Vet. App. No. 19-4123

IN THE UNITED STATES COURT
OF APPEALS FOR VETERANS CLAIMS

STACEY D. DUFFEY,
Appellant,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,
Appellee.

ON APPEAL FROM THE BOARD OF VETERANS' APPEALS

BRIEF OF THE APPELLEE SECRETARY OF VETERANS AFFAIRS

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I. ISSUE PRESENTED

Whether the Court should remand the April 10, 2019, Board of Veterans' Appeals (Board) decision, which denied entitlement a rating in excess of 10% for right ankle strain with degenerative arthritis and callosities (hereinafter "right ankle strain").

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

The Court has jurisdiction over the instant appeal[1] pursuant to 38 U.S.C. § 7252(a), which grants the Court of Appeals for Veterans Claims exclusive jurisdiction to review final decisions of the Board.

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[1] In his Informal Brief, Appellant also take issues with the Board's finding that the issue of claim of clear and unmistakable error in the February 1995 rating decision

B. Nature of the Case

Appellant, Stacey D. Duffey, appeals the April 10, 2019, Board decision, which denied his entitlement to a rating in excess of 10% for a right ankle strain. *See* Appellant's Informal Brief (App. Inf. Br.) at 1-17; (R. at 3-9).

C. Statement of Relevant Facts

Appellant served in active service from February 1993 through October 1994. (R. at 477).

In December 1994, Appellant filed a claim for entitlement to service connection for "early degenerative joint disease" of the right ankle. (R. at 743-46). In a February 1995 rating decision, the Regional Office (RO) granted entitlement to degenerative joint disease of the right ankle and assigned a 10% evaluation. (R. at 730-72).

Appellant filed a claim for an increased rating in January 2016. (R. at 499-507).

In March 2016, VA provided a VA examination. (R. at 350-64). Appellant reported that he had "chronic daily pain with 'giving way'" and that he did not experience flare-ups of the ankle. *Id*. at 353. Appellant reported functional loss or functional impairment of his joint and described it as an inability to walk or stand

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warranted remand. *See* App. Inf. Br. at 2. This Court does not have jurisdiction over this issue and accordingly, this issue is not currently before the Court. *See Breeden v. Principi*, 17 Vet.App. 475, 478 (2004) (per curiam) (the Court lacks jurisdiction to review Board remands

for extended periods of time. *Id*. The examiner noted that range of motion (ROM) was abnormal with dorsiflexion limited to 15 degrees and plantar flexion limited to 30 degrees. *Id*. at 353-54. The examiner opined that ROM contributed to functional loss by limiting standing. *Id*. at 354. The examiner almost noted that pain was noted on examination and caused functional loss, noting that both dorsiflexion and plantar flexion exhibited pain. *Id*. The examiner also opined that there was evidence of pain with weight bearing. *Id*. There was no additional loss of function or ROM after repetitive-use testing with at least three repetitions. *Id*. at 355. The examiner noted that Appellant was not examined immediately after repetitive use over time and that he was unable to say without mere speculation whether pain, weakness, fatigability, or incoordination significantly limited functional ability with repeated use over a period of time. *Id*. at 356. As explanation, the examiner stated that "[i]t [wa]s not possible to determine without resorting to mere speculation, because there [wa]s no conceptual or empirical basis for making such a determination without directly observing function under th[o]se conditions." *Id*. The examiner opined that additional factors contributing to disability included less movement than normal, disturbance of locomotion, and interference with standing. *Id*. at 358-59. There was no ankylosis of the right ankle upon examination. *Id*. at 360. There was ankle instability of the right ankle with a positive anterior drawer test. *Id*. at 360-61.

Later that month, the RO continued the 10% evaluation for his right ankle strain. (R. at 316-37). Appellant filed his notice of disagreement in April 2016, (R. at 304-05), the RO issued a statement of the case (SOC) continuing the denial of an increased rating, (R. at 199-224), and Appellant filed his substantive appeal in July 2017, (R. at 95-103). The RO issued a supplemental SOC in August 2017, continuing the 10% evaluation for his claimed condition. (R. at 69-76).

The Board issued an April 2019 decision. (R. at 3-9). This appeal followed.

III. SUMMARY OF THE ARGUMENT

The Court should vacate and remand the Board's decision that denied entitlement to a rating in excess of 10% for a right ankle condition. The March 2016 VA examination upon which the Board relied was inadequate because it did not comply with *DeLuca* and *Mitchell*. *DeLuca v. Brown*, 8 Vet.App. 202 (1995); *Mitchell v. Shinseki*, 25 Vet. App. 32 (2011). To the extent that Appellant argues that the Board erred in failing to provide an evaluation pursuant to 38 C.F.R. § 4.71a, Diagnostic Code (DC) 5270, Appellant fails to point to any evidence showing the requisite right ankle ankyloses and thereby fails to show Board error. Finally, the Board did not err when it did not address whether Appellant's condition warranted extraschedular consideration because Appellant did not explicitly or was reasonably raised by the evidence.

IV. ARGUMENT

A. The Secretary concedes that the Board relied upon an inadequate VA examination in denying Appellant's claim for a rating in excess of 10% for a right ankle strain.

In his Informal Brief, Appellant contends that the Board erred in applying the *DeLuca* factors of pain. App. Inf. Br. at 13; *see DeLuca*, 8 Vet.App. at 206. The Secretary acknowledges Appellant's contention and concedes that the Board erred in relying upon an inadequate examination to deny his claim.

In *Mitchell*, the Court reaffirmed *DeLuca* and its proposition "that when pain is associated with movement, to be adequate for rating purposes an examination must 'compl[y] with the requirements of § 4.40, and the medical examiner must be asked to express an opinion on whether pain could significantly limit functional ability during flare-ups or when the arm is used repeatedly over a period of time.'" *Mitchell*, 25 Vet. App. at 43-44; (quoting *DeLuca*, 8 Vet.App. at 206). If feasible, such "determinations should . . . be 'portray[ed]' . . . in terms of the degree of additional range-of-motion loss due to pain on use or during flare-ups." *DeLuca*, 8 Vet.App. at 206 (quoting 38 C.F.R. § 4.40). Specifically, the Court explained in *Mitchell* that where an examiner notes no additional limitation after repetitive use, but makes no initial finding as to the degree of ROM loss due to pain on use, the examination does not provide "a clear picture of the nature of the veteran's disability and the extent to which pain is disabling." *Mitchell*, 25 Vet. App. at 44 (citing *DeLuca*, 8 Vet.App. at 206).

Here, VA provided an examination in March 2016, and the examiner opined that Appellant's initial ROM measurements were abnormal. (R. at 353 (350-64)). The examiner provided the ROM results to include dorsiflexion limited to 15 degrees and plantar flexion limited to 30 degrees. *Id*. at 354. While the examiner noted that ROM exhibited pain and noted that there was no ROM loss upon repetitive-use testing, the examiner did not make an initial finding as to the degree of ROM loss due to pain on use. *See* (R. at 354-355); *see also Mitchell*, 25 Vet.App. at 44. Because the examination does not comply with *Deluca* and *Mitchell*, the Secretary concedes that the examination, upon which the Board relied, see (R. at 6 (3-9)), was inadequate and that remand is warranted.

B. The Board's statement of reasons or bases for denying a rating under DC 5270 is adequate.

Appellant contends that the Board erred in failing to provide a 30% or 40% rating under DC 5270. App. Inf. Br. at 12 (citing 38 C.F.R. 4.71a, DC 5270). Appellant misunderstands the prerequisites that would otherwise warrant a rating under DC 5270, and the Court should reject his argument. 38 C.F.R. 4.71a, DC 5270.

DC 5270 provides a 20% evaluation for an ankle ankylosed in plantar flexion at less than 30 degrees; a 30% evaluation for an ankle ankylosed in plantar flexion between 30 and 40 degrees, or in dorsiflexion between 0 and 10 degrees; and a 40% evaluation for an ankle ankylosed in plantar flexion at more than 40 degrees,

in dorsiflexion at more than 10 degrees, or with abduction, adduction, inversion, or eversion deformity. 38 C.F.R. § 4.71a, DC 5270.

The record in this case does not contain evidence that suggests that Appellant has right ankle ankylosis or equivalent functional impairment. Appellant relies upon the March 2016 VA examination that showed dorsiflexion was limited to 15 degrees and plantar flexion was limited to 30 degrees, *see* (R. at 353-54 (350-64)), but Appellant cites to no evidence that supports that he experienced ankylosis of the right ankle as is contemplated by DC 5270. 38 C.F.R. § 4.71a, DC 5270. Indeed, the Mach 2016 VA examination, upon which Appellant relies in making his argument, indicated that Appellant had ***no ankylosis*** of the right ankle upon examination. (R. at 360 (350-64)). Simply, ankle ankylosis is contemplated in all evaluations provided under DC 5270, and without evidence of ankylosis, Appellant's right ankle condition did not warrant an evaluation under DC 5270, just as the Board found in its decision. (R. at 7 (3-9)); *see* 38 C.F.R. § 4.71a, DC 5270.

As such, the Court should reject Appellant's contention that a separate rating under DC 5270 was warranted. 38 C.F.R. § 4.71a, DC 5270.

C. Appellant did not raise a claim for entitlement to extraschedular consideration for his right ankle condition before the Board.

Appellant argues that the Board "failed to consider [his] extraschedular arguments in support of his claim, including the report[s] of chronic, daily pain, and his ankle 'giving way' which limit[ed] his ability to stand or walk for extended periods . . ." App. Inf. Br. at 16. Appellant has failed to carry his burden of presenting

coherent arguments and providing adequate support for those arguments,[2] however, and the Court should reject Appellant's argument.

The Board is required to address whether referral for extraschedular consideration is warranted only whenever the issue is either "argued by the claimant or reasonably raised by the record." *Yancy v. McDonald*, 27 Vet.App. 484, 495 (2016). Reasonably raised by the record involves situations "[w]here there is evidence in the record that shows exceptional or unusual circumstances," *Colayong v. West*, 12 Vet.App. 524, 536 (1999), or when the record shows that the schedular rating may be inadequate. *Thun v. Peake*, 22 Vet.App. 111, 116 (2008), *aff'd*, 572 F.3d 1366 (Fed. Cir. 2009). Alternatively, when extraschedular consideration is neither specifically alleged by the claimant, nor reasonably raised by the record, the Board then has no duty to address whether referral is warranted. *Yancy*, 27 Vet.App. at 494.

[2] The Secretary is mindful of his legal obligation to "give a sympathetic reading" to Appellant's *pro se* filings in order to determine "'all potential claims raised by the evidence, applying all relevant laws and regulations.'" *Szemraj v. Principi*, 357 F.3d 1370, 1373 (Fed. Cir. 2004) (quoting *Roberson v. Principi*, 251 F.3d 1378, 1384 (Fed. Cir. 2001). Even so, it is long-established that Appellant still carries the burden of presenting coherent arguments and of providing adequate support for those arguments. *See Berger v. Brown*, 10 Vet.App. 166, 169 (1997) ("[T]he appellant . . . always bears the burden of persuasion on appeals to this Court."); *see also Locklear v. Nicholson*, 20 Vet.App. 410, 416 (2006) (holding that the Court will not entertain underdeveloped arguments); *Coker v. Nicholson*, 19 Vet.App. 439, 442 (2006) ("The Court requires that an appellant plead with some particularity the allegation of error so that the Court is able to review and assess the validity of the appellant's arguments.").

Here, Appellant does not support his contention with any evidence in the record that demonstrates that a claim for extraschedular consideration was either explicitly raised or reasonably raised by the record before the Board. Rather, he simply alleges that his ankle had chronic, daily pain, his ankle gave way, and he had functional limitations affecting ability to stand or walk for extended periods of time amounted to evidence of a reasonably raised extraschedular claim. App. Inf. Br. at 16. There is no allegation in his Informal Brief that he raised the contention below. There is also no allegation that the schedular evaluations for ankle conditions were insufficient such that his disability picture would be so unique, warranting extraschedular consideration. Without Appellant alleging anything more, he fails to bear his burden of persuasion, and this Court should reject Appellant's contention. *See Berger*, 10 Vet.App. at 169; *Coker*, 19 Vet.App. at 442.

D. **Appellant has abandoned all issues not argued in his brief.**

It is axiomatic that issues not raised on appeal are abandoned. *See Disabled Am. Veterans* at 688 n.3 (stating that the Court would "only address those challenges that were briefed"); *Winters v. West*, 12 Vet.App. 203, 205 (1999); *Williams v. Gober*, 10 Vet.App. 447, 448 (1997) (deeming abandoned BVA determinations unchallenged on appeal); *Bucklinger v. Brown*, 5 Vet.App. 435, 436 (1993). Thus, any and all other issues that have not been addressed in Appellant's Informal Brief, have therefore been abandoned.

V. CONCLUSION

In view of the foregoing arguments, Appellee, the Secretary of Veterans Affairs, respectfully requests that the Court remand for adjudication the issue of entitlement to a rating in excess of 10% for a right ankle condition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify under possible penalty of perjury under the laws of the United States of America that, on January 16, 2020, a copy of the foregoing was mailed postage prepaid to:

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