

Vet. App. No. 19-1209

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

JAMES D. SMITH,
Appellant,

v.

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

ON APPEAL FROM THE BOARD OF VETERANS' APPEALS

BRIEF OF APPELLEE

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Secretary of Veterans Affairs,)	
)	
Appellee.)	

**ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS**

**BRIEF OF THE APPELLEE
SECRETARY OF VETERANS AFFAIRS**

ISSUES PRESENTED

Whether the Board of Veterans' Appeal (Board) provided an adequate statement of reasons or bases to support its finding that the medical and lay evidence of record after the September 2014 Department of Veteran Affairs (VA) medical examination was sufficient to fully inform the Board on the medical questions in the record, so that its decision, despite the inadequacies in the September 2014 VA examination, would be a fully informed one.

STATEMENT OF THE CASE

I. Jurisdictional Statement

This Court has jurisdiction under 38 U.S.C. § 7252(a), which grants the United States Court of Appeals for Veterans Claims (the Court) exclusive jurisdiction to review Board decisions.

II. Nature of the Case

Appellant, James D. Smith, appeals the Board's decision denying a rating in excess of 20% for a low back disability. [Record Before the Agency (R.) at 1-15].

The Board's decision also granted an increase in Appellant's rating for a low back disability to 20% prior to October 21, 2014, which is a favorable finding of fact that cannot be disturbed by the Court. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007).

III. Statement of Facts

Appellant served in the United States Army from February 1970 to March 1973, with additional National Guard and Reserve service. [R. at 727]; [R. at 830-32]; [R. at 823]. In April 2014, Appellant filed a claim for service connection for a lumbar spine condition, among other claims. [R. at 1019-20].

In September 2014, VA afforded Appellant an examination for his lumbar spine disability. [R. at 475-97]. In October 2014, the VA Regional Office (RO) granted service connection for "S/P compression fracture of the lumbar spine (claimed as lumbar spine condition)" and assigned a 10% rating effective April 15, 2014. [R. at 459-66]; [R. at 443-55].

In November 2014, Appellant filed a Notice of Disagreement (NOD) with this decision. [R. at 421-22]. Appellant indicated he disagreed with the rating assigned for his lumbar spine disability. *Id.* He also submitted additional medical evidence from an evaluation of his back disability from a private treatment provider. [R. at 423-28]. Appellant indicated that his condition was worse than documented by the VA examination and included the private treatment records as documentation in support of his argument. [R. at 422]; [R. at 423-28].

In May 2016, the RO issued a Statement of the Case (SOC) and an additional Rating Decision that granted an increase in Appellant's rating for his lumbar spine disability to 20% effective October 21, 2014. [R. at 99-101]; [R. at 150-52]; [R. at 122-49]. Appellant filed a VA Form 9 in June 2016. [R. at 120]. Appellant stated that "I believe the VA examiner assessment of my range of motion is not the norm for me, instead my daily range of motion is more in line with the evidence submitted from Dr. Danny Bartel." *Id.*

In October 2018, the Board issued a decision that granted Appellant a 20% rating for his low back disability prior to October 21, 2014, but denied a rating in excess of 20% throughout the appeal period. [R. at 1-15]. This appeal follows.

SUMMARY OF THE ARGUMENT

The Board noted that the September 2014 VA examination was not adequate to fully describe Appellant's low back disability but also provided an adequate statement of reasons or bases to explain why the other evidence of record was sufficient to permit the Board to render a fully informed decision. The

Board's decision, thus, addressed all the reasonably raised arguments in the record relating to Appellant's claim and provided an adequate statement of reasons or bases to support its findings. Appellant has not met the burden of demonstrating clear error with the Board's findings on these issues and the Board's decision must, thus, be affirmed.

ARGUMENT

I. Standard of Review

The Court reviews the Board's determinations with respect to findings of fact under the "clearly erroneous standard." *Gilbert v. Derwinski*, 1 Vet.App. 49, 53 (1990). The Board's assignment of credibility and weight to particular evidence is a finding of fact that this Court reviews under the clearly erroneous standard. *Id.* at 52; *Wood v. Derwinski*, 1 Vet.App. 190, 193 (1991). The Board's evaluation of the probative value of medical evidence is also subject to the "clearly erroneous" standard of review. *See Parrish v. Shinseki*, 24 Vet.App. 391, 399 (2011).

The Court determines whether a Board's decision on a factual issue is "clearly erroneous" in light of the record as a whole. *Hyatt v. Nicholson*, 21 Vet.App. 390, 395 (2007). Under the "clearly erroneous" standard of review, "the court is not permitted to substitute its judgment for that of the [Board] . . . if there is a 'plausible basis' in the record for the factual determinations of the [Board], even if this Court might not have reached the same factual determinations," the Court cannot overturn the Board's findings. *Gilbert*, 1 Vet.App. at 52-53; *Hyatt*, 21 Vet.App. at

395 (Only if, “the Court is left with a definite and firm conviction that the Board erred in its findings,” may the Court overturn the Board’s decision as clearly erroneous).

II. The Board provided an adequate statement of reasons or bases for its determination that the medical evidence of record was sufficient so that its decision would be a fully informed one because it acknowledged the inadequacies of the September 2014 VA examination and explained why the additional private evaluation and Appellant’s lay statement allowed it to render a fully informed decision.

The Board noted that there were aspects of the September 2014 VA examination that were inadequate to fully describe Appellant’s lumbar spine disability. But the Board found that it could still render a fully informed decision on the average impairment caused by Appellant’s lumbar spine disability because he submitted additional medical evidence documenting that impairment. Appellant has not shown that this finding by the Board is clearly erroneous. The Board must provide a written statement of reasons or bases for any of its “findings and conclusions on all material issues of facts and law presented” in the case. *Allday v. Brown*, 7 Vet.App. 517, 527 (1995). The Board’s reasons or bases for its determinations must identify what evidence “it finds persuasive or unpersuasive, analyze the credibility and probative value of all material evidence submitted by and on behalf of the claimant.” *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995). The Board, as the finder of fact, has wide latitude and discretion in its evaluation of the evidence, and its assignment of probative weight, credibility determinations, and interpretations are subject to review under the clearly erroneous standard. 38 U.S.C. § 7261(a)(4). “Where there are two permissible views of the evidence, the

factfinder's choice between them cannot be clearly erroneous." See *Anderson v. City of Bessemer*, 470 U.S. 564, 574 (1985).

Further, the Court, in reviewing the Board's weighing of the evidence, may not weigh the evidence itself. *DeLoach v. Shinseki*, 604 F.3d 1370, 1380 (Fed. Cir. 2013). And Appellant must demonstrate that the Board's weighing of this evidence was clearly erroneous in light of the record as a whole and demonstrate that any error identified was harmful. *Overton v. Nicholson*, 20 Vet.App. 427, 435 (2006); see also *Waters v. Shinseki*, 601 F.3d 1274, 1277-78 (Fed. Cir. 2010). Here, the Board acknowledged the issues in the September 2014 VA examination, but it explained why the subsequent statements and additional medical evidence submitted by Appellant remedied these issues and permitted a fully informed decision by the Board. The Board did not clearly err in its analysis and weighing of the evidence in this case and its decision should be affirmed.

The Board noted that there were inadequacies with the VA examination in its description of Appellant's disability during flare-ups as well as a lack of adequate documentation of his disability in active and passive motion as well as weight-bearing and non-weight bearing positions. R. at 11-13. But the purposes of the examiner's responses to these questions is not simply to satisfy this Court's characterizations of an adequate examination but, rather, to provide the Board with sufficient detail so that its decision is a fully informed one. See *Monzingo v. Shinseki*, 26 Vet.App. 97, 105 (2012) ("There is no requirement that a medical examiner comment on every favorable piece of evidence in a claims file.");

Acevedo v. Shinseki, 25 Vet.App. 286, 293 (2012) (noting that an examination is adequate if it “rests on correct facts and reasoned medical judgment so as [to] inform the Board on a medical question and facilitate the Board’s consideration and weighing of the report against any contrary reports.” *Acevedo v. Shinseki*, 25 Vet.App. 286, 293 (2012); *Barr v. Nicholson*, 21 Vet.App. 303, 311 (2007) (holding that an examination is adequate if “it is based upon consideration of the Veteran’s prior medical history and examinations and also describes the disability in sufficient detail so that the Board’s ‘evaluation of the claimed disability will be a fully informed one.’”). Further, the rating criteria for musculoskeletal disabilities, while accounting for, and possibly assigning a higher disability evaluation based on, factors such as pain, fatigability, incoordination or painful motion, still compensates a claimant based only on the average impairment caused by his disability. See 38 C.F.R. §§ 4.45, 4.59; see also 38 C.F.R. § 3.321(a) (“The provisions contained in the rating schedule will represent as far as can practicably be determined, the average impairment in earning capacity in civil occupations resulting from disability.”). For lumbar spine disabilities the Secretary has chosen to use range of motion as the best approximation for this average impairment to earning capacity. 38 C.F.R. § 4.71a. As the Board acknowledged, the September 2014 VA examination report lacks certain indications that it fully described Appellant’s disability. [R. at 11-13] (citing to *DeLuca v. Brown*, 8 Vet.App. 202 (1995) and *Correia v. McDonald*, 28 Vet.App. 158 (2016)). But the Board noted that other medical evidence in the record, supplemented by Appellant’s statements, provided the necessary

information that the Board required to have a full understanding of the average impairment caused by Appellant's lumbar spine disability. *Id.*

The Board provided an adequate statement of reasons or bases to support its finding that Appellant's lay evidence and his private treatment records were adequate to supplement the information not addressed in VA examination. The Board noted specifically what information was not reported in the September 2014 VA examination. [R. at 11-13]; *see also* [R. at 475-87]. But the information missing, such as whether pain causes additional functional loss, is information that could be supplemented by other medical or lay evidence. *Sharp v. Shulkin*, 29 Vet.App. 26, 34-35 (2017) (noting that lay evidence related to flare-ups of the veteran's shoulder, elbow/forearm, and hand disabilities was competent and could be considered by an examiner when the examination itself was not conducted during a flare-up); *see also Petitti v. McDonald*, 27 Vet.App. 415, 429-30 (2015) (holding that credible lay evidence could be objective evidence of functional loss due to pain, including during flare-ups). Thus, when Appellant submitted additional medical evidence of a greater reduction in range of motion and made multiple statements about this examination documenting his impairment caused by his lumbar spine disability most of the time, the Board did not clearly err in accepting this evidence as competent and credible. *See* [R. at 423-28] (documenting Appellant's range of motion in his lumbar spine as flexion 50 degrees, extension 10 degrees, lateral rotation 0 degrees); [R. at 422] (requesting the RO review the October 2014 private medical evaluation for evidence that his back disability was

worse than documented in the VA examination); [R. at 120] (“I believe the VA examiner assessment of my range of motion is not the norm for me, instead my daily range of motion is more in line with the evidence submitted from Dr. Danny Bartel. Therefore, based on that I am seeking a least a 20% evaluation for this condition.”); [R. at 13] (“the Board finds that the evidence of record is sufficient, especially in light of the fact that . . . the Veteran acknowledges that his functional impairment more closely approximates a 20% rating for the entire appeal period.”). Appellant has not demonstrated that the Board clearly erred in accepting his statements, and the medical evidence he offered in support of these statements, as sufficient to evaluate his appeal, so the Court should affirm the Board’s decision.

Appellant argues that because neither the VA examination administered in September 2014, nor the private evaluation administered in October 2014, individually contains sufficient information to satisfy the requirements articulated in *DeLuca v. Brown*, 8 Vet.App 202 (1995); *Mitchell v. Shinseki*, 25 Vet.App. 32 (2011); *Correia v. McDonald*, 28 Vet.App. 158 (2016); *Jones v. Shinseki*, 23 Vet.App. 382 (2010); and *Sharp v. Shulkin*, 29 Vet.App. 26 (2017), it is not possible, as the Board found, for the cumulative medical and lay evidence to be sufficient for the Board’s decision to be a fully informed one. But, as noted above, these decisions and the information that they require in VA examination are one set of tools to evaluate whether the Board had sufficient information to assign an appropriate disability evaluation that reflects the average impairment caused by any particular disability. See *Acevedo*, 25 Vet.App. at 293; see also 38 C.F.R.

§ 3.321(a). As the Board explained, the record here provided such information when Appellant repeatedly acknowledged that the October 2014 private evaluation was an accurate representation of the severity of his lumbar spine condition most of the time, while the September 2014 VA examination was not. [R. at 422]; [R. at 120]. When the record, by Appellant's own acknowledgment, contains medical evidence that reflects the limitations caused by his disability most of the time, the record, thus, contains sufficient information for the Board to evaluate his average earning impairment caused by that disability. See *Acevedo*, 25 Vet.App. at 293; see also 38 C.F.R. § 3.321(a).

Further, Appellant argues that the Board erred by considering the September 2014 and October 2014 medical reports because it considered other evidence of record that noted that Appellant obtained relief from medication. Appellant's Br. at 16-18. But the Court in *Jones v. Shinseki*, did not find that the medical examinations were inadequate or inaccurate, rather, the Court's holding is limited to what factors the Board can consider in its reasons or bases when denying a higher rating. *Jones*, 26 Vet.App. 56, 63 (2012). Further, Appellant points to evidence that post-dates these examinations to indicate that his current pain management regime was not effective and that as a result in 2015, after both medical evaluations were generated, his medication was increased to more powerful opioid pain medication. [R. at 354-56 (340-97)]. In addition, the private treatment records from April 2014 note that while Appellant initially obtained relief from an injection, the effect wore off quickly and caused him to return for further

treatment and evaluation. [R. at 969]. Appellant pointed to no evidence that he received any recent injection that provides relief prior to either the September 2014 VA examination or the October 2014 private evaluation. Appellant's Br. at 16-18. Thus, these examinations are highly unlikely to represent Appellant's disability ameliorated by medication as there was no evidence that he experienced ameliorative effects at that time. And thus, the Board use of them is less likely than other evidence of record to result in inadvertently consideration of the effects of medication on Appellant's disability. The Board, thus, considered the competent and credible evidence of record, and provided an adequate statement of reasons or bases to explain why there was sufficient evidence to render a fully informed decision. And Appellant has not shown that these findings were clearly erroneous, so the Board's decision should be affirmed.

CONCLUSION

For the foregoing reasons, the Court should affirm the Board's decision.

Respectfully submitted,

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