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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 16-0920

JESSIE BELL, APPELLANT,

V.

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

Before PIETSCH, *Judge*.

MEMORANDUM DECISION

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

PIETSCH, *Judge*: The appellant, Jessie Bell, appeals through counsel a February 8, 2016, decision of the Board of Veterans' Appeals (Board) that determined that referral for an extraschedular rating for chronic onychomycosis was not warranted. Record (R.) at 2-9. This appeal is timely, and the Court has jurisdiction pursuant to 38 U.S.C. § 7252(a). Both parties submitted briefs, and the appellant submitted a reply brief. A single judge may conduct this review. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the reasons set forth below, the Court will vacate the Board's February 8, 2016, decision and remand the matter of referral for an extraschedular rating for chronic onychomycosis for further proceedings consistent with this decision.

I. FACTS

Mr. Bell served on active duty in the U.S. Army from February 1977 to January 1997. R. at 1394-95.

In March 2010, the veteran underwent a VA examination for his service-connected lumbar spine disorder. R. at 2197-99. Later that month, he filed a claim for service connection and compensation for a number of conditions, including onychomycosis. R. at 2164-68. In May 2010,

he filed a statement regarding his service-connected right shoulder disorder. R. at 2148-49. In June 2010, Mr. Bell underwent a VA joints examination and a VA skin examination for his onychomycosis condition. R. at 2130-32, 2139-41. In May 2011, he underwent a VA foot examination. R. at 2038-40.

In June 2011, he was awarded entitlement to service connection for multiple conditions, including chronic onychomycosis of the great toes. R. at 2030-31. In September 2011, Mr. Bell underwent another VA skin examination for his onychomycosis condition. R. at 2006-12.

In October 2011, Mr. Bell filed a Notice of Disagreement with the assigned noncompensable rating for his chronic onychomycosis. R. at 1969-77. In February 2013, the regional office (RO) issued a Statement of the Case continuing the assigned noncompensable evaluation. R. at 1692-1711. That same month, Mr. Bell appealed to the Board. R. at 1687-89. In April 2014, he underwent a VA foot examination. R. at 1167-70.

The Board, in June 2015, denied Mr. Bell's claim for an increased disability rating for his service-connected chronic onychomycosis. R. at 421-28. In October 2015, this Court granted a joint motion by the parties to vacate and remand the June 2015 Board decision for readjudication of the issue of a higher rating for chronic onychomycosis on an extraschedular basis to allow the Board to provide adequate reasons or bases regarding Mr. Bell's reported symptoms of painful toenails. R. at 370; *see* R. at 363-69. On February 8, 2016, the Board issued the decision here on appeal. R. at 2-9.

II. ANALYSIS

The appellant argues that the Board erred by failing to adequately explain why referral regarding entitlement to an extraschedular rating for his service-connected chronic onychomycosis was not warranted. Appellant's Brief (App. Br.) at 6-10; App. Reply Br. at 1-5.

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* 38 C.F.R. § 3.321(b)(1) (2016). First, the Board must determine whether the evidence "presents such an exceptional disability picture that the available schedular evaluations for that service-connected disability are inadequate." *Thun*, 22 Vet.App. at 115. This requires that the Board

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 the first requirement is satisfied, the Board must 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 (quoting 38 C.F.R. § 3.321(b)(1)). If the first two inquiries are answered in the affirmative, the Board must refer the matter to the Under Secretary for Benefits or the Director of the Compensation Service (Director) for completion of the third step—a determination of whether, to accord justice, the claimant's disability picture requires the assignment of an extraschedular rating. *Id.*

The Board's findings must also be supported by an adequate statement of reasons or bases that explains why the schedular rating is adequate. *See id.* at 115. This necessarily includes a discussion and assessment of whether a disability or its symptomatology is so severe that it prevents the veteran from working, and an explanation as to whether and why such interference with work is of the same degree and nature as contemplated by the schedular rating. *See id.* In *Yancy v. McDonald*, the Court stated that "[a]lthough the first and second *Thun* elements involve separate factual questions, both inquiries require a full and accurate description of a claimant's disability picture." 27 Vet.App. 484, 494 (2016).

As always, 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); *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).

In this case, the appellant points out that the Board found that the evidence of record regarding his painful toenails did not demonstrate marked interference with his employment as an instructor and argues that the Board "failed to explain why all of the evidence did not indicate this level of difficulty with employment." App. Br. at 8-9. However, the Court concludes that the Board

adequately considered and analyzed this evidence in its *Thun* analysis. The Board first noted that "[s]ince the [appellant's] complaints of painful toenails with ambulation or at rest and pain on palpitation are not contemplated under the rating[] criteria, the Board will address the second and third questions posed by *Thun*." R. at 7. The Board then found that the appellant's service-connected chronic onychomycosis condition "with associated toenail pain impacts his ability to work." R. at 8. However, the Board further explained that the evidence did not show that the appellant's condition caused him "to miss substantial periods of work or otherwise have a marked impact on his employment." *Id.* The Board also relied on the June 2010 and September 2011 VA examinations wherein the examiners noted that the appellant's symptoms did not impact his ability to work, limit his daily activities, or cause any loss of function. *Id.*; see R. at 2012, 2131. The Board also noted in support an April 2014 podiatry evaluation that "revealed that the [appellant] was employed as a teacher despite bilateral foot pain (some of which was attributable to his pes planus disability)." R. at 8-9. Therefore, when read as a whole, the Board's decision that referral for extraschedular consideration for his chronic onychomycosis condition alone was not warranted is understandable and facilitates judicial review. See *Thun*, 22 Vet.App. at 115; *Allday*, 7 Vet.App. at 527; *Gilbert*, 1 Vet.App. at 56-57.

The appellant also argues that the Board, when analyzing whether referral for extraschedular consideration for his chronic onychomycosis was warranted, failed to properly consider the combined effects of all of his service-connected conditions, as required pursuant to *Johnson v. McDonald*, 762 F.3d 1362 (Fed. Cir. 2014). App. Br. at 10-13; App. Reply Br. at 5-7. In *Johnson*, the U.S. Court of Appeals for the Federal Circuit held that "§ 3.321(b)(1) provides for referral for extraschedular consideration based on the collective impact of multiple disabilities." 762 F.3d at 1365. In addition to his service-connected chronic onychomycosis, the appellant also is service-connected for a number of other conditions including pes planus, degenerative disc disease of the lumbar spine and cervical spine, and right shoulder impingement syndrome. R. at 147-48.

In the decision on appeal, the Board noted the requirement pursuant to *Johnson* that entitlement to an extraschedular rating must be based upon the combined effects of all service-connected disabilities, but found that "such a situation has not been suggested by the [v]eteran or the other evidence of record." R. at 9; see *Yancy*, 27 Vet.App. at 495 (requiring the Board to undertake

combined-effects analysis pursuant to *Johnson* when the issue is raised by the appellant or reasonably raised by the record).

However, based upon review of the record, the Court concludes that the issue of whether the combined effects of the appellant's service-connected conditions require referral for extraschedular consideration was reasonably raised by the record. In *Yancy*, the evidence showed that the service-connected disorders that the veteran experienced combined to cause him to be unable to stand or sit. 27 Vet.App. at 496. The Court found that evidence to be sufficient to reasonably raise entitlement to an extraschedular disability rating on a collective basis, and it instructed the Board to apply *Johnson. Id.*

In this case, the appellant complained of severe foot pain that limited the amount of time he could exercise with his students or stand in a classroom. *See R.* at 2038-39. He complained that his right shoulder disorder caused him a great deal of pain if he slept on it and limited him to four hours of sleep each night. *See R.* at 173, 1770, 1994, 2148. He also reported extreme difficulty writing on the blackboard in class and exhaustion when he uses his right hand. *See R.* at 32, 1770, 2139, 2148-49. Moreover, he reported that his neck and back conditions caused him to lose time from his job. *See R.* at 135. Regarding his back, he reported that back pain prevented him from participating in physical training in his job. *See R.* at 2198; *see also App. Br.* at 11. Accordingly, the Board's terse conclusion that a combined effects analysis is not required because "such a situation has not been suggested by . . . the other evidence of record"—without further analysis of all of the evidence of record regarding the effects of all of the appellant's service-connected disabilities upon his ability to work—frustrates judicial review and requires remand. *See Caluza*, 7 Vet.App. at 506; *see also 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.").

In pursuing the matter on remand, the appellant is free to submit additional evidence and argument on the remanded matter, 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 has held 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). The Board must proceed expeditiously, in accordance with 38 U.S.C. § 7112 (requiring the Secretary to provide for "expeditious treatment" of claims remanded by the Court).

III. CONCLUSION

After consideration of the appellant's and Secretary's briefs, and a review of the record on appeal, the February 8, 2016, Board decision as to its determination that referral for an extraschedular rating for chronic onychomycosis was not warranted is VACATED and the matter is REMANDED for further proceedings consistent with this decision.

DATED: April 28, 2017

Copies to:

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