

RAYMOND S. ZIRKELBACH,)
Appellant,)
)
v.) Vet. App. No. **20-1558**
)
DENIS MCDONOUGH,)
Secretary of Veterans Affairs,)
Appellee.)

Pursuant to U.S. Vet. App. Rules 27 and 45(g), the parties move the Court to vacate the November 12, 2019, decision of the Board of Veterans' Appeals (Board), which denied a motion for revision or reversal of an August 2013 rating decision, which reduced the rating assigned for a service-connected lower back disability (now characterized as degenerative disc disease of the lumbar spine with intervertebral disc syndrome and left lower extremity radiculopathy, and previously characterized as mechanical low back pain) from 40% to 20% on the basis of clear and unmistakable error (CUE), and to remand this issue for additional development and readjudication consistent with the following.

The parties agree that vacatur and remand are required because the Board failed to provide an adequate statement of reasons or bases. A Board decision must include “a written statement of the Board’s findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented on the record.” 38 U.S.C. § 7104(d)(1). This Court has

interpreted that requirement to impose on the Board the obligation to analyze the probative value of the evidence, account for that which it finds persuasive or unpersuasive, and explain the basis of its rejection of evidence materially 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).

In the present decision, the Board acknowledged Appellant's argument that "there was no specific finding in the August 2013 rating decision that the requirements of 38 C.F.R. § 3.344 had been met." (R. at 9). However, it determined his argument was "essentially a disagreement as to how the facts were weighed or evaluated," which cannot establish CUE, and further found "the evidence of record can fairly be said to support the [Regional Office's (RO's)] finding of sustained improvement." (R. at 9). The Board explained that the VA examinations performed in October 2011 and August 2013 "showed increased range of motion of the spine when compared to the September 2007 examination" and that these later findings were consistent with a reduced 20% rating rather than Appellant's previous 40% rating. *Id.* It concluded, "[t]he RO correctly applied the law in effect at the time of the disputed rating decision to determine that a rating reduction was warranted based on the evidence of record at that time. Based on the foregoing, the Board concludes that there was no CUE in the August 2013 rating decision." (R. at 10-11). However, the Board did not adequately explain the basis for this finding given that the August 2013 rating decision does not contain any discussion

of 38 C.F.R. § 3.344. (R. at 3783-3785); see *Allday v. Brown*, 7 Vet.App. 517, 527 (1995) (holding that the Board's statement of reasons or bases "must be adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court"). This reasons and bases error requires vacatur of the decision on appeal.

Additionally, the Board did not consider Appellant's argument that VA violated fair process because the notice of the August 2013 RO decision indicated that it had "granted" Appellant's claims. (R. at 3779); (Appellant Brief (App. Br.) at 16) [arguing that "It is fundamentally unfair for VA to reduce a veteran's disability rating and not say so"]; see (R. at 56 (53-58)) [April 2019 NOD arguing that the RO did not "mention the reduction anywhere at all in its rating decision or notice letter"]. Remand is warranted for the Board to address this argument in the first instance. See *Robinson v. Peake*, 21 Vet.App. 545, 552 (2008) (the Board is required to consider all issues raised by the claimant), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009); see also *Andre v. Principi*, 301 F.3d 1354, 1361 (Fed. Cir. 2002) ("[E]ach 'specific' assertion of CUE constitutes a claim that must be the subject of a decision by the B[oard] before the . . . Court can exercise jurisdiction over it.").

Further, while the Secretary does not concede error on this point, Appellant contends the Board erred when it failed to make an explicit determination as to the finality of the August 2013 rating decision with respect to providing Appellant with

notice that the disability rating for his “mechanical low back pain” had been reduced. The Board will address this argument on remand.

The parties agree that this joint motion and its language are the product of the parties’ negotiations. The Secretary further notes that any statements made herein shall not be construed as statements of policy or the interpretation of any statute, regulation, or policy by the Secretary. Appellant also notes that any statements made herein shall not be construed as a waiver as to any rights or VA duties under the law as to the matter being remanded except that, pursuant to Rule 41(c)(2), the parties agree to unequivocally waive further Court review of and any right to appeal to the U.S. Court of Appeals for the Federal Circuit of the Court’s order on this Joint Motion. The parties respectfully ask that the Court enter mandate upon the granting of this motion.

The Court should vacate the Board decision and remand the appeal for readjudication consistent with the foregoing. On remand, Appellant may submit additional argument to the Board consistent with a notice letter that will be sent by the Board. In any subsequent decision, the Board must set forth adequate reasons or bases for its findings and conclusions on all material issues of fact and law presented on the record. See 38 U.S.C. § 7104(d)(1); *Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990). The Board shall incorporate copies of this joint motion, the parties’ briefs, supplemental memoranda of law, Appellant’s notices to the Court, and the Court’s order into Appellant’s record. The Board shall provide this

claim expeditious treatment as required by 38 U.S.C. § 7112.

CONCLUSION

In light of the foregoing, the parties request the Court vacate the November 12, 2019, decision of the Board, which denied a motion for revision or reversal of an August 2013 rating decision, which reduced the rating assigned for a service-connected lower back disability from 40% to 20% on the basis of CUE, and remand this issue for additional development and readjudication consistent with the terms of this joint motion.

Respectfully submitted,

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