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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 20-3219

ROBERT P. JALBERT, APPELLANT,

v.

DENIS MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before FALVEY, *Judge*.

MEMORANDUM DECISION

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

FALVEY, *Judge*: Marine Corps veteran Robert P. Jalbert, through counsel, appeals a February 11, 2020, Board of Veterans' Appeals decision that denied service connection for arthritis of the feet and legs, including as secondary to diabetes mellitus II (diabetes), and a disability rating greater than 20% for diabetes.¹ This appeal is timely, and the Court has jurisdiction to review the Board's decision. *See* U.S.C. §§ 7252(a), 7266(a). We have determined that a single-judge decision is appropriate.²

For diabetes, we are asked to address whether the Board properly rejected private examination reports from 2011 and 2019, and, for arthritis, we are asked to decide whether the

¹ The Board also remanded, among other things, the matter of a higher disability rating for peripheral neuropathy secondary to diabetes. We do not address the merits of matters remanded by the Board, as they are nonfinal decisions outside our jurisdiction. *See* 38 U.S.C. § 7252(a) (stating that the Court has "exclusive jurisdiction" to review final Board decisions); *Breeden v. Principi*, 17 Vet.App. 475, 478 (2004) (holding that a Board remand "does not represent a final decision over which this Court has jurisdiction").

² This case was submitted for a decision by a panel of three judges and oral argument was heard on December 14, 2021. At oral argument, the appellant clarified that he is not asking to receive a higher diabetes disability rating based on factors unrelated to the control or management of diabetes or for factors associated with his separately rated peripheral neuropathy condition. Oral argument at 13:15-13:25. As clarified, we understand that this appeal is of relative simplicity, its outcome is not reasonably debatable, and its resolution does not involve new law or an application of law to a novel factual situation. Thus, single-judge decision is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990).

Board erred in relying on a 2015 VA examination report. As we explain below, we find it appropriate to remand this matter so that the Board may provide a statement of reasons or bases that facilitates judicial review and addresses in the first instance the parties' competing arguments about the examinations. We therefore will set aside the Board's decision and remand the matter for further proceedings.

I. BACKGROUND

Mr. Jalbert served on active duty from 1966 to 1969, including service in Vietnam. Record (R.) at 3049. He suffers from diabetes mellitus type II (diabetes), for which he is service connected with a disability rating of 20% and an effective date of 2004. R. at 2867. The current appeal stems from his 2007 claim for increased compensation. R. at 2778, 2732-35. We recite here the most salient points from that lengthy proceeding.

In December 2011, the veteran sent VA a note from his private examiner. The private examiner stated that the veteran "is considerably disabled" from his diagnosed diabetes, peripheral neuropathy, and other conditions and "requires substantial [r]egulation of [a]ctivities as a result." R. at 2023 (emphasis omitted).

In August 2015, Mr. Jalbert underwent VA examinations to address his diabetes and painful legs and feet. R. at 1422-24 (diabetes); 1395-405 (legs); 1409-15 (feet). During the diabetes examination, the examiner noted that the veteran's diabetes required insulin injections, a prescribed oral medicine, and a restricted diet. R. at 1422. But the examiner found that diabetes did not require regulation of activities. *Id.* She also rejected the private examiner's endorsement of regulated activities because the private examiner did not say that regulation was required "due to changes in blood sugar levels or hypoglycemia with increased activity where activity needs to be restricted to avoid sudden drops in blood sugar." R. at 1424.

In the August 2015 foot examination, the examiner diagnosed the veteran with arthritis of the right foot. R. at 1410. In the leg examination, she stated that he "has developed age related degenerative arthritis in bilateral knees." R. at 1396. But the examiner concluded that these were age-related conditions not likely related to service or service-connected diabetes. R. at 1392.

Mr. Jalbert also participated in a hearing before a Board hearing officer in August 2019. R. at 184-204. During that hearing, the veteran reported being told to avoid strenuous activities as a

result of his diabetes. R. at 191. He also suggested that his peripheral neuropathy had worsened, R. at 196, and that the neuropathy caused problems with his gait, R. at 197.

After the Board hearing, Mr. Jalbert submitted an October 2019 Disability Benefits Questionnaire (DBQ) completed by a private physician. R. at 148-50. The DBQ examiner checked a box to indicate "yes" to the question asking whether Mr. Jalbert "require[d] regulation of activities as part of medical management of diabetes." R. at 148. But an explanatory note under the checked box states that the veteran "had to stop working in 2009 due to problems [with] balance [and] neuropathy." *Id.* The examiner also found that diabetes likely aggravated the veteran's "peripheral neurop[athy], chronic lower ext pn (sic)." R. at 149.

In the February 11, 2020, decision here on appeal, the Board denied a higher disability rating for diabetes. The Board stated that "[t]he term 'regulation of activities' contained in [Diagnostic Code (DC)] 7913 means that a [v]eteran must have a medical need, caused by the [v]eteran's diabetes mellitus, to avoid strenuous occupational or recreational activities." R. at 9. The Board acknowledged that both the veteran's private physician and the DBQ examiner stated that the veteran should regulate his activities, but the Board accorded little weight to that evidence because it "fails to demonstrate that the [v]eteran's activities were regulated for the purposes of avoiding hypoglycemic episodes. Rather the [v]eteran's disability has been characterized by the use of insulin, restricted diet, and restricted activities related to his loss of balance and leg pain stemming from peripheral neuropathy." R. at 11. The Board also denied service connection for foot and leg arthritis, including as secondary to diabetes, based on the 2015 VA examination. R. at 5.

Mr. Jalbert now appeals the Board's decision.

II. ANALYSIS

A. Diabetes

For diabetes, Mr. Jalbert argues that the Board "impermissibly injected additional criteria into the applicable . . . DC," Appellant's Brief (Br.) at 8, when the Board rejected the 2011 and 2019 examinations because "neither specifically claim his diabetes . . . requires regulation of activities for the purpose of controlling his blood sugar," R. at 11. And he maintains that the Board's "entire discussion of regulation of activities was tainted by th[at] injection of additional rating criteria." Reply Br. at 3. He also argues that the Board erred in dismissing the December

2011 and October 2019 examinations because those examinations prove that his diabetes requires regulation of activities. Appellant's Br. at 9-11; Reply Br. at 2-3. According to the veteran, remand is warranted for the Board to either award benefits based on those examinations or, if they are unclear, send them back for clarification. Appellant's Br. at 9-10.

The Secretary argues in favor of affirmance because the veteran "fails to point to any evidence in the record that shows that it is medically necessary for him to regulate his activities for the medical management of his diabetes." Secretary's Br. at 9; oral argument at 21:41-59. In the Secretary's view, the December 2011 and October 2019 examinations do not provide that evidence because, even though the examinations stated that diabetes required regulation of activities, in each examination there is qualifying information to suggest that the examiner intended to find that the veteran's regulation of activities was related to several conditions, and thus was not required solely by diabetes. Secretary's Br. at 19-20. And the Secretary maintains that the applicable DC encompasses avoidance of hypoglycemic episodes. Oral argument at 21:33-43.

The veteran's diabetes is rated under DC 7913. Under that regulation, a 40% rating is warranted when there is diabetes mellitus "[r]equiring . . . insulin, restricted diet, and regulation of activities." 38 C.F.R. § 4.119, DC 7913 (2021). A 20% rating is applied when the condition requires insulin and restricted diet or, in the alternative, an oral hypoglycemic agent and a restricted diet. *Id.* A 10% rating is appropriate when diabetes is "[m]anageable by restricted diet only." *Id.* Note 1 to DC 7913 states that "compensable complications of diabetes" should be rated separately (unless they are part of a 100% disability rating), but that "[n]oncompensable complications are considered part of the diabetic process under DC 7913." *Id.* We have explained that, to receive a 40% disability rating, a successful "claimant must demonstrate not only that a claimant's diabetes requires insulin and a restricted diet, *but also* that the diabetes requires that the claimant's activities be regulated." *Camacho v. Nicholson*, 21 Vet.App. 360, 367 (2007) (emphasis in original).

The Board must support its decision with a written statement of the reasons or bases that is understandable by the claimant and facilitates review by this Court. *See* 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995). To comply with this requirement, the Board must analyze the credibility and probative value of the evidence, account for the evidence it finds persuasive or unpersuasive, and provide the reasons for the rejection of any material evidence favorable to the claimant. *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table).

Here, we find that the Board's statement of reasons or bases does not facilitate judicial review. Despite the veteran's argument that the Board "impermissibly injected additional criteria" into DC 7913, it is not clear on appeal to what extent the Board did so. Appellant's Br. at 8. The Board stated that the examinations were discounted because they "fail[ed] to demonstrate that the [v]eteran's activities were regulated for the purposes of avoiding hypoglycemic episodes" and "neither specifically claim [that Mr. Jalbert's] diabetes . . . requires regulation of activities for the purpose of controlling his blood sugar." R. at 11. But the Board also stated that "[t]he term 'regulation of activities' contained in DC 7913 means that a [v]eteran must have a medical need, caused by the [v]eteran's diabetes mellitus, to avoid strenuous occupational or recreational activities," R. at 9, which does not, on its face, relate to the avoidance of hypoglycemic episodes. Also factored, somehow, into the Board's analysis was that the veteran's regulated activities "stemm[ed] from peripheral neuropathy," R. at 11, but it is not clear from the Board's decision whether this was an alternate basis for denying a higher disability rating or whether, as the appellant contends, the entire analysis was tainted by the Board's references to avoiding hypoglycemic episodes, Reply Br. at 3. Because the bases for the Board's decision are unclear, our review is frustrated. *See Allday*, 7 Vet.App. at 527.

Our review also is frustrated by the Board's failure to address the duty to assist. *See Thompson v. Gober*, 14 Vet.App. 187, 188 (2000) (noting that it is the Board's responsibility to make the findings of fact that the Court reviews on appeal); *see also D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008) (stating that whether VA has met the duty to assist is a finding of fact). The parties disagree about whether the 2011 and 2019 examinations were clear enough to inform the Board's decision; those are disagreements about whether the examinations were adequate. *See Stefl v. Nicholson*, 21 Vet.App. 120, 123 (2007). But the Board made no findings about the adequacy of the 2011 and 2019 examinations. *See* R. at 5-18. The parties also make competing arguments about the 2019 examiner's reference to "chronic lower ext pn (sic)," R. at 149, but the Board did not make any findings about that reference, either, R. at 5-18. And Mr. Jalbert testified at the Board hearing that his condition had worsened, R. at 193-94, yet the Board did not discuss that evidence or address whether the duty to assist required a new examination, R. at 5-18. The Board's failure to address these matters renders its statement of reasons or bases inadequate. *See Allday*, 7 Vet.App. at 527.

B. Arthritis

For arthritis, Mr. Jalbert argues that the 2015 VA examination relied on by the Board was not detailed enough to inform the Board's decision. He therefore contends that the Board either clearly erred in impliedly finding that the examination satisfied the duty to assist or, in the alternative, inadequately explained why it found the examination adequate. But, as with the other medical examinations of record, the Board did not make any findings of fact about the duty to assist or the adequacy of the 2015 examination. *See* R. at 5-18. Although the parties make competing arguments about the adequacy of the examination and whether VA satisfied its duty to assist, our review is frustrated by the Board's failure to address those matters in the first instance. *See Hensley v. West*, 212 F.3d 1255, 1263-64 (Fed. Cir. 2000) (noting that, when a court of appeals reviews a lower court's decision, it may remand the case if the previous adjudicator failed to make findings of fact essential to the decision).

C. Remand

Thus, we find that remand is appropriate for the Board to address the duty to assist and make the relevant findings of fact in the first instance. *See* 38 U.S.C. § 7252(a) (stating that the Court has the power to remand "as appropriate"); *see also Hensley*, 212 F.3d at 1263. And, because the claim is being remanded, we need not analyze the veteran's additional arguments. *See Mahl v. Principi*, 15 Vet.App. 37, 38 (2001) (per curiam order) ("[I]f the proper remedy is a remand, there is no need to analyze and discuss all the other claimed errors that would result in a remedy no broader than a remand.").

In pursuing his claim on remand, the veteran will be free to submit additional argument and evidence as to the remanded matter, and he has 90 days to do so from the date of the postremand notice VA provides. *See Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order); *see also Clark v. O'Rourke*, 30 Vet.App. 92, 97 (2018). The Board must consider any such evidence or argument submitted. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002); *see also Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991) ("A remand is meant to entail a critical examination of the justification for the decision.").

IV. CONCLUSION

For these reasons, the Board's February 11, 2020, decision is SET ASIDE, and the matter is REMANDED for further adjudication.

DATED: April 11, 2022

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