BRIEF OF APPELLANT

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

18-2928

MICHAEL L. CHAVIS

Appellant

v.

ROBERT L. WILKIE,
SECRETARY OF VETERANS AFFAIRS,

Appellee

KAITLYN C. DEGNAN
CHISHOLM CHISHOLM & KILPATRICK
One Turks Head Place, Suite 1100
Providence, Rhode Island 02903
(401) 331-6300
(401) 421-3185 Facsimile
Counsel for Appellant

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STATEMENT OF THE ISSUES

I. 38 C.F.R. §§ 4.40 and 4.45 (2018) provide guidance to adjudicators on how to properly evaluate various musculoskeletal disabilities. Yet the Board determined that these regulations did not apply to the Veteran's lumbar spine claim because he is receiving the highest rating not requiring ankylosis. Did the Board misinterpret *Johnston v. Brown*, 10 Vet.App. 80, 84-85 (1997), *DeLuca v. Brown*, 8 Vet.App. 202, 205-06 (1995), and the rating criteria when it failed to apply sections 4.40 and 4.45?

II. The Board failed to consider whether the symptoms of the Veteran's lumbar spine disability, including functional loss during flare ups, was functionally equivalent to ankylosis of his lower back. And the record lacked an adequate medical opinion on the extent of functional loss due to flare ups. Did the Board rely on inadequate medical evidence and fail to support its decision with an adequate statement of reasons or bases?

III. The Board denied the Veteran a rating in excess of 20 percent for his bilateral lower extremity radiculopathy. However, it failed to explain the standard it used to determine the Veteran's symptoms were "moderate," and not "moderately severe." Was the Board's decision arbitrary and capricious and unsupported by adequate reasons or bases?

STATEMENT OF THE CASE

Mr. Michael L. Chavis served honorably in the United States Army from May 1975 to April 1976. R-3106. While stationed at Fort Hood, TX, Mr. Chavis injured his back after falling off a tanker truck. R-3474 (3474-77). He was standing atop the truck, when the driver failed to turn off the pump as instructed. *Id.* As a result, the tanker overflowed, causing Mr. Chavis to slip and fall approximately 13 feet, landing on rocks below. *Id.*

Shortly following his discharge from service, Mr. Chavis filed for entitlement to service connection and compensation for a low back disability. R-3829-32. A VA examination found recurrent low back pain and stiffness. R-3820 (3818-24). The Regional Office granted service connection at a noncompensable rate. R-3810; R-3801-03.

In November 2008, the Veteran filed a claim to reopen, which the RO treated as a claim for an increased rating. R-3508. He attended a VA examination in December 2008, where the examiner noted constant low back pain at a ten on a scale of one to ten. R-3474. He experienced flare ups of pain precipitated by physical activity. *Id.* While his flare ups could sometimes be mitigated by medication, often bed rest was the only way to alleviate his pain. *Id.* The examiner also noted pain with bowel movements. *Id.*

The RO increased Mr. Chavis's rating to 40 percent in a February 2009 rating decision. R-3462-65. He timely appealed that rating. R-3439-41 (Nov. 2009 notice

of disagreement); R-3397-417 (Feb. 2010 statement of the case); R-3394-95 (Apr. 2010 substantive appeal). In December 2010, the Social Security Administration determined Mr. Chavis was disabled, in part due to his back pain. R-923-28. Shortly thereafter, in February 2011, he underwent a VA vocational rehabilitation evaluation, and it was determined that "a vocational goal [was] infeasible." R-490. His case manager explained that he presented with "severe limitations with mobility," and could not tolerate prolonged walking, standing, or sitting. *Id.* He experienced insomnia due to his pain at night, and could not cook for himself, clean, or do laundry. R-488 (488-89). Mr. Chavis's back pain interfered with his activities of daily living, including dressing, bathing, toileting, and sleeping. R-3331 (3330-36).

A December 2011 VA examination revealed pain episodes that ranged from requiring the use of a cane to causing Mr. Chavis to not be able to get out of bed. R-3276-85. At this point, there was no specific trigger to his flare ups, and he experienced extreme back pain, leg weakness, and could not bend. R-3277. The examiner noted less movement than normal, pain on motion, disturbance of locomotion, and interference with sitting, standing, and weight-bearing. R-3279. He also remarked that flare ups interfered with the Veteran's ability to engage in activities of daily living. R-3285.

Mr. Chavis testified at a Board hearing in December 2015 that his back pain prevented him from engaging in physical activities. R-3032 (3023-46). He described that at times he could walk "normal[ly]," but that his flare ups sometimes required

him to use multiple canes or a wheel chair to get around. R-3033. At times his flare ups were so bad he could not get out of bed. *Id.* During those flare ups where he could not get out of bed, he could not bend over, needed help getting dressed, his wife had to feed him, and he required the use of a bedpan. R-3034. He also explained that he did not go to the hospital because it took too long and caused too much pain for his wife to get him in the car. R-3035.

The Board remanded Mr. Chavis's claim in February 2016 to obtain missing records and a new VA examination. R-3011-15. He attended a VA examination in February 2017 and described experiencing pain and stiffness during flare ups. R-623 (622-31). Although the examination was conducted during a flare up, the examiner found no significant impairment of functional ability due to weakness, fatigue, or incoordination. R-625. An addendum to that opinion found "moderate" symptoms of bilateral lower extremity radiculopathy. R-83 (82-84). As a result, the RO granted separate 10 percent ratings for bilateral lower extremity radiculopathy from February 2017. R-50-54.

The Board denied Mr. Chavis entitlement to a rating in excess of 40 percent for his low back disability, and in excess of 20 percent for bilateral lower extremity radiculopathy in April 2018. R-1-15. It found that because the Veteran had the highest schedular rating for limitation of motion for his low back disability, 38 C.F.R. §§ 4.40 and 4.45 did not apply. R-10-11. It also denied him entitlement to a rating in excess of 20 percent for bilateral radiculopathy because his symptoms were

"moderate." R-11-12. Finally, the Board granted the Veteran entitlement to TDIU from February 1, 2017, and remanded his entitlement to TDIU prior to that period for referral to the Director of Compensation and Pension Service. R-14. This appeal followed.

SUMMARY OF THE ARGUMENT

The Board found that 38 C.F.R. §§ 4.40 and 4.45 were not for application because the Veteran was in receipt of the highest scheduler rating for limitation of motion, and cited to *Johnston*, 10 Vet.App. 80. However, the Court in *Johnston* held that 38 C.F.R. §§ 4.40 and 4.45 were not for application because that veteran had the highest scheduler rating under that diagnostic code, not based on limitation of motion. As the Court held in *DeLuca*, 8 Vet.App. 205-06, the Board was still required to consider whether the Veteran was entitled to a higher rating based on limitation of motion that was the functional equivalent to ankylosis. As a result, the Board's finding that 38 C.F.R. §§ 4.40 and 4.45 were not for application was the result of a misinterpretation and misapplication of law, requiring remand.

Further, the Board erred in not applying those provisions because the Veteran could demonstrate his entitlement to a higher rating by showing that his symptoms more nearly approximated the functional equivalent of ankylosis. Mr. Chavis's low back pain caused flare ups that left him bed ridden and unable to bend, and he required assistance for bathing, dressing and toileting. He also required the use of a wheelchair during some flare ups and had pain during bowel movements. Had the

Board adequately considered this evidence it might have found the Veteran's back was functionally ankylosed and granted entitlement to a higher rating.

Alternatively, the Board was unable to adequately consider the full extent of the Veteran's back disability because the record lacked adequate medical evidence regarding the extent of functional loss caused by flare ups. The December 2008 and 2011 VA examinations lacked opinions on whether flare ups could significantly limit functional ability. And the February 2017 VA examiner's conclusions regarding flare ups were inconsistent with the remainder of the record. The Board's reliance on these examinations failed to ensure compliance with the duty to assist, and the Board's finding in that respect was therefore clearly erroneous and requires reversal. Remand is required for the Board to obtain an adequate medical examination.

Finally, the Board denied a rating in excess of 20 percent for bilateral lower extremity radiculopathy because the Veteran's symptoms were moderate. However, the Board failed to explain the standard it used to determine his symptoms were moderate rather than moderately severe. As a result, the Veteran did not know the precise basis for the Board's decision, and judicial review was precluded. The Board's denial of a rating in excess of 20 percent was arbitrary and capricious, requiring remand to explain the standard used and readjudicate the claim.

STANDARD OF REVIEW

The Board's determination regarding the level of a veteran's impairment under the applicable rating criteria is a finding of fact subject to the "clearly erroneous" standard of review. 38 U.S.C. § 7261(a)(4); *Johnston*, 10 Vet.App. at 84. "'A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990) (quoting *United States v. U.S. Gypsum Co.,* 333 U.S. 364, 395 (1948)). This Court may hold a clearly erroneous finding unlawful and set it aside or reverse it. *See* 38 U.S.C. § 7261(a)(4).

The scope of the duty to assist is a question of law. *See Beasley v. Shinseki*, 709 F.3d 1154, 1157 (Fed. Cir. 2013). The Court reviews claims of legal error by the Board under the *de novo* standard of review. *See Butts v. Brown*, 5 Vet.App. 532, 539 (1993) (en banc). The Board's interpretation of statutes and regulations is a legal ruling to be reviewed without deference by the Court. *See Lennox v. Principi*, 353 F.3d 941, 945 (Fed. Cir. 2003). A conclusion of law shall be set aside when that conclusion is determined to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or unsupported by adequate reasons or bases." *King v. Shinseki*, 26 Vet.App. 433, 437 (2014); *see also* 38 U.S.C. § 7261(a)(3).

ARGUMENT

I. The Board misinterpreted and misapplied the law when it found the provisions of 38 C.F.R. §§ 4.40 and 4.45 did not apply to the evaluation of the Veteran's back disability.

The Board found that because "the Veteran already has the highest available rating based on restriction of motion," 38 C.F.R. §§ 4.40 and 4.45 were not for application. R-10-11. This was a misinterpretation of the law. *See id.*

Sections 4.40 and 4.45 "provide guidance to adjudicators on how to properly rate various musculoskeletal disabilities." *Correia v. McDonald*, 28 Vet.App. 159, 169 (2016); 38 C.F.R. §§ 4.40, 4.45. The regulations "demonstrate that particular information regarding the function of the joints is 'essential' to permit an adjudicator to determine the proper disability rating for a joint disability." *Id.* But here, the Board determined that the provisions of 38 C.F.R. §§ 4.40 and 4.45 did not apply to Mr. Chavis's case because he was already receiving "the highest available rating based on restriction of motion." R-11 (citing *Johnston v. Brown*, 10 Vet. App. 80, 85 (1997)). However, this finding was the result of a misinterpretation of *Johnston*, as well as the law of *DeLuca v. Brown*, 8 Vet.App. 202, 206 (1995), and the rating criteria.

In *Johnston*, the Court found the Board did not need to consider additional functional limitation due to pain because "the appellant is already receiving the maximum disability rating available under DC 5215 and, thus, remand is not appropriate." 10 Vet.App. at 85. Essentially, the Court found that the Board's error in that case was harmless because the veteran was already receiving the *highest available*

rating *under the diagnostic code*. *See id.* However, the Court *did not* hold that 38 C.F.R. §§ 4.40 and 4.45 do not apply when the maximum evaluation *based on limitation of motion* is reached. *See id.* Instead, it declined to find harm because the veteran was already receiving the highest rating under that specific rating criteria in general. *See id.*

Unlike the veteran in *Johnston*, Mr. Chavis is not receiving the maximum disability rating for his back disability, because the diagnostic code under which he is rated has evaluations of 60 and 100 percent. *See* 38 C.F.R. § 4.71a, DC 5237 (2018). Therefore, the Board's erroneous finding that 38 C.F.R. §§ 4.40 and 4.45 did not apply was not harmless. *But see Johnston*, 10 Vet.App. at 85.

The next higher available ratings under diagnostic code 5237, 60 and 100 percent, require ankylosis. 38 C.F.R. § 4.71a, DC 5237. Ankylosis is defined as "immobility and consolidation of a joint due to disease, injury, or surgical procedure." *Ankylosis*, Dorland's Illustrated Medical Dictionary (32d ed. 2012). An ankylosed joint presents functional loss that manifests as complete limitation of motion. *See id.* And a veteran can obtain a higher rating if he or she demonstrates functional loss equivalent to limitation of motion at the next higher level. *See Mitchell v. Shinseki*, 25 Vet.App. 32, 44 (2011); *DeLuca*, 8 Vet.App. 205-06; *see also* 38 C.F.R. §§ 4.40, 4.45; 38 C.F.R. § 4.71a, DC 5237 (measuring compensation based on range of motion). Therefore, the Board's finding that Mr. Chavis was in receipt of the "highest available rating based on restriction of motion," was the result of a misinterpretation of the law. *See* R-11.

The Board's failure to apply 38 C.F.R. §§ 4.40 and 4.45 prejudiced Mr. Chavis because, as will be discussed in the next section, the evidence reflects his disability did more nearly approximate the functional equivalent of ankylosis. *See infra* Section II. Had the Board properly determined that 38 C.F.R. §§ 4.40 and 4.45 applied in this case, it might have considered the Veteran's functional loss beyond range of motion testing, as discussed below. *See* R-10-11; *see also Wagner v. United States*, 365 F.3d 1358, 1365 (Fed. Cir. 2004) ("Where the effect of an error on the outcome of a proceeding is unquantifiable, however, we will not speculate as to what the outcome might have been had the error not occurred."). Remand is therefore required. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) ("[W]here the Board has incorrectly applied the law, failed to provide an adequate statement of reason or bases for its determinations, or where the record is otherwise inadequate, a remand is the appropriate remedy.").

II. The Board erred when it denied entitlement to a rating in excess of 40 percent for the Veteran's back disability without determining whether the Veteran's back was functionally ankylosed.

a. The Board never made a finding whether there was the functional equivalent of ankylosis.

The Board noted that "[t]he medical evidence clearly indicates the Veteran does not have ankylosis or IVDS of the spine treated with prescribed bed rest at any time during the course of the appeal." R-10. It explained that Mr. Chavis's back pain had not required him to take an ambulance to the hospital since 2004. R-10-11. As a result, it found Mr. Chavis not entitled to a rating in excess of 40 percent under 38

C.F.R. § 4.71a, DC 5237. R-10-11. However, under 38 C.F.R. §§ 4.40 and 4.45, the Board was required to evaluate whether the evidence demonstrated the *functional equivalent* of his back being ankylosed. *See Mitchell*, 25 Vet.App. at 44. Had the Board looked to what the requirements for a finding of ankylosis were rather than rely on an irrelevant benchmark, it might have found that Mr. Chavis's symptoms were the functional equivalent of ankylosis.

Although there has been no precedential decision on this exact issue, several single judge decisions support Mr. Chavis's argument that his functional loss could be rated as the functional equivalent of ankylosis, and are persuasive for their logic and reasoning. *See* U.S. Vet.App. R. 30(a). In *Mote v. Shulkin*, the veteran experienced "additional functional loss in the form of less than normal movement, weakened movement, excess fatigability, incoordination, disturbance of locomotion, pain, abnormal gait, and interference with sitting, standing, or weightbearing." 2017 WL 773711, at *6 (Vet.App. Feb. 28, 2017). Flare-ups occurred daily and further limited range of motion. *Id.* The Court found that the Board's failure to conduct a functional loss analysis rendered its reasons or bases inadequate. *Id.* And "[w]ithout a Board finding as to whether the functional loss found by [the evidence] was sufficient to be considered equivalent to the limitations imposed by unfavorable ankylosis, the Court is not able to say whether the deficiencies in the Board's analysis were prejudicial to the veteran." *Id.*

Likewise, the Court remanded for the Board's failure to adequately discuss whether the evidence demonstrated the functional equivalence of ankylosis in *Marshall v. McDonald*, 2014 WL 4068699 (Vet.App. Aug. 19, 2014). In that case, the evidence demonstrated "severely limited [range of motion]." *Id.* at *4. However, the Board "concluded [an increased rating was not warranted] – without discussing any particular evidence or providing reasons for discounting the seemingly favorable evidence[.]" *Id.* The Court held that this "conclusory assessment of the evidence" was an insufficient statement of reasons or bases, requiring remand. *See id.*

Similarly, here, the Board should have considered whether Mr. Chavis's low back pain caused limitations that were functionally equivalent to the limitations caused by ankylosis. Mr. Chavis experienced constant back pain. R-3277. Upon examination in December 2011, in addition to an abnormal range of motion, the examiner noted less movement than normal, pain on movement, disturbance of locomotion, and interference with sitting, standing, and/or weight-bearing. R-3279.

During a flare-up, Mr. Chavis's pain increased and he experienced stiffness. R-623. At times he could only lay in bed and could not bend over. R-3034; R-3474. He needed help getting dressed, his wife had to feed him, and he required the use of bedpan. *See* R-3034. For those times when he could get out of bed, he required the use of two canes, or a wheelchair. R-3033. No specific activity or movement triggered these flare-ups. R-3277. His low back pain interfered with his ability to

complete activities of daily living, causing problems with dressing, bathing, and toileting. R-3331; R-3285.

Moreover, the rating criteria requires that ankylosis, or the functional equivalent thereof, result in "difficulty walking because of a limited line of vision," "gastrointestinal symptoms due to pressure of the costal margin on the abdomen," or other effects. 38 C.F.R. § 4.71a, note 5. Here, Mr. Chavis required the use of a wheelchair during flare ups. R-3033. And he had pain with bowel movements due to his back disability. R-3474. This evidence suggests that Mr. Chavis may have met one of the requirements to show unfavorable ankylosis of the lumbar spine.

Therefore, the Board should have considered whether the Veteran's back condition caused limitations functionally equivalent to the limitations caused by ankylosis. *See DeLuca*, 8 Vet.App. at 205 ("Weakness is as important as limitation of motion, and *a part which becomes painful on use must be regarded as seriously disabled.*") (emphasis added). Instead, it dismissed the application of 38 C.F.R. §§ 4.40, 4.45, never considering whether the severity of Mr. Chavis's disability – including that he was often confined to bed during a flare up, could not bend, made use of a wheelchair and had pain with bowel movements – equated to functional ankylosis. *See* R-3033; R-3034; R-3331; R-3474. The Board neither discussed this evidence, *see Dela Cruz v. Principi*, 15 Vet.App. 143, 149 (2001), nor did it make a finding whether the Veteran's symptoms more nearly approximated the functional equivalent of ankylosis.

The Court cannot make a finding whether the Veteran's symptoms more nearly approximate the functional equivalent of ankylosis in the first instance. *See Thurlow v. Wilkie*, 30 Vet.App. 231, 240-41 (2018). Therefore, it cannot be said that the Board's failure to adjudicate the issue was harmless. *See id.* Had the Board done so, it might have found that a higher rating for the Veteran's low back disability was warranted. *See Wagner*, 365 F.3d at 1365.

Functional loss can be shown by limitation of motion or some other impairment of earning capacity. *See Mitchell*, 25 Vet.App. at 44; *Saunders v. Wilkie,* 886 F.3d 1356, 1367-68 (Fed. Cir. 2018). For the purpose of functional loss as measured by limitation of motion, a veteran can obtain a higher rating if he demonstrates functional loss that is equivalent to limitation of motion at the next higher level. *See Mitchell*, 25 Vet.App. at 44; *DeLuca*, 8 Vet.App. at 205-06; *see also* 38 C.F.R. §§ 4.40, 4.45 (2017). Mr. Chavis also complained of sleep impairment due to his lumbar spine disability. R-488; R-496 (495-98); R-498; R-3331. In an Independent Living Assessment, he explained that he experiences "insomnia due to the physical pain at night while he tries to sleep." R-488. And pain that interfered with his ability to fall asleep and stay asleep was noted several other times during the period on appeal. R-496; R-498; R-3331. The Board failed to discuss whether the Veteran's difficulty sleeping, which was caused by his back pain, resulted in additional functional limitation that could cause an impairment in earning capacity, therefore warranting a higher rating under section 4.71a. *See Saunders*, 886 F.3d at 1367 (finding that

functional loss as contemplated under sections 4.40 and 4.59 does not always manifest as impairment in the normal working movements of the body).

Additionally, the Board is required to discuss all relevant evidence, and must provide an adequate statement of reasons or bases before rejecting favorable material evidence. *See Thompson v. Gober*, 14 Vet.App. 187, 188 (2000). Here, the Board failed to adequately discuss the evidence listed above of the Veteran's functional loss. Mr. Chavis also submitted video evidence depicting his impairment during flare ups that the Board failed to address. *See* R-2961-98 (RBA screenshots of videos); R-3038. Although the Board may have noted some of this evidence in its summary, it did not discuss it in its adjudication of the Veteran's disability, and therefore its reasons or bases were inadequate. *See Dennis v. Nicholson*, 21 Vet.App. 18, 22 (2007) ("The Court has long held that merely listing the evidence before stating a conclusion does not constitute an adequate statement of reasons or bases.").

Accordingly, remand is required for the Board to properly assess the Veteran's limitations and to evaluate whether his disability resulted in the functional equivalent of ankylosis, and thereby caused additional functional loss warranting the assignment of a higher rating. *Tucker*, 11 Vet.App. at 374; *see Mote*, 2017 WL 773711, at *6; *Marshall*, 2014 WL 4068699, at *4.

b. Alternatively, the record contained inadequate information about the extent of functional loss due to flare ups to adjudicate the claim.

The Board relied on the findings of the December 2008, December 2011, and February 2017 VA examination reports to deny Mr. Chavis a rating in excess of 40 percent for his low back disability. However, by relying on these examinations, the Board failed to comply with its duty to assist because the examinations did not contain adequate information to adjudicate the Veteran's claim. *See D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008) (noting the Court reviews the Board's determination that a medical examination is adequate for clear error). As a result, the Board's finding that the duty to assist was met was contrary to the evidence of record, warranting reversal. *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.").

An adequate medical examination should include an "opinion on whether pain could significantly limit functional ability during flare-ups or when the [spine] is used repeatedly over a period of time." *DeLuca*, 8 Vet.App. at 206. Moreover, "these determinations should, if feasible, be 'portray[ed]' . . . in terms of the degree of" additional range-of-motion loss due to pain on use or during flare-ups." *Id.* The examinations of record were inadequate and provided insufficient information to

adjudicate Mr. Chavis's claim because they lacked adequate information about the extent of functional loss due to flare-ups.

The December 2008 examiner recorded Mr. Chavis's range of motion, noting that flexion was limited to 20 degrees, extension to 0, bilateral flexion each to 10 degrees, and bilateral rotation each to 10 degrees. R-3475. Pain occurred at those points as well. *See id.* The examiner noted Mr. Chavis experienced constant low back pain, which "can be elicited by physical activity[, and] is relieved by rest and [medication]." R-3474. Although medication can relieve this pain, at times he can "only lie in bed until it goes away." *Id.* However, the examiner did not provide an opinion about the extent of functional loss due to flare-ups. *See* R-3474-75; *DeLuca*, 8 Vet.App. at 206. Nor did he provide the degree of range of motion lost during flare-ups. *Id.*

Mr. Chavis continued to suffer from flare ups of his low back disability in December 2011. R-3277. They were not precipitated by any specific movement, and caused extreme back pain and leg weakness, and prevented him from bending. *Id.* Pain medication was not effective in alleviating symptoms. *Id.* His flare ups ranged from requiring him to use a cane to ambulate to not being able to get out of bed. *Id.* They also interfered with his ability to engage in activities of daily living. R-3285. Yet again, the examiner neither opined on whether pain could significantly limit functional ability during flare-ups, or the range of motion lost during flare ups. *See* R-3277; *DeLuca*, 8 Vet.App. at 206.

The lack of information on additional functional loss and limitation of motion prejudiced Mr. Chavis because he could have established entitlement to a rating in excess of 40 percent if his disability picture more nearly approximated the functional equivalent of ankylosis. *See supra*, Sections I, II. However, because these examinations lacked opinions on the matter, the Board could not adjudicate the issue, and its denial of a rating in excess of 40 percent lacked adequate medical support. *See Colvin v. Derwinski*, 1 Vet.App. 171, 172 (1991) (holding the Board "may only consider independent medical evidence to support [its] findings rather than provide [its] own medical judgment in the guise of a Board opinions").

Moreover, the February 2017 VA examination did not remedy these deficiencies because it was largely inconsistent with the disability picture depicted in the remainder of the record. At his hearing before the Board in December 2015, the Veteran's descriptions of his flare ups were consistent with his prior reports and examinations. R-3034. He described that he was not able to get out of bed during these "episodes," and that his wife had to feed him and bring him a bed pan. *Id.* When asked whether he sought medical treatment, he replied that he "probably could go if [his] wife could get [him] in the car but it would be painful." R-3035.

At the February 2017 examination, the Veteran described experiencing pain and stiffness during flare-ups. R-623. However, the examiner found that pain, weakness, fatigability, or incoordination did not limit functional ability with flare ups. R-625; *DeLuca*, 8 Vet.App. at 206. The Board has an obligation to "reconcil[e] the

various reports into a consistent picture so that the current rating may accurately reflect the elements of disability present." 38 C.F.R. § 4.2 (2018). Mr. Chavis is competent and credible to describe his flare ups and the way they affect him, and the Board has not found otherwise. *See Layno v. Brown*, 6 Vet.App. 465, 469 (1994). Its reliance on the February 2017 VA examination in spite of its inconsistency with the remainder of the record demonstrates that it failed to do so here. *See id.*

An adequate examination is "based upon consideration of the veteran's prior medical history and examinations and also describes the disability in sufficient detail so that the Board's evaluation of the claimed disability will be a fully informed one." *Barr v. Nicholson*, 21 Vet.App. 303, 311 (2007) (internal punctuation omitted). The December 2008, December 2011, and February 2017 VA examinations do not contain sufficient detail regarding the extent of functional loss due to flare ups to facilitate the adjudication of Mr. Chavis's claim, and failed to ensure compliance with the duty to assist. To find that such an error was not prejudicial, the record would have to establish that "the substantially complete application for benefits indicates that there is *no reasonable possibility* that any assistance that VA would provide to the claimant would substantiate the claim." *Thurlow*, 30 Vet.App. at 231 (citing *Sullivan v. McDonald*, 815 F.3d 786, 792 (Fed. Cir. 2016), and quoting 38 C.F.R. § 3.159(d) (2015)) (emphasis in original). As a result, the Board's reliance on this examination fails to ensure compliance with the duty to assist, and renders clearly erroneous the Board's finding that VA's obligation in that respect was met, warranting reversal.

Hood, 23 Vet.App. at 299. Remand is required for the Board to obtain an adequate medical examination. *See Tucker*, 11 Vet.App. at 374.

III. The Board's denial of a rating in excess of 20 percent for bilateral lower extremity radiculopathy was arbitrary and capricious because the Board failed to articulate the standard used to determine the severity of the Veteran's symptoms.

The Board found that a rating in excess of 20 percent for bilateral lower extremity radiculopathy was not warranted because Mr. Chavis's radiculopathy symptoms were "moderate" in severity. R-12. However, the Board merely adopted the assessment of the November 2017 VA examiner, without providing any analysis or explanation of its own. *See* R-11; *Gabrielson v. Brown*, 7 Vet.App. 36, 40 (1994) (finding the Board "cannot evade [its] statutory responsibility" to provide adequate reasons or bases for its decision by "merely adopting [a medical opinion] as its own."). The November 2017 VA examiner found Mr. Chavis's symptoms were moderate. R-83. Under the relevant diagnostic code, a rating of 20 percent required the veteran's radiculopathy be "moderate," and a rating in excess of 20 percent required the veteran's radiculopathy be "moderately severe." *See* 38 C.F.R. § 4.124a (2018), DC 8520. The Board's reliance on the examination report without additional analysis was prejudicial because the examiner could not have classified the Veteran's symptoms as "moderately severe," even if he had wanted to. *See id.* As a result, further analysis is required.

Although the diagnostic code does not define the terms "moderate" or "moderately severe," the M21 does. A "moderate" disability "will likely be described by the claimants and medically graded as significantly disabling." M21 Part III.iv.4.N.c. Other signs and symptom combinations may include "combinations of significant sensory changes and reflex or motor changes of a lower degree, or motor and/or reflex impairment such as weakness or diminished or hyperactive reflexes (with or without sensory impairment) graded as medically moderate." *Id.* An evaluation of "moderately severe," which may only apply to impairments of the sciatic nerve, however, will manifest as "motor and/or reflex impairment (for example, weakness or diminished or hyperactive reflexes) at a grade reflecting a high level of limitation or disability is expected." *Id.*

The functional impact of the symptom is therefore a relevant factor in assigning a level of disability, and the Board should have looked to these factors to rate Mr. Chavis's disability, as they cannot be meaningless. *Cf. Overton v. Wilkie*, 30 Vet.App. 257, 265 (2018) (requiring the Board to explain its reliance on the M21). If the Board need not consider the Manual, it must still ensure that the adjudicators comply with its instructions. *See Gray v. Sec'y of Veterans Affairs*, 884 F.3d 1379, 1380 (Fed. Cir. 2018) (per curiam denial of petitions for panel rehearing and rehearing en banc) (Taranto, J., concurring); *Disabled Am. Veterans v. Sec'y of Veterans Affairs*, 859 F.3d 1072, 1077 (Fed. Cir. 2017). "The manual is intended to instruct VBA employees when processing claims." *Disabled Am. Veterans*, 859 F.3d at 1075. It is

"an effort to obtain consistency of outcome." *Haas v. Peake*, 525 F.3d 1168, 1196 (Fed. Cir. 2008). An adjudicator's failure to follow VA' s own rules would result in a decision-making process that lacks standards, would be inconsistent, and rests on the adjudicator's whim. *See Reliford v. McDonald*, 7 Vet.App. 297, 303-04 (2015); *see also Morton v. Ruiz*, 415 U.S. 199, 235 (1974); *see also Lauer v. Bowen*, 818 F.2d 636, 640 (7th Cir. 1987) (Social Security rulings "are intended not solely to be enlightening but are binding on the Social Security Administration").

If the Board did not follow the M21, it should have used some other authoritative standard for distinguishing between moderate and moderately severe symptoms. At the very least, it was required to provide an adequate statement of reasons or bases for its decision. The failure to do so prejudiced Mr. Chavis because the evidence suggests that the symptoms of his bilateral lower extremity radiculopathy were moderately severe.

The examiner noted that Mr. Chavis's radiculopathy manifested as moderate numbness. R-82-83. Mr. Chavis also experienced leg weakness during flare ups of his low back disability. R-3277. Those symptoms may last several days. R-3270 (3268-70). Although some of these symptoms were reported prior to the appeal period, they are still important to evaluating the history of the disability and were not discussed by the Board. *See Moore v. Shinseki*, 555 F.3d 1369, 1372-74 (Fed. Cir. 2009) (holding that VA failed to satisfy its duty to assist when it did not attempt to obtain hospital records that predated the claims period by two years because such records were relevant to

the issue of the appropriate disability evaluation); 38 C.F.R. § 4.1 (2018) (stating that it is "essential, . . . in the evaluation of disability, that each disability be viewed in relation to its history"); *cf. Romanowsky v. Shinseki*, 26 Vet.App. 289, 294 (2013) (rejecting the argument that medical evidence predating the claim is irrelevant, and concluding that the Board erred where it failed to consider service medical records diagnosing a psychiatric disorder). The Board's failure to properly consider and discuss favorable material evidence of record pertaining to the severity of the Veteran's disability during the earlier time period was prejudicial error, renders its reasons or bases for its decision inadequate, and necessitates remand.

The Board was required to, at a minimum, describe the standard it applied to these facts so that the Veteran may know the "precise basis" for the Board's decision. *Gilbert*, 1 Vet.App. at 57. "Overly ambiguous standards almost inevitably lead to inconsistent application[.]" *Cantrell v. Shulkin*, 28 Vet.App. 382, 391 (2017). "It will not do for a court to be compelled to guess at the theory underlying the agency's action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive." *Gilbert*, 1 Vet.App. at 56-57 (quoting *SEC v. Chenery (Chenery II)*, 332 U.S. 194, 196-97 (1947)). Because the Board failed to articulate a standard for determining whether the Veteran's symptomatology was "moderate" or "moderately severe," it left those terms open to interpretation, rendering its decision arbitrary and capricious. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Aut. Ins. Co.*, 463 U.S. 29, 31 (983). *See also Cantrell*, 28 Vet.App. at

390-91 ("Without a definition of the phrase . . . there is no standard against which VA adjudicators can assess the facts of a veteran's case . . . .")

Recently, in *Johnson v. Wilkie*, the Court held that the Board erred when it denied a veteran a rating in excess of 30 percent for his migraine headaches based on a finding that those headaches were not "very frequent" without explaining the standard used to reach that finding. 30 Vet.App. 245, 255 (2018). Specifically, it "reject[ed] the [ ] position that the Board may make such determinations without any obligation to disclose the standard under which it is operating." *Id.* As a result, remand was required for the Board to remedy these deficiencies. *See id.*

Similarly here, the Board's "dogmatic pronouncement of bare conclusions for a decision denying a claim for a rating increase" without articulation of the standard used "prevent[ed] [Mr. Chavis] from assessing what his [ ] evidence must demonstrate, and virtually guarantees inconsistent results." *See id.*; R-11-12. It is VA's responsibility to define the terms used in its regulations. *See Ortiz-Valles v. McDonald*, 38 Vet.App. 65, 72 (2016). "Moderate," and "moderately severe" are terms enumerated by the rating criteria. *Cf. Withers v. Wilkie*, 30 Vet.App. 139, 149 (2018) (allowing a term not enumerated in the regulation to be defined on a case-by-case basis). The Board's failure to articulate the standard used to determine the Veteran's bilateral lower extremity radiculopathy was moderate, and not moderately severe, rendered its decision arbitrary and capricious. *See Cantrell*, 28 Vet.App. at 390-91; *Allday v. Brown*, 7 Vet.App. 517, 527 (1995). Remand is required for Board to explain

the standard it used, and to adjudicate Mr. Chavis's entitlement to a rating in excess of 20 percent for bilateral lower extremity radiculopathy. *See Tucker*, 11 Vet.App. at 374.

CONCLUSION

The Board misinterpreted and misapplied the law when it found 38 C.F.R. §§ 4.40 and 4.45 were not for application. The Veteran was in receipt of a 40 percent rating for his low back disability. Even though the next higher rating required ankylosis, he could establish entitlement if his back was functionally ankylosed. The Board never analyzed whether the Veteran's back disability more nearly approximated the functional equivalent of ankylosis, and the Court cannot do so in the first instance. Therefore the Board's denial of an increased rating was the result of a misinterpretation and misapplication of the law, and was unsupported by adequate reasons or bases. Remand is required for the Board to determine whether the Veteran's disability picture more nearly approximates the functional equivalent of ankylosis.

Moreover, the Board failed to ensure compliance with the duty to assist when it relied on the December 2008, December 2011, and February 2017 VA examinations. The December 2008 and 2011 examinations lacked opinions on the extent of functional loss due to flare ups. And the February 2017 examination report found that there was no significant impairment of functional ability due to weakness, incoordination, or fatigue due to flare ups, however, that finding was inconsistent

with the remainder of the examination reports and the Veteran's reports. Because the Board failed to reconcile the reports, and adjudicated the Veteran's entitlement without adequate information about his flare ups, the decision was deficient. The Board's finding that it complied with the duty to assist was clearly erroneous, requiring reversal. And remand is necessary for a new examination.

Finally, the Board denied the Veteran entitlement to a rating in excess of 20 percent for bilateral lower extremity radiculopathy. However, it merely adopted the examiner's classification of the Veteran's symptoms as "moderate," without defining the standard it applied or elsewise explaining why his symptoms were "moderate" and not "moderately severe." As a result, the Board's denial was arbitrary and capricious and unsupported by adequate reasons or bases. Remand is required for the Board to articulate the standard used to determine the severity of the Veteran's symptoms.

Respectfully submitted,

/s/ Kaitlyn C. Degnan
Kaitlyn C. Degnan
Chisholm, Chisholm & Kilpatrick
One Turks Head Place, Suite 1100
Providence, RI 02903
(401) 331-6300 Telephone
(401) 421-3185 Facsimile
Counsel for Appellant