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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 15-1670

OSCAR R. FERRELL, APPELLANT,

v.

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

Before SCHOELEN, *Judge*.

MEMORANDUM DECISION

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

SCHOELEN, *Judge*: The appellant, Oscar R. Ferrell, through counsel, appeals a March 26, 2015, Board of Veterans' Appeals (Board) decision in which the Board denied his claim for entitlement to a disability rating in excess of 60% for radiculopathy with partial right foot drop. Record (R.) at 2-26. The Court may not disturb that portion of the Board decision that determined that new and material evidence was received to reopen the appellant's claim for entitlement to service connection for diabetes mellitus and hypertension, or the determination that the appellant is entitled to restoration of a 20% rating for degenerative disc disease status-post laminectomy and discectomy of L5-S1. *Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007) ("The Court is not permitted to reverse findings of fact favorable to a claimant made by the Board pursuant to its statutory authority."). The Board remanded the appellant's claims for service connection for diabetes mellitus and hypertension, and entitlement to a total disability rating based on individual unemployability (TDIU). R. at 18-23. The remanded matters are not before the Court. *See Hampton v. Gober*, 10 Vet.App. 481, 483 (1997) (claims remanded by the Board cannot be reviewed by the Court). This appeal is timely, and the Court has jurisdiction to review the Board's decision pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). Single-judge disposition is appropriate. *See Frankel v. Derwinski*,

1 Vet.App. 23, 25-26 (1990). For the following reasons, the Court will vacate the Board's decision and remand the matter for further proceedings consistent with this decision.

I. BACKGROUND

The appellant served in the U.S. Air Force from July 1961 to July 1981. R. at 735. In October 1981, he was granted service connection for discogenic back pain with sciatica, rated at 10% disabling. R. at 711-12. In June 2002, the appellant filed a request for an increased disability rating, stating that in May 2002 he had back surgery that caused a right foot drop from nerve damage. R. at 689. An October 2002 VA examiner diagnosed the appellant with "[c]hronic lumbar radiculopathy and secondary partial right foot drop and [extensor hallucis longus (EHL)] weakness and chronic paresthesias of the right foot, status post lumbar decompression surgery." R. at 575.

A November 2002 rating decision awarded the appellant a disability rating of 20% for radiculopathy with partial foot drop associated with discogenic back pain. R. at 552-61. A March 2003 decision increased the appellant's disability rating to 40%. R. at 533-35, 539-42.

The appellant's September 2009 VA examination revealed that he had "chronic intermittent tingling of both feet, right foot drop, causing falls" and that to avoid tripping and falling, he used a cane when he was outside the house. R. at 440. The examiner noted that the appellant dragged his right foot, had atrophy of the right leg, a right foot instability, and did not perceive pinprick or light touch on the right sole. R. at 441-42. The appellant was able to extend his right knee nine times before complaining of fatigue. R. at 442. The examiner diagnosed him with sensory radiculopathy with mild functional impairment. *Id.*

In October 2009, the regional office (RO) increased the appellant's disability rating from 40% to 60%. R. at 415-19, 425-34. The following month, the appellant filed a request for TDIU and listed his lower right extremity radiculopathy as a cause for his inability to obtain and sustain substantially gainful employment. R. at 404-05, 420-21. In a January 2010 VA examination, the appellant reported that his back pain and lower right extremity disability interfere with his daily activities and that his pain is precipitated and aggravated by standing and walking. R. at 399. The examination showed decreased motor strength and function, right calf muscle atrophy, inability to

stand on his toes or heel, decreased sensation to pinprick, and evidence of right foot drop. R. at 401. The examiner opined that the appellant was able to perform "some sedentary employment." *Id.*

The appellant underwent another VA examination in August 2011, where symptoms of mild intermittent pain and mild numbness of the right lower extremity, along with partial right foot drop, were noted. R. at 330-31. The examiner observed that the appellant "slaps his right foot down due to partial right foot drop." R. at 332. The examiner opined that the right lower extremity radiculopathy caused "[m]ild functional limitation" but that there were no functional impairments such that no effective function remains other than that which would be equally well-served by an amputation with prosthesis. R. at 339. A March 2012 rating decision denied a disability rating in excess of 60%. R. at 306-09.

In the March 2015 decision on appeal, the Board denied the appellant a disability rating in excess of 60% for his right lower extremity radiculopathy and declined referral of the claim for extraschedular consideration. R. at 2-26. This appeal followed.

II. ANALYSIS

An extraschedular evaluation is warranted where the case presents an exceptional or unusual disability picture with such related factors as a marked interference with employment or frequent hospitalization. 38 C.F.R. § 3.321(b) (2016). *Thun v. Peake*, 22 Vet.App. 111, 115 (2008). The Board's determination whether referral for an extraschedular disability rating is appropriate is a factual determination that the Court reviews under the "clearly erroneous" standard of review. *Thun*, 22 Vet.App. at 115. In rendering its decision, the Board must provide a statement of the reasons or bases for its determination adequate to enable an appellant to understand the precise basis for the Board's decision as well as to facilitate review in this Court. 38 U.S.C. § 7104(d)(1); *see Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1990).

Special Monthly Compensation (SMC) is available when, "as the result of service-connected disability," a veteran suffers additional hardships above and beyond those contemplated by VA's schedule for rating disabilities. *See* 38 U.S.C. § 1114(k)-(s). The rate of SMC "varies according to the nature of the veteran's service-connected disabilities." *Moreira v. Principi*, 3 Vet.App. 522, 524 (1992). The Board's determination as to whether a veteran is entitled to SMC is a finding of fact that

this Court reviews under the "clearly erroneous" standard of review. *See Prejean v. West*, 13 Vet.App. 444, 447 (2000); *Turco v. Brown*, 9 Vet.App. 222, 224 (1996).

The appellant argues that the Board provided an inadequate statement of reasons or bases to support its decision not to refer his claim for extraschedular consideration. Appellant's Brief (Br.) at 8. He asserts that the Board failed to adequately assess whether the diagnostic code adequately contemplated the severity and effects of his right lower extremity radiculopathy. *See id.* Further, the appellant argues that the Board erred when it failed to consider the reasonably raised issue of entitlement to SMC based on loss of use of his lower right extremity. *Id.* at 7. The appellant does not assert any error regarding the Board's determination that a schedular disability rating in excess of 60% was not warranted. Accordingly, the Court will not consider that issue.

The Secretary argues that it is clear that the Board considered the appellant's symptoms and plausibly found that referral for extraschedular consideration was unnecessary and supported that finding with an adequate statement of reasons or bases. Secretary's Br. at 8-10. The Secretary further asserts that the issue of SMC was not reasonably raised by the record because loss of the use of the foot, as defined by VA regulation, was not shown by the evidence of record. *Id.* at 11. He maintains that the appellant's incomplete paralysis of the sciatic nerve was not sufficient to reasonably raise the issue of SMC. *Id.* at 13.

In the decision on appeal, the Board's discussion of whether extraschedular consideration was warranted was cursory and conclusory, stating that

the symptomatology and impairment caused by the Veteran's service-connected radiculopathy with partial right foot drop are specifically contemplated by the rating criteria, as shown above. There are no other ratable symptoms stemming from the disability that are not currently considered in the rating criteria. Likewise, all of the Veteran's symptoms and manifestations have been considered based on all available rating criteria for the disability. In this case, comparing the Veteran's disability level and symptomatology to the rating schedule, the Board finds that the degree of disability throughout the rating period under consideration is contemplated by the rating schedule; therefore, the assigned rating is adequate. As such, referral for consideration for an extraschedular evaluation is not warranted.

R. at 14.

The Court finds the Board's terse conclusion inadequate. Under *Thun*, the Board is required to first determine whether the evidence presents "such an exceptional disability picture that the

available schedular evaluations for that service-connected disability are inadequate." *Thun*, 22 Vet.App. at 115. To accomplish this, the Board must compare "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." *Id.*

The January 2010 VA examination showed the appellant had decreased motor strength and function, right calf muscle atrophy, decreased sensation to pinprick, was unable to stand on his toes or heel, and experienced right foot drop. R. at 401. The appellant also reported that his pain interfered with his daily activities. Although the Board mentioned that the appellant experienced symptoms related to radiculopathy, completely lacking is any discussion of the specific symptoms or their severity and a subsequent comparison to the rating schedule criteria. *Id.* The Board's discussion of why the evidence does not meet the schedular criteria for an 80% rating is not sufficient to explain why extraschedular referral is not warranted. The Board's cursory conclusion that "there are no other ratable symptoms stemming from the disability that are not currently considered in the rating criteria" does not comply with the *Thun's* requirement. This deficiency frustrates the Court's review and renders the Board's statement of reasons or bases inadequate. Consequently, the Court will remand the matter for the Board to properly explain why the rating criteria adequately capture the symptoms of the appellant's disability. *See Allday* and *Gilbert*, both *supra*.

As to the appellant's argument regarding SMC, the Court will not address it at this time. Because the Court is remanding the matter of extraschedular consideration, the Court will exercise its discretion and remand the issue of SMC for the Board to address in the first instance. *See Maggitt v. West*, 202 F.3d 1370, 1377-78 (Fed. Cir. 2000) (stating that the determination of whether to entertain an argument raised for the first time at the Court is a "matter of discretion"). On remand, the appellant may present additional evidence and argument in support of his assertion of Board errors and the matters remanded, and the Board must consider any evidence and argument so presented. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002); *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order). The Board must proceed expeditiously, in accordance with 38 U.S.C. § 7112 (requiring Secretary to provide for "expeditious treatment" of claims remanded by the Court).

III. CONCLUSION

After consideration of the appellant's and the Secretary's pleadings, and a review of the record, the Board's March 26, 2015, decision is VACATED and the matter is REMANDED to the Board for further proceedings consistent with this decision.

DATED: September 7, 2016

Copies to:

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