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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 20-6259

JOE N. BRADDY, JR., APPELLANT,

V.

DENIS MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before MEREDITH, *Judge*.

MEMORANDUM DECISION

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

MEREDITH, *Judge*: The appellant, Joe N. Braddy, Jr., through counsel appeals a July 21, 2020, Board of Veterans' Appeals (Board) decision that denied entitlement to (1) benefits for residuals of an injury of the right hand, bilateral heel disabilities, and a chronic acquired eye disability; (2) an initial disability rating in excess of 10% for status-post old post-traumatic ligamentous calcification parallel to medial metaphyseal region distal femur, also described as degenerative joint disease (DJD), of the left knee, from July 21, 2009, to June 1, 2017; and (3) a total disability rating based on individual unemployability (TDIU). Record (R.) at 4-16. The appellant raises no arguments with respect to the Board's denial of benefits for residuals of an injury to the right hand or for an eye disability; the Court therefore considers those matters abandoned and will dismiss the appeal as to those matters. *See Pederson v. McDonald*, 27 Vet.App. 276, 285 (2015) (en banc).

On November 18, 2021, this matter was referred to a panel of the Court, with oral argument, to address whether the Board, when it adjudicates entitlement to a higher initial disability rating for a service-connected condition, is required to address the propriety of an intervening VA regional office (RO) decision severing service connection for that disability even though an appeal

as to the severance decision was not perfected.[1] The Court heard oral argument on February 3, 2022. After hearing oral argument and ordering and receiving supplemental briefing from the parties, the panel opted to return the matter to the single Judge for resolution on the merits. *See* U.S. VET. APP. INTERNAL OPERATING PROC. V(e)(1).

This appeal is timely, and the Court has jurisdiction to review the Board's decision pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the following reasons, the Court will reverse the Board's finding that the appellant does not have current bilateral heel disabilities; vacate that part of the Board's decision that denied entitlement to an initial disability rating in excess of 10% for DJD of the left knee, benefits for bilateral heel disabilities, and TDIU; and remand the vacated matters for further proceedings consistent with this decision.

I. BACKGROUND

The appellant served on active duty in the U.S. Marine Corps from May 1987 to April 1991. R. at 1635. In a December 1990 report of medical history, the examiner noted a chronic foot strain, medial collateral ligament (MCL) strain, and occasional giving way of the knee. R. at 1861. At that time, the appellant also indicated that he suffered from swollen or painful joints and, although the record is partially illegible, it appears to reflect that he reported a trick or locked knee and foot trouble. R. at 1860. The record contains a March 1991 radiologic consultation request that reflects that the appellant reported left knee pain after physical training. R. at 2560.

In July 2009, the appellant filed claims for benefits for a left knee disability and bilateral heel disabilities, R. at 2900-09, and he underwent a VA joints examination in November 2009, R. at 2758-61. He reported that, after his March 1991 injury, "he was maintained on a profile of no running" until his discharge the following month. R. at 2758. The examiner noted that the appellant had no other treatment for his left knee until 2004, when he injured it in the course of his employment as a school security guard and underwent surgery to repair a left lateral meniscus tear and partial tear of the anterior cruciate ligament (ACL). *Id.* The appellant reported that his pain had improved after surgery, but that, in the ensuing years, the pain had gradually increased, and he experienced swelling in the knee. *Id.* He stated that his knee often popped and gave way, and

[1] As discussed below, 38 C.F.R. § 3.400(*o*)(1) provides that "[a] retroactive increase or additional benefit will not be awarded after basic entitlement has been terminated, such as by severance of service connection."

he was diagnosed in August 2009 with advanced arthrosis. *Id.* The examiner noted that the appellant had been unemployed since March 2008 but had worked as a security guard for a public school system beginning in 2001. R. at 2760. She stated: "He can no longer perform the duties of a security guard because his left knee condition limits his ability to continuously stand and walk, which is a job requirement." *Id.* The examiner diagnosed moderate to severe DJD in both the lateral and medial compartments of the left knee and noted that the results of a February 2004 x-ray of the appellant's left knee were similar to the results of the March 1991 in-service x-ray. *Id.*

The RO granted benefits for DJD of the left knee in February 2010 and assigned a 10% disability rating. R. at 2731-36. The RO denied the appellant's claim for benefits for a bilateral heel condition because there was no evidence of a current bilateral heel disability that is related to service. *See* R. at 2734. In February 2011, the appellant filed a Notice of Disagreement (NOD) with the rating assigned for his left knee disability and with the RO's denial of benefits for a bilateral heel condition. R. at 2705.

In December 2012, the RO sought "clarification of the [November 2009] opinion and a determination as to whether the [appellant's] current left knee condition is related to his in[-]service left knee complaint." R. at 2645. The same month, VA issued a Statement of the Case (SOC) that continued the 10% rating for the left knee DJD and noted that "the [appellant's] claim is being referred to the Rating Activity for review of whether . . . service connection for this condition should be severed." R. at 2603; *see* R. at 2574-606.

Later in December 2012, a different VA physician reviewed the appellant's claims file and provided an opinion. R. at 2636-41. That physician determined that the appellant's left knee condition was less likely than not related to service, opining that the appellant's current symptoms were "not related to the time in the military," that "they are related to the surgical injury [in 2004] and the sequelae of the injury," and that "there is not any objective finding that would possibly be related to any old injury to the medial ligament of the left knee." R. at 2639.

The appellant perfected his appeal of the February 2010 RO decision in February 2013, indicating that he wished to appeal "all of the issues listed on the [SOC]." R. at 2567. He underwent another VA joints examination in August 2014 to determine the current severity of his condition; the examiner did not provide a nexus opinion. *See* R. at 2414-21. VA later sought a medical opinion under 38 C.F.R. § 3.105 to determine whether the initial grant of benefits for left knee DJD was clear and unmistakable error. R. at 2044. A VA physician provided the requested

opinion in February 2015, concluding, after "review[ing] the conflicting medical evidence," R. at 2045, that "the degenerative changes in medial and lateral compartment[s] were post the[] 2004 injury and surgery," which he stated "indicate[d] that the [DJD], medial compartment of the left knee[,] is less likely than not incurred in or caused by in-service injury[,] event[,] or illness," R. at 2047.

In a May 2015 decision, the RO continued the assigned 10% rating for the appellant's left knee DJD, finding the condition had not "increased in severity sufficiently to warrant a higher evaluation." R. at 1956. After receiving additional service medical records, VA requested that an examiner review the appellant's claims file and "indicate what current disability, if any, of the left knee is at least as likely as not associated with the injury and ongoing left knee complaints documented in [the appellant's] service treatment records." R. at 1501. In April 2016, the December 2012 VA examiner reviewed and summarized, at length, the appellant's service medical records and postservice treatment records. R. at 1500-16. He provided the following conclusion and rationale:

> [T]he 03/1991 left knee radiographic finding of medial ligament calcification, also seen 13 years later in left knee radiograph 02/2004 as a more mature finding of marginal osteophyte at medial tibial plateau, is the ONLY residual from the in-military 12/1987 left knee injury, or any other in-military left knee injury. [The appellant] did not have a medial meniscus tear in military, as proven by surgical findings 03/2004. [H]e did not have posterior cruciate ligament tear in military, as proven by surgical findings 03/2004.
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> . . . [T]here is currently definitely more post-trauma arthritis than age-related osteoarthritis in the left knee. [A]s to whether the post-trauma arthritis is more due to the in-military injuries or more due to the 2004 injuries is rather challenging. [Five] years after the 2004 trauma, one first finds arthritis, and this certainly can occur. [F]or this to take 18 years to develop[—]2009 is 18 years after he left military, and over 21 years after the first left knee trauma[—] is less likely. [T]hus, the 2004 acute injury contributes more than 50% to the development of the post-trauma arthritis.

R. at 1516-17.

The RO, in December 2016, issued a decision proposing to sever service connection for the appellant's left knee disability based on clear and unmistakable error, noting that the reduction, if implemented, would be effective 60 days after a final decision taking that action. R. at 1494-97. The decision was based on the November 2009 VA examination report and the December 2012 and April 2016 VA medical opinions. *See* R. at 1495-97. The RO advised the appellant that he

could submit evidence to show that the proposed severance should not be implemented and stated that VA would review any additional evidence even if it was submitted after the effective date of the reduction. R. at 1487-88.

The RO severed service connection for the left knee in March 2017, effective June 1, 2017. R. at 1483-84. At that time, the RO informed the appellant that, if he did not agree with the decision, he "must complete[] and return . . . [an] enclosed VA Form 21-0958, Notice of Disagreement, in order to initiate [his] appeal" within 1 year. R. at 1477 (emphasis omitted). The RO also indicated that the appellant could, "at any time," submit evidence that the reduction should not have taken place and that VA would "reevaluate [his] claim" on the basis of that evidence. R. at 1476.

In a March 2017 Supplemental Statement of the Case (SSOC), the RO continued the assigned 10% rating for DJD of the left knee for the period between July 21, 2009, and June 1, 2017, and the denial of benefits for bilateral heel disabilities. R. at 1465-75. The RO also noted that "[s]ervice connection [for the left knee] has now been severed effective June []1, 2017"; cited § 3.400(*o*)(1) as providing that a retroactive increase cannot be awarded after severance of service connection; and found that the 10% rating would be continued based on painful motion of the knee because a higher schedular rating was not warranted. R. at 1472. The notification letter indicated that, "[i]f you already filed a formal appeal . . . and still wish to continue your appeal, your response to the SSOC is optional." R. at 1463.

The following month, the appellant filed a claim for benefits for a left shoulder disability. R. at 1375-78. After a VA examiner determined that the appellant's left shoulder strain was related to service, R. at 1163, and affected his ability to lift, push, pull, and reach overhead, R. at 1162, the RO granted benefits for that condition and assigned a 20% disability rating. R. at 1153-55.

At an August 18, 2017, hearing, a Board member stated that she and the appellant had "clarified" the issues on appeal as "entitlement to an initial rating in excess of 10[%] for degenerative joint disease of the medial compartment of the left knee from July 21[], 2009, to July 1[] of 2017, as well as service connection claims for the right hand, bilateral heel and left eye." R. at 1112. The appellant testified as to, and the Board member asked questions regarding, the severity of his knee condition. R. at 1111-22. The appellant also testified that he had stopped working approximately 10 years earlier because of his knee condition. R. at 1120. He explained that he had worked on an automobile assembly line for only 2 or 3 days before having to quit

because of knee pain. R. at 1120-21. He reported that he had also worked as a school security guard, but he had to leave that position as well "because of a lot of standing up and walking." R. at 1121. The appellant filed an NOD with the March 2017 severance decision on August 21, 2017. R. at 1107-09.

The Board, in December 2017, listed the issues on appeal as including entitlement to a higher initial rating for left knee DJD from July 21, 2009, to June 1, 2017; disability benefits for a bilateral heel condition; and entitlement to TDIU. R. at 1050. Initially, the Board noted that the appellant had appealed the March 2017 decision severing service connection for the left knee disability and that an SOC had not yet been provided. R. at 1052. The Board determined that remand for the RO to issue an SOC was unnecessary because the RO had acknowledged the appellant's NOD and "additional action [wa]s pending." *Id.* However, the Board remanded the appellant's appeal of the disability rating assigned for DJD of the left knee because it was "intertwined with the severance issue" and should be readjudicated after the RO addressed his appeal as to the severance decision. R. at 1053, 1055. The Board remanded the appellant's bilateral heel claim for further development, including a medical examination. R. at 1053-54. Finally, the Board acknowledged that the appellant had raised the issue of entitlement to TDIU at the August 2017 hearing, R. at 1052, and remanded that issue as well, finding it inextricably intertwined with the appellant's appeal of the disability rating for his left knee condition, R. at 1054.

The RO issued an SOC in November 2018, finding that the March 2017 severance decision was proper. R. at 923-47. In the accompanying cover letter, the RO notified the appellant that, to complete his appeal, he "must file a formal appeal" and that it must be filed within 60 days of the date of that letter or the remainder of the 1-year period from the date of the letter notifying him of the action he appealed. R. at 921. The RO further explained that, "[i]f we do not hear from you within this period, we will close your case." *Id.* (emphasis omitted).

At a July 2019 VA foot conditions examination, the examiner diagnosed the appellant with bilateral pes planus and plantar fasciitis. R. at 400-01. Although the examiner noted the appellant's report that he experienced a gradual onset of pain in both feet during service and that the pain increased after service, the examiner concluded that the appellant's conditions were less likely than not related to service. R. at 401, 433. He explained as follows: "There is no evidence of recurrent foot pain during service, indicating there was no progression of the bilateral pes planus or an onset of plantar fasciitis." R. at 433. In October 2019, the appellant submitted VA Form 21-8940,

Veteran's Application for Increased Compensation Based on Unemployability, asserting that, since 2010, his chronic knee, back, and shoulder disabilities prevented him from securing or following substantially gainful employment. R. at 354-56.

The Board issued the decision on appeal in July 2020, denying entitlement to an initial disability rating in excess of 10% for DJD of the left knee, benefits for a bilateral heel disability, and TDIU. R. at 4-16. This appeal followed.

II. ANALYSIS

A. Left Knee Disability

1. Parties' Arguments

a. Briefs

The appellant argues that, although there is no indication that he perfected his appeal of the March 2017 decision severing service connection for DJD of the left knee by filing a Substantive Appeal after receiving the November 2018 SOC, Appellant's Br. at 15, the Board was nevertheless required to address the propriety of the severance decision as part of its consideration of his appeal of the February 2010 RO decision that assigned an initial 10% rating for that condition, a matter for which he did file a Substantive Appeal, *id.* at 18; *see id.* at 15-21. He asserts that whether severance was proper is "a question in the matter" of the proper disability rating for DJD, *id.* at 15 (citing 38 U.S.C. § 7104(a)), because, as a matter of law (and as the Board found), 38 C.F.R. § 3.400(*o*)(1) prohibits the award of a retroactive increase after service connection has been severed, *id.* at 16. Alternatively, the appellant contends that he did appeal the March 2017 severance decision by filing an NOD and that, because filing a Substantive Appeal is not a jurisdictional requirement, his "omission of this step did not deprive the Board of jurisdiction" over the issue of severance. *Id.* at 19-20. Finally, he explains that he was harmed by the Board's failure to address the propriety of severance because the Board, in light of the conflicting medical evidence, could have concluded that the RO in 2017 "did not meet its burden of establishing that the . . . award of service connection was clearly and unmistakably erroneous." *Id.* at 20. The appellant seeks vacatur of the Board's decision and remand of this matter. *Id.* at 30.

The Secretary responds that, contrary to the appellant's assertion, the Board did not have jurisdiction over the question of the propriety of the March 2017 RO decision severing service connection for the appellant's left knee disability because the appellant did not perfect his appeal

of that decision. Secretary's Br. at 12-17. Further, the Secretary disputes the appellant's contention that whether severance was proper is "a question in the matter" of the appropriate disability rating for his left knee condition. *Id.* at 14-17. In that regard, he argues that, "[w]hen, as is the case at hand, [the a]ppellant seeks an increased rating for his left knee, he does not, by definition, dispute the severance of service connection for his left knee," and therefore there is no inherent relationship between the two matters. *Id.* at 16. The Secretary asks the Court to affirm the Board's decision on this matter. *Id.* at 30.

In reply, the appellant reiterates his arguments regarding his left knee disability. *See* Reply Br. at 1-7. Additionally, he avers that, by continuing to seek a higher rating for his knee disability, he "was necessarily disputing the severance" decision because he could only be awarded a higher rating if that decision was reversed. *Id.* at 3. He again asks the Court to remand that matter. *Id.* at 15.

b. Supplemental Briefs

After oral argument, the Court sought supplemental briefing from the parties on whether fair process required VA to notify the appellant how § 3.400(*o*)(1) and his failure to file a Substantive Appeal in the severance claim stream would affect his appeal of the rating assigned for his left knee disability. *See* Mar. 8, 2022, Order at 3.

i. Secretary

In his supplemental brief, the Secretary contends that VA afforded the appellant fair process throughout his appeal of both the February 2010 rating decision and the March 2017 severance decision. In that regard, the Secretary relies on several decisional documents—the December 2012 SOC, the RO's May 2015 decision, the December 2016 proposed severance decision, the March 2017 severance decision, the March 2017 SSOC, the December 2017 Board decision, the November 2018 SOC, and the April 2020 SSOC—as well as the appellant's February 2015 supplemental claim, the August 2017 Board hearing transcript, the appellant's August 2017 NOD, and the appellant's October 2019 TDIU application, to conclude that the appellant was on notice that the appeal of the disability rating and the severance action were separate and distinct and the appellant was adequately informed of how to appeal those two decisions. Secretary's Supplemental (Supp.) Br. at 10-16.

The Secretary further avers that "neither the RO nor the Board suggested a retroactive increase was possible if the severance stayed intact when they addressed the merits of

[the a]ppellant's request for a[] higher initial evaluation." *Id.* at 18 (emphasis omitted). And, although he concedes that "the Board may have, at times, remained silent on the issue," he asserts that "this makes sense because[,] at those times[,] the severance matter was not yet final, and [the] final disposition would have an impact on whether a higher evaluation was possible at the time the Board made its final decision." *Id.* at 19-20. The Secretary again asks the Court to affirm the Board's decision.

ii. Appellant

In his supplemental reply brief, the appellant argues that VA violated his right to fair process because it failed to provide him with reasonable notice and an opportunity to respond "to the proper legal basis for the denial of his increased rating claim." Appellant's Supp. Reply Br. at 1. He asserts that "VA's first notice . . . that the severance of service connection precluded the award of an increased rating from 2009 to 2017" was the July 2020 Board decision on appeal, by which time the window to perfect the appeal of the severance decision had long passed. *Id.* at 1-2. Therefore, the appellant contends, he was not given a reasonable opportunity to respond by perfecting his appeal. *Id.* at 2.

In that regard, the appellant disputes the Secretary's reliance on various decisional documents to support the assertion that VA repeatedly gave the appellant notice that the appeal of the disability rating and the severance action were separate and distinct matters. *Id.* at 2-4, 7. Notably, the appellant argues that the December 2016 proposed severance decision and the March 2017 severance decision did not adequately inform him of the effect of § 3.400(*o*); instead, those decisions included the "nonsensical sentence" that "'there will be no evaluation for service[-]connected conditions.'" *Id.* at 2 (quoting R. at 1484, 1497). The appellant also asserts that the March 2017 SSOC violated fair process in three ways: (1) although the SSOC included the text of § 3.400(*o*), the substance of the SSOC reflects that a higher rating was denied because the appellant did not meet the schedular criteria for a 20% rating for his knee; (2) the RO did not explain in the SSOC how § 3.400(*o*) affected the decision; and (3) the SSOC misled him to believe that he could obtain a higher schedular rating if the evidence supported such a finding. *Id.* at 2-3. Finally, he maintains that the Board violated fair process at the August 2017 hearing by eliciting information about his knee symptoms "without providing any notice that the severance of service connection would preclude a higher rating as a matter of law." *Id.* at 3.

2. Law

"The entire thrust of the VA's nonadversarial claims system is predicated upon a structure which provides for notice and an opportunity to be heard at virtually every step in the process." *Thurber v. Brown*, 5 Vet.App. 119, 123 (1993); *see id.* at 123-24 (outlining VA's various duties to notify claimants throughout the appeals process). "The Board is obligated to ensure that it provides to appellants fair process in the adjudication of their claims." *Smith v. Wilkie*, 32 Vet.App. 332, 337 (2020).[2] "[E]ven in situations where no particular procedural process is required by statute or regulation, the principle of fair process may nonetheless require additional process if it is implicitly required when 'viewed against [the] underlying concepts of procedural regularity and basic fair play' of the VA benefits adjudicatory system." *Id.* (quoting *Thurber*, 5 Vet.App. at 123).

Matters of notice are generally factual determinations that the Court reviews under the "clearly erroneous" standard of review. *See Prickett v. Nicholson*, 20 Vet.App. 370, 378 (2006), *aff'd sub nom. Prickett v. Mansfield*, 257 F. App'x 288 (Fed. Cir. 2007). In all its decisions, the Board must provide a statement of reasons or bases that is "adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court." *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *see* 38 U.S.C. § 7104(d)(1); *Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1990). Where the Board fails to do so, remand is warranted. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998).

3. Board Decision

In the decision on appeal, the Board noted that, while the appellant's appeal of the initial disability rating for his left knee condition was pending, the RO severed service connection for that disability. R. at 11. The Board acknowledged that the appellant had filed an NOD with the severance decision but found that he had not perfected an appeal of that matter after VA issued the November 2018 SOC. *Id.* Accordingly, relying on § 3.400(*o*)(1), which provides, in relevant part, that "[a] retroactive increase or additional benefit will not be awarded after basic entitlement has

[2] In his supplemental brief, the Secretary asserts that fair process applies "only in very limited circumstances," Secretary's Supp. Br. at 8, including when "'evidence [is] developed or obtained by [the Board] subsequent to the issuance of the most recent [SOC] or [SSOC] with respect to such claim,'" *id.* (quoting *Sprinkle v. Shinseki*, 733 F.3d 1180, 1185-87 (Fed. Cir. 2013)). But the Secretary also acknowledges that VA must "provide[] claimants fair process in the adjudication of their claims." *Id.* (citing *Smith*, 32 Vet.App. at 337). To the extent that the Secretary's citation to *Sprinkle* implies an argument that fair process does not apply in this case, such argument is undeveloped, and the Court will not address it. *See Locklear v. Nicholson*, 20 Vet.App. 410, 416 (2006) (holding that the Court is unable to find error when arguments are undeveloped).

been terminated, such as by severance of service connection," the Board found that "an increased rating may not be awarded" even for the period of time when service connection was in effect. *Id.* The Board thus concluded that the appeal for a higher rating must be denied as a matter of law. R. at 11-12.

4. Discussion

The parties make competing arguments about the sufficiency of the notice the appellant received with respect to the relationship between his appeal of the assigned disability rating for his left knee disability and the March 2017 decision severing service connection for that condition. *See* Appellant's Supp. Br. at 1-4; Secretary's Supp. Br. at 10-16. They also disagree as to whether VA's actions misled the appellant in any way, including misleading him to believe that the severance decision had no effect on his appeal of the assigned rating. *See* Appellant's Supp. Br. at 4-5; Secretary's Supp. Br. at 18-20.

The Board's discussion of the appellant's left knee disability comprises two paragraphs, in which the Board concluded that "service connection for [the knee] disability was severed," the appellant "did not perfect an appeal" of the severance decision, and his request for a higher knee disability rating was thus barred as a matter of law pursuant to § 3.400(*o*). R. at 11-12. In that discussion, the Board did not consider any issues relating to notice provided in the disability rating claim stream, nor did the Board explain its implicit determination that the March 2017 severance decision became final. *See id.* However, as reflected above, the record raises a number of questions as to whether VA adequately notified the appellant in either claim stream as to the legal ramifications of allowing the severance decision to stand, whether he was adequately notified that he must separately perfect an appeal of that severance decision to avoid foreclosing the possibility of a higher rating, and whether any of VA's actions affirmatively misled him. *See, e.g.*, R. at 1111-22 (August 2017 Board hearing at which the Board member asked about the severity of the knee condition but did not discuss severance or § 3.400(*o*)), 1472 (March 2017 SSOC citing § 3.400(*o*) but adjudicating on the merits whether a higher initial rating was warranted), 2567 (February 2013 Substantive Appeal regarding all issues in a December 2012 SOC that advised the appellant that VA was considering severing service connection); *see also Robinson v. Peake*, 21 Vet.App. 545, 552 (2008) (holding that "the Board is required to consider all issues raised either by the claimant . . . or by the evidence of record"), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009). Because the answers to these questions may, at a minimum, bear on whether

the severance decision is final and no longer appealable and whether the appellant was provided with fair process in the disability rating claim stream, the Board was obligated to address these potential procedural irregularities and possible inadequacies in VA's notice. *See* 38 U.S.C. § 7104(d)(1); *Allday*, 7 Vet.App. at 527; *see also Smith*, 32 Vet.App. at 337. Accordingly, the Court will vacate this part of the Board's decision and remand this matter. *See Tucker*, 11 Vet.App. at 374.

B. Bilateral Heel Disability

1. Parties' Arguments

The appellant contends that the Board's determination that he does not have a current disability related to his heels is erroneous because the July 2019 VA examiner diagnosed plantar fasciitis, a disability of the heels. Appellant's Br. at 10-11. He further argues that "the Board should have recognized that the scope of his claim for service connection for a bilateral heel disability included a claim for compensation for other disabilities relating to his foot," *id.* at 11, but that he is "unable to discern from the Board's decision whether it had addressed his entitlement to service connection for pes planus and plantar fasciitis," *id.* at 12. He asserts that he is harmed by the Board's error because, had the Board considered entitlement to benefits for either pes planus or plantar fasciitis, "it might have determined that the 2019 VA examination was inadequate for adjudication purposes." *Id.* at 13. In that regard, the appellant argues that the July 2019 VA examiner did not address his reports of foot pain during service, and therefore the examiner's opinion is deficient because it did not consider whether the appellant's preexisting asymptomatic pes planus was aggravated by service or whether his plantar fasciitis was caused by service. *Id.* at 13-14. He asks the Court to reverse the Board's finding that he does not have a current bilateral heel disability and vacate the Board's denial of benefits for that disability. *Id.* at 30.

For his part, the Secretary concedes that remand is warranted for that part of the Board's decision that denied entitlement to benefits for a bilateral heel disability because the Board relied on an inadequate examination report to deny the appellant's claim. Secretary's Br. at 9-10. The Secretary agrees with the appellant that the July 2019 VA opinion "failed to address [the a]ppellant's reports of foot pain in service and thereafter" and was therefore based on an inaccurate factual premise. *Id.* Accordingly, the Secretary asks the Court to vacate this part of the Board's decision and remand for the Board to "obtain a new examination regarding the possible relationship to service of [the a]ppellant's pes planus with plantar fasciitis." *Id.* at 10. Although

the Secretary disputes the appellant's remaining arguments relating to a heel disability, in doing so, he concedes that "bilateral pes planus with plantar fasciitis is within the scope of the claim for bilateral heel disabilities." *Id.* at 11.

2. Law and Board Decision

Establishing that a disability is service connected for purposes of entitlement to VA disability compensation generally requires medical or, in certain circumstances, lay evidence of (1) a current disability, (2) incurrence or aggravation of a disease or injury in service, and (3) a nexus between the claimed in-service injury or disease and the current disability. *See* 38 U.S.C. § 1110; *Shedden v. Principi*, 381 F.3d 1163, 1166-67 (Fed. Cir. 2004); *see also Davidson v. Shinseki*, 581 F.3d 1313, 1316 (Fed. Cir. 2009); 38 C.F.R. § 3.303 (2022). Whether the record establishes entitlement to service connection is a finding of fact, which the Court reviews under the "clearly erroneous" standard of review. *See Russo v. Brown*, 9 Vet.App. 46, 50 (1996). A finding of fact is clearly erroneous when the Court, after reviewing the entire evidence, "is left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948); *see Gilbert*, 1 Vet.App. at 52.

The Board found that the appellant did not have "a current diagnosis of a bilateral heel disorder and [did] not ha[ve] one at any time during the pendency of the claim or recent to the filing of the claim." R. at 9. The Board acknowledged that the appellant reported foot pain and that pain alone can be a disability if it results in functional impairment of earning capacity, *id.* (citing *Saunders v. Wilkie*, 886 F.3d 1356 (Fed. Cir. 2018)), but stated that the appellant's heel pain was "shown on examination to be related to pes planus and plantar fasciitis," and "[t]hese disorders have not been related to service." *Id.* The Board relied on the July 2019 VA examination report to reach this conclusion. *See* R. at 9-10.

3. Discussion

Although the Secretary frames his concession solely as an acknowledgement that the July 2019 VA foot conditions examination report is inadequate, the Court concludes instead that he has also conceded that the appellant does have current bilateral heel disabilities. *See* Secretary's Br. at 10 ("The error prejudiced [the a]ppellant because *evidence supporting a connection* between [his] service and *his current p[]es planus with plantar fasciitis* could result in a grant of service connection for bilateral pes planus based on the original claim for service connection for disabilities of the heels." (emphases added)). Accordingly, the Court will reverse the Board's

finding that the appellant does not have a current bilateral heel condition and accept the Secretary's concession that the July 2019 VA examination report is inadequate to determine whether that condition is related to service. *See Gutierrez v. Principi*, 19 Vet.App. 1, 10 (2004) ("[R]eversal is the appropriate remedy when the only permissible view of the evidence is contrary to the Board's decision." (citing *Johnson v. Brown*, 9 Vet.App. 7, 10 (1996))).

C. TDIU

The appellant contends that the Court should remand the matter of entitlement to TDIU because it is inextricably intertwined with the issue of the proper level of compensation for his left knee disability. Appellant's Br. at 21. Alternatively, he argues that the Board erred in concluding that he is capable of substantially gainful employment. *Id.* at 21-29. He also argues that the Board incorrectly applied the higher standard for establishing entitlement to TDIU rather than the lower standard to establish that referral to the Director of Compensation Service is warranted. *Id.* at 27-28. The appellant asks the Court to vacate the Board's decision denying TDIU. *Id.* at 30.

In response, the Secretary argues that the Board's decision to deny TDIU is not clearly erroneous and is supported by adequate reasons or bases. Secretary's Br. at 23-27. He further asserts that any error on the part of the Board in applying the standard for adjudicating entitlement to TDIU instead of the standard for referring the issue to the Director of Compensation Service is harmless. *Id.* at 28-29. The Secretary urges the Court to affirm this part of the Board decision. *Id.* at 30.

In light of the Court's remand of the Board's denial of a higher rating for the appellant's left knee disability and the Secretary's concession that the appellant has current bilateral heel disabilities, the Court concludes that the matter of entitlement to TDIU is inextricably intertwined with the matters being remanded. *See Tyrues v. Shinseki*, 23 Vet.App. 166, 177-78 (2009) (en banc) (finding that the Court has discretion to determine whether claims denied by the Board are so inextricably intertwined with a matter still pending before VA that claims should be remanded to await development or disposition of a claim not yet finally decided), *aff'd*, 631 F.3d 1380 (Fed. Cir. 2011), *vacated*, 565 U.S. 802 (2011), *reinstated as modified*, 26 Vet.App. 31 (2012) (per curiam order), *aff'd*, 732 F.3d 1351 (Fed. Cir. 2013); *see also Smith v. Gober*, 236 F.3d 1370, 1372 (Fed. Cir. 2001) (holding that, where the facts underlying two claims are "intimately connected," the interests of judicial economy and of avoiding piecemeal litigation require the claims to be

appealed together). Accordingly, the Court will also vacate this part of the Board decision and remand this matter.[3]

D. Remand

Given this disposition, the Court will not now address the remaining arguments and issues raised by the appellant with respect to the remanded matters. *See Quirin v. Shinseki*, 22 Vet.App. 390, 395 (2009) (noting 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) (per curiam order). On remand, the appellant is free to submit additional evidence and argument on the remanded matters, including the specific arguments raised here on appeal, and the Board is required to consider any such relevant evidence and argument. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002) (stating that, on remand, the Board must consider additional evidence and argument in assessing entitlement to the benefit sought); *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order). The Court reminds the Board that "[a] remand is meant to entail a critical examination of the justification for the decision," *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991), and the Board must proceed expeditiously, in accordance with 38 U.S.C. § 7112.

III. CONCLUSION

The appeal of that part of the Board's July 21, 2020, decision denying entitlement to benefits for residuals of an injury to the right hand and for a chronic acquired eye disability is DISMISSED. After consideration of the parties' pleadings, a review of the record, and oral argument, the Board's finding that the appellant does not have current bilateral heel disabilities is reversed. That part of the Board's decision denying entitlement to an initial disability rating in excess of 10% for DJD of the left knee from July 21, 2009, to June 1, 2017; to benefits for bilateral heel disabilities; and to TDIU is VACATED, and the matters are REMANDED for further proceedings consistent with this decision.

DATED: August 25, 2022

[3] When the Board reconsiders entitlement to TDIU on remand, the Board should be mindful of the Court's holdings in *Ray* and *Snider* regarding the "reasonable possibility" standard for referring a matter to the Director. *Snider v. McDonough*, 35 Vet.App. 1, 8 (2021); *Ray v. Wilkie*, 31 Vet.App. 58, 66 (2019).

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