IN THE
UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

Vet. App. No. 19-1083

JUAN PENA MEDINA,

Appellant,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,

Appellee.

On appeal from the Board of Veterans' Appeals

APPELLANT'S BRIEF

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STATEMENT OF THE ISSUES

1. Whether the Board of Veterans' Appeals (Board) erred in determining that the Appellant, Juan Pena Medina, was not entitled to service connection for a back condition when it relied on an inadequate medical examination?

2. Whether the Board erred in determining that the Appellant was not entitled to service connection for a back condition where it failed to provide an adequate statement of its reasons or bases for its decision?

3. Whether the Appellant's claim for total disability rating based upon individual unemployability (TDIU) is inextricably intertwined with the other issue here on appeal?

JURISDICTION

The Court has jurisdiction to review the Board's decision pursuant to 38 U.S.C. § 7252(a). Under that provision, the Court has the "power to affirm, modify, or reverse a decision of the Board or to remand the matter, as appropriate." *Id.*

STATEMENT OF THE CASE

A. Nature of the Case

The Appellant appeals from a February 5, 2019, Board decision that denied him entitlement to service connection for a back condition and a total disability rating based upon individual unemployability (TDIU).[1] Record Before the Agency (R.) at 2-14.

B. Course of Proceedings

On September 24, 2010, the Regional Office (RO) received the Appellant's original claim

[1] The Board's decision also denied the Appellant entitlement to a rating in excess of 30 percent for PTSD. However, the Appellant does not wish to continue with appealing this issue.

for back pain, sleep disturbances, bilateral hearing loss, posttraumatic stress disorder (PTSD) and TDIU. R. at 665-671. On November 4, 2010, the RO received the Appellant's application for Increased Compensation Based on Unemployability, which stated that his disabilities prevented him from securing any substantially gainful employment. R. at 648-649. In September 2012, the VA determined the Appellant's service treatment records (STRs) and personnel records were destroyed in the fire at the National Personnel Records Center in 1973. R. at 564.

On October 31, 2012, the RO issued a rating decision denying the Appellant entitlement to service connection for back pain and TDIU. R. at 480-484. On November 14, 2012, the Appellant filed a Notice of Disagreement regarding the October 2012 rating decision. R. at 472. On January 22, 2015, the RO issued a Statement of the Case (SOC) where it again found that the Appellant was not entitled to service connection for back pain or TDIU. R. at 435-461. In response, the Appellant submitted a VA Form 9, Appeal to Board of Veterans' Appeals on January 30, 2015. R. at 434. On April 12, 2016, the Board remanded the case back to the RO for further development. R. at 392-407. On September 8, 2016, the RO released a Supplemental Statement of the Case denying the Appellant's claim. R. at 255-277. On December 21, 2016, the Board again remanded the claim for further development. R. at 239-245.

On January 31, 2017, the RO released a Supplemental Statement of the Case denying Appellant's claims for back pain and TDIU. R. at 156-160. On September 29, 2017, the Board issued another remand for further development. R. at 133-139. On December 12, 2018, the RO issued a Supplemental Statement of the Case where it again found the Appellant was not entitled to service connection for back pain or TDIU. R. at 74-80.

The Board issued the decision here on appeal on February 5, 2019. R. at 2-14.

C. Relevant Facts

The Appellant is a Korean War veteran who had active service in the U.S. Army as an infantry solider from June 1951 to June 1959. R. at 700.

On September 24, 2010, the RO received the Appellant's application for compensation asking to be considered for service connection for all conditions listed in the accompanying September 2010 private medical report, which included back pain. R. at 665-671. The September 2010 private examiner explained that the Appellant suffered from severe back pain, which was worsening, and the Appellant could no longer tolerate prolonged sitting or standing. *Id.* The private examiner also noted the Appellant described sensations of "locking" in his back, which limited his movements. *Id.* Ultimately, the private examiner concluded the Appellant injured his back while on active service as a result of continuously carrying heavy equipment. The examiner described how this injury can cause continuous spasms and inflammatory changes, which also lead to degenerative changes. *Id*.

On October 30, 2012, the Appellant underwent a C&P examination for his back condition. R. at 509-539. The examiner diagnosed the Appellant with mild lumbar myositis, but concluded his condition was less likely than not caused by service. *Id*. In relying on this exam, the RO issued a rating decision denying the Appellant entitlement to service connection for back pain and TDIU. R. at 480-484. However, on October 12, 2016, the Board determined the October 2012 C&P exam was inadequate because: (1) the VA failed to obtain private medical records described by the Appellant, (2) the C&P examiner provided "very vague" statements and an "undetailed report" of the Appellant's self-reported history, and (3) the examiner did not address significant lay statements contained in the Appellant's September 2010 private medical opinion. R. at 392-407. For these reasons, the Board remanded the claim. *Id*.

In August 2016, the Appellant underwent another C&P exam. R. at 282-290. The examiner concluded the Appellant's back condition was not connected to service. *Id.* On December 21, 2016, the Board found this C&P exam inadequate because the examiner's rationale repeatedly refers to a review of STRs, but the VA determined the Appellant's STRs were destroyed in the 1973 fire. R. at 239-245. Additionally, like the 2012 examiner, this examiner failed to address the Appellant's private medical opinion. *Id*. Therefore, the Board issued another remand. *Id.*

In January 2017, a C&P examination addendum was obtained to remedy the previous inadequate exams. R. at 206-210. This examiner agreed with the previous C&P examiners' conclusions. *Id*. Again, in its September 2017 decision, the Board remanded the claim and found this addendum to be inadequate because, like the previous C&P exams, the examiner referred to a review of STRs that did not exist. R. at 133-139.

On November 14, 2018, the Appellant underwent another C&P examination. R. at 99. The examiner concluded the Appellant's back condition was unrelated to service. *Id*. The examiner's rationale was that "heavy lifting does not cause pain in affected area more than 40 years thereafter." *Id*. The examiner also stated the September 2010 private doctor did not look at all the Appellant's medical records. *Id*.

In the February 2019 Board decision here on appeal, the Board denied the Appellant service connection for his back condition and entitlement to TDIU based on the November 2018 exam. R. at 2-14. The Board found the November 2018 examiner's opinion to be "the most probative evidence of record regarding the relationship between the Veteran's back disability and service." *Id*. The Board also discounted the Appellant's claim that his back condition is attributed to service because the Appellant does not have "the requisite medical training, expertise, or credentials needed to provide a diagnosis." *Id.*

SUMMARY OF THE ARGUMENT

The Board erred by relying on an inadequate medical examination finding that the Appellant was not entitled to service connection for a back disability. Review of the November 2018 C&P examination shows that the examiner failed to provide an adequate rationale for his opinion and failed to properly address the September 2010 private medical opinion as requested by the Board on remand.

Additionally, the Board erred by failing to provide an adequate statement of its reasons or bases to support its determination that the Appellant was not entitled to service connection for his back condition. Review of the February 2019 Board decision shows that the Board favored the November 2018 VA examination over the September 2010 private medical opinion but failed to provide an adequate statement of its reasons or bases for discrediting the private opinion.

Lastly, the Appellant's claim for TDIU is inextricably intertwined with the back disability claim here on appeal. Depending on the outcome of this appeal, the Appellant could become eligible for TDIU on a schedular basis, and the claims should be considered together.

ARGUMENTS AND AUTHORITIES

A. Inadequate Medical Examination

The VA is subject to a mandatory duty to assist a claimant "in obtaining evidence necessary to substantiate the claimant's claim for a benefit under a law administered by the Secretary." 38 U.S.C. § 5103A(a). This duty "shall include providing a medical examination or obtaining a medical opinion when such an examination or opinion is necessary to make a decision on the claim." 38 U.S.C. § 5103A (d)(1). However, the VA's duty is not discharged simply by conducting a medical examination; the medical examination must be adequate for adjudication purposes. *See* 38 C.F.R. § 4.2 (2018) ("[I]f the report does not contain sufficient detail, it is incumbent upon the

rating board to return the report as inadequate for evaluation purposes."). Once the Secretary undertakes the effort to provide an examination when developing a claim of service connection, the Secretary must provide an adequate examination or notify the claimant why one will not or cannot be provided. *See Barr v. Nicholson*, 21 Vet.App. 303, 311-12 (2007).

A medical examination report, when reviewed for adequacy, should be supported by reasoning, and not simply be a list of data followed by conclusions. *Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 304 (2008). The Court has held "a mere conclusion by a medical doctor is insufficient to allow the Board the make an informed decision as to what weight to assign to a doctor's opinion." *Stefl v. Nicholson*, 21 Vet.App. 120, 125 (2007).

It is certainly within the Court's jurisdiction to review the adequacy of a medical examination, especially one which the VA and Board heavily relied upon in the adjudicatory process. In *Horn v. Shinseki*, 25 Vet.App. 231, 241-42 (2012), the Court noted that a lack of discussion or analysis provided by an expert in rendering an opinion "[p]revent[ed] the Board and the Court from properly assessing whether those conclusions were based on a sufficient evidentiary basis[,]" and that "[t]he assessment whether the physician's report is supported by medical evidence that pertains to the conclusion reached, . . . is a significant part of *de novo* review." In fact, the Court stated, "[w]ithout such review the Court would be in the position of rubber stamping what may be nothing more than a bare, ad hoc assertion." *Id*. at 242.

Here, the November 2018 C&P examiner failed to provide any detail or medical rationale for his findings as the report consists of mostly answers in checkboxes and a particularly brief rationale. Under the rationale section of the report, the examiner makes several statements that are unsupported. First, the examiner states the private doctor, Nanette A. Ortiz-Valentin, MD, "did not have or did not take a look [at] all medical records to achieve her assessment." R. at 99. However,

there is no indication why the examiner concluded Dr. Ortiz-Valentin did not review all available medical records as Dr. Ortiz-Valentin does not state this in her letter. The examiner also uses this as a reason to discredit Dr. Ortiz-Valentin's opinion. However, the examiner himself, and the other two C&P examiners, did not have access to all the Appellant's medical records. In fact, the Board previously determined the VA never obtained treatment records from Dr. Ortiz-Valentin and another non-VA doctor, Dr. Alonso. R. at 401-402. Therefore, Dr. Ortiz-Valentin had access to more records than the C&P examiners.

Additionally, the November 2018 examiner provided no explanation for his statement that heavy lifting injuries do not cause pain after forty years. The examiner failed to include any studies or data to support this blanket statement. Even if this statement were true in most cases, the examiner did not explain how or why it would be true for this particular case. This Court has held, "the Board must be able to conclude the medical expert has applied valid medical analysis to the significant facts of the particular case in order to reach the conclusions submitted in the medical opinion." *Nieves-Rodriguez*, 22 Vet.App. at 304. Here, there was no way for the Board to conclude the examiner applied a valid medical analysis when there was no real analysis shown.

The examiner also states, "there is no evidence in VBMS of any back injuries so as to cause actual condition." R. at 99. However, the Board has repeatedly remanded the Appellant's claim because previous C&P examiners came to this same conclusion despite the impossibility of any evidence of an in-service back injury. As stated before, the Appellant's STRs were destroyed in the NPRC fire. Therefore, if there was any evidence of the Appellant's back injuries in service, it is no longer available. The fact that VBMS contains no evidence of a back injury is actually beneficial to the Appellant's claim because it tends to show the Appellant's back condition was not caused by any event *after* service. Given the circumstances, the only evidence the Appellant

could provide was his own statements and doctor's opinions, which he has submitted.

Moreover, it has been held that the VA cannot reject lay statements of an in-service injury just because it was not recorded in the veteran's service records. *Buczynski v. Shinseki*, 24 Vet. App 221, 224 (2011). In fact, the VA has a heightened duty to assist a veteran whose service records are unavailable. *Washington v. Nicholson*, 19 Vet. App. 362, 369 (2005). In this case, the VA asked the Appellant to prove events that occurred in a combat situation over sixty years ago in a foreign land, despite the fact that his service records were destroyed in the NPRC fire. The examiner should have recognized this heightened duty and given the Appellant the benefit of the doubt as required by 38 U.S.C. § 5107(b).

Lastly, the examiner used the fact that the Appellant did not seek therapy from a VA medical institution to doubt the Appellant's credibility. R. at 99. However, it has been held that the VA cannot determine lay evidence lacks credibility merely because it is unaccompanied by contemporaneous medical evidence. *Buchanan v. Nicholson*, 451 F.3d 1331, 1337 (Fed. Cir. 2006). In other words, it was improper for the examiner to discredit the Appellant's claim he suffered from an in-service back injury based on the lack of VA treatment. Moreover, the examiner ignored evidence the Appellant was visiting private doctors for his condition as noted in the September 2011 C&P examination and the April 2016 Board decision. R. at 611, 401-402.

Given that each of the November 2018 examiner's reasons are inadequate and unsupported, the Board should have determined this C&P exam was inadequate under VA rules. Therefore, remand is required so the Appellant can be provided an adequate medical examination.

B. Inadequate Statement of Reasons or Bases

The Board of Veterans' Appeals is required to consider, and discuss in its decision, all "potentially applicable" provisions of law and regulation. 38 U.S.C.S. § 7104(a). The Board is also

required to provide a written statement of the reasons or bases for its findings and conclusions on all material issues of fact and law presented on the record; the statement must be adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review in the U.S. Court of Appeals for Veterans Claims. 38 U.S.C.S. § 7104(d)(1). To comply with this requirement, the Board must analyze the credibility and probative value of the evidence, account for the evidence that it finds to be persuasive or unpersuasive and provide the reasons for its rejection of any material evidence favorable to the claimant. *See Caluza v. Brown,* 7 Vet.App. 498, 506 (1995). A bare conclusory statement, without supporting analysis and explanation, is neither helpful to the veteran nor in compliance with statutory requirements. *See Gilbert v. Derwinski*, 1 Vet. App. 49, 57 (1990).

As with all types of evidence, it is the Board's responsibility to weigh the conflicting medical evidence to reach a conclusion as to the ultimate grant of service connection. *See Wood v. Derwinski*, 1 Vet.App. 190, 193 (1991). The Board may favor the opinion of one competent medical expert over another if its statement of reasons and bases is adequate to support that decision. *See Owens v. Brown*, 7 Vet.App. 429, 433 (1995). The Board's assessment of the credibility and weight to be given to evidence is a finding of fact that the Court reviews under the "clearly erroneous" standard of review. 38 U.S.C. § 7261(a)(4); *Wood*, 1 Vet. App. at 193.

Here, the Board favored the November 2018 C&P examination over the September 2010 private medical opinion but failed to provide an adequate statement of its reasons or bases for discrediting the private opinion. In fact, the Board failed to provide any explanation why the private opinion would lack credibility. Rather, the Board appears to be blindly accepting the November 2018 examiner's brief conclusions regarding the private opinion even though the examiner failed to offer any rationale. The Board's error becomes even more apparent considering

the Board's reasons for giving the November 2018 exam more weight are actually reasons the Board should have preferred the private opinion.

For example, the Board claimed the November 2018 examiner's opinion was based on "an accurate factual foundation." However, when comparing the private opinion with the examiner's, it becomes clear the private doctor had more familiarity with the Appellant's history. Especially since the private doctor was repeatedly treating the Appellant, while the C&P examiner only saw him once. Moreover, the examiner did not have access to certain private records as discussed above. Another example is that the Board stated the examiner "expressed familiarity with the record." However, the examiner failed to acknowledge part of the record showing the Appellant was visiting private doctors instead of seeking therapy from the VA.

Lastly, the Board made bare conclusory statements about the credibility of the November 2018 exam without providing any supporting analysis. Specifically, the Board repeatedly recites the examiner's conclusions but failed to discuss or cite to any other evidence it found persuasive or unpersuasive. This failure to provide an adequate statement of reasons or bases frustrates judicial review. Remand is required so that the Board may provide an adequate statement of its reasons or bases for its rejection of the September 2010 private medical opinion that diagnosed the Appellant with a back condition caused by his military service. As such, the Appellant requests that the Court vacate the Board's decision and remand the matter to the Board for further consideration. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) (holding that remand is appropriate "where the Board has incorrectly applied the law, failed to provide an adequate statement of reasons or bases for its determinations, or where the record is otherwise inadequate").

C. TDIU

The Board denied the Appellant entitlement to TDIU based in part on the fact that the

Appellant did not meet the rating percentage threshold for a TDIU because he has a combined rating of 40 percent. R. at 13. Here, the Appellant has consistently claimed, and the record contains evidence showing that he is unable to work due to his service-connected disabilities and the claimed disabilities now on appeal. R. at 647-648. Remand of the Appellant's claim for TDIU is required because it is inextricably intertwined with the other claims here on appeal as they could result in eligibility for TDIU on a schedular basis or otherwise. See *Parker v. Brown*, 7 Vet.App. 116 (1994); see also *Harris v. Derwinski*, 2 Vet.App. 180, 183 (1991) (issues are "inextricably intertwined" when a decision on one issue would have a "significant impact" on a veteran's claim for the second issue).

CONCLUSION

The VA failed its duty to assist by providing the Appellant with four inadequate C&P exams and an insufficient Board decision. To reach this point, the Appellant has had to endure nine years of back-and-forth with the VA including three Board remands. The Court should correct these errors by vacating the February 2019 Board decision and remanding the matter to the Board for further adjudication.

Respectfully submitted,

FOR THE APPELLANT:

November 29, 2019
Date

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