IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

SANDRA A. BRILEY,	)	
	)	
Appellant,	)	
	)	
v.	)	Vet. App. No. 22-0657
	)	
DENIS MCDONOUGH,	)	
Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

JOINT MOTION FOR REMAND

Under U.S. Vet. App. R. 27 and 45(g)(2), Appellant, Sandra A. Briley, and Appellee, Denis McDonough, Secretary of Veterans Affairs, by and through their attorneys, respectfully move the Court to vacate and remand the November 24, 2021, decision of the Board of Veterans' Appeals (Board) that denied entitlement to: (1) an initial rating in excess of 10% for a left tibial stress fracture (left tibial disability); (2) an initial rating in excess of 10% for a right tibial stress fracture (right tibial disability); and (3) a total disability rating based on individual unemployability (TDIU) prior to June 2, 2018. *See* Record Before the Agency (R.) at 4-21.

BASES FOR REMAND

The parties agree that remand is required because the Board erred when it failed to provide an adequate statement of reasons or bases to support its decision. *See* 38 U.S.C. § 7104(d).

1. Left and Right Tibial Disabilities

The parties agree that the Board erred when it provided an inadequate statement of reasons or bases in denying entitlement to increased ratings for the left and right tibial disabilities. Generally, the Board's decision must be based on all the evidence of record, and the Board must provide a "written statement of [its] 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). "The statement 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." *Allday v. Brown*, 7 Vet.App. 517, 527 (1995). To comply with this requirement, the Board must analyze the credibility and probative value of the evidence, account for the evidence that it finds persuasive or unpersuasive, provide the reasons for its rejection of any material evidence favorable to the claimant, and consider and discuss all "potentially applicable" provisions of law and regulation. *Schafrath v. Derwinski*, 1 Vet.App. 589, 593 (1991); *see Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996).

Here, the Board did not provide an adequate statement of reasons or bases that sufficiently defined the subjective terms of the applicable diagnostic code (DC) 5262 as they apply to this case. The Board must provide the "standard for comparing and assessing [subjective] terms of

degree" that are undefined in the applicable rating criteria in adjudicating a given case. *See Johnson v. Wilkie*, 30 Vet.App. 245, 255 (2018) (finding that the Board erred for not defining "very frequent" as used in the pertinent DC). Here, Appellant's left and right tibial disabilities are rated under DC 5262. As the Board noted, DC 5262 assigns a 10% rating for malunion with "slight" knee or ankle disability, a 20% for malunion with "moderate" knee or ankle disability, and a 40% rating for nonunion of the tibia and fibula with loose motion requiring a brace. R. at 8; *see* 38 C.F.R. § 4.71a. The Board found that at no point did Appellant's disabilities meet the criteria for compensable rating and there was no evidence of marked limitation of motion. *See* R. at 11-12. But the Board did not provide the standard it used for comparing and assessing the undefined terms of severity under DC 5262, rendering its statement of reasons or bases is inadequate. Remand is therefore warranted for the Board to adequately explain its understanding of the terms set forth under the applicable DC.

The parties also agree that remand is warranted because the Board erred when it did not provide an adequate statement of reasons or bases addressing whether the December 2017 and January 2020 VA examinations that it relied on were compliant with the Court's holding's in *Correia v. McDonald*, 28 Vet.App. 158 (2016) and *Sharp v. Shulkin*, 29 Vet.App. 26, 35 (2017). In *Correia*, the Court held that a VA examination of the joints must include, whenever possible, the results of certain range of motion

testing described in 38 C.F.R. § 4.59. 28 Vet.App. at 169-70. And in *Sharp*, the Court held that "[b]efore concluding that a requested opinion cannot be provided without resorting to speculation, an examiner must 'do [ ] all that reasonably should be done to become informed about a case.'" *Sharp*, 29 Vet.App. at 35 (*citing Jones v. Shinseki*, 23 Vet.App. 382, 391 (2010)). In the case of flare-ups, this includes eliciting information from the veteran about any additional functional loss that he or she may experience during a flare-up, even if the veteran is not experiencing a flare-up during the examination. *Id.* at 36. The examiner should then estimate the additional functional loss due to flare-ups based on all of the evidence of record, including the veteran's lay statements, or otherwise explain why an opinion is not possible. *Id.*

In this case, neither examiner documented whether initial range of motion testing were performed in active, passive, weightbearing, or non-weightbearing situations, and the December 2017 VA examiner noted pain with flexion but did not indicate where this pain initiated in terms of degrees of motion. R. at 5722-23 (5716-32) (December 2017 VA examination); 2266-72 (2261-85) (January 2020 VA examination). The Board did not adequately address whether the December 2017 and January 2020 examinations complied with the requirements set forth in *Correia*. *See Correia*, 28 Vet.App. at 158; *DeLuca*, 8 Vet.App. at 206 (explaining that an examiner's determination "should, if feasible, be "portray[ed]" (§4.40) in

terms of the degree of additional range-of-motion loss due to pain on use or during flare-ups.").

In addition, while the January 2020 examiner found that Appellant did not experience functional loss during flare-ups, Appellant routinely reported that he experiences functional loss. R. at 2270-72; 7119 (7117-23) (July 2011 VA examination) (stating that if "she is on her feet a lot it feels like "she has been beat" in lower legs"); 7120 (reporting weekly flares that require her "to get off feet until symptoms resolve"); 7731 (July 2009 VA examination) (reporting flare ups caused by activities such as "dancing, long walks, fishing in a boat, playing softball, carrying a lot of books, wearing flip flops shoes"). The December 2017 VA examiner indicated that he could not provide an opinion without resorting to speculation. *See* R. at 5724-25. *But see Jones*, 23 Vet.App. at 390. The parties agree that the Board did not provide an adequate statement of reasons or bases addressing whether the December 2017 and January 2020 VA examinations complied with *Sharp*, and provided the Board with sufficient information as to the severity of Appellant's left and right tibial disabilities during a flare up.

Accordingly, remand is warranted for the Board to address whether the December 2017 and January 2020 VA examinations are adequate under *Correia* and *Sharp*, and if not, ensure a new examination is provided to address these deficiencies in order to determine the current severity of Appellant's left and right tibial disabilities.

2. TDIU

The parties agree that the issue of TDIU, prior to June 2, 2018, should be remanded as being inextricably intertwined with the left and right tibial disability rating claims. "[W]here a decision on one issue would have a 'significant impact' upon another, and that impact in turn 'could render any review by this Court of the decision on the other [claim] meaningless and a waste of judicial resources,' the two claims are inextricably intertwined." *Henderson v. West*, 12 Vet.App. 11, 20 (1998) (quoting *Harris v. Derwinski*, 1 Vet.App. 180, 183 (1991)). In this case, Appellant's left and right tibial disabilities may impact his employability and therefore would have a significant impact on entitlement to TDIU. The record also shows that the Board previously found the claims as being inextricably intertwined in February 2021. R. at 679 (674-83). Thus, in light of the need to remand the issues of entitlement to increased ratings for Appellant's left and right tibial disabilities, remand is also required for entitlement to TDIU to ensure that these issues are addressed together.

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 the Court's order on this Joint Motion. The parties respectfully ask that the Court enter mandate upon the granting of this Joint Motion.

On remand, the Board must "reexamine the evidence of record, seek any other evidence the Board feels is necessary, and issue a timely, well-supported decision in this case." *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991). Appellant may submit additional evidence and arguments in support of her claims. *Kutscherousky v. West*, 12 Vet.App. 369, 372 (1999). The Court has held that "'[a] remand is meant to entail a critical examination of the justification for the decision.'" *Kahana v. Shinseki*, 24 Vet.App. 428, 437 (2011) (quoting *Fletcher*, 1 Vet.App. at 397). Before relying on any additional evidence developed, the Board shall ensure that Appellant is given notice thereof, an opportunity to respond thereto, and the opportunity to submit additional argument or evidence. *See Thurber v. Brown*, 5 Vet.App. 119, 126 (1993).

In any subsequent decision, the Board shall provide an adequate statement of reasons or bases for its decision on all material issues of fact and law. *See* 38 U.S.C. § 7104(d)(1). The terms of this joint motion for remand are enforceable. *Forcier v. Nicholson*, 19 Vet.App. 414, 425 (2006). The Board shall incorporate copies of this Joint Motion and the Court's order

into Appellant's record. The Secretary shall afford this case expeditious treatment as required by 38 U.S.C. § 7112.

CONCLUSION

WHEREFORE, the parties respectfully request that the Court vacate the November 4, 2021, Board Decision that denied: (1) entitlement to an initial rating in excess of 10% for a left tibial disability; (2) entitlement to an initial rating in excess of 10% for a right tibial disability; and (3) entitlement to TDIU prior to June 2, 2018, and remand the matters for further proceedings consistent with the foregoing.

Respectfully submitted,

FOR APPELLANT:

Date: August 19, 2022

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