Vet. App. No. 19-3498

IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

ROBERT J. MANNICES,
Appellant,

v.

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

ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS

BRIEF OF APPELLEE SECRETARY OF VETERANS AFFAIRS

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Secretary of Veterans Affairs	)	
	)	
Appellee	)	

ON APPEAL FROM
THE BOARD OF VETERANS' APPEALS

APPELLEE'S BRIEF

I. ISSUES PRESENTED

Whether the Court should affirm the January 25, 2019, decision of the Board of Veterans' Appeals (Board), which denied (1) entitlement to a rating in excess of 20% for lumbar spondylosis L5 with spondylolisthesis at L5-S1 (hereinafter lumbar spine condition), and (2) an earlier effective date, and a rating in excess of 30%, for bilateral flat feet and posterior calcaneal spurs (hereinafter bilateral flat feet), effective March 8, 2016.

II. STATEMENT OF THE CASE

Jurisdictional Statement

The Court has proper jurisdiction pursuant to 38 U.S.C. § 7252(a).

B. Nature of the Case

Robert J. Mannices (Appellant) appeals the January 25, 2019, decision of

the Board, which denied entitlement to a rating in excess of 20% for a lumbar spine condition and an earlier effective date, and a rating in excess of 30%, for bilateral flat feet, effective March 8, 2016.

C. Statement of Relevant Facts

Appellant served in the United States Navy from October 1994 to October 2007. (Record Before the Agency (R.) at 517). In March 2016, he filed a claim for increased ratings for his lumbar spine and bilateral flat feet conditions. (R. at 353-354). VA provided him a compensation and pension (C&P) examination for his lumbar spine condition in April 2016[1]. (R. at 189-194). The examiner found Appellant's range of motion (ROM) was normal; no pain was noted on examination. (R. at 190). She also noted there was no additional loss of function or ROM after repetitive use testing; flare-ups were not reported. (R. at 190). The same day, Appellant was provided a C&P examination for his feet conditions. (R. at 201-207). Appellant reported pain in both feet, primarily in his left foot, with the pain being worse in cold weather. (R. at 202). The examiner noted pain on examination for Appellant's left foot. (R. at 204-205). Additionally, she noted weakened movement, pain on movement, and pain on weight-bearing for Appellant's left foot, with additional functional loss after prolonged walking. (R. at 205). A May 2016 rating decision continued Appellant's lumbar spine rating at

[1] Appellant's examinations were conducted on April 23, 2016, and signed May 2, 2016.

20% and increased his bilateral flat feet rating from 10% to 30%, effective March 8, 2016. (R. at 149-157).

Appellant filed his notice of disagreement (NOD) in November 2016. (R. at 114-120). VA issued a statement of the case, in February 2017, which continued to deny Appellant's claims, finding there was no error in the May 2016 rating decision and no additional evidence had been submitted that would warrant increased ratings. (R. at 86-105). Appellant perfected his appeal in March 2017. (R. at 78-79).

In January 2019, the Board issued the decision on appeal, which denied entitlement to a rating in excess of 20% for a lumbar spine condition and an earlier effective date, and a rating in excess of 30%, for bilateral flat feet, effective March 8, 2016. (R. at 5-16). The present appeal followed.

III. SUMMARY OF ARGUMENT

This Court should affirm the January 25, 2019, decision which denied entitlement to a rating in excess of 20% for a lumbar spine condition and an earlier effective date, and a rating in excess of 30%, for bilateral flat feet, effective March 8, 2016. Specifically, the Board did not err in its statement of reasons or bases for the denial of Appellant's claims. It properly considered and interpreted the applicable law and adequately explained its determinations.

IV. ARGUMENT

A. THE BOARD PROVIDED AN ADEQUATE STATEMENT OF REASONS OR BASES FOR ITS DENIAL OF AN EARLIER EFFECTIVE DATE, AND A RATING IN EXCESS OF 30%, FOR APPELLANT'S BILATERAL FLAT FEET CLAIM

In rendering a decision, the Board must consider all "potentially applicable" provisions of law, *Schafrath v. Derwinski,* 1 Vet.App. 589, 593 (1991), and must provide a statement of reasons or bases sufficient to enable a claimant and this Court to understand the basis of its decision, *Gilbert v. Derwinski,* 1 Vet.App. 49, 57 (1990). The latter generally requires the Board to analyze the probative value of the evidence, account for that which it finds persuasive or unpersuasive, and explain why it rejected evidence materially favorable to the claimant. *Caluza v. Brown,* 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table).

Regarding his April 2016 C&P examination for foot conditions, Appellant asserts the Board "failed to provide an adequate statement of reasons and bases for its decision to require Appellant to rebut the presumption of regularity as a threshold burden to challenge the adequacy of an examination." (Appellant Brief (App. Br.) at 2). He fails to demonstrate this was a prejudicial error.

When a disability of the joints is evaluated based on limitation of motion, the Board must consider any additional limitations due to pain, weakness or fatigue. *DeLuca v. Brown,* 8 Vet.App. 202, 205-06 (1995). In *DeLuca*, the Court found that a medical examination that failed to opine on whether additional

functional loss resulted from pain was inadequate and instructed that the examiner be asked on remand to opine on whether the veteran's pain could significantly limit his functional ability during flare-ups or on repetitive use. *Id*. at 205-06. In *Mitchell v. Shinseki,* 25 Vet.App. 32 (2011), the Court clarified that pain may result in functional loss if it limits the ability to perform normal working movements even if present only on repetitive motion or during a flare-up. *Id*. at 44. The Court thus reaffirmed that an adequate medical examination must contain "an opinion on whether pain could significantly limit functional ability" either during a flare-up or as a result of repetitive use. *Id.* at 43-44 (quotations omitted).

Appellant's November 2016 NOD challenged the adequacy of an unidentified C&P examination, indicating a "*Deluca* failure" and arguing "the medical examination is not reflective of his ordinary, everyday life" and "normal physical condition." (R. at 116). The Board found, "[Appellant's] representative has raised various boilerplate, generalized duty to assist and due process arguments without citing specific issues or deficiencies. … The Board rejects those arguments as vague and conclusory and affirmatively finds that VA satisfied the duty to assist in the development of the claim denied above for the following reasons." (R. at 6). If further found, "[Appellant's] representative also raised some specific contentions regarding the inadequacy of an unspecified VA examination. Specifically, he argued that the unspecified VA examination was inaccurate, because it failed to consider fatigue, pain, and weakness (*Deluca*

factors) caused by repetitive use and movement throughout an *ordinary* day." (R. at 7). The Board noted the presumption of regularity applies to C&P examinations and determined "there was no indication that [the examiner's] findings were biased, inaccurate, or incomplete in any way." (R. at 7). Additionally, the Board found the examiner "adequately addressed the *Deluca* factors (noting no additional limitation of range of motion of the spine after repetitive use due to pain on movement)"; this finding addressed the April 2016 C&P for back conditions. (R. at 7).

As Appellant's November 2016 NOD challenged the adequacy of the examination, not the competence of the examiner, the Board erred in applying the presumption of regularity to the examinations. However, this is harmless error. The critical inquiry in determining whether a particular error is harmful is whether the outcome of the Board decision might have been different had the error not occurred. *See Lamb v. Peake*, 22 Vet.App. 227, 235 (2008) (holding that there is no prejudicial error when a remand for a decision on the merits would serve no useful purpose); *Mayfield v. Nicholson*, 19 Vet.App. 103, 116 (2005) (focus is on the effect of the error on the essential fairness of the adjudication), *rev'd on other grounds by*, 444 F.3d 1328 (Fed. Cir. 2006). Here, the April 2016 examiner considered functional loss and limitation of motion; she noted weakened movement, pain on movement, and pain on weight-bearing for Appellant's left foot only, with additional functional loss after prolonged walking. (R. at 205). The Board did not expressly address the adequacy of the April 2016

C&P examination for foot conditions in its duty to assist discussion. (R. at 7). However, later in its analysis, it found Appellant's level of functional impairment due to pain in his feet was contemplated by the rating criteria of Diagnostic Code (DC) 5276, citing the April 2016 C&P examination as evidence "[Appellant's] symptoms do not cause additional functional loss—besides difficulty walking for a prolonged period—during repetitive use/flare-ups due to pain". (R. at 15); *see* 38 C.F.R. § 4.71a, DC 5276. The Board further noted the April 2016 examiner's finding that "there was no evidence of muscle atrophy nor of [Appellant] requiring an assistive device for locomotion." (R. at 15). Thus, the present decision addresses Appellant's arguments regarding the adequacy of the April 2016 C&P examination, as it found the examiner's functional loss findings to be adequate and probative. (R. at 14-15).

If the basis of the Board decision can be ascertained, its statement of reasons or bases is adequate. *Johnson v. Shinseki*, 26 Vet.App. 237, 247 (2013) ("A Board statement should generally be read as a whole, and if that statement permits an understanding and facilitates judicial review of the material issues of fact and law presented on the record, then it is adequate.") (citation omitted). *See also Mayfield,* 19 Vet.App. at 129 (observing that where judicial review is not hindered by deficiency of reasons or bases, a remand for reasons or bases error would be of no benefit to the appellant and would therefore serve no useful purpose). As such, the Secretary maintains that Appellant has failed to

demonstrate that any error was harmful and prejudicial or that remand would confer any benefit to him; therefore, affirmance is warranted.

Appellant asserts the Board ignored evidence of hallux valgus. (App. Br. at 5). This assertion is false. A January 2010 C&P examination indicates Appellant had bilateral hallux valgus at that time. (R. at 619 (616-620)). However, the April 2016 C&P examination, which included contemporaneous imaging, does not indicate Appellant presently has hallux valgus. (R. at 204), (R. at 207). In his opening brief, Appellant does not cite to any medical or lay evidence that indicates a current complaint or diagnosis of hallux valgus. (App. Br. at 5). There is no evidence of record that this condition has persisted during the period on appeal. Thus, the Board was under no obligation to consider a separate rating under DC 5280. *See* 38 C.F.R. § 4.71a, DC 5280 (providing ratings for unilateral hallux valgus).

Appellant argues the April 2016 examiner failed to "provide an opinion as to the degree of severity of [his] bilateral feet during a flare-up or following their repeated use over time." (App. Br. at 5). This argument is unsupported.

A claimant may be entitled to a higher disability evaluation where he suffers from "range-of-motion loss specifically due to pain and any functional loss during flare-ups" or due to the relevant joint being "used repeatedly over a period of time." *Mitchell*, 25 Vet.App. at 43-44; *DeLuca*, 8 Vet.App. at 206-07. Where possible, range of motion testing should be done to determine the extent of any such functional loss. 38 C.F.R. § 4.59; *Correia v. McDonald*, 28 Vet.App. 158,

168-69 (2016). If possible, VA examinations should be provided during periods of flare-ups, but where that is not possible, if the VA examiner cannot otherwise opine as to functional loss during flare-ups without speculating, he or she must explain why. *See Sharp v. Shulkin*, 29 Vet.App. 26, 33 (2017); *Jones v. Shinseki*, 23 Vet.App. 382, 390 (2010).

This Court, in *Southall-Norman v. McDonald*, 28 Vet.App. 346(2016), held that 38 C.F.R. § 4.59 applies to pes planus. *Id*. at 354. However, the rating criteria for DC 5276 is not based on limitation of motion; thus, the ROM testing required for compliance with *Deluca*, *Mitchell*, and *Correia* does not apply. As to *Sharp* and *Jones*, the examiner adequately described Appellant's functional loss during flare-ups, opining he had weakened movement, pain on movement, and pain on weight-bearing for the left foot; she also opined Appellant had additional functional loss, in both feet, after repeated use over a period of time. (R. at 205-206). An adequate medical opinion must be based upon a consideration of the relevant evidence and must provide the Board with a foundation sufficient enough to evaluate the probative worth of that opinion. *See Ardison v. Brown*, 6 Vet.App. 405, 407 (1994) (adequate medical examination is one that is based on consideration of veteran's prior medical history and describes his or her condition with a level of detail sufficient to allow the Board to make a fully informed decision on the relevant medical question). Here, as the examiner provided reasoned findings regarding Appellant's functional loss, the Board's reliance upon her opinion was proper.

Appellant contends the Board "failed to provide an adequate statement of reasons and bases [for] why it discounted/ignored favorable evidence which raised the potential award of an effective date prior to the date of the March 8, 2016 IR claim." (App. Br. at 6). The crux of his contention appears to be that his March 2016 application for increased compensation indicated his condition "has become worse"; thus, the Board had a duty to sympathetically adjudicate the claim and consider an earlier effective date. (App. Br. at 6). This contention is unpersuasive.

In accordance with 38 U.S.C. § 5110(b)(3), the effective date of an award of increased compensation shall be the earliest date as of which it is ascertainable that an increase in disability had occurred, if application is received within one year from such date. *See Hart v. Mansfield,* 21 Vet.App. 505, 509 (2007) ("When a claim for an increased rating is granted, the effective date assigned may be up to one year prior to the date that the application for increase was received *if it is factually ascertainable that an increase in disability had occurred in that timeframe*.") (emphasis added). The Board found:

> The claims file shows that VA received the Veteran's claim for an increased rating for bilateral feet condition on March 8, 2016. There are no earlier filings that could be construed, even in the broadest sense, as a claim for an increased rating for the bilateral feet disability. Importantly, the Veteran does not allege he filed an earlier claim. While he checked the box on his NOD form disagreeing with the effective date, he has provided no argument as to why he feels an earlier date is warranted.

(R. at 15). It further found, "there are no medical records that reflect a factually ascertainable increase in the bilateral feet condition within the one year prior to his March 2016 claim filing. Thus, the Board finds that an earlier effective date of March 8, 2016 for the 20 percent rating is not warranted." (R. at 15-16).

The April 2016 examiner indicated the level of severity of Appellant's right foot was "stable and mild" but his left foot has "progressed since the split peroneal brevis tendon of the left side in 2014." (R. at 207). This finding was the basis of the May 2016 rating decision that increased his rating from 10% to 30%. (R. at 150-151). The examiner did not indicate when the worsening began. (R. at 207). Appellant argues the examiner should have provided a retrospective opinion and her failure to do so renders the examination inadequate. (App. Br. at 7). However, it is unclear how the examiner could have provided such an opinion without speculation as there is no medical, or lay evidence, of record that indicates when Appellant's symptoms began to worsen. At no point during the appeal process, or in his opening brief, has Appellant indicated when his worsening began; he has merely posited a vague assertion that his March 2016 request for an increased rating was "not a present status, but a historical status of [his] disability." (App. Br. at 6); *see* (R. at 354).

The question before the Board was whether the worsening of Appellant's condition was factually ascertainable prior to his March 2016 request for an increased rating; the Board's determination that it was not is plausible based on the evidence of record. *See Gilbert*, 1 Vet.App. at 52-53 (a finding of fact is not

clearly erroneous if there is a plausible basis for it in the record). Therefore, and in light of Appellant's failure to establish error warranting remand, as required by law, the Court should affirm the Board's decision.

B. THE BOARD PROVIDED AN ADEQUATE STATEMENT OF REASONS AND BASES FOR ITS DENIAL OF A RATING IN EXCESS OF 20% FOR APPELLANT'S LUMBAR SPINE CLAIM

Appellant argues the Board "failed to provide an adequate statement of reasons and bases for its decision to rely upon the inadequate May 2016 medical exam." (App. Br. at 8). This contention is unpersuasive.

The April 2016 examiner noted that Appellant complained of "6/10 intermittent back pain." (R. at 189). She also noted that he reported functional loss due to his lumbar spine condition stating, "I can't lift as much as I used to." (R. at 190). The examiner conducted testing and found Appellant's ROM was normal. (R. at 190). She also noted there was no pain on examination, evidence of pain with weight bearing, or objective evidence of localized tenderness or pain on palpation of the joints or associated soft tissue of the thoracolumbar spine. (R. at 190). The examiner noted that Appellant was able to perform repetitive use testing with at least three repetitions without additional loss of function of ROM. (R. at 190). She also noted Appellant was examined immediately after repetitive use over time and pain, weakness, fatigability nor incoordination significantly limited his functional ability. (R. at 190). The examiner did not opine as to flare-ups because Appellant did not report any. (R. at 189-190). Appellant's muscle strength testing, reflex and sensory examinations were all normal. (R. at 191-

192). Additionally, Appellant's straight leg raising test was normal and no ankylosis of the spine was indicated. (R. at 192). Imaging indicated "[m]ild multilevel degenerative disc disease." (R. at 194). The examiner opined Appellant's lumbar spine condition was "stable and chronic." (R. at 194).

Appellant asserts "[t]he intermittent nature of [his] back pain reasonably raised the issue of flare-ups" and the examiner failed to opine as to whether his flare-ups caused any additional loss of motion (App. Br. at 9). However, this is assertion is not supported by the evidence of record, and he cites to no authority to indicate intermittent pain is analogous to a flare-up. The examiner reviewed Appellant's medical history and conducted an in-person examination prior to authoring her opinion. (R. at 189). There is no basis for suspecting she did not adhere to the protocols and standards of a medical professional and elicit all the relevant and necessary information before rendering her decision, nor did Appellant raise any such argument to the Board. *See Francway v. Wilkie*, 940 F.3d 1304, 1306 (Fed. Cir. 2019); *Cox v. Nicholson*, 20 Vet.App. 563, 569 (2007) (the Board is entitled to assume the competence of a VA medical examiner); *see also Miley v. Principi,* 366 F.3d 1343, 1347 (Fed. Cir. 2004) ("The presumption of regularity provides that, in the absence of clear evidence to the contrary, the court will presume that public officers have properly discharged their official duties."). Appellant's disagreement with the significance of the clinical evidence is a mere disagreement with the weighing of the evidence. *See Kern v.*

Brown, 4 Vet.App. 350, 353 (1993) (noting that "appellant's attorney is not qualified to provide an explanation of the significance of the clinical evidence").

It is the responsibility of the Board to consider and assign probative value to the evidence. *See Washington v. Nicholson*, 19 Vet.App. 362, 368 (2005) (it is the responsibility of the Board to assess the probative weight of the evidence). Appellant's mere disagreement with the weighing of the evidence does not constitute error. *See Deloach v. Shinseki*, 704 F.3d 1370, 1380 (Fed. Cir. 2013); *D'Aries v. Peake*, 22 Vet.App. 97, 108 (2008). Therefore, Appellant's arguments fail and he has not shown that the Board's statement of reasons or bases was prejudicially inadequate.

Moreover, the Secretary does not concede any material issue that the Court may deem Appellant adequately raised, argued and properly preserved, but which the Secretary may not have addressed through inadvertence, and reserves the right to address same if the Court deems it necessary or advisable for its decision. The Secretary also requests that the Court take due account of the rule of prejudicial error wherever applicable in this case. 38 U.S.C. § 7261(b)(2).

V. CONCLUSION

Upon review of all the evidence, as well as consideration of the arguments advanced, Appellant has not demonstrated the Board committed clear error in its findings of fact or its conclusions of law. Because Appellant failed to satisfy his

burden of demonstrating the existence of a prejudicial error, the Court should affirm the decision on appeal.

Respectfully submitted,

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