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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 15-4818

ARTHUR D. KREIDER, JR., APPELLANT,

V.

DAVID J. SHULKIN, M.D.,
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*: Arthur D. Kreider, Jr., appeals through counsel those parts of a November 13, 2015, Board of Veterans' Appeals (Board) decision that denied entitlement to an initial disability rating in excess of 10% for degenerative disc disease of the lumbar spine and declined to refer his claims for consideration of entitlement to an extraschedular disability rating on a collective basis.[2] Mr. Kreider's Notice of Appeal was timely, and the Court has jurisdiction to

[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 granted Mr. Kreider an initial 10% disability rating for a right knee disorder prior to February 17, 2010; an initial 10% disability rating for a left knee disorder prior to February 17, 2010; and an initial 10% disability rating for a bilateral foot disorder prior to January 29, 2010. These are favorable findings that the Court will not disturb. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007).

The Board denied Mr. Kreider an initial compensable disability rating prior to September 26, 2009, and a disability rating in excess of 50% thereafter for sleep apnea; a disability rating in excess of 10% for a right knee disorder; a disability rating in excess of 10% for a left knee disorder; a disability rating in excess of 10% for a bilateral foot disorder; and a disability rating in excess of 10% prior to July 10, 2012, and a disability rating in excess of 20% thereafter for a cervical spine disorder. Mr. Kreider raises no arguments with respect to the Board's decision on these matters, and the Court considers any appeal of those matters abandoned. *See Pederson v. McDonald*, 27 Vet.App. 276, 285 (2015) (en banc) (holding that, where an appellant abandons an issue or claim, the Court will not address it).

Finally, the Board remanded Mr. Kreider's claims for benefits for a right hip disorder, a left hip disorder, and a left shoulder disorder, and those claims are therefore 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))).

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's determination that VA satisfied its duty to assist is clearly erroneous, and because the Board inadequately explained its conclusion that referral for consideration of entitlement to an extraschedular disability rating on a collective basis was not warranted, the Court will vacate those portions of the November 2015 Board decision and remand those matters for further development and readjudication consistent with this decision.

I. FACTS

Mr. Kreider served on active duty in the U.S. Navy from January 1987 to January 2007.

Procedurally speaking, in November 2006, Mr. Kreider filed a claim for VA disability benefits for, among other conditions, a low back disability. In April 2007, a VA regional office granted his claim and assigned a 10% disability rating for a lumbar spine strain. Mr. Kreider filed a Notice of Disagreement with that decision and has continuously appealed the assigned disability rating ever since.

This appeal largely involves three VA medical examinations of Mr. Kreider's back, conducted in December 2006, February 2010, and July 2012. Accordingly, rather than recount all of the evidence of record, the Court will simply summarize those examinations.

In December 2006, Humberto Henriquez, M.D., elicited the following information from Mr. Kreider:

> He suffered from the following symptoms resulting from the spine condition: difficult to bend forward and lift due to discomfort. Also limits heavy lifting. Due to the [s]pine condition[,] he has suffered from pain located at lower back for 17 y[ea]rs. The pain occurs constantly. The pain is localized. The characteristic of the pain is aching in nature. From 1 to 10 (10 being the worst pain)[,] the pain level is at 3. The pain can be elicited by physical activity. It is relieved by the medication, Medication. [sic] At the time of pain he can [] usually function without medications[,] but sometimes has to rest. The current treatment is Motrin and Chiropractor. He states his condition does not cause incapacitation. From the above condition[,] the functional impairment is that he has daily pains and sometimes has to rest when the pain gets severe.

Record (R.) at 1963. Dr. Henriquez's physical examination of the thoracolumbar spine revealed 80 degrees of flexion (10 degrees fewer than normal), with pain at 80 degrees; and 25 degrees of extension (5 degrees fewer than normal), with pain at 25 degrees. All other range of motion measurements of the thoracolumbar spine were normal, although Mr. Kreider reported pain at 30 degrees of right rotation. Dr. Henriquez stated:

> The joint function of the spine is additionally limited by the following after repetitive use: pain[,] and pain has the major functional impact. It is not additionally limited by the following after repetitive use: fatigue, weakness, lack of endurance[,] and incoordination. The above additionally limit the joint function by 0 degrees.

R. at 1969. Imaging studies revealed degenerative disc disease at the L5/S1 vertebrae. Finally, Dr. Henriquez stated: "The diagnosis is [l]umbar strain. The subjective factors are daily ache with lifting. The objective factors are pain or [sic] [range of motion]." R. at 1971.

In February 2010, Stephen Hanson, M.D., examined Mr. Kreider. Dr. Hanson recorded the following history:

> [Mr. Kreider] was diagnosed with [degenerative disc disease] of the lumbar spine in 1989. The condition is not due to injury or trauma. He reports he has limitation in walking because of his spine condition. On average, he can walk 2 miles. It takes 30 [to] 40 minutes to accomplish this. . . . [He] reports the following symptoms associated with the spinal condition: stiffness, fatigue, spasms and decreased motion. . . . He reports experiencing pain which began [in] 1989. It is located on the lower back[,] and the pain occurs constantly. The pain is localized. [He] indicates the pain level is moderate. The pain can be exacerbated by physical activity. It is relieved by chiropractor and hot tub. At the time of pain[,] he can I can [sic] function. During the flare-ups[,] he experiences functional impairment which is described as constant annoying pain and limitation of motion of the joint[,] which is described as ["S]ometimes I am unable to bend over.["] The treatment is chiropractor and going to VA PSO pain [management]. [Mr. Kreider] reports he never was hospitalized nor had any surgery for this condition. He states his condition, in the past 12 months, has not resulted in any incapacitation. The bone condition has never been infected. [He] reports the following overall functional impairment: there are times where it is hard to move.

R. at 1878. After examining Mr. Kreider, Dr. Hanson wrote:

> The examination reveals no evidence of radiating pain on movement. Muscle spasm is absent. There is tenderness noted on exam described as L5-S1. Spinal contour is preserved, though there is tenderness. There is no guarding of movement. The examination does not reveal any weakness. Muscle tone is normal. Musculature is

> normal. . . .There is no atrophy present in the limbs. There is no ankylosis of the thoracolumbar spine.

R. at 1881. Dr. Hanson recorded range of motion measurements of 70 degrees of flexion with pain at 65 degrees, and 25 degrees each of extension, right lateral flexion, left lateral flexion, right rotation, and left rotation, all with pain at 20 degrees. Mr. Kreider was able to complete repetitive motion testing with no decrease in range of motion. Dr. Hanson concluded that Mr. Kreider's condition had not changed since the 2006 examination and stated:

> At this time[,] [Mr. Kreider's] condition is active. The subjective factors are: low back pain. The objective factors are: lumbar tenderness with [range of motion] loss. Intervertebral Disc Syndrome with degenerative arthritis changes and the most likely involved peripheral nerve is the sciatic (is not currently involved). Nerve which affects both sides of the body. [sic] There are no complications.

R. at 1883.

In July 2012, physician Richard Craven examined Mr. Kreider and diagnosed degenerative disc disease of the lumbar spine. Mr. Kreider advised Dr. Craven that the pain and tension in his lower back continued to worsen. Mr. Kreider reported flare-ups of his back condition that make it "difficult to do bending and lifting." R. at 1776. Range of motion testing revealed 75 degrees of forward flexion, with pain at 75 degrees; extension to 20 degrees, with pain at 20 degrees; right and left lateral flexion each to 15 degrees and both with pain at 15 degrees; and right and left lateral rotation each to 30 degrees and neither with any objective evidence of painful motion. There was no change in Mr. Kreider's range of motion after repetitive testing. Dr. Craven recorded that Mr. Kreider had "functional loss, functional impairment, and/or additional limitation of [range of motion]" after repetitive use in the nature of less movement than normal and pain on movement. R. at 1778. Dr. Craven found no radicular pain or other signs of radiculopathy. He further stated that Mr. Kreider's back disability affected his ability to work in that it caused difficulty with bending or lifting.

In November 2015, the Board issued the decision on appeal, denying entitlement to a disability rating in excess of 10% for a lumbar spine disorder and declining to refer Mr. Kreider's claims for consideration of entitlement to an extraschedular disability rating. This appeal followed.

II. ANALYSIS

A. Duty To Assist

On appeal, Mr. Kreider first argues that the Board erred in finding that VA satisfied its duty to assist because none of the VA medical examinations of record comports with the requirements of *Mitchell v. Shinseki*, 25 Vet.App. 32 (2011), *DeLuca v. Brown*, 8 Vet.App. 202 (1995), or 38 C.F.R. §§ 4.40 and 4.45. In particular, he contends that the December 2006, February 2010, and July 2012 VA examiners each failed to state whether he experienced additional functional loss during flare-ups and whether any functional loss could be quantified in degrees of range of motion. The Court agrees.

1. The Law

Section 4.40 addresses disability ratings for the musculoskeletal system and specifically defines "functional loss:"

> 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. *It is essential that the examination on which ratings are based adequately portray the anatomical damage, and the functional loss, with respect to all these elements.* The functional loss may be due to absence of part, or all, of the necessary bones, joints and muscles, or associated structures, or to deformity, adhesions, defective innervation, or other pathology, or it may be due to pain, supported by adequate pathology and evidenced by the visible behavior of the claimant undertaking the motion. Weakness is as important as limitation of motion, and a part which becomes painful on use must be regarded as seriously disabled.

38 C.F.R. § 4.40 (2016) (emphasis added).

As the Court explained in *Mitchell*,

> [s]ection 4.45 expounds upon the concept of functional loss as it specifically relates to the joints. The section begins with the declaration that: "[a]s regards the joints[,] the factors of disability reside in reductions of their normal excursion of movements in different planes." 38 C.F.R. § 4.45 (2011). It then states that six factors are important in evaluating the disability of a joint: Less or more movement than is normal; weakened movement; excess fatigability; incoordination; and pain on movement (as well as swelling, deformity, and atrophy) that affects stability, standing, and weight-bearing. *Id.*

Mitchell, 25 Vet.App. at 37.

The Court has held that "[s]ections 4.40 and 4.45 together . . . make clear that pain must be considered capable of producing compensable disability of the joints." *Schafrath v. Derwinski*, 1 Vet.App. 589, 592 (1991). Further, "a functional loss caused by pain must be rated at the same level as if that functional loss were caused by some other factor (e.g., deformity, adhesion, atrophy, tendon-tie-up, *see* 38 C.F.R. §§ 4.40, 4.45(a)), that actually limited motion." *Mitchell*, 25 Vet.App. at 37.

In *DeLuca*, the Court held that §§ 4.40 and 4.45 require that the disabling effect of painful motion be considered when rating joint disabilities. 8 Vet.App. at 205-06. More specifically, the Court found the medical examination at issue inadequate because the examiner failed to determine any additional functional loss resulting from pain. *Id.* at 206. The Court directed the Board to order the medical examiner "to express an opinion on whether pain could significantly limit functional ability during flare-ups or when the arm is used repeatedly over a period of time." *Id.* Finally, the Court stated that, for disabilities rated based on limitation of motion, the examiner should, "if feasible," express "in terms of the degree of additional range-of-motion loss due to pain on use or during flare-ups." *Id.*

2. Discussion

Here, the Board stated:

> [Mr. Kreider] was accorded VA medical examinations in December 2006, February 2010, and July 2012[,] which, as detailed below, evaluated the service-connected disabilities that are the subject of this appeal. VA examiners are presumed qualified to render competent medical opinion(s). No inaccuracies or prejudice is demonstrated with respect to these examinations, nor has [Mr. Kreider] reported any of these disabilities have increased in severity since the most recent examination. Accordingly, the Board finds that these examinations are adequate for resolution of this case. Consequently, the Board finds that the duty to assist [Mr. Kreider] has been satisfied in this case.

R. at 8-9 (citation omitted). This determination is clearly erroneous. *See* 38 U.S.C. § 7261(a)(4); *D'Aries v. Peake*, 22 Vet.App. 97, 103 (2008); *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990).

First, as a point of distinction, the VA examinations of record make clear that the pain of Mr. Kreider's low back disability results in no additional functional loss. Each of those examinations reveals that Mr. Kreider's range of motion remained stable even after repetitive testing. *See* R. at

1778, 1881, 1969. Indeed, Mr. Kreider limits his argument to the matter of additional functional loss during flare-ups. *See* Appellant's Brief (Br.) at 5-9; Reply Br. at 1-4.

In that regard, the Court finds that the Board erred in finding that VA satisfied its duty to assist. None of the VA examiners stated whether flare-ups of Mr. Kreider's back disability result in additional functional loss and, if so, at what point in the range of motion that functional loss occurs. Indeed, Dr. Henriquez, in the December 2006 examination report, did not even discuss whether Mr. Kreider experiences flare-ups. Moreover, his statement that "the functional impairment is that [Mr. Kreider] has daily pains and sometimes has to rest when the pain gets severe," R. at 1963, is not sufficient to meet the dictates of *DeLuca* and *Mitchell*.

For his part, in February 2010, Dr. Hanson wrote, "During the flare-ups[,] [Mr. Kreider] experiences functional impairment which is described as constant annoying pain and limitation of motion of the joint[,] which is described as ['S]ometimes I am unable to bend over.[']" R. at 1878. Despite acknowledging that Mr. Kreider experiences flare-ups of his back condition, Dr. Hanson made no attempt to quantify the effects of those flare-ups on Mr. Kreider's functional abilities.

Finally, in July 2012, Dr. Craven made only a single mention of flare-ups in his examination of Mr. Kreider. He answered "yes" to the question of whether Mr. Kreider experienced flare-ups and then merely stated, "The claimant describes the impact [of the flare-ups] as it is difficult to do bending and lifting." R. at 1776. Dr. Craven did not state whether this difficulty amounts to a functional impairment or attempt to quantify the functional impairment in degrees.

The requirement to express the functional loss during flare-ups in terms of degrees is, of course, not mandatory. The Court in *DeLuca* stated that such an assessment should be provided "if feasible." 8 Vet.App. at 206. Here, however, none of the VA examiners even attempted to quantify Mr. Kreider's functional loss, and none of them stated that doing so was not feasible. In light of this discussion, the Court concludes that the Board's determination that the VA examinations are adequate is clearly erroneous. *See* 38 U.S.C. § 7261(a)(4); *D'Aries*, 22 Vet.App. at 103; *Gilbert*, 1 Vet.App. at 52.

As a final matter on this issue, the Court notes that the Board stated: "[R]epetitive motion testing was conducted on VA examinations in an effort to simulate the effect of pain during flare-ups." R. at 10. The Board cited no authority for the proposition that repetitive motion testing

is a substitute for an assessment of the functional loss that occurs during flare-ups, and the Court is not aware of any. In fact, as Mr. Kreider points out, in *Mitchell*, the Court appeared to indicate that flare-ups and repetitive use are distinct circumstances that an examiner must consider. Appellant's Br. at 3; *Mitchell*, 25 Vet.App. at 43-44 ("*DeLuca* stands for the proposition that when pain is associated with movement, to be adequate for rating purposes[,] . . . the medical examiner must be asked to express an opinion on whether pain could significantly limit functional ability during flare-ups *or* when the arm is used repeatedly over a period of time." (citing *DeLuca*, 8 Vet.App. at 206) (emphasis added) (quotation omitted)). Accordingly, the Board's statement is incorrect.

On remand, the Board will ensure that Mr. Kreider is provided an examination of his lumbar spine disability that comports with *Mitchell*, *DeLuca*, and §§ 4.40 and 4.45. Further, Mr. Kreider 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).

B. Extraschedular Disability Rating

Next, Mr. Kreider contends that the Board failed to consider whether referral for consideration of entitlement to an extraschedular disability rating was warranted based on the aggregate effect of all of his service-connected disabilities, in compliance with *Johnson v. McDonald*, 762 F.3d 1362 (Fed. Cir. 2014).

Here, the Board wrote:

> The Board finds that the rating criteria contemplate [Mr. Kreider's] service[-] connected sleep apnea, knee disorders, bilateral foot disorder, lumbar spine disorder, and cervical spine disorder. In pertinent part, [Mr. Kreider's] knees, feet, lumbar spine, and cervical spine are manifested by complaints of pain and resulting functional impairment. Pursuant to 38 C.F.R. §§ 4.40, 4.45, and 4.59, such manifestations must be taken into account when determining the appropriate schedular rating. As such, to award an extraschedular rating on such a basis would appear to be a violation of the prohibition against pyramiding. Further, there is no other indicia of an exceptional or unusual disability picture, such as marked interference with employment or frequent periods of hospitalization, for these disabilities *either separately or together*. Therefore, the Board finds the rating

> criteria are adequate to evaluate these service[-]connected disabilities and referral for consideration of extraschedular rating is not warranted.

R. at 21 (emphasis added).

For his part, the Secretary repeatedly (and correctly) cites *Yancy v. McDonald*, 27 Vet.App. 484 (2016), for the proposition that the Board must consider the collective effect of service-connected disabilities only when that issue is expressly raised by the claimant or reasonably raised by the record. Confusingly, the Secretary appears to argue *both* that Mr. Kreider fails to demonstrate that the issue was reasonably raised by the record, *see* Secretary's Br. at 16, *and* that the Board considered the collective impact of his service-connected disabilities, *see id.* at 17. Whether the issue was reasonably raised by the record or not, the Board plainly attempted to address it; accordingly, the question is whether the Board's discussion is clearly erroneous or inadequately explained.

The Court concludes that the Board's discussion is plainly inadequate. First, at no time did the Board discuss whether, collectively, Mr. Kreider's numerous service-connected disabilities paint a disability picture that is wholly contemplated by the schedular rating criteria. *See Thun v. Peake*, 22 Vet.App. 111, 115 (2008), *aff'd* 572 F.3d 1366 (Fed. Cir. 2009); *see also Johnson*, 762 F.3d at 1366. In fact, the Board did not even discuss the actual schedular rating criteria in its analysis, instead focusing solely on the "several regulations that precede the rating schedule for the musculoskeletal system and explain how to arrive at proper evaluations under the [diagnostic codes] appearing in the disability rating schedule." *Petitti v. McDonald*, 27 Vet.App. 415, 424 (2015).

Second, the Board appeared to conflate the first and second elements of the extraschedular disability analysis when it stated that "there is no other indicia of an exceptional or unusual disability picture, such as marked interference with employment or frequent periods of hospitalization." R. at 21. As the Court explicitly laid out in *Thun*, the determination of whether a claimant is entitled to an extraschedular rating is a three-step inquiry. 22 Vet.App. at 115. The *first* step 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." *Id.* If the adjudicator determines that this is so, 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.[3] *Id.* at 116. Accordingly, evidence of marked interference with employment or frequent periods of hospitalization would not be "indicia of an exceptional or unusual disability picture." R. at 21.

The Court is mindful that , although the Court in *Thun* identified three "steps," they are, in fact, necessary "elements" of an extraschedular rating, *see Anderson v. Shinseki*, 22 Vet.App. 423, 427 (2009), such that, if the Board determines that neither element is present and the Court finds error in only one of those determinations, the error is harmless, *Yancy*, 27 Vet.App. at 494-95 ("If either element is not met, then referral for extraschedular consideration is not appropriate."). Nevertheless, given the Board's conflation of elements, it is not clear that the Board properly determined that Mr. Kreider's collective disability picture does not exhibit "other related factors," such as marked interference with employment or frequent periods of hospitalization. *Thun*, 22 Vet.App. at 116.

Moreover, to the extent that the Board intended to analyze the first two *Thun* elements independently, it is not clear from the first part of the Board's discussion that it actually considered the *collective effect* of Mr. Kreider's service-connected "knees, feet, lumbar spine, and cervical spine." R. at 21. It is only in the Board's cursory statement regarding the presence of marked interference with employment or frequent period of hospitalization that the Board expressly indicated that it considered Mr. Kreider's disabilities "separately [and] together." R. at 21.

In sum, the Court concludes that the Board provided inadequate reasons or bases for its determination that Mr. Kreider is not entitled to referral for consideration of entitlement to an extraschedular disability rating on a collective basis. *See* U.S.C. § 7104(d)(1). Remand is required for the Board to reconsider this issue and thoroughly and competently explain any conclusion it reaches.

As noted above, Mr. Kreider is free to submit additional evidence and argument in support of this matter on remand. *See Kay*, 16 Vet.App. at 534; *Kutscherousky*, 12 Vet.App. at 372-73.

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[3] If the first two steps of the inquiry have been satisfied, the third step requires the adjudicator to refer the claim to the Under Secretary for Benefits or the Director of the Compensation and Pension Service for a determination of whether an extraschedular rating is warranted. *Thun*, 22 Vet.App. at 116.

III. CONCLUSION

Upon consideration of the foregoing, those portions of the November 13, 2015, Board decision on appeal are VACATED, and the matters are REMANDED for further development and readjudication consistent with this decision.

DATED: March 6, 2017

Copies to:

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