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**UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS**

NO. 15-2307

NORMAN B. ROZYCKI, APPELLANT,

v.

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

Before DAVIS, *Chief Judge*.

**MEMORANDUM DECISION**

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

DAVIS, *Chief Judge*: U.S. Army veteran Norman B. Rozycki appeals through counsel from a May 6, 2015, Board of Veterans' Appeals (Board) decision that addressed a cervical spine disability and declined to refer the matter for extraschedular consideration pursuant to 38 C.F.R. § 3.321(b) (2016).<sup>1</sup> For the following reasons, the Court will set aside the Board's May 2015 decision and remand the matter for further proceedings.

**I. ANALYSIS**

Mr. Rozycki argues that the Board provided an inadequate statement of reasons or bases for its decision not to refer his claim for extraschedular consideration. In determining entitlement to an extraschedular evaluation, the Board first must determine whether the evidence "presents such an exceptional disability picture that the available schedular evaluations for that service-connected

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<sup>1</sup> The Board also awarded a 10% disability rating, but no higher, for the cervical spine disability and a 40% disability rating for cervical radiculopathy of the right upper extremity, and remanded the matter of a total disability rating based on individual unemployability. Mr. Rozycki raises no contentions of error with respect to these aspects of the Board's decision, and the Court will not address them on appeal. *See Pederson v. McDonald*, 27 Vet.App. 276, 283 (2015) (en banc) (stating that "this Court, like other courts, will generally decline to exercise its authority to address an issue not raised by an appellant in his or her opening brief"); *see also Breeden v. Principi*, 17 Vet.App. 475, 478 (2004) (a Board remand "does not represent a final decision over which this Court has jurisdiction").

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). This determination obliges the Board to 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.* When this requirement is satisfied, the Board must determine whether the veteran's exceptional disability picture exhibits other related factors such as "'marked interference with employment' or 'frequent periods of hospitalization.'" *Id.* at 116 (quoting 38 C.F.R. § 3.321(b)(1)). If both inquiries are answered in the affirmative, the Board must refer the matter to the Under Secretary for Benefits or the Compensation Service director for the third inquiry, i.e., a determination of whether, "[t]o accord justice," the veteran's disability picture requires the assignment of an extraschedular evaluation. *Id.*; *see also Anderson v. Shinseki*, 22 Vet.App. 423, 427 (2009) (outlining the "elements that must be established before an extraschedular rating can be awarded"). In making the extraschedular referral determination, the Board must consider the collective impact of multiple service-connected disabilities whenever that issue is expressly raised by the claimant or reasonably raised by evidence of record. *See Yancy v. McDonald*, 27 Vet.App. 484, 495 (2016).

As with all its material findings of fact and conclusions of law, the Board is required to support its § 3.321(b) determination with a written statement of reasons or bases that is understandable by the claimant and facilitates review by this Court. *See* 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995) (Board's 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"). The statement of reasons or bases must explain the Board's reasons for discounting favorable evidence, *Thompson v. Gober*, 14 Vet.App. 187, 188 (2000), discuss all issues raised by the claimant or the evidence of record, *Robinson v. Peake*, 21 Vet.App. 545, 552 (2008), and discuss all provisions of law and regulation where they are made "potentially applicable through the assertions and issues raised in the record," *Schafrath v. Derwinski*, 1 Vet.App. 589, 593 (1991).

Here, the Board inadequately addressed the combined or collective effect of Mr. Rozycki's service-connected disabilities when assessing § 3.321(b). The entirety of the Board's discussion of this issue consisted of its conclusory statement that a referral for extraschedular consideration was not warranted "even in regard to the collective and combined effect of all of [Mr. Rozycki's]

service[-]connected disabilities." Record (R.) at 20. The Board did not explain why it found that the collective effect of Mr. Rozycki's service-connected knee, radiculopathy, and cervical spine disabilities did not warrant a referral. However, the record contains evidence that these disabilities combined to cause limited motion of the neck, less movement and weakened movement overall, limited motion of the extremities, difficulties turning and rotating, and pain in the knee, neck, and arm. R. at 80 (Mr. Rozycki's statement regarding limitation of movement in extremities and limitation of rotation), 181-85 (medical examiner's opinion that Mr. Rozycki suffered functional loss that included less movement than normal, weakened movement, and pain on movement in his neck), 463 (Mr. Rozycki's statement regarding neck and arm pain), 554 (Mr. Rozycki's statement that he was unable to work "first because of [his] knee" and then "because of [his] neck"). Mr. Rozycki contended that these problems, taken together, caused him to be unable continue his previous work as a carpenter and would make it difficult for him to perform a sedentary desk job. R. at 88. The Board's failure to address this favorable evidence in its decision or explain why the combined effect of Mr. Rozycki's service-connected disabilities did not warrant a referral for extraschedular consideration renders its statement of reasons or bases inadequate. *See Robinson, Thompson, and Schafrath*, all *supra*. Remand is warranted for the Board to address this evidence in the first instance. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) (remand is appropriate "where the Board has incorrectly applied the law, failed to provide an adequate statement of reasons or bases for its determinations, or where the record is otherwise inadequate"); *see also Hensley v. West*, 212 F.3d 1255, 1263 (Fed. Cir. 2000) (stating that "appellate tribunals are not appropriate fora for initial fact finding").

Because the claim is being remanded, the Court need not address Mr. Rozycki's additional arguments as to why the Board's decision should be remanded. *See Mahl v. Principi*, 15 Vet.App. 37, 38 (2001) (per curiam order) ("[I]f the proper remedy is a remand, there is no need to analyze and discuss all the other claimed errors that would result in a remedy no broader than a remand."). In pursuing his claim on remand, however, Mr. Rozycki will be free to submit additional argument and evidence as to the remanded matter, and the Board must consider any such evidence or argument submitted. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002).

## **II. CONCLUSION**

For the foregoing reasons, the Court SETS ASIDE the Board's May 6, 2015, decision and REMANDS the matter for further proceedings.

DATED: December 12, 2016

Copies to:

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