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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 12-2541

STEPHEN D. WELLS, 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, Stephen D. Wells, appeals through counsel a July 18, 2012, Board of Veterans' Appeals (Board) decision that determined a reduction from 100% to 30% for service-connected coronary artery disease (CAD), effective August 1, 2008, was proper. Record (R.) at 3-15. The Court has jurisdiction pursuant to 38 U.S.C. § 7252(a) to review the Board decision. A single judge may conduct that 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 reverse the July 18, 2012, Board decision and remand the matter for further proceedings consistent with this decision.

I. FACTS

The appellant served on active duty in the U.S. Marine Corps from August 1965 to August 1969. R. at 368, 1251.

In May 2006, the appellant underwent a cardiac catherization. R. at 950-55. In August 2006, the appellant was provided a VA heart examination. R. at 1029-31. The VA examiner opined that the appellant's CAD resulted in an ejection fraction of 60% and a metabolic equivalents testing (METs) level of less than 3.0 based on his level of physical activity and reported symptoms. R. at

1030-31. In October 2006, the VA regional office (RO) granted service connection for CAD and rated the condition as 100% disabling, effective February 25, 2006. R. at 935-44. The RO noted that the 100% rating was appropriate due to the appellant's history of "a myocardial infarction and continued due to a workload of less than 3 METs resulting in dyspnea, fatigue, and angina." R. at 941.

In December 2007, the appellant underwent another VA heart examination. R. at 924-26. The VA examiner opined that the appellant's ejection fraction was 60% and his METs level was around 3. R. at 926. The physician further opined that the appellant's METs level was reduced because of his other medical problems and that his METs just with the heart condition would have been between 5 and 7. R. at 926.

In March 2008, the RO issued a rating decision that proposed a reduction of the appellant's rating from 100% to 30% disabling in light of the December 2007 VA examiner's findings. R. at 916-21. The appellant submitted a statement disagreeing with the proposed reduction in April 2008. R. at 910-11. In May 2008, the RO effectuated the reduction and assigned a 30% rating, effective September 1, 2008. R. at 901-05. The appellant appealed the RO's decision. R. at 601-02, 895-96.

An additional VA heart examination was conducted in April 2010. R. at 541. The examiner recorded the appellant's history and performed a physical examination. *Id.* The examiner opined that, based upon the available cardiac evidence, the appellant's estimated METs due solely to his cardiac disease would be approximately 5-7. *Id.* In December 2010, the appellant and his wife testified before the Board and stated that his condition had worsened. R. at 500, 503. The Board remanded the claim to afford the appellant a new VA examination, which was performed in August 2011. R. at 159-62, 409-16. The VA examiner opined that the appellant's METs level was greater than 7 but less than 10. R. at 160. The appellant submitted a statement regarding his condition in March 2012. R. at 38-39. In July 2012, the Board issued the decision on appeal. R. at 3-17.

II. ANALYSIS

The appellant argues that the Board erred in affirming the reduction of his disability rating because the reduction was based upon a supposed improvement in testing values and without proper consideration of any material or functional improvement. Appellant's Brief (Br.) at 6-12. The Secretary argues that "[t]o the extent the Board did not make that explicit finding [of material

improvement], . . . the Board discussed the requirements of [38 C.F.R. §] 4.10," and the Secretary argues that the most recent VA examination reports reflect substantial improvement in the appellant's functional capacity. Secretary's Br. at 16.

In cases where a veteran's disability rating is reduced, the Board must determine whether the reduction was proper. *Dofflemyer v. Derwinski*, 2 Vet.App. 277, 279-80 (1992). A reduction is void ab initio when the Board affirms a reduction of a veteran's disability rating without observing the applicable VA regulations. *Kitchens v. Brown*, 7 Vet.App. 320, 325 (1995). "Reexaminations disclosing improvement, physical or mental, in these disabilities will warrant reduction in rating" for a rating that has been in effect for less than five years. 38 C.F.R. § 3.344(c) (2013). When reducing a disability rating based on the severity of a veteran's condition, the burden falls on VA to show "material improvement" in the veteran's condition from the time of the previous rating examination that assigned the veteran's rating. *Ternus v. Brown*, 6 Vet.App. 370, 376 (1994). Section 4.10 provides: "The basis of disability evaluations is the ability of the body as a whole, or of the psyche, or of a system or organ of the body, to function under the ordinary conditions of daily life, including employment." 38 C.F.R. § 4.10 (2013). Section 4.2 directs that "[e]ach disability must be considered from the point of view of the veteran working or seeking work." 38 C.F.R. § 4.2 (2013). "Thus, in any rating reduction case not only must it be determined that an improvement in a disability has actually occurred but also that improvement actually reflects an improvement in the veteran's ability to function under the ordinary conditions of life and work." *Brown v. Brown*, 5 Vet.App. 413, 421 (1993).

While the Board cited these criteria before engaging in its analysis of the appellant's appeal, it failed to actually analyze these criteria as applied to the appellant. Thus, the Court agrees with the appellant that, although the Board referred to evidence of improvement, the Board's underlying rationale for upholding the rating reduction was premised upon the application of the rating criteria and not on "material improvement" in the appellant's condition. *See*, e.g., R. at 14 ("Such findings are indicative of a 30[%] disability evaluation, and in fact, results from the August 2011 VA examination correspond to a 10[%] rating under Diagnostic Codes 7005 and 7006."). Here, although the Board concluded that the evidence reflected improvement in the appellant's condition, the Board made no finding regarding whether the improvement shown by the VA examinations resulted in "improvement in [the appellant's] ability to function under the ordinary conditions of life." *Brown*,

5 Vet.App. at 421. The Board only determined that the December 2007, April 2010, and August 2011 VA examination results indicated that an improvement in the appellant's condition had occurred. R. at 12-15; *see Brown*, 5 Vet.App. at 421. Even if the findings upon which the Board relied were accurate and representative of some improvement in the veteran's condition, the Board's analysis must then consider whether this improvement includes a better ability to function under the ordinary conditions of life. *Brown*, 5 Vet.App. at 421.

As the appellant notes, there is evidence that reflects that the veteran has not undergone any improvement, including the veteran's reports from his doctors, his two hospitalizations for cardiac issues, and his need for beta blockers, which could not be stopped without risk to his health and which precluded him from performing a stress test. *See* R. at 38, 162, 227-30, 503, 639-40. Although the Board acknowledged the appellant's lay statements, it only considered them for the purpose of determining whether the appellant's heart condition had improved, ultimately concluding that he was not competent to provide evidence as to the METs level. R. at 14. The Board failed to consider the appellant's statements in regard to the effect of his disability on functioning in everyday life. Rather than making the requisite finding regarding material improvement, the Board appears to have relied on a mechanical application of the rating schedule. R. at 13-14. As this is not a case of a claimant seeking an initial or higher disability level, VA's regulations require more than a rote application of the rating criteria to medical data. *See Dofflemeyer,* 2 Vet.App. at 279-80; *Peyton v. Derwinski,* 1 Vet.App. 282, 286 (1991).

Because this matter involves a rating reduction, and the Board failed to apply applicable regulations pertaining to rating reduction, the Board's finding is rendered void ab initio and not in accordance with the law, and the decision of the Board as to this matter will be reversed with direction that the Board reinstate the prior rating. *See Kitchens*, 7 Vet.App. at 325; *Brown*, 5 Vet.App. at 422 (holding Board's reduction of disability rating without observance of applicable law and regulation is void ab initio and setting aside Board decision as "not in accordance with law," reversed and remanded in both).

III. CONCLUSION

After consideration of the appellant's and the Secretary's briefs, and a review of the record, the Board's July 18, 2012, decision is REVERSED and the matter REMANDED for further

adjudication consistent with this decision.

DATED: October 31, 2013

Copies to:

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