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

No. 15-3769

RALPH G. WOOD, APPELLANT,

V.

DAVID J. SHULKIN, M.D.,  
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before SCHOELEN, *Judge*.

**MEMORANDUM DECISION**

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

SCHOELEN, *Judge*: The appellant, Ralph G. Wood, through counsel appeals an August 31, 2015, Board of Veterans' Appeals (Board) decision that determined that referral for extraschedular consideration was not warranted for the appellant's hypertension, hypertensive heart disease, and chronic diverticulosis. Record of Proceedings (R.) at 1-19. This appeal is timely, and the Court has jurisdiction to review the Board's decision pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the following reasons, the Court will vacate the Board's decision and remand the matter for further proceedings consistent with this decision.

**I. BACKGROUND**

The appellant served on active duty in the U.S. Army from April 1979 to June 1992. R. at 178. In July 1992, VA granted the appellant's disability compensation claims for hypertension, a postoperative hemorrhoidectomy, and postoperative residuals of an abdominal abscess repair and appendectomy. R. at 1092-93, 1105-06. VA assigned noncompensable disability ratings effective from June 2, 1992. R. at 1106.

In October 2008, the appellant filed a claim for an increased disability rating for his service-connected hypertension. R. at 1041. Later that month, the appellant filed disability compensation claims for several conditions, including the right foot and knee, gastroenteritis, lower back pain, and pes planus. R. at 1038.

In December 2008, the appellant underwent a VA examination for his hypertension. R. at 999-1005, 1010. The appellant's subjective complaints were that he was "light headed, tired, [and] weak." R. at 999. Following a physical examination and diagnostic testing, the examiner diagnosed hypertension and the beginning stages of hypertensive heart disease. R. at 999-1005.

In July 2009, the appellant underwent several additional VA examinations. R. at 892-917. The examiner noted that the appellant experienced "diverticular episodes" about 2 days per week, 2 to 3 times per day, and "alternating with constipation." R. at 895. The appellant also experienced occasional to intermittent abdominal pain with cramps. R. at 896. The examiner diagnosed the appellant with chronic diverticulosis, but stated that the condition had no effect on employment or daily activities. R. at 896-97. The examiner also noted that the appellant worked as a correctional officer and that, in the past year, "multiple musculoskeletal conditions" caused him to miss about 10 days of work. R. at 900, 911. The examiner diagnosed the appellant with bilateral pes planus, bilateral degenerative joint disease (DJD) of both knees, mechanical lumbosacral strain, and pseudofolliculitis barbae, R. at 904, 908, 917.

In a September 2009 rating decision, the regional office (RO) denied an increased disability rating for hypertension and granted entitlement to disability compensation for mechanical lumbosacral strain, a right knee condition, pes planus, and chronic diverticulosis, all rated as 10% disabling, effective from October 16, 2008. R. at 869-71, 878-88. The RO also granted entitlement to disability compensation for pseudofolliculitis barbae and hypertensive heart disease, but assigned noncompensable disability ratings, effective from October 6, 2008, and December 18, 2008, respectively. *Id.*

The appellant filed a Notice of Disagreement, asserting that his diverticulosis attacks occurred at least 4 times per week and sometimes caused him to lose control and soil his clothing; his back condition caused him to miss time from work; and his heart disease caused dizziness and near fainting episodes. R. at 847-48. A September 2010 VA joints examination further indicated that the appellant had an antalgic gait due to his right knee condition. R. at 664.

In April 2011, the RO issued a Statement of the Case confirming its denial of higher disability ratings for the claimed conditions. R at 607-43. In May 2011, the appellant perfected his appeal to the Board. R at 603-04.

In January 2013, the appellant underwent VA examinations for his right knee, spine, heart disease, hypertension, diverticulosis, and appendectomy residuals. R. at 509-46. Examination of the appellant's right knee revealed functional loss due to weakened movement, excess fatigability, and interference with sitting, standing, and weight-bearing. R. at 511. An examination of his back revealed similar symptoms, as well as incoordination and an impaired ability to execute skilled movements smoothly. R. at 519. The heart examination revealed cardiac hypertrophy, a non-specific T-wave abnormality, and an ejection fraction of 50-54%. R. at 531. An interview-based metabolic equivalent (METs) test indicated that the appellant was able to perform a workload between 5 and 7 METs before experiencing dyspnea. R. at 532. In addition to his cardiac disability, "general deconditioning" affected the appellant's METs level by 60% and his knee condition affected his METs level by 20%. R. at 533. The hypertension examination noted a non-specific T-wave abnormality. R. at 536. Lastly, the examiner noted that residuals from the appellant's appendectomy prevented lifting, pushing, and pulling. R. at 545.

In August 2013, the RO increased, from 0% to 30%, the appellant's disability rating for hypertensive heart disease, effective January 17, 2013. R. at 470-77, 496-502. In a September 2014 decision, the Board granted an initial 10% disability rating for hypertensive heart disease prior to January 17, 2013, and a 60% rating thereafter, but denied increased disability ratings for diverticulosis and hypertension.<sup>1</sup> R at 297-328. The Board remanded for additional development the claims for increased disability ratings for the right knee and back. R. at 320-21.

The appellant appealed the September 2014 Board decision to the Court. In May 2015, the parties filed a joint motion for partial remand (JMPR), agreeing that the Board provided an inadequate statement of reasons or bases for its determination that referral for extraschedular consideration was not warranted for the appellant's hypertension, hypertensive heart disease, and

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<sup>1</sup> In November 2014, the RO issued a rating decision implementing the increased disability ratings granted by the Board. R. at 77-82.

chronic diverticulosis.<sup>2</sup> R. at 70-75. Specifically, the parties agreed that the Board failed to consider the combined effects of the appellant's service-connected disabilities in accordance with *Johnson v. McDonald*, 762 F.3d 1362 (Fed. Cir. 2014). R. at 72-73. The Court granted the parties' motion and the appeal as to the remaining issues was dismissed. R. at 76.

In July 2015, the appellant underwent additional VA examinations of his knee and back. R. at 28-44. With regard to whether the appellant's disabilities affected his ability to work, the examiner noted that the appellant is capable of performing his work, but that his right knee and back conditions "slow[] him down." R. at 36, 44. The appellant reported that knee pain causes him to miss 3 to 4 days of work per year, and that back flareups cause him to miss 2 to 3 days of work per year. *Id.*

On August 31, 2015, the Board determined that referral for extraschedular consideration was not warranted for the appellant's hypertension, hypertensive heart disease, and chronic diverticulosis. R. at 1-19. This appeal followed.

## II. ANALYSIS

Once a disability is found to be service connected, the level of disability compensation is determined using the criteria in the rating schedule established in a series of regulations located in part 4 of title 38 of the Code of Federal Regulations. *Thun v. Peake*, 22 Vet.App. 111, 114 (2008), *aff'd sub nom. Thun v. Shinseki*, 572 F.3d 1366 (Fed. Cir. 2009). In exceptional cases, the rating schedule may be found inadequate to compensate a claimant's unique set of symptoms and an extraschedular rating may be approved by the Under Secretary for Benefits or the director of the Compensation Service. 38 C.F.R. § 3.321(b)(1) (2016).

"Whether a claimant is entitled to an extraschedular rating under § 3.321(b) is a three-step inquiry": If (1) the schedular evaluation does not contemplate the claimant's level of disability and symptomatology, and (2) the disability picture exhibits other related factors such as marked interference with employment or frequent periods of hospitalization, then (3) the case must be referred to an authorized official to determine whether, to accord justice, an extraschedular rating is warranted. *Thun*, 22 Vet.App. at 115. To determine whether the schedular rating criteria

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<sup>2</sup> The appellant abandoned his appeal with respect to the remaining issues finally decided in the September 2014 Board decision. R. at 70; *see Pederson v. McDonald*, 27 Vet.App. 276, 285 (2015) (en banc).

adequately contemplate the veteran's disability picture, the Board must compare "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." *Id.* If an exceptional disability picture is found, the RO or Board must determine whether related factors exist such "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); *Thun*, 22 Vet.App. at 116.

In making the extraschedular referral determination, the Board must consider the collective impact of multiple service-connected disabilities whenever that issue is expressly raised by the claimant or reasonably raised by evidence of record. *Yancy v. McDonald*, 27 Vet.App. 484, 495 (2016) (citing *Johnson*, 762 F.3d at 1365). Although the Board must consider the combined effects of all service-connected disabilities, its consideration is limited to their "impact [on] the disability picture of the disabilities on appeal"; in other words, 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.

The Board's determination whether referral for an extraschedular disability rating is appropriate is a factual determination that the Court reviews under the "clearly erroneous" standard of review. *Thun*, 22 Vet.App. at 115. As with any finding on a material issue of fact or law, the Board must include a written statement of the reasons or bases for the Board's findings and conclusions, adequate to enable an appellant to understand the precise basis for the Board's decision as well as to facilitate review in this Court. 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1990).

The appellant argues that the Board misinterpreted the law and failed to provide an adequate statement of reasons or bases for its decision to deny referral for extraschedular consideration. Appellant's Brief (Br.); Reply Br. Regarding step one of *Thun*, the appellant argues that the Board overlooked favorable evidence, incorrectly concluded that certain of the appellant's symptoms are "expressly contemplated" by rating criteria when, in fact, the symptoms are not listed in the applicable diagnostic codes (DCs), and failed to address the combined effect of the appellant's service-connected disabilities. Appellant's Br. at 7-15. Regarding step two of *Thun*, the appellant argues that the Board imposed a higher standard than required by § 3.321(b), overlooked

evidence, and provided an inadequate statement of reasons or bases for concluding that his disabilities do not cause marked interference with employment. *Id.* at 15-23.

The Secretary responds that the "mere fact that the rating schedules do not contain the precise symptoms [the] [a]ppellant experiences does not, as a matter of law, mean that [the symptoms] are not contemplated by the rating schedules." Secretary's Br. at 5. The Secretary contends that any disparity between the appellant's symptoms and the rating criteria is semantic, rather than real, and he disagrees with the appellant's contention that the Board overlooked evidence relevant to the extraschedular analysis. *Id.* at 5, 10-19. The Secretary also asserts that any failure to address the combined effect of the appellant's disabilities under step one of *Thun* is harmless because the Board considered the combined effect under step two and determined that the criteria had not been met. *Id.* at 19. Regarding step two of *Thun*, the Secretary asserts that the Board did not apply an overly restrictive view of what is necessary to demonstrate marked interference with employment and adequately addressed the appellant's work impairment in finding that the second *Thun* step was not met. *Id.* at 20-26.

Regarding the first step of *Thun*, the Board summarized the appellant's hypertension, hypertensive heart disease, and diverticulosis symptoms, stating that

the [v]eteran's hypertension has been manifested by systolic blood pressure readings from 115 to 170, diastolic blood pressure readings from 70 to 94, continual use of medications, and reduced exertional capacity, to include light-headedness, tiredness, and weakness. The [v]eteran's hypertensive heart disease has been manifested by reduced exercise capacity and fatigue on exertion. The [v]eteran's diverticulosis has been manifested by diarrhea, constipation, loss of bowel control, and abdominal pain with cramps.

R. at 13. The Board then concluded that the rating criteria reasonably describe the appellant's disability level and symptomatology and that the appellant's disability picture is contemplated by the rating schedule. *Id.* In reaching this conclusion, the Board stated:

The [v]eteran's hypertension and hypertensive heart disease symptoms are expressly contemplated under [DCs] 7007 and 7107, which provide ratings based on blood pressure readings, continual use of medications to control hypertension and hypertensive heart disease, and reduced exertional capacity. The [v]eteran's diverticulosis symptoms are expressly contemplated under [DC] 7319, which provides ratings based on bowel disturbances and abdominal distress, which includes diarrhea, constipation, and loss of bowel control.

*Id.*

The Court agrees with the appellant that the Board's statement of reasons or bases is not adequate. The appellant's hypertension is rated under DC 7101, which provides evaluations ranging from 10% to 60%, based on varying degrees of blood pressure readings and whether the condition requires medication for control. *See* 38 C.F.R. § 4.105, DC 7101 (2016). The rating criteria make no reference to "reduced exertional capacity" or other factors such as lightheadedness, tiredness, and weakness, *see id.*, and the Board did not explain how the criteria listed in the DC relate to the appellant's symptoms. "A bare conclusory statement, without both supporting analysis and explanation, is neither helpful to the veteran, nor 'clear enough to permit effective judicial review,' nor in compliance with statutory requirements." *Gilbert*, 1 Vet.App. at 57 (quoting *Int'l. Longshoremen's Assoc. v. Nat'l. Mediation Board*, 870 F.2d 733, 735 (D.C. Cir. 1989)).

The Secretary concedes that DC 7107 does not include "reduced exertional capacity," but contends that DC 7007, which provides disability ratings for hypertensive heart disease, assigns ratings based upon the measured workload that results in dyspnea, fatigue, angina, dizziness, or syncope. *See* 38 C.F.R. § 4.104, DC 7007 (2016). In other words, the Secretary contends that DC 7007 contemplates the appellant's symptoms even though DC 7101 does not. Secretary's Br. at 9-10. The flaw in the Secretary's argument is twofold: First, the Board never reached this conclusion. To the contrary, the Board specifically attributed these symptoms to the appellant's hypertension, not his heart disease. Second, the Secretary provides no support for his contention that the Board may conclude that a symptom caused by one disability is contemplated by the rating criteria for another disability. *Cf. Massey v. Brown*, 7 Vet.App. 204, 208 (1994) ("The Board's consideration of factors which are wholly outside the rating criteria provided by the regulations is error as a matter of law."); *see also Jones v. Shinseki*, 26 Vet.App. 56 (2012).

The appellant similarly argues that the Board contorted the rating criteria to find that his diverticulosis symptoms are "expressly contemplated" by DC 7319. *See* R. at 13. The appellant's diverticulosis is rated under DC 7319 as 10% disabling for "moderate [disability]; frequent episodes of bowel disturbance with abdominal distress." 38 C.F.R. § 4.114, DC 7319 (2016). The appellant contends that the Board erred when it attributed diarrhea, constipation, and loss of bowel control to DC 7319, which refers only to "bowel disturbance" and "abdominal distress." Appellant's Br. at 11-12. The Secretary responds that diarrhea and constipation are contemplated

by the next higher scheduler rating and that bowel "disturbance" is intended to capture a broad range of symptoms, to include loss of bowel control. Secretary's Br. at 16-19.

The Court finds that the Board failed to explain how the scheduler criteria specifically contemplates the appellant's symptoms. A mere listing of the appellant's symptoms and a conclusion that they are contemplated by the DC is insufficient to fulfill the Board's obligation to provide a statement of reasons or bases for its decision. *Abernathy v. Principi*, 3 Vet.App. 461, 465 (1992). Although the Secretary argues that the appellant's symptomatology all falls under the umbrella of "bowel disturbance," his argument amounts to a post hoc rationalization, which cannot make up for the shortcomings in the Board's analysis. *See Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 156 (1991) ("Litigating positions' are not entitled to deference when they are merely appellate's counsel's 'post hoc rationalizations' for agency action."); *Evans v. Shinseki*, 25 Vet.App. 7, 16 (2011) (explaining that "it is the Board that is required to provide a complete statement of reasons or bases" for its decision and "the Secretary cannot make up for [the Board's] failure to do so" by providing his own reasons or bases on appeal). Moreover, even assuming that the appellant's symptoms are contemplated by DC 7319, the Board failed to compare the level of severity of the appellant's symptoms with the rating criteria, which *Thun* also requires. *See Thun*, 22 Vet.App. at 115.

However, the Board's errors with regard to the first step of *Thun* may be deemed harmless, if the Court agrees with the Board's application of the second step of *Thun*. *See Yancy*, 27 Vet.App. at 494-95 (finding that the first and second *Thun* steps involve separate and distinct analyses and, therefore, an error with respect to one does not necessarily affect the other – if either element is not met, then referral for extraschedular consideration is not appropriate). In the present case, the Board analyzed the second step by examining the appellant's hypertension, hypertensive heart disease, and diverticulosis, individually, as well as the combined effect of all the appellant's service-connected disabilities. R. at 14-16. The Board explained the results of its analysis as follows:

The [v]eteran's service-connected disabilities certainly limit his ability to work. However, this is reflected by the combined ratings currently assigned. The [v]eteran misses a few days of work per year and has some limitations while at work but by his own account he is still able to perform his job. Marked interference with employment above that already accounted for by the currently assigned combined disability ratings is not present.

R. at 16.

The Board's statement of reasons or bases explaining its application of the second step of *Thun* is also inadequate. First, the fact that the appellant is "still able to perform his job" is not the appropriate inquiry. The Board is required to assess whether the appellant's service-connected disabilities cause *marked interference* with employment, not prevent work. *See Thun*, 22 Vet.App. at 117 (extraschedular consideration may be warranted for disabilities that present a loss of earning capacity that is less severe than one where the veteran is totally unemployable). Second, the Board failed to explain how it reached the conclusion that "[m]arked interference with employment above that already accounted for by the currently assigned combined disability rating is not present." R. at 16. Absent any discussion explaining how the current rating codes account for certain degrees of interference with employment, the appellant and the Court are unable to discern why the conceded limitations on the appellant's employment do not rise to the level of "marked interference."

For all the foregoing reasons, the Court concludes that the Board's statement of reasons or bases supporting its determination that referral for extraschedular consideration is not warranted is inadequate and remand is required to allow the Board to readdress the matter and to provide a new statement of reasons or bases that clearly explains its determination and adequately discusses the evidence of record. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) ("[W]here the Board has incorrectly applied the law, failed to provide an adequate statement of reasons or bases for its determinations, or where the record is otherwise inadequate, a remand is the appropriate remedy.").

Given this disposition, the Court will not at this time address the remaining arguments and issues raised by the appellant. *See Best v. Principi*, 15 Vet.App. 18, 20 (2001). In pursuing the matters on remand, the appellant is free to submit additional evidence and argument on the remanded matters, and the Board is required to consider any such relevant evidence and argument. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002) (stating that, on remand, the Board must consider additional evidence and argument in assessing entitlement to the benefit sought); *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order). The Court reminds the Board 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), and the Board must proceed expeditiously, in accordance with 38 U.S.C. § 7112.

### **III. CONCLUSION**

After consideration of the parties' pleadings, and a review of the record, the Board's August 31, 2015, decision that determined that referral for extraschedular consideration was not warranted for the appellant's hypertension, hypertensive heart disease, and chronic diverticulosis is VACATED and the matter is REMANDED for further proceedings consistent with this decision.

DATED: February 23, 2017

Copies to:

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