Vet. App. No. 19-0161

IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

THOMAS C. GREEN,
Appellant,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,
Appellee.

ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS

BRIEF OF THE APPELLEE SECRETARY OF VETERANS AFFAIRS

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Appellant,	)	
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v.	)	Vet App. No. 19-0161
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	)	
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ON APPEAL FROM THE BOARD OF VETERANS' APPEALS

BRIEF OF THE APPELLEE SECRETARY OF VETERANS AFFAIRS

I. ISSUE PRESENTED

Whether the Court should affirm the Board of Veterans' Appeals (BVA) September 11, 2018, decision that denied a claim of entitlement to an initial disability rating in excess of 20 percent for service connected degenerative arthritis of the lumbar spine with herniated discs for the period from July 28, 2011, to October 13, 2014, where Appellant has not met his burden to show that it should be reversed, remanded, or otherwise set aside.

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

The Court's jurisdiction in this matter is predicated on 38 U.S.C. § 7252.

B. Factual and Procedural History

Appellant served on active duty from March 1981 until March 1985. (R. at 862). He filed a claim for service connection for a spinal condition on July 28, 2011. (R. at 474-75).

Appellant underwent a VA orthopedic examination in September 2011. (R. at 449-51). Flexion and extension of the dorsal spine was 0 to 60 degrees. (R. at 450). Appellant had lumbar flexion from 0 to 90 degrees. (R. at 451). There was no additional pain, fatigue, weakness, or lack of endurance on repetitive use, or flare-ups with regard to either the dorsal or lumbar spine. (R. at 450-51). Appellant indicated that he had difficulty lifting more than 10 pounds due to back pain. (R. at 451).

A September 27, 2011, rating decision denied service connection for Appellant's back condition. (R. at 443-47). Through his representative, Appellant indicated via letter dated January 2012 that he was submitting new and material evidence in support of his claim. (R. at 427). A rating decision dated July 2012 continued the denial of Appellant's claim. (R. at 360-62). Appellant, through counsel, submitted a notice of disagreement in May 2013. (R. at 344).

May 2012 private physical therapy treatment notes indicate that Appellant's limitation of flexion was "nil." (R. at 384 [381-85]).

Appellant underwent a VA spine examination on October 14, 2014. (R. at 303-11). The examiner indicated that Appellant's degenerative arthritis of the

lumbar spine was as likely as not caused and aggravated by Appellant's service connected right knee condition. (R. at 311). The examiner noted that Appellant had forward flexion to 20 degrees. (R. at 304). Finally, the examiner noted that with repetitive use, there was no further functional loss. (R. at 311).

An October 2014 rating decision granted service connection for a lumbar spine disorder, effective July 28, 2011. (R. at 278-85). Appellant was assigned a disability evaluation of 10 percent effective July 28, 2011, and a 40 percent evaluation effective October 14, 2014. (R. at 278-85).

A Notice of Disagreement was filed in September 2015 regarding the disability rating assigned for the period prior to October 14, 2014. (R. at 223-25). A December 2015 Statement of the Case (SOC) continued the 10 percent disability evaluation for the period prior to October 2014. (R. at 177-199). Appellant submitted a VA Form 9 in February 2016. (R. at 173-76).

The Board issued the decision currently on appeal on September 11, 2018. (R. at 3-14). The Board increased the initial disability rating for the period prior to October 14, 2014, to 20 percent. *Id.* This appeal followed.

III. SUMMARY OF ARGUMENT

The Board's September 11, 2018, decision that denied Appellant's claim for entitlement to an initial disability rating in excess of 20 percent for Appellant's service connected lumbar spine disability for the period from July 28, 2011 to October 13, 2014, should be affirmed, as the Appellant has not carried his burden to show that it should be reversed, remanded, or otherwise set aside. *See Hilkert*

v. West, 12 Vet.App. 145, 151 (1999) (*en banc*) (Appellant bears the burden of demonstrating error). Appellant's assignments of error are without merit, or at the very least, the alleged errors are not prejudicial. *See* 38 U.S.C. § 7261(b)(2).

The duty to assist was satisfied in this case, as the evidence of record clearly indicates that Appellant's disability merited a 20 percent rating for the period from July 28, 2011 through October 13, 2014. The Board did not err in declining to order a new medical examination and/ or retrospective medical opinion. Such a duty was not triggered given the existence of medical evidence that was adequate to rate the disability for the period of time in question. *Chotta v. Peake*, 22 Vet.App. 80 (2008).

The September 2011 VA medical examination provided to Appellant complied with 38 C.F.R. § 4.59, and the Board considered the examiner's notations concerning Appellant's difficulties with lifting (weight bearing) in analyzing Appellant's functional loss. At minimum, any alleged error is not prejudicial, as a new examination would not have resulted in any benefit flowing to the veteran. 38 U.S.C. § 7261(b)(2) (the Court must take account of the rule of prejudicial error).

The Board provided a statement of reasons or bases that was adequate to apprise the claimant of the basis for its decision and therefore complied with 38 U.S.C. § 7104(d)(1). See *Allday v. Brown*, 7 Vet. App. 517, 527 (1995). All relevant evidence for the time period at issue was considered.

The Board's decision denying Appellant's claim had a plausible basis in the record and was not clearly erroneous. The Appellant has not carried his burden to

show that any error was committed, and thus the decision should be affirmed. *See* 38 U.S.C. § 7261 (a)(4); *Kowalski v. Nicholson*, 19 Vet. App. 171, 179 (2005).

IV. ARGUMENT

A. The Board's decision had a plausible basis in the record and was not clearly erroneous; Appellant has not carried his burden to demonstrate otherwise, and therefore the decision should be affirmed.

The assignment of a disability rating is a factual finding that the Court reviews under the "clearly erroneous" standard of review. *Johnston v. Brown*, 10 Vet.App. 80, 84 (1997). In this regard, section 7261(a)(4) directs the Court to reverse or set aside any finding of material fact adverse to the claimant . . . if the finding is clearly erroneous. 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. Of course, if the Board's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it. *Canady v. Nicholson,* 20 Vet.App. 353 (2006).

Appellant seeks an increased disability rating for his service connected degenerative arthritis of the lumbar spine, for which he currently has a 20 percent rating pursuant to 38 C.F.R. § 4.71A (Diagnostic Code [DC] 5235-43).

The next highest disability rating available under DC is 40 percent, which requires "forward flexion of the thoracolumbar spine 30 degrees or less or favorable ankylosis of the entire thoracolumbar spine." 38 C.F.R. § 4.71A (DC 5235-43).

There is no evidence of record that reflects that Appellant meets the criteria necessary for a 40 percent disability rating for the period between July 28, 2011, and October 13, 2014. As the Board noted, the September 2011 VA examination indicated that Appellant had dorsal flexion up to 60 degrees and lumbar flexion up to 90 degrees. (R. at 303-11). Private physical therapy notes dated May 2012 indicate "nil" loss of motion with forward flexion in the lumbar spine; the examiner did not even check that there was "minimal" or "moderate" loss of range of motion. (R. at 384). In short, there is no evidence of record for the period in question that indicates that Appellant's back disability met the criteria for a 40 percent rating.

The Board further considered Appellant's functional loss, including the relevant regulations and case law, as well as the evidence documenting the degree of Appellant's functional loss. (R. at 8-9, 11). The Board noted the September 2011 VA examiner's findings that found no additional pain, fatigue, weakness, or lack of endurance upon repetitive use, or spasms, weakness, or tenderness. The Board further noted that Appellant had denied flare-ups. (R. at 11).

The Board did consider Appellant's reports of problems with prolonged sitting, standing, walking, and perhaps, most notably, "lifting," which involves weight bearing. (R. at 11). Even considering this evidence, the Board made the plausible factual finding that the Appellant's functional loss was not more nearly approximately by a 40 percent evaluation. (R. at 11).

The Board's finding that Appellant is not entitled to a disability rating in excess of 20 percent for the period of time prior to October 14, 2014, is plausible

and supported by the evidence. There is no other evidence relevant to that time period that suggests a different result.

As will be discussed in further detail below, although Appellant makes several assignments of error, they are without merit and he has failed to carry his burden to show that any error was committed, or at least any error that is prejudicial. As such, the Board's decision should be affirmed. *See* 38 U.S.C. § 7261(a)(4); *Kowalski v. Nicholson*, 19 Vet. App. 171, 179 (2005).

B. The Board did not err in finding that the duty to assist had been satisfied, or at the very least, any such error was not prejudicial.

Appellant first assigns error with the Board's decision in arguing that the Board failed to ensure compliance with the duty to assist, specifically with regard to providing him with an adequate VA examination. (Appellant's Brief [AB] at 3-7). However, Appellant's contention is without merit.

Pursuant to 38 U.S.C. § 5103A(a)(1), VA shall make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate the claimant's claim. Such assistance shall include providing a medical examination or obtaining a medical opinion when it is necessary to make a decision on the claim. 38 U.S.C. § 5103A(d)(1).

Pursuant to 38 C.F.R. § 4.59, "painful motion is an important factor of disability. . . t[]he intent of the [rating] schedule is to recognize painful motion with joint or periarticular pathology as productive of disability. . .[t]he joints involved

should be tested for pain on both active and passive motion, in weight-bearing and non-weight bearing."

Appellant asserts error with the Board's finding that the 2011 VA examination satisfied the duty to assist, because it did not comply with 38 C.F.R. § 4.59 and include range of motion testing in weight bearing and non-weightbearing. (AB at 4). Appellant points to this Court's decision in *Correia v. McDonald,* 28 Vet.App. 158 (2016), in support of his argument. *Id.*

The Secretary notes that at the time of the 2011 examination, the agency did not have the benefit of the Court's 2016 decision in *Correia*. Despite that, the examiner still noted that Appellant reported problems with "lifting," (R. at 451) due to his back pain. Lifting an object involves bearing weight, and the Secretary submits that the 2011 VA examination therefore complied with the requirements of 38 C.F.R. § 4.59 and *Correia*.

As the Court in *Correia* noted, "38 C.F.R. § 4.59 is generally referred to in concert with §§ 4.40 and 4.45, which concern functional loss in the musculoskeletal system." *Correia*, 28 Vet.App. at 169. The Board specifically considered Appellant's complaints including problems with lifting, in considering Appellant's functional loss, and determined that even considering such evidence, Appellant's disability did not more nearly approximate the criteria for a 40 percent rating. (R. at 11).

Even assuming *arguendo* that the VA examination did not comply with 38 C.F.R. § 4.59, the Board noted that it would be impossible now to obtain

retrospective range of motion measurements in both weight bearing and non-weight bearing. (R. at 5).[1] As such, remand is not warranted, because a remand would not result in any additional benefit flowing to the Appellant. *See, e.g.*, 38 U.S.C. § 7261(b)(2) (the Court shall take due account of the role of prejudicial error); *see Winters v. West,* 12 Vet.App. 203, 207 (1999) (en banc) (noting that "a remand is not required in those situations where doing so would result in the imposition of unnecessary burdens on the BVA without the possibility of any benefits flowing to the appellant"), *rev'd sub nom. on other grounds, Winters v. Gober,* 219 F.3d 1375 (Fed. Cir. 2000); *Soyini v. Derwinski,* 1 Vet.App. 540, 546 (1991).

Though Appellant argues that the Board erred when it stated that "'retroactive range of motion testing cannot be performed,' rests upon no medical evidence of record," (AB at 5), the Secretary submits that medical evidence is not needed for the Board to render this conclusion. Apart from travelling back in time, obtaining retroactive range of motion measurements would be impossible. One

[1] Though the Appellant alleges that the Board's statement concerning retroactive motion testing and compliance with *Correia* and 38 C.F.R. § 4.59 is "perplexing," (AB at 5), the Secretary disagrees. The Board's statement clearly cites to *Correia* and references the "required range of motion findings" contemplated by that case, which include weight bearing and non-weight bearing. (R. at 5), *see Correia*, 28 Vet.App. at 163-171. Appellant has not asserted any 38 C.F.R. § 4.59 deficiency in the 2011 examination report other than lack of range of motion measurements in weightbearing versus non-weight bearing. (AB at 4). It is his burden to assign and demonstrate error, not the Board's. *Hilkert*, 12 Vet.App. at 151.

need not have specialized education, training, or experience to make this observation. 38 C.F.R. § 3.159(a)(2).

In summation, the 2011 VA examination provided to Appellant was adequate for rating purposes, specifically noting that Appellant experienced problems with weight bearing (lifting). The Board considered this evidence in its discussion of functional loss, which is the point of obtaining such measurements, as noted by the Court in *Correia*. *Correia*, 28 Vet.App. at 169. However, even specifically considering that evidence, the Board still found that the Appellant was not entitled to a disability rating in excess of 40 percent. (R. at 11). Finally, even assuming *arguendo* that the examination was deficient, a remand on this basis would result in no additional benefit flowing to the Appellant, as retrospective of motion testing is physically impossible. The alleged error is not prejudicial.

The Board's decision was not clearly erroneous and should be affirmed.

C. The Board provided a statement of reasons or bases for its decision that was adequate to apprise the claimant of the basis for its decision and complied with 38 U.S.C. § 7104(d)(1), and Appellant has not met his burden to show otherwise.

Appellant argues that the Board erred in providing inadequate reasons and bases for its determination that he is not entitled to an increased rating for his service connected back disability. (AB at 8-10). Appellant's arguments are without merit.

Congress has required that each decision of the Board shall include a written statement of the Board's findings and conclusions, and the reasons or bases for

those findings and conclusions, on all material issues of fact and law presented on the record. 38 U.S.C. § 7104(d)(1).

In making its statement of findings, the Board must identify those findings it deems crucial to its decision and account for the evidence which it finds to be persuasive or unpersuasive. In providing its reasons or bases, the Board must include in its decisions the precise basis for that decision, and the Board's response to the various arguments advanced by the claimant. This must include an analysis of the credibility or probative value of the evidence submitted by and on behalf of the veteran in support of his or her claim and a statement of the reasons or bases for the implicit rejection of this evidence by the Board. *Moore v. Derwinski*, 1 Vet. App. 401, 404 (1991) (internal citations omitted).

The purpose behind the requirement that the Board provide an adequate statement of reasons or bases for its decision is 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. at 527.

Appellant initially argues that the Board erred in not discussing evidence favorable to his claim; however, the evidence Appellant cites is the October 14, 2014, VA medical examination, which was the basis of the 40 percent rating assigned as of that same date. (AB at 8-10). Such evidence is not relevant to the period of time that is the subject of this appeal.[2]

[2] Appellant argues that the Board considered the October 2014 VA examination in determining that separate ratings for neurological manifestations were not

It is well settled that, where evidence indicates distinct time periods where symptoms of a service-connected disability would warrant different disability ratings, the veteran may be assigned staged ratings. *Hart v. Mansfield*, 21 Vet.App. 505, 510 (2007); *Fenderson v. West*, 12 Vet.App. 119, 126 (1999). In evaluating claims for an increased disability rating, the current level of disability is the primary concern. *Francisco v. Brown*, 7 Vet.App. 55, 58 (1994). As such, evidence that does not address the level of disability for the period in question is not relevant.

In this case, the October 14, 2014, VA examination was appropriately considered as evidence that assessed the level of severity of Appellant's disability as of that date. It is not relevant to assess Appellant's disability picture prior to that date. The Board did not err in declining to consider it in assessing the level of disability for the period of time prior to October 14, 2014.

Appellant next argues that the Board erred in not providing him with a retrospective medical opinion to pinpoint exactly when his symptoms satisfied the criteria necessary to obtain a 40 percent rating, boldly surmising without any supporting evidence, that they must have increased at some point prior to October

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warranted, and therefore should consider the examination for purposes of assigning a disability rating for the period at issue. (AB at 8). However, the Board considered the 2014 examination for purposes of determining whether neurological manifestations existed, not to assess the current level of severity of the disability. Moreover, even assuming *arguendo* that the Board should not have relied on the examination for this purpose, that does not mean that the Board is now required to improperly consider it for purposes of assigning a disability rating for a period of time to which it does not relate.

14, 2014. (AB at 9). Despite Appellant's contentions, the duty to provide a retrospective opinion has not been triggered in this case.

In *Chotta v. Peake*, 22 Vet.App. 80, 85 (2008) (emphasis added), this Court held that "if a disability rating *cannot be awarded based on the available evidence*, the Board must determine if a medical opinion is necessary to make a decision on the claim. To determine if a medical opinion or examination is necessary, *the Board must consider whether there is competent medical or lay testimony that indicates that a higher disability rating may be appropriate*, even though it was insufficient to grant such a rating [without more]. . . this may include obtaining a retrospective medical opinion." In *Chotta*, the Court noted that a retrospective medical opinion could be helpful in that case, because there was an absence of medical records during the time period in question. The Court further noted that the duty to provide such an examination is "not automatic." *Id.* (internal citations omitted).

In this case, a retrospective medical opinion is not warranted, and the Board did not err in not ordering one. Even assuming *arguendo* that a VA medical examiner could opine without resort to speculation, as to whether and upon what exact date prior to the October 14, 2014, VA examination that Appellant's range of motion reached the point of warranting a 40 percent rating, such an opinion is unnecessary. Unlike in *Chotta*, there is no evidence of record during the time period in question that "indicates that a higher disability rating may be appropriate." *Chotta*, 28 Vet.App. at 85. In fact, there is evidence of record that indicates that the disability rating assigned is the appropriate one; there is no indication that a

disability rating "could not be awarded based on the available evidence" of record for that time period, or that there is an absence of medical records for that time period, as there was in *Chotta. Id.*

The period of time in question is July 28, 2011 through October 13, 2014. Evidence of record for that time period includes the September 2011 VA examination, which indicated that Appellant's flexion was at worst, to 60 degrees. (R. at 450). Moreover, as Appellant and the Board pointed out, May 2012 physical therapy notes indicate that Appellant's loss of flexion was "nil"-- not even rising to the level of "minimal." (R. at 384, AB at 9). In short, the evidence of record for the time period at issue is sufficient to decide the claim, and none of it indicates that Appellant's disability had increased beyond the level of a 20 percent rating for that period of time.

The Board is under no duty to engage in a fishing expedition and order an examination under these circumstances. *See Chotta*, 28 Vet.App. at 85 ("[T]he duty to provide a medical examination is not automatic. Rather, it applies only once the evidence has met the minimal threshold of indicating the existence of a medical question. It does not require a "'fishing expedition'' to substantiate a completely unsupported claim.").

In summation, the Board's decision had a plausible basis in the record and Appellant has failed to meet his burden to demonstrate any basis meriting a finding of error that requires reversal or remand. *Hilkert*, 12 Vet.App. at 151.

V. CONCLUSION

WHEREFORE, for the foregoing reasons, the Secretary respectfully requests that the Board's September 11, 2018, decision should be affirmed.

Respectfully submitted,

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