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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 15-2906

JERRY R. HODGES, APPELLANT,

V.

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

Before HAGEL, *Senior Judge*.¹

MEMORANDUM DECISION

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

HAGEL, *Senior Judge*: Jerry R. Hodges appeals through counsel a June 12, 2015, Board of Veterans' Appeals (Board) decision that denied entitlement to a disability rating in excess of 10% for tinnitus.² Mr. Hodges's Notice of Appeal was timely, and the Court has jurisdiction to review the Board decision pursuant to 38 U.S.C. § 7252(a). The parties neither requested oral argument nor identified issues that they believe require a precedential decision of the Court. Because the Board inadequately explained its conclusion that VA satisfied its duty to assist, the Court will vacate the

¹ Judge Hagel is a Senior Judge acting in recall status. *In re: Recall of Retired Judge*, U.S. VET. APP. MISC. ORDER 15-16 (Dec. 21, 2016).

² The Board remanded the matter of entitlement to a compensable disability rating for bilateral hearing loss for further development, and that matter is not before the Court at this time. *See* 38 U.S.C. § 7266(a) (stating that the Court reviews only final decisions of the Board); *see also Howard v. Gober*, 220 F.3d 1341, 1344 (Fed. Cir. 2000) (Board remand does not constitute a final decision that may be appealed (citing 38 C.F.R. § 20.1100(b) (1999))).

The Board also referred claims for benefits for headaches, an acquired psychiatric disorder claimed as anxiety and depression, and insomnia, all claimed as secondary to service-connected tinnitus. In the absence of any challenge to the propriety of those referrals, those matters are not before the Court at this time. *See Link v. West*, 12 Vet.App. 39, 47 (1998) ("Claims that have been referred by the Board to the [regional office] are not ripe for review by the Court."); *but see Young v. Shinseki*, 25 Vet.App. 201 (2012) (en banc order) (holding that the Court has limited jurisdiction to review the propriety of referring rather than remanding a claim where the appeal is otherwise properly before the Court).

June 2015 Board decision and remand the matter for further development, if necessary, and readjudication consistent with this decision.

I. FACTS

Mr. Hodges served on active duty in the U.S. Marine Corps from February 1975 to February 1979. His military occupational specialty was military policeman.

In May 1979, a VA regional office granted Mr. Hodges's claims for disability compensation benefits for tinnitus, assigning the maximum 10% disability rating for that condition, and left ear hearing loss, assigning a noncompensable disability rating.

At an August 2010 VA audiological examination conducted in conjunction with a claim for an increased disability rating for bilateral hearing loss,³ Mr. Hodges reported bilateral hearing loss and tinnitus and stated that he had difficulty understanding speech in the presence of background noise. In September 2010, the regional office continued the noncompensable disability rating for bilateral hearing loss. In a January 2011 Notice of Disagreement with that decision, Mr. Hodges advised VA that his service-connected tinnitus had begun to affect his ability to hear. He reported that his symptoms had persisted for years and had begun to worsen. In particular, he wrote that the ringing in his ears often prevented him from sleeping and that tinnitus, along with several other conditions, prevented him from working.

In February 2011, VA advised Mr. Hodges that it was developing his claim for an increased disability rating for tinnitus, in addition to other claims. In March 2011, Mr. Hodges reiterated that the ringing in his ears was getting worse, to the point that it was "affecting [his] total hearing." R. at 113.

Later in March 2011, the regional office continued the 10% disability rating assigned for bilateral tinnitus. The regional office advised Mr. Hodges that 10% is the maximum schedular disability rating for tinnitus and determined that he had not demonstrated that his disability picture was so exceptional as to warrant referral for consideration of an extraschedular disability rating. In

³ The May 1979 rating decision is clear that a noncompensable disability rating was assigned for left ear hearing loss, and the regional office concluded that the hearing in Mr. Hodges's right ear was "essentially normal." Record (R.) at 272. It is unclear from the record when VA recharacterized Mr. Hodges's condition as bilateral hearing loss.

his April 2012 Notice of Disagreement with that decision, Mr. Hodges stated that the ringing in his right ear had gotten worse. He wrote,

The high-pitched ringing, buzzing, and humming keeps me up at night and the next day I am sluggish, tired, [and] have no energy. I find it hard to sleep or concentrate[.] [I]t rings constantly. I have headaches, depressive mood swings, testiness, and a constant state of anxiety. . . . I find it hard to have a conversation in public or when other sounds are in the room.

R. at 81, 83.

In July 2013, Mr. Hodges underwent another VA audiological examination, performed by audiologist Kelsey Jackson. Mr. Hodges reported constant bilateral tinnitus that he said sounded like a tuning fork. He stated that his tinnitus kept him awake at night and affected his ability to work. He also reported that his hearing loss affected his ability to work.

In his August 2013 Substantive Appeal to the Board, Mr. Hodges wrote:

This high-pitched ringing, buzzing[, and] humming in my ears keeps me up at nights. The next day I feel sluggish, tired with no energy to make it through the day. I can't sleep, concentrate from this constant ringing. I can't hide from it and it drives me nuts. Depression, headaches, mood swings, I'm in a constant state of anxiety most of the time due to the tenacity of tinnitus. Now tell me this does not affect and interfere with employment. This has gone on for years [and] I can tell it's gotten wors[e].

R. at 30-31.

In June 2015, the Board issued the decision on appeal, denying entitlement to a higher schedular disability rating for bilateral tinnitus and declining to refer the claim for consideration of entitlement to an extraschedular disability rating. This appeal followed.

II. ANALYSIS

On appeal, Mr. Hodges argues that the Board erred in finding that VA satisfied its duty to assist because it failed to order a new audiological examination in light of his assertions that his bilateral tinnitus continues to worsen. He notes that the Board remanded his claim for a compensable disability rating for bilateral hearing loss for a new examination and contends that it was error to fail to remand his claim for benefits for tinnitus for the same reason, particularly in light of his statement that his worsening tinnitus is the cause of his worsening hearing. Mr. Hodges

acknowledges that an examination could yield no information to support a higher schedular disability rating for tinnitus, as 10% is the maximum schedular disability rating available for that condition. Instead, he contends that an examination "could show that his condition presented something exceptional or unusual" that might necessitate referral for consideration of entitlement to an extraschedular disability rating. Appellant's Brief (Br.) at 7.

The entirety of the Board's discussion of VA's duty to assist as it pertains to medical examinations reads: "The July 2013 VA examiner reviewed the claims file and all pertinent medical evidence, examined [Mr. Hodges], and provided a clear assessment of the severity of [his] service-connected tinnitus. The July 2013 VA examination report is adequate for the Board to determine the issue on appeal." R. at 5-6. It appears that, because the Board found that "there is no legal basis upon which to award a disability rating in excess of 10[%]," the Board concluded that no examination for tinnitus was necessary. R. at 6-7. The Court concludes that this misapprehension of the law—which ignores the possibility of an extraschedular disability rating for tinnitus and essentially concludes that an examination is only relevant to a schedular evaluation—renders the Board's explanation for its conclusion that VA satisfied its duty to assist inadequate. *See* 38 U.S.C. § 7104(d)(1).

The Board acknowledged that Mr. Hodges alleged that his bilateral hearing loss had worsened and that his last examination for that condition was in July 2013. The Board determined that the assertion of worsening, coupled with the passage of nearly two years since the most recent examination, warranted remand for a new examination to assess the severity of that condition. R. at 10 (citing *Palczewski v. Nicholson*, 21 Vet. App. 174, 181-82 (2007); *Caffrey v. Brown*, 6 Vet. App. 377 (1994); 38 C.F.R. § 3.327(a) (2014)). It seems likely, given the similarities between Mr. Hodges's allegations of worsening and the timing of the last examination, that, but for the Board's focus on the fact that Mr. Hodges is already in receipt of the maximum schedular rating for tinnitus, the Board would have concluded that additional development was necessary for tinnitus as well. It is, as Mr. Hodges posits, entirely possible that a new audiological examination to evaluate the severity of Mr. Hodges's tinnitus could yield new information relevant to the determination of whether the 10% schedular disability rating currently assigned for that condition is adequate,

specifically whether Mr. Hodges's disability picture is exceptional or unusual or markedly interferes with employment. *See* 38 C.F.R. § 3.312(b)(1) (2016).

The Court notes that the Secretary did not address Mr. Hodges's argument in his brief. He simply argued that there was no error, prejudicial or otherwise, in the Board's determination that VA satisfied its duty to assist because Mr. Hodges is in receipt of the maximum schedular disability rating for tinnitus. *See* Secretary's Br. at 4-6. In addition, the Secretary incorrectly asserts that Mr. Hodges did not explain "to what end" new evidence might be obtained from a new examination. *Id.* at 5. The Court is at a loss to explain the Secretary's failure to address the argument raised by Mr. Hodges over three pages of his opening brief. It is not necessary in this case in light of the Court's conclusion that the Board's reasons or bases are inadequate, but failure to respond to an argument raised by an appellant can constitute a concession of the point on the part of the Secretary. *See MacWhorter v. Derwinski*, 2 Vet.App. 133, 136 (1992) ("Where appellant has presented a legally plausible position . . . and the Secretary has failed to respond appropriately, the Court deems itself free to assume . . . the points raised by appellant[] and ignored by the General Counsel[] to be conceded.").

The Court acknowledges that Mr. Hodges raises other arguments related to the Board's determination that referral for consideration of entitlement to an extraschedular disability rating is not warranted. In light of the fact that the Court has determined that the Board failed to adequately consider whether all necessary development has been completed, the Court will not address those arguments at this time. *See Best v. Principi*, 15 Vet.App. 18, 20 (2001) (per curiam order) ("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."). Suffice it to say that, on remand, the Board will expressly consider whether referral for consideration of entitlement to an extraschedular disability rating is warranted not only on the basis of tinnitus alone, but also on the basis of the collective impact of Mr. Hodges's service-connected disabilities, as he has now expressly raised this issue. *See Yancy v. McDonald*, 27 Vet.App. 484, 495-96 (2016). The Board will also address the other arguments Mr. Hodges raises in his briefs.

On remand, Mr. Hodges is free to submit additional evidence and argument in accordance with *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order). See *Kay v. Principi*, 16 Vet.App. 529, 534 (2002). "A remand is meant to entail a critical examination of the justification for the decision" by the Board. *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991). In addition, the Board shall proceed expeditiously, in accordance with 38 U.S.C. § 7112 (expedited treatment of remanded claims).

III. CONCLUSION

Upon consideration of the foregoing, the June 12, 2015, Board decision is VACATED, and the matter is REMANDED for further development, if necessary, and readjudication consistent with this decision.

DATED: December 29, 2016

Copies to:

Angela Bunnell, Esq.

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