

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 16-0048

OTHA STEWART, JR., APPELLANT,

v.

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

Before PIETSCH, *Judge*.

MEMORANDUM DECISION

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

PIETSCH, *Judge*: The appellant, Otha Stewart, Jr., appeals through counsel a November 24, 2015, decision of the Board of Veterans' Appeals (Board) denying entitlement to an annual clothing allowance for the year 2014. Record (R.) at 3-8. This appeal is timely, and the Court has jurisdiction pursuant to 38 U.S.C. § 7252(a). Both parties submitted briefs, and the appellant submitted a reply brief. A single judge may conduct this review. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the reasons set forth below, the Court will vacate the Board's decision and remand the matter for further proceedings consistent with the following decision.

I. FACTS

The appellant served on active duty in the United States Army from July 1980 through June 1998. R. at 1502. He is service connected for low back pain due to back injury, rated as 40% disabling, and patellofemoral syndrome of the bilateral knees, each rated as 10% disabling. R. at 985.

The appellant requires use of braces for all three of his service-connected disabilities, which he first requested in December 2010. R. at 1642. The same month, he was awarded a clothing allowance for the use of a lumbar corset (rigid with panels) and a separate allowance for the use of

Koolflex knee braces (elastic with joints). R. at 1683-84. The appellant also received clothing allowances in August 2011 and August 2012. R. at 7.

The appellant requested a clothing allowance for the year 2014, R. at 1681, and in February 2014, the Acting Chief of the Prosthetics Treatment Center of the VA North Texas Health Care System (Chief) denied the request, R. at 1678. The Chief explained that the "Prosthetic Sensory Aids Service at the VA Central Office in Washington, D.C. determined that only braces with exposed metal hinges, exposed plastic inserts, or exposed metal stays can be considered for clothing allowance." R. at 1678. He further explained that "a brace with Velcro fasteners and fabric covered plastic/metal inserts does not cause irreparable damage to clothing and does not qualify for a clothing allowance." *Id.*

The appellant filed a timely Notice of Disagreement with the Chief's decision later that month. R. at 1685. He stated that the braces he wore irritated his skin after prolonged wear, and to prevent the irritation he began wearing his back and knee braces on top of his clothing. *Id.* Wearing them in this manner caused wear and tear on his clothing and wore a large hole in the driver's seat of his vehicle. *Id.*

On March 5, 2014, VA issued a Statement of the Case (SOC), which was prepared by a prosthetics representative from the VA medical center (VAMC) and approved by the Chief. R. at 1679-82. The SOC continued to deny the appellant's claim without commenting on his statements from the NOD and without setting forth any additional reasoning for its denial not already contained within the February 3, 2014, correspondence initially denying the appellant's claim. *Id.* The appellant perfected an appeal, R. at 1685, 1679-82, and, in the decision here on appeal, the Board denied his request for a clothing allowance for the year 2014, R. at 3-8. The Board found that the Chief's opinion outweighed the appellant's lay assertions and that the Chief did not, as required by statute for the appellant to be eligible for a clothing allowance, certify that the appellant's braces tended to wear or tear his clothing. R. at 7-8.

II. ANALYSIS

The Secretary, under regulations which the Secretary shall prescribe, shall pay a clothing allowance . . . to each veteran who – because of a service-connected disability, wears or uses a prosthetic or orthopedic appliance (including a wheelchair)

which the Secretary determines tends to wear out or tear the clothing of the veteran[.]

38 U.S.C. § 1162. The relevant VA regulations provide that a veteran qualifies for a clothing allowance if

(i) A VA examination or a hospital or examination report from a facility specified in [38 C.F.R.] § 3.326(b) establishes that the veteran, because of a service-connected disability or disabilities due to loss or loss of use of a hand or foot compensable at a rate specified in [38 C.F.R.] § 3.350(a), (b), (c), (d), or (f), wears or uses one qualifying prosthetic or orthopedic appliance (including, but not limited to, a wheelchair) which tends to wear or tear clothing; or

(ii) The Under Secretary for Health or a designee certifies that—

(A) A veteran, because of a service-connected disability or disabilities, wears or uses one qualifying prosthetic or orthopedic appliance (including, but not limited to, a wheelchair) which tends to wear or tear clothing; or

(B) A veteran uses medication prescribed by a physician for one skin condition, which is due to a service-connected disability, that causes irreparable damage to the veteran's outergarments.

38 C.F.R. § 3.810(a)(1) (2016).

Here, the Board found that the appellant is potentially eligible for a clothing allowance pursuant to § 3.810(a)(1)(ii)(A) but that "there is no such certification in this case" that meets the certification requirement of § 3.810(a)(1)(ii)(A) because "the Acting Chief of the Dallas VAMC Prosthetic Treatment Center certified that the Veteran's knee braces did not have exposed metal hinges that would cause tend [sic] to wear out his clothing and similarly, his back brace did not have exposed rigid panels that would cause such damage." R. at 8.

The appellant asserts that the Board provided inadequate reasons or bases for its conclusion that the opinion of the Chief of the Prosthetic Treatment Center was more probative than the appellant's lay assertions that the braces he wears cause increased wear and tear to his clothing. Appellant's Brief (App. Br.) at 5. He argues that the RO and the Board failed to properly consider his lay statements that his need to wear the braces on the outside of his clothing to prevent skin irritation caused such increased wear and tear. *Id.* at 7 (citing R. at 1685). He contends that the Board, instead, summarily concluded that the Chief's opinion was more probative, without an

adequate explanation or analysis of the probative value of his lay statements in comparison to the probative value of the Chief's opinion. *Id.* at 7-8.

"Lay testimony is competent . . . to establish the presence of observable symptomatology and 'may provide sufficient support for a claim of service connection.'" *Barr v. Nicholson*, 21 Vet.App. 303, 307 (2007) (quoting *Layno v. Brown*, 6 Vet.App. 465, 469 (1994)); see *Jandreau v. Nicholson*, 492 F.3d 1372, 1377 (Fed. Cir. 2007) (holding that whether lay evidence is competent and sufficient in a particular case is a factual issue to be addressed by the Board); *Washington v. Nicholson*, 19 Vet.App. 362, 368 (2005) (explaining that an appellant may not be competent to testify about the etiology or diagnosis of a disability). Lay statements regarding in-service symptoms or events may not be rejected as not competent simply because they are not corroborated by contemporaneous medical records. *Buchanan v. Nicholson*, 451 F.3d 1331, 1336 (Fed. Cir. 2006).

If the disability is of the type for which lay evidence is competent, the Board must weigh that evidence against the other evidence of record in determining the existence of a service connection. *Id.* at 1334-37; see *Owens v. Brown*, 7 Vet.App. 429, 433 (1995) (holding that it is the Board's responsibility to determine the credibility and probative value of evidence); *Wood v. Derwinski*, 1 Vet.App. 190, 193 (1991). However, such determinations must be supported by adequate reasons or bases, *Washington* 19 Vet.App. at 366-67, and the Board must articulate permissible bases for rejecting the probative value of lay statements, *Buchanan*, 451 F.3d at 1337.

Here, in addressing the appellant's lay statements, the Board stated

while VA examination reports and VA treatment records reference to use of back and knee braces . . . there is no indication that wearing such braces causes wear and tear on the Veteran's clothing. Moreover, there is no other lay evidence of record (such as photographs showing wear and tear, statements from the Veteran's spouse, friends or relatives describing any wear of the Veteran's clothing they have observed, etc.), beyond the Veteran's general lay statements, that indicates the back and/or knee braces cause wear and tear of his clothing.

While the Veteran asserts that his required back and knee braces, which he wears on the outside of his clothing caused wear and tear on his clothing, the regulation requires . . . that . . . the Chief Medical Director or his designee certifies that because of such disability a prosthetic or orthopedic device is worn or used that tends to wear or tear on the veteran's clothing. . . There is no such certification in this case.

R. at 7-8.

This is the extent of the Board's discussion of the appellant's lay statements regarding his back and knee braces. The Court agrees with the appellant's argument that the Board did not, as required, assess the competency, credibility, and probative value of the lay statements and weigh them against the probative value of the Chief's certification opinion. *See Jandreau*, 492 F.3d at 1377 (noting that, e.g., a layperson is competent to identify a broken leg but not a form of cancer); *Buchanan*, 451 F.3d at 1337 ("[T]he Board, as fact finder, is obligated to, and fully justified in, determining whether lay evidence is credible in and of itself, i.e., because of possible bias, conflicting statements, etc."); *Barr*, 21 Vet.App. at 307 (holding veteran is competent to report on observable symptomatology); *Caluza v. Brown*, 7 Vet.App. 498, 511 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table) (explaining that, when assessing the credibility of lay statements, the Board may consider factors such as facial plausibility, bias, self-interest, and consistency with other evidence of record). The Board also seemed to require that evidence or statements corroborating the appellant's lay statements were necessary to substantiate the claim, but the Board provides no support for this requirement. *See Buchanan*, 451 F.3d at 1336. The Board also did not clearly state why such corroborating evidence would be helpful, i.e., whether such evidence would enhance the case for competency of the lay evidence, the credibility, or the probative value of the lay evidence. *See id.*

Therefore, the Court will vacate the Board's decision and remand it for the Board to adequately assess the appellant's lay statements and provide an adequate statement of reasons or bases in this regard. *See Allday v. Brown*, 7 Vet.App. 517, 527 (1995) (holding that the reasons or bases statement "must be adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court"); *Caluza*, 7 Vet.App. at 506 ("the Board must analyze the credibility and probative value of the evidence, account for the evidence that it finds to be persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the veteran"); *see also Tucker v. West*, 11 Vet.App. 369, 374 (1998) (remand is appropriate where the Board has, inter alia, failed to provide an adequate statement of reasons or bases).

The appellant also contends that the Chief's opinion did not adequately consider his lay statements that he wore the braces over his clothing to prevent irritation of his skin and that, therefore, the Board failed to comply with the duty to assist when it relied on the Chief's opinion. App. Br. at 6. To the extent that, pursuant to section 1162 and § 3.810(a), the Board was required to rely upon the Chief's opinion, he argues that, to comply with the duty to assist, the Board was required to remand the clothing allowance claim for a new opinion that adequately addresses the appellant's lay statements. *Id.* at 9-12. In support, he contends that, pursuant to this Court's holding in *Dalton v. Nicholson*, 21 Vet.App. 23, 39 (2007), "[t]he Board's reliance on an examination that failed to consider material lay assertions would be a clear violation of the duty to assist in the context of a medical examination" and argues that "[t]he same logic must apply here." App. Br. at 11.

The Secretary responds that

Dalton, however, dealt with a particular statute (38 U.S.C. § 1154(b)) specifically intended to ease combat veterans' evidentiary burdens by permitting them to introduce lay evidence in support of a claim to establish in-service incurrence or aggravation of an injury or disease notwithstanding the fact there was no official record of such incurrence or aggravation in service. . . .

Unlike the statute at issue in *Dalton* which gives special credence to veterans' lay evidence for the specific purpose of easing evidentiary burdens necessary to establish a service connection for a claimed disability, 38 U.S.C. § 1162 places the discretion to determine whether the prosthetic or orthopedic appliance in question tends to wear out or tear clothing with VA alone.

Secretary's Br. at 8.

This argument raised by the appellant involves the question of the extent to which the duty to assist provisions cited in *Dalton*, and found at 38 U.S.C. § 5103A and 38 C.F.R. § 3.159, apply to claims for a clothing allowance that are made pursuant to section 1162. Because the Board did not make any findings regarding the applicability of the duty to assist provisions to the appellant's claim or whether VA complied with the duty to assist, and because the Court is remanding the appellant's claim for failure to supply adequate reasons or bases, the Court will not at this time consider this argument. *See Quirin v. Shinseki*, 22 Vet.App. 390, 395 (2009) ("It is well settled that the Court will not ordinarily consider additional allegations of error that have been rendered moot by the Court's opinion or that would require the Court to issue an advisory opinion."); *Best v.*

Principi, 15 Vet.App. 18, 20 (2001) (noting that the factual and legal context may change following a remand to the Board and explaining that "[a] narrow decision preserves for the appellant an opportunity to argue those claimed errors before the Board at the readjudication, and, of course, before this Court in an appeal, should the Board rule against him."). On remand, if raised by the appellant and if necessary to supply adequate reasons or bases pursuant to this decision, the Board must address this argument in the first instance and, if needed, provide additional development. *See Hensley v. West*, 212 F.3d 1255, 1263 (Fed. Cir. 2000) (stating that appellate tribunals generally are not appropriate fora for initial fact-finding).

On remand, the appellant is free to submit additional evidence and argument in accordance with *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order), and the Board must consider any such evidence or argument submitted. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002). This matter is to be provided expeditious treatment on remand. *See* 38 U.S.C. § 7112.

III. CONCLUSION

After consideration of the appellant's and Secretary's briefs, and a review of the record on appeal, the Board's November 24, 2015, decision denying entitlement to an annual clothing allowance for the year 2014 is VACATED and the matter is REMANDED for further proceedings consistent with this decision.

DATED: November 30, 2016

Copies to:

Robert V. Chisholm, Esq.

VA General Counsel (027)