

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 18-5810

BRADLEY NUTTY, 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 Bradley Nutty appeals through counsel a June 21, 2018, Board of Veterans' Appeals (Board) decision denying entitlement to an initial disability evaluation in excess of 10% for left knee sprain. Record (R.) at 4-13.¹ For the reasons that follow, the Court will set aside the portion of the June 2018 Board decision denying a left knee sprain evaluation in excess of 10% and remand that matter for further development, if necessary, and readjudication consistent with this decision.

I. FACTS

Mr. Nutty served on active duty in the U.S. Army from February 2006 to May 2007 and August 2008 to October 2009. R. at 2162, 2546. Service medical records reflect complaints of left knee pain following an April 2006 injury while running. R. at 4735, 4740.

¹ In the same decision, the Board awarded a total temporary left knee evaluation based on convalescence under 38 C.F.R. § 4.30 from November 7, 2013, to February 1, 2014. R. at 11-12. Because this determination is favorable to Mr. Nutty, 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 current appeal stems from a December 2009 claim for service connection for a left knee disability. R. at 4630. At a February 2010 VA examination, Mr. Nutty reported left knee tenderness, pain, weakness, swelling, giving way, and lack of endurance, with flare-ups of pain, weakness, and additional limitation of motion up to four times per week, lasting 2 hours each. R. at 4326. The examiner noted left knee tenderness and guarding of movement, and measured flexion to 120 degrees with pain and 118 degrees on repetition due to pain. R. at 4329. The examiner diagnosed left knee sprain, which he described as having a "moderate" effect on the veteran's daily activities. R. at 4332-33.

In April 2010, a VA regional office (RO) granted service connection for left knee sprain and assigned a 10% evaluation. R. at 4270. The veteran timely disagreed with that evaluation. R. at 4229-31.

Mr. Nutty underwent another VA examination in November 2010, where he complained of left knee tenderness, pain, weakness, stiffness, and fatigability. R. at 4123. He also described flare-ups of symptoms up to 3 times per day, each lasting up to 2 hours, resulting in pain during weightbearing and at rest. *Id.* Range of motion testing revealed flexion to 117 with pain and on repetition, and the examiner noted tenderness and guarding of movement. R. at 4124. The examiner diagnosed left knee patella tendonitis, which caused painful weightbearing and decreased locomotion. R. at 4124-25. Following that examination, the RO issued a July 2011 Statement of the Case (SOC) continuing the 10% evaluation, R. at 3889-3912, and the veteran subsequently perfected an appeal, R. at 3845-47.

At a December 2012 decision review officer (DRO) hearing, Mr. Nutty described frequent flare-ups of left knee pain and weakness precipitated by physical activity. R. at 3692-93. He testified that over-the-counter pain medication had no effect and that he needs to ice his knee and simply tolerate the pain until a flare subsides. R. at 3693.

The veteran was afforded another VA examination in January 2013, where he reported flare-ups of radiating left knee pain with activity and at rest and difficulty bearing weight and remaining stable during physical activity. R. at 3574. He had left knee flexion to 110 degrees with pain, which decreased to 85 degrees on repetition. R. at 3575-76. The examiner noted additional functional loss on repetition, including less movement than normal, pain on movement, and instability of station. R. at 3576. Specifically, the examiner stated that Mr. Nutty was unable

to stand for long periods or "walk far" and that he has difficulty walking and climbing ladders. R. at 3580.

After further adjudication, including an April 2013 award of a separate 10% evaluation for left knee instability, R. at 3193, the Board in October 2017 remanded the veteran's left knee sprain claim for an additional medical examination because it found that the February 2010, November 2010, and January 2013 VA examinations did not comply with *Correia v. McDonald*, 287 Vet.App. 258 (2016). R. at 903.

The RO subsequently called Mr. Nutty twice in October 2017 and sent him a letter the next month attempting to schedule the ordered examination. R. at 86. The RO cancelled the examination request later that month when the veteran failed to respond. *Id.* In May 2018, the Appeals Management Center (AMC) issued a Supplemental SOC continuing to deny an initial left knee sprain evaluation in excess of 10%. R. at 32-40. The AMC stated that, due to Mr. Nutty's unresponsiveness, "[e]vidence expected from this examination, which might have been material to the outcome of [his] claim, could not be considered." R. at 39.

The claim was returned to the Board, which issued the decision currently on appeal in June 2018. R. at 4-13. The Board explained that, because Mr. Nutty did not respond to attempts to schedule the VA examination, the Board "must adjudicate the issue on appeal based on evidence that is currently of record." R. at 9. The Board discussed the February 2010, November 2010, and January 2013 VA examinations and concluded that a left knee evaluation greater than 10% was not warranted. *Id.* This appeal followed.

II. JURISDICTION & STANDARD OF REVIEW

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

The Board's determination of the appropriate degree of disability is a finding of fact subject to the "clearly erroneous" standard of review set forth in 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)).

As with any finding on a material issue of fact and law presented on the record, the Board must support its degree-of-disability determination with adequate reasons or bases that enable the claimant to understand the precise basis for that determination and facilitates review in this Court. 38 U.S.C. § 7104(d)(1); *see 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 its rejection of material evidence favorable to the claimant. *See Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table).

III. ANALYSIS

Mr. Nutty argues, *inter alia*, that the Board provided inadequate reasons or bases for its decision because it failed to address additional functional limitation during flare-ups and did not account for his difficulties sitting, standing, and weightbearing when evaluating his left knee sprain. Appellant's Brief (Br.) at 18-20; Reply Br. at 1-4. The Secretary disputes these contentions and asserts that, when the Board decision is read as a whole, it adequately conveys the Board's reasons or bases for denying a left knee sprain evaluation in excess of 10%. Secretary's Br. at 14-17. The veteran's arguments are persuasive.

Mr. Nutty's left knee sprain is evaluated under 38 C.F.R. § 4.71a, Diagnostic Code (DC) 5260, for limitation of leg flexion. *See* R. at 7. DC 5260 provides a noncompensable evaluation when leg flexion is limited to 60°, a 10% evaluation when limited to 45°, a 20% evaluation when limited to 30°, and a 30% evaluation when limited to 15°. 38 C.F.R. § 4.71a, DC 5260 (2019).

A veteran with a service-connected musculoskeletal disability, like Mr. Nutty, may be entitled to a higher disability evaluation than that supported by mechanical application of the Rating Schedule where there is evidence that the disability causes "additional functional loss—i.e., 'the inability . . . to perform the normal working movements of the body with normal excursion, strength, speed, coordination[,] and endurance'—including as due to pain and/or other factors" or "reduction of a joint's normal excursion of movement in different planes, including changes in the joint's range of movement, strength, fatigability, or coordination." *Lyles v. Shulkin*, 29 Vet.App. 107, 117-18 (2017) (quoting 38 C.F.R. § 4.40 and citing 38 C.F.R. § 4.45); *see Mitchell v. Shinseki*, 25 Vet.App. 32, 36-37 (2011); *DeLuca v. Brown*, 8 Vet.App. 202, 205-07 (1995). "Instability of station, disturbance of locomotion, interference with sitting, standing and weight-bearing are

related considerations." 38 C.F.R. § 4.45(f) (2019). To provide adequate reasons or bases for a musculoskeletal evaluation, the Board must assess the foregoing factors, including whether the disability results in additional functional loss with use and during flare-ups. *See Lyles*, 29 Vet.App. at 118.

The evidence of record reflects that, throughout the period on appeal, Mr. Nutty experienced multiple flare-ups of left knee symptoms per week, lasting several hours a day, that caused increased pain with weight-bearing and at rest, weakness, and limitation of motion. R. at 4326 (February 2010 VA examination report), 4123 (November 2010 VA examination report), 3692-93 (December 2012 DRO hearing testimony), 3574 (January 2013 VA examination report). Although the Board noted the veteran's November 2010 and January 2013 reports of flare-ups in its recitation of the evidence, R. at 8, it did not discuss that evidence in its analysis of whether Mr. Nutty was entitled to a higher left knee sprain evaluation, R. at 10. Nor did the Board address the veteran's February 2010 or December 2012 descriptions of his flare-ups. *Id.* In fact, the Board's *DeLuca* analysis does not mention his flare-ups at all and instead focuses solely on the additional limitation of motion noted "upon repetitive testing." *Id.* Because any additional functional loss during flare-ups could have supported a higher left knee sprain evaluation, *see Lyles*, 29 Vet.App. at 117-18, the foregoing evidence was potentially favorable to the veteran's claim and the Board was therefore required to address it in evaluating his disability, *see Caluza*, 7 Vet.App. at 506. The Board's failure to do so rendered inadequate its reasons or bases for denying a left knee sprain evaluation in excess of 10%. *See Gilbert*, 1 Vet.App. at 57; *see also Dennis v. Nicholson*, 21 Vet.App. 18, 22 (2007) ("[M]erely listing the evidence before stating a conclusion does not constitute an adequate statement of reasons or bases.").

The Board also failed to account for record evidence that Mr. Nutty's left knee sprain caused difficulties sitting, standing, and performing other weight-bearing movements. Specifically, the Board did not factor into its *DeLuca* analysis the February 2010 VA examiner's opinion that the left knee sprain had a "moderate" effect on the veteran's daily activities, R. at 4332-33; the November 2010 VA examiner's assessment that the condition caused painful weightbearing and decreased locomotion, R. at 4124-25; or the January 2013 VA examiner's finding that the veteran was unable to stand for long periods, unable to "walk far," and had difficulty walking and climbing ladders, R. at 3580. Given that § 4.45(f) requires the Board to consider "disturbance of locomotion" and "interference with sitting, standing[,] and weight-

bearing" when evaluating a musculoskeletal disability, the Board's failure to address the foregoing evidence reflecting such impairment further diminishes the adequacy of its reasons or bases for denying a higher left knee sprain evaluation. *See Caluza*, 7 Vet.App. at 506; *Gilbert*, 1 Vet.App. at 57. Remand is therefore warranted for the Board to adequately consider and discuss this material, potentially favorable evidence. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) (holding that remand is the appropriate remedy "where the Board has . . . failed to provide an adequate statement of reasons or bases for its determinations, or where the record is otherwise inadequate").

Given this disposition, the Court need not address Mr. Nutty's additional arguments regarding his failure to respond to the RO's October and November 2017 requests to schedule a VA examination, including whether there was good cause for his failure to do so. *See* Appellant's Br. at 10-17; Reply Br. at 4-13. On remand, the Board must either attempt to schedule another VA examination in accordance with its October 2017 remand order or adequately explain why such assistance is not necessary to decide the claim. *See Stegall v. West*, 11 Vet.App. 268, 271 (1998) (holding that a remand by the Board confers on the claimant a legal right to substantial compliance with the remand order). The Board should also be cognizant that, to the extent that further medical evidence is needed to assess the veteran's additional functional limitations during flare-ups, a VA medical opinion, as opposed to an in-person examination, may be used to obtain that information. *See Sharp v. Shulkin*, 29 Vet.App. 26, 33-35 (2017) (holding that an examiner need not examine a claimant during a flare-up to assess the degree of functional limitation and loss caused by the flare; rather, the examiner may base a flare-up opinion on all procurable evidence, including the veteran's lay descriptions of symptoms and impairment).

Mr. Nutty is free on remand to present 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 June 21, 2018, Board decision denying entitlement to an initial evaluation in excess of 10% for left knee sprain is SET ASIDE and that matter is REMANDED for further development, if necessary, and readjudication consistent with this decision.

DATED: April 29, 2020

Copies to:

Zachary M. Stolz, Esq.

VA General Counsel (027)