BOARD OF VETERANS' APPEALS

DEPARTMENT OF VETERANS AFFAIRS
WASHINGTON, DC 20420

IN THE APPEAL OF [redacted]
JEFFREY S. FELDMAN

DOCKET NO. 11-07 538) DATE *February 18, 2016*
) *CMT*
)

On appeal from the
Department of Veterans Affairs Regional Office in Houston, Texas

THE ISSUES

1. Entitlement to a higher (compensable) initial disability rating (or evaluation) for bilateral pes planus.

2. Entitlement to a higher (compensable) initial disability rating for left foot calcaneal spur.

3. Entitlement to a higher (compensable) initial disability rating for right foot calcaneal spur.

4. Entitlement to a higher (compensable) initial disability rating for hemorrhoids.

5. Entitlement to a higher (compensable) initial disability rating for irritable bowel syndrome with diverticulitis.

REPRESENTATION

Appellant represented by: Disabled American Veterans

IN THE APPEAL OF [redacted]
JEFFREY S. FELDMAN

ATTORNEY FOR THE BOARD

B. J. Dempsey, Associate Counsel

INTRODUCTION

The Veteran, who is the appellant, served on active duty from January 1989 to June 1989, and from January 1990 to August 2009.

This matter comes before the Board of Veterans' Appeals (Board) on appeal from October 2012 (initial rating for IBS) and September 2009 (all other issues) rating decisions by the Department of Veterans Affairs (VA) Regional Office (RO) in Winston-Salem, North Carolina. Jurisdiction over this claim is currently with the RO in Houston, Texas.

The Veteran was scheduled for a September 2015 hearing before the Board. In a July 2015 letter, the Veteran asked to withdraw the hearing request, and the hearing request has been withdrawn. 38 C.F.R. § 20.704(e) (2015). The Board has reviewed the electronic files on "Virtual VA" and the Veterans Benefits Management System (VBMS) to ensure a complete review of the evidence in this case.

FINDINGS OF FACT

1. For the entire initial rating period from September 1, 2009, the service-connected bilateral pes planus disability has manifested mild pes planus with symptoms relieved by use of custom orthotics, and has not manifested moderate pes planus with weight-bearing line over or medial to the great toe, inward bowing of the tendo achillis, or pain on manipulation and use of the feet.

2. For the entire initial rating period from September 1, 2009, the left and right calcaneal spur disabilities have manifested left and right foot pain, stiffness, weakness, and fatigue that limits motion after prolonged standing and walking.

3. For the entire initial rating period from September 1, 2009, the service-connected hemorrhoid disability has manifested moderate internal and external hemorrhoids with rectal itching, pain, swelling, tenderness to palpation, and occasional mild bleeding.

4. For the entire initial rating period from September 1, 2009, the service-connected IBS with diverticulitis has manifested frequent episodes of diarrhea with abdominal distress more nearly approximating moderate irritable colon syndrome.

CONCLUSIONS OF LAW

1. For the entire initial rating period from September 1, 2009, the criteria for a compensable initial disability rating for bilateral pes planus have not been met or more nearly approximated. 38 U.S.C.A. §§ 1155, 5103, 5103A, 5107(b) (West 2014); 38 C.F.R. §§ 3.102, 3.159, 3.321, 4.1–4.7, 4.10, 4.14, 4.40, 4.45, 4.71a, Diagnostic Code 5276 (2015).

2. Resolving reasonable doubt in the Veteran's favor, for the entire initial rating period from September 1, 2009, the criteria for a higher initial disability rating of 10 percent for the left calcaneal spur disability, but no higher, have been met. 38 U.S.C.A. §§ 1155, 5103, 5103A, 5107(b) (West 2014); 38 C.F.R. §§ 3.102, 3.159, 3.321, 4.1–4.7, 4.10, 4.40, 4.45, 4.59, 4.71a, Diagnostic Code 5015 (2015).

3. Resolving reasonable doubt in the Veteran's favor, for the entire initial rating period from September 1, 2009, the criteria for a higher initial disability rating of 10 percent for the right calcaneal spur disability, but no higher, have been met. 38 U.S.C.A. §§ 1155, 5103, 5103A, 5107(b) (West 2014); 38 C.F.R. §§ 3.102, 3.159, 3.321, 4.1–4.7, 4.10, 4.40, 4.45, 4.59, 4.71a, Diagnostic Code 5015 (2015).

4. For the entire initial rating period from September 1, 2009, the criteria for a compensable initial disability rating for hemorrhoids have not been met or more nearly approximated. 38 U.S.C.A. §§ 1155, 5103, 5103A, 5107 (West 2014); 38 C.F.R. §§ 3.102, 3.159, 3.321, 4.1–4.7, 4.114, Diagnostic Code 7336 (2015).

5. Resolving reasonable doubt in the Veteran's favor, for the entire initial rating period from September 1, 2009, the criteria for a higher initial disability rating of 10 percent for IBS with diverticulitis, but no higher, have been met. 38 U.S.C.A. §§ 1155, 5103, 5103A, 5107 (West 2014); 38 C.F.R. §§ 3.102, 3.159, 3.321, 4.1–4.7, 4.114, Diagnostic Code 7319 (2015).

REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

Duties to Notify and Assist

The Veterans Claims Assistance Act of 2000 (VCAA) enhanced VA's duties to notify and assist claimants in substantiating their claims for VA benefits. 38 U.S.C.A. §§ 5100, 5102, 5103, 5103A, 5107, 5126 (West 2014); 38 C.F.R. §§ 3.102, 3.156(a), 3.159, 3.326(a) (2015). Upon receipt of a complete or substantially complete application for benefits, VA is required to notify the claimant and the representative of any information, and any medical or lay evidence, that is necessary to substantiate the claim. 38 U.S.C.A. § 5103(a); 38 C.F.R. § 3.159(b).

Proper notice from VA must inform the claimant of any information and evidence not of record (1) that is necessary to substantiate the claim; (2) that VA will seek to provide; and (3) that the claimant is expected to provide. 38 C.F.R. § 3.159(b)(1). This notice must be provided prior to an initial unfavorable decision on a claim by the RO. *Mayfield v. Nicholson*, 444 F.3d 1328 (Fed. Cir. 2006); *Pelegrini v. Principi*, 18 Vet. App. 112 (2004).

As the issues on appeal arise from disagreement with the initial ratings following the grants of service connection, no additional notice is required. The United States Court of Appeals for the Federal Circuit (Federal Circuit) and the United States

Court of Appeals for Veterans Claims (Court) have held that, once service connection is granted, the claim is substantiated, additional notice is not required, and any defect in notice is not prejudicial. *Hartman v. Nicholson*, 483 F.3d 1311 (Fed. Cir. 2007); *Dunlap v. Nicholson*, 21 Vet. App. 112 (2007); 38 C.F.R. § 3.159(b)(3)(i) (no duty to provide VCAA notice upon receipt of a notice of disagreement); VAOPGCPREC 8-2003 (in which the VA General Counsel interpreted that separate notification is not required for "downstream" issues following a service connection grant, such as initial rating and effective date).

The Board concludes that VA has satisfied its duties to assist the Veteran. VA has made reasonable efforts to obtain relevant records and evidence. Specifically, the information and evidence that has been associated with the claims file includes the Veteran's service treatment records, post-service VA treatment records, the April 2009 VA examination report, and the Veteran's lay statements.

VA, through QTC Medical Services, examined the service-connected disabilities in April 2009. The April 2009 VA examiner interviewed the Veteran regarding past and present symptomatology, performed a series of physical examinations, and reported on the severity of the service-connected disabilities, as well as the related functional impairments. The lay and medical evidence developed following the April 2009 VA examination generally demonstrates that the service-connected disabilities have remained within a narrow range of severity, such that there is no compelling evidence – to include any statements or assertions by the Veteran – that the symptoms of the service-connected disabilities on appeal have worsened since the April 2009 VA examination. For these reasons, the Board finds that the April 2009 VA examination report is adequate to assist in determining the severity of the service-connected disabilities, and that no further examination or opinion is needed. *See Barr v. Nicholson*, 21 Vet. App. 303, 312 (2007).

In light of the foregoing, the Board finds that VA has provided the Veteran with every opportunity to submit evidence and arguments in support of the claims, and to respond to VA notices. The Veteran and representative have not identified any outstanding evidence that needs to be obtained. For these reasons, the Board finds that VA has fulfilled the duties to notify and assist the Veteran.

Disability Rating Criteria

Disability ratings are determined by applying the criteria set forth in VA's Schedule for Rating Disabilities. The percentage ratings are based on the average impairment of earning capacity and individual disabilities are assigned separate diagnostic codes. 38 U.S.C.A. § 1155; 38 C.F.R. § 4.1. In determining the disability rating, VA has a duty to acknowledge and consider all regulations that are potentially applicable through the assertions and issues raised in the record, and to explain the reasons and bases for its conclusions. *Schafrath v. Derwinski*, 1 Vet. App. 589, 594 (1991). If two ratings are potentially applicable, the higher rating will be assigned if the disability picture more nearly approximates the criteria required for that rating; otherwise, the lower rating will be assigned. 38 C.F.R. § 4.7. Any reasonable doubt regarding a degree of disability will be resolved in favor of the veteran. 38 C.F.R. § 4.3.

The Court has indicated that a distinction must be made between a veteran's dissatisfaction with original ratings and dissatisfaction with determinations on later filed claims for increased ratings. *Fenderson v. West*, 12 Vet. App. 119, 125–26 (1999). In initial rating cases, separate ratings can be assigned for separate periods of time based on the facts found, a practice known as "staged" ratings. *Id.*; 38 C.F.R. § 4.2. In this case, the initial ratings have been assigned from September 1, 2009, the day after the Veteran separated from active duty service.

Pyramiding, that is, the rating of the same disability, or the same manifestation of a disability, under different diagnostic codes, is to be avoided when rating a veteran's service-connected disability. 38 C.F.R. § 4.14 (2015). However, it is possible for a veteran to have separate and distinct manifestations from the same injury which would permit rating under several diagnostic codes; the critical element in permitting the assignment of several evaluations under various diagnostic codes is that none of the symptomatology for any one of the conditions is duplicative or overlapping with the symptomatology of the other condition. *See Esteban v. Brown*, 6 Vet. App. 259, 261–62 (1994).

Disability of the musculoskeletal system is primarily the inability, due to damage or infection in the parts of the system, to perform the normal working movements of the body with normal excursion, strength, speed, coordination, and endurance. It is essential that the examination on which ratings are based adequately portray the anatomical damage, and the functional loss, with respect to all these elements. The functional loss may be due to absence of part, or all, of the necessary bones, joints and muscles, or associated structures, or to deformity, adhesions, defective innervation, or other pathology, or it may be due to pain, supported by adequate pathology and evidenced by visible behavior of the claimant undertaking the motion. Weakness is as important as limitation of motion, and a part that becomes painful on use must be regarded as seriously disabled. 38 C.F.R. §§ 4.40, 4.45; *see also DeLuca v. Brown*, 8 Vet. App. 202, 206–07 (1995). Painful, unstable, or malaligned joints, due to healed injury, are entitled to at least the minimum compensable rating for the joint. 38 C.F.R. § 4.59. The factors involved in evaluating, and rating, disabilities of the joints include weakness; fatigability; incoordination; restricted or excess movement of the joint, or pain on movement. 38 C.F.R. § 4.45.

The Board is charged with the duty to assess the credibility and weight given to evidence. *Wensch v. Principi*, 15 Vet. App. 362, 367 (2001). In weighing credibility, VA may consider interest, bias, inconsistent statements, bad character, internal inconsistency, facial plausibility, self-interest, consistency with other evidence of record, malingering, desire for monetary gain, and demeanor of the witness. *Caluza v. Brown*, 7 Vet. App. 498, 510–11 (1995); *Macarubbo v. Gober*, 10 Vet. App. 388 (1997); *Coburn v. Nicholson*, 19 Vet. App. 427, 432 (2006) (Board may reject such statements of the veteran if rebutted by the overall weight of the evidence).

Competency of evidence differs from weight and credibility. Competency is a legal concept determining whether testimony may be heard and considered by the trier of fact, while credibility is a factual determination going to the probative value of the evidence to be made after the evidence has been admitted. *Rucker v. Brown*,

10 Vet. App. 67, 74 (1997); *Layno v. Brown*, 6 Vet. App. 465, 469 (1994); *see also Cartright v. Derwinski*, 2 Vet. App. 24, 25 (1991) ("although interest may affect the credibility of testimony, it does not affect competency to testify").

A veteran is competent to report symptoms because this requires only personal knowledge, not medical expertise, as it comes to him through his senses. *See Layno*, 6 Vet. App. 465. Lay testimony is competent to establish the presence of observable symptomatology, where the determination is not medical in nature and is capable of lay observation. *Barr*, 21 Vet. App. at 303. Lay evidence may establish a diagnosis of a simple medical condition, a contemporaneous medical diagnosis, or symptoms that later support a diagnosis by a medical professional. *Jandreau v. Nicholson*, 492 F.3d 1372, 1377 (Fed. Cir. 2007). A veteran as a lay person is competent to offer an opinion on a simple medical condition. *Davidson v. Shinseki*, 581 F.3d 1313, 1316 (Fed. Cir. 2009) (citing *Jandreau*, 492 F.3d at 1372).

Initial Rating for Bilateral Pes Planus

The Veteran contends that a compensable rating is warranted for the service-connected bilateral pes planus disability. Specifically, the Veteran asserts that a higher initial rating should be granted based on bilateral foot pain caused by prolonged standing and walking. *See, e.g.*, March 2011 VA Form 9.

For the entire initial rating period from September 1, 2009, the bilateral pes planus disability has been rated as noncompensable (0 percent disabling) under 38 C.F.R. § 4.71a, Diagnostic Code 5276. Under Diagnostic Code 5276, mild flatfoot with symptoms relieved by built-up shoe or arch support is rated as noncompensable. Moderate flatfoot with weight-bearing line over or medial to the great toe, inward bowing of the tendo achillis, pain on manipulation and use of the feet, bilateral or unilateral, is rated 10 percent disabling. Severe flatfoot, with objective evidence of marked deformity (pronation, abduction, etc.), pain on manipulation and use accentuated, indication of swelling on use, characteristic callosities, is rated 20 percent disabling for unilateral disability, and is rated 30 percent disabling for bilateral disability. Pronounced flatfoot, with marked pronation, extreme tenderness of plantar surfaces of the feet, marked inward displacement, and severe spasm of

the tendo achillis on manipulation, that is not improved by orthopedic shoes or appliances, is rated 30 percent disabling for unilateral disability, and is rated 50 percent disabling for bilateral disability. 38 C.F.R. § 4.71a.

Words such as "severe," "moderate," and "mild" are not defined in the Rating Schedule. Rather than applying a mechanical formula, VA must evaluate all evidence, to the end that decisions will be equitable and just. 38 C.F.R. § 4.6. Although the use of similar terminology by medical professionals should be considered, is not dispositive of an issue. Instead, all evidence must be evaluated in arriving at a decision regarding a request for an increased disability rating. 38 U.S.C.A. § 7104; 38 C.F.R. §§ 4.2, 4.6.

On review of all the evidence, lay and medical, the Board finds that, for the entire initial rating period from September 1, 2009, the service-connected bilateral pes planus disability has manifested mild pes planus with symptoms relieved by use of custom orthotics, and has not manifested moderate pes planus with weight-bearing line over or medial to the great toe, inward bowing of the tendo achillis, or pain on manipulation and use of the feet. VA examined the pes planus in April 2009. The Veteran reported pain rated at 6 out of 10 over several hours of the day, primarily associated with prolonged standing and walking, leading to additional weakness, stiffness, and fatigue. The April 2009 VA examiner observed bilateral flat feet but did not observe any tenderness, painful motion, weakness, edema, heat, redness, instability, atrophy, or disturbed circulation.

In November 2009, the Veteran received a VA podiatry consultation. The associated treatment record notes significant pes planus and pain rated at 1 to 2 on a scale of 10, after a long day on the feet. Feet muscles, skin, and reflexes were all within normal limits. During VA treatment in January 2010, the Veteran reported pain on standing and was fitted for custom orthotics. As noted above, the Veteran described use of arch supports to address pain that accompanied prolonged standing and walking. *See* March 2011 VA Form 9.

In sum, the evidence for the entire initial rating period from September 1, 2009 demonstrates that the bilateral pes planus disability has been manifested by mild

pain, and that prolonged standing and walking results in flare-ups of pain, weakness, stiffness, and fatigue. The Veteran has used custom orthotics to alleviate, but not cure, these symptoms. While the evidence clearly shows pain, weakness, stiffness, and fatigue, there is no evidence of symptoms or impairment that are generally indicative of moderate pes planus. Although the November 2009 VA podiatry treatment record notes "severe" pes planus, all foot examinations were within normal limits and pain was rated as 2/10.

As discussed in more detail below, it is more favorable to the Veteran to associate the bilateral foot pain, fatigue, weakness, and stiffness that limit foot motion with the left and right calcaneal spurs. As such, a separate 10 percent disability rating for bilateral pes planus that contemplates bilateral foot pain, fatigue, weakness, and stiffness, as well as 10 percent disability ratings for both left and right calcaneal spurs based on those same symptoms would violate the rule against pyramiding. *See* 38 C.F.R. § 4.14. Removing the symptoms of pain, fatigue, weakness, and stiffness that limit motion from the rating discussion for bilateral pes planus leaves no evidence, lay or medial, to support a compensable initial disability rating for bilateral pes planus because the remaining evidence – mild pes planus with symptoms relieved by custom orthotics – is consistent with a noncompensable disability rating under Diagnostic Code 5276. 38 C.F.R. § 4.72. Symptoms such as such as weight-bearing line over or medial to the great toe, or inward bowing of the tendo achillis – the symptoms that are consistent with moderate pes planus – are not present in the record. *Id*.

For the reasons outlined above, the Board finds that, for the entire initial rating period from September 1, 2009, the criteria for a compensable initial disability rating for bilateral pes planus have not been met or more nearly approximated. 38 U.S.C.A. § 5107(b); 38 C.F.R. §§ 4.3, 4.7, 4.14, 4.71a. Because the preponderance of the evidence is against the appeal for a compensable initial disability for bilateral pes planus for the period from September 1, 2009, the benefit-of-the-doubt doctrine does not apply. 38 U.S.C.A. § 5107(b); 38 C.F.R. §§ 4.3, 4.7.

Initial Rating for Bilateral Calcaneal Spurs

Separate from the service-connected bilateral pes planus, the Veteran asserts that a higher initial rating than 0 percent should be assigned for the service-connected bilateral calcaneal spurs. The Veteran's representative has identified bilateral foot pain, weakness, stiffness, and fatigue as the symptoms that warrant a higher initial disability rating for bilateral calcaneal spurs. *See* February 2015 representative letter.

For the entire initial rating period from September 1, 2009, the bilateral calcaneal spurs have been rated as noncompensable (0 percent) under 38 C.F.R. § 4.71a, Diagnostic Code 5015, which instructs that benign new bone growths are to be rated as degenerative arthritis on the basis of limitation of motion of the affected joints. Degenerative arthritis established by X-ray findings will be rated on the basis of limitation of motion of the specific joint or joints involved. When the limitation of motion of the specific joint or joints involved is noncompensable under the appropriate diagnostic codes, a 10 percent rating is applied for each major joint or group of minor joints affected by the limitation of motion. These 10 percent ratings are combined and not added. In the absence of limitation of motion, a 10 percent disability rating will be assigned where there is X-ray evidence of the involvement of two or more major joints or two or more minor joint groups. A 20 percent rating will be assigned where there is X-ray evidence of the involvement of two or more major joints or two or more minor joint groups and there are occasional incapacitating exacerbations. 38 C.F.R. § 4.71a, Diagnostic Code 5003.

On review of all the evidence, lay and medical, the Board finds that, for the entire initial rating period from September 1, 2009, the left and right calcaneal spur disabilities have manifested left and right foot pain, stiffness, weakness, and fatigue that limits motion after prolonged standing and walking. The April 2009 VA examination report reflects a diagnosis of bilateral pes planus with heel spurs. The symptoms affecting the feet were not differentiated between the pes planus and heel spurs, and instead, the April 2009 VA examiner generally noted that prolonged standing and walking caused bilateral foot pain, weakness, swelling, stiffness, and fatigue.

As noted above in the analysis for a higher initial rating for bilateral pes planus, it is more favorable to the Veteran to associate the bilateral foot pain, stiffness, weakness, and fatigue with the bilateral calcaneal spur disability because doing so results in higher disability ratings. More specifically, while the Veteran has not specifically described, and the evidence does not otherwise show, limitation of motion of the feet, the pain, fatigue, stiffness, and weakness affecting the feet is sufficient to show at least noncompensable limitation of motion in the feet to warrant a 10 percent disability rating under Diagnostic Code 5015 (through Diagnostic Code 5003) for both right and left calcaneal spurs. 38 C.F.R. § 4.71a. Associating these symptoms with bilateral pes planus would result in a single 10 percent disability rating and would preclude a compensable disability rating for the left or right calcaneal spur disabilities because there would be no associated pain, fatigue, stiffness, and weakness that limits foot motion.

For the reasons outlined above, the Board finds that, for the entire initial rating period from September 1, 2009, the bilateral calcaneal spur disability has manifested bilateral foot pain, stiffness, weakness, and fatigue that limits motion after prolonged standing and walking. Resolving reasonable doubt in the Veteran's favor, the Board finds that a higher initial disability rating of 10 percent each for left and right calcaneal spurs, but no higher, is warranted under Diagnostic Code 5015 for the entire initial rating period from September 1, 2009. 38 U.S.C.A. § 5107(b); 38 C.F.R. §§ 4.3, 4.7, 4.71a.

The Board has considered whether an alternative disability rating is warranted under Diagnostic Code 5284. *See* 38 C.F.R. § 4.71a. Under Diagnostic Code 5284, moderate residuals of foot injuries warrant a 10 percent rating. A 20 percent rating requires moderately severe residuals. A 30 percent rating requires severe residuals. 38 C.F.R. § 4.71a, Diagnostic Code 5284. Here, in consideration of all the symptoms and impairment affecting the feet, the Board finds that the left and right calcaneal spurs more nearly approximate a pair of moderate foot disabilities, such that a rating in excess of 10 percent under Diagnostic Code 5284 is not warranted. While the Veteran's motion is limited by the pain and other symptoms, the Veteran is still able to ambulate and the left and right calcaneal spurs are generally asymptotic – or at worst, of mild severity – at rest. As such, an alternative rating

under Diagnostic Code 5284 would provide no additional benefit to the Veteran, and a separate rating for either left or right calcaneal spurs, or both, under Diagnostic Code 5284 would violate the rule against pyramiding, as all symptoms and functional impairment affecting the feet are considered in the assignment of the 10 percent disability ratings under Diagnostic Code 5276. *See* 38 C.F.R. §§ 4.14, 4.71a; *see also Copeland v. McDonald*, 27 Vet. App. 333, 338 (2015) (improper to rate a disability by analogy where VA's rating schedule includes criteria for the service-connected condition).

Initial Rating for Hemorrhoids

The Veteran also contends that a compensable initial rating should be assigned for the service-connected hemorrhoid disability. The Veteran asserts that an initial rating in excess of 0 percent should be assigned because the hemorrhoids have been reoccurring and accompanied by fissures. *See* March 2011 VA Form 9.

For the entire initial rating period from September 1, 2009, the service-connected hemorrhoid disability has been rated under 38 C.F.R. § 4.114, Diagnostic Code 7336, which provides ratings for internal or external hemorrhoids. Mild or moderate hemorrhoids are rated as noncompensable (0 percent disabling). Large or thrombotic hemorrhoids, irreducible, with excessive redundant tissue, evidencing frequent recurrences, are rated 10 percent disabling. Hemorrhoids with persistent bleeding and with secondary anemia, or with fissures, are rated 20 percent disabling. 38 C.F.R. § 4.114.

On review of all the evidence, lay and medical, the Board finds that, for the entire initial rating period from September 1, 2009, the service-connected hemorrhoid disability has manifested moderate internal and external hemorrhoids with rectal itching, pain, swelling, tenderness to palpation, and occasional mild bleeding. VA examined for hemorrhoids in April 2009. The Veteran reported rectal itching, pain, and swelling. The Veteran also reported leakage of stool less than one-third of the day in slight amounts, without pad use. The Veteran indicated that the hemorrhoids were constant. On physical examination, the April 2009 VA examiner found both internal and external hemorrhoids tender to palpation; however, there was no

evidence of ulceration, fissures, reduction of lumen, rectal tonus, trauma, rectal bleeding, proctitis, infections, protrusion, or loss of sphincter control. The April 2009 VA examiner noted three total hemorrhoids, none of where were reducible. There was no evidence of bleeding, thrombosis, or frequent recurrence.

A May 2010 treatment record from Dr. J.M. includes a diagnosis of chronic anal fissure based on observation and a partial digital examination that also revealed tenderness. The Veteran reported low volume rectal bleeding with anal pain and itching. In the March 2011 VA Form 9, the Veteran reported frequent pain and bleeding associated with the hemorrhoids.

After considering all the evidence, lay and medical, the Board finds that the symptoms reported by the Veteran and observed by VA physicians most closely approximate a hemorrhoid disability that is characterized by moderate internal and external hemorrhoids with symptoms including rectal bleeding, pain, itching, swelling, and tenderness. While the Veteran has credibly reported bothersome discomfort in the form of bleeding and itching, the evidence generally shows that the hemorrhoids have not been large, thrombotic, or generated excessive redundant tissue. While a single fissure is noted in the record, the symptoms accompanying the fissure – including pain, bleeding, and itching – are generally more consistent with moderate hemorrhoids than with large or thrombotic hemorrhoids that bleed persistently with secondary anemia.

For the reasons outlined above, the Board finds that, for the entire initial rating period from September 1, 2009, the service-connected hemorrhoids disability more nearly approximates a moderate hemorrhoid disability. Accordingly, for the entire initial rating period from September 1, 2009, a compensable disability rating for hemorrhoids is not warranted. 38 U.S.C.A. § 5107(b); 38 C.F.R. §§ 4.3, 4.7, 4.114. Because the preponderance of the evidence is against the claim, the benefit of the doubt doctrine is not for application. *See* 38 U.S.C.A. § 5107; 38 C.F.R. §§ 4.3, 4.7.

Initial Rating for IBS with Diverticulitis

The Veteran also seeks a compensable initial disability rating for IBS. The Veteran asserts that frequent episodes of bowel distress – including alternating diarrhea and constipation – with abdominal distress are severe enough to justify a higher initial rating for IBS with diverticulitis. *See, e.g.*, December 2013 VA Form 9.

For the entire initial rating period from September 1, 2009, the service-connected IBS with diverticulitis has been rated as noncompensable under 38 C.F.R. § 4.114, Diagnostic Code 7319, which provides ratings for irritable colon syndrome (spastic colitis, mucous colitis, etc.). Under Diagnostic Code 7319, mild irritable colon syndrome, with disturbances of bowel function with occasional episodes of abdominal distress, is rated noncompensable (0 percent) disabling. Moderate irritable colon syndrome, with frequent episodes of bowel disturbance with abdominal distress, is rated 10 percent disabling. Severe irritable colon syndrome, with diarrhea, or alternating diarrhea and constipation, with more or less constant abdominal distress, is rated 30 percent disabling. 38 C.F.R. § 4.114.

On review of all the evidence, lay and medical, the Board finds that, for the entire initial rating period from September 1, 2009, the service-connected IBS with diverticulitis has manifested frequent episodes of diarrhea with abdominal distress more nearly approximating moderate irritable colon syndrome. During the April 2009 VA examination, the Veteran reported abdominal pain and reoccurring diarrhea. The April 2009 VA examiner diagnosed H-pylori after noting symptoms including upset stomach, nausea, and vomiting.

During VA treatment in January 2010, the Veteran complained of loose stools twice per week, and bloating and gas relieved with diarrhea. The Veteran denied current symptoms of diarrhea during a May 2010 appointment for hemorrhoid treatment with Dr. J.M. A March 2011 letter from a nurse at the U.S. Embassy in Bolivia states that the Veteran was treated for three bouts of gastroenteritis – later diagnosed as IBS with diverticulitis in a March 2011 VA examination report – since July 2010. The symptoms reported during treatment included diarrhea, cramping,

and abdominal pain. In the December 2013 VA Form 9, the Veteran reported several episodes of diarrhea each week, accompanied by abdominal distress.

In sum, the evidence reflects that the Veteran has experienced varying frequency of diarrhea and abdominal distress during the rating period from September 1, 2009; however, during that time, the symptoms have not completely subsided or varied in severity. In the December 2013 VA Form 9, the Veteran indicated that the symptoms have been relatively consistent since onset in 2003. For these reasons, and after resolving reasonable doubt in the Veteran's favor, the Board finds that, for the entire initial rating period from September 1, 2009, the service-connected IBS with diverticulitis more nearly approximated moderate irritable colon syndrome. Accordingly, for the entire initial rating period from September 1, 2009, the criteria for a higher initial rating of 10 percent for IBS with diverticulitis, but no higher, is warranted under Diagnostic Code 7319 for the entire initial rating period from September 1, 2009. 38 U.S.C.A. § 5107(b); 38 C.F.R. §§ 4.3, 4.7, 4.114.

Extraschedular Consideration

The Board has considered whether referral for extraschedular consideration is warranted. An extraschedular disability rating is warranted based upon a finding that the case presents such an exceptional or unusual disability picture with such related factors as marked interference with employment or frequent periods of hospitalization that would render impractical the application of the regular schedular standards. 38 C.F.R. § 3.321(b)(1) (2015); *see Fanning v. Brown*, 4 Vet. App. 225, 229 (1993).

Under *Thun v. Peake*, 22 Vet App 111 (2008), there is a three-step inquiry for determining whether a veteran is entitled to an extraschedular rating. First, the Board must determine whether the evidence presents such an exceptional disability picture that the available schedular evaluations for that service-connected disability are inadequate. Second, if the schedular evaluation does not contemplate the claimant's level of disability and symptomatology and is found inadequate, the Board must determine whether the claimant's disability picture exhibits other related factors such as those provided by the regulation as "governing norms."

Third, if the rating schedule is inadequate to evaluate a veteran's disability picture and that picture has attendant thereto related factors such as marked interference with employment or frequent periods of hospitalization, then the case must be referred to the VA Under Secretary for Benefits or the Director of the Compensation and Pension Service to determine whether the veteran's disability picture requires the assignment of an extraschedular rating.

With respect to the first prong of *Thun*, several rating criteria have been considered when rating the symptoms and functional impairment associated with the essentially undifferentiated service-connected bilateral pes planus and calcaneal spur disabilities. In sum, these bilateral foot disabilities have manifested pain, fatigue, weakness, and stiffness in the feet after prolonged standing and walking, with related use of orthotics to alleviate symptoms. The schedular rating criteria specifically provide for ratings based on pes planus and benign new bone growths, which are rated by analogy to arthritis, which is also specifically addressed in the rating criteria. *See* 38 C.F.R. § 4.71a, Diagnostic Codes 5003, 5015, 5276. Moreover, motion limited by factors such as pain, weakness, and stiffness is incorporated into the schedular rating criteria for the musculoskeletal system, which includes the feet. *See* 38 C.F.R. §§ 4.40, 4.45, 4.59; *DeLuca*, 8 Vet. App. 202. The effect of service-connected disabilities on the ability to walk and stand is contemplated by 38 C.F.R. § 4.45, allowing the Board to consider such functional impairment in its analysis. As the schedular rating criteria provide both specific ratings for pes planus and benign bone growths (such as heel spurs), and allow for wider consideration of factors such as motion limited by pain and other symptoms, the Board finds that the schedular rating criteria specifically provide for and contemplate ratings based on the aforementioned symptomatology, and that no referral for extraschedular consideration is warranted.

The Board also finds that the schedular criteria for rating hemorrhoids reasonably describe all symptoms and functional impairment associated with the disability. The service-connected hemorrhoids have been manifested by internal and external hemorrhoids with rectal itching, pain, swelling, tenderness to palpation, and occasional mild bleeding. The noncompensable schedular rating under Diagnostic Code 7336 contemplates hemorrhoid symptomatology commensurate with mild or

moderate hemorrhoids. The schedular criteria under Diagnostic Code 7336 do not delineate the symptomatology for the noncompensable rating for mild or moderate hemorrhoids and, instead, more generally consider the overall disability picture, without limitation of factors for consideration; however, the criteria for a compensable rating provide guidance in that, if the hemorrhoids are not shown to be severe enough to approximate the criteria for a 10 percent schedular rating, it is reasonable to conclude that the hemorrhoids more closely approximate schedular criteria for a 0 percent rating under Diagnostic Code 7336.

As explained above, the hemorrhoids do not meet or approximate the criteria for a compensable rating and show that the hemorrhoids are of a lesser severity than the symptoms and functional impairment contemplated in a compensable schedular rating. In consideration of the foregoing, the Board finds, after comparing the symptoms manifested by the Veteran to the schedular criteria for the current rating, that the hemorrhoid disability symptoms are fully contemplated in the current noncompensable schedular rating; therefore, because the schedular rating criteria are adequate to rate the service-connected hemorrhoid disability, no extraschedular referral is warranted.

Similarly, the Board finds that all the symptomatology and impairment caused by the service-connected IBS with diverticulitis are specifically contemplated by the schedular rating criteria, and no referral for extraschedular consideration is required. In this case, considering the lay and medical evidence, the IBS has manifested symptoms such as alternating diarrhea and constipation with abdominal distress. Diagnostic Code 7319 specifically provides ratings based on the frequency and severity of symptoms such as bowel disturbance and abdominal distress. As such, the IBS with diverticulitis symptoms were adequately addressed under the criteria of Diagnostic Code 7319, and referral for extraschedular consideration is not warranted.

According to *Johnson v. McDonald*, 762 F.3d 1362 (Fed. Cir. 2014), a veteran may be entitled to "consideration [under 38 C.F.R. § 3.321(b)] for referral for an extra-schedular evaluation based on multiple disabilities, the combined effect of which is exceptional and not captured by schedular evaluations." Referral for an

extraschedular rating under 38 C.F.R. § 3.321(b) is to be considered based upon either a single service-connected disability or upon the "combined effect" of multiple service-connected disabilities when the "collective impact" or "compounding negative effects" of the service-connected disabilities, when such presents disability not adequately captured by the schedular ratings for the service-connected disabilities. The Veteran is service connected for adjustment disorder, lumbar spine arthritis, hemorrhoids, tinnitus, bilateral pes planus, bilateral calcaneal spurs, left ankle sprain residuals, headaches, and IBS with diverticulitis.

In this case, the Veteran has not asserted, and the evidence of record has not suggested, any such combined effect or collective impact of multiple service-connected disabilities that create such an exceptional circumstance to render the schedular rating criteria inadequate. There is neither allegation nor indication that the collective impact or combined effect of more than one service-connected disability presents an exceptional or unusual disability picture to render inadequate the schedular rating criteria.

The schedule is intended to compensate for average impairments in earning capacity resulting from service-connected disability in civil occupations. 38 U.S.C.A. § 1155. "Generally, the degrees of disability specified [in the rating schedule] are considered adequate to compensate for considerable loss of working time from exacerbations or illnesses proportionate to the severity of the several grades of disability." 38 C.F.R. § 4.1 (2015). In this case, the problems reported by the Veteran are specifically contemplated by the criteria discussed above, including the effects on daily life. In the absence of exceptional factors associated with the bilateral pes planus, bilateral calcaneal spurs, hemorrhoids, or IBS with diverticulitis symptoms, the Board finds that the criteria for submission for assignment of an extraschedular rating pursuant to 38 C.F.R. § 3.321(b)(1) are not met. *See Bagwell v. Brown*, 9 Vet. App. 337 (1996); *Shipwash v. Brown*, 8 Vet. App. 218, 227 (1995).

Lastly, the Board has considered whether an inferred claim for a total disability rating based on individual unemployability (TDIU) has been raised. *See Rice v. Shinseki*, 22 Vet. App. 447 (2009). The Veteran has not alleged, and the evidence

does not suggest, inability to secure or follow substantially gainful employment due to the service-connected disabilities; therefore, the Board finds that the issue of entitlement to a TDIU has not been reasonably raised by the record or by the Veteran. *See id.* at 453–54.

ORDER

For the entire rating period from September 1, 2009, a compensable initial disability rating for bilateral pes planus is denied.

For the entire rating period from September 1, 2009, a higher initial disability rating of 10 percent, but no higher, for the left calcaneal spur disability is granted.

For the entire rating period from September 1, 2009, a higher initial disability rating of 10 percent, but no higher, for the right calcaneal spur disability is granted.

For the entire rating period from September 1, 2009, a compensable initial disability rating for hemorrhoids is denied.

For the entire rating period from September 1, 2009, a higher initial disability rating of 10 percent, but no higher, for IBS with diverticulitis is granted.

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J. PARKER
Veterans Law Judge, Board of Veterans' Appeals

Department of Veterans Affairs

YOUR RIGHTS TO APPEAL OUR DECISION

The attached decision by the Board of Veterans' Appeals (BVA or Board) is the final decision for all issues addressed in the "Order" section of the decision. The Board may also choose to remand an issue or issues to the local VA office for additional development. If the Board did this in your case, then a "Remand" section follows the "Order." However, you cannot appeal an issue remanded to the local VA office because a remand is not a final decision. *The advice below on how to appeal a claim applies only to issues that were allowed, denied, or dismissed in the "Order."*

If you are satisfied with the outcome of your appeal, you do not need to do anything. We will return your file to your local VA office to implement the BVA's decision. However, if you are not satisfied with the Board's decision on any or all of the issues allowed, denied, or dismissed, you have the following options, which are listed in no particular order of importance:

- Appeal to the United States Court of Appeals for Veterans Claims (Court)
- File with the Board a motion for reconsideration of this decision
- File with the Board a motion to vacate this decision
- File with the Board a motion for revision of this decision based on clear and unmistakable error.

Although it would not affect this BVA decision, you may choose to also:

- Reopen your claim at the local VA office by submitting new and material evidence.

There is *no* time limit for filing a motion for reconsideration, a motion to vacate, or a motion for revision based on clear and unmistakable error with the Board, or a claim to reopen at the local VA office. None of these things is mutually exclusive - you can do all five things at the same time if you wish. However, if you file a Notice of Appeal with the Court and a motion with the Board at the same time, this may delay your case because of jurisdictional conflicts. If you file a Notice of Appeal with the Court ***before*** you file a motion with the BVA, the BVA will not be able to consider your motion without the Court's permission.

How long do I have to start my appeal to the court? You have **120 days** from the date this decision was mailed to you (as shown on the first page of this decision) to file a Notice of Appeal with the Court. If you also want to file a motion for reconsideration or a motion to vacate, you will still have time to appeal to the court. *As long as you file your motion(s) with the Board within 120 days of the date this decision was mailed to you,* you will have another 120 days from the date the BVA decides the motion for reconsideration or the motion to vacate to appeal to the Court. You should know that even if you have a representative, as discussed below, *it is your responsibility to make sure that your appeal to the Court is filed on time*. Please note that the 120-day time limit to file a Notice of Appeal with the Court does not include a period of active duty. If your active military service materially affects your ability to file a Notice of Appeal (e.g., due to a combat deployment), you may also be entitled to an additional 90 days after active duty service terminates before the 120-day appeal period (or remainder of the appeal period) begins to run.

How do I appeal to the United States Court of Appeals for Veterans Claims? Send your Notice of Appeal to the Court at:

Clerk, U.S. Court of Appeals for Veterans Claims
625 Indiana Avenue, NW, Suite 900
Washington, DC 20004-2950

You can get information about the Notice of Appeal, the procedure for filing a Notice of Appeal, the filing fee (or a motion to waive the filing fee if payment would cause financial hardship), and other matters covered by the Court's rules directly from the Court. You can also get this information from the Court's website on the Internet at: http://www.uscourts.cavc.gov, and you can download forms directly from that website. The Court's facsimile number is (202) 501-5848.

To ensure full protection of your right of appeal to the Court, you must file your Notice of Appeal **with the Court**, not with the Board, or any other VA office.

How do I file a motion for reconsideration? You can file a motion asking the BVA to reconsider any part of this decision by writing a letter to the BVA clearly explaining why you believe that the BVA committed an obvious error of fact or law, or stating that new and material military service records have been discovered that apply to your appeal. It is important that such letter be as specific as possible. A general statement of dissatisfaction with the BVA decision or some other aspect of the VA claims adjudication process will not suffice. If the BVA has decided more than one issue, be sure to tell us which issue(s) you want reconsidered. Issues not clearly identified will not be considered. Send your letter to:

Director, Management, Planning and Analysis (014)
Board of Veterans' Appeals
810 Vermont Avenue, NW
Washington, DC 20420

Remember, the Board places no time limit on filing a motion for reconsideration, and you can do this at any time. However, if you also plan to appeal this decision to the Court, you must file your motion within 120 days from the date of this decision.

How do I file a motion to vacate? You can file a motion asking the BVA to vacate any part of this decision by writing a letter to the BVA stating why you believe you were denied due process of law during your appeal. *See* 38 C.F.R. 20.904. For example, you were denied your right to representation through action or inaction by VA personnel, you were not provided a Statement of the Case or Supplemental Statement of the Case, or you did not get a personal hearing that you requested. You can also file a motion to vacate any part of this decision on the basis that the Board allowed benefits based on false or fraudulent evidence. Send this motion to the address above for the Director, Management, Planning and Analysis, at the Board. Remember, the Board places no time limit on filing a motion to vacate, and you can do this at any time. However, if you also plan to appeal this decision to the Court, you must file your motion within 120 days from the date of this decision.

How do I file a motion to revise the Board's decision on the basis of clear and unmistakable error? You can file a motion asking that the Board revise this decision if you believe that the decision is based on "clear and unmistakable error" (CUE). Send this motion to the address above for the Director, Management, Planning and Analysis, at the Board. You should be careful when preparing such a motion because it must meet specific requirements, and the Board will not review a final decision on this basis more than once. You should carefully review the Board's Rules of Practice on CUE, 38 C.F.R. 20.1400 -- 20.1411, and *seek help from a qualified representative before filing such a motion.* See discussion on representation below. Remember, the Board places no time limit on filing a CUE review motion, and you can do this at any time.

How do I reopen my claim? You can ask your local VA office to reopen your claim by simply sending them a statement indicating that you want to reopen your claim. However, to be successful in reopening your claim, you must submit new and material evidence to that office. *See* 38 C.F.R. 3.156(a).

Can someone represent me in my appeal? Yes. You can always represent yourself in any claim before VA, including the BVA, but you can also appoint someone to represent you. An accredited representative of a recognized service organization may represent you free of charge. VA approves these organizations to help veterans, service members, and dependents prepare their claims and present them to VA. An accredited representative works for the service organization and knows how to prepare and present claims. You can find a listing of these organizations on the Internet at: http://www.va.gov/vso/. You can also choose to be represented by a private attorney or by an "agent." (An agent is a person who is not a lawyer, but is specially accredited by VA.)

If you want someone to represent you before the Court, rather than before the VA, you can get information on how to do so at the Court's website at: http://www.uscourts.cavc.gov. The Court's website provides a state-by-state listing of persons admitted to practice before the Court who have indicated their availability to the represent appellants. You may also request this information by writing directly to the Court. Information about free representation through the Veterans Consortium Pro Bono Program is also available at the Court's website, or at: http://www.vetsprobono.org, mail@vetsprobono.org, or (855) 446-9678.

Do I have to pay an attorney or agent to represent me? An attorney or agent may charge a fee to represent you after a notice of disagreement has been filed with respect to your case, provided that the notice of disagreement was filed on or after June 20, 2007. *See* 38 U.S.C. 5904; 38 C.F.R. 14.636. If the notice of disagreement was filed before June 20, 2007, an attorney or accredited agent may charge fees for services, but only after the Board first issues a final decision in the case, and only if the agent or attorney is hired within one year of the Board's decision. *See* 38 C.F.R. 14.636(c)(2).

The notice of disagreement limitation does not apply to fees charged, allowed, or paid for services provided with respect to proceedings before a court. VA cannot pay the fees of your attorney or agent, with the exception of payment of fees out of past-due benefits awarded to you on the basis of your claim when provided for in a fee agreement.

Fee for VA home and small business loan cases: An attorney or agent may charge you a reasonable fee for services involving a VA home loan or small business loan. *See* 38 U.S.C. 5904; 38 C.F.R. 14.636(d).

Filing of Fee Agreements: In all cases, a copy of any fee agreement between you and an attorney or accredited agent must be sent to the Secretary at the following address:

Office of the General Counsel (022D)
810 Vermont Avenue, NW
Washington, DC 20420

The Office of General Counsel may decide, on its own, to review a fee agreement or expenses charged by your agent or attorney for reasonableness. You can also file a motion requesting such review to the address above for the Office of General Counsel. *See* 38 C.F.R. 14.636(i); 14.637(d).