BOARD OF VETERANS' APPEALS

FOR THE SECRETARY OF VETERANS AFFAIRS

IN THE APPEAL OF
[redacted]
Represented by
Gordon A. Graham, Agent

[redacted]
Docket No. 20-08 864
Advanced on the Docket

DATE: February 8, 2021

ORDER

Entitlement to service connection for left knee meniscal tear residuals, osteoarthritis and recurrent patellar dislocations as secondary to left ankle fracture residuals is granted.

Entitlement to a rating in excess of 10 percent for lumbar disc disease prior to June 10, 2015 is denied.

Entitlement to a 20 percent rating, but no higher, for lumbar disc disease since June 10, 2015 is granted subject to the laws and regulations governing the award of monetary benefits.

REMANDED

Entitlement to an effective date prior to November 29, 2014 for the grant of special monthly compensation (SMC) under 38 U.S.C. § 1114(s)(1) is remanded.

FINDINGS OF FACT

1. The Veteran has left knee meniscal tear residuals, osteoarthritis and recurrent patellar dislocations and the evidence is at least in equipoise to find they are caused by his left ankle fracture residuals.

2. Prior to June 10, 2015, lumbar disc disease was not manifested by forward thoracolumbar flexion 60 degrees or less or, a combined range of motion of the thoracolumbar spine of 120 degrees or less, muscle spasm or guarding severe enough to result in an abnormal gait or abnormal spinal contour such as scoliosis, reversed lordosis, or abnormal kyphosis, or by incapacitating episodes having a total duration of at least two weeks but less than four weeks during the past twelve months.

3. Since June 10, 2015 lumbar disc disease was manifested by forward thoracolumbar flexion of 60 degrees or less, but not by forward thoracolumbar flexion of 30 degrees or less, favorable ankylosis of the entire thoracolumbar spine, or by incapacitating episodes having a total duration of at least four weeks but less than six weeks.

CONCLUSIONS OF LAW

1. The criteria for entitlement to service connection for left knee meniscal tear residuals, osteoarthritis and recurrent patellar dislocations have been met. 38 U.S.C. §§ 1110, 1131, 5107; 38 C.F.R. §§ 3.102, 3.303, 3.310.

2. The criteria for entitlement to a rating in excess of 10 percent rating for lumbar disc disease prior to June 10, 2015 have not been met. 38 U.S.C. §§ 1155, 5107; 38 C.F.R. §§ 4.1, 4.7, 4.40, 4.59, 4.71a, Diagnostic Codes (DC) 5243.

3. The criteria for entitlement to a 20 percent rating, but no higher for lumbar disc disease since June 10, 2015 have been met. 38 U.S.C. §§ 1155, 5107; 38 C.F.R. §§ 4.1, 4.7, 4.40, 4.59, 4.71a, DC 5243.

REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

The Veteran served on active duty from October 1989 to March 1996.

These matters are before the Board of Veterans' Appeals (Board) on appeal of October 2004 and March 2018 rating decisions of a Department of Veterans Affairs (VA) Regional Office (RO). In a February 2018 decision, the Board found that the Veteran had not been properly notified of the October 2004 rating decision, and as a result, that decision did not become final. The Board assigned an effective date of January 23, 2004 for the award of service connection for lumbar disc disease, which was effectuated by a March 2018 rating decision. Notification of the October 2004 rating decision was sent to the Veteran on June 8, 2018 and the Veteran perfected the present appeal.

Entitlement to service connection for left knee meniscal tear residuals, osteoarthritis and recurrent patellar dislocations is granted.

The Veteran contends that he has a left knee disorder which is related to his service-connected left ankle fracture residuals.

Service connection is granted for any current disability that is the result of a disease contracted or an injury sustained while on active duty service. 38 U.S.C. §§ 1110, 1131; 38 C.F.R. § 3.303 (a). Service connection requires competent evidence showing: (1) the existence of a present disability; (2) in-service incurrence or aggravation of a disease or injury; and, (3) a causal relationship between the present disability and the disease or injury incurred or aggravated during service. *Shedden v. Principi*, 381 F.3d 1163, 1167 (Fed. Cir. 2004).

Service connection may also be established on a secondary basis for a disability which is proximately due to or the result of service-connected disease or injury. 38 C.F.R. § 3.310 (a). Additional disability resulting from the aggravation of a non-service-connected condition by a service-connected condition is also compensable under 38 C.F.R. § 3.310 (a).

A veteran need only demonstrate that there is an approximate balance of positive and negative evidence to prevail in a service connection claim. *Gilbert v. Derwinski*, 1 Vet. App. 49, 53 (1990). When the evidence for and against the claim is in equipoise, by law, the Board must resolve all reasonable doubt in favor of the appellant. 38 U.S.C. § 5107; 38 C.F.R. § 3.102. To deny a claim on its merits, the

preponderance of the evidence must be against the claim. *See Alemany v. Brown*, 9 Vet. App. 518, 519 (1996).

In June 2016 a VA examiner diagnosed the Veteran with a left knee strain. In October 2016 an examiner opined that the disorder was less likely than not related to the service-connected left ankle fracture residuals. The examiner reasoned that the Veteran's service treatment records did not reveal complaints of left ankle symptoms. This opinion is inadequate as the absence of in-service complaints is not relevant to the question of whether the left knee disorder was caused or aggravated by left ankle fracture residuals.

In January 2020 a VA examiner diagnosed the Veteran with a left knee meniscal tear, osteoarthritis and recurrent patellar dislocations and opined that the disorders were less likely than not related to the service-connected left ankle fracture residuals. The examiner cited various sources discussing the causes of lateral patellar dislocations but did not clearly explain how that evidence supported the opinion provided.

In September 2020, a private physician, Dr. R.O., opined that the Veteran's "current left knee problem" was more likely than not related to his service-connected left ankle fracture residuals. Dr. R.O. reasoned that the Veteran suffered from abnormal gait which put stress on his knees. Dr. R.O. further noted that recurrent dislocations were associated with an increased risk of osteoarthritis. While Dr. R.O. did not specify which "current left knee problem" was related to the left ankle fracture residuals, given Dr. R.O.'s discussion of the January 2020 VA examiner's findings, the Board finds that his opinion pertains to the left knee disorders diagnosed at that examination.

As little probative value is assigned to the June 2016 and January 2020 VA opinions, the evidence is at least in equipoise as to whether the Veteran's left knee meniscal tear residuals, osteoarthritis and recurrent patellar dislocations are related to his service-connected left ankle fracture residuals. Accordingly, service connection for left knee meniscal tear residuals, osteoarthritis and recurrent patellar dislocations is granted.

Entitlement to an initial rating in excess of 10 percent for lumbar disc disease prior to June 10, 2015 is denied; entitlement to a 20 percent rating since June 10, 2015 is granted.

The Veteran contends that his lumbar disc disease is more severely disabling than represented by the currently assigned 10 percent rating.

Disability evaluations are determined by the application of VA's Schedule for Rating Disabilities (Rating Schedule), 38 C.F.R. Part 4. The percentage ratings in the Rating Schedule represent, as far as can be practicably determined, the average impairment in earning capacity resulting from diseases and injuries incurred or aggravated during military service and their residual conditions in civil occupations. 38 U.S.C. § 1155; 38 C.F.R. § 4.1.

Where an increase in the level of a service-connected disability is at issue, the primary concern is the present level of disability. *Francisco v. Brown*, 7 Vet. App. 55 (1999). Nevertheless, separate ratings can be assigned for separate periods of time based on the facts found, a practice known as "staged" ratings. *See Fenderson v. West*, 12 Vet. App. 119, 126 (1999). The analysis is therefore undertaken with consideration of the possibility that different ratings may be warranted for different time periods within the period on appeal.

Where there is a question as to which of the two evaluations shall be applied, the higher evaluation will be assigned if the disability picture more nearly approximates the criteria required for that rating. Otherwise, the lower rating will be assigned. 38 C.F.R. § 4.7.

Disability of the musculoskeletal system is primarily the inability, due to damage or infection in parts of the system, to perform the normal working movements of the body with normal excursion, strength, speed, coordination, and endurance. It is essential that the examination on which ratings are based adequately portrays the anatomical damage, and the functional loss, with respect to these elements. In addition, functional loss may be due to pain, supported by adequate pathology and evidenced by the visible behavior of the veteran undertaking the motion. Weakness

is as important as limitation of motion, and a part which becomes painful on use must be regarded as seriously disabled. 38 C.F.R. § 4.40.

The intent of the schedule is to recognize painful motion with joint or periarticular pathology as productive of disability. It is the intention to recognize actually painful, unstable, or malaligned joints, due to healed injury, as entitled to at least the minimum compensable rating for the joint. 38 C.F.R. § 4.59.

The appellant's lumbar disc disease is rated under the General Rating Formula for Diseases and Injuries of the Spine. 38 C.F.R. § 4.71a, DC 5243.

The General Rating Formula provides a 20 percent rating when forward thoracolumbar flexion is greater than 30 degrees, but not greater than 60 degrees; or, the combined range of motion of the thoracolumbar spine is not greater than 120 degrees; or, there is muscle spasm or guarding severe enough to result in an abnormal gait or abnormal spinal contour such as scoliosis, reversed lordosis, or abnormal kyphosis. *Id.*

A 40 percent rating is warranted when forward thoracolumbar flexion is 30 degrees or less; or there is favorable ankylosis of the entire thoracolumbar spine. *Id.*

There are alternative rating criteria for the spine available under DC 5243, for an intervertebral disc syndrome, which allows for the assignment of rating criteria based on the frequency and extent of incapacitating episodes. 38 C.F.R. § 4.71a, DC 5243. An incapacitating episode is defined as "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." *Id.* at Note (1).

A 20 percent rating is warranted where there are incapacitating episodes having a total duration of at least two weeks but less than four weeks during the past twelve months. A 40 percent rating is warranted where incapacitating episodes have a total duration of four weeks but less than six weeks during the past twelve months. *Id.*

At an April 2004 VA kinesiotherapy appointment, the Veteran performed low back strength training and his range of motion was noted to be "[within normal limits]".

In December 2014, the Veteran reported back pain for days after lifting more than 20 pounds and stated that 10 days out of the year he had to stay in bed or lay on the couch to let his back recover.

On VA examination on June 10, 2015, the Veteran demonstrated forward flexion to 90 degrees, but exhibited pain on motion at 35 degrees. There was no ankylosis. The Veteran reported flare-ups as being unable to lift over 20 pounds with his arms straight out from his body, and sharp pain with walking, requiring him to stay in bed for three to four days, but opined that there would be no additional limitation of functional ability during flare-ups. The examiner stated that there were no incapacitating episodes over the past twelve months which required bedrest prescribed by a physician.

On VA examination in January 2020, the examiner noted that the Veteran was able to sit in a chair at 90 degrees, but on range of motion testing would only flex to 40 degrees. There was no ankylosis. There was no pain with weight-bearing or non-weightbearing. There was pain with passive range of motion which did not result in functional loss. The Veteran reported flare-ups described as occurring monthly, lasting one to two weeks. The examiner declined to provide additional functional limitation on flare-up in terms of limitation of range of motion, reasoning that the available records were silent for annotations of limitation of range of motion during flares, and that after examining the Veteran and listening to his complete history and current subjective complaints, as well as reviewing the available records, there was no basis to estimate any additional loss of function or motion during flare-ups. The examiner stated that there were no incapacitating episodes over the past twelve months which required bedrest prescribed by a physician.

In his September 2020 medical opinion, Dr. R.O. observed that the Veteran's thoracolumbar spine standing forward flexion was limited to 40 degrees on the January 2020 VA examination. Dr. R.O. further noted that the Veteran reported incapacitating episodes having a total during of at least two weeks, but less than four weeks during a twelve month period.

The foregoing evidence preponderates against granting a rating in excess of 10 percent for lumbar disc disease prior to June 10, 2015. In this regard, there is no

evidence prior to the June 10, 2015 VA examination indicating thoracolumbar flexion 60 degrees or less, a combined range of motion of the thoracolumbar spine of 120 degrees or less, muscle spasm or guarding severe enough to result in an abnormal gait or abnormal spinal contour such as scoliosis, reversed lordosis, or abnormal kyphosis, or incapacitating episodes having a total duration of at least two weeks but less than four weeks during the past twelve months. On the contrary, the only evidence regarding thoracolumbar range of motion pertinent to this period is the April 2004 VA kinesiotherapy note indicating that range of motion was within normal limits.

While the Veteran reported back pain necessitating 10 days of bed rest out of the year there is no evidence that the Veteran was prescribed bed rest by a physician due to any such symptoms. Even assuming that the Veteran's inability to stand or walk approximates an "incapacitating episode" under 38 C.F.R. § 4.71a, DC 5243, the reported duration of such symptoms of 10 days per year is insufficient to warrant a higher rating. Accordingly, a higher rating cannot be awarded based on incapacitating episodes.

For the period since June 10, 2015, the criteria for a 20 percent rating, but no higher for lumbar disc disease are met. In this regard, the June 10, 2015 VA examiner noted pain on motion starting at 35 degrees of forward flexion. The January 2020 VA examiner reported 40 degrees of thoracolumbar forward flexion while standing. While both examiners provided conflicting evidence suggesting that the Veteran may have had greater range of forward flexion, the Board will resolve reasonable doubt in the favor of the Veteran and find that a 20 percent rating is warranted since June 10, 2015.

However, the criteria for a rating in excess of 20 percent since June 10, 2015 are not met. In this regard, the evidence preponderates against finding 30 degrees or less of thoracolumbar forward flexion, favorable ankylosis of the entire thoracolumbar spine or incapacitating episodes with a total duration of at least four weeks. The evidence discussed above reveals no less than 35 degrees of forward flexion, and no indication of ankylosis. While Dr. R.O. reported incapacitating episodes requiring bedrest having a total during of at least two weeks, but less than four weeks during a twelve month period, the criteria for a higher 40 percent rating

under DC 5243 require incapacitating episodes having a total duration of at least four weeks. Accordingly, the reported duration of such symptoms is insufficient to warrant a higher rating.

All of the Veteran's additional reported symptoms have been considered, to include pain and flare-ups. The Board is sympathetic to the pain experienced by the Veteran. It is acknowledged that an adequate discussion of functional loss includes consideration of manifest functional loss during flare-ups. *Mitchell v. Shinseki*, 25 Vet. App. 32, 44 (2011). Flare-ups must be quantifiable and must result in limitation of motion or function beyond that contemplated by the already provided evaluation. In addition, because VA regulations under 38 C.F.R. § 3.344 (a) and 38 C.F.R. § 4.1 address the stabilization of ratings, flare-ups must be of such length as to establish that the overall impairment is more severe than currently evaluated, rather than a brief snapshot in time.

In this case, these symptoms, including during flare-ups, do not reveal thoracolumbar flexion to 60 degrees or less, a combined range of motion of the thoracolumbar spine of 120 degrees or less, muscle spasm or guarding severe enough to result in an abnormal gait or abnormal spinal contour such as scoliosis, reversed lordosis, or abnormal kyphosis or incapacitating episodes of at least two weeks during the past twelve months prior to June 10, 2015, nor do they reveal 30 degrees or less of thoracolumbar forward flexion, favorable ankylosis of the entire thoracolumbar spine or incapacitating episodes with a total duration of at least four weeks since June 10, 2015.

Based on the foregoing, the preponderance of the evidence is against finding that a rating in excess of 10 percent for lumbar disc disease prior to June 10, 2015. Since June 10, 2015, a 20 percent rating, but no higher, is granted.

REASONS FOR REMAND

Entitlement to an effective date prior to November 29, 2014 for the grant of SMC under 38 U.S.C. § 1114(s)(1) is remanded.

SMC is payable at a specified rate under 38 U.S.C. § 1114 (s) when a veteran has a single service-connected disability rated as 100 percent and: (1) has additional service-connected disability or disabilities independently ratable at 60 percent or more, separate and distinct from the 100 percent service-connected disability and involving different anatomical segments or bodily systems. 38 C.F.R. § 3.350 (i).

Prior to November 29, 2014, the Veteran was service connected for posttraumatic stress disorder with bipolar disorder, panic disorder with agoraphobia and alcohol abuse rated 100 percent disabling, asthma rated 30 percent disabling, lumbar disc disease rated 10 percent disabling, and left ankle fracture residuals rated 10 percent disabling. The Veteran's additional service-connected disabilities (other than his single service-connected disability rated as 100 percent) result in a 40 percent combined rating. 38 C.F.R. § 4.25. Thus, prior to November 29, 2014, the Veteran's additional service-connected disabilities do not meet the schedular requirement for an award of SMC under 38 U.S.C. § 1114(s)(1).

However, herein entitlement to service connection for left knee meniscal tear residuals, osteoarthritis and recurrent patellar dislocations is granted. The initial rating will be assigned by the RO in the first instance and may impact the combined rating in a way that impacts SMC under 38 U.S.C. § 1114(s)(1). The issue of entitlement to SMC under 38 U.S.C. § 1114(s)(1) prior to November 29, 2014 must be deferred pending the implementation of this decision, including the assignment of a rating for left knee meniscal tear residuals, osteoarthritis and recurrent patellar dislocations.

The matters are REMANDED for the following action:

(Continued on the next page)

Implement the award of service connection for left knee meniscal tear residuals, osteoarthritis and recurrent patellar dislocations. Then, readjudicate the issue of entitlement to SMC under 38 U.S.C. § 1114(s)(1) prior to November 29, 2014.

Laura E. Collins

LAURA E. COLLINS
Veterans Law Judge
Board of Veterans' Appeals

Attorney for the Board Paul J. Bametzreider

The Board's decision in this case is binding only with respect to the instant matter decided. This decision is not precedential and does not establish VA policies or interpretations of general applicability. 38 C.F.R. § 20.1303.