

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-4123

STACEY D. DUFFEY, 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*: Pro se veteran Stacey D. Duffey appeals an April 2019 Board decision that denied an increased rating higher than 10% for right ankle strain with degenerative arthritis and callosities. This disability is rated under diagnostic code 5271, which provides only two evaluations: 10% for "[m]oderate" limitation of ankle motion and 20% for "[m]arked" limitation of ankle motion. 38 C.F.R. § 4.71a (2019). According to the Board, the evidence tended to show that painful ankle motion caused moderate, rather than marked, limitation.

Mr. Duffey argues, among other things, that the VA examination upon which the Board relied was inadequate because it did not fully and accurately describe the extent of his ankle disability. The Secretary agrees, conceding that the Board clearly erred in accepting the VA examination as adequate because it did not comply with *DeLuca v. Brown*, 8 Vet.App. 202 (1995), and *Mitchell v. Shinseki*, 25 Vet.App. 32 (2011). Specifically, the Secretary contends that, although the examiner noted that the veteran exhibited pain and that there was no range-of-motion loss upon repetitive-use testing, "the examiner did not make an initial finding as to the degree of [range-of-motion] loss due to pain on use." Secretary's Br. at 6. Given the Secretary's concession and agreement to remand, it is unnecessary to inquire further into this issue. *See Checo v. Shinseki*,

748 F.3d 1373, 1378 n.6 (Fed. Cir. 2014). On remand, the Board must ensure that VA obtains an examination that remedies the shortcomings identified by the parties.

The remaining arguments raised by Mr. Duffey require only brief mention. First, the issue of clear and unmistakable error in a February 1995 rating decision was remanded for the regional office to issue a Statement of the Case. Because remands do not constitute final Board decisions, the Court has no jurisdiction over that matter. *See Atilano v. Wilkie*, 31 Vet.App. 272, 278 n.3 (2019). Second, the veteran asserts that the Board should have considered a rating under diagnostic code 5270. But the Board did address that provision and found it inapplicable because it pertains only to ankle ankylosis, which the evidence showed the veteran did not have. R. at 5. Finally, Mr. Duffey suggests that the Board was obliged to consider whether a rating on an extraschedular basis was warranted. An extraschedular evaluation, however, is not even ripe for consideration until schedular avenues for compensation have been exhausted. *See Morgan v. Wilkie*, 31 Vet.App. 162, 168 (2019). That hasn't happened yet.

Accordingly, the April 10, 2019, Board decision is VACATED and the matter is REMANDED for further proceedings consistent with this opinion.

DATED: April 29, 2020

Copies to:

Stacey D. Duffey

VA General Counsel (027)