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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 16-0020

RONALD C. CIANCI, APPELLANT,

v.

DAVID J. SHULKIN, M.D.,
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, Ronald C. Cianci, served in the U.S. Navy from September 1967 to August 1968. Record (R.) at 502. He appeals, through counsel, a November 17, 2015, Board of Veterans' Appeals (Board) decision that, in part, denied entitlement to a compensable disability rating for bilateral hearing loss. R. at 1-19. 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.

On February 22, 2017, the Court stayed this case pending the disposition of *Doucette v. McDonald*, Vet. App. No. 15-2818. The Court issued its decision in *Doucette* on March 6, 2017. *See Doucette v. Shulkin*, __ Vet.App. __, 2017 WL 877340 (Mar. 6, 2017). On March 15, 2017, the appellant filed a motion to lift the stay. The Court will grant the appellant's motion and lift the stay imposed in this case. For the reasons that follow, the Court will vacate that part of the November 17, 2015, decision denying entitlement to a compensable disability rating for bilateral hearing loss and remand the matter for further proceedings consistent with this decision. In addition, as the appellant presents no argument concerning the Board's denial of entitlement to a disability rating greater than 10% for tinnitus, the Court holds that he has abandoned that matter and will,

accordingly, dismiss the appeal as to that issue. *See Pederson v. McDonald*, 27 Vet.App. 276, 285 (2015) (en banc).

Initially, the Court notes that the appellant does not challenge the Board's determination as to the proper schedular disability rating. *See Cromer v. Nicholson*, 19 Vet.App. 215, 217 (2005) ("[I]ssues not raised on appeal are considered abandoned."), *aff'd*, 445 F.3d 1346 (Fed. Cir. 2006). Rather, he argues that the Board misapplied 38 C.F.R. § 3.321(b)(1) and failed to provide an adequate statement of reasons or bases for its determination that he was not entitled to referral for extraschedular consideration. Appellant's Brief (Br.) at 4-10. He contends, inter alia, that the Board failed to explain how his disability was properly contemplated by the rating schedule and to adequately consider the severity of his symptoms "in determining whether a noncompensable rating adequately contemplated his disability." *Id.* at 4. The Secretary responds that the Board's finding that the appellant was not entitled to referral for extraschedular consideration was not clearly erroneous and that the Board provided an adequate statement of reasons or bases to support its decision. Secretary's Br. at 5-11.

"[T]he Board is only obligated to discuss extraschedular referral for hearing loss when there is evidence in the record which reveals that the appellant's hearing loss presents exceptional or unusual circumstances or where the appellant has asserted that a schedular rating is inadequate." *Doucette*, __ Vet.App. at __, 2017 WL 877340, at *4; *see Yancy v. McDonald*, 27 Vet.App. 484, 493 (2016); *Thun v. Peake*, 22 Vet.App. 111, 115 (2008) ("When either a claimant or the evidence of record suggests that a schedular rating may be inadequate, the Board must specifically adjudicate the issue of whether referral for an extraschedular rating is warranted."), *aff'd sub nom. Thun v. Shinseki*, 572 F.3d 1366 (Fed. Cir. 2009). "Once the claimant or the record raises the issue of whether extraschedular referral is warranted, the Board must determine whether the case presents an exceptional or unusual disability picture with such related factors as frequent periods of hospitalization or marked interference with employment." *Doucette*, __ Vet.App. at __, 2017 WL 877340, at *3 (citing 38 C.F.R. § 3.321(b) (2016)).

The Court agrees that the Board failed to provide an adequate statement of reasons or bases to support its determination that referral for extraschedular consideration was not warranted. *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"). Specifically, the Board did not discuss the appellant's statements that his hearing loss causes him embarrassment. *See* R. at 1-19. During an April 2013 VA compensation and pension audiology examination, the appellant reported that "he is comfortable with his family since they are sympathetic to his hearing issues, but being in the presence of friends and others has become an embarrassment." R. at 126. Similarly, in a June 2013 statement in support of his claim, the appellant reported his embarrassment regarding his hearing loss. R. at 161-62. Reading the Board's decision as a whole, *see Prickett v. Nicholson*, 20 Vet.App. 370, 375 (2006), the Board considered only evidence of the appellant's inability to hear speech and other sounds and failed to address the evidence of his embarrassment due to his hearing loss. *See Doucette*, __ Vet.App. at __, 2017 WL 877340, at *3-4 (holding that "the rating criteria for hearing loss contemplate the functional effects of difficulty hearing and understanding speech," but "do not otherwise discuss, let alone account for, other functional effects, such as dizziness, vertigo, ear pain, etc.").

Absent a discussion or analysis of this evidence, the Court cannot understand the precise basis for the Board's determination "that the record does not show that the [appellant]'s bilateral hearing loss . . . [is] so exceptional or unusual as to warrant the assignment of a higher rating on an extra-schedular basis," R. at 14, and the Court's review is frustrated. *See* 38 U.S.C. § 7104(d)(1); *Allday*, 7 Vet.App. at 527; *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995) (holding that the Board must "analyze the credibility and probative value of all material evidence . . . and provide the reasons for its rejection of any such evidence"), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table). The Court will, therefore, vacate the decision on appeal and remand the appellant's claim. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) ("Where the Board has . . . failed to provide an adequate statement of reasons or bases for its determinations . . . a remand is the appropriate remedy.").

Given this outcome, the Court will not address the appellant's remaining arguments. *See Quirin v. Shinseki*, 22 Vet.App. 390, 396 (2009) (holding that "the Court will not ordinarily consider additional allegations of error that have been rendered moot by the Court's opinion or that would require the Court to issue an advisory opinion"). On remand, the appellant is free to submit additional evidence and argument, including the arguments raised in his 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).

The appellant's March 15, 2017, motion is GRANTED, and the Court's February 22, 2017, stay is LIFTED. After consideration of the appellant's and the Secretary's briefs, and a review of the record, that part of the Board's November 17, 2015, decision denying entitlement to a compensable disability rating for bilateral hearing loss is VACATED and the matter is REMANDED to the Board for further proceedings consistent with this decision. The appeal is otherwise DISMISSED.

DATED: March 29, 2017

Copies to:

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