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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 18-6495

ULYSSES D. BRINSON, 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 Ulysses D. Brinson appeals through counsel an August 27, 2018, Board of Veterans' Appeals (Board) decision denying a disability evaluation in excess of 10% for bilateral heel spurs, a compensable evaluation for right foot bunions, a compensable evaluation for left foot bunions prior to March 13, 2013, and an evaluation in excess of 10% for left foot bunions since May 1, 2013. Record (R.) at 4-13.¹ For the reasons that follow, the Court will set aside the August 2018 Board decision and remand those matters for further development and readjudication consistent with this decision.

I. FACTS

Mr. Brinson served on active duty in the U.S. Marine Corps from August 1979 to August 1999. R. at 1292, 2236. He filed a claim for service connection for bilateral heel spurs and bilateral bunions in October 1999. R. at 2687. A February 2000 VA regional office (RO) rating decision

¹ In the same decision, the Board remanded the issues of entitlement to increased evaluations for dermatitis and left ulnar neuropathy. R. at 11-12. Because a remand is not a final decision of the Board subject to judicial review, the Court does not have jurisdiction to consider these issues at this time. See *Howard v. Gober*, 220 F.3d 1341, 1334 (Fed. Cir. 2000); *Breeden v. Principi*, 17 Vet.App. 475, 478 (2004) (per curiam order); 38 C.F.R. § 20.1100(b) (2019).

granted service connection for bilateral heel spurs with a 10% initial evaluation and bilateral bunions with a noncompensable initial evaluation. R. at 2665. He did not appeal and that decision became final.

In October 2010, Mr. Brinson's Pensacola Naval Hospital treatment records showed left foot pain with mild to moderate hallux valgus² and intermetatarsal neuroma treated with a nerve block injection. R. at 1155-57. He filed a claim for increased evaluations in November 2011, reporting ongoing treatment at the Pensacola Naval Hospital. R. at 2472.

A December 2011 VA examination included X-rays showing advanced hallux valgus deformities bilaterally. R. at 1719. The examiner noted a November 2007 diagnosis of hallux valgus, a December 2011 diagnosis of pes cavus, and longstanding heel spurs, R. at 1720-21, but characterized the hallux valgus as mild or moderate, R. at 1722. Mr. Brinson reported ongoing treatment for heel spurs and bunions with cortisone injections and that he uses shoe inserts. R. at 1721, 1726. The examiner diagnosed bilateral heel spurs and bunions, each characterized as mild, but found no Morton's neuroma, metatarsalgia, hammertoes, hallux rigidus, or other foot injuries. R. at 1719, 1721-24. The examiner described bunions on each great toe, the left worse than the right, and obvious clawing of the second and third digits with pronounced *versus valgus* of the first digit, the left worse than the right. R. 1725. The examiner finally noted mild functional limitations without functional impact on Mr. Brinson's ability to work. R. at 1727.

The RO continued the 10% evaluation for heel spurs and noncompensable evaluation for bunions in an April 2012 rating decision, R. at 2227, and Mr. Brinson appealed in May 2012, R. at 1821, 2215. His Pensacola Naval Hospital treatment records show left foot intermetatarsal neuroma, hallux valgus, and soft tissue foot pain in June 2012. R. at 907. He underwent a left foot bunionectomy and arthroplasty in March 2013. R. at 1905-08.³

At a July 2013 VA examination, the examiner reviewed the March 2013 left bunionectomy and noted bony spur formation, mild hammertoes deformities, and plantar calcaneal spur. R. at 1688. The examiner diagnosed hammertoes deformities of the left second, third, and fourth toes and asymptomatic hallux valgus deformities. R. at 1697-98. The examiner found no other foot

² "Hallux valgus," commonly referred to as a "bunion," is an "angulation of the great toe away from the midline of the body, or toward the other toes." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 818 (32d ed. 2012).

³ In November 2014, he was assigned a temporary total evaluation for left foot bunions related to that surgery, from March 15, 2013, to May 1, 2013. R. at 1237.

conditions and reported no impact on Mr. Brinson's ability to work. R. at 1699-1701, 1704. The examiner noted a normal gait and recorded Mr. Brinson's refusal to attempt heel or toe walking due to fear of increased pain. R. at 1704.

In a January 2014 statement, Mr. Brinson reported ongoing pain, numbness, tingling, a limp, and inability to stand for prolonged periods of time. R. at 1821. The March 2014 Pensacola Naval Hospital treatment records show hallux valgus of the left foot, soft tissue foot pain, and bunion. R. at 1187. In March 2015, Mr. Brinson had surgery for right foot plantar fasciitis. R. at 296.⁴ Mr. Brinson described the surgery as heel spur removal to an April 2015 VA examiner, who also noted the March 2013 left foot bunionectomy. R. at 306.

The April 2015 examination included X-rays showing right foot hallux valgus with plantar calcaneal spur formation and left foot hallux valgus with spur formation. R. at 307, 322. The examiner diagnosed bilateral hallux valgus and calcaneal spurs, but found no functional limitation caused by either condition. R. at 308, 318-19. The examiner noted no other foot condition. R. at 319-20. Mr. Brinson described right foot pain to the examiner, who opined that the pain does not cause functional loss. R. at 320. The examiner further found no pain, weakness, fatigability, incoordination, or other functional loss during flare-up or on use over time. R. at 321-22.

In July 2015, the RO issued a rating decision finding clear and unmistakable error in the November 2014 rating decision and awarding a 10% evaluation for left foot bunion following surgery, effective May 1, 2013. R. at 245-47. In July 2015, the RO also issued a Statement of the Case (SOC) continuing his foot evaluations, R. at 214-41, and Mr. Brinson perfected his appeal later that month, R. at 168. At a February 2017 Board hearing, he described foot pain, treatment with shoe inserts and injections, swelling, and the inability to wear dress shoes. R. at 44-45, 76-77. He also related hammertoe deformity on his second, third, and fourth toes to his service-connected left bunion. R. at 48. He finally reported that he would be beginning occupational therapy at the Pensacola Naval Hospital that month. R. at 88.

In the August 2018 decision on appeal, the Board noted Mr. Brinson's March 2013 left foot bunionectomy, that his left foot bunions are evaluated under 38 C.F.R. § 4.71a, Diagnostic Code (DC) 5280 (hallux valgus, unilateral), and that he is already in receipt of the highest possible evaluation under that DC following his surgery. R. at 10. For the period prior to his surgery, and

⁴ In June 2015, he was assigned a temporary total evaluation for right heel spurs related to that surgery, from March 18, 2015, to May 1, 2015. R. at 273.

for his right foot throughout the appellate period, the Board found no evidence that his bunions caused severe impairment equivalent to great toe amputation sufficient to warrant a compensable evaluation. *Id.* As to Mr. Brinson's bilateral heel spurs, the Board noted that he has been evaluated under § 4.71a, DCs 5276 for flat feet and 5284 for other foot injuries, but found no evidence of moderate flat feet or moderate foot injury that would entitle him to an increased evaluation under those DCs. *Id.* The Board finally considered other DCs, but concluded that no other DC was more appropriate for evaluating either Mr. Brinson's bunions or heel spurs. R. at 10-11. This appeal followed.

II. JURISDICTION AND STANDARD OF REVIEW

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

The duty to assist includes providing a medical examination or obtaining a medical opinion based upon a review of the evidence of record if VA determines it is necessary to decide the claim. 38 C.F.R. § 3.159(c)(4) (2019); *see* 38 U.S.C. § 5103A(d). When the Secretary undertakes to provide a veteran with a VA medical examination or opinion, he must ensure that the examination or opinion is adequate. *Barr v. Nicholson*, 21 Vet.App. 303, 311 (2007). 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). *See also Acevedo v. Shinseki*, 25 Vet.App. 286, 293 (2012) ("[A]n adequate medical report must rest on correct facts and reasoned medical judgment so as [to] inform the Board on a medical question and facilitate the Board's consideration and weighing of the report against any contrary reports."); *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, inter alia, portray the extent of functional loss and limitation due to pain and the other factors set forth in 38 C.F.R. §§ 4.40 and 4.45, including with use and on flare-up, *Mitchell v. Shinseki*, 25 Vet.App. 32, 44 (2011); *DeLuca v. Brown*, 8 Vet.App. 202, 206-07 (1995); and "wherever possible, include the results of the range of motion testing described in the final sentence of [38 C.F.R.] § 4.59," *Correia v. MacDonald*, 28 Vet.App. 158, 169-70 (2016)—i.e., "on both active and passive motion, in weight-bearing and nonweight-bearing and, if possible, with the range of the opposite undamaged joint," 38 C.F.R. § 4.59 (2019).

The Board's determinations regarding the adequacy of a medical examination or opinion and the appropriate degree of disability are findings of fact subject to the "clearly erroneous" standard of review. 38 U.S.C. § 7261(a)(4); see *D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008); *Smallwood v. Brown*, 10 Vet.App. 93, 97 (1997); see also *Ardison*, 6 Vet.App. at 407 (holding that the Board errs when it relies on an inadequate medical examination). "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)); see *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990) (explaining that the Court "is not permitted to substitute its judgment for that of the [Board] on issues of material fact" and therefore may not overturn the Board's factual determinations "if there is a 'plausible' basis in the record for [those] determinations").

As with any finding on a material issue of fact and law presented on the record, the Board must support its material determinations of fact and law with adequate reasons or bases. 38 U.S.C. § 7104(d)(1); *Pederson v. McDonald*, 27 Vet.App. 276, 286 (2015) (en banc); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Gilbert*, 1 Vet.App. at 56-57 (1990). To comply with this requirement, the Board must analyze the credibility and probative value of evidence, account for evidence it finds persuasive or unpersuasive, and provide reasons for rejecting material evidence favorable to the claimant. *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table). The Board must also address all potentially favorable evidence. See *Thompson v. Gober*, 14 Vet.App. 187, 188 (2000) (per curiam order).

III. ANALYSIS

A. Evaluations for Left Foot Bunion Prior to March 15, 2013, and Right Foot Bunions

Mr. Brinson first argues that the Board failed to consider favorable evidence demonstrating functional loss in his feet. Appellant's Brief (Br.) at 11. He specifies that the December 2011 examiner diagnosed mild or moderate hallux valgus, pes cavus, and heel spurs with mild functional limitation; that the July 2013 examiner noted persistent pain due to left foot deformity and the inability to perform heel or toe walking due to fear of increased pain; and that the April 2015 examiner noted bunion pain and right heel pain. Appellant's Br. at 12-13. Mr. Brinson cites these details as evidence of painful symptomatology and disturbance in normal locomotion that the Board did not consider as supporting a finding of the equivalent of moderate flat feet under DC 5276. Appellant's Br. at 13. He similarly argues that the Board overlooked evidence of painful symptomatology, including in his testimony at the Board hearing, as favorable evidence potentially supporting a compensable evaluation for his bunions based on painful motion. Appellant's Br. at 14-15.

The Secretary agrees that the Board provided an inadequate statement of reasons or bases as to the evaluations for left foot bunion prior to March 2013 and for right foot bunion for the entire period on appeal. The Secretary explains that the evidence of record contains conflicting information as to whether Mr. Brinson has pain due to his bunions, triggering the application of 38 C.F.R. § 4.59. Secretary's Br. at 9-10. The Secretary highlights that the Board relied on the examination reports reflecting Mr. Brinson's complaints of pain but relied on the examiners' findings that the bunions were asymptomatic to determine that compensable evaluations were not warranted, without explicitly determining that the examiners' determinations are more probative than Mr. Brinson's lay reports of pain. Secretary's Br. at 9. The Secretary further notes that the Board did not consider other record evidence of painful bunions.

The Court agrees with the parties that the Board provided inadequate reasons or bases to support its decision to deny a compensable evaluation for left foot bunion prior to March 2013 and for right foot bunions for the entire period on appeal. Section 4.59 announces VA's intention that the Rating Schedule "recognize[s] painful motion with joint or periarticular pathology as productive of disability . . . entitled to at least the minimum compensable rating for the joint." 38 C.F.R. § 4.59 (2019); *see Burton v. Shinseki*, 25 Vet.App. 1, 3-5 (2011) (noting the Secretary's position that § 4.59 is not limited to the arthritis context); VA Fast Letter 04-22 (Oct. 1, 2004)

(same). Here, the Board did not discuss that regulation or provide reasons why Mr. Brinson's report of pain did not warrant the minimum compensable rating for the joint. R. at 10-11. Because § 4.59 "is applicable to the evaluation of musculoskeletal disabilities involving actually painful, unstable, or malaligned joints or periarticular regions," including the feet, *Southall-Norman v. McDonald*, 28 Vet.App. 346, 354 (2016), the Board was required to address that regulation in assessing the veteran's entitlement to a compensable left foot bunion evaluation prior to March 15, 2013, and a compensable right foot bunion evaluation for the entire period on appeal. The Board's failure to do so rendered inadequate its reasons or bases for those portions of its decision. *See id.*; *Allday*, 7 Vet.App. at 527; *Gilbert*, 1 Vet.App. at 56-57.

B. Evaluations for Left Foot Bunion Since March 15, 2013, and Bilateral Heel Spurs

As to the left foot bunion evaluation following May 2013, and bilateral heel spurs evaluation, Mr. Brinson argues that the Board failed to address evidence of functional loss and relied on inadequate examinations that did not comply with the Court's holding in *Correia v. McDonald*, 28 Vet. App. 158 (2016), and provided inadequate rationales for their conclusions. Appellant's Br. at 6-14. Regarding left foot bunion, the Secretary highlights that Mr. Brinson is already in receipt of the highest evaluation for left foot bunion under DC 5280 for that period, cites the Board's finding that different or additional evaluations are not appropriate, and argues that the December 2011 and April 2015 VA examiners' findings as to Mr. Brinson's functional limitations support the Board's decision to deny increased evaluations. Secretary's Br. at 17-18. The Secretary also disputes the veteran's argument that the Board provided inadequate reasons or bases for the determinations involving heel spurs. He cites the Board's finding of a lack of evidence of moderate flat feet or moderate foot injury supporting increased evaluation under DC 5276 or 5284, and argues that Mr. Brinson has not identified any evidence that would justify increased evaluation under either DC. Secretary's Br. at 14.

Additionally, Mr. Brinson specifies that the Board should have considered separate evaluations for claw foot and hammertoes under DCs 5278 and 5282, respectively, in light of the December 2011 and July 2013 VA examination reports. Appellant's Br. at 17. He highlights that such manifestations are not contemplated by DCs 5276 for flat feet or 5284 for other foot injuries. Appellant's Br. at 18. The Secretary responds that hammertoes and claw foot are not associated with either service-connected bunions and heel spurs and that symptoms attributable to these diagnoses were not before the Board. Secretary's Br. at 15, 18-20. However, the Secretary fails

to consider that Mr. Brinson argued below, at his February 2017 Board hearing, that hammertoe deformities on his second, third, and fourth toes are related to his service-connected left bunion. R. at 48; *see Robinson v. Peake*, 21 Vet.App. 545, 553 (2008) (holding that the Board errs when it fails to adequately address all issues expressly raised by the claimant or reasonably raised by the evidence of record), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009).

The Court initially notes that the Secretary is not competent to put forth an argument as to which symptoms are manifestations of Mr. Brinson's service-connected bunions and heel spurs and which are not. *See Colvin v Derwinski*, 1 Vet.App. 171, 172 (1991) (the Board "must consider only independent medical evidence to support [its] findings rather than provide [its] own medical judgment in the guise of a Board opinion"); *Kern v. Brown*, 4 Vet.App. 350, 353, (1993) (noting that attorneys are generally "not qualified to provide an explanation of the significance of the clinical evidence"). The Board makes no specific finding as to the adequacy of the examinations of record, but the examination reports do not appear to include opinions regarding whether hammertoes or pes cavus are related to Mr. Brinson's service-connected bunions and heel spurs. R. 322, 1688, 1721, 1725-27. The examiners failed to differentiate between what they considered to be symptoms of his service-connected conditions and symptoms not related to those service-connected conditions, and there is no other evidence of record that would assist the Board in making such distinctions. *See Stefl*, 21 Vet.App. at 123. Without such opinions, the Board would be forced to impermissibly use its own medical judgment to resolve that issue. Consequently, the Court concludes that the record was inadequate to answer this question, and that, to the extent that the Board relied on those VA examinations to deny Mr. Brinson's claims for increased evaluations, it clearly erred. *See D'Aries*, 22 Vet.App. at 104; *Ardison*, 6 Vet.App. at 407.

Moreover, it is the obligation of the Board, not the Secretary, to provide adequate reasons or bases for its decision, and the Secretary's attempt to make up for the Board's deficient analysis is nothing more than a post-hoc rationalization that the Court will not accept. *See In re Lee*, 277 F.3d 1338, 1345-46 (Fed. Cir. 2002) ("[C]ourts may not accept appellate counsel's post-hoc rationalizations for agency action.") (*quoting Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)); *Evans v. Shinseki*, 25 Vet.App. 7, 16 (2011) ("[I]t is the Board that is required to provide a complete statement of reasons or bases, and the Secretary cannot make up for its failure to do so.").

Here, the December 2011 examiner noted pes cavus, R. at 1721; the July 2013 examiner diagnosed hammertoes, R. at 1688, 1697-98; and the April 2015 examiner made no indication of any diagnosis for either pes cavus or hammertoes, R. at 319. Yet the Board concluded that no other DC would more appropriately address Mr. Brinson's symptoms without discussing these diagnoses or independent medical evidence that these diagnoses are not related to Mr. Brinson's service-connected bunions and heel spurs. See R. at 10-11; see also *Mittleider v. West*, 11 Vet.App. 181, 182 (1998) ("[W]hen it is not possible to separate the effects of the [service-connected condition and the non-service-connected condition], VA regulations . . . clearly dictate that such signs and symptoms be attributed to the service-connected condition.").

The Board's failure to explain why, in light of the evidence of record, it reached the conclusion it did renders its statement of reasons or bases inadequate. See 38 U.S.C. § 7104(d)(1); *Pederson*, 27 Vet.App. at 286; *Allday*, 7 Vet.App. at 527; *Caluza*, 7 Vet.App. at 506; *Gilbert*, 1 Vet.App. at 56-57. Consequently, remand of the claims for increased evaluations for left foot bunion following March 2013 and heel spurs is warranted. See *Tucker v. West*, 11 Vet.App. 369, 374 (1998) (holding that remand is the appropriate remedy "where 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").

Finally, Mr. Brinson is correct that none of the VA examinations elicited evidence of pain on active and passive motion or in weight-bearing and non-weight-bearing modes, in violation of *Correia*. Appellant's Br. at 7-8. Each examination of record, from December 2011, July 2013, and April 2015, predates this Court's 2016 holding in *Correia*. The Secretary responds that Mr. Brinson failed to identify specific inadequacies of each examination that are prejudicial and to explain how another VA examination would lead to increased evaluations. Secretary's Br. at 14-16. However, as further examinations are necessary to address which of Mr. Brinson's foot problems are manifestations of his service-connected conditions, this argument can be addressed by the Board on remand. See *Quirin v. Shinseki*, 22 Vet.App. 390, 396 (2009).

Mr. Brinson is free on remand to present any additional arguments and evidence relevant to the remanded claims 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 August 27, 2018, Board decision is SET ASIDE and these matters are REMANDED for further development and readjudication consistent with this decision.

DATED: April 30, 2020

Copies to:

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