*Designated for electronic publication only*

**UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS**

NO. 14-0825

SANTIAGO PAZ, APPELLANT,

V.

ROBERT A. MCDONALD,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before BARTLEY, *Judge*.

**MEMORANDUM DECISION**

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

BARTLEY, *Judge*: Veteran Santiago Paz appeals through counsel a December 9, 2013, Board of Veterans' Appeals (Board) decision determining that a reduction in disability evaluation for service-connected low back strain from 40% to 20% effective May 1, 2008, was proper. Record (R.) at 2-15.[1] This appeal is timely and the Court has jurisdiction to review the Board's decision

[1]The Board also remanded the issue of entitlement to a higher evaluation for service-connected low back strain. R. at 3, 13-15. Because a remand is not a final decision of the Board subject to judicial review, the Court does not have jurisdiction at this time to consider the remanded issue. *See Howard v. Gober*, 220 F.3d 1341, 1344 (Fed. Cir. 2000); *Breeden v. Principi*, 17 Vet.App. 475, 478 (2004) (per curiam order); 38 C.F.R. § 20.1100(b) (2014). However, the Court notes that, although the Board initially characterized that issue as entitlement to an evaluation "higher than 20[%] for low back strain," that issue is not mooted by the Court's conclusion that the reduction to 20% for that disability was improper because the Board found that, in January 2010, one and a half years after the effective date of the reduction, the veteran asserted that his low back disability had worsened. R. at 13. Thus, regardless of the Court's conclusion as to the propriety of the reduction, VA is obligated to develop and adjudicate the separate issue of entitlement to a higher evaluation for service-connected low back strain, at least as of January 2010. *See AB v. Brown*, 6 Vet.App. 35, 38 (1993) (holding that, "on a claim for an original or an increased rating, the claimant will generally be presumed to be seeking the maximum benefit allowed by law and regulation, and it follows that such a claim remains in controversy where less than the maximum available benefit is awarded").

In addition, the Board referred to the VA regional office (RO) for initial adjudication (1) claims for service connection for residuals of herbicide exposure, a bilateral arm disability, and a disability manifested by shortness of breath; (2) the issue of whether the veteran filed a timely Notice of Disagreement (NOD) as to an August 2006 RO decision denying a compensable evaluation for service-connected residuals of a fractured right metacarpal; and (3) the issue of entitlement to separate evaluations for neurologic impairment of the right and left lower extremities. R. at 3,

pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). Single-judge disposition is appropriate in this case. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the reasons that follow, the Court will reverse the Board's December 2013 determination that the reduction was proper and remand that matter with instructions to reinstate the veteran's 40% evaluation for low back strain effective May 1, 2008, the effective date of the reduction.

## I. FACTS

Mr. Paz served on active duty in the U.S. Marine Corps from April 1970 to April 1972, including service in Vietnam. R. at 2528. He was initially granted service connection for low back strain in April 1986 and assigned a noncompensable evaluation effective June 13, 1985, the date he injured his low back while on active duty for training in the National Guard. R. at 2850. That initial evaluation was subsequently increased to 10%, and to 20% effective February 11, 2003. R. at 2324.

In May 2006, Mr. Paz filed an informal claim for an increased evaluation, asserting that his low back condition had recently gotten worse. R. at 2137. Two months later, he underwent a VA spine examination, and range of motion testing of the thoracolumbar spine revealed forward flexion to 30 degrees, extension to 10 degrees, left and right lateral flexion to 10 degrees, and left and right lateral rotation to 20 degrees. R. at 2104. The examiner noted that Mr. Paz's movement was "painful on extreme of flexion and reextension and extremes of twisting" and that he wore a back brace for support. R. at 2103-04. Based on the results of that examination, the RO issued a September 2006 rating decision increasing the veteran's low back strain evaluation from 20% to 40% effective May 25, 2006, the date of his informal claim. R. at 2077-79, 2081-86.

VA reevaluated Mr. Paz's low back condition in September 2007, and he complained of constant low back pain with random daily flare-ups that lasted five minutes and resolved with medication. R. at 1977-78. He indicated that he did not use assistive devices or wear a brace (R. at 1978), but stated that his low back condition interfered with his job as a tree trimmer because he

---

13. The Court has jurisdiction to review referred issues only to the extent that the appellant argues that remand, rather than referral, was appropriate. *See Young v. Shinseki*, 25 Vet.App. 201, 202-03 (2012) (en banc order). Because Mr. Paz has not challenged the propriety of the Board's referrals, the Court will not address the referred matters. *See Link v. West*, 12 Vet.App. 39, 47 (1998) ("Claims that have been referred by the Board to the RO are not ripe for review by the Court.").

was unable to climb trees and lift heavy branches due to pain (R. at 1980). On range of motion testing, he had forward flexion of the thoracolumbar spine to 60 degrees, extension to 30 degrees, left lateral flexion to 15 degrees, right lateral flexion to 10 degrees, and left and right lateral rotation to 20 degrees. R. at 1982. The examiner noted pain at the end of all ranges of motion, but found no additional limitations due to pain. R. at 1983.

Later in September 2007, Mr. Paz's employer submitted a statement indicating that the veteran was "unable to work" due to low back pain. R. at 1956. Specifically, he stated that Mr. Paz's low back condition prevented him from picking up logs, pulling branches, climbing trees, and cutting down tree limbs. *Id.*

In November 2007, the RO proposed to reduce Mr. Paz's 40% evaluation for low back strain to 20% based on the results of the September 2007 VA examination. R. at 1931-39. Mr. Paz did not respond to that proposal and, in February 2008, the RO implemented the reduction effective May 1, 2008. R. at 1902-09. In March 2008, Mr. Paz filed a timely NOD as to that decision (R. at 1897) and submitted a separate statement complaining of constant low back pain and asserting that the examiner "forced [him] to move both sides forward" despite pain (R. at 1892). The RO issued a June 2008 Statement of the Case finding the reduction warranted and continuing the 20% evaluation (R. at 1821-45) and the veteran subsequently perfected his appeal to the Board (R. at 1827-28; *see* R. at 1543).

Mr. Paz underwent a third VA spine examination in November 2009, and he reported daily, moderately severe low back pain with flare-ups brought on by prolonged sitting, standing, and ambulation. R. at 1742-43. The veteran stated that he missed six to ten days of work that year due to low back symptoms, but indicated that he was able to perform activities of daily living, did not use assistive devices, and did not wear a back brace. R. at 1743-44. Range of motion testing of the thoracolumbar spine showed forward flexion to 45 degrees, extension to 10 degrees, and bilateral flexion and rotation to 15 degrees. R. at 1747. The examiner noted "end-range pain in all directions, more with forward flexion" (R. at 1747, 1749), but found no additional limitation of motion on repetition (R. at 1752).

The next month, the RO issued a Supplemental Statement of the Case (SSOC) continuing the 20% evaluation for low back strain. R. at 1733-39. Subsequent SSOCs issued in January 2010, January 2011, and February 2012 reached the same conclusion. R. at 1492-96, 1561-68.

In December 2013, the Board issued the decision currently on appeal, which determined that the reduction of the veteran's low back strain evaluation from 40% to 20% effective May 1, 2008, was proper. R. at 2-15. Specifically, the Board upheld the reduction because it found that the July 2007 VA spine examination "clearly show[ed] substantial improvement, in that the range of forward flexion was to 60 degrees[,] whereas it had previously been to 30 degrees or less," and the veteran walked with a normal gait. R. at 12. The Board acknowledged that a veterans service organization had argued on Mr. Paz's behalf that the 40% evaluation should be restored because "no 'actual material improvement' had been demonstrated, [he] had an altered gait[,] and the condition was not improved under the ordinary conditions of life and work." *Id*. However, the Board rejected those arguments because the 40% evaluation had been in effect for less than five years at the time of the reduction and, therefore, "such findings regarding material improvement under the ordinary conditions of life and work are not necessary." *Id*. (citing 38 C.F.R. § 3 344(c) (2013)). This appeal followed.

## II. ANALYSIS

Mr. Paz argues that the Board erred in finding that VA had properly reduced his 40% low back strain evaluation to 20% as of May 1, 2008, because, inter alia, VA violated the Court's holding in *Brown v. Brown*, 5 Vet.App. 413, 420 (1993), by not making a finding as to whether his low back condition improved under the ordinary conditions of life and work. Appellant's Brief (Br.) at 5-7. He therefore asserts that the reduction was void ab initio and that the proper remedy is for the Court to reverse the Board decision and order reinstatement of the 40% evaluation retroactive to May 1, 2008. *Id*. at 8.

The Secretary responds that, although VA did not expressly find that Mr. Paz's low back strain had improved under the ordinary conditions of life and work, it implicitly made that finding by assigning a lower evaluation, which was necessarily based on VA's assessment of his ability to function under the conditions of daily life, including employment. Secretary's Br. at 11-14 (citing

38 C.F.R. § 4.10 (2014)). The Secretary disagrees with the veteran's reading of *Brown* and contends that that case "did not impose any additional requirements on the Board, or demand that a (non-stabilized) disability be viewed differently in the context of a reduction than in the context of the assignment of a disability evaluation in the first instance," because the Court "merely adopted the rationale that underlies the very heart of the disability evaluation system and made clear that the same considerations relevant to the assignment of a disability evaluation in the first place are relevant to the reduction of a disability evaluation." *Id*. at 13.

The Secretary further argues that, to the extent that the Court agrees with the veteran's reading of *Brown*, the proper remedy in this case is to remand, not to reverse and reinstate the 40% evaluation, because the Board's failure to make the findings required by *Brown* constitutes a reasons-or-bases error that "does not concern or otherwise implicate the substance or merits of the reduction." *Id.* at 14. In fact, the Secretary asserts that the Court lacks jurisdiction to provide the remedy requested by Mr. Paz. *Id*. at 14-20.

For the reasons that follow, the Court agrees with Mr. Paz that the Board violated *Brown* and that reversal and reinstatement of the 40% evaluation is the proper remedy in this case.

A. The General Requirements for Reduction Set Forth in *Brown*

The primary issue in *Brown* was how to measure the length of time that a disability is evaluated at the same level for the purpose of determining whether a veteran is entitled to 38 C.F.R. § 3.344(a)'s enhanced protections for stabilized disabilities evaluated at the same level for five years or more. 5 Vet.App. at 416-19. After determining that the relevant starting point for measuring that period was the effective date of the evaluation, not the date of the decision that assigned the evaluation, the Court concluded that the Board had erred in upholding an RO decision that reduced the veteran's 30% asthma evaluation to 10% without complying with § 3.344(a), even though the 30% evaluation was in effect for more than five years. *Id*. at 419-20.

The Court additionally stated that the Board had also "failed to comply with several general VA regulations applicable to all [] reductions regardless of whether the [evaluation] has been in effect for five years or more." *Id*. at 420. Specifically, the Court noted that, taken together, 38 C.F.R. §§ 4.2 and 4.10 mandate that, "in *any* . . . reduction case[,] not only must it be determined that an improvement in a disability has actually occurred[,] but also that that improvement actually

reflects an improvement in the veteran's ability to function under the ordinary conditions of life and work." *Id*. at 421 (emphasis added) (citing 38 C.F.R. 4.2 (1992) (directing that "[e]ach disability must be considered from the point of view of the veteran working or seeking work"); 38 C.F.R. § 4.10 (1992) (stating that "[t]he 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")).[2]

Since deciding *Brown*, the Court has repeatedly made clear that VA errs when it reduces an evaluation without complying with the "general VA regulations applicable to all []reduction cases, regardless of the [evaluation] level or the length of time that the [evaluation] has been in effect," including the specific requirements of §§ 4.2 and 4.10. *Faust v. West*, 13 Vet.App. 342, 349 (2000); *see Murphy v. Shinseki*, 26 Vet.App. 510, 517 (2014) (holding that the Board erred in effectively reducing the veteran's 30% sinusitis evaluation to 10% because it "did not make the findings that an AOJ [(agency of original jurisdiction)] would be required to make to justify a reduction in a disability evaluation," including whether any improvement in sinusitis "indicated an improvement, if it existed, in his ability to function under the ordinary conditions of life and work"). Thus, it is well established in the Court's caselaw that VA cannot reduce a veteran's disability evaluation without first finding, inter alia, that the veteran's service-connected disability has improved to the point that he or she is now better able to function under the ordinary conditions of life and work. *See Murphy*, 26 Vet.App. at 517; *Faust*, 13 Vet.App. at 349; *Brown*, 5 Vet.App. at 421.

In the instant case, neither the RO nor the Board expressly found that any putative improvement in Mr. Paz's service-connected low back strain resulted in an increased ability to function under the ordinary conditions of life and work. *See* R. at 2-15, 1902-09, 1931-39. In fact, the RO did not mention the ordinary conditions of life and work (*see* R. at 1909, 1937-38), and the Board only did so to make clear that the enhanced protections of § 3.344(a) did not apply in this case (R. at 6, 12).[3] Given that such a finding is required in *every* reduction case, *Murphy*, 26 Vet.App.

---

[2]The portions of §§ 4.2 and 4.10 relied on by the Court in *Brown* are identical to those in effect today.

[3]Section 3.344(a) requires a showing of *material improvement* that will be *maintained* under the ordinary conditions of life and work, whereas §§ 4.2 and 4.10 require only a showing of improvement under the ordinary conditions of life and work. *Compare* 38 C.F.R. § 3.344(a) (2014), *with Brown*, 5 Vet.App. at 421.

at 517; *Faust*, 13 Vet.App. at 349; *Brown*, 5 Vet.App. at 421, the Court concludes that the Board erred in finding that the RO properly reduced Mr. Paz's low back strain evaluation from 40% to 20% without assessing the veteran's condition in the context of the ordinary conditions of his life and work. *See Faust*, 13 Vet.App. at 348 ("The Court determines de novo whether VA has followed and applied its own regulations in reducing or terminating VA benefits.").

The Secretary's attempt to circumvent the Court's holding in *Brown* is unavailing. If, as the Secretary contends (Secretary's Br. at 13), VA's assignment of a lower evaluation necessarily establishes that a veteran's service-connected disability has improved under the ordinary conditions of life and work, then there would have been no reason for the Court to identify and discuss that requirement in *Brown* (and its progeny) because every reduction decision would, by definition, satisfy that requirement. That is not a tenable reading of *Brown*.[4] Thus, the Secretary's argument must fail.

B. Remedy

Given the Court's conclusion that the Board erred in upholding the RO decision reducing Mr. Paz's low back strain evaluation from 40% to 20% effective May 1, 2008, the Court must now determine the proper remedy for that error. As Mr. Paz correctly points out (Appellant's Br. at 8), when VA reduces a veteran's disability evaluation without complying with applicable provisions of law and regulation, the reduction decision is void ab initio and reinstatement of the prior evaluation is appropriate. *See Hudgens v. Gibson*, 26 Vet.App. 558, 564 (2014); *Murphy*, 26 Vet.App. at 517; *Sorakubo v. Principi*, 16 Vet.App. 120, 123-24 (2002); *Greyzck v. West*, 12 Vet.App. 288, 292 (1999); *Hayes v. Brown*, 9 Vet.App. 67, 73 (1996); *Kitchens v. Brown*, 7 Vet.App. 320, 325 (1995); *Brown*, 5 Vet.App. at 422; *Jeanes v. Derwinski*, 3 Vet.App. 264, 266 (1992); *Dofflemyer v. Derwinski*, 2 Vet.App. 277, 282 (1992); *Schafrath v. Derwinski*, 1 Vet.App. 589, 596 (1991); *Heerdt v. Derwinski*, 1 Vet.App. 551, 551-52 (1991).

[4]To the extent that the Secretary desires the Court to "reexamine and reevaluate [the holding in *Brown*] and/or provide clarification" (Secretary's Br. at 14), he is free to request that relief in a separately filed motion for a panel decision and, ultimately, a motion for en banc review. *See* U.S. VET. APP. R. 35(b), (c); *Tobler v. Derwinski*, 2 Vet.App. 8, 14 (1991) (holding that VA is bound by decisions of this Court, unless or until that decision is overturned by this Court en banc, the Federal Circuit, or the Supreme Court).

Although the Secretary disputes whether the Court has jurisdiction to take this action (Secretary's Br. at 14-20), the foregoing cases–as well as others declaring decisions void ab initio in other contexts, *see, e.g.*, *King v. Shinseki*, 26 Vet.App. 484, 493 (2014) (concluding that an RO decision improperly eliminating a previous grant of non-service-connected pension benefits was void ab initio); *MacKlem v. Shinseki*, 24 Vet.App. 63, 71-72 (2010) (holding that the RO's retraction of an improperly issued proposed rating decision reinstating VA benefits from 2007 to 1950 was void ab initio because the retraction amounted to a resurrection of VA's extraordinary award procedure, which had previously been invalidated by the U.S. Court of Appeals for the Federal Circuit)–have decisively settled this issue.[5] Accordingly, the November 2007 RO decision reducing Mr. Paz's low back strain evaluation from 40% to 20% effective May 1, 2008, was void ab initio, and reinstatement of the 40% evaluation retroactive to May 1, 2008, is required.[6]

## III. CONCLUSION

Upon consideration of the foregoing, the December 9, 2013, Board determination that the RO's November 2007 reduction of Mr. Paz's low back strain evaluation from 40% to 20% effective May 1, 2008, was proper is REVERSED and the matter is REMANDED with instructions to reinstate the veteran's 40% evaluation retroactive to May 1, 2008.

DATED: April 24, 2015

Copies to:

Maxwell D. Kinman, Esq.

VA General Counsel (027)

[5]Again, to the extent that the Secretary desires the Court to "revisit[]" this issue (Secretary's Br. at 14), he is free to file a motion for a panel decision followed by a motion for en banc review. *See supra* note 4.

[6]Given this disposition, the Court need not address Mr. Paz's additional argument that the September 2007 VA spine examination was inadequate (Appellant's Br. at 9-12) because that argument cannot result in a remedy greater than reinstatement of the 40% evaluation effective May 1, 2008.