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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 14-1658

PAUL E. HAGGERTY, APPELLANT,

V.

ROBERT A. McDONALD,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before MOORMAN, *Judge*.

MEMORANDUM DECISION

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

MOORMAN, *Judge*: The appellant, Paul E. Haggerty, appeals through counsel an April 9, 2014, decision of the Board of Veterans' Appeals (Board) denying entitlement to an increased disability rating for bronchial asthma, currently rated as 30% disabling. Record (R.) at 3. This appeal is timely, and the Court has jurisdiction pursuant to 38 U.S.C. § 7252(a). Both parties submitted briefs, and the appellant submitted a reply brief. A single judge may conduct this review. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the reasons set forth below, the Court will affirm the Board's decision denying entitlement to an increased disability rating for bronchial asthma on a schedular basis, vacate the Board's decision as to whether extraschedular consideration of the appellant's claim was warranted, and remand the matter of extraschedular consideration for further proceedings consistent with this decision.

I. FACTS

Mr. Haggerty served on active duty in the U.S. Army from July 1989 to November 1990. R. at 917. At separation, he received a medical discharge with disability severance pay. *Id.*

Mr. Haggerty filed a claim for service connection for "bronchial asthma" in December 1990. R. at 763-66. In a March 1991 rating decision, a VA regional office (RO) granted Mr. Haggerty

service connection for bronchial asthma and assigned a disability rating of 10%. R. at 740-41. The RO subsequently increased his disability rating to 30%, effective June 6, 2003. R. at 643.

In January 2010, Mr. Haggerty submitted an informal claim for an increased rating for his service-connected asthma, requesting a reevaluation. R. at 218. In March 2010, Mr. Haggerty underwent a VA examination. R. at 201-03. Under the heading "Specific History for Bronchial Asthma," the examiner noted:

Over the past 12 months the claimant has gained 40 lbs. Due to his respiratory condition, he has orthopnea,^[1] cold and hot weather and shortness of breath after walking 1 city block[. . . He states he has asthmatic attacks monthly. He needs to visit a physician to control the attacks as often as 4 time(s) per year. He said he contracts infection easily from his respiratory condition which requires antibiotics periodically 1 time(s) per year, each time lasting for 2 week(s). . . . He is receiving the following treatment for his condition: Albuterol (since/for) BID. The duration has been 20 years and the response has been minimal. There are side effects of anxiety, shakiness. The claimant does not require the usage of outpatient oxygen therapy. Additionally the claimant indicates the following: Seen at emergency room for asthma/bronchitis and given two rounds of breathing treatment. The claimant reports the following overall functional impairment(s): Have been a welder for 15 years and can no longer weld due to fumes and asthma has become worse. Cannot perform an active lifestyle such as walking or working out without rescue inhaler and breathing treatments at home. Use Nebulizer of albuterol daily at least twice, plus rescue inhaler. Recently seen at ER as could not catch breath.

R. at 202.

The examiner conducted a pulmonary function test (PFT). The results of the PFT yielded a post-bronchodilator forced vital capacity (FVC) of 3.38, which was 67% of the predicted value; a forced expiratory volume in one second (FEV-1) of 2.91, which was 70% of the predicted value; and an FEV-1/FVC value of 0.90. R. at 203. The examiner concluded that "[Mr. Haggerty] provided a good effort" and that "FEV1 more accurately reflects the severity of the condition." *Id.* The examiner diagnosed "bronchial asthma." *Id.* As part of his diagnosis and remarks, the examiner noted:

¹"Orthopnea" is "dyspnea that is relieved by assuming an upright position." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1338 (32d ed. 2012). "Dyspnea" is "breathlessness or shortness of breath; difficult or labored respiration." *Id.* at 582.

At this time the claimant's condition is active. The subjective factors are: shortness of breath. The objective factors are: abnormal PFT. He does not have any complications such as cor pulmonale, right ventricular hypertrophy, pulmonary hypertension or chronic respiratory failure with carbon dioxide retention. . . .

The effect of the condition on the claimant's usual occupation [a]s welder limited by asthma and fume inhalation. The effect of the condition on the claimant's daily activity is limited exertional sports.

Id.

Subsequent to the March 2010 examination, the RO continued Mr. Haggerty's 30% disability rating. R. at 141-47. Mr. Haggerty submitted a Notice of Disagreement in August 2010, stating his belief that his condition is more severe than what is reflected by his rating, due to his inability to "walk 1 block without being out of breath." R. at 136. The RO issued a Statement of the Case (SOC) in January 2011, again continuing the 30% rating. R. at 85. Mr. Haggerty submitted a Substantive Appeal to the Board in February 2011 and requested a Board hearing. R. at 80-81.

Mr. Haggerty underwent another VA examination in February 2012. R. at 48-64. The examiner noted that Mr. Haggerty used inhalational bronchodilator therapy on a daily basis and inhalational anti-inflammatory medication on a daily basis. R. at 51-52. The examiner listed "other inhaled medications" and frequency of use as follows: "Albuteral 2 puff q six hours prn shortness of breath, Formoterol 12mcg inhaled q 12 hours, Mometasone 220 mcg two puffs twice a day, Albuteral solution for nebulizers [sic] treatments at least twice a week for difficulty breathing." R. at 52. The examiner further noted that Mr. Haggerty had been treated at Oklahoma State University Medical Center for asthma exacerbations in June 2011 and checked the box on the examination form indicating that physician visits for required care of exacerbations over the past 12 months was less frequent than monthly. R. at 54. The examiner further stated that there were "other significant diagnostic test findings and/or results" and provided a summary of a pulmonary procedure consultation dated February 21, 2012. R. at 63. The note from the pulmonologist referred to a PFT Report and indicated a diagnosis of "borderline obstructive defect, normal lung volumes, normal diffusion capacity, studies compatible with small airway disease" and noted "[v]eteran on forced expiration today has increased wheezing in the lungs with forcing the expiration" and that "[Mr. Haggerty] has taken his medications, but despite this he still does have some wheezing." R. at 63-64.

In an August 2012 Supplemental SOC, the RO again continued Mr. Haggerty's 30% rating. R. at 38-39. In February 2013, Mr. Haggerty testified at a Board hearing. R. at 930-44. During the hearing, he asserted that the inhaled mometasone furoate that he uses to treat his asthma should be considered to be a systemic corticosteroid. R. at 934-35. In April 2014, the Board denied Mr. Haggerty an increased rating above 30% (R. at 3-15), and this appeal followed.

II. ANALYSIS

A. Increased Disability Rating

The Board is required to provide a written statement of the reasons or bases for its findings and conclusions on all material issues of fact and law presented on the record; the statement must be adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court. *See* 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Simon v. Derwinski*, 2 Vet.App. 621, 622 (1992); *Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990). To comply with this requirement, the Board must analyze the credibility and probative value of the evidence, account for the evidence that it finds to be persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the claimant. *See Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table); *Gabrielson v. Brown*, 7 Vet.App. 36, 39-40 (1994); *Gilbert, supra*.

A 30% rating is warranted for bronchial asthma when there is an "FEV-1 of 56- to 70-percent predicted, or; FEV-1/ FVC of 56 to 70 percent, or; daily inhalational or oral bronchodilator therapy, or; inhalational anti-inflammatory medication." 38 C.F.R. § 4.97, DC 6602 (2015). A 60% rating is warranted for an "FEV-1 of 40- to 55-percent predicted, or; FEV-1/FVC of 40 to 55 percent, or; at least monthly visits to a physician for required care of exacerbations, or; intermittent (at least three per year) courses of systemic (oral or parenteral) corticosteroids." *Id.* A 100% rating is warranted for an "FEV-1 less than 40-percent predicted, or; FEV-1/FVC less than 40 percent, or; more than one attack per week with episodes of respiratory failure, or; requires daily use of systemic (oral or parenteral) high dose corticosteroids or immuno-suppressive medications." *Id.*

The appellant contends that in denying a schedular rating in excess of 30%, the Board failed to properly interpret the terms "oral" and "parenteral" found in DC 6602. He contends that his twice-

daily use of the inhaled corticosteroid mometasone furoate and his use of the inhaled corticosteroid formoterol constitute use of "systemic (oral or parenteral) corticosteroids" pursuant to DC 6602 and that the Board thus committed legal error and provided inadequate reasons or bases for denying a schedular rating in excess of 30% under DC 6602. Appellant's Brief (App. Br.) at 7-8.

However, the Court does not agree. The February 2012 VA examiner explained the distinction between "inhaled" and "oral or parenteral" medications that are used to control asthma, and the Board appropriately relied upon the February 2012 examination. The February 2012 VA examiner noted that the appellant regularly takes mometasone furoate, that this drug is an "inhaled steroid" (R. at 50), and that the appellant's asthma does not require the use of "oral or parenteral corticosteroid medications" (R. at 51). The Board relied upon the February 2012 examination to determine that the appellant's use of inhaled mometasone furoate does not constitute an orally or parenterally administered corticosteroid. R. at 11. The Board further explained that "parenteral administration" principally refers to administration "through the skin." *Id.* The Board thus denied the appellant's claim for a rating in excess of 30%. R. at 3. Upon review of the record, the Court therefore holds that the Board provided adequate reasons or bases for its decision, and the Board's decision is not clearly erroneous. *See United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948) (holding that a finding of material fact is clearly erroneous when the Court, after reviewing the entire evidence, "is left with a definite and firm conviction that a mistake has been committed"); *Caluza*, *supra*; *Gilbert*, 1 Vet.App. at 52, 57.

B. Extraschedular Consideration

The appellant next asserts that the Board failed to properly consider whether referral of the appellant's claim for extraschedular consideration under 38 C.F.R. § 3.321(b) (2015) was warranted. App. Br. at 14.

In exceptional cases, the rating schedule may be found inadequate to compensate a claimant's unique set of symptoms and an extraschedular rating may be approved by the Under Secretary for Benefits or the Director of Compensation Service. 38 C.F.R. § 3.321(b)(1). The threshold question in determining whether the appellant is entitled to an extraschedular rating is whether the evidence presents "such an exceptional disability picture that the available schedular evaluations for that service-connected disability are inadequate." *Thun v. Peake*, 22 Vet.App. 111, 115 (2008), *aff'd*

sub nom. Thun v. Shinseki, 572 F.3d 1366 (Fed. Cir. 2009). If an exceptional disability picture is found, the RO or Board must determine whether related factors exist such "as marked interference with employment or frequent periods of hospitalization as to render impractical the application of the regular schedular standards." 38 C.F.R. § 3.321(b)(1); *see Thun*, 22 Vet.App. at 116. Neither the RO nor the Board is permitted to assign an extraschedular rating in the first instance; rather, the matter must initially be referred to those officials who possess the delegated authority to assign such a rating. *See Floyd v. Brown*, 9 Vet.App. 88, 95 (1996); *see also Wages v. McDonald*, 27 Vet.App. 233, 238 (2015) (holding that the Board conducts de novo review of the Director's decision denying extraschedular consideration).

The Court holds that the Board provided inadequate reasons or bases for its conclusion that extraschedular consideration of the appellant's claim was not warranted. The Board failed to discuss whether the rating criteria adequately addressed the appellant's symptomatology and disability level, which is what *Thun* requires. *See Thun*, 22 Vet.App. at 115 (providing that "initially, there must be a comparison between the level of severity and symptomatology of the claimant's service-connected disability with the established criteria found in the rating schedule for that disability"). The appellant is currently rated 30% disabled for his asthma pursuant to DC 6602, which requires, in relevant part, "daily inhalational oral bronchodilator therapy, *or*; inhalational anti-inflammatory medication" (emphasis added). The February 2012 examiner clearly noted that the appellant uses daily inhalational oral bronchodilator therapy *and* daily inhalational anti-inflammatory medication. R. at 51. The examiner also noted *additional* medications used by the appellant to control his asthma and their frequency: "Albuteral 2 puff q six hours prn shortness of breath, Formoterol 12mcg inhaled q 12 hours, Mometasone 220 mcg two puffs twice a day, Albuteral solution for nebulizers [sic] treatments at least twice a week for difficulty breathing." R. at 51-52. The pulmonology consult report in the February 2012 examination diagnosed "borderline obstructive defect . . . studies compatible with small airway disease." R. at 63-64. Upon examination of Mr. Haggerty, the examiner noted that "[v]eteran on forced expiration today has increased wheezing in the lungs with forcing the expiration" and that "[Mr. Haggerty] has taken his medications, but despite this he still does have some wheezing." *Id.*

However, the Board's analysis of the first prong of *Thun* does not include a discussion or analysis of any of this medical evidence from the February 2012 examination report. The Board simply concluded that "a comparison between the level of severity and symptomatology of the [v]eteran's disability with the established criteria shows that the rating criteria reasonably describe the [v]eteran's disability level and symptomatology for service-connected bronchial asthma" and that "there is no evidence in the medical records of an exceptional or unusual clinical picture." R. at 12. The Board's conclusion that the appellant's symptoms are contemplated by the rating schedule does not comply with *Thun's* requirement that the Board compare the level of severity and symptomatology of the appellant's service-connected disability with the established rating criteria. This deficiency frustrates the Court's review and renders the Board's statement of reasons or bases inadequate. See 38 U.S.C. § 7104(d)(1); see also *Thun*, *Allday*, and *Gilbert*, all *supra*. Consequently, the Court will remand the matter for the Board to address whether the appellant's disability picture is adequately contemplated by the rating schedule, and if not, whether the appellant's disability picture exhibits other factors such as marked interference with employment and frequent periods of hospitalization. See *Thun*, *supra*.

III. CONCLUSION

After consideration of the appellant's and Secretary's briefs, and a review of the record on appeal, the Board's April 9, 2014, decision as to entitlement to an increased disability rating for bronchial asthma on a schedular basis is AFFIRMED. The Board's decision as to whether extraschedular consideration of the appellant's claim was warranted is VACATED and the matter is REMANDED for adjudication consistent with this decision.

DATED: July 29, 2015

Copies to:

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