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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 10-448

JEFFREY O. KENNEDY, APPELLANT,

V.

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

Before KASOLD, *Chief Judge*.

MEMORANDUM DECISION

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

KASOLD, *Chief Judge*: Veteran Jeffrey O. Kennedy appeals through counsel that part of an October 7, 2009, decision of the Board of Veterans' Appeals (Board) that denied benefits for a bilateral knee disability and a disability rating in excess of 10%, as well as an effective date earlier than March 1, 2002, for benefits for irritable bowel syndrome (IBS). Mr. Kennedy essentially argues that the Board (1) misinterpreted the law in finding that the functional loss caused by his knee pain did not constitute a current disability, (2) failed to address favorable evidence in its statement denying benefits for his knee condition, and (3) provided inadequate reasons or bases for its IBS determinations. The Secretary contends that the Board (1) did not misinterpret the law or (2) fail to address favorable evidence in its statement denying benefits for a knee condition, but (3) provided inadequate reasons or bases in its IBS determinations. Single-judge disposition is appropriate. *Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the reasons stated below, (1) that part of the Board decision on appeal denying benefits for a bilateral knee disability will be affirmed, and (2) that part of the decision involving IBS will be set aside and the matter remanded for further adjudication.

In support of his first argument, Mr. Kennedy asserts that his functional loss caused by pain

constitutes a current disability under 38 C.F.R. § 4.40 even without an underlying diagnosable malady. Although Mr. Kennedy essentially recognizes that the law is to the contrary, *see Sanchez-Benitez v. West*, 13 Vet.App. 282, 285 (1999) (noting that § 4.40 applies "during the course of *rating* a disability," and holding that "pain alone, without a diagnosed or identifiable underlying malady or condition, does not in and of itself constitute a disability for which service connection may be granted" (emphasis added)), *appeal dismissed in part and vacated in part on other grounds sub nom. Sanchez-Benitez v. Principi*, 259 F.3d 1356 (Fed. Cir. 2001), he nevertheless attempts to bolster his argument that pain can constitute a disability with reliance on *Read v. Shinseki*, 651 F.3d 1296 (Fed. Cir. 2011) and *Allen v. Brown*, 7 Vet.App. 439 (1995) (en banc). His reliance is misplaced.

Mr. Kennedy notes the Court's statement in *Allen* that "[t]he term, disability, as contemplated by VA regulations, means impairment in earning capacity resulting from . . . all types of diseases or injuries . . . incident to military service and their residual conditions," and argues that this means pain can be a disability if it causes earnings impairment. However, *Allen* generally involved the issue of compensating for secondary conditions – not whether pain can constitute a current disability – and Mr. Kennedy otherwise fails to recognize that the statement on which he relies acknowledges that there must be a specific "residual condition[ ]" to constitute a current disability, rather than merely a general impairment of earning capacity resulting from service. 7 Vet.App. at 448 (internal brackets and quotation marks omitted). Similarly, although Mr. Kennedy notes that *Read* discusses the term "disability" as premised on diminution in earning capacity, he fails to recognize that *Read* addressed the term "disability" in the context of a disability rating for a disability already service connected and whether an assigned rating code could be changed; it did not purport to define what constituted a "disability" for service-connection purposes. 651 F.3d at 1300 (noting that "[t]he only question on appeal" involves the changing of an assigned rating code); *cf. United States v. Bird*, 124 F.3d 667, 677 n.3 (5th Cir. 1997) ("While certain language in [a precedent], read in isolation, might be understood to embrace a somewhat far-reaching . . . analysis, the opinion must be read in the context of what was before the panel there . . . ."). In sum, the law remains clear that pain alone does not

constitute a disability for VA purposes.[1] *Sanchez-Benitez*, *supra*; *see also Palczewski v. Nicholson*, 21 Vet.App. 174, 179 (2007) (Secretary has discretion to promulgate regulations defining disability for purposes of applying laws he administers).

The record does not support Mr. Kennedy's argument that the Board failed to address favorable evidence in its statement denying benefits for his knee condition. Although he asserts that the Board should have addressed whether the symptoms of fluid, effusion, and crepitation noted in the medical evidence constituted a current disability, the Board noted that the only *diagnoses* in the medical evidence were arthralgia (knee pain)[2] and degenerative joint disease (DJD).[3] As such, the contention that symptoms of fluid, effusion, and crepitation – which were not diagnosed as a disability by the medical examiners – should have been addressed as a possible disability by the Board was not reasonably raised by the record. *See Parrish v. Shinseki*, 24 Vet.App. 391, 398 (2011) (finding no error where Board did not address issue not raised by appellant or reasonably raised by the record).

Additionally, although Mr. Kennedy asserts that the Board should have addressed whether x-ray evidence of back problems in a March 2002 medical report could have affected his knee condition, he fails to identify where in the record he or his counsel raised this issue, or how the issue reasonably was raised when the report did not link Mr. Kennedy's back problems to his knee condition. *See Parrish*, *supra*; *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (appellant bears burden of demonstrating error on appeal); *see also Robinson v. Peake*, 21 Vet.App. 545, 553 (2008) ("[T]he Board's obligation to analyze claims goes beyond the arguments explicitly made. However, it does not require the Board to assume the impossible task of inventing and rejecting

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[1] Although Mr. Kennedy's joint pain alone does not constitute a current disability, the Board noted that it could be a manifestation of an undiagnosed illness pursuant to 38 C.F.R. § 3.317 (2011) (providing benefits for undiagnosed illnesses of Persian Gulf veterans), and remanded this theory of service connection for further adjudication.

[2] "Arthralgia" is defined as "pain in a joint." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 150 (32d ed. 2012).

[3] The DJD diagnoses were rendered without radiological evidence and therefore given little weight by the Board.

every conceivable argument in order to produce a valid decision."), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009).

On the other hand, the record supports the parties' general agreement that the Board provided inadequate reasons or bases for finding unwarranted a disability rating in excess of 10% for IBS. Specifically, the Board failed to discuss the examiner's statement that IBS caused "significant effects" on Mr. Kennedy's occupation, to wit: "frequent vomiting while working. Result in loss job. Also got depressed at the time." Record (R.) at 143-44. The Board's failure to address this material evidence possibly supporting a higher rating or an extraschedular rating frustrates judicial review. *See Allday v. Brown*, 7 Vet.App. 517, 527 (1995) (holding that the Board's statement "must be adequate to enable claimant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court"); *Schafrath v. Derwinski*, 1 Vet.App. 589, 593 (1991) (Board must discuss provisions of law and regulation where they are made "potentially applicable through the assertions and issues raised in the record"); *see also Otero-Castro v. Principi*, 16 Vet.App. 375, 381-82 (2002) (noting that "38 C.F.R. § 4.10 specifies that '[t]he basis of disability evaluations is the ability of . . . [an] organ of the body to function under the ordinary conditions of daily life including employment"). Remand is warranted. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) (remand is appropriate "where the Board has incorrectly applied the law, failed to provide an adequate statement of reasons or bases for its determinations, or where the record is otherwise inadequate").

The record also supports the parties' general agreement that the Board provided inadequate reasons or bases for finding unwarranted an effective date earlier than March 1, 2002, for benefits for IBS. Specifically, although Mr. Kennedy's October 1998 claim for IBS was granted presumptive service connection in a March 2003 VA regional office decision, the Board failed to address a notation in an April 2008 report under the "review of medical records" section that the "date of onset" of his diarrhea problems was "1991" (in service) and that loose bowel movements continued thereafter "intermittent[ly] w[ith] remissions" (R. at 142), which potentially could support an earlier effective date based on direct service connection if the April 2008 examiner correctly stated the facts and these symptoms were more likely than not related to IBS. *Compare* 38 C.F.R. § 3.114(a) (effective date of award based on liberalizing VA issue generally "shall not be earlier than the effective date of the . . . administrative issue"), *with* 38 C.F.R. § 3.400 (effective date of award

generally "will be the date of receipt of the claim or the date entitlement arose, whichever is later"). Because the Board did not "provide the reasons for its rejection of [this] material evidence favorable to the claimant," remand is warranted. *Washington v. Nicholson*, 19 Vet.App. 362, 367 (2005); *Tucker*, *supra*.

On remand, Mr. Kennedy may present, and the Board must consider, any additional evidence and argument in support of the remanded IBS matter. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002). This matter is to be provided expeditious treatment on remand. *See* 38 U.S.C. § 7112.

Accordingly, that part of the October 7, 2009, Board decision on appeal denying benefits for a bilateral knee disability is AFFIRMED, and that part involving IBS is SET ASIDE and the matter REMANDED for further adjudication.

DATED: March 26, 2012

Copies to:

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