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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-0664

EMIL G. HAGEMAN, 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 Emil G. Hageman appeals through counsel a December 4, 2018, Board of Veterans' Appeals decision denying service connection for right ankle injury residuals. Record (R.) at 4-9.¹ The appeal is timely; the Court has jurisdiction to review the Board 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).

We are asked to decide whether the Board provided adequate reasons or bases for its determination. Because the Board did not adequately explain why it found that Mr. Hageman did not suffer from a condition warranting service connection, we will set aside the portion of the decision denying service connection for right ankle injury residuals and remand the matter for readjudication.

¹ The Board also remanded claims for service connection for a low back condition and right knee injury residuals. Because a remand is not a final decision of the Board subject to judicial review, the Court does not have jurisdiction to consider those matters. *See Howard v. Gober*, 220 F.3d 1341, 1344 (Fed. Cir. 2000); *Breeden v. Principi*, 17 Vet.App. 475, 478 (2004); 38 C.F.R. § 20.1100(b) (2019).

I. FACTS

Mr. Hageman served on active duty from 1965 to 1969. R. at 335. The veteran maintains that during service he injured his ankle performing duties as a deckhand. R. 1180-81. He also explains that, although he did not receive medical attention for his injury during service, R. at 6139, he took medication to manage his pain, R. at 1184. He further contends that he denied any issues with his ankle during his separation examination because he was anxious to leave service quickly. R. at 1184.

In December 1976, Mr. Hageman reported to VA with right ankle pain. R. at 6641-44. He explained that he injured his right foot and knee earlier in the year. *Id.* Further, he stated that the injury healed after six weeks, but that he had since experienced acute episodes of pain, specifically in his right ankle. *Id.*

In July 2009, the veteran filed a claim seeking service connection for his right ankle. R. at 6114.

In October 2009, a VA examiner diagnosed Mr. Hageman with achilles tendinitis. R. at 3195. The examiner noted that ankle dorsiflexion was negative 3 degrees bilaterally, that dorsiflexion was limited in some of the toes, and that the veteran had pain on palpitation. R. at 3195. The examiner also explained that the veteran needed a cane to ambulate and ordered that he attend a follow-up examination in December 2009. R. at 3195-96. The December 2009 follow-up examination noted "functional hallux limitus" in the veteran's gait and moderately severe out toeing, as well as ankle dorsiflexion that was limited to 0 degrees bilaterally. R. at 3171-72.

In June 2010, a regional office denied his claim, R. at 5391-92, and, in August 2010, Mr. Hageman appealed this decision, R. at 5383. After further proceedings, in December 2017 the Board remanded Mr. Hageman's claim for an additional examination. R. at 1172. The Board directed that the examiner explain "whether there is any medical reason to accept or reject the [v]eteran's contention that his experiencing chronic . . . ankle pain since separation did not represent the onset of chronic orthopedic disabilities in light of the normal separation examination findings." *Id.*

In April 2018, a VA examiner explained that Mr. Hageman stated that he had not been previously diagnosed with an acute or chronic medical condition related to the right ankle. R. at 47. The examiner further explained that he did not complete the requested examination because the veteran wanted to withdraw his claim. *Id.*

In December 2018, the Board issued its decision denying service connection for right ankle injury residuals. R. at 4-9. The Board noted its reliance on the veteran's statements within the April 2018 examination. R. at 6. Specifically, the Board relied on the veteran's assertion that he had never been diagnosed with a right ankle condition and his admission that he has never received any treatment for his right ankle. *Id.* The Board concluded by stating that, in the absence of medical evidence demonstrating that Mr. Hageman has a right ankle disability, or functional impairment of the right ankle to the extent of causing impairment of earning capacity, there can be no valid claim. R. at 6-7. This appeal followed.

II. ANALYSIS

Mr. Hageman argues that the Board erred by finding that he did not have an ankle disability that warranted service connection. Appellant's Brief (Br.) at 7-9. He further argues that the Board did not ensure substantial compliance with its previous December 2017 remand order. Appellant's Br. at 9-12. The Secretary disagrees and argues that the Board did not err in any of its determinations. Secretary's Br. at 3-9.

Every Board decision must include a written statement of reasons or bases for its findings and conclusions on all material issues of fact and law; this statement must be adequate to enable the appellant to understand the precise basis for the Board's decision and to facilitate informed review by this Court. 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995). The Board must analyze the credibility and probative value of evidence, account for the persuasiveness of evidence, 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). Additionally, a remand order by the Board or the Court imposes on the Secretary a duty to ensure compliance with the terms of the remand. *Stegall v. West*, 11 Vet.App. 268, 271 (1998); *but see Dymment v. West*, 13 Vet.App. 141, 146-47 (1999) (no *Stegall* violation when the examiner "substantially complied with the Board's remand order"). Substantial compliance with the terms of a remand is shown when the Secretary's actions "resolve the issue that required the remand order." *D'Aries v. Peake*, 22 Vet.App. 97, 105 (2008); *Dymment*, 13 Vet.App. at 146-47. It is the Board's duty to weigh the evidence in the first instance. *See Buchanan v. Nicholson*, 451 F.3d 1331, 1336 (Fed. Cir. 2006).

Here, the Board provided inadequate reasons or bases for denying service connection for right ankle injury residuals. Despite evidence of functional impairment on examination, including ambulation with a cane, limited dorsiflexion of the ankle² and toes, achilles tendinitis, and evidence of "functional hallux limitus," *see* R. at 3195, 3171, the Board determined that Mr. Hageman did not have a disability that impaired his earning capacity, R. at 6-7. For the Court to adequately adjudicate whether the Board's finding regarding earning capacity was made in error, the Board must first address this evidence of functional impairment. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) (remand is the appropriate remedy where the Board has failed to provide an adequate statement of reasons or bases for its determinations). This is especially important given that VA's Schedule of Rating Disabilities allows for compensation for ankle disabilities that have moderate limitation of motion, coupled with the Board's duty to address all potential theories of service connection, including foot disabilities resulting from an ankle injury. *See Kuppamala v. McDonald*, 27 Vet. App. 447, 454 (2015) *citing* 38 U.S.C. § 1155 ("Average impairment in earning capacity is the standard that forms the basis for the entire rating schedule."); *Robinson v. Peake*, 21 Vet.App. 545, 552-56 (2008), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009); 38 C.F.R. § 4.71a DC 5271. Thus, we will remand for the Board to address the evidence of functional impairment found within the record.

Additionally, the Board clearly erred by failing to ensure substantial compliance with its December 2017 remand order. In that order, the Board instructed that a VA examination be conducted to ascertain whether there is a medical reason to reject the veteran's contentions that he has had chronic pain since service, despite his normal separation examination. R. at 1172. Rather than provide the requested opinion, the examiner instead declined to conduct the examination because he believed that Mr. Hageman desired to withdraw his claim. R. at 47. Because the ordered examination was not conducted and, therefore, did not provide the requested opinion, it is unclear how this examination satisfied the prior remand order. The Board's failure to discuss whether there was substantial compliance is especially concerning given the Board's explicit finding that Mr. Hageman did not withdraw his claim during the April 2018 examination. R. at 6. On remand, the Board should also discuss whether there has been substantial compliance with its December 2017 remand order. *See Stegall*, 11 Vet.App. at 271.

² Diagnostic Code (DC) 5271 provides compensation for moderate loss of motion of the ankle, so the veteran may have functional loss warranting a 10% rating. *See* 38 C.F.R. § 4.71a DC 5271 (2019).

On remand Mr. Hageman is free to submit additional argument and evidence, including those raised in his briefs, 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.").

III. CONCLUSION

Upon consideration of the foregoing, the portion of the December 4, 2018, Board decision denying service connection for right ankle injury residuals is SET ASIDE and REMANDED for further proceedings.

DATED: May 11, 2020

Copies to:

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