

*Designated for electronic publication only*

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

No. 16-0869

HERMAN D. McCRAE, 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, Herman D. McCrae, served in the U.S. Army from October 1963 to November 1993, including service in the Republic of Vietnam, and is the recipient of the Bronze Star. Record (R.) at 763-64, 766-69. He appeals, through counsel, a January 29, 2016, Board of Veterans' Appeals (Board) decision that, in part, denied entitlement to a disability rating greater than 20% for prostate cancer prior to August 28, 2012, and greater than 60% thereafter.<sup>1</sup> R. at 1-27. 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 that part of the January 29, 2016, decision denying entitlement to referral for extraschedular consideration of the appellant's increased rating claim for his service-connected prostate cancer and remand that matter for further proceedings consistent with this decision. The decision will otherwise be affirmed.

---

<sup>1</sup> The Board remanded the issues of entitlement to service connection for a left eye condition; entitlement to increased disability ratings for degenerative changes of the thoracic spine, a left shoulder sprain, and a healed fracture of the right metatarsal; and whether the withholding of retroactive VA benefits for the period from March 1, 2008, to January 1, 2012, was proper. The Court lacks jurisdiction over those issues, and they will not be addressed further. *See* 38 U.S.C. §§ 7252(a), 7266(a); *Howard v. Gober*, 220 F.3d 1341, 1344 (Fed. Cir. 2000). In addition, the Board's finding that the appellant had submitted new and material evidence to reopen his left eye claim is a favorable determination, which the Court may not disturb. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007).

The appellant does not challenge the Board's determinations regarding the proper schedular ratings for his service-connected prostate cancer. *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 to support its determination that he was not entitled to referral for extraschedular consideration. Appellant's Brief (Br.) at 5-11. Specifically, he argues that the Board improperly found that this symptoms were contemplated by the schedular rating criteria and that it erred by not considering the collective impact of his multiple service-connected disabilities or whether remand was warranted in light of the Board's remand of his thoracic spine claim for additional development. *Id.* The Secretary disputes the appellant's contentions and asks the Court to affirm the Board's decision. Secretary's Br. at 6-21.

The Court agrees that the Board failed to provide an adequate statement of reasons or bases. *See* 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995). 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. "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." *Id.* 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.*

VA rates residuals of prostate cancer under 38 C.F.R. § 4.115b, diagnostic code (DC) 7527, which instructs adjudicators to rate a veteran's disability "as voiding dysfunction or urinary tract infection" under 38 C.F.R. § 4.115a, "whichever is predominant." 38 C.F.R. § 4.115b, DC 7527 (2016). Voiding dysfunction, in turn, may be rated as "urine leakage, frequency, or obstructed voiding." 38 C.F.R. § 4.115a (2016). The appellant's prostate cancer is rated under the criteria for voiding dysfunction, classified as urine leakage. R. at 1361.

Here, the Board remanded the appellant's thoracic spine claim, in part, to obtain an examination addressing "any other associated objective neurologic abnormalities, to include bowel or bladder impairment." R. at 21. As the appellant's prostate cancer is rated on the basis of voiding dysfunction, it is not clear from the Board's decision whether the thoracic spine examination on remand could result in additional evidence relevant to the appellant's prostate cancer claim or the combined effects of his prostate cancer and thoracic spine disability. Cf. *Yancy v. Shinseki*, 27 Vet.App. 484, 495-96 (2016) (requiring the Board to consider the collective impact of a veteran's service-connected disabilities when determining whether extraschedular consideration is warranted when that issue is reasonably raised by the record); *Brambley v. Principi*, 17 Vet.App. 20, 24 (2003) (holding that remand of the issue of extraschedular referral is warranted when the record is not complete). The Board's failure to address this issue frustrates the Court's review, and the Board's statement of reasons or bases is therefore inadequate. See *Allday*, 7 Vet.App. at 527. The Court will, therefore, vacate the Board's determination that extraschedular referral is not warranted and remand that matter.

In light of this outcome, the Court will not consider 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 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. §§ 5109 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, that part of the Board's January 29, 2016, decision denying entitlement to referral for extraschedular consideration of the appellant's increased rating claim for prostate cancer is VACATED, and that matter is

REMANDED for further proceedings consistent with this decision. The decision is otherwise AFFIRMED.

DATED: April 13, 2017

Copies to:

Robert V. Chisholm, Esq.

VA General Counsel (027)