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

No. 15-3473

ARDELLA ANDERSON, APPELLANT,

v.

ROBERT D. SNYDER,  
ACTING SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before LANCE, *Judge*.

**MEMORANDUM DECISION**

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

LANCE, *Judge*: The appellant, Ardella Anderson, served in the U.S. Army from September 1983 to February 2005. Record (R.) at 290. She appeals, through counsel, a July 21, 2015, Board of Veterans' Appeals (Board) decision that, in part, denied entitlement to an initial disability rating greater than 10% for right hallux valgus with degenerative joint disease (DJD), bursitis, and exostosis; an initial compensable rating for right mallet toes; and an initial rating greater than 30% for irritable bowel syndrome (IBS), each on an extraschedular basis. R. at 2-20. Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). This appeal is timely, and the Court has jurisdiction over the case pursuant to 38 U.S.C. §§ 7252(a) and 7266.

For the reasons that follow, the Court will vacate those portion of the July 21, 2015, decision denying entitlement to an initial rating higher than 10% for right hallux valgus, an initial compensable rating for right mallet toes, and an initial rating higher than 30% for IBS, each on an extraschedular basis, and remand those matters for further proceedings consistent with this decision. As the appellant presents no argument concerning the Board's denial of entitlement to a total disability rating based upon individual unemployability, the Court holds that she has abandoned that matter and will dismiss the appeal as to that issue. *See Pederson v. McDonald*, 26 Vet.App. 276, 285 (2015) (en banc).

By way of background, in May 2011, the Board remanded the appellant's hallux valgus, mallet toe, and IBS claims, as "the evidence suggests consideration of extraschedular ratings." R. at 285. The Board directed the VA regional office, after additional development, to "[r]efer the claims for extraschedular ratings to the Under Secretary for Benefits or to the Director of Compensation and Pension as provided for in 38 C.F.R. § 3.321." R. at 287. In a March 2014 decision, the Director denied an extraschedular evaluation for the appellant's hallux valgus, mallet toes, and IBS. R. at 44-45.

On appeal, the appellant contends, and the Court agrees, that the Board failed to provide an adequate statement of reasons or bases to support its determinations that extraschedular ratings were not warranted for her foot disabilities and IBS. Appellant's Brief (Br.) at 8-23; *see* 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995) (holding that the Board's statement of reasons or bases for its decision "must be adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate informed review in this Court"); *see also Kuppamala v. McDonald*, 27 Vet.App. 447, 458 (2015) ("The Board reviews the entirety of the Director's decision de novo and is thus authorized to assign an extraschedular [evaluation] when appropriate.").<sup>1</sup>

An extraschedular rating is appropriate where the case presents an exceptional or unusual disability picture with such related factors as frequent periods of hospitalizations or marked interference with employment. 38 C.F.R. § 3.321(b) (2016). "The determination of whether a claimant is entitled to an extraschedular rating . . . is a three-step inquiry." *Thun v. Peake*, 22 Vet.App. 111, 115 (2008), *aff'd sub nom. Thun v. Shinseki*, 572 F.3d 1366 (Fed. Cir. 2009); *see Anderson v. Shinseki*, 22 Vet.App. 423, 427 (2009) (clarifying that, although the Court in *Thun* identified three "steps," they are, in fact, necessary "elements" of an extraschedular rating). The first step in the inquiry is to determine whether "the evidence before VA presents such an exceptional disability picture that the available schedular evaluations for that service-connected disability are inadequate." *Thun*, 22 Vet.App. at 115; *see Sowers v. McDonald*, 27 Vet.App. 472, 478 (2016) ("The rating schedule must be deemed inadequate before extraschedular consideration is warranted.").

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<sup>1</sup> The Court notes that it issued its decision in *Kuppamala* five months after VA issued the Board decision on appeal.

"Therefore, initially, 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." *Thun*, 22 Vet.App. at 115. If the adjudicator determines that the available schedular ratings are inadequate, 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. Then, if the first two steps have been satisfied, the adjudicator must refer the claim to the Under Secretary for Benefits or the Director of the Compensation Service for a determination of whether an extraschedular rating is warranted. *Id.*

In the decision on appeal, the Board found "that the [appellant]'s symptomatology is fully addressed by the rating criteria under which such disabilities are rated." R. at 14. With respect to the appellant's foot disabilities, the Board determined "that the service-connected right hallux valgus . . . and right mallet toes are addressed by the rating criteria under which such disabilities are rated, as 38 C.F.R. § 4.71a, Diagnostic Code [(DC)] 5280 specifically contemplates severe as well as post-surgical residuals of hallux valgus and [DC]5282 contemplates hammer toes of all toes without claw foot." *Id.* The Board concluded that "the 10 percent rating for right hallux valgus currently assigned contemplates the overall functional loss from the [appellant]'s symptomatology attributable to her disability, to include pain and limited mobility" and that "a higher rating under [DC] 5282 is available when there is hammer toe of all toes, which is not the case here." *Id.* With respect to the appellant's IBS, the Board explained that "the rating criteria under 38 C.F.R. § 4.114, [DC] 7319 clearly address the whole of the symptoms referable to IBS" as "[t]he rating criteria contemplate severe symptoms of diarrhea and constipation with more or less constant abdominal distress." *Id.* The Board further explained that "[t]here are no additional symptoms for this disorder." *Id.*

The Board's discussion of the first *Thun* elements for both of the appellant's foot disabilities and IBS simply recites the language of the respective diagnostic code at issue without providing any analysis as to why her individual symptomatology is contemplated by the respective rating criteria. R. at 14. Indeed, for the appellant's foot disabilities, the Board fails to explain how her "pain and limited mobility" are contemplated by her current schedular ratings. *Id.*; Appellant's Br. at 19. Similarly, for her IBS, the Board fails to explain how her accidents associated with her IBS are

contemplated by her current schedular rating. R. at 14; Appellant's Br. at 14; *see* R. at 925. The Board's terse analysis does not address the symptomatology resulting from her foot disabilities or IBS, and the Board's statement of reasons or bases is therefore inadequate. *See* 38 U.S.C. § 7104(d)(1); *Allday*, 7 Vet.App. at 527. Although the Secretary now attempts to explain how the appellant's symptoms are contemplated by her assigned disability ratings, Secretary's Br. at 7, 12-13, his arguments are unavailing as, absent the Board's discussion of this evidence in the first instance, they amount to post hoc rationalizations, which the Court cannot accept. *See Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 156 (1991) ("[L]itigating positions' are not entitled to deference when they are merely appellate counsel's 'post hoc rationalizations' for agency action."). As the Board failed to provide an adequate statement of reasons or bases to support its determination that referral for extraschedular consideration was not warranted for the appellant's service-connected hallux valgus, mallet toes, and IBS, the Court will vacate the Board's decision with respect to these matters and remand it for further proceedings. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) (holding that remand is the appropriate remedy "where the Board has . . . failed to provide an adequate statement of reasons or bases for its determinations").

In light of this outcome, the Court will not address the appellant's remaining arguments. *See Quirin v. Shinseki*, 22 Vet.App. 390, 396 (2009). On remand, the appellant is free to submit additional evidence and argument, including the arguments raised in her briefs to this Court, in accordance with *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order), and the Board must consider any such evidence or argument submitted. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002). The Board shall proceed expeditiously, in accordance with 38 U.S.C. §§ 5109B and 7112 (requiring the Secretary to provide for "expeditious treatment" of claims remanded by the Board or the Court).

After consideration of the parties' briefs and a review of the record, those parts of the Board's July 21, 2015, decision denying entitlement to an initial rating higher than 10% for right hallux valgus, an initial compensable rating for right mallet toes, and an initial rating higher than 30% for IBS, each on an extraschedular basis, are VACATED, and the matters are REMANDED to the Board for further proceedings consistent with this decision. The appeal is otherwise DISMISSED.

DATED: February 2, 2017

Copies to:

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