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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 18-7419

BENJAMIN J. SELTZER, IV, APPELLANT,

v.

ROBERT L. WILKIE,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before FALVEY, *Judge*.

MEMORANDUM DECISION

*Note: Pursuant to U.S. Vet. App. R. 30(a),
this action may not be cited as precedent.*

FALVEY, *Judge*: Navy veteran Benjamin J. Seltzer IV appeals an August 31, 2018, Board of Veterans' Appeals decision that denied a disability rating greater than 30% for plantar fasciitis and service connection for a low back disability and a bilateral knee disability. This appeal is timely, the Court has jurisdiction to review the Board's decision, and single-judge disposition is appropriate. *See* 38 U.S.C. §§ 7252(a), 7266(a); *Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990).¹

Mr. Seltzer argues that the Board erred in not obtaining and addressing evidence regarding his plantar fasciitis claim and erred in not addressing lay evidence regarding his in-service back and knee problems. We find no error in the Board's denial of a higher plantar fasciitis disability rating and, therefore, will affirm that part of the Board's decision. However, because the Board failed to adequately discuss the veteran's lay statements, we will set aside that part of the Board's

¹ The Board also remanded the matters of a right ankle disability, eye disability, hypertension, bilateral wrist disability, and degenerative changes of the left first (big) toe. The Court lacks authority to address these nonfinal matters. *See* 38 U.S.C. § 7252(a) (Court has "exclusive jurisdiction" to review final Board decisions); *Breeden v. Principi*, 17 Vet.App. 475, 478 (2004) (a Board remand "does not represent a final decision over which this Court has jurisdiction").

decision that addressed a low back disability and a bilateral knee disability and will remand the matter for further proceedings.

I. ANALYSIS

A. Plantar Fasciitis

Mr. Seltzer argues that the Board erred regarding his plantar fasciitis rating because the Board did not obtain medical records or address evidence regarding his callosities. The veteran has a 30% disability rating under Diagnostic Code (DC) 5276 for plantar fasciitis of both feet. *See* 38 C.F.R. § 4.71a, DC 5276 (2019). The next available higher rating for bilateral plantar fasciitis is the maximum 50% rating for "[p]ronounced" flat feet, which requires a showing of "marked pronation, extreme tenderness of plantar surfaces of the feet, marked inward displacement and severe spasm of the tendo achillis on manipulation, not improved by orthopedic shoes or appliances." *Id.* Mr. Seltzer also has claims pending below based on characteristic callosities of the left and right feet, tinea versicolor, tinea pedis, tinea unguium, and a right big toe disability. Record (R.) at 7.

We review the Board's factual findings under the "clearly erroneous" standard. *Butts v. Brown*, 5 Vet.App. 532, 534 (1993) (en banc). Under that standard, we may not reverse a Board finding unless, on review of the entire record, we are left with the definite and firm conviction that a mistake has been committed. *Deloach v. Shinseki*, 704 F.3d 1370, 1378-79 (Fed. Cir. 2013). The appellant bears the burden of showing that the Board finding is clearly erroneous. *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc); *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000).

Here, the Board denied a 50% disability rating for bilateral plantar fasciitis because "the evidence does not demonstrate that the [condition] more closely approximates pronounced symptoms with marked pronation, extreme tenderness of plantar surfaces of the feet, marking inward displacement and severe spasm of the tendo Achilles on manipulation, that is not improved by orthopedic shoes or appliances." R. at 16-17. Viewed in the context of the entire record, this conclusion is not clearly erroneous. *See Deloach*, 704 F.3d 1370. Although Mr. Seltzer complains about the Board's failure to obtain or discuss evidence of callosities, the criteria for a higher disability rating do not include callosities. *See* DC 5276. Furthermore, as the Board noted, the veteran's callosities claim is being separately addressed below and "will be the subject of a subsequent Board decision, if otherwise in order." R. at 7. Accordingly, we find that the veteran

has not met his burden of demonstrating error in the Board's decision. *See Hilkert*, 12 Vet.App. at 151.

B. Low Back and Bilateral Knee Disabilities

Mr. Seltzer also argues that the Board erred in not addressing his lay statements. The Board is required to support its decision with a written statement of the reasons or bases that is understandable by the claimant and facilitates review by this Court. *See* 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995). The statement of reasons or bases must explain the Board's reasons for discounting favorable evidence, *Thompson v. Gober*, 14 Vet.App. 187, 188 (2000); discuss all issues raised by the claimant or the evidence of record, *Robinson v. Peake*, 21 Vet.App. 545, 552 (2008), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1335 (Fed. Cir. 2009); and discuss all provisions of law and regulation where they are made "potentially applicable through the assertions and issues raised in the record," *Schafrath v. Derwinski*, 1 Vet.App. 589, 592 (1991).

Here, for both the low back and bilateral knee disabilities, the Board rejected the veteran's account of suffering pain since service, in part because his records do not reflect medical complaints or reports of those conditions. However, the veteran explained at a 2017 Board hearing that he was not the kind of person who sought medical treatment or complained of conditions unless they were "really somewhat extreme." R. at 98. He told the Board that "there's a lot of ailments that I've had, and may have had, that I just didn't go get documented or I just didn't even report. To me, it was just a part of a feeling that I had and I just dealt with." *Id.* In discussing why it rejected the veteran's accounts of in-service symptoms, the Board failed to address this hearing testimony. Its failure to do so renders its statement of reasons or bases inadequate. *See Tucker*, 14 Vet.App. at 188.

Remand is warranted for the Board to provide an adequate statement of reasons or bases regarding the veteran's lay statements. To provide guidance to the Board on remand, we note that the Board also relied on medical examinations that did not consider the veteran's account of in-service symptoms. *See* R. at 10-13; *see also Quirin v. Shinseki*, 22 Vet.App. 390, 396 (2009). We recently held in *Miller v. Wilkie*, 32 Vet.App. 249, 256, 259 (2020), that the duty to assist required an examiner "address the veteran's lay statements to provide the Board with an adequate medical opinion," in part because "medical opinions can inform credibility findings." On remand, the Board may wish to consider *Miller* and its application to Mr. Seltzer's case.

Because the claims are being remanded, the Court need not address Mr. Miller's additional arguments that would result in no broader remedy than a remand. *See Mahl v. Principi*, 15 Vet.App. 37, 38 (2001) (per curiam order) ("[I]f the proper remedy is a remand, there is no need to analyze and discuss all the other claimed errors that would result in a remedy no broader than a remand."). In pursuing his claim on remand, the veteran will be free to submit additional argument and evidence as to the remanded matter, and he has 90 days to do so from the date of the postremand notice VA provides. *See Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order); *see also Clark v. O'Rourke*, 30 Vet.App. 92, 97 (2018). The Board must consider any such evidence or argument submitted. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002); *see also Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991) ("A remand is meant to entail a critical examination of the justification for the decision.").

II. CONCLUSION

Based on the above, that part of the Board's August 31, 2018, decision that addressed plantar fasciitis is **AFFIRMED**, and those parts of the decision that addressed a low back disability and a bilateral knee disability are **SET ASIDE** and **REMANDED** for further proceedings.

DATED: May 5, 2020

Copies to:

Benjamin J. Seltzer IV

VA General Counsel (027)