

REPLY BRIEF OF APPELLANT

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

15-3125

DOUGLAS M. BERKOWITZ

Appellant

v.

ROBERT A. MCDONALD
SECRETARY OF VETERANS AFFAIRS,

Appellee.

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TABLE OF CONTENTS

APPELLANT’S REPLY ARGUMENTS. 1

I. The Board committed prejudicial legal error when it failed to properly interpret the results from an August 2014 examination and further erred by failing to ensure the duty to assist was satisfied by relying upon an inadequate April 2011 examination to deny the Veteran entitlement to an increased rating in excess of 20 percent for his low back disability. 1

II. The Board misinterpreted 38 C.F.R. § 3.321(b)(1) when it failed to assess whether the Veteran’s level of severity was adequately contemplated by his assigned rating and when it failed to conduct a combined effects analysis of the Veteran’s multiple service connected disabilities. 4

CONCLUSION 6

TABLE OF AUTHORITIES

Cases

| | |
|---|---------|
| <i>DeLuca v. Brown</i> , 8 Vet.App. 202 (1995)..... | 3 |
| <i>Martin v. Occupational Safety & Health Review Comm’n</i> , 499 U.S. 144 (1991) | 5 |
| <i>Mitchell v. Shinseki</i> , 25 Vet.App. 32 (2011)..... | 2, 3, 6 |
| <i>Thompson v. McDonald</i> , 815 F.3d 781 (2016)..... | 3 |
| <i>Wanless v. Principi</i> , 18 Vet.App. 337 (2004) | 5 |
| <i>Yancy v. McDonald</i> , 27 Vet.App. 484 (2016) | 5 |

Regulations

| | |
|-------------------------------|------------|
| 38 C.F.R. § 3.321(b)(1)..... | 4, 6 |
| 38 C.F.R. § 4.40 (2016) | 2, 3 |
| 38 C.F.R. § 4.71a (2016)..... | 1, 2, 3, 4 |

Record Before the Agency (“R”) Citations

| | |
|--|------|
| R-2-25 (June 2015 BVA Decision)..... | 5 |
| R-92-128 (August 2014 VA Examinations) | 1, 2 |
| R-138-39 (March 2014 TDIU Application) | 6 |
| R-1046-54 (April 2011 VA Spine Examiantion)..... | 3, 4 |

APPELLANT'S REPLY ARGUMENTS

- I. The Board committed prejudicial legal error when it failed to properly interpret the results from an August 2014 examination and further erred by failing to ensure the duty to assist was satisfied by relying upon an inadequate April 2011 examination to deny the Veteran entitlement to an increased rating in excess of 20 percent for his low back disability.**

The Secretary argues that 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.” Sec. Br. at 7. Further, he argues that the “Appellant has not demonstrated the Board committed prejudicial error that would warrant any action by the Court other than affirmance.” Sec. Br. at 8. The Secretary’s argument must fail because the medical evidence of record demonstrates that the Veteran was entitled to a rating in excess of 20 percent and the Board misinterpreted the applicable law and committed prejudicial legal error when it failed to apply that rating. Apa. Op. Br. 6-11.

Mr. Berkowitz argued that because the August 2014 examination indicated that he experienced *pain on motion with functional loss* beginning at 30 degrees of forward flexion, he was entitled to a 40 percent evaluation under the diagnostic code. Apa. Op. at 8-9; R-92; *see* 38 C.F.R. 4.71a (2016). The Secretary asserts that this argument is contrary to Diagnostic Code 5243. Sec. Br. at 9. It is unclear how the Secretary reached that conclusion.

Under Diagnostic Code 5243, a 20 percent rating is warranted for forward flexion of the thoracolumbar spine greater than 30 degrees, but not greater than 60

degrees, while a 40 percent rating is warranted when forward flexion of the thoracolumbar spine is 30 degrees or less. 38 C.F.R. 4.71a. During the August 2014 examination, the examiner found that the Veteran had objective evidence of painful motion at 30 degrees. R-92. He further noted that the Veteran was unable to flex forward unassisted very far, that forward flexion was not repeated more than two times, and that there was functional loss in the form of less movement than normal and pain on movement. R-93-95.

Under 38 C.F.R. § 4.40 (2016), functional loss may be due to pain, and a body part that becomes painful on use must be regarded as seriously disabled. An adequate examination “must comply with the requirements of § 4.40, and the medical examiner must be asked to express an opinion on whether pain could significantly limit functional ability.” *Mitchell v. Shinseki*, 25 Vet.App. 32, 38 (2011). Here, the examiner noted that pain on movement caused functional loss or impairment of function that limited the Veteran’s flexion to 30 degrees. R-92. This finding entitles the Veteran to a 40 percent rating under diagnostic code 5243. As such, it is unclear why the Secretary believes the Veteran’s argument is contrary to the diagnostic code. Further, it is entirely unclear how, given the findings above, the Secretary can assert that 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.” Sec. Br. at 10.

The Secretary next asserts that there was no error in the April 2011 examination, and to the extent that there was any error, it was cured by the August

2014 examination “which Appellant has not alleged was inadequate.” Sec. Br. at 11. First, Appellant did argue that the August 2014 examination was adequate in that it required the assignment of a 40 percent rating and that the Board failed to properly interpret that data. Apa. Op. Br. at 8-9. Since the Secretary agrees that the examination deficiencies of April 2011 are cured by this examination, Sec. Br. at 11, then the assignment of a 40 percent rating should be assigned for the entire period on appeal.

Second, the April 2011 examination is inadequate. *See* R-1046-54. In *Thompson v. McDonald*, 815 F.3d 781, 785 (2016), the Federal Circuit determined that “it is clear that the guidance of § 4.40 is intended to be used in understanding the nature of a veteran’s disability, after which a rating is determined based on the § 4.71a criteria.” Thus, in order to properly rate the Veteran’s condition under the rating criteria, the Board needs a clear understanding of normal working movements of the body and of any functional loss the Veteran may have, which includes pain on movement. *See Thompson*, 815 F.3d at 785. The examiner’s proper reflection of pain on motion, which contributes to functional loss, and the Board’s proper interpretation of that notation, was essential to properly adjudicating the claim, as the Court has explicitly “rejected the Secretary’s argument that DCs based upon limitation of range of motion already ‘contemplate the functional loss resulting from pain on undertaking motion.’” *Mitchell*, 25 Vet.App. at 37 (citing *DeLuca v. Brown*, 8 Vet.App. 202, 205-06 (1995)).

Here, during the April 2011 examination, the examiner noted that the Veteran had a history of fatigue, decreased motion, stiffness, weakness, spasm, and pain. R-1046-47. Mr. Berkowitz was unable to walk more than a few yards and the examiner observed objective evidence of pain on active range of motion. R-1047. However, he failed to make a notation of where that pain began. *Id.* Thus, the Board did not have the proper information concerning the functional loss at issue and how such loss impacted the normal working movement of Mr. Berkowitz's body so that a proper rating could be assigned under 38 C.F.R. 4.71a. The Secretary's assertion that this examination was adequate is without merit and unsupported by law.

II. The Board misinterpreted 38 C.F.R. § 3.321(b)(1) when it failed to assess whether the Veteran's level of severity was adequately contemplated by his assigned rating and when it failed to conduct a combined effects analysis of the Veteran's multiple service connected disabilities.

The Secretary alleges that "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*." Sec. Br. at 14-15. He attempts to argue that needing assistive devices and morphine tablets is not a symptom, that the extent to which the Veteran points to pain, that is contemplated by the rating criteria, and that an inability to bend, sit, stand, or work are "obvious products of pain and limitation of motion." *Id.* This argument is unpersuasive because these are the unsubstantiated and incorrect findings of the Secretary. They were never discussed by the Board.

The Board is required to consider and compare the Veteran's symptoms with the assigned schedular evaluation. *See Yancy v. McDonald*, 27 Vet.App. 484, 495 (2016). The Board's entire analysis consisted of the conclusory opinion that "his symptoms are congruent with the disability picture represented by the 20 percent rating assigned ... and he does not have symptoms associated with this disability that have been unaccounted for by the schedular rating assigned herein." R-18. This was not a sufficient explanation by the Board, as argued in Appellant's opening brief, *Apa. Op. Br.* at 11-16, and the Secretary's explanation does not resolve this error.

The Secretary's attempt to justify this decision by arguing that assistive devices, morphine tablets, and pain are contemplated by the rating criteria are nothing more than post-hoc rationalization. *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 146 (1991) (holding that litigating positions are not entitled to judicial deference when they are merely counsel's "*post hoc* rationalizations" for agency action and are advanced for the first time on appeal); *see also Wanless v. Principi*, 18 Vet.App. 337, 343 (2004) (Steinberg J., concurring) (explaining that the "Court's role is to review whether the Board in its decision, rather than the Secretary in his brief, provided an adequate statement of reasons or bases").

Further, this explanation ignores VA's own policy that the effects of medication may be a basis for extraschedular referral. VA Gen. Coun. Prec. 06-96 (Aug. 16, 1996). Additionally, as described above, the Court has expressly rejected that Diagnostic Codes based on limitation of movement contemplate pain on

undertaking motion. Thus, the Secretary's arguments must fail as contrary to established policy and law. *Mitchell*, 25 Vet.App. at 37.

Lastly, the Secretary argues that "Appellant fails to point [sic] any persuasive evidence that this issue was raised by the record" with regard to the combined effects of the Veteran's multiple disabilities. Sec. Br. at 16. This argument is equally unpersuasive. The Veteran expressly raised the combined impact of his service connected conditions when he filed for individual unemployability due to the combined impact of his right knee condition, low back disability, bilateral radiculopathy, and headaches and their impact on his employment. R-138-39. The Board failed to address the collective impact of his conditions in any capacity, and the Secretary makes no reasonable argument for why this was not error.

If the Board had contemplated the severity, symptomatology, or combined impact of the Veteran's service connected disabilities as required, it could have found that extraschedular referral was warranted. As such, the Board's misinterpretation of 38 C.F.R. § 3.321(b)(1) prejudiced the Veteran, and remand is required for the proper adjudication of his claim.

CONCLUSION

Mr. Berkowitz was entitled to compensation in excess of 20 percent for his low back disability based on his limitation of forward flexion of the thoracolumbar spine to 30 degrees or less. He was also entitled to have his entire disability picture considered, and the Board was required to consider all of his symptoms in

determining whether a referral for extraschedular consideration was warranted.

Because the Board failed to properly interpret the results of the August 2014 examination and failed to adequately consider whether Mr. Berkowitz's disability was adequately compensated by the schedular criteria, the Board erred.

Based on the foregoing reasons, as well as the arguments contained in Mr. Berkowitz's opening brief, the Court should vacate the Board's decision and remand the appeal with instructions for the Board to readjudicate the issue of entitlement to an increased rating for his low back condition and extraschedular referral, as well as provide adequate reasons or bases for its decision, in accordance with the Court's opinion.

Respectfully Submitted,

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