Vet.App. No. 19-4051

IN THE UNITED STATES COURT
OF APPEALS FOR VETERANS CLAIMS

JORGE J. DELGADO-MADURO,
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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IN THE UNITED STATES COURT OF APPEALS
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JORGE J. DELGADO-MADURO, Appellant,	)	
v.	)	Vet. App. No. 19-4051
ROBERT L. WILKIE, Secretary of Veterans Affairs, Appellee.	)	

ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS

BRIEF OF APPELLEE
SECRETARY OF VETERANS AFFAIRS

I. ISSUE PRESENTED

Whether the Court should vacate a February 21, 2019, decision of the Board of Veterans' Appeals (the Board), which denied ratings in excess of 20% for radiculopathy of the bilateral lower extremities; denied an initial rating in excess of 10% for instability of the right knee; and denied an initial rating in excess of 10% for limitation of flexion of the right knee.

Whether the Court should affirm the Board's decision, to the extent that it denied initial ratings in excess of 50% for sleep apnea, in excess of 30% for sinusitis, in excess of 0% for rhinitis, and in excess of 40% for a low back disability.

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

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

B. Nature of the Case

Appellant, Jorge J. Delgado-Maduro, appeals from a February 21, 2019, decision of the Board that denied initial ratings in excess of 50% for sleep apnea, in excess of 30% for sinusitis, in excess of 0% for rhinitis, and in excess of 40% for a low back disability. Appellant also appeals the Board's decision, to the extent that it denied ratings in excess of 20% for radiculopathy of the bilateral lower extremities; denied an initial rating in excess of 10% for instability of the right knee; and denied an initial rating in excess of 10% for limitation of flexion of the right knee.

With this decision, the Board also granted service connection for an acquired psychiatric disorder, granted the 20% ratings for radiculopathy of the bilateral lower extremities, granted an initial 10% rating for symptomatic removal of semilunar cartilage of the right knee, and granted the 10% rating for instability of the right knee. These favorable aspects of the Board's decision are not before the Court and should remain undisturbed. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007).

The Board also remanded the issue of entitlement to a total disability rating based upon individual unemployability. This remanded issue is also not before the Court. *See Breeden v. Principi*, 17 Vet.App. 475, 477-78 (2004).

C. Statement of Relevant Facts

In June 2013, the Department of Veterans Affairs regional office (RO) granted several claims filed by Appellant. The RO granted service connection for sleep apnea and assigned an initial rating of 50%, it granted service connection for a low back disability and assigned an initial rating of 40%, it granted service connection for sinusitis and assigned an initial rating of 30%, it granted service connection for rhinitis with a 0% rating, and it granted service connection for residuals of left knee surgery with a 10% initial rating. (R. at 3863-83).[1]

In July 2013, Appellant submitted a statement, alleging that his service-connected disabilities render him unemployable, which the RO construed as also raising the issue of entitlement to increased disability ratings for his service-connected conditions. (R. at 3790-97, 3823). Following a June 2014 examination (R. at 3587-3636), the RO continued Appellant's previously assigned ratings in a July 2014 decision. (R. at 3454-65).

Appellant, in September 2014, submitted additional evidence sourced from the Social Security Administration (R. at 3382-3403), and the RO issued another

[1] References preceded by "R." refer to the Record of Proceedings.

decision in December of that year, by which it again continued Appellant's previously assigned disability ratings. (R. at 2730-42).

Appellant submitted a notice of disagreement with this decision in May 2015. (R. at 2399-2400). The RO issued a statement of the case in March 2017. (R. at 2037-79). In May 2017, Appellant submitted a substantive appeal to the Board. (R. at 445-73). In this submission, Appellant alleged that his service-connected conditions had worsened. He stated that he experienced daily sinus pressure and congestion, as well as nose bleeds. (R. at 460). He also alleged that his knee had become more limited it its range of motion, and he also noted instability, locking, and swelling. (R. at 460). As to sleep apnea, he complained that the earlier VA examination did not discuss whether he experiences "chronic respiratory failure with carbon dioxide retention or cor pulmonale" (R. at 464), and he stated that he experiences worsened headaches upon waking up. (R. at 460). He stated that his back condition had worsened, with increased limitation of motion (R. at 460), and he argued that his earlier examination was unclear as to the presence of intervertebral disc syndrome (IVDS). (R. at 464).

The Board, in February 2019, continued Appellant's disability ratings, and it also, as relevant here, granted separate ratings for radiculopathy of the lower extremities and for right knee instability. (R. at 4-30). Appellant now appeals from this decision.

III. SUMMARY OF THE ARGUMENT

The Court should vacate, in part, the Board's decision, as it relates to the limitation of flexion and instability in Appellant's knee and to the bilateral lower extremity radiculopathy, because the Board provided an inadequate statement of reasons or bases. The Court should otherwise affirm the Board's decision, because Appellant has failed to demonstrate prejudicial Board error.

IV. ARGUMENT

A. The Board Provided an Inadequate Statement of Reasons or Bases with Respect to Appellant's Radiculopathy

The Board discussed the evidence speaking to Appellant's lower extremity radicular symptoms and noted the impairments stemming from those symptoms. (R. at 22-24). The Board assigned separate 20% ratings for these impairments, finding that higher ratings of 40% were not warranted, because the symptomatology is best described as moderate, as opposed to moderately severe. (R. at 24-25). Appellant argues that the Board's discussion in this regard is inadequate, because the Board failed to articulate the standard it used to distinguish between moderate and moderately severe impairment. (Appellant's Brief at 9). The Secretary agrees.

Appellant's radiculopathy is rated pursuant to the rating criteria of Diagnostic Code (DC) 8520. *See* 38 C.F.R. § 4.124a. That criteria provides for escalating disability ratings, based upon whether partial paralysis of the sciatic nerve is mild, moderate, moderately severe, or severe. *Id.* In *Johnson v. Wilkie*, this Court

discussed rating criteria that, like the criteria found in Diagnostic Code 8520, "is rife with subjective terms of degree, the standards for which are undefined in the Board's discussion or anywhere in the regulatory structure." 30 Vet.App. 245, 254 (2018). The Court found that this lack of regulatory clarity, combined with a lack of discussion by the Board as to how the various subjective standards are distinguished, rendered the Board's application of the rating criteria "unreviewable in this Court." *Id.* at 255.

Those same circumstances are present here. DC 8520's criteria are subjective in nature, and they convey no specific standards for determining what constitutes moderate, as opposed to moderately severe, impairment. 38 C.F.R. § 4.124a. And, while the Board discussed Appellant's symptoms here, it articulated no standard in this regard. The Secretary, therefore, agrees that, pursuant to *Johnson*, the Board's statement of reasons or bases is inadequate with respect to the denial of ratings in excess of 20% for Appellant's bilateral lower extremity radiculopathy. Vacatur and remand is, therefore, warranted.

B. The Board Provided an Inadequate Statement of Reasons or Bases with Respect to Appellant Right Knee Flexion and Instability

The Board found that the evidence does not support assignment of ratings in excess of 10% for either the instability or the limitation of flexion in Appellant's right knee. (R. at 28). Appellant argues that vacatur and remand of these determinations is warranted, because the Board provided an inadequate

statement of reasons or bases with respect to its duty to assist. (Appellant's Brief at 7). The Secretary agrees.

In his May 2017 substantive appeal, Appellant alleged that his knee symptoms had "become worse since [his] last VA examination" in June 2014. (R. at 460). He indicated that his range of motion had become additionally limited and that his knee "feels unstable every other day" and "feels like [his] leg will fall out from under [him]." (R. at 460).

Where, as here, the Board undertakes an evaluation of a claimant's disability, it must ensure that the record is adequate to determine the current state of disability. *See Palczewski v. Nicholson*, 21 Vet.App. 174, 181 (2007). Generally, where a claimant submits evidence that a condition has worsened since it was last evaluated, the record will be considered inadequate to rate the condition, and a new examination will be required. *See Proscelle v. Derwinski*, 2 Vet.App. 629, 632 (1992) (requiring a new examination where the record "was inadequate for evaluating the current state of the veteran's service-connected disability."); 38 C.F.R. § 3.327(a) ("Generally, reexaminations will be required . . . evidence indicates there has been a material change in a disability or that the current rating may be incorrect.").

Appellant has specifically alleged that his knee symptomatology has worsened since his last examination, and he clarified that this worsening is such that it could be suggestive of a higher disability rating. Indeed, the additional range of motion that he has alleged could be shown to be consistent with the limitation

contemplated by the criteria applicable to greater-than-10% ratings, and the instability he has alleged could similarly be shown to be consistent with the higher levels of instability or subluxation contemplated by DC 5257. Although the Board, apparently, found the record to be adequate to evaluate Appellant's knee impairment, it did not discuss these allegations of worsened symptoms and, further, did not discuss whether these allegations warrant the provision of an additional examination. The Secretary, therefore, agrees with Appellant in the assertion that the Board provided an inadequate statement of reasons or bases with respect to its duty to assist in the development of his claim. Vacatur and remand is, therefore, warranted.

C. Remand Is Not Warranted with Respect to the Claims Pertaining to Sleep Apnea, Sinusitis, Rhinitis, and the Low Back

With respect to his sleep apnea, sinusitis, rhinitis, and the low back, Appellant raises the same argument that he does with respect to his knee. He argues that the Board prejudicially erred by failing to account for his allegations of worsening symptoms. (Appellant's Brief at 7). Appellant's contention is not persuasive in these contexts.

Appellant is correct, to the extent he alleges that the Board erred. He made allegations of worsening symptoms, and the Board did not discuss that worsening, which is error. But, demonstrating error is not the whole story. Before remedial action by the Court is warranted, there must be *prejudicial* error, and it is clear that

the lack of Board discussion noted by Appellant is harmless here. *See* 38 U.S.C. § 7261(b)(2); *Simmons v. Wilkie*, 30 Vet.App. 267, 279 (2018).

First, Appellant's sleep apnea is rated as 50% disabling, pursuant to DC 6847. (R. at 3463); *see* 38 C.F.R. § 4.100. To qualify for a higher rating for sleep apnea, that condition must result in either chronic respiratory failure that includes retention of carbon dioxide or cor pulmonale, or must require tracheostomy.[2]

When Appellant alleged that his sleep apnea had worsened, he was quite clear as to the nature of his worsened symptoms. He stated that "the headaches that [he] experience[s] upon waking up are now much worse." (R. at 460).[3] Appellant said nothing about any cardiac problems arising from his sleep apnea,[4] and he made no allegation regarding the need for the surgical establishment of an alternative airway. Absent any such suggestion, the record does not reasonably raise the possibility of an increased rating for Appellant's sleep apnea. There is

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[2] Cor pulmonale refers to "[h]ypertrophy or failure of the right ventricle [of the heart] resulting from disorders of the lungs, pulmonary vessels, or chest wall." TABER'S CYCLOPEDIC MEDICAL DICTIONARY, at 447 (18th Ed. 1997) ("Cor pulmonale"). Tracheostomy refers to a surgical incision in the trachea to provide an alternative airway. *Id.* at 1978 ("tracheostomy").

[3] Appellant's headaches are compensated by his sinusitis rating. *See* 38 C.F.R. § 4.97 (DC 6514).

[4] Appellant appears to blame the June 2014 VA examiner for this, in that he faults the Board for not discussing whether that examination may be inadequate, due to the failure to state whether cor pulmonale was present. (Appellant's Brief at 7). The examiner specifically indicated that there were no pertinent complications of Appellant's sleep apnea. (R. at 3591). This fairly conveys that Appellant does not experience ventricular failure due to his sleep apnea.

nothing in Appellant's allegations of worsened sleep apnea symptoms that renders the record inadequate, for purposes of determining whether he might be entitled to a rating in excess of 50% for that condition. The Board's omission of Appellant's allegations vis-à-vis his sleep apnea and his headaches is, therefore, harmless.

Second, Appellant's sinusitis is rated 30% disabling under DCs 6512. (R. at 2740); 38 C.F.R. § 4.97.[5] To qualify for a greater-than-30% rating for sinusitis, there must be either chronic osteomyelitis "[f]ollowing radical surgery" or "near constant sinusitis" with various symptoms that persist "after repeated surgeries." 38 C.F.R. § 4.97 (DCs 6512, 6514).

As with sleep apnea, Appellant was clear as to the nature of his worsened sinus symptoms. He stated that he experiences "sinus pressure and congestion, along with nose bleeds," with the pressure and congestion persisting for several hours in the morning and for "about two hours" in the afternoon. (R. at 460). Appellant does not allege, and the record does not suggest, that his sinusitis has ever required surgical intervention, which is required for an increased sinusitis rating. 38 C.F.R. § 4.97 (DCs 6512, 6514). Absent some suggestion that this necessary condition for a higher rating might exist here, there is no suggestion that the record is inadequate to determine whether Appellant may be entitled to a 50% sinusitis rating. Absent such a suggestion, the record is clear that he is not so

[5] Appellant refers, in his brief, to an allegation concerning the worsening of his rhinitis (Appellant's Brief at 7), but the evidence he cites refers only to his "sinus condition." (R. at 460).

entitled. There is, accordingly, no prejudice flowing from the Board's failure to specifically discuss the allegations of worsened sinusitis.

Third, Appellant's lumbar spine disability is rated as 40% disabling pursuant to the General Rating Formula (General Spine Formula) applicable to spinal disabilities. (R. at 2740); 38 C.F.R. § 4.71a. To qualify for a higher rating, Appellant's disability must, at a minimum, result in unfavorable ankylosis of the entire thoracolumbar spine. 38 C.F.R. § 4.71a. Unfavorable ankylosis refers to the spine's being "fixed in flexion or extension," where

> the ankylosis results in one or more of the following: difficulty walking because of a limited line of vision; restricted opening of the mouth and chewing; breathing limited to diaphragmatic respiration; gastrointestinal symptoms due to pressure of the costal margin on the abdomen; dyspnea or dysphagia; atlantoaxial or cervical subluxation or dislocation; or neurologic symptoms due to nerve root stretching.

38 C.F.R. § 4.71a (General Spine Formula, Note 5).

Appellant's allegation of worsened back symptomatology consists of his statement that his range of back motion has decreased and that his back pain requires him to lie or sit down at least once weekly. (R. at 460). Nothing in this allegation suggests that any portion of Appellant's spine, let alone the entire thoracolumbar spine, is fixed in position. Moreover, even if once is to assume that the reduced, but still clearly present, motion that Appellant alleges could potentially be sufficiently severe as to fairly approximate an ankylosed and immobilized spine, Appellant points to nothing to suggest the existence of any of the myriad sequelae that are indicative of unfavorable ankylosis, within the meaning of VA regulations.

In the absence of any of those sequelae, there can be no suggestion of entitlement to a rating in excess of 40%. The record here is, notwithstanding Appellant's allegation of worsened symptoms, clearly sufficient to determine that he is not entitled to a rating in excess of 40% for his low back disability. The Board's omission of Appellant's statements here is thus harmless.

Similarly harmless is Appellant's allegation of Board error vis-à-vis his argument that the June 2014 VA examination was inadequate, due to conflicting information regarding whether he has intervertebral disc syndrome (IVDS). (Appellant's Brief at 7); (R. at 464). He is correct that the examiner suggested that he had IVDS, while also stating that he does not. (R. at 3621, 3626). But, the question here really does not concern whether Appellant has IVDS. The question here is whether Appellant is entitled to a rating in excess of 40% for his low back disability.

Even assuming that Appellant does have IVDS, there must be some suggestion that the IVDS causes incapacitating episodes sufficient to entitle him to a greater-than-40% rating. Such a rating, based on IVDS, requires incapacitating episodes, which required physican-prescribed bedrest, with a total duration of at least 6 weeks during a 12-month period. 38 C.F.R. § 4.71a (Formula for Rating IVDS). Appellant points to nothing to suggest that he has experienced any episodes requiring physician-prescribed bedrest. The complete absence of any evidence in this regard obviates any suggestion of prejudice stemming from the inconsistency in the VA examiner's notations vis-à-vis IVDS.

D. Appellant Has Abandoned All Issues Not Argued in His Brief.

It is axiomatic that issues or arguments not raised on appeal are abandoned. *See Disabled Am. Veterans v. Gober*, 234 F.3d 682, 688 n.3 (Fed. Cir. 2000) (stating that the Court would "only address those challenges that were briefed"); *Pederson v. McDonald*, 27 Vet.App. 276, 284 (2015); *Williams v. Gober*, 10 Vet.App. 447, 448 (1997). Accordingly, any and all issues that have not been addressed in Appellant's brief have been abandoned.

V. CONCLUSION

For the foregoing reasons, Appellee respectfully submits that the Court should vacate the February 21, 2019, decision of the Board, to the extent that it denied ratings in excess of 20% for radiculopathy of the bilateral lower extremities and denied ratings in excess of 10% for instability and limited flexion of the right knee. The Court should affirm the remainder of the Board's decision.

Respectfully submitted,

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