United States Court of Appeals for Veterans Claims

Vet. App. No. 19-1209

JAMES D. SMITH,

Appellant,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,

Appellee.

APPELLANT'S REPLY BRIEF

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PRELIMINARY STATEMENT

The Appellant, James D. Smith (hereinafter, "Mr. Smith" or the "Veteran"), appeals the October 25, 2018 decision of the Board of Veterans' Appeals ("Board") that denied him entitlement to a rating in excess of 20 percent for status post-compression fracture of the lumbar spine with degenerative arthritis and spondylolisthesis (hereinafter, a "low back disability"). Record Before the Agency ("R.") 3–17. Mr. Smith filed his initial brief on August 29, 2019 ("App. Br."). The Secretary of Veterans Affairs ("Secretary") filed a brief in this case on November 6, 2019 ("Sec. Br."). Pursuant to U.S. Vet. App. R. 28(c), Mr. Smith files this reply brief.

As discussed in greater detail below, Mr. Smith respectfully urges the Court to reject the Secretary's arguments for affirmance. Instead, he respectfully requests that the Court vacate the Board's decision and remand his claim to the Board with instructions to provide a medical examination that conducts all the required testing and that adequately addresses any additional impairment caused during flare-ups or when the joints in his lower back are used repeatedly over time. Finally, Mr. Smith requests that the Court also instruct the Board to provide an adequate statement of reasons or bases as to whether he is entitled to a rating in excess of 20 percent for his low back disability.

ARGUMENT

I. THE COURT SHOULD REJECT THE SECRETARY'S ARGUMENTS THAT THE BOARD PROVIDED AN ADEQUATE STATEMENT OF REASONS AND BASES FOR DENYING A RATING IN EXCESS OF 20 PERCENT FOR MR. SMITH'S LOW BACK DISABILITY.

Mr. Smith argued in his initial brief that neither the September 2014 VA examination, nor the October 2014 private examination, were adequate for rating purposes because neither examiner provided an opinion on additional range of motion lost when Mr. Smith experiences a flare-up or uses his low back used repeatedly over time, and because these examiners did not conduct the range of motion testing required by 38 C.F.R. § 4.59. App. Br. 10–15.

In response, the Secretary argues that the Board acknowledged that the September 2014 VA examination contained inadequacies, but found that it could "still render a fully informed decision on the average impairment caused by Appellant's lumbar spine disability because [Mr. Smith] submitted additional medical evidence documenting that impairment." Sec. Br. at 5. However, the additional evidence the Board relied upon here included the October 2014 private examination that itself was incomplete because it too failed to record what additional range of motion would be lost during a flare-up or after repeated use, and further failed to include the range of motion testing required by 38 C.F.R. § 4.59. *See* R. at 12–13 (3–17); App. Br. at 14–15.

The Secretary maintains that despite the inadequacies in the September 2014 VA examination—inadequacies that the Secretary and Board admit include the examiner's lack of description of Mr. Smith's disability during a flare-up and as "a lack of adequate documentation of his disability in active and passive motion as well as weight-bearing and non-weight bearing"—such omissions are excusable because an examiner's response on 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." Sec. Br. at 6 (emphasis added). However, this Court's "characterizations of an adequate examination" encompass data that the Secretary has found important to rendering a fully informed rating decision—data incorporated in his own regulations, including 38 C.F.R. §§ 4.40, 4.45, 4.59. *See Correia v. McDonald*, 28 Vet. App. 158, 168; *Mitchell v. Shinseki*, 25 Vet. App. 32 (2011); *Jones v. Shinseki*, 23 Vet. App. 382, 390 (2010); *DeLuca v. Brown*, 8 Vet. App. 202 (1995), *Sharp v. Shulkin*, 29 Vet. App. 26, 34 (2017). Moreover, while the Secretary cites *Sharp* for the proposition that lay evidence can be considered "by an examiner" when an examination is not conducted during a flare up, the Secretary ignores the fact that here no examiner addressed lay evidence of a flare-up and operationalized that data into a range of motion estimate, or explained why such an estimate was not feasible. Sec. Br. at 8.

The Secretary further argues that the Board did not err in relying on the credible and competent medical evidence of greater functional loss when it awarded the 20 percent rating. *Id*. This argument misses the point. The Board is most certainly entitled to take into account additional competent and credible evidence that a higher rating is warranted. However, when the information that *is* supplied necessitates at least a 20 percent rating, that fact begs the question as to what range of motion loss would be estimated if the examinations included the full complement of required testing and an estimate as to the additional functional loss that would be expected during a flare-up or after repeated use.

What the Secretary appears to be arguing is that since the Board found enough information in the record to award a higher 20 percent rating, the Board was free to stop

there. Sec. Br. at 8 (documenting the range of motion during the October 2014 private examination). It is not. Accordingly, the Court should find that Mr. Smith is entitled to an adequate medical examination and opinion. 38 U.S.C. §5103A. At a minimum, the Court should remand the matter for the Board to provide an adequate statement of reasons or bases for not awarding a higher than 20 percent rating for Mr. Smith's low back disability. 38 U.S.C. § 7104(d)(1).

II. THE SECRETARY HAS NOT REBUTTED MR. SMITH'S ARGUMENTS THAT THE BOARD'S REASONS OR BASES FOR ITS DECISION ARE INADEQUATE, BECAUSE THE BOARD FAILED TO EXPLAIN THE IMPORT OF ITS EMPHASIS ON "CONSERVATIVE" PAIN MEDICATION, FAILED TO DISCOUNT THE AMELIORATIVE EFFECTS OF MEDICATION, AND FAILED TO ADDRESS WHETHER NEW AND INCREASING USE OF OPIOID PAIN MEDICATION TRIGGERED THE DUTY TO PROVIDE A MORE CONTEMPORANEOUS EXAMINATION.

Mr. Smith argued in his initial brief that the Board further erred in not supporting its decision with an adequate statement of reasons or bases, and detailed three specific areas where the Board's decision is sufficiently deficient to warrant remand. App. Br. at 16–18. Mr. Smith demonstrated that the Board: (1) failed to explain its repeated emphasis on "conservative" pain medication, or what relevance such a characterization had in its decision to deny a higher rating; (2) failed to take into account any ameliorative effects of Mr. Smith's treatment; and, (3) failed to address whether the prescription of increasing doses of the strong opioid medication, Hydrocodone, reflected a worsening of his low back disability sufficient to warrant a more contemporaneous medical examination. *Id*. The Secretary offers no response to Mr. Smith's first and third arguments. In light of the Secretary's silence, these arguments should be deemed

conceded and the claim remanded for the reasons set forth in Mr. Smith's initial brief. App. Br. 16–18; *MacWhorter v. Derwinski*, 2 Vet. App. 655, 656 (1992) (holding that the Secretary's failure to respond to an appellant's arguments will be construed as a concession of error).

As to Mr. Smith's second argument—that the Board failed to address any ameliorative effects of his medications in its rating decision—the Secretary speculates that the September 2014 VA examination and the October 2014 private examination are "highly unlikely to represent Appellant's disability ameliorated by medication as there was no evidence that he experienced ameliorative effects at that time." Sec. Br. at 11. From this the Secretary concludes, "the Board [*sic*] use of them is less likely than other evidence of record to result in inadvertently consideration [*sic*] of the effects of medication on Appellant's disability." *Id*.

The Secretary's speculation is unpersuasive for several reasons. First, it amounts to a post-hoc rationalization because it is the Board's province to weigh and discuss the evidence, including whether it did or did not discount the ameliorative effects of medication in the first instance, and it neglected this duty here. *Barr v. Nicholson*, 21 Vet. App. 303 (2007) (citing *Martin v. OSHRC*, 499 U.S. 144, 156 (1991)) ("'[L]itigating positions' are not entitled to deference when they are merely appellate counsel's 'post hoc rationalizations' for agency action").

Second, this post-hoc rationalization is based on an assumption that the methylprednisone acetate injection that Mr. Smith received in April 2014 had worn off by the time of the September and October 2014 examinations were conducted, an

assumption that the Secretary is unqualified to make. R. at 969; *Colvin v. Derwinski*, 1 Vet. App. 171, 172 (1991); *Kahana v. Shinseki*, 24 Vet. App. 428, 435 (2011) ("[U]nder *Colvin*, when a Board inference results in a medical determination, the basis for that inference must be independent and it must be cited.").

Third, and contrary to the Secretary's averments here, the Board's repeated emphasis on "conservative" treatment with pain medication demonstrates that it was focused on medication management when concluding that not more than a 20 percent rating for Mr. Smith's low back disability was warranted. *See* App. Br. at 16; R. at 12 (3–17) (Board's discussion that only a 20 percent rating is warranted includes a statement that "although VA and private treatment records from this period show occasional treatment for low back pain, the Veteran's symptoms were treated conservatively with pain medication …."); R. at 13 (3–17) (Board's notation that Mr. Smith's low back symptoms have been treated conservatively, and he has maintained significant range of motion). This strongly suggests that the Board impermissibly took into account the ameliorative effects of medication in assigning that rating. *Jones v. Shinseki*, 26 Vet. App. 56, 63 (2012). At a minimum the Board's focus on "conservative" treatment requires additional explanation.

In short, while the Secretary's responsive argument invites speculation, this invitation merely serves to underscore the inadequacy of the Board's reasons and bases for its decision and highlights the need for the Board to adequately address exactly how it accounted for Mr. Smith's medication in rendering its decision. 38 U.S.C. § 7104(d)(1).

CONCLUSION

For the foregoing reasons, and those explained in his initial brief, Mr. Smith respectfully requests that this Court vacate the Board's October 25, 2018 decision that denied him entitlement to a rating in excess of 20 percent for his low back disability. Mr. Smith also respectfully asks this Court to remand his claim to the Board with instructions to provide a medical opinion that conducts all the required testing and that adequately addresses any additional impairment caused during flare-ups or when the joints in his lower back are used repeatedly over time. Finally, Mr. Smith requests that the Court also instruct the Board to provide an adequate statement of reasons or bases as to whether he is entitled to a rating in excess of 20 percent for his low back disability.

Respectfully submitted,

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