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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-0257

MICHAEL W. MOORE, SR., APPELLANT,

V.

ROBERT L. WILKIE,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before FALVEY, *Judge*.

MEMORANDUM DECISION

Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.

FALVEY, *Judge*: U.S. Army veteran Michael W. Moore, Sr., appeals through counsel an October 22, 2018, Board of Veterans' Appeals decision that affirmed a reduction of the veteran's disability rating for diabetes from 40% to 20%, effective October 1, 2012; and affirmed the reduction of the veteran's lumbar strain rating from 20% to 10%, effective June 22, 2011.[1] The appeal is timely; the Court has jurisdiction to review the Board decision; and single-judge disposition is appropriate. *See* 38 U.S.C. §§ 7252(a), 7266(a); *Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990).

We are asked to address the propriety of the veteran's rating reductions. Because the Board improperly shifted the burden of proof to the veteran and relied on an inadequate medical examination, we will reverse the Board's October 22, 2018, rating reduction decision.

I. ANALYSIS

When an appellant's disability rating is reduced, the Board must decide whether the reduction was proper. *Dofflemyer v. Derwinski*, 2 Vet.App. 277, 279-80 (1992). If VA has reduced

[1] Because we are reversing the Board decision and restoring the veteran's 40% rating for his diabetes, we need not address the Board's determination that the veteran is not entitled to a rating above 20%.

the rating without following the applicable VA regulations, the reduction is void at its inception. *Kitchens v. Brown*, 7 Vet.App. 320, 325 (1995). In any reduction case, VA needs to comply with several general VA regulations applicable to all rating-reduction cases, regardless of the rating level or how long that rating has been in effect; these regulations include 38 C.F.R. §§ 4.1, 4.2, 4.10, and 4.13. *See Brown v. Brown*, 5 Vet.App. 413, 420-21 (1993). Whether VA has complied with these requirements is a legal question that we review de novo. *Faust v. West*, 13 Vet.App. 342, 348 (2000).

Under §§ 4.1 and 4.2, VA is "required in any rating-reduction case to ascertain, based upon review of the entire recorded history of the condition, whether the evidence reflects an actual change in the disability and whether the examination reports reflecting such change are based upon thorough examinations." *Brown*, 5 Vet.App at 421 (citing *Schafrath v. Derwinski*, 1 Vet.App. 589, 594 (1991)); *see* 38 C.F.R. § 4.13 (2019) (requiring "an actual change in the condition[ ]"). And, under §§ 4.2 and 4.10, VA must not only "determine[ ] that an improvement in a disability has actually occurred but also that that improvement actually reflects an improvement in the veteran's ability to function under the ordinary conditions of life and work." *Brown*, 5 Vet.App. at 421.

The Secretary bears the burden of establishing by a preponderance of evidence that the rating reduction was warranted. *Id.* at 421-22. Thus, when the Board erroneously shifts the burden of proof to the veteran, the proper remedy is to reinstate the pre-reduction rating. *See Kitchens*, 7 Vet.App. at 325; *Brown*, 5 Vet.App. at 421-22. This reflects the general rule that reinstatement of a pre-reduction rating is warranted when the reduction was made without observance of the law. *See Schafrath*, 1 Vet.App. at 596. That said, reversal and reinstatement are not appropriate when the Board erred only in failing to provide adequate reasons or bases for its decision on the propriety of a reduction. *See Faust*, 13 Vet.App. at 352-53; *Peyton v. Derwinski*, 1 Vet.App. 282, 286-87 (1991) (remanding where the Board provided inadequate reasons or bases in a reduction case). Here, reversal of both ratings is the appropriate remedy.

A. Diabetes Rating

Reversal of Mr. Moore's diabetes rating reduction is appropriate because the Board improperly shifted the burden of proof. Despite reciting some of the appropriate legal standard in its opinion, the Board abandoned that standard when it came to analyzing Mr. Moore's diabetes. Rather than requiring the Secretary to demonstrate that a rating reduction was proper, the Board focused on what evidence was needed to establish entitlement to the 40 % rating.

For example, the Board acknowledged complications of the veteran's diabetes, including vitiligo, retinopathy, erectile dysfunction, and diabetic nephropathy, but cast them aside because, "per the diagnostic criteria for rating diabetes, noncompensable complications are considered part of the diabetic process" and thus they were "not a means by which the higher 40 percent rating for diabetes [could] be sustained." R. at 10-11. The problem is that the Board did not have to rate these symptoms; instead, it had to consider whether VA had met its burden of showing that "an improvement in a disability has actually occurred." *Brown*, 5 Vet.App. at 421. Put another way, Mr. Moore did not have to show that those complications entitled him to his current rating; VA had to prove that his disability, including those symptoms, had improved.

Even if the Board's conclusion about these symptoms was correct, the rest of the Board's analysis confirms its erroneous burden-shifting. The Board focused on whether Mr. Moore's diabetes caused regulation of activities, because that was the "necessary element to warrant the higher 40 percent rating for diabetes." R. 11. The Board made it perfectly clear that regulation of activities was "the primary element upon which the Board's review ha[d] focused." *Id*. But the Board's review should have focused on whether "an improvement in a disability has actually occurred," *Brown*, 5 Vet.App. at 421, not on checking whether the veteran met the criteria for the 20% or the 40% rating.

As the Board focused its analysis on whether Mr. Moore proved that he met the rating criteria for his 40% rating, rather than whether VA met its burden of proving that his disability had improved, the Board improperly shifted the burden of proof. Its decision is void and requires reversal. *See Kitchens*, 7 Vet.App. at 325.

B. Spine Rating

Likewise, we will reverse the reduction of Mr. Moore's spine rating. The Secretary agrees that there are problems with the Board decision. Still, he argues that these problems are merely inadequately explained and thus require only remand. But the Secretary is wrong. Apart from reasons-or-bases issues, the Board relied on an inadequate examination, and so it failed to follow the general rules governing rating examinations. *See Brown*, 5 Vet.App. at 421. When the issue on appeal is a rating reduction and the evaluation process is "not in accordance with the law," 38 U.S.C. § 7261(a)(3), the Board's decision is void and the appropriate remedy is to vacate the reduction and restore the prior rating. *See Schafrath*, 1 Vet.App. at 595-96; *see also Tatum v. Shinseki*, 23 Vet.App. 152, 159 (2009).

We have held that, in evaluating a musculoskeletal disability, VA must rely on an examination that adequately elicits evidence about the frequency, severity, duration, or functional loss manifested by the veteran's flare-ups. *See Sharp v. Shulkin*, 29 Vet.App. 26, 35 (2017). What's more, examiners must make "flare opinions based on estimates derived from information procured from relevant sources, including the lay statements of veterans." *Id*.

The 2011 examination used by the Board to reduce the veteran's spine rating flouts this standard. The examiner mentioned only that the veteran experienced functional impairment during flare-ups; he did not address the extent of that functional impact. R. at 1112. Because the opinion fails to adequately address the veteran's flare-ups, it fails to appropriately inform the Board's analysis of whether the veteran's disability had improved. *See Brown*, 5 Vet.App. at 421. And so, because the Board's evaluation of the veteran's back disability was contrary to law, remand is not the appropriate remedy. Instead, the reduction is void and restoration of the rating is appropriate.

II. CONCLUSION

Thus, the October 22, 2018, Board decision is REVERSED and the matter is REMANDED for reinstatement of the veteran's ratings.

DATED: April 27, 2020

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