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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 14-1434

JEFFREY G. KINDER, APPELLANT,

V.

ROBERT A. McDONALD,
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, Jeffrey G. Kinder, appeals through counsel an April 3, 2014, decision of the Board of Veterans' Appeals (Board) concluding that the reductions of his disability ratings for a left foot second toe metatarsophalangeal (MTP) joint¹ replacement from 30% to 10% and for related scar, from 10% to noncompensable, were proper. Record (R.) at 3-13. Both parties have submitted briefs, and the appellant has submitted a reply brief. This appeal is timely, and the Court has jurisdiction pursuant to 38 U.S.C. § 7252(a). A single judge may conduct this review. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the reasons set forth below, the Court will reverse the Board's April 3, 2014, decision and remand the matter for further proceedings consistent with this decision.

¹ A "metatarsophalangeal joint" is defined as a joint "formed between the heads of the five metatarsal bones and the proximal ends of the corresponding phalanges." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 160 (32d ed. 2012) [hereinafter DORLAND'S]. "Metatarsal bone" is defined as "the five bones (metatarsals) extending from the tarsus to the phalanges of the toes, being numbered in the same sequence from the most medial to the most lateral." DORLAND'S at 1341.

I. FACTS

Mr. Kinder served on active duty in the U.S. Army from December 1983 to December 1986 and from January 1988 to February 2005. R. at 590-91. During his service, in 2004, he received a left foot second toe cheilectomy² and joint implant placement. R. at 393-95. An October 2004 VA examination, completed before Mr. Kinder's military discharge, noted that Mr. Kinder had a fixed second distal metatarsal, wore a soft shoe and required a cane. R. at 990. The examiner noted that Mr. Kinder had had a left toe joint replacement and that he currently experienced constant pain which was aggravated by putting pressure on the toe. R. at 991.

In March 2005, a VA regional office (RO) awarded Mr. Kinder service connection for, inter alia, joint replacement of the second toe on the left foot and a tender scar on that foot related to the same event. R. at 1003-26. He was awarded disability ratings of 30% for the left toe joint replacement and 10% for the left toe scar, both effective on March 1, 2005, the date following his military discharge. R. at 1008-09.

VA performed additional examinations of Mr. Kinder's left toe and scar in February 2006. R. at 940-44. The examiner noted that the left toe had a "successful surgical outcome with some persistent pain and reduced motion." R. at 941. The examiner noted that there was tenderness with motion and that Mr. Kinder had subjective complaints of pain in the region of the joint, including pain with walking, standing, and activity. R. at 940-41. The examiner also indicated that Mr. Kinder was unemployed. R. at 940. Following this examination, the RO proposed to reduce Mr. Kinder's disability rating for his left toe to 10% and reduce the rating for his scar to noncompensable. R. at 930-38. Mr. Kinder expressed his disagreement with this proposal in a May 2006 letter, which indicated that the surgery on his left foot aggravated him so much that he could hardly walk, that he was unemployed, and requested that he be afforded vocational rehabilitation. R. at 844.

²"Cheilectomy" is "the operation of chiseling off the irregular bony edges of a joint cavity that interfere with motion." DORLAND'S at 339.

The RO implemented the rating reduction in May 2006. R. at 920-29. Mr. Kinder filed a timely Notice of Disagreement in August 2006. R. at 843. The same month he submitted a letter to VA regarding his service-connected disabilities and again requested that he be afforded vocational rehabilitation. R. at 530.

In October 2006, VA performed another examination of Mr. Kinder's service-connected foot disorder. R. at 822-24. The examiner noted that Mr. Kinder had "worked as a civilian in Kuwait as an ammo specialist" in 2005 and "then worked as a civilian contractor in Iraq for 6 weeks" but "was then medically evac[uated] out of Iraq due to problems with his right foot and right leg." R. at 822. The examiner then stated: "He has not missed any days of work in the last year due to his left foot or toe condition." *Id.* The examiner also noted that Mr. Kinder reported "chronic pain in his left second toe at the MTP joint that has brought worse flares everyday with weightbearing or any standing or walking." *Id.* The examiner further noted that Mr. Kinder complained that his pain "has never gotten better after surgery and never gone away." R. at 822-23.

The RO issued a Statement of the Case in December 2007, and Mr. Kinder submitted his timely Substantive Appeal in January 2008. R. at 767, 782-801. The Board affirmed the reduction of Mr. Kinder's disability ratings in a November 2012 decision. R. at 360-75. In January 2013, Mr. Kinder appealed that decision to this Court, and the Court granted a joint motion for remand (JMR) in April 2013. R. at 351-55. As part of the remand, the parties agreed that the Board failed to discuss whether Mr. Kinder's conditions actually improved under the ordinary conditions of daily life. R. at 356-59. The Board issued the decision here on appeal on April 3, 2014. R. at 2-15. This appeal followed.

II. ANALYSIS

"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) (2014). 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 laws and regulations. *Tatum v. Shinseki*, 23 Vet.App. 152, 159 (2009)

("Because this matter involves a rating reduction, and the Board failed to consider the applicable laws and regulations before finding that [the appellant] was no longer entitled to a compensable disability rating, the Board's finding is rendered 'void ab initio' and 'not in accordance with the law.'"); *Kitchens v. Brown*, 7 Vet.App. 320, 325 (1995); *Brown v. Brown*, 5 Vet.App. 413, 422 (1993); see *Schafraath v. Derwinski*, 1 Vet.App. 589, 595-96 (1991) ("When the issue raised is a rating reduction and the Court determines that the reduction was made without observance of law . . . this Court, acting under 38 U.S.C. § 4061(a)(3)(D) [(now 38 U.S.C. § 7261(a)(3)(D))], has ordered reinstatement of the prior rating.").

Section 4.10 of title 38, U.S. Code, 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 (2014). Section 4.2 of title 38, U.S. Code, 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 (2014). "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*, 5 Vet.App. at 421; see 38 C.F.R. § 4.13 (2014) ("When any change in evaluation is to be made, the rating agency should assure itself that there has been an actual change in the conditions, for better or worse, and not merely a difference in thoroughness of the examination or in use of descriptive terms."). In addition, the Board must "establish, by a preponderance of the evidence . . . , that a rating reduction was warranted." *Id.*

When a claim involves a musculoskeletal disability, an adequate examination of that disability must indicate that the examiner considered the effects of pain on the veteran's range of motion. *DeLuca v. Brown*, 8 Vet.App. 202, 206 (1995); 38 C.F.R. § 4.40 (2014) (requiring an evaluation of "functional loss . . . due to pain supported by adequate pathology and evidenced by the visible behavior of the claimant undertaking the motion"). Moreover, the examiner must address any functional impairment the disability causes. See 38 C.F.R. § 4.10; see also *Bierman v. Brown*, 6 Vet.App. 125, 129 (1994) (noting examiner's duty to furnish full description of effects of disability

upon ordinary activity); 38 C.F.R. § 4.1 (2014) ("For the application of [the rating] schedule, accurate and fully descriptive medical examinations are required, with emphasis upon the limitation of activity imposed by the disabling condition.").

In this case, the appellant contends that in determining that the rating reductions were warranted, the Board failed to comply with the applicable law found in *Brown v. Brown*, 5 Vet.App. at 421, and 38 C.F.R. §§ 3.344, 4.1, 4.2, 4.10, and 4.13 because, he asserts, the Board wrongly focused on the rating schedule and "improved test scores" upon examination rather than on whether there was actual improvement in his functioning in ordinary life. Appellant's Brief (App. Br.) at 5-6. Specifically, the appellant contends that his "actual functioning under the ordinary conditions of daily life was not properly evaluated or assessed" by the VA medical examiner or the Board and that, therefore, the Board decision should be reversed. Reply Br. at 2-3; *see* App. Br. at 9 (noting that the "examiner provided no opinion as to what effect the condition would have on his ability to work"). He asserts that there was "insufficient evidence to support the reduction." App. Br. at 10. The Court agrees.

First, the Board relied on insufficient evidence showing improvement in the conditions in light of the February 2006 report and the appellant's lay evidence of pain on use of his MTP joint and scar. The February 2006 examiner noted that the appellant reported increasing pain in his left toe with prolonged standing, as well as pain in the MTP joint area with walking, standing, or activity. R. at 940-41. Further, the October 2006 examiner noted that the appellant complained of "chronic pain in his left second toe at the MTP joint that has brought worse flares every day with weightbearing or any standing or walking" and that the pain "has never gotten better and has never gone away," that it "flares daily," and that "he is no longer able to run." R. at 822-23. The appellant also submitted a statement to VA in May 2006 that "the surgery that was performed on my left foot has aggravated me so much I can hardly walk." R. at 844. However, the Board's discussion of this evidence amounted to a cursory notations of "some persistent pain and reduced motion" in the MTP joint before the Board found actual improvement for the reason that the appellant "used no brace or cane for ambulation" and that the February 2006 examiner "noted a normal foot exam with full extension and full flexion of the relevant toe." R. at 10. Regarding his service-connected scar, the Board concluded that actual improvement occurred because the February 2006 examiner "found [it]

to be non-tender" and that the October 2006 examination of the scar "showed no pain or discomfort." R. at 12. As for the appellant's complaints of pain on use of the scar, the Board noted only the appellant's "assertions to the contrary" of the examiner's report of no pain or discomfort upon examination of the scar. *Id.*

Second, the Board relied on insufficient evidence showing the effect of the appellant's left toe condition and scar on his ability to work. The Board noted that

the Veteran began physically demanding work in 2005 as a civilian contractor in Kuwait and then in Iraq. The February 2006 VA examiner stated that the Veteran's disability does not affect the Veteran's current employment. The Veteran's October 2006 VA examination noted that he did not miss any days of work in the prior year due to his left foot or toe condition. Therefore, the Board finds that these examinations show the Veteran's ability to function in daily life and work.

R. at 10.

The Board's analysis of the effect of the appellant's toe disability on his degree of occupational impairment is flawed. First, while the Board noted as support for its conclusion the February 2006 examiner's opinion that the appellant's "[c]ondition does not affect his usual occupation," the Board took the examiner's opinion out of context. A full reading of the examination report reveals that the examiner noted that the appellant's toe condition could not have affected his occupation *because the appellant was unemployed* at the time of the examination. R. at 940. Therefore, at most, the examiner's opinion amounts to neutral evidence regarding the effect of the appellant's toe condition on his level of occupational impairment. Further, the Board's analysis of whether improvement was reflected in functioning in ordinary life fails to acknowledge the appellant's May 2006 statement requesting vocational rehabilitation and noting that the appellant was not working, could not walk normally, and was experiencing difficulty finding a job. R. at 844.

Finally, the Board's use of the October 2006 VA examination report as evidence for improvement is not valid because this examination occurred *after* the RO decision that initially reduced the appellant's disability ratings. *See Ternus v. Brown*, 6 Vet.App. 370, 376 (1994) (holding that when reducing a disability rating the burden falls on VA to show improvement in the veteran's condition from the time of the previous rating examination that assigned the veteran's higher rating).

While the Board stated that "such after-the-fact evidence may not be used to justify an improper reduction," the Board did exactly that when it used the October 2006 examiner's findings to justify the appellant's rating reduction. R. at 8, 10.

Accordingly, the Court concludes that the appellant's lay statements regarding his pain on use of his toe and its effects on his daily activities are certainly material and probative of whether a rating reduction was warranted, and the Board erred in not analyzing this evidence or providing any reasons for its rejection. *See Buchanan v. Nicholson*, 451 F.3d 1331, 1336 (Fed. Cir. 2006) (discussing Board's obligations in assessing credibility of lay statements); *Washington v. Nicholson*, 19 Vet.App. 362, 367-68 (2005) (noting that it is the Board's responsibility to "assess the credibility of, and weight to be given to," the evidence of record); *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995) (holding that the Board must provide the reasons for its rejection of any material evidence favorable to the claimant). The Court further 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 actual improvement in the appellant's condition based upon functioning in daily life conditions. *See Brown v. Brown*, 5 Vet.App. at 421.

Because this matter involves a rating reduction and the Board failed to apply the applicable regulations pertaining to a rating reduction based on the evidence of record, the Board's findings, that the preponderance of the evidence showed (1) improvement of the left foot disability and scar and (2) improvement under the ordinary conditions of life and work, are not in accordance with the law, and the decision of the Board as to this matter is rendered void ab initio and will be reversed with direction that the Board reinstate the prior rating. *See Tatum and Kitchens*, both *supra*; *Brown v. Brown*, 5 Vet. App. at 422.

III. CONCLUSION

After consideration of the appellant's and Secretary's briefs, and a review of the record on appeal, the Board's April 3, 2014, decision is REVERSED and the matter is REMANDED for reinstatement of the appellant's original disability ratings of 30% for a left foot second toe metatarsophalangeal joint replacement and 10% for related scar.

DATED: May 21, 2015

Copies to:

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