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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 15-3054

PAUL N. MULLIS, APPELLANT,

v.

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

Before LANCE, *Judge*.

MEMORANDUM DECISION

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

LANCE, *Judge*: The appellant, Paul N. Mullis, served in the U.S. Air Force from August 1990 to August 1995. Record (R.) at 35. He appeals, through counsel, a June 3, 2015, Board of Veterans' Appeals (Board) decision that, in part, denied entitlement to a disability rating in excess of 10% for a low back disability, prior to June 16, 2014, and in excess of 20% since June 16, 2014.¹ R. at 1-21. Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). This appeal is timely, and the Court has jurisdiction over the case pursuant to 38 U.S.C. §§ 7252(a) and 7266. For the reasons that follow, the Court will affirm that part of the Board's decision denying entitlement to a 10% rating prior to June 16, 2014. As the appellant presents no argument concerning the Board's denial of entitlement to a 20% rating since June 16, 2014, the Court will dismiss the appeal as to that issue. *See Pederson v. McDonald*, 26 Vet.App. 276, 285 (2015) (en banc).

¹ The Board's determination that the appellant was entitled to a separate 10% rating for mild radiculopathy of the left lower extremity is a favorable determination, which the Court cannot disturb. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007). In addition, the Court lacks jurisdiction over entitlement to a dependency allowance for the appellant's son that was remanded, and it will not be addressed further. *See* 38 U.S.C. §§ 7252(a), 7266(a); *Howard v. Gober*, 220 F.3d 1341, 1344 (Fed. Cir. 2000).

The appellant contends that the Board clearly erred in finding that VA satisfied its duty to assist, as the August 2008 VA examination was not adequate. Appellant's Brief (Br.) at 9-15. Specifically, he argues that the VA examiner failed to discuss functional loss during flare-ups and "did not conduct any range-of-motion testing in regard to pain and weight-bearing" as required by 38 C.F.R. § 4.59. *Id.* at 12-14. In the alternative, he contends that the Board failed to provide an adequate statement of reasons or bases for its finding that the duty to assist was satisfied. *Id.* at 15-16. Finally, the appellant argues that the Board failed to provide an adequate statement of reasons or bases for rejecting lay evidence of muscle spasms, pain, and functional loss. *Id.* at 16-17.

The Secretary responds that the evidence of record contained no indication of flare-ups but rather "generally static symptoms typified by constant pain and regularly occurring spasms" and, thus, that "the examiner was under no obligation to discuss the degree to which flares inhibit his back function." Secretary's Br. at 5. He further argues that the VA examiner assessed the appellant's disability under weight-bearing circumstances, as the range of motion testing was performed in standing and sitting positions and the examiner "assessed the effects of his spine disability on his gait, his posture, and the degree to which pain resulted from movement." *Id.* at 6-8. He also contends that the Board did, in fact, address the appellant's lay evidence of muscle spasms but found that those spasms did not "cause[] additional functional manifestations, such as abnormal gait or spinal contour." *Id.* at 9-10. Finally, the Secretary argues that the "Board performed exactly the inquiry that is called for by the rating criteria" in addressing functional loss due to pain. *Id.* at 12.

The Court holds that the Board did not clearly err in finding the August 2008 VA examination report to be adequate. *See D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008) ("Whether a medical opinion is adequate is a finding of fact, which the Court reviews under the 'clearly erroneous' standard."). The Board found that the VA examination report was "based upon consideration of the [appellant's] pertinent medical history, his lay assertions and complaints" and "described his low back disability in detail sufficient to allow the Board to make a fully informed determination." R. at 5. To the extent that the appellant faults the examiner for failing to consider functional loss during flare-ups or additional functional loss and pain during range of motion testing with weight-bearing, Appellant's Br. at 11, the examiner explicitly discussed the appellant's reports of "pain in his back which occurs constantly," making no finding of flare-ups. R. at 476. The examiner also noted a normal posture and gait, the point at which pain began during range of motion

testing, including flexion, extension and rotation, and "difficulty walking," indicating that the examiner observed the appellant while he was walking and standing. R. at 476-477. Furthermore, as the Secretary argues, Secretary's Br. at 6-8, VA regulations regarding range of motion testing for the low back illustrate that the tests are conducted from a standing position, *see* 38 C.F.R. § 4.71 (Plate V) (2016), and the appellant has not demonstrated that his testing was not under weight-bearing conditions, *see Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) ("An appellant bears the burden of persuasion on appeals to this Court."), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000) (table).

In addition, the appellant cites no evidence of record that would have reasonably raised the issue of flare-ups. *See Robinson v. Peake*, 21 Vet.App. 545, 552 (2008) (holding that the Board must address issues raised by the appellant or reasonably raised by the record), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009); *see also Acevedo v. Shinseki*, 25 Vet.App. 286, 293 (2012) (holding that "there is no reasons or bases requirement on examiners"); *Roberson v. Shinseki*, 22 Vet.App. 358, 367 (2009) ("A medical examiner need not discuss all evidence favorable to an appellant's claim when rendering an opinion."). Based on the foregoing, the Court holds that the Board's determination that the August 2008 VA examination report was adequate is not the product of clear error. *See Hood v. Shinseki*, 23 Vet.App. 295, 299 (2009) ("The Court reviews factual findings under the 'clearly erroneous' standard such that it will not disturb a Board finding unless, based on the record as a whole, the Court is convinced that the finding is incorrect."); *D'Aries*, 22 Vet.App. at 104.

Although the appellant argues that the Board failed to consider evidence of muscle spasms, pain, and functional loss, Appellant's Br. at 16-17, he cites no evidence that the Board failed to discuss in its analysis. *See Coker v. Nicholson*, 19 Vet.App. 439, 442 (2006) ("The Court requires that an appellant plead with some particularity the allegation of error so that the Court is able to review and assess the validity of the appellant's arguments."), *rev'd on other grounds sub nom. Coker v. Peake*, 310 F. App'x 371 (Fed. Cir. 2008) (per curiam order). Instead, as noted by the Secretary, the Board made specific mention of the appellant's reports of muscle spasms but found that they did not result in "an abnormal gait or abnormal spinal contour" that would warrant a higher disability rating. R. at 4. Moreover, the Board specifically noted the appellant's reports of pain, stiffness, having to "stop activities to sit or lay down," and difficulty walking. R. at 10. The

appellant's arguments amount to a disagreement with how the Board weighed the evidence of record, finding the August 2008 examination report more probative than the appellant's lay statements, R. at 13, and the Court discerns no error in this regard. *See Madden v. Gober*, 125 F.3d 1477, 1481 (Fed. Cir. 1997) (it is the "duty [of] the Board to analyze the credibility and probative value of evidence"); *Owens v. Brown*, 7 Vet.App. 429, 433 (1995) (it is the province of the Board to weigh and assess the evidence of record).

Finally, to the extent that the appellant contends that the Board failed to provide an adequate statement of reasons or bases by relying on an inadequate VA examination, Appellant's Br. at 15-16, his assertion essentially restates his argument above, which the Court has already considered and rejected. Ultimately, as the Board's decision is understandable and facilitates judicial review, the Court holds that its statement of reasons or bases is adequate. *See* 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995).

After consideration of the parties' briefs and a review of the record, that part of the Board's June 3, 2015, decision denying entitlement to a disability rating in excess of 10% for a low back disability prior to June 16, 2014, is AFFIRMED. The appeal is DISMISSED as to the issue of entitlement to a disability rating in excess of 20% for a low back disability since June 16, 2014.

DATED: November 30, 2016

Copies to:

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