

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

Vet. App. No. 19-3498

ROBERT J. MANNICES,

Appellant

v.

ROBERT L. WILKIE,

SECRETARY OF VETERANS AFFAIRS

Appellee.

APPELLANT'S BRIEF

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I. STATEMENT OF THE ISSUES

- A. Whether the Board of Veterans' Appeals commits remandable error when it fails to provide an adequate statement of reasons and bases for its decision to require Appellant to rebut the presumption of regularity as a threshold burden to challenge the adequacy of an examination.**
- B. Whether the Board of Veterans' Appeals commits remandable error when it fails to provide an adequate statement of reasons and bases for its decision to discount favorable evidence which it found was not "objective" and instead relied upon an inadequate examination.**
- C. Whether the Board of Veterans' Appeals commits remandable error when it fails to provide an adequate statement of reasons and bases for its decision to rely upon the inadequate May 2016 medical exam.**

II. STATEMENT OF THE CASE

A. Jurisdiction

Appellant Robert J. Mannices (Appellant) invokes this Court's appellate jurisdiction granted through 38 U.S.C. § 7252 (2019).

B. Nature of the Case / Result Below

Appellant appeals the Board's January 25, 2019 decision denying increased ratings for his lumbar spine and bilateral pes planus. [R 5-18 (January 2019 BVA Decision)]

C. Relevant Facts

Appellant is a U.S. Navy veteran, with honorable service from October 1994 to October 2007, and he was awarded, inter alia, the Good Conduct Medal (x3). [R 517 (DD-214)]. Appellant's claims are on appeal from a May 2016 rating decision. [R 149-57 (May 2016 Rating Decision)]

III. ARGUMENTS & AUTHORITIES

A. Bilateral Pes Planus and Posterior Calcaneal Spurs

1. **The Board failed to provide an adequate statement of reasons and bases for its decision to require Appellant to rebut the presumption of regularity as a threshold burden to challenge the adequacy of an examination.**

In its preface to deciding both claims the Board acknowledged Appellant has challenged the adequacy of relied-on May 2016 medical exams to rate the disabilities. The Board conceded Appellant has argued the relied-on examiners failed to consider adequately the *DeLuca* factors (e.g. fatigue, pain, and weakness caused by repetitive use, or use over a period of time, as well as flare-ups of the disabilities) in their reporting the ranges of motion of the lumbar spine and bilateral feet disabilities. *See DeLuca v. Brown*, 8 Vet. App. 202 (1995); 38 C.F.R. §§ 4.40, 4.45 (2019). [R 7 (5-18) (decision); 114-20 (November 2016 NOD)]

In considering appellant's challenges to the exams; and, despite the fact appellant has not challenged the competency of the examiners to conduct the exams and/or author the relied-on exam reports, but instead has challenged the incompleteness of the exams, the Board erroneously found the relied-on May 2016 exams were presumed adequate because appellant had failed to present "clear evidence . . . to rebut the [exams'] presumption of regularity". [*Id.*]

As its legal basis for its erroneous finding, the Board misunderstood and then misapplied *Rizzo v. Shinseki*, 580 F.3d 1288, 1292 (Fed. Cir. 2008). The Board's blanket finding that the exams were adequate, as appellant had not

rebutted their presumption of regularity, is clearly erroneous. It is an inadequate statement of reasons and bases. It denies the Court and appellant an opportunity for meaningful judicial review. See 38 U.S.C. § 7104(d) (2019).

The Board's clearly erroneous finding also imposed on appellant a burden which is contrary to law. As appellant need not present "clear evidence . . . to rebut the presumption of regularity" in order to show the relied-on exams are incomplete/inadequate, the Board's requiring him to do so (as a threshold burden for it to consider the adopted, relied-on exams' inadequacies) is a denial of basic procedural and substantive Due Process. See *Cushman v. Shinseki*, 576 F.3d 1290 (2009); *Gilbert v. Derwinski*, 1 Vet. App. 49, 55 (1991) (burden of proof fixed by statute); 38 U.S.C. § 5107 (2019). Furthermore, such a "presumption of regularity" has recently been held to be inapposite to the VA's duty to assist veterans. See *Francway v. Wilkie*, -- F.3d ----, 2019 WL 5151736 (Fed. Cir. 2019) (holding that VA's requirement that veteran raise the issue of competency of a medical examiner is best referred to as a requirement, and not a 'presumption of competency' of the examiner). Therefore, the Board remandably erred in requiring appellant to rebut the presumption of regularity as a threshold burden for him to challenge the incompleteness/inadequacy of the relied-on May 2016 medical exams.

- 2. The Board failed to provide an adequate statement of reasons and bases for its decision to discount favorable evidence which it found was not "objective" and instead relied upon an inadequate examination.**

The relied-on May 2016 examiner, after diagnosing bilateral flat feet and posterior calcaneal spurs (accompanied by bilateral degenerative changes), reported appellant suffers from flare-ups of his bilateral foot disability, which “impact the function of [his feet]”. [R 207 (201-07) (May 2016 foot conditions exam)]

The examiner further reported appellant explained “the pain is a lot worst and more noticeable” during a flare-up. [R 202 (201-07) (May 2016 foot conditions exam)]

The examiner reported Appellant’s right foot as “stable and mild” at the time of the exam, but also marked that Appellant suffered from additional functional loss after prolonged walking. The examiner also reported, though appellant’s progressively worsening left foot was “stable and moderate” at the time of the exam, it suffered from additional “pain, weakness, fatigability, or incoordination that significantly limits functional ability during flare-ups or when the foot is used repeatedly over a period of time”. [R 205 (201-07) (May 2016 foot conditions exam)]

After conceding the exam had not been conducted during a flare-up, nor following the repeated use of the feet over a period of time, the examiner attempted no explanation why the exam could not have included data from during a flare-up, or following repeated use over a period of time. The examiner further reported the severity of appellant’s bilateral foot disability, as considered during a non-flare-up and not following their repeated use over a period of time, negatively “impact[s] his ability to perform any type of occupational task (such as standing, walking, lifting, sitting, etc.)”. [R 207 (201-07) (May 2016 foot conditions exam)]

The medical exam, which failed to provide an opinion as to the degree of severity of appellant's bilateral feet during a flare-up or following their repeated use over time; and, which also failed to provide a rationale why such opinions were not available, is incomplete. It is inadequate to rate appellant's bilateral foot disability. See *Sharp v. Shulkin*, 29 Vet.App. 26 (2017); *Mitchell v. Shinseki*, 25 Vet.App. 32 (2011); *Jones v. Shinseki*, 23 Vet.App. 382 (2010); *DeLuca v. Brown*, 8 Vet.App. 202 (1995); 38 C.F.R. §§ 4.40, 4.45 (2019). See also *Correia v. McDonald*, 28 Vet. App. 15 (2016) (The exam also did not report on limitations during weight-bearing, non-weight-bearing, and active-passive use.) As discussed above, the Board erroneously found appellant was required to rebut the presumption of regularity to argue the relied-on May 2016 exam was inadequate for its failures to adequately consider the *DeLuca* factors. The Board failed to provide a valid explanation for its reliance on the incomplete/ inadequate May 2016 exam. The Board's failure to explain its decision denies the Court and appellant an opportunity for meaningful judicial review. See 38 U.S.C. § 7104(d) (2019).

In considering the severity of appellant's disability, the Board erroneously found "The medical evidence of record does not reflect that the Veteran has a bilateral . . . hallux valgus". [R 15 (5-18) (decision)] The Board ignored the January 2010 examiner's report (based on x-rays) appellant suffers from "bilateral hallux valgus deformity". [R 619 (616-20) (January 2010 exam)]

In continuing the March 8, 2016 effective date for the increased 30 percent rating, the Board found:

[T]here are no medical records that reflect a factually ascertainable increase . . . within the one year prior to his March 2016 claim filing. Thus, the Board finds that an earlier effective date of March 8, 2016 for the 20 percent rating is not warranted.

[R 15-16 (5-18) (decision)]

The Board failed to provide an adequate statement of reasons and bases why it discounted/ignored favorable evidence which raised the potential award of an effective date prior to the date of the March 8, 2016 IR claim. Specifically, appellant's March 8, 2016 lay statement "my condition has become worse". [R 353-54 (March 8, 2016 VAF21-526b)] That is, on March 8, 2016 appellant explained his condition had already worsened. The appellant's lay statements as to the onset of symptoms, continuity, flare-ups, and additional disability during flare-ups are competent evidence. *See Buchanan v. Nicholson*, 451 F.3d 1331, 1337 (Fed. Cir. 2006). While his words describing the worsening condition first appeared of record on March 8, 2016, his words factually described facts uniquely and personally known to him which explained his disability had already worsened. He described not a present status, but a historical status of the disability. The Secretary had a duty to sympathetically develop the claim in light of the favorable evidence (including when the symptoms associated with the to-be-awarded 30 percent rating had onset). And, the Board had a duty to sympathetically adjudicate the claim by considering that favorable evidence. *See Sharp, supra*.

Appellant's lay statement (*i.e.* his feet are progressively worsening) is corroborated by medical records both before and after his March 8, 2016 lay statement's description of his disability. The January 2010 feet examiner reported appellant's disability was a progressively worsening condition. [R 617 (616-20) (January 2010 feet exam)] Likewise, the relied-on May 2016 examiner reported "the current level of severity of veteran's left foot has progressed since . . . 2014." [R 207 (201-07) (May 2016 foot conditions exam)] Both medical examiners reported opinions which are consistent with appellant's lay statement his disability had worsened prior to his March 8, 2016 claim/lay statement.

Furthermore, the incomplete May 2016 medical exam also failed to report a retrospective opinion when the increased symptoms (on which the increased 30 percent rating was awarded) had onset; or in the alternative, a rationale why such an opinion was not otherwise available. *See Chotta v. Peake*, 22 Vet. App. 80 (2008) (holding that the duty to assist may include requiring the VA to develop medical evidence through a retrospective medical evaluation).

The favorable, competent lay and medical exam evidence triggered the Board's consideration of an effective date prior to the date of the March 8, 2016 IR claim. The Board's finding "medical evidence" does not show a "factually ascertainable increase . . . within one year prior to March 2016" only concedes the fact the Board failed to consider the actual language of appellant's claim, but instead relied on the inadequate medical exam record.

This Court has previously held that “where the Board has incorrectly applied the law, failed to provide an adequate statement of reasons and bases for its determinations, or where the record is otherwise inadequate, a remand is the appropriate remedy.” *Kay v. Principi*, 16 Vet. App. 529 (2002). The Supreme Court stated in *Florida Power & Light Co. v. Lorion*:

If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.

470 U.S. 729, 744 (1985).

Yet, as shown above, the Board’s failure to provide adequate reasons and bases is in error. See *Davies v. Nicholson*, 21 Vet. App. 46, 52 (2007). See *Florida Power & Light Co., supra*. Therefore, without adequate explanation, the Court and appellant have been denied an opportunity for meaningful judicial review. 38 U.S.C. § 7104(d) (2019).

B. Lumbar Spine

1. The Board failed to provide an adequate statement of reasons and bases for its decision to rely upon the inadequate May 2016 medical exam.

In deciding appellant’s lumbar spine claim, the Board continued the previously awarded 20 percent rating. The Board found appellant’s forward flexion was not limited to 30 degrees or less; and, there was no “objective evidence” of unfavorable/favorable ankylosis. (Both are alternative, necessary rating criteria

associated with an increased rating in excess of 20 percent pursuant to DC 5239.) The Board adopted the May 2016 exam. [R 9-13 (5-18) (decision); 189-94 (May 2016 back exam)]. As above, the Board has failed to consider the favorable evidence in support of Appellant's claim for an increased rating. In the 2016 exam, the examiner notes Appellant's "6/10 intermittent lower back pain" as well as Appellant's statement that he "can't lift as much as I used to," but then marks 'no' to the question Appellant's reports of flare-ups. The appellant's lay statements as to the onset of symptoms, continuity, flare-ups, and additional disability during flare-ups are competent evidence. See *Buchanan, supra*. Accordingly, no response was given to the question of additional loss of range-of-motion during flare-ups.

The intermittent nature of Appellant's back pain reasonably raised the issue of flare-ups and with that, the possibility of additional loss of range-of-motion. However, the examiner failed to opine as to whether Appellant's flare-ups caused any additional loss of motion. See *Sharp, supra*. Therefore, the examination is inadequate, and the Board has failed to provide adequate reasons and bases for its reliance on that examination. See *Davies v. Nicholson*, 21 Vet. App. 46, 52 (2007). See *Florida Power & Light Co., supra*. Therefore, without adequate explanation, the Court and appellant have been denied an opportunity for meaningful judicial review. 38 U.S.C. § 7104(d) (2019).

The Board has committed remandable error.

CONCLUSION

The Board committed remandable error when it failed to provide adequate reasons and bases for its imposition of a requirement to rebut a presumption of regularity before allowing a challenge to the adequacy of an examination, its discounting of favorable evidence, and its reliance upon an inadequate examination. Appellant asks this Court to remand these issues for further development.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify, to the best of my knowledge and ability, under penalty of perjury under the laws of the United States, that copy of the forgoing was served electronically to the attorney of record for the party below:

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