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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-4051

JORGE J. DELGADO-MADURO, APPELLANT,

V.

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

Before ALLEN, *Judge*.

MEMORANDUM DECISION

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

ALLEN, *Judge*: Appellant Jorge Delgado-Maduro served the Nation honorably in the United States Army from August 2004 through July 2008.[1] In this appeal, which is timely and over which the Court has jurisdiction,[2] he contests a February 21, 2019, decision of the Board of Veterans' Appeals that denied (1) an initial disability rating higher than 50% for sleep apnea; (2) an initial disability rating higher than 30% for sinusitis; (3) and initial compensable disability rating for rhinitis; (4) an initial disability rating higher than 40% for a low back disability; (5) a separate disability rating higher than 20% for right lower extremity radiculopathy secondary to a low back disability; (6) a separate disability rating higher than 20% for left lower extremity radiculopathy secondary to a low back disability; (7) an initial disability rating higher than 10% for instability of the right knee;[3] and (8) an initial disability rating higher than 10% for limitation

[1] Appellant had a second period of service in the Army for which he received an other than honorable discharge. Record (R.) at 5799. This second period of service is not relevant to the resolution of this appeal.

[2] *See* 38 U.S.C. §§ 7252(a), 7266(a).

[3] At times the Board referred to this matter as a left knee disability, but all agree that appellant's claim concerns his right knee.

of flexion of the right[4] knee.[5] Because the Board did not provide a statement of reasons or bases sufficient to allow meaningful judicial review, we will set aside its decision and remand this matter for further proceedings.

I. ANALYSIS

The Board's decision regarding the degree of disability under the rating schedule is a factual finding that the Court reviews for clear error.[6] The Court will reverse a factual finding of the Board when, after reviewing the evidence of record, we are left with "'a definite and firm conviction that a mistake has been committed.'"[7] And of particular importance to this appeal, for all its findings on a material issue of fact and law, the Board must support its decision with an adequate statement of reasons or bases that enables a claimant to understand the precise bases for the Board's decision and facilitates review in this Court.[8] If the Board failed to do so, remand is appropriate.[9]

A. Radiculopathy of the Bilateral Lower Extremities

The Secretary concedes that the Board's statement of reasons or bases for declining to award appellant disability ratings higher than 20% for radiculopathy of the right and left lower extremities is inadequate.[10] The Court agrees.

Appellant's bilateral radiculopathy is rated under 38 C.F.R. § 4.124a, Diagnostic Code (DC) 8520. Under DC 8520, incomplete paralysis of the sciatic nerve is rated based on severity. A 10% rating is warranted for "mild" disability; 20% for "moderate" disability; 40% for

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[4] As with instability, with regard to flexion the Board also at times mistakenly referred to the left knee when it should have referred to the right.

[5] R. at 5-30. The Board's decisions granting (1) service connection for an acquired psychiatric condition, including PTSD; (2) an initial disability rating of 10% for removal of the cartilage of the knee; (3) 20% disability ratings for radiculopathy of the left and right lower extremities; and (4) an initial disability rating of 10% for instability of the right knee are favorable findings we may not review. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007). The Board also remanded appellant's request for a total disability rating based on individual unemployability. We lack jurisdiction over this remanded matter. *See Breeden v. Principi*, 17 Vet.App. 475, 478 (2004) (per curiam).

[6] *Tedesco v. Wilkie*, 31 Vet.App. 360, 363 (2019); *Prokarym v. McDonald*, 27 Vet.App. 307, 312 (2015); *see also* 38 U.S.C. § 7261(a)(4); *Gilbert v. Derwinski*, 1 Vet.App. 49, 53 (1990).

[7] *Gilbert*, 1 Vet.App. at 53 (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

[8] 38 U.S.C. § 7104(d)(1); *Gilbert*, 1 Vet.App. at 57.

[9] *Tucker v. West*, 11 Vet.App. 369, 374 (1998).

[10] *See* Secretary's Brief (Br.) at 5-6.

"moderately severe" disability; and 60% for "severe" disability with marked muscular atrophy.[11] The Board discussed appellant's symptoms and concluded that his condition was only "moderate" and not "moderately severe."[12]

The problem with the Board's discussion is that it never explains what it understands the terms "moderate" or "moderately severe" mean. This Court has made clear that the Board cannot base its decisions on undisclosed standards.[13] Doing so amounts to nothing more than the Board saying that a veteran is not entitled to certain benefits "'because I say so.'"[14] Thus, remand is warranted for the Board to explain what it understands these critical regulatory terms to mean and to apply them in accordance with that understanding.

B. Right Knee Flexion and Instability

The Secretary also concedes that remand is appropriate with respect to the Board's decisions concerning the appropriate disability ratings for appellant's right knee flexion and instability.[15] Once again, the Court agrees.

In May 2017, appellant submitted his Substantive Appeal in this matter. He included an affidavit in which he testified, among other things, that his knee conditions had worsened since he had last been afforded a VA examination.[16] The Board did not address appellant's contention or even acknowledge that he had submitted this affidavit. This omission is significant because "[g]enerally, reexaminations will be required . . . if evidence indicates there has been a material change in a disability or that the current rating may be incorrect."[17] And recognizing this principle, we have held that the Board must ensure that the record is adequate to rate a disability when a claimant alleges that his or her disability has worsened.[18]

The Board's failure to address appellant's evidence that his knee conditions had worsened makes its statement of reasons or bases inadequate for meaningful judicial review. On remand, the

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[11] 38 C.F.R. § 4.124a, DC 8520 (2019).

[12] R. at 24-25.

[13] *See Tedesco*, 31 Vet.App. at 366-67; *Johnson v. Wilkie*, 30 Vet.App. 245, 254-55 (2018).

[14] *Cantrell v. Shulkin*, 28 Vet.App. 382, 392 (2017) (quoting *Hood v. Brown*, 4 Vet.App. 301, 303 (1993)); *see Johnson*, 30 Vet.App. at 255.

[15] *See* Secretary's Br. at 6-8.

[16] R. at 460.

[17] 38 C.F.R. § 3.327(a); *see* VA GEN. COUN. PREC. 11-95, at 10 (Apr. 7, 1995).

[18] *See Palczewski v. Nicholson*, 21 Vet.App. 174, 181 (2007).

Board must address appellant's contentions and ensure that sufficient medical evidence enables it to evaluate the current state of appellant's disability.

C. Disability Ratings for Sleep Apnea, Sinusitis, Rhinitis, and a Low Back Condition

There is a strong connection between the Board's decision concerning appropriate ratings for sleep apnea, sinusitis, rhinitis, and low back condition on the one hand and appellant's knee condition on the other. Namely, in the same affidavit appellant submitted in May 2017 in which he described worsening of his knee conditions, he also testified about worsening of his other service-connected disabilities.[19] And as with the knee condition, the Board did not acknowledge appellant's contentions.

The Secretary concedes that the Board erred by not addressing appellant's claims that his conditions had worsened since his most recent VA examinations.[20] However, the Secretary contends that remand is not necessary because the Board's errors are harmless.[21] We agree with the Secretary that the Board erred, but disagree that we can say the errors were harmless.

To begin with, the Board's error is plain. As we discussed with respect to appellant's knee condition, the Board must ensure that the medical evidence on which it bases its evaluations accurately reflects a claimant's current level of disability.[22] The Secretary contends that we can ignore that error here because even if the Board had considered appellant's claims that these conditions worsened, the Board would have concluded that higher ratings would not be warranted. We can't say the Secretary is correct. To start out, in order for us to agree with the Secretary's argument, we would need to engage in detailed factfinding about what the medical evidence in the record shows for each disability and compare those facts with the appropriate DCs. While we can find facts in order to assess the prejudicial nature of an error, the amount of factfinding the Secretary urges is not appropriate. As the Federal Circuit has explained, "[t]he Court of Appeals for Veterans Claims, as part of its clear error review, must *review* the Board's weighing of the evidence; it may not weigh any evidence itself."[23] The Board is in the best position to engage in

[19] R. at 460.

[20] *See* Secretary's Br. at 8.

[21] *See id*. at 8-12.

[22] *See Palczewski*, 21 Vet.App. at 181; *see also* 38 C.F.R. § 3.327(a); VA GEN. COUN. PREC. 11-95, at 10 (Apr. 7, 1995).

[23] *Deloach v. Shinseki*, 704 F.3d 1370, 1380 (Fed. Cir. 2013) (emphasis in original) (citing *Andre v. Principi*, 301 F.3d 1354, 1362 (Fed. Cir. 2002)); *see* 38 U.S.C. § 7261(c) (prohibiting the Court from making factual determinations).

the detailed and extensive factfinding the Secretary suggests so that, if necessary, we can engage in appellate review.

Even if we agreed with the Secretary that it would be appropriate for us to engage in the level of factual investigation required to find the Board's errors harmless in terms of the appropriate schedular ratings he discusses, we would still find remand necessary. As appellant points out in his reply brief when addressing the Secretary's harmless-error argument,[24] even if the Secretary were correct that the relevant DCs would not support higher disability ratings on a schedular basis, appellant could be entitled to consideration for an extraschedular rating.[25] And on top of that, the Board would need to consider its duty to maximize benefits using all schedular tools not just the application of a specific DC.[26] The Secretary simply asks us to do too much.

In the end, the Secretary's harmless-error argument amounts to a post hoc rationalization of what the Board might have done had it engaged in appropriate factfinding. However, it is not his prerogative to correct the Board's error in reasoning.[27] We have made it clear that "[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."[28] On remand, the Board must consider appellant's contentions that his conditions have worsened and ensure that the record is adequate for it to assess the current level of his disability.

D. Appellant's Rights on Remand

Because the Court is remanding this matter to the Board for readjudication, the Court need not address any remaining arguments now, and appellant can present them to the Board.[29] On remand, appellant may submit additional evidence and argument and has 90 days to do so from

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[24] *See* Appellant's Reply Br. at 4.

[25] *See* 38 C.F.R. § 3.21.

[26] *See Morgan v. Wilkie*, 31 Vet.App. 162, 167-68 (2019).

[27] *See In re Lee,* 277 F.3d 1338, 1345-46 (Fed. Cir. 2002) ("[C]ourts may not accept appellate counsel's *post hoc* rationalization for agency action." (quoting *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156, 168 (1962))); *McCray v. Wilkie*, 31 Vet.App. 243, 258 (2019); *Simmons v. Wilkie,* 30 Vet.App. 267, 277 (2018) (holding that the "Court cannot accept the Secretary's post-hoc rationalizations" to cure the Board's reasons-or-bases errors); *Smith v. Nicholson,* 19 Vet.App. 63, 73 (2015) ("[I]t is not the task of the Secretary to rewrite the Board's decision through his pleadings filed in this Court.").

[28] *Evans v. Shinseki*, 25 Vet.App. 7, 16 (2011).

[29] *Best v. Principi*, 15 Vet.App. 18, 20 (2001).

the date of VA's postremand notice.[30] The Board must consider any such additional evidence or argument submitted.[31] The Board must also proceed expeditiously.[32]

II. CONCLUSION

After consideration of the parties' briefs, the governing law, and the record, the Court SETS ASIDE the Board's February 21, 2019, decision and REMANDS this matter for further adjudication.

DATED: May 15, 2020

Copies to:

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VA General Counsel (027)

[30] *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order); *see also Clark v. O'Rourke*, 30 Vet.App. 92 (2018).

[31] *Kay v. Principi*, 16 Vet.App. 529, 534 (2002).

[32] 38 U.S.C. §§ 5109B, 7112.