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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-1209

JAMES D. SMITH, APPELLANT,

V.

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

Before TOTH, *Judge*.

MEMORANDUM DECISION

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

TOTH, *Judge*: James D. Smith challenges an October 2018 Board decision denying a rating higher than 20% for status-post compression fracture of the lumbar spine with degenerative arthritis and spondylolisthesis. He argues that the Board relied on inadequate medical evidence to evaluate his condition. The Secretary responds that, although a September 2014 VA examination was inadequate, the Board remedied its defects with other evidence of record. However, because VA did not have an opinion regarding the extent to which Mr. Smith's range of motion was limited during flare ups or a competent explanation for why an estimate was not feasible, the Court must vacate the decision.

Mr. Smith served from February 1970 to March 1973 with additional service in the reserves. He sought disability compensation for a back injury in April 2014. VA arranged for an examination, which took place that September. During the clinical interview, Mr. Smith reported that he had back pain when walking, sitting, and standing, and that he experienced daily flare ups of back pain that lasted 6 hours. The examiner recorded subnormal ranges of motion.[1] There was

[1] The veteran's ranges of motion were: forward flexion to 80 degrees, extension to 25 degrees, right and left lateral flexion to 25 degrees, and right and left lateral rotation to 25 degrees. For reference, VA examiners consider normal range of knee motion to be: forward flexion to 90 degrees or more, extension to 30 degrees or greater, right and left lateral flexion to 30 degrees or greater, and right and left lateral rotation to 30 degrees or greater. R. at 518–

no additional range of motion loss after repetitive-use testing. The examiner indicated that functional loss included painful movement and interference with sitting, standing, and weight bearing. But the examiner did not record whether range of motion testing was done during active or passive motion or in a weight-bearing or non-weight-bearing position. Furthermore, the examiner did not estimate the extent to which flare ups caused additional range of motion loss, stating only that he was "not present during a flare up in order to assess the patient." R. at 524.

In October 2014, VA issued a rating decision awarding service connection for a lumbar spine disorder and assigned a 10% rating, effective April 2014. Mr. Smith disagreed with the rating assigned and submitted a private medical report. The private physician recorded subnormal range of motion findings, somewhat worse than those recorded by the VA examiner.[2] And like the VA examiner, the private physician did not estimate range of motion loss during a flare up. In a supplemental statement, Mr. Smith contended that he was entitled to "at least" a 20% rating for his lumbar condition, that the range of motion findings reflected in the VA examination report were "not the norm," and that his daily ranges of motion were more consistent with the private physician's findings. R. at 120. VA treatment records also documented that Mr. Smith took opioids to treat his back problems and reported a pain level of 5 out of 10, occasionally spiking to 10.

Based on this evidence, VA assigned a 20% rating effective October 21, 2014. The veteran pursued the matter to the Board. In the decision on appeal, the Board found that the September 2014 VA examination was inadequate because it failed to account for functional impairment caused by the "lumbar spine disability during flare-ups" and that the evidence of record did not otherwise "strictly satisfy the requirements of *Correia*." R. at 11–12. However, the Board determined that there was enough evidence on file to evaluate Mr. Smith's condition without remanding for another examination. Regarding the severity of his functional impairment, the Board found Mr. Smith's admission "that his back symptomatology warranted a 20% rating" particularly probative, that the private medical records showed conservative treatment, and that the VA examiner and private physician's range of motion findings showed limitations contemplated by no more than a 20% rating. R. at 12. Accordingly, the Board assigned a 20%

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[2] Forward flexion to 50 degrees, extension to 10 degrees, lateral rotation to 10 degrees, and lateral bending to 10 degrees.

rating for the period before October 21, 2014, but determined that the evidence did not support a higher rating before or after that date. The veteran appealed.

Mr. Smith argues that the Board relied on inadequate medical evidence to decide his claim. Specifically, he argues that the Board did not have a medical opinion estimating degrees of range of motion loss during flare ups. The Secretary counters that the available medical evidence was sufficient, emphasizing Mr. Smith's report that he felt his back condition was "more in line" with a 20% rating. R. at 120.

Once VA undertakes to provide a VA medical examination, it must ensure that the it is adequate. *Barr v. Nicholson*, 21 Vet.App. 303, 311 (2007). A VA medical examination is adequate when it is based on the veteran's medical history and describes the medical issues in enough detail that the Board's evaluation of the claimed disability will be a fully informed one. *Sharp v. Shulkin*, 29 Vet.App. 26, 31 (2017). This Court has consistently provided guidelines for evaluating joint disabilities and set forth specific requirements for VA examination reports. In particular, the Court has made clear that 38 C.F.R. §§ 4.40 and 4.45 oblige VA examiners to *estimate* the extent to which the veteran's range of motion is additionally limited during flare ups or provide an opinion explaining why an estimate is not feasible. *E.g.*, *Sharp*, 29 Vet.App. at 34; *Mitchell v. Shinseki*, 25 Vet.App. 32, 43–44 (2011); *DeLuca v. Brown*, 8 Vet.App. 202, 204 (1995).

Here, the Board issued the decision on appeal without a medical professional estimating the additional range of motion lost during flare ups or providing an explanation for why an estimate was not feasible. The VA September 2014 examiner said only that he could not provide an opinion because the veteran was not experiencing a flare up at the time of examination. The Court has held that this is not a satisfactory explanation. *Sharp*, 29 Vet.App. at 34. Recognizing this, the Secretary concedes that the September 2014 examination report was not adequate to decide the case. Sec's Br. at 5. Nevertheless, he urges the Court to affirm, arguing that the other record evidence sufficed to permit the Board to reach an informed decision, namely, treatment records showing that Mr. Smith's condition required only conservative treatment and his statement that he felt he was entitled to "at least" a 20% rating. R. at 120. Neither of these evidentiary bases, however, makes up for the lack of an estimate of the range of motion loss during flare ups that the VA examiner was supposed to provide (or explain why it couldn't be provided). *See Sharp*, 29 Vet.App. at 34.

First, conservative treatment for a condition does not, on its own, adequately inform the Board about the extent of a veteran's functional impairments during flare ups. The Court has held

that VA joint examinations are inadequate when they fail to "express an opinion on whether pain could significantly limit functional ability" or estimate functional impairment "in terms of the degree of additional range-of-motion loss due to pain on use or during flare-ups." *DeLuca*, 8 Vet.App. at 206–07. That conservative treatment was employed for a joint condition does not tell the Board the specific information it needs to properly consider a joint disability.

Second, the Board could not reasonably construe Mr. Smith's assertion that he felt he was entitled to "at least" a 20% rating as a medical finding obviating the need for a VA examiner to provide an estimate. R. at 120. VA has a duty to sympathetically construe the filings of pro se veterans in light of their claims. *Comer v. Peake*, 552 F.3d 1362, 1367 (Fed. Cir. 2009). Here, Mr. Smith's statement evinced his general desire for a higher rating. Reading the statement as a request for a 20% rating, and no higher, is not a sympathetic construction. Moreover, the Court cannot see how the Board could read his statement as a studied assessment of functional impairment on par with that offered by a VA examiner using medical instruments to record range of motion and providing the detail required by relevant regulations and caselaw.

So, regardless whether (as a general matter) the Board is permitted to rely on other evidence of record to avoid remanding for an inadequate VA medical examination, the evidence the Board relied on here did not provide the sort of information the Court's cases have explained is necessary to assess a joint disability. For these reasons, the Board decision must be vacated and the matter remanded. On remand, the Board must ensure that VA procures an examination that provides an estimate of functional impairment in terms of degrees of range of motion loss during flare ups or provides a satisfactory explanation for why an estimate is not feasible.

Mr. Smith also points out that the VA examination report did not indicate whether range of motion testing was administered during active or passive motion or in a weight-bearing or non-weight-bearing position. The Court has held that this information too is required in the context of joint disabilities. *See Correia v. McDonald*, 28 Vet.App. 158, 170 (2016). The September 2014 examination report did not contain this information either. The Board should remedy these errors as well.

Accordingly, the Court VACATES the October 25, 2018, Board decision and REMANDS the matter for readjudication consistent with this decision.

DATED: April 28, 2020

Copies to:

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