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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 10-1697

THOMAS A. WISNIEWSKI, APPELLANT,

v.

ERIC K. SHINSEKI,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before MOORMAN, *Judge*.

MEMORANDUM DECISION

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

MOORMAN, *Judge*: The appellant, Thomas A. Wisniewski, appeals through counsel a May 3, 2010, Board of Veterans' Appeals (Board) decision that denied entitlement to an initial evaluation in excess of 20% for gout. The Court has jurisdiction pursuant to 38 U.S.C. §§ 7252(a) and 7266(a) to review the Board's decision. Both parties have filed briefs, and Mr. Wisniewski has filed a reply brief. Mr. Wisniewski argues that the Board erred by defining the phrase "incapacitating exacerbations," which is found in 38 C.F.R. § 4.71a, Diagnostic Code (DC) 5002, by analogy to the phrase "incapacitating episodes," which is found in multiple locations in the rating schedule. He also argues that the Board failed to provide an adequate statement of reasons or bases regarding the disability rating assigned for gout. A single judge may conduct this review because the outcome in this case is controlled by the Court's precedents and "is not reasonably debatable." *Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the following reasons, the Court will vacate and remand the Board decision.

I. BACKGROUND

Mr. Wisniewski served on active duty from January 1973 to August 1980 and from May 1982 to November 1994. Record (R.) at 4. Mr. Wisniewski filed a claim for service connection for

"gout arthritis" in August 1994. R. at 234-37. A VA regional office (RO) granted service connection and assigned a 0% disability rating, effective December 1, 1994. R. at 9.

In a letter dated October 1998, Mr. Wisniewski stated that his gout was "by far the most limiting and disabling condition" from which he suffered. R. at 1261. He stated that he suffered from "eight attacks a year" and at times felt "excruciating pain in [his] joints." *Id.* He stated that "the gout is a very limiting factor when I am having an attack. It physically interferes with my job and generally makes things very miserable." *Id.*

In February 1999, the RO increased Mr. Wisniewski's disability rating to 20%, effective from the date of the original grant of service connection. R. at 303.

In December 2002, Mr. Wisniewski's wife submitted a letter in which she described Mr. Wisniewski's right great toe as "always tender, even to a gentle touch, but [it] becomes extremely painful during flare-ups." R. at 657. She explained:

During flare-ups he has to sit with his foot elevated and [he] has pain. His shoes do not fit during attacks and he limps badly. He has difficulty sleeping and avoids any item contacting his affected area. The attacks last different amounts of time, but usually pass within a week. These attacks occur five to seven times a year and have been on going for years now. During attacks he can not do very much as walking is difficult and painful for him, generally he just sits.

Id. Mr. Wisniewski's son also submitted a letter stating that Mr. Wisniewski's gout affects him several times per year and when he is suffering with an attack, "he isn't able to do a lot and basically has to take it easy for a week or so . . . [he] gets pretty miserable and is in constant pain." R. at 658.

In October 2003, Mr. Wisniewski testified before the Board. He testified that at times his joints were "stiff and extremely painful" and that he suffered "seven to eight attacks" per year. R. at 270-71.

In November 2004, Mr. Wisniewski submitted a letter in which he stated that he had "frequent attacks that are both painful and physically limiting." R. at 430. His wife wrote that he could not perform "simple chores around that house" and that he required "a lot of assistance during his gout attacks" and that he was "unable to even dress himself and in intense pain for a long period." R. at 433.

VA provided a medical examination in March 2005 in which the examiner diagnosed him with "gout, controlled most of the time with medications, but has five to six flare-ups of the gouty arthritis a year." R. at 196.

In June 2007 the Board denied an initial evaluation in excess of 20% for gout, and Mr. Wisniewski appealed the decision. In April 2009, the Court granted a joint motion for remand (JMR) that was based on the parties' agreement that the Board failed to provide an adequate statement of reasons or bases. R. at 5, 31. The JMR noted that the Board failed to discuss lay testimony from Mr. Wisniewski, his wife, and his son; and it failed to discuss the definition of "incapacitating exacerbations" and apply it to the evidence of record. R. at 32-33. In addition, the JMR stated that, "to the extent that [the statements of Mr. Wisniewski's wife and son] give lay testimony as to the number of attacks Appellant has had and their severity, *i.e.* whether they are incapacitating, such observations do appear to be within the realm of lay observation, and the Board should duly discuss the statements in that context." R. at 32.

In the May 2010 decision here on appeal, the Board found that there was "no evidence of impairment of health objectively supported by examination findings, nor is there convincing, credible evidence of incapacitating exacerbations of gout occurring three or more times a year." R. at 5. The Board also found that Mr. Wisniewski's gout was not unusual and did not require frequent hospitalization or marked interference with employment. The Board denied an initial evaluation in excess of 20%, stating that Mr. Wisniewski's "gouty episodes were not shown by the record to be incapacitating such that bed rest and treatment by a physician were required." R. at 11.

On appeal, Mr. Wisniewski presents two arguments. First, he argues that the Board erred by requiring him to show that he suffered from incapacitating episodes that required bed rest prescribed by a physician and treatment by a physician. Appellant's (App.) Brief (Br.) at 6. He argues that diagnostic code (DC) 5002, under which gout is rated, does not define the phrase "incapacitating exacerbations," and the Board therefore "exceeded its authority by applying the definition from elsewhere in the regulation for 'incapacitating episodes.'" *Id.* (citing 38 C.F.R. 4.71a). He urges the Court to reverse the Board's decision to deny him at least a 40% rating and remand the matter to the Board for consideration of a 60% or higher rating. In the alternative, Mr. Wisniewski argues that the Board failed to provide an adequate statement of reasons or bases for why he was not granted a

40% disability rating for gout based on the criteria that he exhibit "definite impairment of health objectively supported by examination findings." App. Br. at 17-18.

In response to Mr. Wisniewski's first argument, the Secretary concedes that the Court should vacate and remand the Board's decision for the Board to provide an adequate statement of reasons or bases, stating that the Board failed to consider relevant lay evidence of Mr. Wisniewski, his wife, and his son, as specifically required by the April 2009 JMR. Secretary's (Sec'y) Br. at 1-3. The Secretary argues that remand, not reversal, is the proper remedy because the Board has not assessed the credibility or weighed the lay testimony of Mr. Wisniewski's wife and son. In response to Mr. Wisniewski's second argument, the Secretary concedes that the Board failed to provide an adequate statement of reasons or bases as to why Mr. Wisniewski did not meet the rating criteria of "symptom combinations productive of definite impairment of health objectively supported by examination findings." Sec'y Br. at 4.

In reply to the Secretary's brief, Mr. Wisniewski states that he "knowingly waives the *Stegall v. West*, 11 Vet.App. 268, 271 (1998), error conceded by the Secretary because it is at most peripheral to the central issue before the Board, i.e., whether periods of prescribed bed rest are required for a higher rating for gout." App. Reply Br. at 1 (citing *Janssen v. Principi*, 15 Vet.App. 370, 374 (2001). Mr. Wisniewski continues to argue that reversal is the proper remedy because, according to him, the record does not provide a plausible basis for a finding that he does not suffer from incapacitating exacerbations three or more times per year.

II. ANALYSIS

A. Waiver of *Stegall* Error

The appellant cites *Janssen* for the proposition that he may waive a *Stegall* error by the Board concerning its failure to discuss certain favorable evidence. The Court in *Janssen* held that a veteran could waive the Court's consideration of the Veterans Claims Assistance Act (VCAA) on appeal. *See Del Rosario v. Peake*, 22 Vet.App. 399, 406 (2009). An effective waiver requires (1) knowledge of the right, and (2) voluntary intent to relinquish the right. *Janssen*, 15 Vet.App. at 374. While the Court decided *Janssen* in the context of a waiver of VCAA rights, the Court has also discussed waiver in other contexts. In *Coburn v. Nicholson*, 19 Vet.App. 427, 430 (2006), the Court stated that

it would not grant a *Stegall* remand in the face of opposition by the appellant. The Court went on to explain, however, that a remand on other grounds, such as one necessitated because appellate review is frustrated due to inadequate reasons or bases, "is not exclusively an appellant's right." *Id.* at 431. Based on a review of the Board's decision, and as discussed further below, the Court concludes that judicial review is frustrated by the lack of an adequate statement of reasons or bases and the appropriate remedy is to vacate and remand the decision. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998). Therefore, although the appellant's waiver is made with knowledge of the right and with voluntary intent to relinquish the right, his waiver does not alleviate the Board of its obligation to provide a statement of its reasons or bases that is adequate to facilitate informed review in this Court. *See* 38 U.S.C. § 7104(a); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995).

B. Reasons or Bases

Before deciding a claim, the Board is required to consider all relevant evidence of record and to consider and discuss in its decision all "potentially applicable" provisions of law and regulation. *Schafrath v. Derwinski*, 1 Vet.App. 589, 593 (1991); *see* 38 U.S.C. § 7104(a); *Weaver v. Principi*, 14 Vet.App. 301, 302 (2001) (per curiam order). In addition, the Board is required to provide a written statement of the reasons or bases for its findings and conclusions, adequate to enable an appellant to understand the precise basis for the Board's decision as well as to facilitate review in this Court. 38 U.S.C. § 7104(d)(1); *Allday*, 7 Vet.App. at 527; *Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1990). To comply with this requirement, the Board must analyze the credibility and probative value of the evidence, account for the evidence that it finds to be persuasive or unpersuasive, and provide the reasons for its rejection of any 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); *Gilbert*, 1 Vet.App. at 57.

A Board determination of the appropriate degree of disability under the rating code is a finding of fact subject to the "clearly erroneous" standard of review. 38 U.S.C. § 7261(a)(4); *see Smallwood v. Brown*, 10 Vet.App. 93, 97 (1997). However, here, the Court is asked to determine whether the Secretary's interpretation of 38 C.F.R. § 4.71a (specifically, the meaning of "incapacitating exacerbations" in diagnostic code 5002) is proper, a legal question that the Court

reviews de novo. 38 U.S.C. § 7261(a)(1); *see Smith v. Gober*, 14 Vet.App. 227, 230 (2000). The regulation at issue in this matter is 38 C.F.R. § 4.71a, the rating schedule for disabilities of the musculoskeletal system. Of particular concern to the appellant is the section on "Acute, Subacute, or Chronic Diseases," under which Diagnostic Code 5002 provides the following:

Arthritis rheumatoid (atrophic) As an active process:

With constitutional manifestations associated with active joint involvement, <i>totally incapacitating</i>	100
Less than criteria for 100% but with weight loss and anemia productive of severe impairment of health or <i>severely incapacitating exacerbations</i> occurring 4 or more times a year or a lesser number over prolonged periods	60
Symptom combinations productive of definite impairment of health objectively supported by examination findings or <i>incapacitating exacerbations</i> occurring 3 or more times a year	40
One or two <i>exacerbations</i> a year in a well-established diagnosis.....	20

38 C.F.R. § 4.71a, DC 5002 (emphases added).

In this case, the Board failed to provide an adequate statement of reasons or bases regarding its definition of "incapacitating exacerbations," frustrating judicial review. In attempting to define "incapacitating exacerbations" under DC 5002, the Board first noted that "incapacitating episode" is defined in another part of the rating schedule for the musculoskeletal system under the code for intervertebral disc syndrome. That definition states that an incapacitating episode is "a period of acute signs and symptoms due to intervertebral disc syndrome that requires bed rest prescribed by a physician and treatment by a physician." 38 C.F.R. § 4.71a, DC 5243, Note (1). The Board then provides a "see also" citation to DCs 7345 (chronic liver disease) and 7354 (hepatitis C), both of which define "incapacitating episode" as "a period of acute signs and symptoms severe enough to require bed rest and treatment by a physician." 38 C.F.R. § 4.114, DCs 7345 Note (2), 7354 Note (2).¹ The Board then states:

¹ The Court notes that while these two definitions are similar, DC 5243 expressly requires bed rest *prescribed by a physician* while DCs 7345 and 7354 require bed rest, but do not expressly require a prescription for such by a physician.

The Board does not find that the definition of incapacitating episode in the Note to Diagnostic Codes 7345 and 7354 is directly applicable to Diagnostic Code 5002. However, in the voluminous medical record over the relatively lengthy appeal period, there have not been instances of gout requiring extended bed rest prescribed by a physician or need for hospitalization or other acute treatment and certainly nothing approaching 3 or more episodes per year.

R. at 11. The Court is unsure how to interpret the Board's statement that the definition in DCs 7345 and 7354 is not "directly applicable" to DC 5002 without further explanation.²

Next, the Board opaquely states, "It is not clear that [the appellant's] description of a flare-up would equate to an incapacitating exacerbation." R. at 11. This statement implies that the Board was essentially operating without a working definition of "incapacitating exacerbation." If the Board had provided an adequate definition of an "incapacitating exacerbation," it could have determined whether the appellant's description of his flare-ups—or the descriptions offered by his wife and son—satisfied the definition.

The parties both note that "[a]n agency's interpretation of its own regulation is of controlling weight unless it is plainly erroneous or inconsistent with regulation." *Cullen v. Shinseki*, 24 Vet.App. 74, 79 (2010). Here, however, VA's interpretation of its regulation is so unclear as to frustrate judicial review. As a result, the Court will vacate the Board's decision and remand the matter for readjudication. Although the appellant argues for reversal, remand is generally the appropriate remedy when the Board has incorrectly applied the law or failed to provide an adequate statement of reasons or bases for its determinations or where the record is otherwise inadequate. *Gutierrez v. Principi*, 19 Vet.App. 1, 10 (2004); *Tucker, supra*.

C. Remand

On remand, the Board must consider and discuss the various lay statements in the record, including those of the appellant, his wife, and his son. The Board must adhere to the instructions found in the April 2009 JMR, which include discussing the statements from the appellant's wife and son "to the extent that those statements give lay testimony as to the number of attacks Appellant has

² The Court is not holding that the definition is or is not applicable to DC 5002, only that the Board needs to explain its statement and the reasoning supporting it.

had and their severity, *i.e.* whether they are incapacitating." R. at 32. The Court notes that the Secretary and the appellant have agreed that "such observations do appear to be within the realm of lay observation." *Id.* The Board must also make express credibility determinations regarding the lay statements.

In addition, the Board must also discuss VA's interpretation of "incapacitating exacerbations" as found in DC 5002. The Court notes that the ratings in DC 5002 use the following terms in descending order of severity: "totally incapacitating," "severely incapacitating exacerbations," "incapacitating exacerbations," and "exacerbations." § 4.71a, DC 5002.

Lastly, as conceded by the Secretary, the Board must provide an adequate statement of reasons or bases as to whether the evidence showed "symptom combinations productive of definite impairment of health objectively supported by examination findings." *Id.*

On remand, the appellant is free to submit additional evidence and raise arguments to the Board and the Board is required to consider them. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002); *Kutscherousky v. West*, 12 Vet.App. 369, 372 (1999) (per curiam order). The Secretary must provide expeditious treatment of this matter on remand. *See* 38 U.S.C. §§ 5109B, 7112.

III. CONCLUSION

Based on the foregoing analysis, the appellant's and the Secretary's briefs, and a review of the record on appeal, the Board's May 3, 2010, decision is VACATED and the matters are REMANDED for further adjudication consistent with this decision.

DATED: January 17, 2012

Copies to:

Sean Kendall, Esq.

VA General Counsel (027)