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**UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS**

No. 19-1581

LUIS G. DE PAZ, APPELLANT,

v.

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

Before BARTLEY, *Chief Judge*.

**MEMORANDUM DECISION**

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

BARTLEY, *Chief Judge*: Veteran Luis G. De Paz appeals through counsel a December 4, 2018, Board of Veterans' Appeals (Board) decision denying entitlement to a disability evaluation in excess of 10% for a right knee disability. Record (R.) at 4-17.<sup>1</sup> For the reasons that follow, the Court will set aside that portion of the December 2018 Board decision and remand that matter for further development, if necessary, and readjudication consistent with this decision.

**I. Facts**

Mr. De Paz served on active duty in the U.S. Marine Corps from September 2000 to May 2004. R. at 9753. While in service, he filed a February 2004 claim for service connection for right knee pain. R. at 9836. In a July 2004 rating decision, a VA regional office (RO) awarded service connection for right knee patellofemoral pain syndrome, assessing a 10% initial evaluation. R. at

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<sup>1</sup> In the same decision, the Board awarded service connection for an acquired psychiatric disorder. R. at 4-10. Because this determination is favorable to Mr. De Paz, the Court will not disturb it. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007) ("The Court is not permitted to reverse findings of fact favorable to a claimant made by the Board pursuant to its statutory authority."). The Board also remanded the issue of entitlement to a total disability evaluation based on individual unemployability (TDIU). R. at 16-17. Because a remand is not a final decision of the Board subject to judicial review, the Court does not have jurisdiction to consider this issue at this time. *See Howard v. Gober*, 220 F.3d 1341, 1334 (Fed. Cir. 2000); *Breeden v. Principi*, 17 Vet.App. 475, 478 (2004) (per curiam order); 38 C.F.R. § 20.1100(b) (2019).

9795-99. He did not appeal, but instead filed claims for increased evaluation in July 2006, R. at 9527; November 2008, R. at 9212; and most recently in August 2012, R. at 8981.

At a September 2012 VA examination, Mr. De Paz reported that he treats his right knee pain with ice and prescription medication. R. at 1558. He described flare-ups relieved by rest, swelling, and popping, but denied locking. *Id.* The examiner measured 125 degrees of flexion, with objective evidence of pain at 125 degrees, full extension without objective evidence of pain, and pain and swelling on repetition. R. at 1559, 1562. The examiner noted pain on palpation, full muscle strength, and joint stability. R. at 1562-63. The examiner found no subluxation, meniscal condition, or history of knee surgery; and, at that time, Mr. De Paz was not using a brace, cane, walker, or any other assistive device. R. at 1563-65.

The RO continued the existing 10% evaluation for right knee patellofemoral pain syndrome in a December 2012 rating decision. R. at 8675. Mr. De Paz appealed, R. at 8668, and the RO responded with a February 2016 Statement of the Case (SOC), R. at 7037-71. VA treatment records show that he was issued a new knee brace in July 2013, which prevented his knee from buckling. R. at 7494.

At an April 2014 examination, Mr. De Paz reported ongoing pain, but denied flare-ups, and the examiner noted some crepitus. R. at 1289. The examiner reviewed the September 2012 examiner's report of 125 degrees of flexion, without objective evidence of pain, and full extension; but did not report range of motion due to the veteran's active resistance to flexion at 105 degrees due to either anxiety or pain. R. at 1290-91. The examiner found no pain on palpation, full muscle strength, no subluxation, and joint stability on testing. R. at 1291-92. The examiner diagnosed chronic exertional compartment syndrome in addition to the existing diagnosis of patellofemoral pain syndrome, but found no meniscal condition. R. at 1292-92. At that time, Mr. De Paz did use a brace, but still had no medical history of knee surgery. R. at 1293. April 2015 VA treatment records reflect Mr. De Paz's complaints of pain, stiffness, giving way, and frequent popping, as well as a diagnosis of degenerative joint disease. R. at 6925. Mr. De Paz perfected his appeal in March 2017, reporting increased stiffness, limited flexion, giving way, pain, popping, and locking in extension. R. at 6335.

At an August 2017 Board hearing, Mr. De Paz described right knee locking, giving way, inflammation, and pain. R. at 5762. He also reported weakness and that he uses a knee brace. R. at 5763. He finally testified that he has treated his knee pain with physical therapy, R. at 5767,

and his swelling with ice, R. at 5781. Following that hearing, the Board issued a November 2017 remand to obtain a more recent examination. R. at 3544-45, 3547-48.

At a December 2017 VA examination, Mr. De Paz reported crepitus; numbness with walking stairs, squatting, and lifting; swelling; and flare-ups causing limited motion due to pain. R. at 3072. The examiner measured 110 degrees of flexion, limited by pain, with pain on weight bearing, non-weight bearing, and passive motion. *Id.* The examiner noted pain on palpation, but found no limitation of extension and no additional functional loss or limitation of range of motion on repetition. R. at 3072-73. The examiner offered that Mr. De Paz's statements describing functional loss with repetitive use over time and during flare-ups were consistent with the examination results, estimating that Mr. De Paz's flexion would be limited to 90 degrees during a flare-up. R. at 3074-75. The examiner found full muscle strength without muscular atrophy, no ankylosis, no subluxation, no joint instability, no recurrent effusion, and no meniscal condition. R. at 3076-79. The examiner finally noted Mr. De Paz's use of a brace and stated that standing, walking, lifting, and carrying would all cause flare-ups. R. at 3079-80. A September 2018 peripheral nerves examination report showed slightly reduced right knee muscle strength, rated at 4 out of 5, R. at 202, and the examiner offered that this is due to Mr. De Paz's right knee condition rather than right-sided radiculopathy, R. at 206.

In the December 2018 decision on appeal, the Board noted Mr. De Paz's current 10% evaluation for limitation of extension under 38 C.F.R. § 4.71a, Diagnostic Code (DC) 5261 (2019), R. at 12, but found no evidence of compensable limitation of flexion or limitation of extension, R. at 15. However, the Board found that Mr. De Paz's right knee pain causes additional functional loss interfering with standing and sitting and considered a compensable evaluation appropriate, citing *DeLuca v. Brown*, 8 Vet.App. 202 (1995), and 38 C.F.R. §§ 4.40, 4.45, and 4.59. R. at 15. Although the Board considered Mr. De Paz's lay statements competent and credible, it denied an evaluation in excess of 10% because of a lack of evidence of further limitation of flexion or extension, ankylosis, recurrent subluxation, lateral instability, or cartilage dislocation or removal. R. at 15-16. The Board did not mention the veteran's reports of giving way in the April 2015 VA treatment record and March 2017 Substantive Appeal, or the September 2019 peripheral nerves examination report showing muscular weakness. R. at 10-16. This appeal followed.

## II. JURISDICTION AND STANDARD OF REVIEW

Mr. De Paz's appeal is timely and the Court has jurisdiction to review the December 2018 Board decision pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). Single-judge disposition is appropriate in this case. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990).

The Board's determination regarding the appropriate degree of disability is a finding of fact subject to the "clearly erroneous" standard of review. 38 U.S.C. § 7261(a)(4); *see Smallwood v. Brown*, 10 Vet.App. 93, 97 (1997). "A factual finding 'is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Hersey v. Derwinski*, 2 Vet.App. 91, 94 (1992) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)); *see Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990) (explaining that the Court "is not permitted to substitute its judgment for that of the [Board] on issues of material fact" and therefore may not overturn the Board's factual determinations "if there is a 'plausible' basis in the record for [those] determinations"). However, the Board's selection of a DC may be set aside only if such selection is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Butts v. Brown*, 5 Vet. App. 532, 539 (1993) (en banc) (quoting 38 U.S.C. § 7261(a)(3)(A)).

As with any finding on a material issue of fact and law presented on the record, the Board must support its determinations with an adequate statement of reasons or bases that enables the claimant to understand the precise basis for that determination and facilitates review in this Court. *See* 38 U.S.C. § 7104(d)(1); *Gilbert*, 1 Vet.App. at 57. To comply with this requirement, the Board must analyze the credibility and probative value of evidence, account for evidence it finds persuasive or unpersuasive, and provide reasons for rejecting material evidence 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). The Board must also address all potentially favorable evidence. *See Thompson v. Gober*, 14 Vet.App. 187, 188 (2000) (per curiam order).

## III. ANALYSIS

Mr. De Paz argues, *inter alia*, that the Board failed to discuss favorable evidence of functional impairment due to problems with balance, endurance, and fatigability. Appellant's Brief (Br.) at 8. He highlights that functional loss need not cause additional limitation of motion to support a higher evaluation, citing *Lyles v. Shulkin*, 29 Vet.App. 107, 117 (2017), and that

functional limitation in addition to limitation of motion may justify a higher evaluation, citing *English v. Wilkie*, 30 Vet.App. 347 (2018). Appellant's Br. at 19-20. He similarly argues that the Board failed to consider a separate evaluation for instability, highlighting that the Board cannot require objective evidence of lateral instability to support a compensable evaluation under DC 5257. Appellant's Br. at 8, 24-25. The Secretary responds that the Board adequately explained the December 2018 decision and is not required to address every piece of evidence in the record. Secretary's Br. at 8.

Here the evidence of record includes Mr. De Paz's April 2015 and March 2017 reports that his right knee gives way. R. at 6925 (April 2015 VA treatment records), 6335 (March 2017 Substantive Appeal). The record also contains the September 2019 VA peripheral nerves examination report showing reduced muscular strength. R. at 202, 206. The Board did not address this evidence of weakness and instability in its review of the evidence, R. at 10-15, or in its analysis of the appropriate right knee evaluation, R. at 15-16. Rather, the Board summarily concluded that a higher evaluation was not warranted by finding that the record lacked evidence of ankylosis, recurrent subluxation, lateral instability, or cartilage dislocation or removal. R. at 16.

Mr. De Paz is correct that the Board was obligated to, but did not, discuss, this potentially favorable evidence. R. at 10-16. *See* 38 U.S.C. § 5107(b) (requiring the Secretary to "consider all information and lay and medical evidence of record in a case"); *Davidson v. Shinseki*, 581 F.3d 1313, 1316 (Fed. Cir. 2009) (noting that 38 U.S.C. § 1154(a) "requires that the VA give 'due consideration' to 'all pertinent medical and lay evidence' in evaluating a claim to disability or death benefits"); *Buchanan v. Nicholson*, 451 F.3d 1331, 1335 (Fed. Cir. 2006) (explaining that "lay evidence is one type of evidence that must be considered, if submitted, when a veteran's claim seeks disability benefits" and holding that, in certain situations, "competent lay evidence can be sufficient in and of itself" to establish entitlement to such benefits). Remand is required as it is the Board's responsibility, as factfinder, to weigh the relative probative value of competing evidence, *Owens v. Brown*, 7 Vet.App. 429, 433 (1995), and the Board has not done so in this aspect of this case.

Moreover, this disposition is consistent with *English*, where the Court held that objective medical evidence of lateral instability of the knee is not categorically more probative than lay evidence. 30 Vet.App. at 349. The Court in *English* acknowledged that the Board must assign probative value to competent lay evidence of lateral knee instability, but is free to discount that

lay evidence provided it supports its conclusion with an adequate statement of reasons or bases. *Id.* at 353. While the Board in this case found that the examiner's specific findings held greater probative weight than Mr. De Paz's competent and credible assertions generally supporting a higher evaluation, R. at 16, the Board reached this conclusion without considering the lay statements as to instability or the September 2018 examination report, thereby failing to provide an adequate statement of reasons or bases for its decision.

Additionally, the Board was required to account for this evidence and explain why separate evaluations for the veteran's symptoms of instability or weakness were not warranted. *See Lyles*, 29 Vet.App. at 109, 117-19. Although the Secretary is correct that the Board is not required to address each individual piece of evidence and that the Board considered functional loss interfering with standing and sitting, Secretary's Br. at 18-20, the Secretary is incorrect that instability, evaluated under DC 5257, would necessarily overlap with the symptoms of functional loss interfering with standing and sitting that currently support Mr. De Paz's compensable evaluation under DC 5261, *id.* at 25. The Court explained in *Lyles* that entitlement to a separate evaluation in a given case depends on whether the manifestations of disability for which a separate evaluation is being sought have already been compensated by an assigned evaluation under a different DC. *Lyles*, 29 Vet.App. at 109. Here the Board has not addressed that question, particularly given that it failed to discuss the foregoing evidence of instability and weakness.

Given this disposition, the Court need not address Mr. De Paz's additional arguments regarding the Board's reliance on the VA examinations of record, Appellant's Br. at 8, 11-12, 14-16, which could not result in a remedy greater than remand. On remand, Mr. De Paz is free to present those arguments, as well as any additional arguments and evidence, to the Board in accordance with *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order). *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002). The Court reminds the Board that "[a] remand is meant to entail a critical examination of the justification for [the Board's] decision," *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991), and must be performed in an expeditious manner in accordance with 38 U.S.C. § 7112.

#### **IV. CONCLUSION**

Upon consideration of the foregoing, the portion of the December 4, 2018, Board decision denying an evaluation in excess of 10% for right knee disability is SET ASIDE and that matter is

REMANDED for further development, if necessary, and readjudication consistent with this decision.

DATED: April 27, 2020

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