

No. [REDACTED]

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

[REDACTED],
Appellant,

v.

**DOUGLAS A. COLLINS,
SECRETARY OF VETERANS AFFAIRS
Appellee.**

**APPEAL FROM FINAL DECISION OF THE BOARD OF VETERANS'
APPEALS**

OPENING BRIEF OF APPELLANT,

[REDACTED]

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I. ISSUES PRESENTED FOR REVIEW

Issue #1:

The Board misinterpreted and misapplied the law when it denied Special Monthly Compensation (“SMC”) due to loss of use. The Board denied SMC for loss of use based on its finding that [REDACTED] did not demonstrate a complete loss of effective function and that while his functioning was more diminished than if he had no wrist disability, some functioning remained intact. This is not the standard for determining loss of use. Rather, the Board should have considered his actual remaining function and considered whether his remaining function would be the same if an amputation was done and prosthesis in place. Did the Board improperly apply the law and provide inadequate reasons and bases for its denial of SMC?

Issue #2:

For a medical opinion to be adequate, it must be supported by medical reasoning linking the facts and medical history to a conclusion. Before relying on a medical opinion, the Board must ensure that it is adequate. The March 2023 opinion relied on by the Board to deny entitlement to SMC for loss of use was inadequate, as the examiner simply checked a box without providing medical reasoning for her opinion. Did the Board commit prejudicial error when it relied on the March 2023 opinion to deny SMC for loss of use?

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

The Court has exclusive jurisdiction to review Board decisions.¹

¹ 38 U.S.C. § 7252.

B. Statement of the Case

██████████ served honorably in the United States Navy as an aircraft mechanic from November 1964 to November 1968.²

In December 2014, ██████████ sought service connection for, in relevant part, his left wrist.³ He also submitted a report from Dr. Yocom, who noted ██████████ injury to his left wrist during a fall while in the military and opined that his current wrist disability is more likely than not related to service.⁴ Dr. Yocom noted loss of the left grip and pain with use, especially in rotation.⁵ The RO declined to reopen the claim in September 2015, finding that the evidence submitted was not new and material.⁶

██████████ once again sought service connection for his left wrist condition and submitted evidence in support of his claim in May 2022.⁷ Included in this evidence submission was a March 2022 report from Dr. Traficante, in which she discussed his wrist pain and paresthesia.⁸ She noted that his pain is constant in varying degrees, intensified with pushing, pulling,

² R. at 4855.

³ R. at 4226-4228.

⁴ R. at 4222-4223.

⁵ R. at 4223.

⁶ R. at 3948-3977.

⁷ R. at 3891-3928.

⁸ R. at 3894-3897.

twisting, gripping, and weather changes.⁹ He lost some dexterity of fine motor skills and “tends to drop things weekly.”¹⁰ Examination revealed positive Tinel’s sign, positive Reverse Prayer Test, and marked weakness and grip strength.¹¹

The RO denied his claim for service connection in August 2022, and [REDACTED] [REDACTED] timely appealed, submitting a Decision Review Request on October 24, 2022.¹²

On March 14, 2023, the Board granted service connection for [REDACTED] [REDACTED] left wrist disability.¹³ One week later, the RO implemented the Board’s decision and assigned a 10-percent rating from April 29, 2022.¹⁴

That same month, the VA requested an examination to determine the severity of [REDACTED]’ left wrist disability.¹⁵ [REDACTED] underwent a wrist conditions examination on March 21, 2023.¹⁶ He reported chronic wrist pain and stiffness, flare-ups that occur monthly, and difficulties with heavy lifting.¹⁷

⁹ R. at 3884.

¹⁰ *Id.*

¹¹ *Id.*

¹² R. at 3080-3085; R. at 3086-3132.

¹³ R. at 3046-3064.

¹⁴ R. at 2995-3007, 3038-3040.

¹⁵ R. at 3044.

¹⁶ R. at 2982-2991.

¹⁷ R. at 2984.

There was additional loss of function or range of motion after repetitive use, with pain and lack of endurance limiting functional ability.¹⁸ The examiner selected the checkbox for “no” when asked if there was functional impairment such that no effective function remains other than that which would be equally well served by amputation with prosthesis.¹⁹

The RO continued the 10-percent rating in a decision dated April 12, 2023.²⁰ On May 10, 2023, [REDACTED] filed a Decision Review Request: Board appeal, seeking an increased rating for his left wrist condition.²¹

The Board issued a decision on September 19, 2023, denying a rating above 10 percent for the left wrist condition.²² [REDACTED] appealed that denial to this Court, and in May 2024, the Court granted a Joint Motion for Remand.²³ In the JMR, the parties agreed that the Board failed to address entitlement to SMC under 38 U.S.C. § 1114(k).²⁴

The Board issued a decision on October 23, 2024, in which it denied SMC based on loss of use for [REDACTED]’ left wrist disorder, finding that his ability

¹⁸ R. at 2986-2987.

¹⁹ R. at 2989.

²⁰ R. at 2894-2906, 2967-2970.

²¹ R. at 2820-2824.

²² R. at 2792-2806.

²³ R. at 159-165.

²⁴ R. at 160-163.

“remains intact, even if that functional ability is lesser than it would be if he had no wrist condition. And it is, therefore, not a complete loss of effective function.”²⁵ This appeal followed.

III. SUMMARY OF THE ARGUMENT

The Board erred in multiple ways. First, it misinterpreted and misapplied the law when it denied SMC due to loss of use. The Board denied SMC for loss of use based on its finding that [REDACTED] did not demonstrate a complete loss of effective function and that while his functioning was more diminished than if he had no wrist disability, some functioning remained intact. This is not the standard for loss of use. The Board should have considered his actual remaining function and considered whether his remaining function would be the same if an amputation was done. The Board improperly applied the law and provided inadequate reasons and bases for its denial of SMC, requiring remand.

Second, the Board erred in failing to address a pre-decisional duty to assist error and in relying on an inadequate medical opinion. The March 2023 opinion relied on by the Board to deny entitlement to SMC for loss of use was inadequate, as the examiner simply checked a box without providing medical reasoning for her opinion. The Board erred when it failed to address this pre-

²⁵ R. at 7.

decisional duty to assist error and when it relied on the March 2023 opinion to deny SMC for loss of use, requiring remand.

IV. ARGUMENT

1. The Board misapplied the law when it denied SMC based on loss of use of the left wrist.

SMC is available when a veteran's service-connected disability or disabilities cause "additional hardships above and beyond those contemplated by VA's schedule for rating disabilities."²⁶ The Board denied SMC for loss of use based on its finding that [REDACTED] did not demonstrate a "complete loss of effective function."²⁷ This is not the standard for loss of use, as articulated in *Tucker*.²⁸ Rather, the Board should have considered his actual remaining function, and considered whether his remaining function would be the same if an amputation was done and prosthesis was in place. Because it did not do so, remand is required.

The Court reviews the Board's determinations as to entitlement to SMC under the "clearly erroneous" standard of review.²⁹ A factual finding is clearly erroneous "when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a

²⁶ *Breniser v. Shinseki*, 25 Vet. App. 64, 68 (2011); see 38 U.S.C. § 1114.

²⁷ R. at 7.

²⁸ *Tucker v. West*, 11 Vet. App. 369, 373 (1998).

²⁹ See *Prejean v. West*, 13 Vet. App. 444, 447 (2000); *Warren v. McDonald*, 28 Vet. App. 214, 218 (2016).

mistake has been committed.”³⁰ The Board “shall include a written statement of the Board’s findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented on the record.”³¹ The statement of reasons or bases must explain the Board’s reasons for discounting favorable evidence,³² discuss all issues raised by the claimant or the evidence of record,³³ and discuss all provisions of law and regulation where they are made “potentially applicable through the assertions and issues raised in the record.”³⁴

Loss of use of a hand or a foot will be held to exist when no effective function remains other than that which would be equally well served by an amputation stump at the site of election below elbow or knee with use of a suitable prosthetic appliance.³⁵ The determination will be made ***on the basis of the actual remaining function***, whether the acts of . . . balance, propulsion, etc., in the case of the foot, could be accomplished equally well by an amputation stump with prosthesis.³⁶ Notably, “[t]he relevant question. . . is

³⁰ *Hersey v. Derwinski*, 2 Vet. App. 91, 94 (1992) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

³¹ 38 U.S.C. § 7104(d)(1); *Gilbert v. Derwinski*, 1 Vet. App. 49, 56-57 (1990); *D’Aries v. Peake*, 22 Vet. App. 97, 104 (2008); *Gutierrez v. Principi*, 19 Vet. App. 1, 7 (2004).

³² *Thompson v. Gober*, 14 Vet. App. 187, 188 (2000).

³³ *Robinson v. Peake*, 21 Vet. App. 545, 552 (2008).

³⁴ *Schafrath v. Derwinski*, 1 Vet. App. 589, 593 (1991).

³⁵ 38 C.F.R. § 3.350(a)(2); *see* 38 C.F.R. § 4.63.

³⁶ 38 C.F.R. § 4.63.

not whether amputation is warranted, but whether [an] appellant has had effective function remaining other than that which would be equally well served by an amputation with the use of a suitable prosthetic appliance.”³⁷

The Board erred when it required [REDACTED] to show a total loss of functioning in his wrist before it would grant benefits based on loss of use. First, it noted that although his strength with which he was able to push, pull, twist and grip was weakened, “the Veteran’s *ability to do so remains intact*, even if that functional ability is lesser than it would be if he had no wrist condition. And it is, therefore, *not a complete loss of effective function*.”³⁸ The Board noted that he “still has dexterity in his hand *such that a degree of fine motor skills remains*.”³⁹ Next, it discussed his problems with dropping items and loss of grasping function, finding that “he is not experiencing the issue on a constant, daily, or more frequent basis, as would be the case for someone *with no functional use of the hand*.”⁴⁰ Finally, it stated that “his overall ability to lift objects, even if constrained or limited to some measure, *remains intact*.”⁴¹

³⁷ *Tucker*, 11 Vet. App. at 373 (citing 38 C.F.R. § 3.350(a)(2)).

³⁸ R. at 7 (emphasis added).

³⁹ R. at 8. (emphasis added).

⁴⁰ *Id.* (emphasis added).

⁴¹ R. at 9 (emphasis added).

The regulatory test is not whether there is *any* function remaining in the wrist (or whether the veteran has demonstrated a complete loss of function) but whether that function is equal to what would be achieved through amputation and the use of a suitable prosthetic.⁴² The regulation is clear that the determination will be made ***on the basis of the actual remaining function***, whether the acts of . . . balance, propulsion, etc., in the case of the foot, could be accomplished equally well by an amputation stump with prosthesis.⁴³ The standard articulated in *Tucker* requires the Board to make its determination on the basis of the actual remaining function, whether the acts of gripping, pushing, pulling, etc. could be accomplished equally well by an amputation stump with prosthesis.⁴⁴ Here, the Board incorrectly focused on the fact that there was some remaining function, or “not a complete loss of effective function,” and did not explain what the level of function for an amputee with prosthetic would be, nor did it explain whether the acts of gripping, pushing, pulling, etc. could be accomplished equally well by an amputation with prosthesis.⁴⁵

⁴² See, e.g., *Kemp v. Shulkin*, 2017 U.S. App. Vet. Claims LEXIS 1459 (October 4, 2017) (non-precedential decision cited only for its persuasive value); *Cotto-Colon v. McDonough*, 2024 U.S. App. Vet. Claims LEXIS 483 (March 29, 2024) (nonprecedential decision cited only for its persuasive value).

⁴³ 38 C.F.R. § 4.63.

⁴⁴ See *Tucker*, 11 Vet. App. at 371.

⁴⁵ See R. at 6-9.

The Board's error here is similar to the error in *Kemp*, a non-precedential decision cited only for its persuasive value. The Board in *Kemp* also denied SMC for loss of use based on its finding that Mr. Kemp had not established that "no effective function remains."⁴⁶ The Board relied on the fact that he retained "some effective functioning."⁴⁷ The Court found that the Board's analysis was based on a misunderstanding of VA regulations and application of the wrong standard. The Court emphasized that "[t]he question is, given the current level of effective function of Mr. Kemp's feet, would he be at least as well served by prosthetics?"⁴⁸

More recently, in *Cotto-Colon*, the Court found:

The problem with the Board's analysis is that it focused on whether Mr. Cotto-Colon retained any ability to ambulate and concluded that, because he did, his remaining function was "clearly better" than with a suitable prosthetic. But the regulatory test is not whether there is any function remaining in the feet but whether that function is equal to what would be achieved through amputation and the use of a suitable prosthetic. And the Board's reasons or bases are silent for any explanation as to what sort of function would be expected with a suitable prosthetic or how that compares to Mr. Cotto-Colon's limited ambulatory ability such that auto benefits are not warranted.⁴⁹

⁴⁶ *Kemp*, 2017 U.S. App. Vet. Claims LEXIS 1459 at *4-8 (nonprecedential decision cited only for its persuasive value).

⁴⁷ *Id.*

⁴⁸ *Id.* at *8, citing *Jensen v. Shulkin*, 29 Vet. App. 66, 74 (2017).

⁴⁹ *Cotto-Colon*, 2024 U.S. App. Vet. Claims LEXIS 483 at *8-9 (nonprecedential decision cited only for its persuasive value).

The Board committed the same errors here. In discussing the March 2022 private opinion, the Board noted that, “[a]lthough, as the examiner notes, the Veteran’s strength with which he is able to perform these acts may be weakened by his wrist condition, the Veteran’s ability to do so remains intact, even if that functional ability is lesser than it would be if he had no wrist condition. And it is, therefore, not a complete loss of effective function. 38 C.F.R. § 3.350(a)(2).”⁵⁰

It continued, finding that the examiner’s observation that he lost “some dexterity of fine motor skills’ suggests, if not implicitly concludes, that the Veteran still has some dexterity in his hand such that a degree of fine motor skills remains.”⁵¹ With respect to his ability to lift objects, the Board found that even if it was constrained or limited, it “remains intact.”⁵²

The question to be answered when assessing for loss of use is not whether his functional ability is lesser than it would be if he had no wrist disability, whether there is a complete loss of function, or whether any function remains intact. It is whether, as articulated in *Tucker* and *Kemp*: given the current level of effective function of [REDACTED]’ wrist, would he be at least as well served by prosthetics? Nor did the Board explain, as the Court noted in *Cotto-*

⁵⁰ R. at 7.

⁵¹ R. at 8.

⁵² R. at 9.

Colon, what sort of function would be expected with a suitable prosthetic or how that compares to [REDACTED]' limitations.

The law is clear that the Board's statement of reasons and bases must allow the claimant to understand the reasons for the Board's decision and facilitate review by the Court.⁵³ Although it is obvious that the Board believes [REDACTED]' level of function does not amount to loss of use, it remains unclear how it arrived at that conclusion. For example, he reported chronic worsening wrist pain in August 2021 and requested a splint for support.⁵⁴ The March 2022 private examiner noted constant pain in the wrist, intensified with pushing, pulling, twisting, gripping, and weather changes.⁵⁵ She noted that [REDACTED] has lost "some dexterity of fine motor skills" and that he drops things weekly.⁵⁶ [REDACTED] has marked weakness in grip strength and decreased extension and flexion in the wrist.⁵⁷ A December 2014 report indicates loss of the left grip and pain with use, especially in rotation.⁵⁸

The Board's reasons and bases are silent for any explanation as to what sort of function would be expected with a suitable prosthetic or how that compares to [REDACTED]' limitations in functioning caused by his left wrist

⁵³ See *Gilbert*, 1 Vet. App. at 57.

⁵⁴ R. at 3218-3222.

⁵⁵ R. at 3884.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ R. at 4222-4223.

disability. Instead, the Board wrongly concluded its analysis after determining that [REDACTED] did not have “a complete loss of effective function.”⁵⁹

The Board’s application of the wrong standard and inadequate reasons and bases is prejudicial because it resulted in the denial of his claim, has caused unnecessary delay, prevents [REDACTED] from understanding the basis of the denial, and frustrates judicial review. If the Board had not wrongly believed that it could not grant SMC for loss of use until there was a complete loss of effective function, it likely would have granted SMC. At a minimum, application of the correct standard would have resulted in a different statement of reasons or bases, one which may have allowed [REDACTED] to understand the basis for the denial or allowed for effective judicial review by this Court. Therefore, remand is warranted for the Board to apply the correct standard for loss of use, and to provide an adequate statement of reasons or bases for its decision.⁶⁰

2. The Board erred when it relied on the March 2023 opinion, which was not supported with medical reasoning.

It is well-established that to be adequate, a medical opinion must be accompanied by a rationale linking the facts to the conclusion.⁶¹ This is so that

⁵⁹ R. at 7.

⁶⁰ *Tucker*, 11 Vet. App. at 374.

⁶¹ *See Stefl v. Nicholson*, 21 Vet. App. 120, 124 (2007); *Nieves-Rodriguez v. Peake*, 22 Vet. App. 295, 301 (2008).

the Board can ensure that the opinion is based on adequate facts and data, and so the Board's "evaluation of the claimed disability will be a fully informed one."⁶² DBQs "help collect necessary medical information to process [. . .] disability claims."⁶³ Under the Appeals Modernization Act, "[i]f the Board . . . identifies or learns of an error on the part of the agency of original jurisdiction" regarding the duty to assist, then it must "remand the claim to the agency of original jurisdiction for correction of such error and readjudication."⁶⁴

"Whether a medical opinion is adequate is a finding of fact which the Court reviews under the 'clearly erroneous' standard."⁶⁵ A finding of fact is clearly erroneous when the Court, after reviewing the entire evidence, "is left with the definite and firm conviction that a mistake has been committed."⁶⁶

The Board relied on the March 2023 examination report to deny entitlement to SMC for loss of use.⁶⁷ During this exam, [REDACTED] reported chronic wrist pain and stiffness, flare-ups that occur monthly, and difficulties

⁶² *Stefl*, 21 Vet. App. at 123; see *Miller v. Wilkie*, 32 Vet. App. 249, 254 (2020); *Reonal v. Brown*, 5 Vet. App. 458, 460-61 (1993).

⁶³ Public Disability Benefits Questionnaires, U.S. Dep't of Veterans Aff's, available at https://www.benefits.va.gov/compensation/dbq_publicdbqs.asp (last accessed May 29, 2025).

⁶⁴ 38 U.S.C. § 5103A(f)(2)(A).

⁶⁵ *D'Aries*, 22 Vet. App. at 104.

⁶⁶ *United States v. U.S. Gypsum Co.*, 333 U.S. at 395; *Gilbert*, 1 Vet. App. at 52.

⁶⁷ R. at 8; R. at 2982-2991.

with heavy lifting.⁶⁸ There was additional loss of function or range of motion after repetitive use, with repeated use over time, and during flare ups, with pain and lack of endurance limiting functional ability.⁶⁹ The examiner selected the checkbox for “no” when asked if there was functional impairment such that no effective function remains other than that which would be equally well served by amputation with prosthesis.⁷⁰

While examiners do not have an obligation to provide reasons and bases, they are required to provide medical reasoning for their opinions.⁷¹ Whether [REDACTED]’ functional loss is the same as if there were an amputation with prosthesis is an opinion that must be supported by medical reasoning to facilitate the Board’s weighing of that opinion and reliance on it to adjudicate entitlement to SMC for loss of use. The opinion here was simply a checkmark in the “no” box, without any medical explanation or rationale to support it. The Board did not acknowledge the lack of medical reasoning for this opinion, and so it is unclear how it determined that the examination is “supported by a detailed rationale.”⁷²

⁶⁸ R. at 2984.

⁶⁹ R. at 2986-2987.

⁷⁰ R. at 2989.

⁷¹ See *Stefl*, 21 Vet. App. at 124; *Nieves-Rodriguez*, 22 Vet. App. at 301.

⁷² See R. at 8-9.

██████████ was prejudiced by the Board’s error. If the Board had analyzed the lack of medical reasoning in relation to the adequacy of the opinion, it could have found that it was inadequate and that a new opinion was needed.⁷³ A new examination, with a reasoned medical opinion regarding whether ██████████ would be equally well served by an amputation with prosthesis, could show that he satisfied the criteria for SMC based on loss of use.⁷⁴ Accordingly, remand is required for the Board to discuss the March 2023 examination’s adequacy in light of the lack of medical reasoning in the first instance.

V. RELIEF REQUESTED

For the foregoing reasons, the Board’s decision that denied entitlement to SMC based on loss of use of the left wrist was in error. The Board’s October 2024 decision should be vacated, and this appeal should be remanded for the Board to properly apply the standard for loss of use and ensure substantial compliance with the May 2024 remand instructions.

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⁷³ See *Simmons v. Wilkie*, 30 Vet. App. 267, 279 (2018).

⁷⁴ See *King v. Shinseki*, 26 Vet. App. 484, 492 (2014) (“There is no way of knowing whether the record supports [the] claim without properly developing the record, and consequently there is no way of knowing whether the appellant was harmed by VA’s failure” to provide an adequate examination).

Respectfully submitted,
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