BOARD OF VETERANS' APPEALS

DEPARTMENT OF VETERANS AFFAIRS
WASHINGTON, DC 20420

IN THE APPEAL OF
JOSEPH SPELLERS

SS [redacted]

DOCKET NO. 09-48 806) DATE *November 17, 2016*
) *KEC*
)

On appeal from the
Department of Veterans Affairs Regional Office in Denver, Colorado

THE ISSUE

Entitlement to initial ratings in excess of 10 percent for right and left lower extremity sciatica on an extra-schedular basis pursuant to 38 C.F.R. § 3.321, to include as due to the collective impact of all of the Veteran's service-connected disabilities.

REPRESENTATION

Veteran represented by: Robert V. Chisholm, Attorney at Law

WITNESSES AT HEARING ON APPEAL

The Veteran and his spouse

ATTORNEY FOR THE BOARD

Kate Sosna, Associate Counsel

INTRODUCTION

The Veteran had active duty service from November 1978 to October 1989.

This matter comes before the Board of Veterans' Appeals (Board) on appeal from a November 2009 rating decision issued by the Department of Veterans Affairs (VA) Regional Office (RO) in Denver, Colorado, which granted service connection for sciatica of the bilateral lower extremities and assigned initial 10 percent ratings, effective September 30, 2008. The Veteran appealed with respect to the propriety of the initially assigned ratings.

In August 2014, the Veteran and his spouse testified at a hearing before the undersigned Veterans Law Judge. A transcript of these proceedings has been associated with the record. At that time, the Veteran waived agency of original jurisdiction (AOJ) consideration of the evidence associated with the record since the issuance of the June 2013 supplemental statement of the case. 38 C.F.R. § 20.1304(c) (2015). Additionally, the undersigned held the record open for 30 days to allow for the submission of additional evidence. Such evidence, consisting of the report of a VA examination, was submitted later in August 2014. In April 2015, the Veteran's representative submitted a waiver of AOJ consideration of the newly submitted evidence. *Id*. Furthermore, the Veteran's attorney submitted additional evidence and argument in October 2016 with a waiver of AOJ consideration. Therefore, the Board may properly consider all newly received evidence.

In May 2015 the Board issued a decision denying the Veteran's claims for higher initial rating for right and left lower extremity sciatica on a schedular and extra-schedular basis, and remanded the issue of entitlement to a total disability rating based on individual unemployability due to service-connected disabilities (TDIU)

for additional development. The Veteran subsequently appealed the issue of entitlement to initial ratings in excess of 10 percent for right and left lower extremity sciatica on an extra-schedular basis pursuant to 38 C.F.R. § 3.321 to the United States Court of Appeals for Veterans Claims (Court) and, following a March 2016 Joint Motion for Remand (JMR), such decision was vacated and remanded so as to allow the Board to provide adequate reasons and bases as to the denial of the referral for extra-schedular consideration, to include as due to the combined effects of the Veteran's service-connected disabilities.

As noted, the Board remanded the issue of entitlement to a TDIU in the May 2015 decision. A review of the record indicates that the Agency of Original Jurisdiction (AOJ) has not completed the requested development and readjudication of that issue and, as such, it is not currently before the Board.

The issue of entitlement to specially adapted housing has been raised in an April 2016 Veteran's Application in Acquiring Specially Adapted Housing or Special Home Adaptation Grant (VA 26-4555), but has not been adjudicated by the AOJ. Therefore, the Board does not have jurisdiction over it, and it is referred to the AOJ for appropriate action. 38 C.F.R. § 19.9(b) (2015).

This appeal was processed using the Veterans Benefits Management System (VBMS) and Virtual VA paperless claims processing systems.

FINDINGS OF FACT

1. The Board incorporates by reference the findings and conclusions in the May 2015 decision with regard to VA's duties to notify and assist.

2. The Veteran's right and left lower extremity sciatica, singularly or in combination with his other service-connected disabilities, do not result in symptoms not contemplated by the applicable rating criteria for his disabilities.

CONCLUSION OF LAW

The criteria for referral for extra-schedular consideration pursuant to 38 C.F.R. § 3.321 for initial ratings in excess of 10 percent for right and left lower extremity sciatica, to include as due to the collective impact of all of the Veteran's service-connected disabilities, has not been met. 38 U.S.C.A. §§ 1155, 5107(b) (West 2014); 38 C.F.R. § 3.321 (2015); *Yancy v. McDonald*, 27 Vet. App. 484 (2016); *Johnson v. McDonald*, 762 F.3d 1362 (Fed. Cir. 2014).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

As a preliminary matter, the Board notes that the March 2016 JMR was narrow in scope. Specifically, it moved the Court to vacate the Board's May 2015 decision as to the denial of higher initial ratings for right and left lower extremity sciatica only to the extent that it failed to provide an adequate statement of reasons or bases for why referral of those claims for extra-schedular consideration was not warranted, to include as based on the combined effects of the Veteran's service connected disabilities. In this regard, the JMR specifically stated that the Board's decision denying higher schedular ratings for the Veteran's right and left lower extremity sciatica should not be disturbed, and it did not direct that additional development be conducted in connection with any other aspect of the decision. The Veteran's representative who entered into the JMR is an attorney in a law firm with extensive experience in VA litigation. "[W]hen an attorney agrees to a [JMR] based on specific issues and raises no additional issues on remand, the Board is required to focus on the arguments specifically advanced by the attorney in the motion, *see Forcier* [*v. Nicholson*, 19 Vet. App. 414,] 426 [(2006)], and those terms will serve as a factor for consideration as to whether or to what extent other issues raised by the record need to be addressed." *Carter v. Shinseki*, 26 Vet. App. 534, 542-43 (2014), (vacated on other grounds sub nom. *Carter v. McDonald*, 794 F.3d 1342 (Fed. Cir. 2015). Based on the foregoing, and in the interest of administrative efficiency, the Board will proceed by addressing only that aspect of its May 2015 decision that the JMR identified as inadequate. *Id*. In short, the only question presently on appeal before the Board is whether referral for extra-schedular

consideration pursuant to 38 C.F.R. § 3.321 for initial ratings in excess of 10 percent for right and left lower extremity sciatica, to include as due to the collective impact of all of the Veteran's service-connected disabilities, is warranted.

In this vein, in a September 2016 submission, which was received by the Board in October 2016, the Veteran's representative argued that the issue of entitlement to special monthly compensation (SMC) for aid and attendance and/or loss of use should be decided by the Board pursuant to *Akles v. Derwinski*, 1 Vet. App. 118, 121 (1991), which holds that the Board is charged with considering the Veteran's entitlement to the maximum benefit available, to include consideration of whether an increased rating claim encompasses a claim for SMC. However, given the plain reading of the JMR and the holding in *Carter*, the Board declines to accept jurisdiction of such issues. To the extent the Veteran or his representative wish to file a claim for such benefits, they are advised that a claim for benefits submitted after March 24, 2015, must be submitted on the application form prescribed by the Secretary. 38 C.F.R. §§ 3.1(p), 3.155, 3.160 (2015). Furthermore, the Veteran's representative argued that the Board should grant a TDIU at his juncture; however, as noted in the Introduction, such matter is currently pending at the AOJ. As such, the Board declines jurisdiction over the issue of entitlement to a TDIU at the current time.

Further, as noted above, the March 2016 JMR and resulting Order vacated the Board's May 2015 decision with regard to the sole matter of whether referral for extra-schedular consideration pursuant to 38 C.F.R. § 3.321 for initial ratings in excess of 10 percent for right and left lower extremity sciatica, to include as due to the collective impact of all of the Veteran's service-connected disabilities, is warranted, and a review of the JMR shows that the only issue discussed in that motion was the Board's lack of reasons and bases regarding such determination. In fact, as indicated previously, the JMR explicitly dismissed the issues of entitlement to higher initial ratings for right and left lower extremity sciatica on a schedular basis. Furthermore, the JMR did not address or identify any error in the Board's findings and conclusions with regard to VA's duties to notify and assist or the Board's decision not to address entitlement to SMC.

Again, the Veteran is currently represented by the same law firm that represented him in his appeal to the Court. Since the time of the March 2016 JMR, neither the Veteran nor his representative have presented any argument regarding any insufficiency in the Board's May 2015 decision's determinations in regard to VA's duties to notify and to assist. Under these circumstances, the Board herein incorporates the findings and conclusions as to such matters from the May 2015 decision and shall not further discuss those issues.

The Board recognizes that where a case has been remanded to the Board, the order of the Court constitutes the law of the case, and the Board is bound to follow the Court's mandate. *See Winslow v. Brown*, 8 Vet. App. 469, 472 (1996). The Board has done so here, explicitly considering the issue addressed by the JMR in the discussion below.

Accordingly, considering that the only deficiency identified by the March 2016 JMR was the Board's decision that the Veteran's service-connected bilateral lower extremity sciatica did not warrant referral for an extra-schedular rating pursuant to 38 C.F.R. § 3.321, to include as due to the combined effect of the Veteran's service-connected disabilities, the Board shall focus its analysis on that narrow issue alone.

In this regard, an extra-schedular rating is warranted if 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 application of the regular schedular standards would be impracticable. 38 C.F.R. § 3.321(b)(1).

In *Thun v. Peake*, 22 Vet. App. 111, 115-16 (2008), the Court explained how the provisions of 38 C.F.R. § 3.321 are applied. Specifically, the Court stated that the determination of whether a claimant is entitled to an extra-schedular rating under § 3.321 is a three-step inquiry. First, it must be determined whether the evidence presents such an exceptional disability picture that the available schedular evaluations for that service-connected disability are inadequate. In this regard, the Court indicated that 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. Under the approach

prescribed by VA, if the criteria reasonably describe the claimant's disability level and symptomatology, then the claimant's disability picture is contemplated by the rating schedule, the assigned schedular evaluation is, therefore, adequate, and no referral is required.

Second, if the schedular evaluation does not contemplate the claimant's level of disability and symptomatology and is found inadequate, the RO or Board must determine whether the claimant's exceptional disability picture exhibits other related factors such as "marked interference with employment" and "frequent periods of hospitalization." Third, when an analysis of the first two steps reveals that the rating schedule is inadequate to evaluate a claimant'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 Under Secretary for Benefits or the Director of the Compensation and Pension Service to determine whether, to accord justice, the Veteran's disability picture requires the assignment of an extra-schedular rating. *Id*.

Pursuant to *Johnson, supra*, a Veteran may be awarded an extra-schedular rating based upon the combined effect of multiple conditions in an exceptional circumstance where evaluation of the individual conditions fails to capture all the symptoms associated with service-connected disabilities experienced.

The Court provided further guidance regarding the Board's need to address the combined effects of a veteran's service-connected disabilities in *Yancy v. McDonald*, 27 Vet. App. 484 (2016). In that case, the Court stated that "[n]othing in *Johnson* changes the long-standing principle that the issue of whether referral for extra-schedular consideration is warranted must be argued by the claimant or reasonably raised by the record." *Id*. at 495. Further, the Court explicitly held that "the Board is required to address whether referral for extra-schedular consideration is warranted for a veteran's disabilities on a collective basis only when that issue is argued by the claimant or reasonably raised by the record through evidence of the collective impact of the claimant's service-connected disabilities." *Id*., *citing Thun v. Peake*, 22 Vet. App. 111, 115 (2008); *Robinson v. Nicholson*, 21 Vet. App. 545, 552 (2008).

The Court further noted that the three step process of *Thun* applied to evaluations of collective disabilities as it does to single disabilities. Finally, the Court noted that "although *Johnson* requires the Board, in certain cases, to discuss the collective impact of a claimant's service-connected disabilities, it does not alter the Board's jurisdiction over individual schedular or extra-schedular ratings." *Id*. The Court stated that the Board "lacks jurisdiction to consider whether referral is warranted solely for any disability or combination of disabilities not in appellate status, just as it lacks jurisdiction to examine the proper schedular rating for a disability not on appeal." *Id*. at 496, *citing DiCarlo v. Nicholson*, 20 Vet. App. 52, 55 (2006).

The Board has reviewed all the evidence in the record. Although the Board has an obligation to provide adequate reasons and bases supporting this decision, there is no requirement that the evidence submitted by the appellant or obtained on his behalf be discussed in detail. When there is an approximate balance of evidence for and against the issue, all reasonable doubt will be resolved in the Veteran's favor. 38 U.S.C.A. § 5107; 38 C.F.R. § 3.102; *Gilbert v. Derwinski*, 1 Vet. App. 49 (1990).

A. Extra-Schedular Consideration Based on Right and Left Lower Extremity Sciatica

Turning to the first element of *Thun* outlined above, to warrant a referral for extra-schedular consideration, the Veteran's level of impairment due to his right and left lower extremity sciatica must not be adequately contemplated by the currently assigned schedular rating.

Regarding the currently assigned schedular criteria, the Board notes that neurological disabilities are to be rated in proportion to the impairment of motor, sensory, or mental function. 38 C.F.R. § 4.120. Further, if psychotic manifestations, complete or partial loss of use of one or more extremities, speech disturbances, impairment of vision, disturbances of gait, tremors, visceral manifestations, injury to the skull, etcetera, present, such disorders are to be rated under corresponding schedular criteria. *Id*. Relevant to this claim, in rating

peripheral nerve injuries and their residuals, attention should be given to the site and character of the injury, the relative impairment in motor function, trophic changes, or sensory disturbances. *Id.*

The Veteran's right and left lower extremity sciatica are rated pursuant to Diagnostic Code 8520, which pertains to paralysis of the sciatic nerve. Under this provision, mild incomplete paralysis warrants a 10 percent rating; moderate incomplete paralysis warrants a 20 percent rating; moderately severe incomplete paralysis warrants a 40 percent rating; and severe incomplete paralysis with marked muscular atrophy warrants a 60 percent rating. An 80 percent rating is warranted for complete paralysis, where the foot dangles and drops, there is no active movement possible of the muscles below the knee, and/or flexion of the knee is weakened or (very rarely) lost. *See* 38 C.F.R. § 4.124a, Diagnostic Code 8520.

The term "incomplete paralysis" with peripheral nerve injuries indicates a degree of loss or impaired function substantially less than the type pictured for complete paralysis given with each nerve, whether due to the varied level of the nerve lesion or to partial regeneration. When the involvement is wholly sensory, the rating should be for mild, or at most, the moderate degree. *See* Note at "Diseases of the Peripheral Nerves" in 38 C.F.R. § 4.124a.

The Board observes that the words "slight," "moderate," and "severe" are not defined in the Rating Schedule. Rather than applying a mechanical formula, the Board must evaluate all of the evidence to the degree that its decisions are "equitable and just." *See* 38 C.F.R. § 4.6. It should also be noted that use of descriptive terminology such as "mild" by medical examiners, although an element of evidence to be considered by the Board, is not dispositive of an issue. All evidence must be evaluated in arriving at a decision regarding an increased rating. 38 U.S.C.A. § 7104(a); 38 C.F.R. §§ 4.2, 4.6.

Based on the symptoms the Veteran reported experiencing during the course of the appeal, the Board finds that step one of the *Thun* analysis has not been satisfied as his reported symptoms are reasonably described by the rating criteria associated with the diagnostic code assigned to his right and left lower extremity sciatica.

In this regard, in a September 2016 submission, the Veteran's representative asserted that the following symptoms reported by the Veteran during examinations, treatment, and in a May 2016 affidavit are not adequately contemplated by the currently assigned rating criteria: radiating pain; give-way of the legs, especially after prolonged periods of standing; falling associated with pain and give-way; the use of a cane; the use of a walker with a seat due to an inability to stand for prolonged periods; and side-effects from narcotic pain medications, such as drowsiness and impaired concentration. In addition to these symptoms identified by the Veteran's representative as warranting extra-schedular consideration, the Board notes that throughout the appeal the Veteran has also reported: leg weakness; spasms in his legs once or twice a week, depending on the strenuous nature of his activities; tingling and numbness in his feet; stiffness in the legs; increased radiating pain with physical activity such as standing for ten minutes, sitting for 30 minutes, walking for half a block, climbing ten stairs, and lifting five to ten pounds; and difficulty with some activities of daily living including getting out of bed or the shower and putting on his pants.

Specifically, the Veteran's reports of radiating pain, muscle weakness, fatigue, give-way, spasms, falls, tingling, numbness, and the like, are clearly contemplated by the currently assigned rating criteria. In this regard, 38 C.F.R. § 4.120 notes that neurologic impairments are to be rated based impairment of motor, sensory, or mental function, to include trophic changes or sensory disturbances. The Veteran's falls, weakness, give-way, fatigue, and stiffness are all impairments of his motor function. Similarly, his reports of shooting or radiating pain, numbness, and tingling are examples of sensory disturbances. Such symptoms have been considered by the currently assigned rating criteria and are not so unusual or exceptional such that the available schedular evaluations are inadequate.

Next, the Board has considered whether the Veteran's use of a cane and a walker warrants extra-schedular consideration. While the use of an assistive device, such as a cane or a walker, is not specifically listed in the rating criteria for evaluating neurologic disabilities, assistive devices are provided to alleviate the presence of symptoms and/or functional limitations caused by an individual's disability. For

instance, a cane is provided to normalize an abnormal gait pattern that may be limited by pain, weakness, or decreased endurance. The symptoms that necessitate use of an assistive device are fully contemplated by the rating criteria and associated regulations, and the use of such assistive device directly addresses a veteran's functional limitations. *See* 38 C.F.R. §§ 4.40, 4.45, 4.59. The Board has fully considered the regular use of an assistive device in the Veteran's case as it relates to the symptomatology and functional independence associated with his right and left lower extremity sciatica, but finds that the use of such devices does not create an exceptional disability picture such that the rating criteria is inadequate.

Similarly, the Board finds that the Veteran's occasional need for assistance in getting out of bed or the shower due to weakness, give way, and pain as well as his inability to drive are contemplated by the rating criteria. Like the use of an assistive device, the physical support from his wife is rendered due a physical failure in his lower extremities, a symptom that is plainly contemplated by the currently assigned schedular rating as such includes consideration of physical impairment resulting from such neurological disabilities. *See* 38 C.F.R. § 4.120. Similarly, the Veteran reported at the August 2014 Board hearing that he is unable to drive, primarily due to spasms of his lower legs and his inability to sit for prolonged periods. These physical manifestations of his disabilities, as noted above, are fully contemplated by the currently assigned schedular ratings, which encompass physical manifestations of the Veteran's service-connected bilateral lower extremity sciatica.

Next, the Board must also consider whether the side effects of the Veteran's use of pain medication warrant referral for extra-schedular consideration. In this regard, the Veteran reported in a May 2016 affidavit (which was received by the Board in October 2016) that he experiences side effects associated with his use of narcotic pain medication, including feeling drowsy and having poor concentration. However, the Board finds that the evidence of record does not support this assertion. In this regard, while the Veteran reported the use of pain pills during VA examinations conducted in April 2007, September 2008, September 2009, April 2013, and August 2014; at the August 2014 Board hearing; and during an October 2015 Social and Industrial Survey, he did not report any side effects of such medication at those times. Additionally, while the Veteran reported experiencing

nausea related to his narcotic use in January 2012, he did not report feeling drowsy or the inability to concentrate. Furthermore, during subsequent January 2012 treatment, he denied experiencing any side effects. Finally, the Board notes that, in July 2009, the Veteran entered a Patient Agreement – For Opioid Treatment for Chronic Pain in which he specifically agreed to report any significant side effects related to his use of pain medication. Nevertheless, there is no indication prior to the May 2016 affidavit drafted in support of this appeal that the Veteran ever reported to any treatment provider, examiner, or the undersigned VLJ that he experienced drowsiness or a lack of concentration related to his use of pain medication. Thus, the Board finds that his recent report in this regard lacks credibility in light of the conflicting contemporaneous evidence of record and his failure to previously report these symptoms to treatment providers despite his contractual obligation to do so. *Buchanan v. Nicholson*, 451 F.3d 1331, 1336-1337 (2006) (the lack of contemporaneous medical records, the significant time delay between the affiants' observations and the date on which the statements were written, and conflicting statements of the veteran are factors that the Board can consider and weigh against a veteran's lay evidence).

The Board acknowledges that, in October 2016, the Veteran's representative submitted a September 2016 report from Dr. D.M. While Dr. D.M.'s credentials are notably impressive, his compiled findings do not indicate that the Veteran's right and left lower extremity sciatica are manifested by symptoms not contemplated by the currently assigned rating criteria. In this regard, Dr. D.M. reviewed and recited sections of the medical evidence currently of record and discussed by the Board in the May 2015 decision. Additionally, he conducted a phone interview with the Veteran during which the Veteran apparently reported radiating shock-like pain, paresthesias, numbness, his use of a cane and walker, and his need for assistance from his wife with certain activities of daily living. Ultimately, Dr. D.M stated that the Veteran's bilateral lower extremity sciatica was moderate to moderately severe in nature due to his pain, intermittent numbness, and paresthesias, straight leg raising positive bilaterally, the loss of ankle reflexes, and diminished sensory testing. However, the Board must once again note that the aforementioned symptoms are all contemplated by the currently assigned schedular ratings, which includes consideration of physical, sensory, and mental symptoms of

sciatica. Moreover, Dr. D.M. has not reported that the Veteran's symptoms are not contemplated by the currently assigned criteria. Instead, he has reported that, throughout the appeal period, the Veteran's symptoms warrant a higher *schedular* rating as indicated by his reference to moderate and moderately severe symptomatology, which are respectively assigned 20 and 40 percent ratings under Diagnostic Code 8520. *See* 38 C.F.R. § 4.124a. As noted in the JMR, while the presence of a higher available rating cannot support a decision not to refer a case for extra-schedular consideration, the fact that a medical examiner believes that a higher schedular rating is warranted is similarly not an indication that a case should be referred for extra-schedular consideration. On the contrary, it is an indication that the currently assigned rating criteria adequately capture the Veteran's symptomatology and level of impairment.

Tangentially, as the Board's May 2015 decision to deny higher initial schedular ratings for the Veteran's right and left lower extremity sciatica is final, the Veteran and his representative are advised that Dr. D.M.'s opinion may be submitted to the AOJ in support of a properly filed claim for an increased schedular rating for such disabilities.

Ultimately, the Rating 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. Here, the problems reported by the Veteran are specifically contemplated by the criteria discussed above, including the effect on his daily life. In contrast to his assertions, the evidence does not establish that the disability picture associated with his right and left lower extremity sciatica is exceptional such that the available schedular evaluations are inadequate. As such, the Board finds that referral of the claim based solely on the manifestations of the Veteran's service-connected right and left lower extremity sciatica is not warranted.

B. Extra-Schedular Consideration Based on the Collective Impact of Disabilities

The Board now considers whether referral for extra-schedular consideration is warranted based on the combined effects of the Veteran's service-connected disabilities. Notably, the Veteran is service-connected for degenerative arthritis of the lumbar spine, bilateral shoulder strain, and bilateral chondromalacia of the knees.

Initially, pursuant to the Court's holding in *Yancy*, the Board need only address the issue of entitlement to an extra-schedular rating for the combined effects of the Veteran's service-connected disabilities if the issue is argued by the claimant or is reasonably raised by the record. In this case, the parties to the JMR agreed that such issue has been raised based on an August 2014 VA examination finding that the Veteran had an antalgic gait related to his service-connected low back disability and bilateral lower extremity sciatica, and the Veteran's reports at the examination that certain physical and sedentary activities caused pain to radiate from his back to his legs.

Notably, because the only issue on appeal is entitlement to higher initial ratings for right and left lower extremity sciatica on an extra-schedular basis, any contention regarding the collective impact of the Veteran's disabilities must include his bilateral lower extremity sciatica, as his low back disorder, bilateral shoulder strain, and bilateral knee chondromalacia are not in appellate status. Stated differently, the propriety of the currently assigned ratings for the Veteran's back, bilateral shoulder, and bilateral knee disabilities is not before the Board, but a review of the rating schedule to determine whether it adequately contemplates the Veteran's current symptoms is necessary to determine if he has any symptomatology that is not currently being captured by one or more of his currently assigned ratings.

i. General Rating Principles

Disability of the musculoskeletal system is primarily the inability, due to damage or infection in parts of the system, to perform the normal working movements of the body with normal excursion, strength, speed, coordination and endurance.

Functional loss may be due to the absence or deformity of structures or other pathology, or it may be due to pain, supported by adequate pathology and evidenced by the visible behavior in 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. In *Mitchell v. Shinseki*, 25 Vet. App. 32 (2011), the Court held that, although pain may cause a functional loss, "pain itself does not rise to the level of functional loss as contemplated by VA regulations applicable to the musculoskeletal system." Rather, pain may result in functional loss, but only if it limits the ability "to perform the normal working movements of the body with normal excursion, strength, speed, coordination, or endurance." *Id*., quoting 38 C.F.R. § 4.40.

With respect to joints, in particular, the factors of disability reside in reductions of normal excursion of movements in different planes. Inquiry will be directed to more or less than normal movement, weakened movement, excess fatigability, incoordination, pain on movement, swelling, deformity or atrophy of disuse. 38 C.F.R. § 4.45.

In determining the degree of limitation of motion, the provisions of 38 C.F.R. §§ 4.10, 4.40, and 4.45 are for consideration. *See DeLuca v. Brown*, 8 Vet. App. 202 (1995).

ii. Low Back Disability

The Veteran's low back disability is rated pursuant to Diagnostic Code 5237-5243, under the General Rating Formula for Diseases and Injuries of the Spine or the Formula for Rating Intervertebral Disc Syndrome Based on Incapacitating Episodes.

Ratings under the General Rating Formula for Diseases and Injuries of the Spine are made with or without symptoms such as pain (whether or not it radiates), stiffness, or aching in the area of the spine affected by residuals of injury or disease. Such provides a 10 percent disability rating for forward flexion of the thoracolumbar spine greater than 60 degrees but not greater than 85 degrees; or, combined range of

motion of the thoracolumbar spine greater than 120 degrees but not greater than 235 degrees; or, muscle spasm, guarding, or localized tenderness not resulting in abnormal gait or abnormal spinal contour; or, vertebral body fracture with loss of 50 percent or more of the height. A 20 percent disability rating is assigned for forward flexion of the thoracolumbar spine greater than 30 degrees but not greater than 60 degrees; or, the combined range of motion of the thoracolumbar spine not greater than 120 degrees; or, muscle spasm or guarding severe enough to result in an abnormal gait or abnormal spinal contour such as scoliosis, reversed lordosis, or abnormal kyphosis. A 40 percent disability rating is assigned for forward flexion of the thoracolumbar spine 30 degrees or less; or, favorable ankylosis of the entire thoracolumbar spine. A 50 percent disability rating is assigned for unfavorable ankylosis of the entire thoracolumbar spine. A 100 percent disability rating is assigned for unfavorable ankylosis of entire spine. 38 C.F.R. § 4.71a.

Relevantly, Note (1) to the rating formula specifies that any associated objective neurologic abnormalities, including, but not limited to, bowel or bladder impairment, should be separately evaluated under an appropriate diagnostic code.

In the alternative, the Formula for Rating Intervertebral Disc Syndrome Based on Incapacitating Episodes provides that a 10 percent evaluation is warranted when there are incapacitating episodes having a total duration of at least one week but less than 2 weeks during the past 12 months. A 20 percent evaluation is warranted when there are incapacitating episodes having a total duration of at least 2 weeks but less than 4 weeks during the past 12 months. A 40 percent evaluation is warranted when there are incapacitating episodes having a total duration of at least 4 weeks but less than 6 weeks during the past 12 months. A 60 percent evaluation is warranted when there are incapacitating episodes having a total duration of at least 6 weeks during the past 12 months. Note (1) provides that an incapacitating episode is a period of acute signs and symptoms due to intervertebral disc syndrome that requires bed rest prescribed by a physician and treatment by a physician.

iii. Bilateral Shoulder Strain

The Veteran's bilateral shoulder strain is currently rated pursuant to Diagnostic Code 5024 for tenosynovitis, which provides that such disability is to be rated on the basis of limitation of motion of the affected part. 38 C.F.R. § 4.71a, Diagnostic Code 5024.

iv. Bilateral Knee Chondromalacia

The Veteran's bilateral knee chondromalacia is rated pursuant to Diagnostic Code 5261, which contemplates loss of extension of the knee. Such provides for a zero percent evaluation where extension of the leg is limited to five degrees. A 10 percent evaluation requires extension limited to 10 degrees. A 20 percent evaluation is warranted where extension is limited to 15 degrees. A 30 percent evaluation may be assigned where the evidence shows extension limited to 20 degrees. For a 40 percent evaluation, extension must be limited to 30 degrees. Finally, where extension is limited to 45 degrees, a 50 percent evaluation may be assigned.

v. Analysis of Extra-schedular Consideration

In a September 2016 submission, the Veteran's representative asserted that the Veteran's service-connected low back disability caused his right and left lower extremity sciatica and his bilateral knee chondromalacia aggravated this condition, and therefore, referral for extra-schedular consideration pursuant to *Johnson, supra*, is required. In support thereof, his representative noted the Veteran's reports of radiating pain through multiple body parts, paresthesia, instability, loss of muscle tone, numbness, and back pain that escalates his lower-extremity symptomatology. Additionally, it was again reported that the Veteran uses a cane/walker, takes pain medication, is unable to drive, and he receives assistance with activities of daily living such as getting out of bed or the shower.

While the Board acknowledges the Veteran's sincerely held belief that the combined effects of his service-connected disabilities render him more disabled

than contemplated by his currently assigned ratings for each individual disability, the Board finds that referral for extra-schedular consideration based on the combined effects of the Veteran's service-connected disabilities is not warranted.

Initially, for the reasons stated previously, the Board finds that the Veteran's May 2016 report that he experiences drowsiness and poor concentration related to his use of pain medications lack credibility based on the conflicting evidence in the record.

In regard to the reports that the Veteran's combined disabilities result in physical symptoms such as radiating pain through multiple body parts, paresthesia, instability, loss of muscle tone, numbness, and back pain that escalates his lower-extremity symptomatology, the Board finds that such symptoms are contemplated by the currently assigned rating criteria. First, the intent of the Rating Schedule is to recognize actually painful, unstable or malaligned joints, due to healed injury. 38 C.F.R. § 4.59. Thus, the Veteran's reports of pain are contemplated by the rating schedule. Second, as noted above, disability of the musculoskeletal system is primarily the inability, due to damage or infection in parts of the system, to perform the normal working movements of the body with normal excursion, strength, speed, coordination and endurance. Therefore, the Veteran's reports of weakness; reduced stability; reduced range of motion; and reduced ability to sit, stand, walk, or lift are also contemplated by the rating criteria. Specifically, the criteria related to the Veteran's low back disability consider limitations of motion, antalgic gaits, spinal deformities, and even specifically call for separate ratings for neurologic disorders associated with back disorders.

In fact, as is the case here, many veterans are assigned separate ratings for neurologic impairments associated with service-connected back disorders. Thus, the Veteran's representative's assertion that the Veteran's pain (especially radiating pain), numbness, and paresthesias are not contemplated by the currently assigned evaluations is contrary to the plain reading of the Rating Schedule. In fact, if taken to the extreme, the Veteran's argument would mean that every veteran who is service-connected for a low back disability and an associated neurologic disorder should be referred for extra-schedular consideration. Such a system would be directly contrary to the hallmarks of extra-schedular ratings: that they are unique,

exceptional, and the symptoms reported are not already contemplated by the Rating Schedule.

Similarly, the assigned rating schedules adequately contemplates the Veteran's instability and fatigue for which he uses assistive devices. As noted above, assistive devices are provided to alleviate the presence of symptoms and/or functional limitations caused by an individual's disability, the symptoms that necessitate use of an assistive device are fully contemplated by the rating criteria and associated regulations, and the use of such assistive devices directly addresses a veteran's functional limitations. *See* 38 C.F.R. §§ 4.40, 4.45, 4.59; *see also DeLuca*, 8 Vet. App. 202. Moreover, the rating criteria would also allow for a compensable rating for limitation of extension, limitation of flexion, and instability of the knee if adequately supported by the medical evidence of record and claimed by the Veteran. *See* VAOPGCPREC 9-04 (September 17, 2004), published at 69 Fed. Reg. 59, 990 (2004); VAOPGCPREC 23-97 (July 1, 1997), published at 62 Fed. Reg. 63, 604 (1997); VAOPGCPREC 9-98, 63 Fed. Reg. 56, 704 (1998).

As to the Veteran's reports that his service-connected disabilities cause him weakness and incoordination necessitating assistance from his spouse with certain activities of daily living, the Board again finds that such symptomology does not indicate that evaluation of the individual conditions fails to capture all of the symptoms associated with his service-connected disabilities. In this regard, his need for assistance is due to physical failure in his lower extremities, a symptom that is plainly contemplated by the currently assigned ratings for his right and left lower extremity sciatica and bilateral knee chondromalacia, which, as noted above, consider loss of movement, loss of stability, weakness, lack of endurance, and abnormal mobility of the joints and body parts in general.

Ultimately, in this case, the sum of the parts equals the whole. The Veteran's symptoms have been considered by the rating criteria assigned to his currently service-connected disabilities. There is no indication that the Veteran experiences any unique symptoms that have not been considered in the myriad of diagnostic codes dedicated to disabilities of the body. To the extent that the Veteran's collective disabilities do impact his employment, such prong of *Thun* need not be

reached as there has been no showing that the rating criteria do not account for his particular symptoms of his service-connected disabilities, either individually or collectively. The preponderance of the evidence is against the Veteran's claim, and there is no doubt to be resolved. For the reasons described above, initial ratings in excess of 10 percent for right and left lower extremity sciatica on an extra-schedular basis pursuant to 38 C.F.R. § 3.321, to include as due to the collective impact of all of the Veteran's service-connected disabilities, is not warranted.

ORDER

Initial ratings in excess of 10 percent for right and left lower extremity sciatica on an extra-schedular basis pursuant to 38 C.F.R. § 3.321, to include as due to the collective impact of all of the Veteran's service-connected disabilities, are denied.

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A. JAEGER
Veterans Law Judge, Board of Veterans' Appeals

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).