IN THE

UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

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Vet. App. No. 19-161

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Thomas C. Green

***Appellant*,**

v.

ROBERT L. WILKIE
SECRETARY OF VETERANS AFFAIRS,

***Appellee*.**

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APPELLANT'S REPLY BRIEF

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REBUTTAL

Thomas C. Green ("Mr. Green," "Veteran" or "Appellant") responds as follows to the arguments raised by the Secretary of Veterans Affairs' ("Secretary") brief.

I.) THE SECRETARY'S ASSERTION THAT 38 C.F.R. § 4.59 MERELY REQUIRES AN EXAMINER TO RECITE A VETERAN'S REPORT OF SYMPTOMS, RATHER THAN CONDUCT A FULL SUITE OF RANGE OF MOTION TESTING, IS MISTAKEN.

Mr. Green's principal brief argued that the Board's denial of entitlement to a lumbar spine rating greater than 20 percent (prior to October 14, 2014) must be vacated and remanded for a new examination or medical opinion, because the Board relied upon a September 2011 VA examination that did not record the results of range of motion ("ROM") testing in both weight-bearing and non-weight-bearing modes. *See* Appellant's Brief ("AB") at 3-7. The provisions of 38 C.F.R. §4.59 require such testing whenever possible. *See Correia v. McDonald*, 28 Vet. App. 158, 165 (2016).

The Secretary posits that the September 2011 examination *did* comply with the requirements of §4.59 and *Correia*, because the examiner noted the Veteran's report that he experienced difficulty lifting due to back pain. Secretary's Brief ("SB") at 8. *Correia* held that §4.59 requires examiners to record the results of ROM testing in both active and passive modes. 28 Vet. App. at 170. A Veteran's report of his symptoms is self-evidently not a ROM test. The Secretary's position is therefore mistaken.

II.) IT IS FOR MEDICAL PROFESSIONALS, AND NOT THE BOARD, TO CONCLUDE THAT MEDICAL TESTING IS NOT POSSIBLE OR NOT NECESSARY.

The Board held that "retroactive motion testing cannot be performed to determine the now-required range of motion findings[…]." R. at 5 (4-12). The Veteran's principal brief observed that this conclusion rested upon no medical evidence of record, and the Board had impermissibly relied upon its own lay opinion to resolve a medical question. *See* AB at 5. The Secretary insists that the Board's reliance upon its lay judgment was permissible. *See* SB at 9-10. The Court has repeatedly, and vehemently, disagreed. *See, e.g., Jones v. Shinseki*, 23 Vet. App. 382, 390 (2010) (explaining that a "conclusion that [an] opinion is not possible without resort to speculation is a medical conclusion just as much as a firm diagnosis or a conclusive opinion"); *see also Colvin v. Derwinski,* 1 Vet. App. 171, 175 (1991) (the Board may not rely upon its own lay assessment to resolve medical questions). Further, *Correia* held that examination reports without the full set of range-of-motion measurements could only be adequate *if a medical examiner* stated that the required testing could not be completed, and if the examiner clearly explained why this was so. *See* 28 Vet. App. at 170. The Board's lay conjecture rendered its statement of reasons or bases inadequate. *Id.*

One of the Court's recent memorandum decisions is particularly instructive. *See* U.S. Vet. App. R. 30(a) (non-precedential decisions may be cited for their persuasive value). In *Garrison v. Wilkie*, No. 18-3641 (Nov. 5, 2019), the Veteran sought a lumbar spine rating greater than 20 percent for the period December 10, 2015, to October 31,

2016. Neither of the VA examinations of record contained the full set of range of motion test results mandated by §4.59. In pertinent part, the Court held:

> "[It] appears that the Board, rather than a medical professional, determined that the required *Correia* testing was not required or was not possible. […]The Court acknowledges that obtaining a retrospective medical opinion that complies with *Correia* for earlier time periods may not be possible; however, it is for the medical professionals and not the Board to conclude that testing is not possible or not necessary. *See Correia*, 28 Vet. App. at 170." Slip. op. at 4 (underline added).

Although the facts of *Garrison* are strikingly similar to the instant appeal, the Court's application of the law was unremarkable. The Court's memorandum decisions have repeatedly rejected the Secretary's lay assertions that the severity of a knee disability *prior to total knee replacement* is impossible to ascertain. *See, e.g., Allgood v. Wilkie*, 2018 U.S. App. Vet. Claims LEXIS 538 (April 17, 2018) (holding "the Court cannot accept the Secretary's conjecture that a new VA [knee] examination is impracticable without first obtaining a medical opinion supporting that determination"); *Lynn v. Wilkie*, 2018 U.S. App. Vet. Claims LEXIS 1219 (September 11, 2018) (holding "the Board's statement that a retrospective [knee] opinion is not feasible […] was a medical conclusion that it was not competent to make"); *Sarratt v. Wilkie*, 2019 U.S. App. Vet. Claims LEXIS 94 (January 22, 2019). The Court should likewise reject the Secretary's invitation, in Mr. Green's appeal, to substitute the Board's speculation for medical judgment.

III.) THE SECRETARY'S ASSERTION THAT FAVORABLE OCTOBER 2014 VA EXAMINATION FINDINGS ARE NOT RELEVANT TO THE PERIOD ON APPEAL IS IMPERMISSIBLY CONTRARY TO THE BOARD'S DECISION.

The Veteran's principal brief asserted that the Board provided inadequate reasons or bases for denying entitlement to a rating greater than 20 percent prior to October 14, 2014, when it did not discuss range of motion measurements within the VA examination of that date. *See* AB at 8-9. The October 2014 VA examination found that forward flexion of the spine was limited to 20 degrees, which corresponds to the criteria for a 40 percent rating. *See id.; see also* R. at 114 (114-122) (October 2014 VA examination report). The Secretary responds that the October 2014 VA examination "is not relevant to the period of time that is the subject of this appeal." SB at 11. However, the Board clearly determined that the October 2014 examination report *was* relevant to the period before it. The Board relied upon the October 2014 examiner's conclusion that Mr. Green did not have radiculopathy. *See* AB at 8; R. at 12 (4-12) (September 2018 Board Decision). The Secretary's suggestion that the Board simply erred in finding that the examiner's report was relevant is a quintessentially impermissible *post hoc* rationale. *See Evans v. Shinseki*, 25 Vet. App. 7, 16 (2011) ("[I]t is the Board that is required to provide a complete statement of reasons or bases, and the Secretary cannot make up for its failure to do so."). To the extent that the Board's relevance determination was favorable to the Veteran, the Court *cannot* reverse or vacate it. *See*

Medrano v. Nicholson, 21 Vet. App. 165, 170 (2007) (Court is not permitted to reverse the Board's favorable findings of fact).

The Secretary also appears to suggest that, although the Board found the October 2014 VA examination was relevant, it did *not* find the examination was relevant to the severity of Mr. Green's lumbar spine disability. SB at 11-12, fn. 2. This interpretation of the Board's decision makes little sense. The *only* matter on appeal was the severity of the lumbar spine disability. *See* R. at 4.

The Board must provide reasons or bases for the weight placed upon favorable evidence. *See Caluza v. Brown*, 7 Vet. App. 498, 506 (1995). In the instant appeal, the Board did not even *discuss* range of motion findings that supported entitlement to an increased rating, and were contained within a record the Board found relevant to the period on appeal. Vacatur and remand are necessary for the Board to do so. *Id.*

CONCLUSION

For the reasons and facts set forth above and in his principal brief, Mr. Green respectfully requests that the Court vacate and reverse the Board's erroneous conclusion that VA had met its duty to assist the Veteran, and remand the instant appeal for further proceedings consistent with this outcome. Alternatively, Mr. Green requests that the Court vacate and remand the Board decision on appeal.

Respectfully submitted,

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