

NO. 15-3097

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

JAMES W. LEWIS, JR.,

Appellant,

v.

ROBERT A. McDONALD,
Secretary of Veterans Affairs,

Appellee.

Appeal from the Board of Veterans' Appeals

APPELLANT'S REPLY BRIEF

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I. OVERVIEW

James W. Lewis (“Mr. Lewis”) is service connected, inter alia, for stab wound residuals of the right posterior chest, right lower abdomen, and right lower leg. R. 281 (279–81). Mr. Lewis is appealing the April 29, 2015, Board of Veterans’ Appeals (“Board”) decision to the limited extent (1) the Board failed in its duty to assist by relying on inadequate examination reports that evaluated scarring from the service-connected stab wounds but failed to address muscle damage, and (2) the Board failed to address all issues reasonably raised by the record by not considering evidence of damage to the underlying muscles as a result of service-connected stab wounds.

The Secretary argues that the Board’s decision should be affirmed because Mr. Lewis has not complained of or been treated for muscle damage, but this argument ignores Mr. Lewis’s extensive medical history detailing a high likelihood of muscle damage. The Board’s conclusion that the examinations were adequate in view of the record evidence of possible muscle injury constitutes prejudicial error because the Board failed to consider muscle damage under 38 C.F.R. § 4.56 and 38 C.F.R. § 4.73.

II. SECRETARY’S ARGUMENTS AND APPELLANT’S RESPONSE

A. Record Evidence of Muscle Injury

As an initial matter, the Secretary does not dispute that Mr. Lewis’s medical records from the 1979 assault provide clear evidence of muscle damage. At the hospital after the assault, Mr. Lewis’s physician noted a laceration to the right-lower leg, which was “deep to the bone and muscle tissues with partial muscle severance,” R. 360, and “extending through the anterior compartment muscle,” R. 366. The surgical report also

indicated that the wound to the leg went “through the fascia compartment and into the anterior tibial muscles in two places for a total length of probably 15 cm.” R. 370 (368–70). The physician also found “eight separate holes in various portions of the small intestine,” R. 356, that there “[appeared] to be omentum hanging out of the [abdomen] wound,” and that the “abdominal wound does have viscera extruding from the stab site,” R. 360.

B. Requirement of Current Complaints or Treatment for Muscle Damage

The Secretary’s brief contains a single point of contention with Mr. Lewis’s position: according to the Secretary, the Board was under no duty to discuss or provide an examination with respect to muscle damage because “none of the current medical records show that Appellant has complained of or has been treated for muscle damage as part of his post stab wound residuals.” Secretary’s Brief (“SB”) at 4. The Secretary reasons that the Department of Veterans Affairs (“VA”) examinations in November 2010 and October 2012 provide evidence that Mr. Lewis’s scars “had no other disabling effects,” and as result, there was no duty for the Board to discuss or provide an examination with regard to muscle damage. *Id.* at 6. But in view of the evidence in the record of the multiple stab wounds and the likelihood of an underlying muscle injury, the medical examination reports should have extended beyond an evaluation of Mr. Lewis’s scars to address possible damage to underlying muscles, and the examination reports are therefore inadequate for evaluation purposes.

Contrary to the Secretary’s position, the focus of the adequacy of a medical examination is not limited to current complaints or treatment for muscle damage. A

medical examination is deemed adequate “where it is based upon consideration of the veteran’s *prior medical history and examinations . . .*.” *Stefl v. Nicholson*, 21 Vet. App. 120, 123 (2007) (emphasis added) (quoting *Ardison v. Brown*, 6 Vet. App. 405, 407 (1994)); *see also* 38 C.F.R. § 4.2 (“[i]t is the responsibility of the rating specialist to interpret reports of examination in the light of the whole recorded history”). In *Ardison*, this Court found a VA examination inadequate where the examination did not consider the prior history of a veteran’s condition, and instead unduly limited the scope of the examination without regard to the veteran’s medical history. 6 Vet. App. at 407. The veteran in *Ardison* suffered from a condition that fluctuated between periods of activity and remission, and the VA examination took place during a period of remission. *Id.* Although Mr. Lewis does not claim that a muscle injury fluctuates in the same manner, this Court’s holding that examinations must consider the entire scope of the pertinent medical history remains relevant. Here, VA examiners in Mr. Lewis’s two most recent medical examinations limited their analysis to scarring and failed to consider underlying muscle injuries related to Mr. Lewis’s stab wound residuals, despite clear evidence *in the record* of likely muscle damage.

In addition, as detailed in Mr. Lewis’s opening brief, the Board erred by relying on medical examinations that failed to consider evidence of through-and-through muscle damage, which do not require current complaints or treatment for muscle damage. Instead, “once a through-and-through muscle wound is found to contain ‘muscle damage’ the rating becomes automatic.” *Beyrle v. Brown*, 9 Vet. App. 377, 385 (1996); *see also Jones v. Principi*, 18 Vet. App. 248, 258 (2004) (citing 38 C.F.R. § 4.56(b)) (noting

where a claimant had sustained through-and-through injuries to muscle groups I and II, he was entitled “to have ‘each group of muscles damaged’ rated ‘as no less than a moderate injury’”). All that is required is evidence of “muscle damage,” and “muscle damage” does not mean current complaints or treatment.

But even assuming, arguendo, that Mr. Lewis did not sustain any through-and-through muscle injuries, Mr. Lewis’s medical history is also relevant to a determination of whether Mr. Lewis has residual muscle injuries as a result of his service-connected stab wounds. When rating muscle injuries under 38 C.F.R. § 4.56, a “totality-of-the-circumstances” test is applied. *Tropf v. Nicholson*, 20 Vet. App. 317, 324–25 (2006). One of the elements considered under 38 C.F.R. § 4.56 is the historical record of treatment of the wound. *See, e.g.*, 38 C.F.R. § 4.56(d)(1)(i), (ii), (2)(i), (ii), (3)(i), (ii), (4)(i), (ii) (each level of muscle disability requires a consideration of “Type of injury” and “History and complaint”). This requires review of all the pertinent service medical records. There is no evidence that either examiner did so. As a result, a proper evaluation of residual muscle damage must consider Mr. Lewis’s medical history prior to his two most recent examinations. Thus, the Secretary is incorrect in arguing that the relevant consideration is only current complaints or treatment for muscle damage.

To support the requirement of medical or lay evidence of a current muscle injury, the Secretary cites to *McLendon v. Nicholson*, 20 Vet. App. 79 (2006), but this case is inapposite. In *McLendon*, the veteran appealed a denial of entitlement to *service connection* for a chronic low-back disability. *McLendon v. Nicholson*, 20 Vet. App. 79, 80 (2006). In contrast, however, Mr. Lewis has already established service connection

for his stab wound residuals, and is seeking an increased (compensable) rating or ratings for those residuals. R. 281 (279–81). The remaining question is the nature and severity of his stab wound residuals, and this is not an issue that was addressed by *McLendon*. As a result, *McLendon*'s discussion of "current disability" criteria has no bearing on the current case.

III. CONCLUSION

Appellant respectfully requests that the Court grant the relief specified in his opening brief.

Respectfully submitted,

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