

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

RICARTE A. SOLIBEN,

Appellant,

v.

DAVID J. SHULKIN, M.D.,
Secretary of Veterans Affairs,

Appellee.

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Vet.App.No. 14-3240

JOINT MOTION FOR REMAND

Pursuant to Rules 27 and 45(g), the parties, Ricarte A. Soliben, and David J. Shulkin, M.D., Secretary of Veterans Affairs, by and through their attorneys, respectfully move the Court to vacate the May 23, 2014, decision of the Board of Veterans' Appeals (Board) that denied Appellant's claim of entitlement to a rating in excess of 10% for intervertebral disc disorders, status postoperative laminectomy L5-S1 (back disability) prior to November 18, 2011. [Record Before the Agency (R.) at 1-20]. The parties request that the Court remand this appeal for further proceedings consistent with this motion.

BASES FOR REMAND

The parties agree that the Board provided an inadequate statement of reasons or bases because it failed to address whether Appellant demonstrated good cause for his failure to report to his Department of Veterans Affairs (VA) examinations scheduled for October 2007, April 2008, June 2009, and November 2009. See 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995).

This Court reviews Board determinations as to whether good cause has been shown by a claimant under 38 C.F.R. § 3.655 (a) under the “clearly erroneous” standard of review. See *Kowalski v. Nicholson*, 19 Vet.App. 171, 177 (2005).

When a claimant fails to report for a scheduled examination, and there is no good cause shown, the Board can either deny the claim or rate it based on the evidence of record, depending on the type of claim. 38 C.F.R. § 3.655 (a). Examples of good cause include, but are not limited to, the illness or hospitalization of the claimant, death of an immediate family member, etc. *Id.*

The Board found that Appellant’s failure to appear to all four scheduled VA examinations resulted in significant difficulty in VA’s ability to rate his claim. [R. at 12]. See 38 C.F.R. § 3.655 (a). The Board recognized that Appellant worked overseas as a private security contractor during the period on appeal. [R. at 12]. The Board noted that Appellant had a duty to appear to the examinations to assist in developing his claim, and it concluded that his failure to report caused significant difficulty in VA’s ability to rate his claim. *Id.*

The record reflects that Appellant frequently notified VA that he was not residing in the United States. For example, in October 2007, the VA Medical Center (VAMC) contacted the Regional Office (RO) and stated that it had received an examination request. [R. at 766 (October 15, 2007, Email from the VAMC to the RO)]. However, because Appellant was currently working in Afghanistan and would not return until December 2007, the RO requested that the VAMC cancel the examination. [R. at 766 (October 15, 2007, Email from the

VAMC to the RO)]. In an April 2008 VA medical record, the examiner stated that Appellant's wife called to indicate that he was in Iraq as a contractor and would not be able to attend the April 2008 VA examination. [R. at 701 (April 14, 2008, Telephone Note)]. The examiner indicated that Appellant would need to reschedule a VA examination because he was out of the country. *Id.*

Because the Board did not determine whether Appellant had shown good cause for failing to attend the scheduled examinations, it did not provide an adequate statement of reasons or bases for its decision. *Allday*, 7 Vet.App. at 527; *Cf. VA Adjudication Procedures Manual* (M21-1), Part III, Subpart iv, 3.A.1.b. (VA's adjudication process to accommodate foreign resident claimants); see also M21-1, Part III, Subpart iv, 8.8.f (RO is directed to forward a field examination request directly to the involved embassy or consulate).

Upon remand, if the Board determines that good cause was shown for Appellant's failure to report to the VA examinations scheduled for October 2007, April 2008, June 2009, and November 2009, to include consideration of the relevant M21-1 provisions addressing VA's adjudication process to accommodate foreign resident claimants, it should determine whether a retrospective medical opinion is warranted. See *Chotta v. Peake*, 22 Vet.App. 80, 85-87 (2008) (In cases that span a lengthy period, the Secretary must determine whether a retrospective medical opinion "is necessary to make a decision on the claim."); *Swain v. McDonald*, 27 Vet.App. 219, 225 (2015) (The effective date for an increased rating, indeed, as well as for an initial rating or for

staged ratings, is predicated on when the increase in the level of disability can be ascertained.).

Finally, the parties agree that the Board failed to discuss relevant evidence as to whether an increased rating in excess of 10% is warranted prior to November 18, 2011. Indeed, relevant to the period on appeal, in the November 2011 VA examination, the examiner diagnosed Appellant with intervertebral disc syndrome (IVDS) and noted that in the past 12 months, he experienced incapacitating episodes that lasted “at least six weeks.” [R. at 103-04 (97-112) (November 18, 2011, VA examination)]. Under 38 C.F.R. § 4.71a, Diagnostic Code (DC) 5243, a 60% rating is warranted for IVDS with incapacitating episodes over the previous 12 months that lasted “at least six weeks.” *Id.* Because the examiner’s finding regarding Appellant’s IVDS symptoms is relevant to the time period on appeal, i.e., prior to November 18, 2011, upon remand the Board should address whether this relevant evidence warrants an increased rating. See *Van Valkenburg v. Shinseki*, 23 Vet.App. 113, 117 (2009) (remanding where the Board’s “failure to fully discuss the evidence in the file” that was “relevant and material to” an issue “frustrate[d] judicial appellate review”); see also *Velez v. Shinseki*, 23 Vet.App. 199, 206-07 (2009) (remanding where “[n]othing in the Board’s analysis addressed [a] piece of apparently relevant evidence”).

On remand, Appellant is entitled to submit additional evidence and argument. See *Kutscherousky v. West*, 12 Vet.App. 369, 372 (1999) (*per curiam* order). 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. See 38 U.S.C. § 7104(d)(1). The Board also should address the applicability of the benefit-of-the-doubt doctrine set forth at 38 U.S.C. § 5107(b) and 38 C.F.R. § 3.102. The Board is further directed to obtain copies of the Court's order and this motion, and incorporate them into Appellant's record before VA for appropriate consideration in subsequent decisions on this claim. The Court has held that "[a] remand is meant to entail a critical examination of the justification for the decision." *Kahana v. Shinseki*, 24 Vet. App. 428, 437 (2011) (quoting *Fletcher v. Derwinski*, 1 Vet. App. 394, 397 (1991)). Finally, the Secretary "shall take such actions as may be necessary to provide for the expeditious treatment" of this claim. 38 U.S.C. §§ 5109B, 7112.

WHEREFORE, the parties respectfully move the Court to vacate and remand the May 23, 2014, decision of the Board that denied Appellant's claim of entitlement to a rating in excess of 10% for a back disability prior to November 18, 2011. [R. at 1-20]. The parties request that the Court remand this appeal for further proceedings consistent with this motion.

Respectfully submitted,

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Date: June 9, 2017

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