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

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No. 18-6495

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**ULYSSES D. BRINSON**,

Appellant,

v.

**ROBERT L. WILKIE**,

Secretary of Veterans Affairs,

Appellee.

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# APPELLANT'S REPLY BRIEF

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### I. The parties agree that the Board erred when it failed to provide an adequate statement of reasons or bases regarding whether Appellant's statements about painful joint symptomatology support compensable ratings for his bilateral bunions; however, the Board must also provide reasons or bases as to the probative value of Appellant's statements and other VA treatment records.

The Secretary concedes error to the extent that "the Board provided an inadequate statement of reasons or bases for denying a compensable rating [for Appellant's bilateral bunions]" because "the Board failed to determine [] whether Appellant's reports of bilateral bunion pain were credible, such that a compensable rating was warranted under 38 C.F.R. § 4.59." Secretary's Brief ("Sec. Br.") at 8. Although Appellant agrees that the Board failed to provide an adequate statement of reasons or bases here, he disagrees that the Board's only requirement on remand is to merely "resolve whether Appellant's reports of bunion pain are credible." Sec. Br. at 10. Rather, pursuant to its obligation under 38 U.S.C. § 7104(d)(1) to provide "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", the Board should be instructed to analyze both the credibility and probative value of the evidence and provide reasons for its rejection of any material evidence favorable to Appellant. *See Wise v. Shinseki*, 26 Vet. App. 517, 524 (2014) (internal citation omitted).

The Secretary also notes that in November 2007[1], Appellant complained of a painful bunion deformity in both feet but asserts that this statement is the only one among several

[1] The Secretary refers to this as a November 2007 statement, but the actual statement is

cited in Appellant's Brief ("App. Br.") that specifically relates to bunion pain. Sec. Br. at 9. While this may be the only statement that specifically uses the word "bunion", the other VA treatment records to which Appellant cites demonstrate painful foot symptomatology that may reasonably be associated with bunions, and it is the Board's obligation to make factual findings regarding the probative value of such evidence as it relates to Appellant's claims for compensable bunion ratings. *See* App. Br. at 14 (noting October 2010, June 2012, and May 2014 treatment records describing pain alongside mention of the toes or hallux valgus). Furthermore, as Appellant noted in his brief, a November 2007 specifically discusses his bilateral bunions, the pain they cause, and how he is required to buy larger shoes to accommodate this pain. **R. 2547 (2547-48)**. Therefore, to the extent that the Board erred when it provided an inadequate statement of reasons or bases regarding a compensable bunion rating, the foregoing evidence should be specifically addressed as well.

## II. Appellant has demonstrated that the Board's selection of DC 5276 and 5284 to rate the bilateral heel spurs is arbitrary or capricious.

The Secretary asserts that Appellant fails to show that the Board's finding as to the appropriate diagnostic code with which to rate Appellant's heel spurs is arbitrary and capricious. Sec. Br. at 11. However, as Appellant explained in his brief, VA's duty to maximize benefits requires it to consider and exhaust schedular alternatives, such as a

found in a June 2012 treatment record. Given the quoted language and record citation in the Secretary's brief, which both pertain to the June 2012 record, this most likely refers to the June 2012 record, rather than the November 2007 one.

rating by analogy, when reasonably raised by the record. *See Morgan v. Wilkie*, 31 Vet. App. 162, 168 (2019).

Whether separate heel ratings are warranted pursuant to the duty to maximize benefits is a separate inquiry from the medical observations of the VA examiners to which the Secretary cites as evidence against separate heel ratings. Sec. Br. at 12. Furthermore, Appellant *has* explained why the Board is required to address the possibility of separate ratings for each heel. App. Br. at 17-18; *see Morgan, supra* at 164 ("Thus, schedular rating concepts—*including, but not limited to* … the ability to rate a single disability under multiple diagnostic codes without pyramiding—are critical components of the duty to maximize benefits[.]") (emphasis added); *see also* **R. 1089** ("States the heels hurt him the most").

Additionally, the Secretary contends that Appellant is "attempt[ing] to link his scars that he felt that was standing on needles, this is purely speculative and he fails to point to anything suggesting that this feeling was due to his scars, rather than his underlying foot disability." Sec. Br. at 12.

Appellant is no way attempting to allege that his actual scars are painful; rather, Appellant is arguing that his foot disability symptomatology, rated by the Board *by analogy* via DCs 5276 and 5284, may be more appropriately rated *by analogy* as two painful scars, which would potentially provide for greater benefits consistent with the Secretary's duty to maximize benefits. *See* App. Br. at 19. Thus, the Board's finding as to a compensable rating for actual scars noted on prior VA examinations, Sec. Br. at 11, is not pertinent to whether rating Appellant's heel spurs by analogy to two painful scars under DC 7804 is

apposite. Therefore, remand is warranted for the Board to provide an adequate statement of reasons or bases as to analogous ratings for Appellant's bilateral spurs under DCs 5284 and 7804.

## III. Appellant has demonstrated that the Board's finding as to a 10% rating for bilateral heel spurs is inadequate because it failed to account for favorable evidence of functional loss supporting an increased rating.

The Secretary next avers that the Board's finding as to a 10% rating for bilateral heel spurs under DCs 5276 and 5284 was not clearly erroneous. Sec. Br. at 12. However, Appellant's argument is that the Board erred because it failed to address favorable evidence of functional loss which may support an increased disability rating. App. Br. at 11-14.

The Secretary first argues that "Appellant points to no evidence of record suggesting that his foot disability would qualify for higher ratings under either criterion", Sec. Br. at 14, despite noting in the preceding paragraph that Appellant has specifically pointed to evidence of pain and use of an assistive device. Sec. Br. at 13. As Appellant explained in his brief, the December 2011, July 2013, and April 2015 VA examiners overall noted persistent pain, some degree of functional limitation, inability to perform heel to toe walk due to fear of increased pain, and use of shoe inserts to alleviate pressure. App. Br. at 13. These factors (e.g. painful motion, disturbance in locomotion, use of an assistive device) are specifically enumerated in 38 C.F.R §§ 4.40 and 4.45 and are indicative of functional loss, and the Court has consistently held that such functional loss may permit a higher rating than "that supported by mechanical application of the schedule[.]" *See Sharp v. Shulkin*, 29 Vet. App. 26, 31 (2017).

Next, the Secretary argues that Appellant has failed to demonstrate the equivalent of moderately severe symptoms, under DC 5284, or "evidence of weight-bearing line over or medial to great toe, inward bowing of the tendo achilles, pain on manipulation and use of feet, bilateral of unilateral" under DC 5276. Again, functional loss may permit a higher disability rating than that supported by mechanical application of the rating criteria in a diagnostic code. *See Sharp*, *supra*; *DeLuca v. Brown*, 8 Vet. App. 202, 206-07 (1995). Thus, the Secretary's argument fails because requiring Appellant to specifically demonstrate "moderately severe symptoms" or "evidence of weight-bearing line over or medial to great toe" to qualify for an increased rating under DCs 5276 and 5284 improperly requires satisfaction of the strict criteria of the rating schedule to the exclusion of pertinent evidence of functional loss in the form of painful symptomatology and disturbance in locomotion.

Finally, the Secretary cites to the findings of the VA examiners as evidence that Appellant does not meet the criteria for an increased heel spurs rating. However, as Appellant has previously noted, "[b]eyond rote recitations to the December 2011 and April 2015 examiner's opinions regarding lack of functional limitation, the Board provides no explanation for why Appellant's disability picture more nearly approximates the mild or moderate criteria than the severe criteria under DC 5276", as well as whether "the 'functional impairment' addressed by the examiners encompasses Appellant's foot disability symptomatology", or "how Appellant's demonstrated symptomatology was factored into its ultimate evaluation." App. Br. at 13. As such, the Board erred when it failed to provide an adequate statement of reasons or bases regarding favorable evidence

of functional loss supporting increased ratings per sections 4.40 and 4.45. Thus, remand is warranted accordingly.

## IV. The December 2011, July 2013, and April 2015 VA foot examinations are inadequate, and the Board thus erred when it relied upon inadequate medical examinations to adjudicate Appellant's claims.

Regarding the VA examinations, the Secretary first cites to the fact that Appellant's representative did not previously raise any duty to notify or duty to assist issues before the Board. Sec. Br. at 14. However, it is unclear how this relates to Appellant's argument that the Board clearly erred "when it relied on insufficiently detailed examinations". App. Br. at 11.

The Secretary contends that the Board did not rely on the July 2013 examination in determining Appellant's disability rating for heel spurs. Sec. Br. at 15. While this is true, the Secretary also does not address the fact that the Board relied upon the July 2013 examination in determining Appellant's bunion ratings. **R. 10 (3-13)**. As Appellant explained in his brief, the July 2013 examination is inadequate because it failed to address the functional loss in Appellant's feet. App. Br. at 10-11. Thus, the Board's reliance on a medical examination that overlooked these factors prejudiced Appellant because a higher bunion rating may have been assigned had the examiner adequately addressed the extent of functional loss in Appellant's feet, which the Board could then have factored into its disability evaluation. *See Sharp*, 29 Vet. App. at 31.

Regarding the April 2015 VA examination, the Secretary argues that "[t]o the extent Appellant asserts error with the examiner's note that his right foot pain was caused by an unrelated SC condition, he overlooks that he is service-connected for residuals of a great

right toe fracture, which as noted above, is not [on] appeal in this case." Sec. Br. at 15. First, it unclear whether the examiner is referencing the residuals of a great right toe fracture, and it is this very ambiguity that vitiates the examiner's rationale. *See* App. Br. at 9. More importantly, Appellant is not required to affirmatively demonstrate how "further discussion of right foot pain, attributable to a condition not on appeal, would lead to a rating greater than 10% for either of his disabilities on appeal." Sec. Br. at 15-16. The Board may only consider independent medical evidence to support its findings, *Colvin v. Derwinski*, 1 Vet. App. 171, 175 (1991), and is required to reject insufficiently detailed medical reports. *See Kahana v. Shinseki*, 24 Vet. App. 428, 435 (2011). Thus, Appellant is specifically arguing that the Board erred in relying upon an inadequate April 2015 examination which failed to sufficiently explain its medical conclusions, and it is not clear how speculation as to whether the right foot symptomatology would lead to an increased rating is relevant to the issue at hand, which is the adequacy of the April 2015 examination.

Finally, the Secretary argues that "Appellant, does not, at any point, explain how another VA examination would lead to him to ratings greater than 10% for bilateral heel spurs under 38 C.F.R § 4.71a, DC 5276 or DC 5284 and in doing so, fails to carry his burden of showing how this possibly harmed him." Sec. Br. at 16. Again, Appellant is not required to specifically demonstrate that a higher rating would be attainable because his argument pertains to the adequacy of the examination itself, rather than whether a new examination would ultimately lead to an increased rating. Furthermore, Appellant explicitly noted that the Board's reliance on the December 2011, July 2013, and April 2015 examinations is prejudicial because the examinations "failed to procure information

specifically required by regulatory authority—or at least explain why such information could not be procured—[and] are inadequate to inform the Board of Appellant's full disability picture[.]" App. Br. at 8; *see* 38 C.F.R. §§ 4.40, 4.45, 4.59; *Correia v. McDonald*, 28 Vet. App. 158, 169 (2016).

As Appellant explained in his brief, section 4.59 sets forth the testing procedures through which medical examiners obtain the information on painful motion necessitated by sections 4.40 and 4.45 to permit an adjudicator to accurately evaluate a joint disability, and it is well-established that a VA examination that fails to consider the factors listed in sections 4.40 and 4.45 is inadequate for adjudication purposes. *See DeLuca v. Brown*, 8 Vet. App. 202, 206-07 (1995). The Secretary does not address at all Appellant's central contention with the December 2011, July 2013, and April 2015 examinations. Sec. Br. at 12-16. Therefore, the Board clearly erred when it relied upon inadequate medical examinations to adjudicate Appellant's claims, and remand is warranted to obtain new examinations or opinions.

## V. Although Appellant receives the maximum rating under DC 5280 for his right toe bunion, the Board erred when it failed to provide adequate reasons or bases as to the possibility of increased ratings under other DCs.

Regarding Appellant's right bunion rating, the Secretary argues that "Appellant fails to show that the Board's determination was arbitrary or capricious". Sec. Br. at 17. In support, the Secretary discusses how "it is certainly not arbitrary for the Board to rate a disability under a diagnostic code specific to this disability." Sec. Br. at 18.

However, the Board does not adequately explain why DC 5276 or DC 5284 are not applicable for purposes of an increased rating for Appellant's right bunion. The Board is

required to provide an adequate statement of reasons or bases for its selection of a particular diagnostic code. *See Suttman v. Brown*, 5 Vet. App. 127, 133 (1993). Pursuant to the Secretary's duty to maximize benefits under 38 C.F.R. § 3.103(a), VA is also required to exhaust all schedular rating alternatives to adjudicate "claims that include symptoms and effects not contemplated by an applicable diagnostic code" when "raised by the claimant or reasonably raised by the record." *See Morgan*, 31 Vet. App. at 168.

As Appellant discussed in his brief, the Board's finding that "the equivalent of moderate flatfoot or moderate foot injury is not shown at any time", **R. 10 (3-13)**, is inadequately explained because, "[b]eyond rote recitations to the December 2011 and April 2015 examiner's opinions regarding lack of functional limitation, the Board provides no explanation for why Appellant's disability picture more nearly approximates the mild or moderate criteria than the severe criteria under DC 5276" or "whether the 'functional impairment' addressed by the examiners encompasses Appellant's foot disability symptomatology[.]" App. Br. at 13. That the December 2011 and April 2015 examiners opined as to general functional limitation is distinct from the fact that they observed actual functional loss in the form of pain on use, inability to perform a walking test, and use of shoe inserts to alleviate the foot disability symptomatology. *See* App. Br. at 13 (citing VA examinations at **R. 1695-1705** and **306-08**).

Judicial review is thus frustrated because the Board made no factual findings regarding this evidence of functional loss (rather than the examiner's mere opinions as to functional limitation) and also failed to explain its finding that "[n]o other Diagnostic Code more appropriately addresses the symptoms or allows for compensable or higher ratings."

**R. 10 (3-13)**. As such, \remand is warranted for the Board to provide adequate reasons or bases accordingly.

## VI. The Board should have addressed whether separate ratings for Appellant's diagnosed claw foot and hammer toe are warranted because they may reasonably be distinct manifestations of his underlying service-connected foot disabilities.

Finally, regarding separate ratings for claw foot and hammer toe, the Secretary asserts that "[t]he Court should reject Appellant's attempt to circumvent the VA adjudication system and bootstrap these claims for nonservice-connected disabilities to his current appeal." Sec. Br. at 18-19. Appellant is not arguing that nonservice-connected disabilities should now be on appeal. Rather, Appellant is simply asserting that the Board, pursuant to its duty to provide an adequate statement of reasons or bases regarding its selection of DCs, *see Suttman*, 5 Vet. App. at 133, should have at least addressed whether Appellant' claw foot and hammer toe may possibly be rated as "separate and distinct manifestations from the same injury permitting two different disability ratings." *Fanning v. Brown*, 4 Vet. App. 225, 230 (1993).

Appellant is service-connected for numerous foot-related, and particularly toe-related, conditions (e.g. bilateral bunions, bilateral heels spurs, and the residuals of a right great toe fracture), **R. 182 (179-84)**; thus, it does not require speculation to see that there is at least a reasonable possibility that his claw foot and hammer toe may have arisen from the same underlying foot condition. Given this reasonable possibility, the Board was required to address separate ratings under DCs 5278 and 5282. Instead, it made a conclusory finding that "no other Diagnostic Code more appropriately addresses the

symptoms or allows for compensable or higher ratings." **R. 10 (4-13)**. Judicial review is frustrated in light of the Board's lack of fact-finding, and remand is further warranted accordingly. *See Gilbert v. Derwinski*, 1 Vet. App. 49, 56-57 (1990) (finding that a bare conclusory statement is neither helpful to the veteran nor in compliance with statutory requirements)

## CONCLUSION

For the reasons articulated above and in his principal brief, Appellant respectfully requests that the Court set aside the Board's decision of August 27, 2018, to the extent argued in his briefs, and to remand this matter for readjudication consistent with the points discussed in his briefs.

Respectfully submitted,

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December 10, 2019

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