IN THE

UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

Vet. App. No. 19-4051

JORGE J. DELGADO-MADURO,

Appellant,

v.

ROBERT L. WILKIE,
SECRETARY OF VETERANS AFFAIRS,

Appellee.

APPELLANT'S REPLY BRIEF

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REBUTTAL

Jorge J. Delgado-Maduro responds as follows to the arguments raised by the Secretary of Veterans Affairs ("Secretary").

I. APPELLANT DOES NOT DISPUTE THE SECRETARY'S CONCESSION THAT THE COURT SHOULD VACATE THAT PORTION OF THE BVA DECISION THAT DENIED A RATING IN EXCESS OF 20% FOR BILATERAL LOWER EXTREMITY RADICULOPATHY, 10% FOR LIMITATION OF LEFT KNEE FLEXION, AND 10% FOR LEFT KNEE INSTABILITY.

The Secretary conceded that the Board did not support its denial of a rating in excess of 20% for bilateral lower extremity radiculopathy, 10% for limitation of left knee flexion, and 10% for left knee instability[1] with an adequate statement of reasons or bases. *See* Secretary's Brief ("SB") at 5-7. The veteran agrees. Accordingly, that portion of the Board decision should be vacated, and the claim remanded. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998).

II. THE SECRETARY' STANDARD FOR DETERMINING PREJUDICIAL ERROR AND WHETHER A NEW EVALUATION FOR A SERVICE-CONNECTED CONDITION IS WARRANTED IS NOT SUPPORTED BY THE LAW, AND HIS ARGUMENT IS IMPERMISSIBLE POST-HOC RATIONALIZATION.

Appellant argued the Board's statement of reasons or bases for denying a rating in excess of 50% for sleep apnea, 0% for rhinitis, 30% for sinusitis, and 40% for a low back disability is inadequate, where the BVA failed to discuss whether VA complied with its duty to assist in light of his allegation of worsening and VA's failure to provide him new

[1] The Board misidentified the knee as the right knee in the Order, Findings of Fact, and Conclusions of Law section in the decision on appeal. It correctly identified it as the left knee on [R. at 25-29]. The Secretary also misidentified the knee. The knee is correctly identified as the left knee by the AOJ. [R. at 2716 (2714-39); R. at 2037 (2037-79)].

examinations. *See* Appellant's Brief ("AB") at 5-8.[2] In response, the Secretary argued that while the BVA erred by failing to discuss the veteran's statement of worsening symptomatology, this is not prejudicial. SB at 8-12.

When the evidence shows there has been a material change in a disability or that the current rating may be incorrect, VA regulations specifically require the performance of a new medical examination. *See Caffrey v. Brown*, 6 Vet.App. 377, 381 (1994); *Snuffer v. Gober*, 10 Vet.App. 400, 403 (1997); *Schafrath v. Derwinski*, 1 Vet.App. 589, 595 (1991) ("Where the record does not adequately reveal the current state of the claimant's disability, a VA examination must be conducted."); *see also* 38 C.F.R. § 3.327(a) (1993) ("Reexaminations...will be requested whenever VA determines there is a need to verify...the current severity of a disability."). VA General Counsel Precedential Opinion 11-95 states:

> An examination which was adequate for purposes of determination of the claim by the agency of original jurisdiction will ordinarily be adequate for purposes of the Board's determination, *except to the extent that the claimant asserts that the disability in question has undergone an increase in severity since the time of the examination*.

at 10 (April 7, 1995) (emphasis added). This is precisely what happened here: the veteran argued below that his service-connected sinus condition, low back condition, and

[2] Appellant also argued below that the Board's statement of reasons or bases for denying a rating in excess of 20% for bilateral lower extremity radiculopathy, 10% for limitation of knee flexion, and 10% for knee instability is inadequate, where the BVA did not discuss whether new examinations are warranted in light of his allegation of worsening symptoms. *See* AB at 5-8. However, where the Secretary conceded that vacatur of these denials and remand of these claims is warranted, Mr. Delgado will limit this argument to the issues for which the Secretary has not conceded that vacatur and remand are warranted.

sleep apnea worsened since his last VA examination, and that his low back condition and sleep apnea examinations were inadequate, and asked VA to provide him new examinations to evaluate the current severity of the conditions. [R. at 460, 463-65]. VA did not provide new examinations or explain why new examinations were not necessary.

The Secretary's argument that there is no prejudice from the BVA's error is not persuasive. Mr. Delgado is prejudiced from VA's error because the record lacks sufficient information as to the current severity of his service-connected conditions. Absent a contemporary medical evaluation, the Board lacks sufficient information to render a fully informed adjudication, thus prejudicing the veteran. *See* 38 U.S.C. § 5103A(d)(1); *Stefl v. Nicholson*, 21 Vet.App. 120, 124 (2007).

The Secretary's contention that VA only needs to provide a new medical examination for a service-connected condition, following an allegation of worsening, when it is accompanied by a report of symptomatology enumerated in the schedular criteria for the next higher rating is not supported by the law, nor does it comport with the Secretary's own understanding of the regulations. *See Caffrey*, 6 Vet.App. at 381; *Snuffer*, 10 Vet.App. at 403; 38 C.F.R. § 3.327(a) (1993); VA Gen. Coun. Prec. 11-95 at 10 (April 7, 1995). In many cases, a veteran will not have the requisite medical knowledge to identify such symptomatology if it falls outside the scope of what is observable first-hand by a lay person. *See Washington v. Nicholson,* 21 Vet.App. 191, 195 (2007). Nor will veterans always know the schedular criteria that would entitle them to a higher rating when stating that their conditions have worsened. Thus, the Secretary's argument here is contrary to the pro-veteran nature of the VA disability compensation

system, as it would deprive veterans of their ability to gain evidence in support of their claims for increased ratings. Further, if the Record already contained evidence that the condition has worsened, because the Veteran supplied that evidence, then there would no longer be a need for a new examination.

Additionally, the Secretary's premise, that Appellant's assertion of worsening is not accompanied by symptomatology showing that an increased rating is warranted, is incorrect. In regard to his sinus condition, Appellant specifically stated that he suffers from nose bleeds, which is symptomatology is not contemplated by the schedular rating criteria for sinusitis or rhinitis. *See* 38 C.F.R. § 4.97, diagnostic code 6522, and the General Rating Formula for Sinusitis (DC's 6510-6514).This symptomatology raises the issue of entitlement to an extraschedular rating. *See* 38 C.F.R. § 3.321(b)(1). Mr. Delgado also stated that his back range-of-motion has become more limited. Were the range-of-motion limitations severe, it may be analogous to the limitation of motion caused by an ankylosed spine, thus warranting a 50% rating by analogy. *See* 38 C.F.R. § 4.71a, General Rating Formula for Diseases and Injuries of the Spine.

Furthermore, Appellant specifically argued below that his most recent examination reports did not provide sufficient information as to the current severity of his conditions, and that the June 2014 sleep apnea and back conditions examination reports are inadequate. [R. at 460, 463-65]. The BVA failed to even note Appellant's assertion of his worsened disabilities. Rather, it found that "neither the Veteran nor his representative has raised any other issues, nor have any other issues been reasonably raised by the record." [R. at 29 (2-30)]. The Board did not discuss VA's compliance with its duty to assist at all.

The failure to respond to the veteran's specifically raised arguments renders the BVA's errors prejudicial. *See Robinson v. Mansfield*, 21 Vet. App. 545, 552 (2008)*; Urban v. Principi*, 18 Vet. App. 143, 145 (2004). The Secretary's assertion that the Board's error is non-prejudicial is nothing more than impermissible post hoc rationalization for the Board's clear error of its assessment of the evidence. *See Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 156 (1991) ("'[L]itigating positions' are not entitled to deference when they are merely appellate counsel's 'post hoc rationalizations' for agency action, advanced for the first time in the reviewing court.").

For these reasons, the denial of a rating in excess of 50% for sleep apnea, 0% for rhinitis, 30% for sinusitis, and 40% for a low back disability should be vacated, and the claims remanded. *See Tucker*, 11 Vet.App. at 374.

CONCLUSION

For the reasons and facts set forth above and in his principal brief, Appellant respectfully requests that Court vacate those portions of the Board decision on appeal that denied ratings in excess of 50% for sleep apnea, 0% for rhinitis, 30% for sinusitis, 40% for a low back disability, 20% for bilateral lower extremity radiculopathy, 10% for limitation of left knee flexion, and 10% for left knee instability, and remand the claims.

Respectfully submitted,

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