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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 15-2103

ROBERT R. BARROZO, 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, Robert R. Barrozo, through counsel, appeals an April 24, 2015, Board of Veterans' Appeals (Board) decision in which the Board denied an initial compensable disability rating for service-connected bilateral hearing loss and a compensable rating for sinusitis prior to December 21, 2009. Record of Proceedings (R.) at 1-26. Additionally, the Board granted an increased disability rating of 30% for sinusitis for the period beginning December 21, 2009. R. at 19. The Court may not disturb that favorable portion of the Board decision. *Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007) ("The Court is not permitted to reverse findings of fact favorable to a claimant made by the Board pursuant to its statutory authority."). The Board also remanded an increased rating claim for residuals of a right orbital floor fracture with right eye inflammation, pain, and headaches. R. at 20-24. The remanded claims are not before the Court. *See Hampton v. Gober*, 10 Vet.App. 481, 483 (1997) (claims remanded by the Board cannot be reviewed by the Court); *Bond v. Derwinski*, 2 Vet.App. 376, 377 (1992) (per curiam order) ("This Court's jurisdiction is confined to the review of final [Board] decisions which are adverse to a claimant."). 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. Marine Corps from August 1965 to August 1968. R. at 2258. In October 2000, he filed a disability compensation claim for various conditions, including a sinus condition and hearing loss. R. at 1144-46.

In May 2002, the appellant underwent a VA examination that determined the appellant's sinus condition was sinusitis and a right nasal obstruction, both as likely as not related to a fracture of the appellant's right orbit and right maxillary sinus. R. at 1107-15. The following month, the appellant underwent an examination for hearing loss, tinnitus, dizziness, and imbalance. R. at 1092-96. The examiner noted that "at the end of a day of physical exertion[, the appellant] feels more dizzy and more imbalanced and has more hearing loss." R. at 1092. In September 2002, the regional office granted the appellant service connection for hearing loss and sinusitis, and assigned both a noncompensable rating, effective October 23, 2000. R. at 940.

In December 2009, after development, the appellant underwent VA examinations for his hearing loss and sinusitis. R. at 589-95. The VA examiner stated that, regarding sinusitis, the appellant had interference breathing through his nose, purulent discharge from his nose, and pain. R. at 592. Additionally, the examiner noted the appellant's "inability to work" as a functional impairment caused by his sinusitis. *Id.* The VA audiological examiner opined that the appellant's hearing loss affected his usual occupation and daily activities due to "hearing in noisy or stressful situations." R. at 590.

In March 2013, the appellant testified before the Board, stating that his hearing worsened upon physical exertion as a result of the pressure in his head. R. at 2505. He also testified that to hear his wife, he must ask her to repeat herself, and that he cannot hear when background noise is present. R. at 2507.

Following a July 2013 Board remand for further development, an October 2013 VA examiner opined that the appellant's hearing loss affected the ordinary conditions of his daily life, including his ability to work. R. at 216-17. Specifically, the examiner identified the functional effects of his hearing loss as muffled hearing following physical exertion and decreased hearing in the presence of background noise. R. at 217.

In April 2015, the Board issued the decision on appeal, granting the appellant a 30% disability rating for his sinus condition from December 21, 2009, but denied a compensable rating for the period before December 21, 2009. R. at 17. Additionally, the Board denied an initial compensable disability rating for bilateral hearing loss and also denied extraschedular referral. R. at 18. Lastly, the Board remanded a claim for residuals of a right orbital floor fracture. R. at 20-24. This appeal followed.

II. ANALYSIS

A. Sinusitis

The Board must provide a statement of the reasons or bases for its determination 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); *see Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1990). To comply with this requirement, the Board must analyze the credibility and probative value of the evidence, account for the evidence it finds persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the claimant. *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table).

The assignment of a disability rating is a factual finding that the Court reviews under the "clearly erroneous" standard of review. *Johnston v. Brown*, 10 Vet.App. 80, 84 (1997). A finding of fact is clearly erroneous when the Court, after reviewing the entire evidence, "is left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948); *see Gilbert*, 1 Vet.App. at 52; *see also* 38 U.S.C. § 7104(d)(1); *Allday*, 7 Vet.App. at 527 (stating that the Board must include a written statement of the reasons or bases for its findings and conclusions on all material issues of fact and law presented on the record adequate to enable an appellant to understand the precise basis for the Board's decision, and to facilitate informed review in this Court).

The appellant argues that the Board provided inadequate reasons or bases for its decision because the Board failed to explain adequately why the appellant was not entitled to a compensable disability rating for sinusitis prior to his December 2009 medical examination, even though the examination suggested that the appellant's increased symptomatology began prior to December

2009. Appellant's Brief (Br.) at 7-10. The Secretary argues that the Board assigned the proper effective date and provided an adequate statement of reasons and bases. Secretary's Br. at 4-8.

The Court agrees with the appellant that the Board's statement of reasons or bases was inadequate. In reaching its decision to grant a 30% disability rating for sinusitis under Diagnostic Code (DC) 6513¹, the Board noted that

evidence dated from December 21, 2009[,] to the present shows the [appellant's] sinusitis has been manifested by near constant, non-incapacitating episodes per year which were manifested by sinus pain and purulent discharge. Indeed, at the December 2009 examination, the [appellant] reported that his sinusitis episodes were constant and occurred 365 days a year

R. at 15-16. Immediately following this assessment, the Board found that

a compensable rating is not warranted prior to that date, as the pertinent evidence dated prior to December 2009 does not contain any information or evidence relevant to the frequency of the [appellant's] sinusitis episodes and the available evidence does not reflect that the severity of his sinusitis was severe enough to warrant a compensable rating.

R. at 16.

In awarding the 30% disability rating from December 21, 2009, the Board relied on the December 2009 examiner's report, which related that the appellant experiences 365 non-incapacitating sinusitis episodes per year. Thus, the appellant is correct that there is some evidence in the record that he had been experiencing sinusitis symptoms for at least a year prior to the December 2009 examination. *See* R. at 592. The Board did not explicitly address the credibility of the appellant's statements to the examiner. Despite its finding that none of the evidence pre-dating December 2009 established a compensable disability rating, the Board erred when it wholly failed to address the favorable retrospective evidence elicited in the December 2009 examination report itself. *See McGrath v. Gober*, 14 Vet.App. 28, 35 (2000) (holding that in determining the date entitlement arose, when an original claim for benefits is pending, the Board must determine when a claimant's disability manifested itself under all the "facts found" and "the date on which the evidence is submitted is irrelevant"); *see also Caluza*, 7 Vet.App. at 506. Accordingly, because

¹ A 30% disability rating is warranted under the General Rating Formula for Sinusitis whenever a claimant displays "[t]hree or more incapacitating episodes per year of sinusitis requiring prolonged (lasting four to six weeks) antibiotic treatment, or; more than six non-incapacitating episodes per year of sinusitis characterized by headaches, pain, and purulent discharge or crusting." 38 C.F.R. § 4.97, DC 6510-6514 (2016).

the Board did not address the positive retrospective evidence, the Court will remand the matter in order for the Board to provide a statement of reasons or bases adequate to facilitate judicial review. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) (holding that remand is the appropriate remedy "where 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").

B. Extraschedular Referral for Hearing Loss

Generally, disability ratings for hearing loss are derived from the mechanical process of applying the rating schedule to the specific numeric scores assigned by audiology testing. *See Lendenmann v. Principi*, 3 Vet.App. 345, 349 (1992); 38 C.F.R. §§ 4.85, 4.86 (2016). In exceptional cases, VA has authorized the assignment of extraschedular ratings. 38 C.F.R. § 3.321(b)(1) (2016). "[W]hether 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 v. Peake*, 22 Vet.App. 111, 115 (2008).

The Court has held that "[u]nlike the rating schedule for hearing loss, § 3.321(b) does not rely exclusively on objective test results to determine whether a referral for an extraschedular rating is warranted," and therefore, "in addition to dictating objective test results, a VA audiologist must fully describe the functional effects caused by a hearing disability in his or her final report." *Martinak v. Nicholson*, 21 Vet.App. 447, 455 (2007). 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. In rendering its decision, the Board must provide a statement of the reasons or bases for its determination, 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); *see Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Gilbert*, 1 Vet.App. at 56-57.

Here, the appellant argues that the Board misinterpreted 38 C.F.R. § 3.321(b)(1), thereby rendering inadequate its statement of reasons and bases why the matter did not warrant extraschedular referral. Appellant's Br. at 10. Specifically, the appellant contends that the Board failed to adequately explain how the functional effects of his hearing loss – namely, muffled

hearing following physical exertion, decreased hearing in the presence of background noise, and the need to wear hearing aids – were contemplated by the rating schedule. *Id.* at 12-13. The Secretary responds that the Board decision should be affirmed because the Board properly recognized that the functional effects of the appellant's hearing loss are contemplated by the relevant schedular criteria. Secretary's Br. at 8.

In the decision on appeal, the Board found that "the manifestations of the [appellant's] hearing loss . . . are fully contemplated by the schedular rating criteria." R. at 17. With respect to extraschedular referral for the appellant's bilateral hearing loss (the only extraschedular referral denial that the appellant challenges), the Board noted that the appellant's hearing loss "affects his daily activities, that background noise interferes with his hearing, and that he cannot hear with background noise or when other people are talking." *Id.* The Board then stated that "[d]espite this evidence, the functional impairment described by the [appellant] does not appear to be exceptional or unusual, but, rather, appears to be of the type that would be a natural consequence of any hearing loss experienced by most members of the general population." *Id.* Accordingly, the Board denied referral for extraschedular consideration under the first prong of *Thun*. R. at 18. Further, the Board opined that it was unnecessary to discuss *Thun*'s second prong, but did note that there had been no hospitalizations for the appellant's hearing loss and that the percentage ratings are adequate to compensate for "considerable loss of working time from exacerbations proportionate to the severity of the several grades of disability." *Id.* (citing 38 C.F.R. § 4.1).

The Court agrees with the appellant that the Board's statement of reasons and bases is inadequate to facilitate judicial review because the Board never addressed the appellant's exacerbated hearing loss symptoms following physical exertion. *See* Appellant's Br. at 13. However, this Court's recent decision in *Doucette v. Shulkin* makes clear that "when a claimant's hearing loss results in an inability to hear or understand speech or to hear other sounds in various contexts, those effects are contemplated by the schedular rating criteria." No. 15-2818, 2017 WL 877340, at *3 (U.S. Vet. App. Mar. 6, 2017). Examples of functional effects not contemplated by the schedular rating criteria include "dizziness, vertigo, [and] ear pain." *Id.* Here, the functional effects in question are the appellant's ability to hear after physical exertion, decreased hearing in the presence of background noise, and the need to wear hearing aids. Because those functional effects amount to an "inability to hear or understand speech," they are clearly contemplated by the schedular rating criteria. *See Doucette*, No. 15-2818, 2017 WL 877340, at *3. Furthermore, the

appellant does not assert any other factors, such as marked interference with employment or frequent periods of hospitalization. *See Thun*, 22 Vet.App. at 115.

In light of *Doucette*, the Court holds that although the Board's statement of reasons or bases regarding denial of referral for extraschedular consideration is inadequate, the error is not prejudicial. *See* 38 U.S.C. § 7261(b) (requiring the Court to "take due account of the rule of prejudicial error"); *see also Shinseki v. Sanders*, 556 U.S. 396, 406 (2009) (noting that the statute requiring this Court to "take due account of prejudicial error [] requires the Veterans Court to apply the same kind of 'harmless error' rule that courts ordinarily apply in civil cases"); *Thompson v. Gober*, 14 Vet.App. 187, 191 (2000) (noting that determining whether an error is prejudicial to the appellant "can only be done by looking at the error in the context of the entire record and making a qualitative judgment that the error did or did not have an impact on the decision"). Therefore, the Board did not clearly err in denying referral for extraschedular consideration for the appellant's hearing loss.

However, the appellant also contends that the Board failed to comply with the U.S. Court of Appeals for the Federal Circuit's decision in *Johnson v. McDonald*, 762 F.3d 1362 (Fed. Cir. 2014), by not considering the "collective impact" of all his service-connected disabilities when determining whether referral for extraschedular consideration was appropriate. Appellant's Br. at 14-16; *see Johnson*, 762 F.3d at 1365 (holding that "§ 3.321(b)(1) provides for referral for extraschedular consideration based on the collective impact of multiple disabilities"). The three-part analysis set forth in *Thun* applies in considering whether referral is warranted based on the combined effects of a veteran's service-connected disabilities. *Yancy*, 27 Vet.App. at 495. Thus, "[i]f the schedular evaluations reasonably contemplate the veteran's symptomatology – including any symptoms resulting from the combined effects of multiple service-connected disabilities – then the first *Thun* step is not satisfied, and referral is not warranted." *Id.*

Here, the Board addressed the combined effect of the appellant's multiple conditions by stating that "the record does not reflect any additional impairment that has not been specifically attributed to his service-connected hearing loss or sinusitis disability." R. at 18. The appellant properly points out in his reply brief that the Board decision mentions the appellant's sinusitis and hearing loss, but fails to mention any of the appellant's other service-connected disabilities, such as the right orbital floor fracture (which the Board remanded in the decision on appeal). Reply Br. at 10-11. *Yancy* makes clear that the Board should have included the appellant's other service-

connected conditions in its analysis. 27 Vet.App. at 496 ("[T]he Board must consider any combined effects resulting from all of a claimant's service-connected disabilities insofar as they impact the disability picture of the disabilities on appeal . . ."). Accordingly, the Board's statement of reasons and bases regarding its combined-effects analysis frustrates judicial review, and the Court will remand the matter so that the Board may fully explain its analysis in accordance with *Johnson and Yancy*. See *Tucker and Allday*, *supra*.

Given this disposition, the Court will not, at this time, address the other arguments and issues raised by the appellant. See *Best v. Principi*, 15 Vet.App. 18, 20 (2001) (per curiam order) (holding that "[a] narrow decision preserves for the appellant an opportunity to argue those claimed errors before the Board at the readjudication, and, of course, before this Court in an appeal, should the Board rule against him"). 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 benefit sought); *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order). The Board must proceed expeditiously, in accordance with 38 U.S.C. § 7112 (requiring Secretary to provide for "expeditious treatment" of claims remanded by the Court).

III. CONCLUSION

After consideration of the appellant's and the Secretary's pleadings, and a review of the record, the Board's April 24, 2015, decision is VACATED and the matter is REMANDED to the Board for further proceedings consistent with this decision.

DATED: April 17, 2017

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