

UNITED STATES COURT OF VETERANS APPEALS

No. 90-1545

ROBERT M. BANKS, APPELLANT,

v.

ANTHONY J. PRINCIPI,
ACTING SECRETARY OF VETERANS AFFAIRS, APPELLEE.

On Appeal from the Board of Veterans' Appeals

(Decided November 4, 1992)

Robert M. Banks, pro se.

James A. Endicott, Jr., General Counsel, David T. Landers, Assistant General Counsel, Pamela L. Wood, Deputy Assistant General Counsel, and John D. McNamee were on the pleadings for appellee.

Before KRAMER, MANKIN, and IVERS, *Associate Judges.*

KRAMER, *Associate Judge:* In its decision of November 9, 1990, the Board of Veterans' Appeals (BVA) ruled that (1) the appellant was not entitled to an effective date earlier than May 10, 1988, for the assignment of a 10% disability rating for his lumbosacral strain (the appellant contends that the 10% rating should be effective as of the date of his service connection), and (2) that the appellant was not entitled to a higher disability rating than 20% for his lumbosacral strain. An appeal to this Court followed.

On February 11, 1992, the Secretary of Veterans Affairs (Secretary) filed a motion for remand of that portion of the BVA decision denying the appellant an increase in the 20% disability rating currently assigned to his lumbosacral strain, and for summary affirmance of that portion of the BVA decision denying the appellant an earlier effective date for the assignment of a 10% disability rating for his lumbosacral strain.

In that portion of his motion requesting a partial remand of the BVA decision, the Secretary correctly noted that the BVA had failed to adequately discuss the effect on the appellant's disability rating of his claim of extreme and consistent pain. *See* 38 C.F.R. §§ 4.40-4.45 (1991); *Schafraath v. Derwinski*, 1 Vet.App. 589 (1991); *Gilbert v. Derwinski*, 1 Vet.App. 49 (1990). As a result, the Court will grant this portion of the Secretary's motion.

With respect to that portion of the BVA decision denying the appellant an earlier effective date for his 10% disability rating, the Court notes that 38 C.F.R. § 4.71(a), Diagnostic Code 5295 (1991) provides that a 10% disability rating will be assigned to lumbosacral strains when there is

"characteristic pain on motion." A review of the record on appeal reveals that the appellant was suffering from pain upon motion in his lower back at the effective date of his service connection, *see* R. at 8, 34, 56, 87-88, 94, and nothing in the record suggests to the contrary or reflects that such pain ever subsided. Therefore, the BVA's findings of fact to the contrary are clearly erroneous, *see Gilbert*, 1 Vet.App. at 52-53 (factual findings of the BVA are clearly erroneous when there is no plausible basis for them in the record), and the appellant is entitled to a 10% disability rating for his lumbosacral strain as of the date of his service connection.

For the foregoing reasons, that portion of the Secretary's motion for summary affirmance is denied. The BVA decision is VACATED and REMANDED for the BVA to assign a 10% disability rating effective the date of the appellant's service connection for his lumbosacral strain, and for readjudication of the appellant's claim for an increased rating for his current lumbosacral condition.

It is so Ordered.