

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

No. 15-2987

Eric R. Welsh,

Appellant,

v.

Robert A. McDonald,

Secretary of Veterans Affairs,

Appellee.

Appellant's Reply Brief

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Argument

I. The Secretary Concedes That the Right-Tibia-Rating Issue Should Be Remanded.

Mr. Welsh appreciates the Secretary's candor in acknowledging that the Board erred by failing to provide an adequate statement of reasons or bases for its denial of an increased rating for his right tibia disability. Appellee's Brief at 5-6. *See also* Appellant's Brief at 11-12 (raising the argument with which the Secretary agrees). Given the parties' agreement on this issue, the Court should vacate the Board's decision and remand for readjudication based on this agreement regardless of its disposition of Mr. Welsh's other arguments pertaining to this issue.

II. *Correia v. McDonald* Confirms That the Board Erred By Finding the January 2014 VA Examination Report Adequate to Satisfy the Duty to Assist.

Mr. Welsh argued in his principal brief that the Board erred by finding the January 2014 VA examination report adequate to satisfy the duty to assist because it lacks all of the range-of-motion ("ROM") findings required by 38 C.F.R. § 4.59. Appellant's Brief at 7-8. The Court held in *Correia v. McDonald*, 28 Vet. App. 158 (2016), that a VA examination must include the ROM testing delineated in section 4.59's final sentence when there is painful motion unless the examiner determines that it cannot or should not be conducted. *See Correia*, 28 Vet. App. at 169-70. Consequently, *Correia* establishes that the Board clearly erred by not remanding for a VA examination yielding either the ROM measurements required by section 4.59 or an explanation by the examiner for why such testing could not be performed. *See Correia, supra*.

The Secretary acknowledges *Correia*, but states that he will not concede that it is dispositive because he is “currently seeking panel reconsideration of that decision and, in the alternative, full Court review.” Appellee’s Brief at 7-8. On October 5, 2016, the Court denied the Secretary’s motion for reconsideration and held his alternative motion for a full Court decision in abeyance. *Correia v. McDonald*, No. 13-3238 (Vet. App. Oct. 5, 2016) (order). Unless and until the full Court grants the alternative motion, which it has not done, the Court’s panel decision remains binding. *See Bethea v. Derwinski*, 2 Vet. App. 252, 254 (1992). Thus, the Secretary has presented no basis for the Court to reject Mr. Welsh’s argument.

The Secretary also makes a specious argument that Mr. Welsh “failed to show that the examiner did not include both active and passive ranges of motion in the examination or that such testing was possible[.]” Appellee’s Brief at 7. The face of the examination report confirms that only one ROM measurement was performed both initially and after repetitive use. **Record Before the Agency at (“R.”) 198-99 (197-206)**. Measurement of both active and passive ROM would require two sets of ROM measurements or a statement that active and passive ROM were the same. The absence of both in the examination report establishes that Mr. Welsh has made his case. Moreover, the Secretary does not even aver that there is any ambiguity as to whether the examiner failed to measure ROM while bearing weight and not bearing weight.

Consequently, the Court should also hold that the Board clearly erred by finding the duty to assist satisfied in the face of the inadequate January 2014 examination report.

III. The Secretary Invokes Inapposite Language To Defend the Board's Application of the Wrong Legal Standard In Denying Extraschedular Referral.

Mr. Welsh argued in his principal brief that the Board did not provide adequate reasons or bases for finding referral for extraschedular consideration of the combined effects of his service-connected disabilities unwarranted because it incorrectly sought evidence that “all forms of employment” are precluded. Appellant’s Brief at 10-11. The Secretary avers that Mr. Welsh’s argument is “incorrect[],” because “[a]fter finding that Appellant’s symptoms were contemplated by the rating schedule’s diagnostic code, the Board then acknowledged that various VA examiners stated that Appellant’s lower extremity disabilities did not prevent all forms of employment and Appellant was still capable of sedentary employment.” Appellee’s Brief at 11 (citing **R. at 16 (2-16)**). Thus, in the Secretary’s estimation, “[t]his factually correct statement was simply made in addition to the fact that Appellant’s symptoms were contemplated by the rating code.”

Id.

The factually correct statement, however, confirms that the Board incorrectly held Mr. Welsh to an inapplicable standard to demonstrate that the combined effects of his service-connected disabilities rendered application of the schedular criteria inadequate. *See* Appellant’s Brief at 10; **R. at 16 (2-16)**. The Secretary’s argument to the contrary is grounded on an incomplete reading of the pertinent paragraph of the Board’s decision. After making the statements the Secretary cites, the Board summed up by stating: “***For these reasons***, the Board finds that the schedular rating criteria are adequate to rate the disabilities on appeal, and referral for consideration of an extraschedular evaluation is not

warranted.” **R. at 16 (2-16)** (emphasis added). The Board *then* began its analysis of whether referral based on the combined effects of the disabilities was warranted. *See R. at 16 (2-16)*. Reading the paragraph as a whole, it is evident that the language the Secretary cites was the Board’s analysis of whether any of the service-connected disabilities *individually* warranted extraschedular referral, while the lone reason for the Board’s rejection of a combined-effects referral was its finding that the service-connected disabilities did not preclude all forms of employment. *See R. at 15-16 (2-16)*. It is this latter analysis with which Mr. Welsh takes issue. *See Appellant’s Brief at 10*.

The Secretary does not dispute that total unemployability is not a prerequisite for extraschedular referral. Appellee’s Brief at 9-11. There is, therefore, no basis on which to sustain the Board’s rejection of a combined-effects referral for want of a complete inability to work.

Conclusion

For the reasons articulated in his principal brief and herein, Mr. Welsh respectfully requests that the Court vacate the Board’s decision and remand for readjudication.

Respectfully submitted,

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