functional loss, any such assertions must be weighed against all other evidence of record, and here, as discussed below, the medical evidence does not show that Appellant’s low back pain caused additional restriction that would otherwise warrant an increased rating, through pain or repetitive use, or that the Board erred in finding that the particular functional loss asserted by Appellant justified the assigned for rating for the entire period on appeal, under 38 C.F.R. § 4.71a, DCs 5243; see *Mitchell*, 25 Vet.App. at 37; *DeLuca*, 8 Vet.App. at 206; 38 C.F.R. § 4.40.

Moreover, assuming arguendo any deficiency in the 2011 examination, such deficiency was cured by the August 2014 examination which Appellant has not alleged is inadequate. See 38 U.S.C. § 7261(b)(2) (Court must “take due account of the rule of prejudicial error”).

To the extent Appellant argues that if the Board solely considered the August 2014 examination Appellant would have been awarded a 40 percent rating because the August 2014 examiner found that pain contributed to functional loss beginning at 30 degrees and the examiner found that Appellant would lose an additional 50 degrees, Appellant has failed to cite to the case law supporting this argument. AB at 10. As explained above, DC 5234 is clear that a 40 percent rating is warranted when forward flexion of the thoracolumbar spine is 30 degrees or less. See also *Hilkert*, 12 Vet. App. at 151 (holding that appellant has the burden of demonstrating error).

Appellant argues that the Board failed to provide an adequate written statement of reasons and bases when it denied referral for an extraschedular rating for his back disability. AB at 11-14. The Board’s determination of whether an Appellant’s claim warrants referral for an extraschedular disability rating under § 3.321(b) “is a three-step inquiry.” *Thun v. Peake*, 22 Vet.App. 111, 115 (2008), *aff’d sub nom. Thun v. Shinseki*, 572 F.3d 1366 (Fed.Cir. 2009). First, the Board must determine whether the evidence presents “such an exceptional disability picture that the available schedular evaluations for that service-connected disability are inadequate.” *Id.* Thus, the Board must determine whether the

applicable DC reasonably describes the appellant's disability level and symptomatology. If so, the appellant's disability picture is contemplated by the rating schedule, the assigned disability rating is adequate, and no referral is required. *Id.* If the Board determines that the applicable DC does not reasonably encompass the appellant's disability, the Board next must determine whether the appellant's exceptional disability picture exhibits other related factors such as "marked interference with employment" and "frequent periods of hospitalization." *Id.* at 116. Finally, the Board must then refer the case for the RO to determine whether, to accord justice, VA must assign an extraschedular disability rating. *Id.*

In the instant case, the Board provided the following analysis when denying referral for extraschedular consideration:

The schedular rating in this case is adequate. The diagnostic criteria contemplate and adequately describe the symptomatology of the Veteran's service-connected DDD, which is primarily productive of limited flexion, pain, and an abnormal gait. *See Thun, 22 Vet. App.* at 115. When comparing the Veteran's symptoms with the schedular criteria, the Board finds his symptoms are congruent with the disability picture represented by the 20 percent rating assigned from April 20, 2011 to March 31, 2015, and he does not have symptoms associated with this disability that have been unaccounted for by the schedular rating assigned herein. ...

Consequently, the Board finds that the available schedular rating is adequate to rate the Veteran's DDD, L5-S1. Based on this threshold finding, there is no need to consider whether there are "related factors" such as marked interference with employment or frequent periods of hospitalization.

[R. at 15]. The Board made a "comparison between the level of severity and symptomatology" and the "established criteria found in the rating schedule for

that disability,” satisfying the threshold element of *Thun*. 22 Vet.App. at 115. Some of the examples provided by Appellant in his brief (e.g., assistive devices and morphine tablets) are not symptoms and to the extent he points to pain it is contemplated by the rating criteria, and an inability to bend, sit, stand or work are obvious products of pain and limitation of motion. As the Board provided an adequate written statement of reasons or bases for its determination that the first step was met it was not required to discuss the second step of the *Thun* analysis. Therefore, as to this issue, he has not met her burden on appeal. *Hilkert*, 12 Vet.App. at 151.

Appellant argues the Board erred in not discussing the combined effects of Appellant’s disabilities when determining whether Appellant was entitled to extra schedular consideration but that issue was not reasonably raised. (AB at 16). In its decision, the Board is required to address all theories raised by either the claimant, *Schroeder v. West*, 212 F.3d 1265, 1271 (2000), or the evidence of record, *Solomon v. Brown*, 6 Vet.App. 396, 402 (1994). “Indeed, by regulation, the Board is required to construe an appellant’s arguments ‘in a liberal manner for purposes of determining whether they raise issues on appeal.’” *Robinson v. Peake*, 21 Vet.App. 545, 552 (2008) (citing 38 C.F.R § 20.202 (2007)). To that end, however, the Board is not required to discuss *all* of the evidence of record, but rather it must discuss the *relevant* evidence. *Dela Cruz v. Principi*, 15 Vet.App. 143, 149 (2001); see *Schafraath v. Derwinski*, 1 Vet.App. 589, 593 (1991); see also *Gonzalez v. West*, 218 F.3d 1378, 1380-81 (Fed. Cir. 2000)

(holding that “absent specific evidence indicating otherwise,” VA is presumed to have reviewed all evidence in the record when making a determination as to service connection.). This Court has stated that the Board does not assume “the impossible task of inventing and rejecting every conceivable argument in order to produce a valid decision.” *Robinson*, 21 Vet.App. at 553. See *Yancy v. McDonald*, 27 Vet. App. 484, 495 (2016) (“the Board is require to address whether referral for extraschedular consideration is warranted for veteran’s disabilities on a collective basis only when that issue is argued by the claimant or reasonably raised by the record through evidence of the collective impact of the claimant’s service-connected disabilities.”). Here, Appellant fails to point any persuasive evidence that this issue was raised by the record. Appellant points to an April 2011 examination, in which the examiner indicated that he was unable to tell whether his reported falls were due to his knee or back condition as support but as the examiner did not opine that the falls were due to both conditions or the collective impact of both conditions, it is unclear how this examination reasonably raised the issue. Appellant also points to the fact that Appellant is service connected for bilateral lower extremity radiculopathy but fails to point to any evidence that in concert with his back the disabilities have a collective impact. As such, the Board did not error in discussing the collective impact of Appellant’s service connected disabilities. See *Marciniak v. Brown*, 10 Vet.App. 198, 201 (1997) (holding that the appellant bears the burden of demonstrating prejudice on

appeal and that remand is unnecessary “[i]n the absence of demonstrated prejudice”).

Because Appellant limited allegations of error to those noted above, Appellant has abandoned any other issues or arguments he could have raised but did not. *Woehlaert v. Nicholson*, 21 Vet.App. 456, 463 (2007).

V. CONCLUSION

In view of the foregoing arguments, Appellee, Robert A. McDonald, Secretary of Veterans Affairs, respectfully requests that the Court affirm the portion of the June 25, 2015 decision, which denied entitlement to a disability rating in excess of 20 percent, from April 20, 2011 to March 31, 2015, for DDD, L5-S1.

Respectfully submitted,

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