

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

<b>PHILIP G. WILSON,</b>	)	
	)	
Appellant,	)	
	)	
v.	)	Vet. App. No. 16-1626
	)	
<b>ROBERT A. MCDONALD,</b>	)	
Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

**JOINT MOTION FOR REMAND**

Pursuant to U.S. Vet. App. Rules 27(a) and 45(g), Appellant, Philip G. Wilson, and Appellee, Robert A. McDonald, Secretary of Veterans Affairs, by and through their respective counsel, respectfully move the Court to issue an order vacating and remanding the January 29, 2016, decision of the Board of Veterans' Appeals (Board), which denied entitlement to separate disability ratings for service-connected central sleep apnea (CSA), chronic bronchitis, asthma, chronic obstructive pulmonary disease (COPD), and allergic bronchospasms, and also denied entitlement to an initial disability rating in excess of 50 percent. [Record (R.) at 2-13].

**BASES FOR REMAND**

Under 38 U.S.C. § 7104(d)(1), a "decision of the Board shall include . . . a written statement of the Board's findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law

presented on the record.” *Reyes v. Nicholson*, 21 Vet.App. 370, 377 (2007); *Gilbert v. Derwinski*, 1 Vet.App. 49, 56 (1990). The Board is required to consider, and discuss in its decision, all “potentially applicable” provisions of law and regulation. *Roper v. Nicholson*, 20 Vet.App. 173, 181-82 (2006); 38 U.S.C. § 7104(a). Deficiencies in the BVA’s analysis preclude effective judicial review, warranting remand. See *Simington v. West*, 11 Vet.App. 41, 45 (1998).

The parties agree vacatur and remand are required because the Board provided inadequate reasons or bases for three separate findings. First, the Board inadequately explained how it determined that CSA was the predominant condition, and thus, diagnostic code (DC) 6847 would apply. Second, the Board failed to adequately explain why Appellant’s symptomatology did not warrant referral to the Director of Compensation Service (Director) for consideration of an extraschedular rating. Finally, the Board failed to adequately assess whether Appellant was entitled to a total disability rating based on individual unemployability (TDIU).

#### Applicability of the chosen DC

In the instant decision, the Board explained that Appellant’s disabilities were all considered respiratory conditions, and thus, pursuant to 38 C.F.R. § 4.96(a), only one rating could be awarded. [R. at 7-8]. The Board then discussed Appellant’s assertion that separate DCs should be awarded due to the nature of his actual conditions. See [R. at 8-10]. The Board then, inexplicably, concluded that because Appellant’s CSA warrants a 50 percent rating, but no higher, under

DC 6847, his assigned rating is correct. [R. at 10-11]. The Board noted consideration of other DCs, but failed to provide any explanation as to which DCs were considered, or why those DCs were ruled out, to include any explanation as to why those DCs would not have provided Appellant with a higher rating than the one he is currently assigned. See [R. at 11]. The parties note that when providing reasons or bases for a determination, the Board must provide an explanation that is sufficient to allow a claimant to fully understand the reasoning behind the Board's determination. *Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990). In the instant case, the Board provided no explanation whatsoever for its choice of DC, which is wholly insufficient to allow Appellant to understand why the Board made the determination it did. On remand, the Board must reassess the applicability of the potential DCs, and adequately explain to Appellant why it chooses to apply the DC it applies at that time.

#### Extraschedular rating

In rare and exceptional cases, a schedular evaluation may be inadequate to compensate a veteran for the average impairment in earning capacity caused by his or her disability; in those statistically anomalous cases, it may be appropriate to assign an extraschedular evaluation under 38 C.F.R. § 3.321(b). Determining whether referral for extraschedular consideration is warranted involves a three-step process. See *Thun v. Peake*, 22 Vet.App. 111, 115 (2008). The first step is to determine whether the evidence “presents such an exceptional disability picture that the available schedular evaluations for that service-

connected disability are inadequate.” *Id.* If so determined, the second step of the inquiry requires the adjudicator to determine whether the claimant’s exceptional disability picture exhibits other related factors such as marked interference with employment or frequent periods of hospitalization. *Id.* at 116. If the first two steps are satisfied, the third step requires the adjudicator to refer the claim to the Director for extraschedular consideration. *Id.*

In the instant case, the Board noted that extraschedular referral was considered, but found it not warranted as “the evidence does not present an exceptional disability picture that renders inadequate the available schedular ratings under DC 6847 for [Appellant]’s sleep apnea.” [R. at 11-12]. The Board then discussed Appellant’s CSA symptoms, noting that such symptoms are adequately contemplated by the rating schedule, and further noted that, as it had previously discussed, his CSA symptoms did not meet the requirements for a higher schedular rating. [R. at 12]. The Board noted that in some circumstances, extraschedular ratings can be based on the collective impact of multiple service-connected conditions, but found that Appellant does not have any additional symptoms not already considered under the applied DC. [R. at 12]; *see also Johnson v. Shinseki*, 26 Vet.App. 237, 244 (2013), *rev’d on other grounds by Johnson v. McDonald*, 762 F.3d 1362 (Fed. Cir. 2014).

The parties agree that the Board’s explanation for declining to refer Appellant’s claim for extraschedular consideration was insufficient. While the Board noted that it believed Appellant’s schedular rating sufficiently considered

his CSA symptomatology, it then noted that a higher rating for CSA was available, but Appellant did not meet said schedular requirements, thus his rating was appropriate. [R. at 12]. It is unclear to the parties what relevance the fact that a 100 percent rating for CSA exists has to whether the 50 percent rating assigned is appropriate. The parties note that the purpose of an extraschedular rating is to allow for ratings for symptomatology that falls outside the rating schedule. See 38 C.F.R. § 3.321(b). Therefore, simply because a higher rating exists within the rating schedule does not adequately explain why a claimant would not be entitled to referral for an extraschedular rating. On remand, the Board must adequately consider whether Appellant's symptomatology is contemplated by the rating schedule, without consideration as to the availability of a higher schedular rating, which he does not qualify for.

Additionally, the parties agree that the Board provided inadequate reasons or bases for its determination that consideration under *Johnson*, for the combined effects of Appellant's conditions, would not apply. In the instant case, the Board simply noted that "there are no additional symptoms that have not been attributed to a specific service-connected condition." [R. at 12]; see also *Johnson v. Shinseki*, 26 Vet.App. 237, 244 (2013), *rev'd on other grounds by Johnson v. McDonald*, 762 F.3d 1362 (Fed. Cir. 2014). As the Board failed to provide any explanation as to which symptoms it was discussing, it is not clear to Appellant why such referral was denied. On remand, the Board must provide such reasons or bases to Appellant.

## TDIU

A total disability rating may be assigned where the schedular evaluation is less than total but the disabled veteran is unable to secure or follow a substantially gainful occupation as a result of single service-connected disability ratable at 60 percent or more or multiple service connected disabilities ratable at 70 percent or more where certain additional criteria are met. 38 C.F.R. § 4.16(a). Alternatively, if a veteran fails to meet the percentage requirements but is nevertheless rendered unemployable by reason of one or more service-connected disabilities, the matter must be submitted to the Director for extraschedular consideration. 38 C.F.R. § 4.16(b).

In the instant decision, the Board noted that the issue of TDIU had not been raised because there was “no evidence of unemployability due to the service-connected [CSA.]” [R. at 13]; see also *Roberson v. Principi*, 251 F.3d 1378, 1384 (Fed. Cir. 2001). The parties note two errors with the Board’s instant finding. First, the Board failed to consider all relevant evidence of Record, to include a statement in a 2014 Sleep Apnea Disability Benefits Questionnaire (DBQ) where Appellant’s physician stated that he had difficulty concentrating and focusing because of his CSA, and that “[h]e randomly falls asleep during the day when sitting.” [R. at 432 (431-34)]. Second, the parties note that while Appellant’s only DC is for CSA, that rating encompasses numerous other conditions, to include COPD and asthma. [R. at 7-8]. Thus, it is wholly unclear to both parties why, when providing its analysis of whether Appellant warrants a rating pursuant

to 38 C.F.R. § 4.16(b), the Board only provided discussion of CSA. On remand, the Board must discuss all relevant evidence of record, and also must provide adequate consideration of all of Appellant's service-connected respiratory conditions.

On remand, Appellant is entitled to submit additional evidence and argument, *Kutscherousky v. West*, 12 Vet.App. 369, 372 (1999) (per curiam order), and VA is obligated to conduct a critical examination of the justification for the decision, *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991). In any subsequent decision, the Board must set forth adequate reasons or bases for its findings and conclusions on all material issues of fact and law presented on the record. See 38 U.S.C. § 7104(d)(1); *Gilbert*, 1 Vet.App. 49. As stated in *Forcier*, the terms of a joint motion for remand granted by the Court are enforceable. *Forcier v. Nicholson*, 19 Vet.App. 414, 425 (2006) (Secretary's duty to ensure compliance with the terms of a remand "include[s] the terms of a joint motion that is granted by the Court but not specifically delineated in the Court's remand order"). Further, the Board shall obtain copies of the Court's Order, and this motion, and incorporate them into Appellant's claims folder for appropriate consideration in subsequent decisions on this claim.

**WHEREFORE**, the parties respectfully move this Court to issue an order vacating and remanding the January 29, 2016, decision of the Board, which denied entitlement to separate disability ratings for service-connected CSA,

chronic bronchitis, asthma, COPD, and allergic bronchospasms, and also denied entitlement to an initial disability rating in excess of 50 percent.

Respectfully submitted,

FOR APPELLANT:

DATE: 12/13/2016

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