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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 15-4290

CHARLES R. BLANCHARD, APPELLANT,

V.

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

Before PIETSCH, *Judge*.

MEMORANDUM DECISION

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

PIETSCH, *Judge*: The appellant, Charles R. Blanchard, appeals through counsel an October 8, 2015, Board of Veterans' Appeals (Board) decision in which the Board denied him entitlement to a compensable disability rating for bilateral hearing loss for the period prior to November 3, 2011. Record (R.) at 2-9. This appeal is timely and the Court has jurisdiction over the matters on appeal pursuant to 38 U.S.C. §§ 7252(a) and 7266. Single-judge disposition is appropriate when the issues are of "relative simplicity" and "the outcome is not reasonably debatable." *Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the reasons that follow, the Court will vacate the Board's decision and remand the matters on appeal for further proceedings consistent with this decision.

I. BACKGROUND

The appellant served on active duty in the U.S. Army from May 1953 until May 1956. R. at 2, 27, 510. On September 30, 2005, he filed a claim for entitlement to disability benefits for hearing loss and tinnitus. R. at 509-18. In February 2006, a VA medical examiner reviewed his case and reported the results of audiometric testing conducted to determine his hearing acuity. R. at 471.

In July 2009, the Board granted the appellant entitlement to disability benefits for tinnitus. R. at 317-27. In August 2009, the VA regional office (RO) implemented the Board's decision and assigned his disorder a 10% disability rating effective September 30, 2005. R. at 312-14.

According to a November 3, 2011, examination report, a VA medical examiner performed audiometric testing on the appellant and concluded that he has hearing loss that likely is linked to his active service. R. at 152-54. In November 2011, the RO granted the appellant entitlement to disability benefits for bilateral hearing loss and assigned his disorder a noncompensable disability rating effective September 30, 2005. R. at 143-48. In January 2012, the RO determined that it erred in its earlier decision and assigned the appellant's bilateral hearing loss a 10% disability rating effective November 3, 2011. R. at 117-20. In February 2012, the appellant challenged the RO's decision. R. at 109. He asserted that the effective date for the 10% disability rating assigned to his disorder should be September 30, 2005. *Id.*

On October 8, 2015, the Board issued the decision here on appeal. R. at 2-9. The Board concluded that the appellant is not entitled to a compensable schedular disability rating for his hearing loss prior to November 3, 2011, and that his case should not be referred to an appropriate agency official for extraschedular consideration. The appellant challenges both conclusions on appeal.

II. ANALYSIS

A. Schedular Disability Rating

When VA assigns a schedular disability rating to a veteran's hearing loss, it generally is required by law to base its decision entirely on audiometric testing results. *Lendenmann v. Principi*, 3 Vet.App. 345, 349 (1992); 38 C.F.R. §§ 4.85 (2016), 4.86 (2016). The record in this case contains the results of audiometric testing performed on the appellant in February 2006 and November 2011. The February 2006 results, the Board concluded, demonstrate that the appellant had noncompensable hearing loss on the date when they were obtained. By November 2011, it acknowledged, his results qualified him for a compensable disability rating.

The appellant does not challenge the Board's conclusion that his February 2006 testing results indicate that he was not entitled to a compensable disability rating at that time. The Court, therefore,

will not review it. *See Cacciola v. Gibson*, 27 Vet.App. 45, 56-57 (2014) (when an appellant abandons an issue, the Court will not decide it); *Ford v. Gober*, 10 Vet.App. 531, 535 (1997) (arguments not raised before the Court are considered abandoned on appeal).

The appellant asserts that his hearing loss became compensable some time between 2006 and 2011 and that the Board should have attempted to pinpoint when that event occurred. He argues that the Board should have obtained a medical opinion identifying the date when he likely first qualified for a 10% disability rating.

The effective date for a disability rating compensating a veteran for hearing loss may be earlier than the date of the audiometric test on which that disability rating is based. *Swain v. McDonald*, 27 Vet.App. 219, 225 (2015) ("[T]he effective date for an increased rating, indeed, as well as for an initial rating or for staged ratings, is predicated on when the increase in the level of hearing loss can be ascertained.").

"[I]f a disability rating cannot be awarded based on the available evidence, the Board must determine if a medical opinion is necessary to make a decision on the claim." *Chotta v. Peake*, 22 Vet.App. 80, 85 (2008). In certain circumstances, "a retrospective medical opinion *may* be necessary and helpful." *Id.* "To determine if a medical opinion or examination is necessary, the Board must consider whether there is competent medical or lay testimony that indicates that a higher disability rating may be appropriate." *Id.*

The only evidence that the Board relied upon to establish that a noncompensable disability rating is appropriate prior to November 2011 is the February 2006 audiometric test results. The Board projected those results five years forward in time to cover the entire period in question.

Record evidence suggests that the appellant's hearing may have deteriorated prior to November 2011. In August 2011, a private care provider wrote a letter supporting the appellant's assertions. R. at 180-82. She stated that "as the years have passed, later audiometric evaluations do show continued loss in low frequency side of the charts." ¹ R. at 180. The record also contains the

¹ The record contains one full and one partial set of audiometric test results from testing conducted by the appellant's private care provider. R. at 159, 183. The Board concluded that it is "unaware of any" "existing evidence that could be obtained to substantiate the claim." R. at 5. It did not discuss whether there may be outstanding audiometric testing results in the private provider's possession that the Secretary has not obtained and placed in the record.

results of audiometric testing conducted by that same provider on October 5, 2011. Those results appear to be similar to those obtained by the November 2011 examiner. R. at 152, 159.

The Board concluded that the appellant's "private medical records do not show any evidence of additional hearing loss treatment or otherwise provide information required for rating purposes." R. at 8. After considering the appellant's lay statements, the Board wrote that "there is no other evidence showing sufficient hearing impairment to warrant a compensable rating prior to November 3, 2011." *Id.* The Board did not discuss the evidence cited above, weigh its probative value, and determine whether it indicates that an additional medical inquiry is necessary. The Court agrees with the appellant that it should do so on remand. *See Thompson v. Gober*, 14 Vet.App. 187, 188 (2000) (stating that the Board must provide an adequate statement of reasons or bases "for its rejection of any material evidence favorable to the claimant").

B. Extraschedular

Pursuant to 38 C.F.R. § 3.321(b)(1), in

the exceptional case where the schedular evaluations are found to be inadequate, the Under Secretary for Benefits or the Director, Compensation Service, upon field station submission, is authorized to approve on the basis of the criteria set forth in this paragraph an extra-schedular evaluation commensurate with the average earning capacity impairment due exclusively to the service-connected disability or disabilities. The governing norm in these exceptional cases is: 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 as to render impractical the application of the regular schedular standards.

38 C.F.R. § 3.321(b)(1) (2016).

The Court has reduced this regulation to a three-part test. First, the "threshold factor" is whether "the evidence before VA presents such an exceptional disability picture that the available schedular evaluations for that service-connected disability are inadequate." *Thun v. Peake*, 22 Vet.App. 111, 115 (2008). To determine whether the evidence presents an "exceptional disability picture," the adjudicator must compare

the level of severity and symptomatology of the claimant's service-connected disability with the established criteria for that disability. . . . [I]f 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.

Id.

If, however, the severity and symptomatology of the appellant's disability are unusual, then the adjudicator should proceed to the second step of the inquiry. *Id.* at 115-16. Under the second step, the Board "must determine whether the claimant's exceptional disability picture exhibits other related factors such as those provided by the regulation as 'governing norms.'" *Id.* at 116. If such governing norms as marked interference with employment or frequent periods of hospitalization exist, then the matter must be referred to an appropriate VA official to determine whether, "to accord justice," an extraschedular disability rating should be assigned. *Id.*

In *Johnson v. McDonald*, 762 F.3d 1362, 1365 (Fed. Cir. 2014), the U.S. Court of Appeals for the Federal Circuit concluded that "§ 3.321(b)(1) provides for referral for extra-schedular consideration based on the collective impact of multiple disabilities." In *Yancy v. McDonald*, the Court held that the Board is only required to conduct an extraschedular analysis in the manner mandated by *Johnson* "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." 27 Vet.App 484, 495 (2016).

The Board's statement of reasons or bases supporting its conclusion that referral of the appellant's claim to an appropriate agency official for extraschedular consideration is not warranted reads as follows:

The manifestation of the [appellant's] disability, hearing impairment, is contemplated by the schedular criteria. The Board acknowledges that the [appellant] has difficulty understanding conversational speech. Nevertheless, his level of hearing impairment is specifically contemplated by the schedular criteria, and the Board has no reason to believe that the average industrial impairment from his level of hearing impairment reached a compensable degree during the period at issue.

R. at 8.

The Board's statement of reasons or bases is deficient for a few reasons. First, the Board may have conflated the schedular and extraschedular analyses. The question is not whether the appellant's "hearing impairment reached a compensable degree" if, by that, the Board meant

compensable under the schedular rating criteria. *Id.* The question is whether the appellant's "disability picture" is so unusual that the schedular rating criteria fail to account for all of its features. 38 C.F.R. § 3.321(b)(1).

Second, the Board failed to consider evidence that may indicate that the symptoms of the appellant's hearing loss are more severe than those contemplated by the schedular rating criteria. *See Martinak v. Nicholson*, 21 Vet.App. 447, 455 (2007) ("Unlike the rating schedule for hearing loss, § 3.321(b) does not rely exclusively on objective test results to determine whether a referral for an extraschedular rating is warranted").

The November 2011 examiner stated that the appellant's hearing loss "impact[s] ordinary conditions of daily life, including ability to work." R. at 155. According to the examiner, the appellant reported that "I don't go out socializing anymore because I don't understand anyone" and "I don't answer questions anymore because I'm afraid I'll answer wrong." *Id.* Also, in 2004, the appellant reported that his disorder affects his ability to communicate in one-on-one situations and in small groups, makes it difficult for him to enjoy television or other entertainment options, causes him to struggle to hear when background noise and environmental sounds are present, has negative effects on his social life, is annoying and upsetting, and affects his "enjoyment of life." R. at 525. According to a March 2004 treatment note, the appellant compensates for his hearing loss "by reading lips." R. at 432. The Board should have discussed this evidence.² *See Thompson*, 14 Vet.App. at 188.

Finally, the Board failed to mention *Johnson*. As noted above, the Board must apply *Johnson* when a *Johnson* issue is specifically argued by the appellant or is implicated by the evidence in the record. *Yancy*, 27 Vet.App. at 495. In *Yancy*, the evidence showed that the service-connected disorders that the veteran experienced combined to cause him to be unable to stand or sit. 27 Vet.App. at 496. The Court found that evidence to be sufficient to reasonably raise entitlement

² A panel likely will soon issue a precedential decision in *Doucette v. McDonald*, No. 15-2818 (argued Nov. 2, 2016) that will provide guidance to the Board about how it should weigh functional limitations caused by a veteran's hearing loss in the extraschedular context. Because there is no evidence that the Board ever considered the evidence discussed here, the Court will not stay this case to await the outcome of *Doucette*. The parties and the Board should be aware, however, that *Doucette* may affect the manner in which the Board should discuss the evidence listed above when it reviews this case on remand.

to an extraschedular disability rating on a collective basis, and it instructed the Board to apply *Johnson*. *Id.*

The facts in this case are comparable to those in *Yancy*. The appellant is entitled to receive disability benefits for tinnitus. The November 2011 examiner stated that the appellant's tinnitus is at least as likely as not "a symptom associated with the hearing loss." R. at 156. The appellant also described how his tinnitus affects his hearing. R. at 157. The Court concludes, therefore, that he Board should have considered whether the appellant is entitled to referral for extraschedular consideration for the combined effects of his hearing loss and tinnitus in the manner prescribed by *Johnson*.

C. Other Matters

The Court need not at this time address any other arguments that the appellant has raised. *See Best v. Principi*, 15 Vet.App. 18, 20 (2001) (per curiam order) (holding that "[a] narrow decision preserves for the appellant an opportunity to argue those claimed errors before the Board at the readjudication, and, of course, before this Court in an appeal, should the Board rule against him"). On remand, the appellant is free to submit additional evidence and argument on the remanded matter, and the Board is required to consider any such relevant evidence and argument. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002); *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order). The Court has held that "[a] remand is meant to entail a critical examination of the justification for the decision." *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991). The Board must proceed expeditiously, in accordance with 38 U.S.C. § 7112 (requiring the Secretary to provide for "expeditious treatment" of claims remanded by the Court).

III. CONCLUSION

After consideration of the appellant's and the Secretary's briefs and a review of the record, the Board's October 8, 2015, decision is VACATED and the matters on appeal are REMANDED for further proceedings consistent with this decision.

DATED: December 29, 2016

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