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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-6572

JACK A. SHANDLEY, JR., 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*: Self-represented Air Force veteran Jack A. Shandley, Jr., appeals a July 12, 2018, Board of Veterans' Appeals decision that denied a rating higher than 40% for lumbosacral strain. The appeal is timely;[1] 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).

Mr. Shandley generally argues that the Board erred in denying a higher rating for his back condition. Appellant's Informal Brief (Br.) at 1-2; *see De Perez v. Derwinski*, 2 Vet.App. 85, 86 (1992) (liberally construing arguments raised in unrepresented appellant's informal brief). As the Secretary concedes, the Board failed to discharge VA's duty to assist when it relied on an inadequate medical examination. We therefore will set aside the Board decision and remand the matter for further development, if necessary, and readjudication.

[1] The appeal is considered timely because, although Mr. Shandley may have filed the Notice of Appeal (NOA) more than 120 days after the Board's decision, the Secretary did not move to dismiss the appeal within 45 days of the filing date of the Board decision. *See* U.S. Vet. App. Rule 4(a)(3)(A) (finding that, under these circumstances, the NOA will be treated as timely regardless of the date it was received).

I. BACKGROUND

Mr. Shandley served on active duty from January 1954 to December 1962. R. at 2860, 2881. In a March 1963 rating decision, a VA regional office (RO) granted service connection for lumbosacral strain with a 10% rating. R. at 2859-60. In a September 2003 rating decision, Mr. Shandley's rating was increased to 40%. R. at 824-30.

In September 2012, Mr. Shandley submitted a statement that VA construed as a claim for an increased lumbosacral strain rating. R. at 263, 610. He reported that his back condition and other disabilities had worsened and noted that he needed assistance with bathing and transferring, used a walker and wheelchair, and relied on other people to drive, clean, and cook. R. at 610. In a December 2014 rating decision, the RO continued a 40% rating for lumbosacral strain. R. at 262-64. In July 2015, Mr. Shandley filed a Notice of Disagreement, stating that he could not perform any daily activities and had severe pain, weakness, stiffness, limited range of motion, and balance issues. R. at 173-74.

In November 2015, Mr. Shandley underwent a VA examination. R. at 144-54. The examiner noted that the veteran experienced pain at rest and with range of motion, R. at 147, but did not perform any range of motion testing during the examination, R. at 148. The examiner explained that the "patient is too unstable and cannot stand alone to perform adequate [range of motion] testing," and concluded "it is not possible to determine, without resorting to mere speculation . . . loss of range of motion, because there is no conceptual or empirical basis for making such a determination without directly observing function under these conditions." R. at 148. As to functional loss, the examiner stated that "the examination is neither medically consistent or inconsistent with the [v]eteran's statements describing functional loss with repetitive use over time." R. at 147. The examiner also recorded that the veteran could not transfer unassisted. R. at 153.

In December 2017, the RO issued a Statement of the Case, continuing the 40% rating for lumbosacral strain, R. at 62-95, and Mr. Shandley appealed in January 2018, R. at 45. In May 2018, Mr. Shandley testified at a Board hearing, stating that he always uses a walker, his legs give way, and he can't do activities such as sweeping the floor or washing the dishes because "anything that involves leaning over is real[ly] painful." R. at 19-20.

In July 2018, the Board denied a rating higher than 40% for lumbosacral strain, R. at 7, and this appeal followed.

II. ANALYSIS

A VA examination is adequate when it describes a disability in sufficient detail so that the Board's "evaluation of the claimed disability will be a fully informed one." *Ardison v. Brown*, 6 Vet.App. 405, 407 (1994); *see Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 301 (2008) (holding that an adequate examination must not only contain data and conclusions, but it must also provide "a reasoned medical explanation connecting the two"). As we explained in *Correia v. McDonald*, the Secretary requires that "certain range of motion testing be conducted whenever possible in cases of joint disabilities." 28 Vet.App. 158, 168 (2016) (citing 38 C.F.R. § 4.59 (2016, unchanged in 2020)). Specifically, "[t]he joints involved should be tested for pain on both active and passive motion, in weight-bearing and nonweight-bearing and, if possible, with the range of the opposite undamaged joint." 38 C.F.R. § 4.59. "If for some reason the examiner is unable to conduct the required testing or concludes that the required testing is not necessary . . . he or she should clearly explain why that is so." *Correia*, 28 Vet.App. at 170.

When VA evaluates musculoskeletal disabilities under the rating schedule, it must assess the factors listed in 38 C.F.R. §§ 4.40 (functional loss due to pain on movement and diminished excursion, strength, speed, coordination, and endurance) and 4.45 (abnormal extent of movement, weakened movement, excess fatigability, and incoordination, as well as pain on movement, instability of station, disturbance of locomotion, interference with sitting, standing, and weight-bearing). *DeLuca v. Brown*, 8 Vet.App. 202, 206-07 (1995). And, §§ 4.40 and 4.45 oblige VA examiners to also estimate how much a veteran's range of motion is additionally limited during flare-ups or provide an opinion explaining why an estimate is not feasible. *Sharp v. Shulkin*, 29 Vet.App. 26, 34 (2017); *Mitchell v. Shinseki*, 25 Vet.App. 32, 43-44 (2011); *DeLuca*, 8 Vet.App. at 204. If an examination is not given during a flare-up, the examiner may offer an opinion based on information from all procurable sources, including the veteran's lay statements. *Sharp*, 29 Vet.App. at 34-35. The Court has held that, when the Board has not called the veteran's credibility into question, and an examiner does not offer an opinion based on the veteran's lay statements that is necessary for the Board to make an informed decision on the claim, the examination is inadequate. *Miller v. Wilkie*, 32 Vet.App. 249, 262 (2020).

The adequacy of a medical examination is a finding of fact that the Court reviews under the "clearly erroneous" standard. *D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008). Under the "clearly erroneous" standard, '"[a] finding is "clearly erroneous" when although there is evidence to support

it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990) ((quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948))).

Here, the Board relied on the November 2015 examination to deny a rating higher than 40% for lumbosacral strain. R. at 6. It found that, although the examination lacked range of motion testing, "[b]ecause [the veteran] indicated he is unable to perform range of motion testing, the Board finds that remand for another VA examination to conduct such testing would be fruitless." R. at 6. But, as the Secretary concedes, Secretary's Br. at 7-8, if the November 2015 examiner could not perform range of motion testing as required by *DeLuca*, *Mitchell*, and *Correia*, the examiner had to assess whether that information could be reliably obtained from other procurable sources, including the veteran's lay statements, *see Sharp*, 29 Vet.App. at 34-35. Because the examiner did not consider evidence from other sources, including the veteran's lay statements, before stating that he could not determine loss of motion or functional loss, the examiner's opinion was inadequate. *See Miller*, 32 Vet.App. at 262. The examiner also failed to opine on "whether pain could significantly limit functional ability during flare-ups or on repetitive use." *DeLuca*, 8 Vet.App. at 206. Thus, the examination was also inadequate in that regard. *See id.*; *see also Sharp*, 29 Vet.App. at 35.

In sum, the Court agrees that the Board relied on an inadequate examination and we will remand the matter for the Board to order an adequate medical examination or explain why one is not needed. *See Miller*, 32 Vet.App. at 262; *Ardison*, 6 Vet.App. at 407. Given this disposition, the Court need not address any additional arguments that could lead to no greater remedy than 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, Mr. Shandley will be free to submit additional argument and evidence, 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."). On remand, per *Quirin v. Shinseki*, 22 Vet. App. 390, 395 (2009), the Board

may consider whether Mr. Shandley's assertions that he requires assistance of another person to perform daily activities due to his back condition and other service-connected disabilities, R. at 610 (inability to bathe, cook, clean, transfer, and drive); R. at 173-74 (similar), raise consideration of special monthly compensation based on the need for aid and attendance. *See Robinson v. Peake*, 21 Vet.App. 545, 552 (2008), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009); 38 U.S.C. § 1114(l); 38 C.F.R. § 3.352(a)(2020).

III. CONCLUSION

On consideration of the above, the July 12, 2018, Board decision denying a rating higher than 40% for lumbosacral strain is SET ASIDE and REMANDED for further development, if necessary, and adjudication consistent with this decision.

DATED: November 6, 2020

Copies to:

Jack A. Shandley, Jr.

VA General Counsel (027)