

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

JOHN L. GRUMMEL, JR.,
Appellant,

v.

DENIS MCDONOUGH,
Secretary of Veterans Affairs,
Appellee.

Vet. App. No. 21-539

JOINT MOTION FOR REMAND

Pursuant to U.S. Vet. App. R. 27 and 45(g), the parties respectfully move the Court to vacate the November 23, 2020, Board of Veterans' Appeals (Board) decision that denied Appellant's claims of entitlement to (1) an increased rating in excess of 20 percent for a cervical spine disability and (2) an increased rating in excess of 20 percent for a lumbar spine disability; and to remand the claims for further proceedings consistent with the following. Record Before the Agency at (R.) 5-16.

BASES FOR REMAND

The parties agree that vacatur and remand are required because the Board failed to (1) adequately discuss relevant evidence in determining whether higher ratings were warranted for functional loss; (2) address whether the VA examinations adequately portrayed the reported functional loss due to pain; (3) address the translated addendum of the private medical examination relating to the cervical and lumbar spines; (4) discuss whether Appellant is entitled to special

monthly compensation (SMC) for Aid and Attendance; and (5) obtain translations of the German medical records from the appeal period and one-year lookback period for increased rating claims.

1. *Reasons or Bases: Relevant Evidence and §§ 4.40, 4.45, and DeLuca*

The Board did not adequately address whether the evidence of functional loss factors supported a higher rating for Appellant's cervical spine and lumbar spine conditions. See 38 U.S.C. § 7104(d)(1); *DeLuca v. Brown*, 8 Vet.App. 202, 205-06 (1995) (holding that the rating schedule "does not forbid consideration of a higher rating based on a greater limitation of motion due to pain on use"); see also *Mitchell v. Shinseki*, 25 Vet.App. 32, 44 (2011). When evaluating musculoskeletal disabilities under diagnostic codes, in addition to considering limitation of motion, VA must assess functional loss due to pain on movement and diminished excursion, strength, speed, coordination, and endurance. See *DeLuca*, 8 Vet.App. at 205-06; 38 C.F.R. § 4.40. Moreover, § 4.45 states that evaluations must consider "[i]nstability of station, disturbance of locomotion, [and] interference with sitting, standing and weight-bearing." 38 C.F.R. § 4.45.

In denying higher ratings, the Board listed factors from the foregoing regulations pursuant to *Mitchell* and *DeLuca*, but its analysis relied exclusively on the quantitative ROM measurements or IVDS requiring adequate bedrest. See R. 12-13, 16. The Board's discussion failed to include analysis of the functional loss factors reported by Appellant and found by the VA examinations, including an inability to turn his neck due to chronic pain, an inability to bend, stoop, sit, stand,

run, or lift due to stiffness and severe pain. See e.g., R. 546, 555 (Aug. 2017 VA cervical examination), 532 (Aug. 2017 VA lumbar examination), 61 (April 2019 VA lumbar examination), 350 (Jul. 2018 Report of Information). While the Board listed some of this impairment in its recitation of facts, it failed to address this evidence in its analysis of the ratings to be assigned throughout the appeal period. See *Dennis v. Nicholson*, 21 Vet.App. 18, 22 (2007) (stating the Board's merely listing evidence before stating a conclusion does not constitute adequate reasons or bases). Further, the April 2019 VA lumbar examination reported that repetitive-use testing could not be conducted due to pain (R. 64), and the August 2017 VA cervical examination reported that Appellant's functional loss resulted in him being unable to turn his neck (R. 546); yet the Board failed to address whether the evidence indicating an inability to move his cervical spine or lumbar spine warranted a higher rating.

The Board failed to adequately explain whether this evidence supported higher ratings under §§ 4.40, 4.45, and *DeLuca*. See *DeLuca, Mitchell, supra*; see also 38 C.F.R. § 4.40 (consideration of strength, speed, coordination, and endurance), § 4.45 (consideration of disturbance of locomotion, interference with sitting, standing and weight-bearing). On remand, the Board must adequately discuss the foregoing evidence and address whether Appellant's reported functional loss factors entitle him to higher ratings.

2. *Reasons or Bases: VA Examination Adequacy*

Relatedly, the Board did not address whether the VA examinations

adequately portrayed Appellant's additional functional loss due to pain in terms of range-of-motion (ROM) estimates when it assigned probative weight to the VA examinations. The Board's reasons and bases concerning the duty to assist must permit the Court to conduct proper review. See *Daves v. Nicholson*, 21 Vet.App. 46, 51 (2007). The level of additional impairment "should, if feasible, be 'portrayed' in terms of the degree of additional range-of-motion loss due to pain on use or during flare-ups." *DeLuca*, 8 Vet.App. at 206. "It is important for the medical examiner to note this information so that the VA rating official can have a clear picture of the nature of the veteran's disability and *the extent to which pain is disabling*." *Mitchell*, 25 Vet.App. at 44 (emphasis added).

The April 2019 cervical spine and lumbar spine VA examinations each reported flares of his conditions. See R. 63, 50. Further, the May 2019 VA lumbar examiner reported that Appellant had significant additional limitation due to repeated use over time, and she also reported that Appellant's cervical pain was so severe that repeated-use testing could not be conducted. See R. 52, 64. The VA examiner did not describe Appellant's level of additional impairment during flares or after repetitive use over time in terms of ROM. See R. 65-66, 52-53. Instead, the VA examiner merely stated without explanation that while Appellant had additional lumbar limitation due to pain after repeated use over time, and due to pain and weakness during flares, that there was no "anticipated" loss of ROM. R. 65-66. However, the Board did not address whether the statements for a lack of ROM estimates of the additional functional impairment due to pain or weakness

are adequately explained. An adequate medical report must “describe[] the disability in sufficient detail” so that the Board can make a “fully-informed” evaluation. *Barr*, 21 Vet.App. at 311 (quoting *Ardison v. Brown*, 6 Vet.App. 405, 407 (1994)). On remand, the Board must address whether the VA examinations adequately portrayed Appellant’s reported functional loss due to pain in terms of ROM.

3. *Reasons or Bases: Discussion of Favorable Evidence*

In assigning no probative value to the private DBQ submitted by Appellant, the Board failed to address the translated addendum to the examination that also addressed Appellant’s lumbar spine severity. “[T]he Board must analyze the credibility and probative value of the evidence, account for the evidence that it finds persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the claimant.” *Wise v. Shinseki*, 26 Vet.App. 517, 524 (2014) (citing *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff’d per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table)); see *Thompson v. Gober*, 14 Vet.App. 187, 188 (2000) (per curiam order) (stating the Board must provide an adequate statement of reasons and bases “for its rejection of any material evidence favorable to the claimant”).

In its decision, the Board only assessed the August 2017 private DBQ in its assessment of Appellant’s cervical spine rating, and it afforded it “no probative value” after determining it was conclusory and not thorough. R. 12. However, the Board entirely failed to address the private examiner’s separate document

providing explanations for his answers on the VA examination. See e.g., R. 241-49 (Oct. 2018-received translation), 416-22 (Sept. 2017-received translation); see also R. 490-500 (Aug. 2017 private DBQ). Specifically, the private examiner explained the history of chronic pain, described how the pain from his neck radiates into his shoulder and from his lumbar spine into his left leg due to static exertion, and radicular symptoms in the left leg. R. 418, 420. By failing to address the attached translated answers to questions in the August 2017 private DBQ, the Board failed to adequately explain how the examination was conclusory and its *sub silentio* finding that the examination was not germane to assessing the severity of Appellant's lumbar condition. See *Wise, Thompson, supra*; R. 12.

On remand, the Board must adequately address the entirety of the private August 2017 DBQ and discuss its findings on both claims. See *Acevedo v. Shinseki*, 25 Vet.App. 286 (2012) (stating that medical opinions must be read as a whole); *Van Valkenburg v. Shinseki*, 23 Vet.App. 113, 116-17 (2009) (BVA must fully discuss evidence that is relevant and material to the issue in question).

4. *Reasons or Bases: SMC Entitlement*

Furthermore, the Board did not discuss whether Appellant was entitled to SMC for Aid and Attendance due to his service-connected cervical spine and lumbar spine disabilities. The Board must consider all issues raised by the claimant or reasonably raised by the record on appeal. See *Robinson v. Mansfield*, 21 Vet.App. 545, 552-54 (2008), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009). Veterans are "presumed to be seeking the maximum

benefit allowed by law and regulation.” *A.B. v. Brown*, 6 Vet.App. 35, 38 (1993). Veterans may claim SMC or it may be raised by the evidence of record. See *Akles v. Derwinski*, 1 Vet.App. 118, 121 (1991); *Bradley v. Peake*, 22 Vet.App. 280, 294 (2008). SMC is “to be accorded when a veteran becomes eligible *without need for a separate claim*.” *Bradley*, 22 Vet.App. at 294 (emphasis added).

Appellant reported to VA that he has issues in his activities of daily life, including driving and picking up items, and that he requires the assistance of a service dog to help him in tasks that require reaching like doing laundry due to his limitations in daily activities. R. 350 (Jul. 2018 Report of Information). However, the Board did not address whether Appellant met the requirements to qualify for SMC for Aid and Attendance since he requires the aid of another to perform the personal functions required in everyday living. See 38 U.S.C. § 1114(l); 38 C.F.R. §§ 3.350(b), 3.351(b), 3.352(a). Since the issue of Appellant being unable to pick up items, do laundry, or drive himself was raised by his lay report, the Board must address his entitlement to SMC benefits on remand.

5. Fair Process: Medical Record Translation

Finally, the Board failed to ensure all evidence of record was translated before issuing a decision on Appellant’s claims. Where documents remain untranslated before the Board, its statement of reasons or bases does not facilitate informed review by the Court because it is unclear whether and to what extent the Board considered such documents. See *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); see also U.S. Vet.App. R. 3(h).

Appellant's VA file contains medical records from the appeal period that are in German and were not translated before the Board issued its decision. While some records are translated, other pages were not. *Compare* R. 241-49, 416-22 (above-cited translations) *with* R. 411-14, 423-53 (Sept. 2017-received Medical Treatment Records). On remand, the Board must obtain a translation of the untranslated portion of the medical records and review it in conjunction with Appellant's claims through the one-year lookback period of his increased rating claims.

GENERAL INSTRUCTIONS

The Court should vacate the Board decision and remand the appeal for readjudication consistent with the foregoing. On remand, the Board will send Appellant a letter permitting no fewer than 90 days for the submission of additional argument to the Board prior to readjudication, barring an explicit waiver by Appellant. In any subsequent decision, the Board must set forth adequate reasons or bases for its findings and conclusions on all material issues of fact and law presented on the record. See 38 U.S.C. § 7104(d)(1); *Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990). Consistent with the closed record characteristic of the AMA and the structure of its review lanes, the Board shall reexamine the evidence of record and conduct a critical examination of the justification for the previous decision. The Board shall incorporate copies of this joint motion and the Court's order into Appellant's record. The Board shall provide this matter expeditious treatment as required by 38 U.S.C. § 7112.

The parties agree that this Joint Motion and its language are the product of the parties' negotiations. The Secretary further notes that any statements made herein shall not be construed as statements of policy or the interpretation of any statute, regulation, or policy by the Secretary. Appellant also notes that any statements made herein shall not be construed as a waiver as to any rights or VA duties under the law as to the matter being remanded, except that, pursuant to Rule 41(c)(2), the parties agree to unequivocally waive further Court review of and any right to appeal the Court's order on this Joint Motion. The parties respectfully ask that the Court enter mandate upon the granting of this motion.

CONCLUSION

WHEREFORE, the parties respectfully move the Court to vacate the November 23, 2020 Board decision that denied entitlement to (1) an increased rating in excess of 20 percent for a cervical spine disability and (2) an increased rating in excess of 20 percent for a lumbar spine disability, and remand for readjudication consistent with the foregoing.

Respectfully submitted,

FOR APPELLANT:

/s/ Glenn R. Bergmann
GLENN R. BERGMANN

Date: August 30, 2021

/s/ Homer R. Richards
HOMER R. RICHARDS
Bergmann & Moore, LLC
7920 Norfolk Avenue, Suite 700
Bethesda, MD 20814
(301) 290-3198

FOR APPELLEE:

RICHARD A. SAUBER
General Counsel

MARY ANN FLYNN
Chief Counsel

/s/ Christopher Wallace
CHRISTOPHER WALLACE
Deputy Chief Counsel

Date: August 30, 2021

/s/ Aaron M. Reinsbach
AARON M. REINSBACH
Appellate Attorney
Office of the General Counsel (027L)
U.S. Department of Veterans Affairs
810 Vermont Avenue NW
Washington, DC 20420
(202) 632-6812