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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 15-3644

ROGER BLAKLEY, APPELLANT,

v.

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

Before DAVIS, *Chief Judge*.

MEMORANDUM DECISION

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

DAVIS, *Chief Judge*: U.S. Air Force veteran Roger Blakley appeals through counsel an August 12, 2015, Board of Veterans' Appeals (Board) decision that denied a compensable disability rating for left foot hallux valgus prior to May 22, 2013, and declined to refer the claim for extraschedular consideration.¹ For the following reasons, the Court will set aside the Board's determinations with respect to the hallux valgus rating and consideration of referral for extraschedular consideration and remand those matters for readjudication.

I. ANALYSIS

Mr. Blakley's left foot hallux valgus is rated under 38 C.F.R. § 4.71a, Diagnostic Code (DC) 5280 (2016). He asserts, in part, that the Board "failed to explain how it accounted for favorable evidence of functional loss" in applying 38 C.F.R. §§ 4.40, 4.45, and 4.59 (2016) and determining he was not entitled to a minimum compensable rating. Appellant's Brief (Br.) at 11-

¹ The Court notes that Mr. Blakley does not raise any contentions of error in the Board's denial of a disability rating in excess of 10% for traumatic arthritis of the left great toe. Therefore, the Court deems this matter as abandoned. See *Pederson v. McDonald*, 27 Vet.App. 276, 283 (2015) (en banc) (stating that "this Court, like other courts, will generally decline to exercise its authority to address an issue not raised by an appellant in his or her opening brief").

14. He further asserts that the Board erred when it failed to consider whether the combined effect of his service-connected disabilities warranted extraschedular referral. *Id.* at 26-28. The Court agrees.

Hallux valgus is rated under 38 C.F.R. § 4.71a, DC 5280, which provides a 10% rating when a veteran has undergone an operation with resection of the metatarsal head or the condition is severe enough to be equivalent to amputation of the great toe. In evaluating the schedular disability ratings for musculoskeletal disabilities, VA must assess the relevant musculoskeletal DCs in the context of the factors listed in §§ 4.40, 4.45, and 4.59. Section 4.40 directs VA to consider, among other things, weakness, excess fatigability, and pain on use. 38 C.F.R. § 4.40. Section 4.45 addresses the adjudication of joint disabilities and states that factors such as pain on movement, instability of station, disturbance of locomotion, and interference with sitting, standing, and weight bearing "are related considerations." 38 C.F.R. § 4.45(f). Section 4.59 recognizes "actually painful, unstable, or malaligned joints, due to healed injury, as entitled to at least the minimum compensable rating for the joint." The Court recently held in *Southall-Norman v. McDonald*, 28 Vet.App. 346 (2016),² that "the plain language of § 4.59 indicates that it is applicable to the evaluation of musculoskeletal disabilities involving actually painful, unstable, or malaligned joints or periarticular regions, regardless of whether the DC under which the disability is being evaluated is predicated on range of motion measurements." *Southall-Norman*, 28 Vet.App. at 354.

To determine entitlement to an extraschedular evaluation, the Board first must determine whether the evidence "presents such an exceptional disability picture that the available schedular evaluations for that service-connected disability are inadequate." *Thun v. Peake*, 22 Vet.App. 111, 115 (2008); *aff'd sub nom. Thun v. Shinseki*, 572 F.3d 1366 (Fed. Cir. 2009). This determination obliges the Board to 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.* When this requirement is satisfied, the Board must determine whether the veteran'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 both

² On September 13, 2016, this matter was stayed pending disposition of *Southall-Norman v. McDonald*, 28 Vet.App. 346 (2016). The stay was lifted on January 9, 2017, following disposition of *Southall-Norman*, and the appellant was ordered to file his reply brief within 16 days of the order. His reply brief was received on January 24, 2017.

inquiries are answered in the affirmative, the Board must refer the matter to the Under Secretary for Benefits or the Compensation Service director for the third inquiry, i.e., a determination of whether, "[t]o accord justice," the veteran's disability picture requires the assignment of an extraschedular evaluation. *Id.*; see also *Anderson v. Shinseki*, 22 Vet.App. 423, 427 (2009) (outlining the "elements that must be established before an extraschedular rating can be awarded"). In making the extraschedular referral determination, the Board must consider the collective impact of multiple service-connected disabilities whenever that issue is expressly raised by the claimant or reasonably raised by evidence of record. See *Yancy v. McDonald*, 27 Vet.App. 484, 495 (2016).

As with all its material findings of fact and conclusions of law, the Board is required to support its determinations as to schedular and extraschedular evaluations with a written statement of reasons or bases that is understandable by the claimant and facilitates review by this Court. See 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995). The statement of reasons or bases must explain the Board's reasons for discounting favorable evidence, *Thompson v. Gober*, 14 Vet.App. 187, 188 (2000), discuss all issues raised by the claimant or the evidence of record, *Robinson v. Peake*, 21 Vet.App. 545, 552 (2008), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1335 (Fed. Cir. 2009), and discuss all provisions of law and regulation where they are made "potentially applicable through the assertions and issues raised in the record," *Schafrath v. Derwinski*, 1 Vet.App. 589, 592 (1991); see also *Majeed v. Principi*, 16 Vet.App. 421, 431 (2002).

The Board noted "reports of pain associated with the left foot hallux valgus" but found that "the evidence demonstrated that [Mr. Blakley] was able to perform repetitive-use testing and showed no additional limitation of motion following such testing." Record (R.) at 15-6. The Board further found that Mr. Blakley's lay statements about functional loss "consider[ed] the overall impact of all of [his] service-connected disabilities," not just his left foot hallux valgus. R. at 16. The Board also noted that the assignment of a minimum compensable rating under § 4.59 would "have absurd results," as "a 10 percent rating would be the same rating provided if the condition were so severe it was equivalent to amputation or even if the great toe was amputated." *Id.*

The Court holds that the Board failed to provide an adequate statement of reasons or bases for its discussion of 38 C.F.R. § 4.59, as the Board failed to discuss favorable evidence of pain with walking, standing, and weight-bearing activities. See R. at 824; *Southall-Norman*, 28 Vet.App. at 354. The Board's failure to discuss this evidence in the context of § 4.59 renders its statement of reasons or bases inadequate and warrants remand. *Tucker v. West*, 11 Vet.App.

369, 374 (1998) (remand is appropriate "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"). To the extent that Mr. Blakley argues in favor of reversal, *see* Appellant's Reply Brief at 2, remand is the appropriate remedy when the Board has provided an inadequate statement of reasons or bases. *Tucker*, 11 Vet.App. at 374.

As to whether extraschedular evaluation was warranted, the Secretary concedes that "the Board failed to discuss whether extraschedular consideration based on the collective-impact of his disabilities was reasonably raised by the record." Secretary's Br. at 17. The Court agrees that the Board's statement of reasons or bases is inadequate for judicial review. Despite the appellant's service-connected conditions of arthritis of the right and left foot and ankle, left great toe arthritis, right and left knee disabilities, and right and left foot hallux valgus, the Board failed to consider the combined effects of these conditions, as reasonably raised by the evidence of record. *See R.* at 853 (appellant's "foot injury, as well as his ankle . . . make [his job] an impossible task"), 1048 (degenerative arthritis of the right foot due to "overutilization due to compensating for the impaired left great toe"). The Board's failure to address the combined effects of Mr. Blakley's service-connected disabilities warrants remand. *See Allday*, 7 Vet.App. at 527; *see also Johnson v. McDonald*, 762 F.3d 1362, 1365-66 (Fed. Cir. 2014) ("The plain language of § 3.321(b)(1) provides for referral for extraschedular consideration based on the collective impact of multiple disabilities."); *Thompson*, 14 Vet.App. at 188; *see Tucker*, 11 Vet.App. at 374.

The Court acknowledges that Mr. Blakley makes several other arguments as to the adequacy of the Board's reasons or bases as to the schedular and extraschedular rating for hallux valgus. As the Board will necessarily render a decision on remand that will contain a new statement of reasons or bases, the Court need not address those arguments at this time. *See Mahl v. Principi*, 15 Vet.App. 37, 38 (2001) (per curiam order) ("[I]f the proper remedy is a remand, there is no need to analyze and discuss all the other claimed errors that would result in a remedy no broader than a remand."). On remand, Mr. Blakley may submit additional evidence and argument, and the Board must consider any such evidence or argument submitted. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002). This matter is to be provided expeditious treatment on remand. 38 U.S.C. § 7112.

II. CONCLUSION

On consideration of the foregoing, the Court SETS ASIDE the Board's August 12, 2015, decision and REMANDS that matter for further proceedings consistent with this decision.

DATED: April 28, 2017

Copies to:

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