

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 17-0697

JOE L. ROWE, APPELLANT,

v.

PETER O'ROURKE,
ACTING SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before DAVIS, *Chief Judge*, and SCHOELEN and ALLEN, *Judges*.

ORDER

On March 9, 2017, appellant Joe L. Rowe appealed a December 6, 2016, Board of Veterans' Appeals decision that denied entitlement to service connection for erectile dysfunction, as well as an extraschedular rating greater than 10% for service-connected lumbar strain.¹ The appeal was submitted to a panel of the Court for decision on February 20, 2018. On May 23, 2018, the panel issued an order directing the parties to submit supplemental briefing addressing the issue of entitlement to a higher extraschedular rating for lumbar strain. Thereafter, on June 4, 2018, the parties filed a joint motion for partial remand (JMPR).

In the JMPR, the parties seek to vacate the portions of the Board's decision that denied entitlement to service connection for erectile dysfunction and an extraschedular rating greater than 10% for lumbar strain. Regarding erectile dysfunction, they now "agree that the Board and examiners did not adequately account for evidence that demonstrates that [a]ppellant has taken medication (Oxycodone/Percocet) for his service-connected low back strain, which may potentially have an effect on [erectile dysfunction]." JMPR at 4. With regard to a higher extraschedular rating for lumbar spine strain, the parties also now agree that "the Board did not ensure that the duty to assist was met," as a June 2015 VA examination "did not adequately address [a]ppellant's flare-ups." JMPR at 6. The parties contend that remand is warranted for VA to obtain new medical opinions addressing the above issues.

Finally, as part of their JMPR, the parties have affirmatively waived any right to appeal this matter. JMPR at 8. Accordingly, pursuant to Rule 41(b) of the Court's Rules of Practice and Procedure, this order will serve as the mandate of the Court, and any application pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412(d), for an award of attorneys' fees and expenses must be submitted no later than 30 days from the date of this order. *Cf. Bly v. Shulkin*, 883 F.3d 1374 (Fed. Cir. 2018).

¹ The Board also remanded the issues of entitlement to service connection for an acquired psychiatric disorder, to include posttraumatic stress disorder, service connection for a disability manifested by memory loss, separate compensable rating for any neurologic abnormalities associated with his lumbar spine disability, and a total disability rating based on individual unemployability. These non-final issues are not before the Court. *See Breeden v. Principi*, 17 Vet.App. 475, 478 (2004) (per curiam order).

Upon consideration of the foregoing, it is

ORDERED that the Court's May 23, 2018, order directing supplemental briefing is revoked. It is further

ORDERED that the parties' JMPR is granted. Pursuant to Rule 41(b), this order is the mandate of the Court.

DATED: June 21, 2018

PER CURIAM.