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

No. 19-0161

THOMAS C. GREEN, 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*: The appellant, Thomas C. Green, appeals through counsel a September 11, 2018, Board of Veterans' Appeals (Board) decision in which the Board granted him entitlement to a 20% disability rating, but no higher, for "degenerative arthritis of the lumbar spine with herniated discs" for the period from July 28, 2011, until October 13, 2014. R. at 4-12. The Board's conclusion that the appellant is entitled to a 20% disability rating for his back disorder is favorable to him. The Court will not disturb it. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007).

This appeal is timely and the Court has jurisdiction over the matter on appeal pursuant to 38 U.S.C. §§ 7252(a) and 7266. Single-judge disposition is appropriate when the issues are 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 Board's conclusion that the appellant is not entitled to a disability rating greater than 20% from July 2011 until October 2014, and it will remand that matter for further proceedings consistent with this decision.

## I. BACKGROUND

The appellant served on active duty in the U.S. Air Force from March 1981 until March 1985. R. at 862. In July 2011, he filed a claim for entitlement to disability benefits for a lumbar spine disorder. R. at 474-75. In September 2011, a VA medical examiner found "no functional impairment of the lumbar spine" and diagnosed the appellant with a "[n]ormal orthopedic physical examination." R. at 451. Soon thereafter, the VA regional office (RO) denied his claim. R. at 443-46.

In February 2013, the appellant argued that the 2011 examination report is inadequate. R. at 169-70. In October 2014, a VA medical examiner reviewed the appellant's symptoms and identified functional limitations. R. at 114-22. Later that month, the RO granted the appellant entitlement to disability benefits for lumbar spine degeneration and related symptomatology. R. at 280-85. The RO assigned his disorder a 10% disability rating for the period from July 28, 2011, until October 14, 2014, and a 40% disability rating after that date. R. at 280-85. The appellant challenged the disability rating assigned to the period prior to October 14, 2014. R. at 225.

On September 11, 2018, the Board issued the decision presently under review. R. at 4-12.

## II. ANALYSIS

The September 2011 VA examiner's opinion does not accord with later findings made by the Agency and is deficient in many respects. The Board essentially concluded that despite its shortcomings, the report retains enough probative value to support its decision. *See Monzingo v. Shinseki*, 26 Vet.App. 97, 102 (2012) (per curiam). The parties' arguments concern one aspect of that conclusion. The appellant asserted that the September 2011 examination report is not sufficient to decide this case because the examiner neither complied with the requirement found in 38 C.F.R. § 4.59 that he test "for pain on both active and passive motion, in weight-bearing and nonweight-bearing," nor explained why that testing cannot be done. *See Correia v. McDonald*, 28 Vet.App. 158, 169-70 (2016).

The Board's only response is that "retroactive motion testing cannot be performed to determine the now-required range-of-motion findings and the examination is largely compliant in this regard." R. at 5. In other words, even though the examiner did not provide all of the required findings, it's too late now and the appellant is out of luck.<sup>1</sup>

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<sup>1</sup> Although the phrase "largely compliant" means that the Board acknowledged that the examiner did not fully

This determination is plainly conclusory. The Board supported it only with a general citation to *Correia* that lacks pinpoint citation, parenthetical, or quotation. It is unclear how the Board reached its conclusion that no remediation can overcome the shortcomings in the September 2011 examination report. *See Chotta v. Peake*, 22 Vet.App. 80, 85 (2008). As a consequence, its statement of reasons or bases is not amenable to appellate review. Remand is warranted for the Board to explain in detail both the legal and evidentiary bases for its conclusion that nothing can now be done to remedy the deficiencies in the September 2011 examination report.

The prejudicial effect of the Board's decision is exacerbated by the choices that it made in the substantive portion of its analysis. The rating period under consideration is more than three years long. It ends with the October 2014 examination report, which the RO determined demonstrates that the appellant is entitled to a 40% disability rating. In its statement of reasons or bases, the Board chose to project forward through the rating period negative findings made by the 2011 examiner without accounting for the gaps left by the inadequacies in his opinion. The Board also, as the appellant notes, chose to apply to the rating period a negative finding made by the October 2014 medical examiner without doing the same for findings that led to the 40% disability rating that begins on that date. *See McGrath v. Gober*, 14 Vet.App. 28, 35 (2000) (holding that "the date on which the evidence is submitted is irrelevant"). It did all of this without citing to any legal authority and without discussing whether the benefit of the doubt doctrine counsels a different result.

On remand, the Board should explicitly and directly discuss the inadequacies of the September 2011 examination report. It should explain how those inadequacies affect its ability to correctly assign a disability rating to the appellant's disorder. *Correia v. McDonald*, 28 Vet.App. 158, 169-70 (2016). If the Board concludes that other evidence in the record sufficiently mitigates the gaps left by the 2011 examination report, it should list that evidence and fully support its conclusion. *Id.* If it does not believe that an additional medical opinion can correct the deficiencies created by the 2011 examination report, it should explain its position fully, remaining mindful that it may not reach medical conclusions on its own. *Chotta*, 22 Vet.App. at 85; *see Kahana v. Shinseki*, 24 Vet.App. 428, 435 (2011) (holding that, when a Board inference "results in a medical determination, the basis for that inference must be independent and it must be cited"). Finally, it

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comply with the § 4.59 requirements, the Board did not make factual findings identifying the specific deficiencies in the examiner's report. The Court leaves it to the Board to make those findings on remand.

should review whether the October 2014 report is sufficient to show that the appellant's disorder worsened prior to the date that it was written. *McGrath*, 14 Vet.App. at 35.

The Court need not address additional arguments raised by the appellant at this time. *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 readjudication, and, of course, before this Court in an appeal, should the Board rule against him [or her]").

### **III. CONCLUSION**

After consideration of the appellant's and the Secretary's briefs and a review of the record, the portion of the Board's September 11, 2018, decision denying the appellant entitlement to a disability rating greater than 20% for the period from July 28, 2011, until October 13, 2014, is VACATED and that matter is REMANDED for further proceedings consistent with this decision.

DATED: April 29, 2020

Copies to:

Jeany C. Mark, Esq.

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