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

No. 19-3498

ROBERT J. MANNICES, APPELLANT,

V.

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

Before SCHOELEN, *Senior Judge*.[1]

**MEMORANDUM DECISION**

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

SCHOELEN, *Senior Judge*: The appellant, Robert J. Mannices, appeals through counsel a January 25, 2019, Board of Veterans' Appeals decision that denied a disability rating higher than 20% for lumbar spondylosis, and higher than 30% for bilateral flat feet and posterior calcaneal spurs, effective March 8, 2016. Record of Proceedings (R.) at 5-16. 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. *Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the following reasons, the Court will affirm, in part, and vacate, in part, the Board's decision, and remand the vacated matters for further proceedings consistent with this decision.

## I. BACKGROUND

The appellant served on active duty in the United States Navy from October 1994 to October 2007. R. at 517. In March 2016, he filed claims for increased ratings for his service-connected lumbar spine and bilateral flat feet conditions, which were rated at 20% and 10%, respectively, at the time. R. at 353-54.

[1] Judge Schoelen is a Senior Judge acting in recall status. *In re: Recall of Retired Judge*, U.S. VET. APP. MISC. ORDER 04-20 (Jan. 2, 2020).

In April 2016, the appellant underwent an in-person VA examination in connection with his claims. R. at 189-94, 201-07. For his back condition, an x-ray was administered, and the examiner reviewed the appellant's VA e-folder and VA's Computerized Patient Record System (CPRS). R. at 158. At the examination, the appellant reported that he had experienced "6/10 intermittent lower back pain," but no "flare-ups." R. at 189-90. He described his functional loss as not being able to lift as much as he used to. R. at 190. Upon examination, "no pain [was] noted," and his range of motion was normal. *Id.* Examination also revealed no evidence of pain with weight bearing, and no objective evidence of localized tenderness or pain on palpitation of the joints or associated soft tissue of the thoracolumbar spine. The appellant was able to undergo repetitive-use testing with at least three repetitions, exhibiting no additional loss of function or range of motion after three repetitions. *Id.* Immediately after repetitive-use testing, the examiner observed that pain, weakness, fatigability, or incoordination did not significantly limit the appellant's functional ability. *Id.* Moreover the examiner reported that the appellant's back condition did not affect his ability to work.

Concerning his foot condition, the examiner reviewed the appellant's e-folder and CPRS, and an x-ray was administered. R. at 202. Examining the appellant's flat feet, the examiner noted pain on examination, weakened movement, pain on use and movement, and pain on weight-bearing for his left foot. R. at 204-05. To the question whether the appellant suffered from "functional loss due to pain, during flare-ups and/or when the joint is used repeatedly over a period of time," the examiner responded, "prolonged walking," and "prolonged weight bearing." R. at 205. The appellant reported pain in both feet, primarily in his left foot, flare-ups with the pain being worse in cold weather, that he has "numbness and tingling" in his left foot, and that his functional loss due to pain includes not being able to run, having to walk at a slower pace, and finding it "very tough" "exercise wise." R. at 202-03.

In May 2016, VA continued the appellant's lumbar spine rating at 20%, and increased his bilateral flat feet rating to 30%, effective March 8, 2016. R. at 149-57. The appellant appealed this decision. R. at 114-20, 78-79.

In its January 2019 decision on appeal, the Board first "affirmatively f[ound] that the May 2016 VA examination relied upon in the decision was adequate for rating purposes." R. at 6-7. In particular, the Board applied the "presumption of regularity" to the May 2016 VA examination, and found that, concerning the back examination, the examiner "adequately addressed the

*De*[*L*]*uca* factors (noting no additional limitation of range of motion of the spine after repetitive use due to pain on movement)." R. at 7; *see DeLuca v. Brown*, 8 Vet.App. 202 (1995).

The appellant contends that the May 2016 medical examination relied upon by the Board was inadequate, and that the Board erred by relying on it to deny his claims. In particular, he asserts, the examiner failed to opine on whether any flareups of his back condition caused any additional loss of motion, Appellant's Brief (Br.) at 9, and "failed to provide an opinion as to the degree of severity of appellant's bilateral feet during a flare-up or following their repeated use over time," *id.* at 5. Further, he contends that to find the examination adequate, the Board erroneously applied the presumption of regularity.

The Secretary disputes that the Board improperly relied upon the May 2016 examinations. First, he argues that the examiner was not required to opine on flareups because the appellant did not report any concerning his back. Secretary's Br. at 12. With respect to the bilateral feet examination, the Secretary argues that the Board (albeit not expressly) found the examiner's functional loss findings due to repetitive use and flareups adequate and probative, because the Board relied upon the examination in its merits analysis, and the Board's determination was proper. Secretary's Br. at 6-7. Concerning the Board's application of the presumption of regularity, the Secretary argues that the appellant has failed to demonstrate prejudicial error.

The appellant also argues that the Board overlooked favorable evidence that raised the possibility of an award of an effective date prior to the date of the March 2016 claim --- specifically, a 2016 lay statement that his "condition has become worse," a statement by the May 2016 examiner that the "the current level of severity of veteran's left foot has progressed since . . . 2014," and a 2010 examination report describing his condition as "progressively worsening." Appellant's Br. at 6. The Secretary argues that the Board properly found no evidence of a factually ascertainable worsening of the appellant's foot condition within 1 year before his March 2016 claim. Secretary's Br. at 11.

## II. ANALYSIS

### A. Duty To Assist: Lumbar Spondylosis

A VA medical examination or opinion is adequate "where it is based upon consideration of the veteran's prior medical history and examinations," *Stefl v. Nicholson*, 21 Vet.App. 120, 123 (2007), "describes the disability. . . in sufficient detail so that the Board's 'evaluation of the claimed

disability will be a fully informed one,'" *id*. (quoting *Ardison v. Brown*, 6 Vet.App. 405, 407 (1994)), and "sufficiently inform[s] the Board of a medical expert's judgment on a medical question and the essential rationale for that opinion," *Monzingo v. Shinseki*, 26 Vet.App. 97, 105 (2012) (en banc); *see also Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 301 (2008) ("[A] medical examination report must contain not only clear conclusions with supporting data, but also a reasoned medical explanation connecting the two.").

For a VA joints examination to be adequate, the examination must portray the extent of functional loss or limitation due to pain and the other factors set forth in 38 C.F.R. §§ 4.40 and 4.45, including functional loss or limitation with repetitive use and on flareup, *Mitchell v. Shinseki*, 25 Vet.App. 32, 44 (2011); *DeLuca v. Brown*, 8 Vet.App. 202, 206-07 (1995). Where feasible, "these determinations should . . . be 'portrayed' [ ] 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; *see also Mitchell*, 25 Vet. App. at 37. When flareups are indicated, the examiner must offer a flareup opinion based on estimates from relevant sources, including the veteran's lay statements describing his functional limitation. *Sharp v. Shulkin*, 29 Vet.App. 26, 34-35 (2017).

In this case, the Secretary concedes, and the Court agrees, that the Board erred in applying the presumption of regularity in analyzing the adequacy of the May 2016 VA examination, as the competency of the examiner was not at issue. R. at 7; Secretary's Br. at 6; *see Rizzo v. Shinseki*, 580 F.3d 1288, 1292 (Fed. Cir. 2009) (applying the presumption of regularity to the VA examiner's competence). But the Court is unable to determine that this particular reasons-and-bases error did not prejudice the appellant, because the Board's analysis of the examination's adequacy was also deficient in another respect, which frustrates judicial review. 38 U.S.C. § 7261(b)(2) (requiring the Court to "take due account of the rule of prejudicial error"); *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) (explaining that the burden of showing that an error is harmful normally falls upon the party attacking the Agency's determination).

Specifically, it is unclear to the Court how the Board was able to conclude that the examination "adequately addressed the *De*[*L*]*uca* factors (noting no additional limitation of range of motion of the spine after repetitive use due to pain on movement)" when the examination does not appear to have been conducted when the appellant was experiencing pain on movement (i.e., during a flareup). R. at 7; *see Sharp*, 29 Vet.App. at 34-35; *Mitchell*, 25 Vet.App. at 44; *DeLuca*, 8 Vet.App. at 206-07. Indeed, as the Board acknowledged, R. at 11, the examiner reported that

the appellant experienced "intermittent pain," but he underwent the range-of-motion examination when there was "no pain noted." R. at 190.

Although the appellant did not characterize his "intermittent pain" as a "flareup," the examiner is not relieved of his duty to discuss whether the appellant had any functional loss and limitation of motion as a result of such intermittent pain, pursuant to the requirements of *DeLuca*, 8 Vet.App. at 206-07, and *Mitchell*, 25 Vet.App. at 44. At a minimum, the notes of intermittent pain but no flareups in the examination report appear to be an internal inconsistency that the Board should have addressed. *See Crowe v. Brown*, 7 Vet.App. 238, 247 (1994) (a flare up is "'a sudden increase in symptoms of a latent or subsiding disease'" (quoting WEBSTER'S MEDICAL DESK DICTIONARY 245 (1986))). Thus, the Court finds that the Board's reasons or bases are inadequate. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998). Remand is required for the Board to explain why complying with *DeLuca*, 8 Vet.App. at 206-07, *Mitchell*, 25 Vet.App. at 44, and *Sharp*, 29 Vet.App. at 34-35, does not ask for clarification from the examiner.

B. Bilateral Flat Feet and Posterior Calcaneal Spurs

*1. Duty To Assist*

The appellant also contends that the Board erroneously relied on the 2016 flat feet examination, which he alleges was inadequate under *DeLuca.* Appellant's Br. at 5 (citing *Sharp*, 29 Vet.App. at 34-35; *Mitchell*, 25 Vet.App. at 44; *DeLuca*, 8 Vet.App. at 206-07). As discussed above, the Board considered whether the May 2016 VA lumbar spine examination satisfied the *DeLuca* requirements. R. at 7. However, as the Secretary concedes, the Board does not comment on whether the foot examination was adequate under *DeLuca.* Although the Secretary points the Court to the Board's merits discussion, where the Board considered whether the appellant was entitled to a higher rating for his foot condition on the basis of functional loss due to pain or due to weakness, fatigability, incoordination, or pain on movement of a joint, R. at 14, *see Mitchell*, 25 Vet.App. at 44; *DeLuca*, 8 Vet.App. at 206-07, and although the Court is mindful that Board decisions must be read "as a whole," *Janssen v. Principi*, 15 Vet.App. 370, 379 (2001) (per curiam), the Board's discussion in this regard applies metrics different than those required for a duty-to-assist analysis. Therefore, the Court cannot determine that the Board's analysis in the merits section of its decision provides adequate reasons and bases for its finding as to VA's duty to provide an adequate medical examination.

To the extent that the Board implicitly found the examination adequate under *DeLuca*, its reasons are not readily apparent. The Court's review is frustrated by the Board's failure to make the necessary factual findings in the first instance, *see Hensley v. West*, 212 F.3d 1255, 1263 (Fed. Cir. 2000) ("[A]ppellate tribunals are not appropriate fora for initial fact finding."); *see also* 38 U.S.C. § 7261(c). And, it is not clear to the Court that this error was harmless. 38 U.S.C. § 7261(b)(2); *Sanders*, 556 U.S. at 409. Thus, remand is warranted for clarification. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) ("[W]here the Board has incorrectly applied the law, failed to provide an adequate statement of reasons or bases for its determinations, or where the record is otherwise inadequate, a remand is the appropriate remedy.").

Given this disposition, the Court will not address the other arguments and issues raised by the appellant concerning the Board's analysis of the adequacy of the May 2016 examination. *See Best v. Principi*, 15 Vet.App. 18, 20 (2001) (per curiam order) (holding that "[a] narrow decision preserves for the appellant an opportunity to argue those claimed errors before the Board at the readjudication, and, of course, before this Court in an appeal, should the Board rule against him"). The appellant is free on remand, in accordance with *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order), to submit additional evidence and argument, including the arguments raised in his briefs to this Court, and the Board must consider any such evidence or argument submitted. *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.

*2. Earlier Effective Date*

The appellant also argues that the Board provided an inadequate statement of reasons or bases for denying an earlier effective date for an increased rating for his flat feet. Appellant's Br. at 6. The general rule governing the effective date of a rating increase is that benefits are effective from the date that VA received the claim for an increase or the date that entitlement arose, whichever is later. 38 U.S.C. § 5110(a); 38 C.F.R. § 3.400(o)(1) (2019). However, the effective date of a rating increase may date back 1 year prior to the date the claim for an increase was filed, "if it is ascertainable that an increase in disability had occurred" within that 1-year period. 38 U.S.C. § 5110(b)(2); 38 C.F.R. § 3.400(o)(2); *see Gaston v. Shinseki*, 605 F.3d 979, 983-84 (Fed. Cir. 2010) (to obtain an effective date earlier than the date of the claim for an increase, the

increase must have occurred during the 1-year period prior to the date of the claim); *Hart v. Mansfield*, 21 Vet.App. 505, 509 (2007) ("When a claim for an increased rating is granted, the effective date assigned may be up to one year prior to the date that the application for increase was received if it is factually ascertainable that an increase in disability had occurred within that timeframe.").

A Board determination as to the proper effective date is a finding of fact that will not be overturned unless the Court finds the determination to be clearly erroneous. *See* 38 U.S.C. § 7261(a)(4); *Evans v. West*, 12 Vet.App. 396, 401 (1999); *see also Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990) ("'A 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.'" (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948))). As with any material issue of fact or law, the Board must provide a statement of the reasons or bases for its determination "adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court." *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *see* 38 U.S.C. § 7104(d)(1); *Gilbert*, 1 Vet.App. at 56-57.

In this case, the Board determined that there was no medical evidence reflecting a "factually ascertainable increase in the bilateral feet condition within the one year prior to [the appellant's] March 2016 claim filing"; therefore it awarded an effective date of March 8, 2016. R. at 11-12. The Court discerns no reason to disturb this finding. The record does not show, and the appellant has not established, that an increase in his disability occurred within the year prior to March 2016. *See Gaston*, 605 F.3d at 983. Rather, the evidence the appellant directs the Court's attention to, at best, suggests that an increase in his disability occurred more than a year before he filed his claim, *see* Appellant's Br. at 7 (pointing to a medical record noting that his symptoms had "progressed since . . . 2014"), or is silent on the time of onset of increase, Appellant's Br. at 6-7 (his 2016 lay statement that his symptoms generally had "become worse" and 2010 examination report describing his condition as "progressively worsening"). Therefore, to the extent that the Board did not specifically consider this evidence, the Board's error was harmless. *See* 38 U.S.C. § 7261(b)(2) (requiring the Court to "take due account of the rule of prejudicial error"); *Shinseki*, 556 U.S. at 409 (holding that the harmless-error analysis applies to the Court's review of Board decisions and that the burden is on the appellant to show that he or she suffered prejudice as a result of VA error);

*Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000) (table).

## III. CONCLUSION

After consideration of the appellant's and the Secretary's pleadings, and a review of the record of proceedings, the Board's January 25, 2019, decision is AFFIRMED, IN PART, and VACATED, IN PART, and the vacated matter is REMANDED for further proceedings consistent with this decision.

DATED: April 28, 2020

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