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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 15-3097

JAMES W. LEWIS, JR., APPELLANT,

v.

ROBERT A. McDONALD,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before BARTLEY, *Judge*.

MEMORANDUM DECISION

*Note: Pursuant to U.S. Vet. App. R. 30(a),
this action may not be cited as precedent.*

BARTLEY, *Judge*: Veteran James W. Lewis, Jr., appeals through counsel an April 29, 2015, Board of Veterans' Appeals (Board) decision denying compensable evaluations for status post stab wound of the right posterior chest with traumatic pneumothorax, status post stab wound of the right lower abdomen with traumatic perforated intestine, and status post stab wound of the right lower leg. Record (R.) at 2-12.¹ This appeal is timely and the Court has jurisdiction to review the Board decision pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the reasons set forth below, the Court will set aside the April 2015 Board decision and remand the matters for additional development, if necessary, and readjudication consistent with this decision.

I. FACTS

Mr. Lewis served on active duty in the U.S. Navy from August 1976 to August 1980. R. at

¹ The Board remanded the issue of a compensable evaluation for status post stab wound of the right index finger. R. at 10-12. Because remands are not decisions of the Board subject to review, the Court does not have jurisdiction to consider that matter at this time. *See Howard v. Gober*, 220 F.3d 1341, 1344 (Fed. Cir. 2000); *Breeden v. Principi*, 17 Vet.App. 475, 478 (2004) (per curiam order); 38 C.F.R. § 20.1100(b) (2016).

565. In January 1979, he suffered penetrating stab wounds to the right lower abdomen, right posterior chest, and right lower leg. R. at 356, 360, 366, 368-70. More specifically, service medical records (SMRs) documented "eight separate holes in various portions of the small intestine," R. at 356, and that the "omentum" and "viscera" were extruding from one abdominal wound.² R. at 360. The laceration to the right lower leg was "deep to the bone and muscle tissues[,] with partial muscle severance," R. at 360, "extending through the anterior compartment muscle," R. 366. *See also* R. at 370 (indicating that the stab wound went "through the fascia compartment and into the anterior tibial muscles in two places for a total length of probably 15 [centimeters]"). The right posterior chest wound penetrated between the ribs and punctured a lung. R. at 360. In August 1980, he sought service connection for these injuries, which the VA regional office (RO) granted in March 1981; it assigned noncompensable evaluations for each under Diagnostic Code (DC) 7805.³ R. at 279-81.

In June 2010, the veteran sought "an increase in all of his [service-connected] stab wound conditions." R. at 184; *see also* R. at 187-88. He underwent a November 2010 VA examination, which found that each stab wound scar was not painful, bore no signs of skin breakdown, was superficial, had no inflammation or edema, and presented no other disabling effects. R. at 154-61. Based on this examination report, the RO denied compensable evaluations for these disabilities in April 2011. R. at 430-39. Mr. Lewis timely disagreed with this decision, alleging that he had informed the examiner that his scars were painful. R. at 113-15.

The veteran underwent another VA scar examination in October 2012. The VA examiner found that right posterior chest, right lower abdomen, and right lower leg scars were not painful or unstable and did not present any other pertinent physical findings, complications, conditions, signs, or symptoms, such as muscle or nerve damage, noting that "[a]ll scars are well-healed[] and non-tender." R. at 80-94. The RO continued its denial of compensable evaluations, R. at 51-60, and the veteran appealed to the Board, disputing the characterization of his scars as "superficial" and

² Omentum is "a fold of peritoneum extending from the stomach to adjacent organs in the abdominal cavity." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1319 (32d ed. 2012).

³ DC 7805 pertained to "[s]cars, other" and advised to "[r]ate on limitation of function of part affected." 38 C.F.R. § 4.118, DC 7805 (1979).

reiterating that his scars were painful "in weather changes," R. at 38-39.

In the April 2015 decision on appeal, the Board denied compensable evaluations for status post stab wounds of the right posterior chest, right lower abdomen, and right lower leg. The Board concluded that the evidence of record did not show that the disabilities warranted compensable evaluations under DCs 7800 through 7805. R. at 2-12. This appeal followed.

II. ANALYSIS

Mr. Lewis asserts that the record reasonably raised the issues of entitlement to compensable evaluations for underlying muscle injury caused by the in-service stabbing. On this basis, he argues that the Board clearly erred in failing to address these issues and in accepting as adequate VA examinations that failed to address muscle damage, including evidence of through-and-through injuries. Appellant's Brief (Br.) at 3-8; Reply Br. at 1-5. The Secretary disputes these contentions and urges the Court to affirm the Board decision. Secretary's Br. at 3-6. Mr. Lewis's arguments are persuasive.

The Board is required to consider all theories of entitlement to VA benefits that are either raised by the claimant or reasonably raised by the record, *Schroeder v. West*, 212 F.3d 1265, 1271 (Fed. Cir. 2000); *Robinson v. Peake*, 21 Vet.App. 545, 553 (2008), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009), and the Court has jurisdiction to review whether the Board erred in failing to consider such issues, *Barringer v. Peake*, 22 Vet.App. 242, 244 (2008). This obligation includes giving "a sympathetic reading to the veteran's filings by 'determining all potential claims raised by the evidence, applying all relevant laws and regulations.'" *Szemraj v. Principi*, 357 F.3d 1370, 1373 (Fed. Cir. 2004) (quoting *Roberson v. Principi*, 251 F.3d 1378, 1384 (Fed. Cir. 2001)).

DC 7805, under which Mr. Lewis's scars are currently evaluated, instructs as follows: "Evaluate any disabling effect(s) not considered in a rating provided under diagnostic codes 7800-04 [pertaining to painful, unstable, disfiguring, and other aspects of scars] under an appropriate diagnostic code." 38 C.F.R. § 4.118, DC 7805 (2016). For VA benefits purposes, the muscles of the body are divided into 23 groups based on commonality of function; muscle injuries may be assigned certain evaluations according to whether the injury is slight, moderate, moderately severe,

or severe. *See* 38 C.F.R. § 4.73, DCs 5301-5323 (2016). With respect to all groups, a "moderate" muscle injury is entitled to at least a 10% evaluation. *See id.*

A separate regulation, entitled "Evaluation of muscle disabilities," fleshes out the meaning of the terms such as "moderate" used in § 4.73 and provides additional guidance in choosing amongst these evaluation levels. 38 C.F.R. § 4.56 (2016). This regulation states, in part, that "the cardinal signs and symptoms of muscle disability are loss of power, weakness, lowered threshold of fatigue, fatigue-pain, impairment of coordination and uncertainty of movement." 38 C.F.R. § 4.56(c). Generally, in the context of a "moderate" disability of the muscles, cardinal signs and symptoms include "[s]ome loss of deep fascia or muscle substance or impairment of muscle tonus and loss of power or lowered threshold of fatigue when compared to the sound side." 38 C.F.R. § 4.56(d)(2)(iii).

This regulation also provides that "[a] through-and-through injury with muscle damage shall be evaluated as no less than a moderate injury for each group of muscles damaged." 38 C.F.R. § 4.56(b). The Court has previously addressed the meaning of § 4.56(b) and held that, based on this regulation, a "through-and-through" muscle wound is "to be rated as of at least moderate degree of disability regardless of whether the muscle sustained any permanent damage." *Beyrle v. Brown*, 9 Vet.App. 377, 383 (1996) (citing *Myler v. Derwinski*, 1 Vet. App. 571, 574 (1991)). Put another way, under § 4.56(b), a through-and-through muscle wound must be accorded a "moderate" disability evaluation "[r]egardless of the Board's finding as to muscle damage and the applicability of [§ 4.73]." *Id.* at 386.

In the present case, the Court concludes that January 1979 SMRs, in conjunction with the veteran's statements, reasonably raised the issue of entitlement to evaluations based on injury to various muscles under § 4.73 and further concludes that the Board's failure to address this issue requires remand. *See Barringer*, 22 Vet.App. at 244. The wound to the right lower leg penetrated to the bone and partially severed the anterior tibial muscle. R. at 360, 366, 370. SMRs currently before the Court are not otherwise explicit as to muscle involvement, but they do reflect that the wound to the right posterior chest penetrated deeply enough to puncture a lung and that at least one right lower abdomen wound resulted in the extrusion of omentum and viscera. R. at 356, 360. Moreover, when Mr. Lewis sought increased evaluations in June 2010, he did not simply ask for

higher scar evaluations; rather he formulated his request as "an increase in all of his [service-connected] stab wound conditions." R. at 184. This reasonably encompasses all stab wound residuals, not only scars. Thus, given the nature of these wounds, the veteran's broad request for an increase in "all . . . stab wound conditions," and DC 7805's instruction that disability not covered under a DC pertaining to scars should be evaluated under an "appropriate" DC, the Court agrees with the veteran that the Board was obligated to address and explain the applicability of evaluations based on muscle injury and the potential for compensable evaluations based on §§ 4.56(b) and 4.73. *See Szemraj*, 357 F.3d at 1370; *Robinson*, 21 Vet.App. at 553; *see also Schroeder*, 212 F.3d at 1269-71 (stating that the Board must discuss all potentially applicable DCs).

Although he urges affirmance, the Secretary does not even acknowledge § 4.56(b) or *Beyrle*. He contends that evaluations for muscle injury were not reasonably raised and, hence, that the Board was not required to discuss the issue, because the record does not contain any evidence indicating current muscle disability. Secretary's Br. at 5-6. This contention, however, fails to engage with the language of § 4.56(b) and *Beyrle's* holding that a through-and-through muscle injury is entitled to a "moderate" disability evaluation regardless of whether the muscle sustained permanent damage. *See* 9 Vet.App. at 383, 386. As such, the Secretary's arguments are unavailing.

Of course, the applicability of § 4.56(b) depends upon whether the muscle wounds Mr. Lewis sustained were through-and-through injuries. *See id.* It is not clear to the Court whether the November 2010 and October 2012 VA examination reports contain sufficient information for the Board to determine whether the muscle wounds sustained by the veteran in January 1979 were through and through. If, on remand, the Board determines that the medical evidence of record is not adequate to permit it to determine whether § 4.56(b) is applicable here, it must remand the claims for VA to obtain the requisite medical opinion. *See Bowling v. Principi*, 15 Vet.App. 1, 12 (2001) (finding that, "[i]f further evidence [or] clarification of the evidence . . . is essential for a proper appellate decision," the Board should remand the case for additional development); 38 C.F.R. § 4.2 (2016) ("If a diagnosis is not supported by the findings on the examination report or if the report does not contain sufficient detail, it is incumbent upon the rating board to return the report as inadequate for evaluation purposes."); *see also Kahana v. Shinseki*, 24 Vet.App. 428, 434 (2011) (explaining that the Board may not rely on its own medical judgment but must rely on competent, independent

medical evidence).

Mr. Lewis is free on remand to present to the Board any additional arguments and evidence in accordance with *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order). See *Kay v. Principi*, 16 Vet.App. 529, 534 (2002). The Court reminds the Board that "[a] remand is meant to entail a critical examination of the justification for the [Board's] decision," *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991), and must be performed in an expeditious manner in accordance with 38 U.S.C. § 7112.

III. CONCLUSION

Upon consideration of the foregoing, the April 29, 2015, Board decision is SET ASIDE, and the matters are REMANDED for additional development, if necessary, and readjudication consistent with this decision.

DATED: November 30, 2016

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