

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-1491

STEPHEN E. WILLIAMS, APPELLANT,

v.

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

Before PIETSCH, *Judge*.

MEMORANDUM DECISION

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

PIETSCH, *Judge*: Stephen E. Williams appeals pro se a November 28, 2018, Board of Veterans' Appeals (Board) decision that denied entitlement to a compensable disability rating for loss of teeth numbers 7, 8, 9, 10, 11, 22, 23, 24, and 25 as a result of an in-service trauma. This appeal is timely, and the Court has jurisdiction to review the Board's decision pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). Single-judge disposition is appropriate as the issue is of "relative simplicity" and "the outcome is not reasonably debatable." *Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the reasons that follow, the Court will vacate the November 28, 2018, Board decision and remand the matter for readjudication consistent with this decision.

I. FACTS

Mr. Williams served on active duty in the U.S. Air Force from April 1966 to December 1969. Record (R.) at 2296. During service, while changing the tire on a forklift, Mr. Williams fractured his jaw and lost several teeth. *See* R. at 5. He is service-connected for injuries related to this accident.

In February 2016, Mr. Williams sought an increased disability rating for his "dental trauma/broken jaw," which was rated 0% disabling. R. at 2123. At a May 2016 VA examination to assess the current severity of his condition, Mr. Williams was diagnosed with tooth loss and a fractured mandible, which was found to be well healed. R. at 2108-09. The examiner noted that Mr. Williams

was missing all his upper and lower teeth. R. at 2110. The examiner stated that Mr. Williams's last pair of dentures broke and that he could not afford a replacement. *Id.* The examiner reported that Mr. Williams's dental condition made it difficult for Mr. Williams to eat and affected his speech. *Id.* However, the examiner stated that the masticatory surfaces could be restored by suitable prosthesis. *Id.*

A VA regional office (RO) issued a decision in May 2016 continuing to deny Mr. Williams a compensable disability rating for the loss of his teeth due to trauma. R. at 2094-98. Mr. Williams appealed that decision. R. at 114. In written argument he stated that he is entitled to a higher disability rating because all his teeth are missing, noting that while only some teeth were removed during service, the remaining teeth fell out as a result of his condition. R. at 12-13. He also argued that he had pain associated with his condition, which limited his functional ability and range of motion. R. at 13.

In November 2018, the Board issued the decision on appeal, finding that Mr. Williams's loss of masticatory surface could be restored with prosthesis and, therefore, denying him a compensable disability rating for his lost teeth. R. at 6. The Board also noted that Mr. Williams's mandible fracture was well healed and not entitled to a separate disability rating. R. at 7.

Before the Court, Mr. Williams argues that the Board erred by failing to recognize that he still has pain associated with his in-service trauma and loss of his teeth. He states that although prosthetics can replace the lost teeth, the pain he experiences cannot be alleviated. He asks the Court to award him a compensable disability rating.

The Secretary concedes that remand is required because the Board failed to provide adequate reasons or bases for its decision. Specifically, the Secretary states that the Board failed to discuss whether Mr. Williams's painful jaw should be compensated under 38 C.F.R. § 4.59 (2019). The Secretary notes that the Board had not considered Mr. Williams's complaints of tooth loss-related pain.

II. ANALYSIS

Initially, the Court notes that Mr. Williams attached a May 2019 RO decision to his brief and refers to this decision in his brief. However, the only matter before the Court is the November 2018 Board decision on appeal, and the Court does not have jurisdiction to review the May 2019 RO decision. *See* 38 U.S.C. §§ 7252(a), 7266(a).

All dental disabilities may be considered service connected for treatment purposes; but only those dental disabilities that involve actual loss of part of the structure of the jaw will be compensable under VA's schedule of rating disabilities. *See* 38 U.S.C. § 1712; 38 C.F.R. § 4.150 (2019). Diagnostic Code (DC) 9913 provides the rating criteria for loss of teeth. 38 C.F.R. § 4.150. This DC provides for compensable disability ratings only "[w]here the lost masticatory surface cannot be restored by suitable prosthesis." 38 C.F.R. § 4.150, DC 9913. In situations where a claimant's teeth can be replaced by "suitable prosthesis," a noncompensable disability rating is warranted. *Id.*

The Board discussed this rating criteria and noted that the May 2016 VA examiner found that Mr. Williams's masticatory surfaces could be replaced by suitable prosthesis. Mr. Williams does not challenge this portion of the Board's decision, but instead argues that the Board failed to consider his continued "pain from the trauma" he experienced during service. The Court agrees. The record of proceedings before the Court reflects that Mr. Williams has reported pain associated with his jaw, *see* R. at 2112, 2117-19, as well as pain associated with the loss of his teeth. R. at 12-13. As the Secretary concedes, the Board did not consider this evidence.

In rendering its decision, the Board is required to provide a written statement of reasons or bases for its findings and conclusions on all material issues of fact and law presented on the record. 38 U.S.C. § 7104(d)(1). The statement must be adequate to enable a claimant to understand the precise basis for the Board's decision and to facilitate review in this Court. *Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990). To comply with this requirement, the Board must analyze the credibility and probative value of evidence, account for evidence that it finds persuasive or unpersuasive, and provide reasons for rejecting any 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).

Mr. Williams is service connected for residuals of a fractured mandible, as well as for loss of teeth numbers 7, 8, 9, 10, 11, 22, 23, 24, and 25. The Board found that a higher disability rating was not warranted for any of Mr. Williams's dental or oral conditions. In his brief, the Secretary states that the Board should have considered whether Mr. Williams's jaw pain warrants a compensable disability rating under 38 C.F.R. § 4.59, which is intended to "recognize actually painful, unstable, or malaligned joints, due to healed injury, as entitled to at least the minimum compensable rating for the joint." The Court agrees, and notes that the Board should also have considered whether Mr. Williams experienced functional loss as a result of his jaw pain, because

he expressly raised that issue to the Board before its November 2018 decision. *See* 38 C.F.R. § 4.40 (2019); *see also DeLuca v. Brown*, 8 Vet.App. 202, 205 (1995) (holding that 38 C.F.R. §§ 4.40, 4.45 require the disabling effects of painful motion be considered when rating joint disabilities). As for Mr. Williams's pain associated with the loss of his teeth, the Board should discuss whether his pain alone causes sufficient functional impairment to be considered a disability for compensation purposes. *See Saunders v. Wilkie*, 886 F.3d 1356 (Fed. Cir. 2018).

Further, the Court notes that to the extent the Board requires a medical opinion to address these matters, including the disabling effects of Mr. Williams's pain, the Board must obtain such additional development on remand. *See DeLuca*, 8 Vet.App. at 206-07; *see also Bowling v. Principi*, 15 Vet.App. 1, 12 (2001) (finding that, upon assessing medical reports, "[i]f further evidence [or] clarification of the evidence . . . is essential for a proper appellate decision," the Board should remand the case for additional development).

On remand, Mr. Williams may present, and the Board must consider, any additional evidence and argument in support of the matter remanded. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002); *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order). The Court has held that "[a] remand is meant to entail a critical examination of the justification for the decision." *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991). This matter is to be provided expeditious treatment on remand. *See* 38 U.S.C. § 7112.

III. CONCLUSION

Upon consideration of the foregoing analysis, the record of proceedings before the Court, and the parties' pleadings, the November 28, 2018, Board decision is VACATED and the matter is REMANDED for readjudication consistent with this decision.

DATED: April 28, 2020

Copies to:

Stephen E. Williams

VA General Counsel (027)