

APPELLANT'S BRIEF

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

No. 16-3193

CURTIS J. WASHINGTON,

Appellant,

v.

**DAVID J. SHULKIN, M.D.,
Secretary of Veterans Affairs,**

Appellee.

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III. STATEMENT OF THE ISSUES

- A. Whether the Board improperly denied Mr. Washington's claims for higher ratings for his service connected lumbar spine and right knee disabilities on an extraschedular basis where it failed to state adequate reasons or bases for its decision in view of material, favorable evidence that was ignored by the Board.
- B. Whether the Board misinterpreted the legal standard created in *Johnson v. McDonald*, and applied an improper legal standard to the combined extraschedular evaluation issue. Whether the Board failed to state adequate reasons or bases for its denial of extraschedular consideration for the combination of the Appellant's service connected disabilities in view of the material evidence which was favorable to his claims.

IV. STATEMENT OF FACTS

Mr. Curtis J. Washington ("Appellant" or "veteran") served on active duty in the U.S. Navy from December 3, 1985 until January 21, 1994, when he received his honorable discharge due to physical disability (Record Before the Agency [R.]. 559). He was born on October 10, 1966, and is 50 years old today (R. 559).

V. STATEMENT OF THE CASE

On December 9-10, 1985, during active duty service, Mr. Washington was treated for headache (R. 319). On November 1, 1986, Mr. Washington was treated for right knee pain (R. 264-65).

On May 1, 1987, Mr. Washington was treated for headache and diagnosed as possible vascular headache (R. 322-23). On July 11, and September 17, 1987, Mr. Washington was treated for headache and diagnosed with tension headaches (R. 325-28). In October 1987, Mr. Washington was again treated for history of headache (R. 334-35). In January 1988, April 1988, and July 1988, Mr. Washington was again treated for headaches (R. 337-38, 343-44, 346-47).

On October 3, 1988, Mr. Washington was treated for closed head trauma with fracture (R. 351). On February 10, 1989, Mr. Washington was diagnosed with migraine type headaches (R. 354).

On August 16, 1989, Mr. Washington was again treated for tension headache (R. 220). On October 29, 1991, Mr. Washington was treated for tension vs. vascular headache (R. 357, 359, 360-63).

On September 20, 1993, Mr. Washington was treated for his chronic right knee pain and was diagnosed with chronic right knee patellofemoral syndrome, unresolved (R. 194, 197-98).

On November 30, 1993, a physical evaluation board found Mr. Washington unfit for duty due to right knee patellofemoral syndrome, chronic, unresolved (R. 3351). He was discharged on January 21, 1994 (R. 559).

On April 14, 1999, Mr. Washington filed a VA application for compensation and/or pension for lower back pain, right knee pain, and headache disorder after head trauma (R. 3334-337).

On December 6, 1999, the RO issued a Rating decision denying Mr. Washington's application for disability benefits as not well grounded (R. 3292-298).

On March 20, 2003, Mr. Washington filed his written claim to reopen his claim for service connection for his back disability (R. 3281-282). On May 16, 2003, Mr. Washington filed an application for compensation and/or pension for lower back, right knee patellofemoral syndrome, and severe headache disorder (R. 3229-244).

On May 19, 2004, the VA Medical Center, Tuscaloosa, Alabama, conducted a compensation and pension (C&P) examination of Mr. Washington for evaluation of low back pain, right knee pain, and severe headaches (R. 3065-074). Dr. Shivashankara concluded that Mr. Washington was not able to obtain or maintain substantial gainful work (R. 3073).

On August 20, 2004, the RO issued a Rating decision granting service connection for the veteran's lumbar spine disabilities with a twenty (20%) percent rating effective April 14, 1999; granting service connection for right knee patellofemoral syndrome with a zero (0%) percent evaluation effective April 14, 1999;

and it denied his claim for service connection for his headache disorder because it concluded that the evidence submitted was not new and material (R. 3050-054, 3057-064). Mr. Washington filed his notice of disagreement (NOD) to the RO's decision on May 13, 2005 (R. 3013-019).

On September 9, 2004, during the one-year appeal period, the VAMC physician diagnosed Mr. Washington with an “[a]djustment disorder with depressed mood-associated with chronic pain and unemploy[ment].” (R. 1890-898, 2675-676). The VA physician began treating the veteran with Elavil 25 mg at bedtime (R. 1894). The examiner stated that the veteran “attributed his feelings of depression to dealing with chronic back pain [for] 2 years. Pain disturbs his sleep and reportedly makes him irritable. He is reportedly unable to work and unable to do the things he used to enjoy.” (R. 2676).

On September 28, 2005, Dr. Donald Blanton diagnosed Mr. Washington with “major depression secondary to chronic pain and lifestyle changes” and assigned a Global Assessment of Functioning (GAF)¹ score of 50² (R. 1749-753). Dr. Blanton stated that the veteran had “scored in the severely depressed range on th[e]

¹ Global Assessment of Functioning (GAF) is for reporting the clinician's judgment of the individual's overall level of psychological, social, and occupational functioning on a hypothetical continuum (1-100) of mental health-illness. This information is useful in planning treatment and measuring its impact and in predicting outcome. *Diagnostic and Statistical Manual of Mental Disorders (DSM-IV)*. 4th ed (American Psychiatric Association, 1994), 30-32.

² GAF of 50 indicates Serious symptoms (e.g., suicidal ideation, severe obsessional rituals, frequent shoplifting) OR any serious impairment in social, occupational, or school functioning (e.g., no friends, unable to keep a job). *Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR)*. (American Psychiatric Association, 2000), 34.

administration of the Beck Depression Inventory II”, and he encouraged the veteran “to discuss this further with his VA doctors as more antidepressant medications and psychotherapy may be of benefit to him.” (R. 1751).

The VA issued its Statement of the Case (SOC) on February 17, 2006, continuing the RO’s previous decision (R. 2959-988). Mr. Washington filed his formal appeal on April 14, 2006 (R. 2946-952). On July 21, 2006, Mr. Washington submitted evidence to support his claim for an increased evaluation for his right knee patellofemoral syndrome and chronic headaches (R. 4264-265).

On June 22, 2006, the VAMC made a referral to Mental Health for treatment of the veteran’s depression (R. 3887-889). On August 9, 2006, the veteran’s treating VAMC physician diagnosed him with depression, assigned a GAF score of 50, and found him to have “severe social and occupational d[y]sfunction” (R. 1733, 1729-734).

On October 23, 2006, the Social Security Administration (SSA) found Mr. Washington to be totally disabled from August 1, 2002, solely due to his “thoracolumbar pain, history of L5-S1 discectomy with continuing low back pain radiating to right leg, and depression so severe that [he is] unable to perform any work existing in significant numbers in the national economy.” (R. 1632, 1630-638, 1641).

On November 29, 2007, the veteran’s VAMC provider diagnosed him with dysthymia (R. 3834-838).

On May 2, 2008, Mr. Washington was treated at the VA Medical Center, Tuscaloosa, for his right knee and lower back (R. 2710-711).

On April 10, 2009, the Board of Veterans' Appeals (Board or BVA) remanded Mr. Washington's claim for entitlement to an initial compensable rating for right knee patellofemoral syndrome and reopened his claim for entitlement to service connection for headaches (R. 2920-932). In its Remand order, the Board stated the following:

A review of the record reveals that a remand is required in this case. The Veteran's last VA medical examination to determine the severity of his service-connected lumbar spine and right knee conditions was in May 2004. Based upon the lapse in time from that examination and the absence of contemporaneous treatment records, the actual severity of the Veteran's service-connected lumbar spine and right knee disabilities is unclear. He must be afforded a contemporaneous and thorough VA examination....

In addition, a medical opinion is required before the reopened claim of service connection for headaches can be adjudicated... Here, the service treatment records contain multiple notations of complaints of headaches during active military service. The May 2004 VA examination also reflects an existing diagnosis of "chronic headaches." There is also some indication of an association between the in-service and current conditions as the VA examiner states that the Veteran's headaches began during service, in approximately 1987. However, the record does not contain a medical opinion as to nexus, or a possible causal relationship between the claimed in-service and current conditions. As there is insufficient medical evidence upon which to decide the claim, a medical opinion must be obtained.

Finally, the record contains no current VA treatment records. If there are VA treatment records for this Veteran, they must be obtained and associated with the claims file.

* * *

... Thereafter, readjudicate the issues on appeal. If the determinations remain unfavorable to the Veteran, he and his representative must be furnished a Supplemental Statement of the Case which addresses all evidence associated with the claims file since the last Statement of the Case....

(R. 2927-930).

On May 15, 2009, Mr. Washington was treated at the VA Medical Center, Tuscaloosa, with complaints of headache. The notes record the veteran's history that his "[h]e headache pattern has been similar for the past 20 years." (R. 1989, 1987-990).

On June 30, 2009, Mr. Washington filed his claim to establish service connection for his depression or mood disorder (R. 2656).

On July 7, 2009, a Compensation and Pension (C&P) examination was conducted at the VA Medical Center, Tuscaloosa, for Joints. The examiner's diagnosis was listed as grade I/II chondromalacia involving the patellofemoral joint with limited flexion of right knee. The examiner concluded that the impact on occupational activities was "Decreased mobility, Problems with lifting and carrying, Lack of stamina, Weakness or fatigue, Decreased strength: lower extremity, Pain." (R. 2641-653).

On July 7, 2009, a C&P examination was conducted at the VA Medical Center, Tuscaloosa, for Neurological Disorders. The examiner stated that the date of onset of his headaches was 1987 while stationed in Guam. The diagnosis was headaches with significant effects on usual occupations due to pain (R. 2644-646, 3556-559).

On November 29, 2007, Mr. Washington was diagnosed with dysthymia (R. 3834-838).

On March 15, 2010, the VARO issued a Supplemental Statement of the Case (SSOC) (R. 2601-611). The SSOC noted the following as evidence: (1) treatment reports, VAMC Tuscaloosa, from May 20, 2004 through May 15, 2009 and (2) VA

examination, VAMC Tuscaloosa, dated July 7, 2009 (R. 2603). The SSOC granted an increased evaluation of right knee patellofemoral syndrome to 10 percent effective May 16, 2003 and continued the denial of service connection for headaches (R. 2609).

On March 29, 2010, the VARO issued a Rating decision granting service connection for limitation of extension, right knee with an evaluation of 40 percent effective July 7, 2009; an increased evaluation to 10 percent for right knee patellofemoral syndrome effective May 16, 2003; and continued the denial of his claim for entitlement to service connection for headaches (R. 2539-545, 2595-600).

On May 19, 2010, the Board issued its final decision denying the veteran's claims for entitlement to service connection for headaches; entitlement to a compensable rating for right knee patellofemoral syndrome from April 14, 1999 to May 15, 2003; and a rating in excess of 10 percent for right knee patellofemoral syndrome from May 16, 2003. This May 2010 decision also remanded the veteran's claims for a higher initial rating for his service-connected low back disorder (R. 2443-473).

On June 24 and 25, 2010, the VA conducted a neurologic C&P examination for the veteran's low back disorders (R. 2077-082, 2391-403). The examiner provided a diagnosis of lumbago with shooting pain legs; negative for radiculopathy, normal neurological examination with shooting pain right leg and foot. The effects on usual occupation and resulting work problems are unable to do physical work due to constant pain low back and both legs. (R. 2392). On the spine examination, the

examiner diagnosed degenerative disease at the L5-S1 level with residuals of right lumbar laminectomy and chronic low back pain with sciatica (lumbar radiculopathy) both legs resulting in limited ambulation, standing and walking; persistent pain low back; unable to concentrate. (R. 2398).

On September 16, 2010, Mr. Washington filed his appeal of the Board's May 2010 decision with this Court (R. 2327-332).

On September 21, 2010, Mr. Washington filed his Notice of Disagreement (NOD) with the VA's March 29, 2010 Rating decision (R. 2375-376).

On October 4, 2011, this Court granted the parties' Joint Motion for Remand and remanded that part of the Board's May 2010 decision that had denied entitlement to service connection for headaches; a compensable rating for right knee patellofemoral syndrome from April 14, 1999 to May 15, 2003; and a rating in excess of 10 percent for right knee patellofemoral syndrome from May 16, 2003, pursuant to 38 U.S.C. § 7252(a) (R. 2229-233).

On January 27, 2012, the VARO issued its Statement of the Case (SOC) on the issues of (1) service connection for limitation of extension, right knee; (2) evaluation of right knee patellofemoral syndrome currently evaluated as 40 percent disabling; (3) evaluation of lumbar spine degenerative disc disease with right L-5 radiculopathy currently evaluated as 20 percent disabling; (4) service connection for headaches; (5) entitlement to an earlier effective date than July 7, 2009 for limitation of extension,

right knee at 40 percent; and (6) entitlement to an earlier effective date than May 16, 2003 for right knee patellofemoral syndrome at 10 percent (R. 2200-220).

On February 10, 2012, Mr. Washington filed his substantive appeal in response to the appealed issues in the VA's January 27, 2012 SOC (R. 2169-174).

On February 28, 2012, the Board issued its decision remanding Mr. Washington's claims for entitlement to service connection for headaches; entitlement to a compensable rating for right knee patellofemoral syndrome from April 14, 1999 to May 15, 2003; and entitlement to a rating in excess of 10 percent for right knee patellofemoral syndrome from May 16, 2003 (R. 2165-168).

On March 30, 2012, Mr. Washington submitted new evidence including the SSA's October 2006 decision that found him totally disabled (R. 1309-312).

On April 14, 2015, the VARO issued its SSOC denying (1) entitlement to service connection for headaches; (2) entitlement to a compensable rating for right knee patellofemoral syndrome from April 14, 1999 to May 15, 2003; (3) entitlement to a rating in excess of 10 percent for right knee patellofemoral syndrome from May 16, 2003; and entitlement to an initial rating in excess of 20 percent for degenerative disc disease of the lumbar spine with right L-5 radiculopathy (R. 1023-028).

On December 9, 2015, the VARO issued its Rating decision granting a 40 percent evaluation of the lumbar spine degenerative disc disease with right L-5 radiculopathy, effective June 25, 2010 (R. 839-44, 3367-368, 3584-585).

On January 29, 2016, Mr. Washington submitted new evidence including Dr. Philip Golomb's January 7, 2016 Medical Opinion with Physical Capacities Evaluation, Supplemental Questionnaire as to Residual Functional Capacity, Clinical Assessment of Fatigue, Clinical Assessment of Pain, Medical Assessment Form (Mental) (R. 672-00).

On January 29, 2016, Mr. Washington filed his NOD with the VA's December 9, 2015 Rating decision (R. 624-28).

On February 5, 2016, Mr. Washington submitted new evidence in support of his claims from (1) VA Medical Center, Tuscaloosa, dated July 13, 2010 through November 9, 2015; (2) Sumter Central High School records dated 1979 to 1985; and (3) Dr. Donald Blanton, Psychological Evaluation, dated February 1, 2016 (R. 639-67).

On February 12, 2016, Mr. Washington submitted new evidence in support of his claims from (1) Dr. Philip Golomb, January 7, 2016 Medical Opinion with Physical Capacities Evaluation, Supplemental Questionnaire as to Residual Functional Capacity, Clinical Assessment of Fatigue, Clinical Assessment of Pain, Medical Assessment Form (Mental); (2) Dr. Donald Blanton, Psychological Evaluation, dated February 1, 2016; and (3) Mr. Christopher Young, Vocational Management Services, Vocational Evaluation, dated February 10, 2016 (R. 574-623).

In its May 19, 2016 decision, the Board denied Mr. Washington's claims for (1) entitlement to an initial compensable disability rating prior to May 16, 2003, and a rating in excess of 10 percent from May 16, 2003 to June 25, 2010, for patellofemoral

syndrome of the right knee; (2) entitlement to an initial disability rating in excess of 40 percent for limitation of extension of the right knee for the period prior to June 25, 2010; (3) entitlement to an initial disability rating in excess of 20 percent prior to June 25, 2010, and in excess of 40 percent thereafter, for degenerative disc disease of the lumbar spine; and (4) entitlement to an effective date earlier than July 7, 2009, for the grant of service connection for limitation of extension of the right knee. This May 2016 Board decision also granted entitlement to a separate 10 percent disability rating for radiculopathy of the right lower extremity and entitlement to a separate 10 percent disability rating for radiculopathy of the left lower extremity³ (Record Before the Agency [R.]. 2-43).

On September 15, 2016, Mr. Washington filed his Notice of Appeal with this Court to obtain judicial review of the Board's May 2016 decision.

VI. SUMMARY OF ARGUMENT

The Board improperly denied the Appellant's claims for higher ratings for his service connected lumbar spine and right knee disabilities on an extraschedular basis. When either a claimant or the evidence of record suggests that a schedular rating may

³ The May 2016 Board decision also remanded the veteran's claims for entitlement to service connection for headaches; entitlement to service connection for an acquired psychiatric disorder, including as secondary to his service-connected disability; and entitlement to a total disability rating based on unemployability due to service-connected disabilities (TDIU).

be inadequate, the Board must specifically adjudicate the issue of whether referral for an extraschedular rating is warranted. The Board is required to include in its decision 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. The evidence before the Board proved that the Appellant's chronic psychiatric disorder was related to or caused by his service connected lumbar spine and right knee disabilities. The Board must analyze the credibility and probative value of the evidence, account for the evidence that it finds to be persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the claimant.

The Board referred to the Court's decision in *Johnson v. McDonald*, 762 F.3d 1362 (Fed. Cir. 2014), but it misinterpreted the legal standard established in that decision. As a result of its misinterpretation, the Board applied an improper legal standard to evaluate whether the Appellant was entitled to extraschedular consideration of the combination of his service connected disabilities. The Board also failed to state adequate reasons or bases for its finding that the record did not demonstrate that there was no effect due to the combination of the Appellant's service connected lumbar spine and right knee disabilities in view of the material evidence which was favorable to his claims. The Board improperly ignored all of this favorable, material evidence in denying the Appellant entitlement to a higher rating for his service connected lumbar spine and right knee disabilities on an extraschedular basis and in denying his

entitlement to an extraschedular rating for the combined effects of these service connected disabilities.

VII. ARGUMENT

- A. THE BOARD IMPROPERLY DENIED MR. WASHINGTON'S CLAIMS FOR HIGHER RATINGS FOR HIS SERVICE CONNECTED LUMBAR SPINE AND RIGHT KNEE DISABILITIES ON AN EXTRASCHEDULAR BASIS WHERE IT FAILED TO STATE ADEQUATE REASONS OR BASES FOR ITS DECISION IN VIEW OF MATERIAL, FAVORABLE EVIDENCE THAT WAS IGNORED BY THE BOARD.
-

The Board improperly denied the Appellant's claims for higher ratings for his service connected lumbar spine and right knee disabilities on an extraschedular basis pursuant to 38 C.F.R. § 3.321(b)(1) (R. 27-28).

Generally, it is sufficient to evaluate a disability using either the corresponding or analogous diagnostic codes contained in the rating schedule. *See* 38 C.F.R. §§ 4.20, 4.27 (2016). "However, in exceptional cases where the rating is inadequate, it may be appropriate to assign an extraschedular rating." *Thun v. Peake*, 22 Vet. App. 111, 114 (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. *See Colayong v. West*, 12 Vet. App. 524, 536 (1999). Factors that may indicate that an extraschedular rating is warranted

include “marked interference with employment or frequent periods of hospitalization” beyond the contemplation of the rating schedule. 38 C.F.R. § 3.321(b)(1) (2016).

In *Thun*, the Court concluded that “determination of whether a claimant is entitled to an extraschedular rating under § 3.321(b) is a three-step inquiry.” *Thun*, 22 Vet. App. at 115. First, the Board or the RO must determine whether the evidence presents “such an exceptional disability picture that the available schedular evaluations for that service-connected disability are inadequate.” *Id.* To do this, the Board or the RO must determine whether the criteria found in the rating schedule reasonably describe the claimant's disability level and symptomatology. If so, the claimant's disability picture is contemplated by the rating schedule and the assigned schedular evaluation is, therefore, adequate, and no referral is required. *Id.* However, *if* the schedular evaluation does not contemplate the claimant's level of disability and symptomatology, the RO and Board move on to the second prong of the analysis. *Id.*

The Board is required to include in its decision 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; that statement must be adequate to enable an appellant to understand the precise basis for the Board's decision, as well as to facilitate informed review in this Court. *See* 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); *Kellar v. Brown*, 6 Vet. App. 157, 161 (1994) (remanding for Board's failure to provide adequate statement of reasons or bases regarding applicability of 38 C.F.R. § 3.321(b)(1)). To comply with

this requirement, the Board must analyze the credibility and probative value of the evidence, account for the evidence that it finds to be persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the claimant. *See Caluza v. Brown*, 7 Vet. App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table); *Gabrielson v. Brown*, 7 Vet. App. 36, 39-40 (1994); *Gilbert*, *supra*.

The evidence before the Board proved that the Appellant's chronic psychiatric disorder was related to or caused by his service connected lumbar spine and right knee disabilities.

During the one-year appeal period after the VA's August 20, 2004 rating decision, the VA received new and material evidence proving that the veteran's service connected lower back disabilities and right knee disabilities were more disabling than the August 2004 decision had provided for. This new and material evidence consisted of the September 9, 2004 VAMC records of his medical treatment for his depression due to the chronic pain caused by his service-connected back and right knee (R. 1890-898, 2675-676). This 2004 VAMC record stated, "He attributed his feelings of depression to dealing with chronic back pain [for] 2 years. Pain disturbs his sleep and reportedly makes him irritable. He is reportedly unable to work and unable to do the things he used to enjoy." (R. 2676, 2675-676).

During the course of this appeal, the VA also received Dr. Blanton's September 28, 2005 psychological report and the VAMC's August 9, 2006 treatment for depression and its November 29, 2007 medical treatment for dysthymia (R. 1309-312,

1729-734, 1749-753, 2020-024). Dr. Blanton's September 2005 report noted that the veteran had "back problems, joint pain, hypertension", and he diagnosed him with major depression secondary to chronic pain and lifestyle changes and assigned a GAF score of 50 (R. 1751, 1749-753). Dr. Blanton further noted that he "encouraged [the veteran] to discuss this further with his VA doctors as more antidepressant medications and psychotherapy may be of benefit to him."

The VAMC's August 9, 2006 record noted that the veteran had been diagnosed and treated for depression and the VA examiner noted that he had "severe social and occupational d[y]sfunction" and a GAF score of 50 (R. 1733, 1729-734). The VAMC's November 29, 2007 medical treatment diagnosed the veteran with dysthymia and stated he was "[l]ast seen 8-9-06 for increasing depression after several crises occurred in his life; mom died in 2001, dad died in 2002; he had back surgery in 2002 and had not been able to work." (R. 3834-838).

In July 2009, a VA neurologist opined that the Appellant's chronic headache disorder was "highly associated with [e]motional problems". (R. 3558, 3556-559). This medical evidence suggests that his chronic headache disorder is related to his chronic psychiatric disorder which is caused by his chronic pain due to his service connected lumbar spine and right knee disabilities.

On March 30, 2012, the VA received the favorable SSA decision (R. 1631, 1630-638, 1641). In this decision, the SSA's administrative law judge (ALJ) "found [the Appellant] disabled on August 1, 2002 because of thoracolumbar pain, history of L5-

S1 discectomy with continuing low back pain radiating to right leg, and depression so severe that you are unable to perform any work existing in significant numbers in the national economy.” In this favorable decision, the ALJ made the explicit finding that “[t]he chronic pain and inability to sleep due to pain has contributed to depressive symptoms.” (R. 1632). The ALJ’s finding was consistent with and presumably based on the evidence discussed above. The SSA’s Earnings Record for the Appellant did not reflect that he had earned substantial gainful earnings after 2000 (R. 1694-699).

Although the Appellant filed his claim to establish service connection for his chronic psychiatric disorder in June 2009 and his headache disorder in April 1999 (R. 2656, 3334-337), these claims have not been finally adjudicated.

The Board denied the Appellant’s entitlement to consideration of extraschedular ratings because it believed that his lower back and right knee disabilities were not unusual. The Board further ignored that this lower back and right knee disabilities have caused his depression and have combined to cause him to experience “marked interference with employment.” 38 C.F.R. 3.321(b)(1). In denying the Appellant entitlement to an extraschedular evaluation for his service connected physical disabilities, the Board reasoned,

The Board further finds that at no time during the period at issue has the Veteran’s right knee or lumbar spine disability been shown to be so exceptional or unusual as to warrant the referral for consideration of any higher ratings on an extra-schedular basis. *See* 38 C.F.R. 3.321(b)(1). Here, there is an absence of evidence of frequent periods of hospitalization, or evidence that the Veteran’s right knee or lumbar spine disability, without consideration of other disabilities, has rendered impractical the application of the

regular schedular standards. *In that connection, the Board notes that his symptoms are all specifically contemplated by the criteria discussed above.*

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Thus, based on the record before it, the Board does not find that the medical evidence demonstrates any unusual disability with respect to the claims that is not contemplated by the rating schedule. *The very symptoms the Veteran experiences are all addressed by the rating schedule. Thun v. Peake*, 22 Vet. App. 111 (2008). As a result, the Board concludes that a remand for referral of the rating issues to the VA Central Office for consideration of extra-schedular evaluation is not warranted. (emphasis added).

(R. 27-28).

The Board was aware that “the record contains diagnoses of multiple psychiatric disorders during the claim period.” (R. 5). In its May 2016 decision, the Board ignored all of this evidence which related the veteran’s psychological symptoms to his service connected lower back and right knee disabilities and suggested that he was not able to engage in a substantial gainful occupation as a result (R. 9-28).

In *Thun v. Peake*, 22 Vet. App. 111 (2008), this Court stated, “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. Under the approach prescribed by VA, if the *criteria* reasonably describe the claimant’s disability level and symptomatology, then the claimant’s disability picture is contemplated by the rating schedule, the assigned schedular evaluation is, therefore, adequate, and no referral is required.” *Thun, supra*, at 115 (emphasis added). Here there was medical evidence that Mr. Washington has a severe

recurrent mental disability caused by his service connected lower back and right knee disabilities and that these disabilities in combination cause a marked interference with employment or preclude all competitive work.

The relevant rating criteria in the Diagnostic Codes (DC) are found in 38 C.F.R. §§ 4.71a, 5003, 5010, 5257, 5260, 5261, 5235-5243 (2015), 5292, 5293, and 5295 (2003). None of these DCs take into account symptoms of depression and headaches as associated with lumbar spine and knee disabilities or consider total disability due to each disability, and these rating criteria are therefore inadequate to compensate the Appellant for the unusual nature of his service connected disabilities. *Thun v. Peake*, 22 Vet. App. 111, 115 (2008). The Board's decision and the VA's ratings under these Diagnostic Codes (DC) were therefore not adequate to account for the type and degree of disability these service connected disabilities had caused the veteran.

The Secretary's regulations on lower back and right knee disabilities are inadequate in this case because Mr. Washington's disability presents an exceptional disability picture. The available schedular evaluations are not adequate to compensate for the mental disability he has been caused by his lower back and right knee disabilities because no regulation or diagnostic code for back or knee disabilities takes into account the depression resulting from it or the total disability resulting from the physical disability and the mental disability. *See* 38 C.F.R. § 4.71a; *see also* VA Gen. Coun. Prec. 6-1996 (Aug. 16, 1996) para. 7 (when service-connected disability affects

employment “in ways not contemplated by the rating schedule” § 3.321(b)(1) is applicable).

The Board ignored all of the mental symptoms and disabilities that have been caused by the veteran’s service connected back and right knee disabilities. The Board’s decision did not address in any manner the mental symptoms which were caused by or related to his service connected lower back and right knee disabilities. Contrary to the Board’s explicit finding that “[t]he very symptoms the Veteran experiences are all addressed by the rating schedule[]”, the relevant DCs do not address any mental disabilities or symptoms, such as depression or dysthymia, as caused by a service connected lower back disability or knee disability. The VAMC’s own August 2006 record proved that his service connected back and right knee disabilities caused him mental symptoms which caused his “severe social and occupational d[y]sfunction” with a GAF score of 50 (R. 1733, 1729-734). This August 2006 VAMC record suggests that the mental limitations, which are caused by his service connected lumbar and right knee disabilities, alone are significant enough to preclude all work. *Cf. Richard v. Brown*, 9 Vet. App. 266, 267 (1996); *DSM-IV*, *supra*, 30-32.

After having denied the Appellant higher ratings for his service connected lower back and right knee disabilities, the Board addressed other evidence from “private evaluations” submitted to the VA prior to the Board’s 2016 decision in the remand section of its decision (R. 33-34). The Board recognized

The private physician further recounted the Veteran’s report of having experienced “almost daily” headaches since that incident.

The physician diagnosed the Veteran with “posttraumatic chronic headache disorder caused by trauma to his head” in service, as well as with depression “secondary to chronic pain” due to service-connected disabilities. In the February 2016 vocational evaluation, a private vocational expert opined that the Veteran is unable to work due both to his service-connected physical disabilities and to his psychiatric disorder, which the evaluator linked to the service-connected disabilities. Similarly, in the February 2016 psychological evaluation, the Veteran was diagnosed with major depressive disorder “due to multiple medical problems and worsened by chronic pain.”

(R. 33).

The Board recognized that the VA’s 2004 rating decision remained on appeal (R. 4-5), and the Board was required to address all evidence submitted after the VA’s 2004 and before the Board’s 2016 decision. *See* 38 U.S.C. §§ 1154(a), 5107(b), 7104(a); 38 C.F.R. § 3.156(a). The Board is required to address all material evidence that is favorable to the Appellant’s claim. *See Gilbert, supra*, at 57.

In denying the Appellant potentially higher ratings for his service connected back and right knee disabilities on an extraschedular basis, the Board improperly ignored the 2004, 2005, 2006, 2007, 2009, and 2016 medical evidence, and the 2006 SSA decision and SSA Earnings Record, which proved that his service connected back and right knee disabilities had caused him significant mental symptoms which interfered with or prevent him from being able to work. The Board failed to state adequate reasons or bases for its denial of extraschedular consideration where it ignored this material evidence which was favorable to his claims for increased ratings. *See Thun, supra*, at 115.

Without the Board's analysis of the evidence proving his mental symptoms caused by his service connected disabilities, the Court has no basis for assessing whether the diagnostic codes are adequate for his disability and whether an extra-schedular rating was improperly denied. The Appellant moves the Court to vacate the Board's decision and to remand the claim to the Board to state explicit and adequate reasons or bases for its findings based upon all of the relevant evidence on Mr. Washington's low back and right knee disabilities. *See Thun v. Peake, supra; see also* 38 U.S.C. § 7104(a).

Further, the Board's denial of extraschedular ratings was also premature given the Board's recognition of the VA's need to further develop the Appellant's claim for his TDIU rating based on the same service connected disabilities. After denying an extraschedular evaluation for these service connected disabilities, the Board remanded the Appellant's claim for a total disability rating based on his unemployability (TDIU) due to the same service connected disabilities to the VARO for further development and adjudication (R. 36-40). The Board stated in relevant part as follows:

Finally, the Board notes that a request for a TDIU [rating] – whether expressly raised by a Veteran or reasonably raised by the record – is not a separate claim for benefits, but rather involves an attempt to obtain an appropriate rating for a disability as part of a claim for increased compensation ... In support of his appeal, the Veteran has submitted multiple statements and private evaluations indicating that he is unable to work. Thus, the Board finds that the Veteran's claim properly includes consideration of whether a TDIU [rating] is warranted under the provisions of 38 C.F.R. § 4.16. The Board further notes that the claims [for service connection for chronic psychiatric disorder and headache disorder] being remanded herein are inextricably intertwined with the

Veteran's claim for a TDIU ... The service connection issues must be addressed by the AOJ before the Board renders a decision on the TDIU claim.

(R. 35-36). The Board ordered new C&P examinations to be performed for the veteran's acquired psychiatric disorders, headache disorder, and the severity of his right knee disabilities (R. 37-39).

Although it is well settled that extraschedular consideration and TDIU claims are not necessarily "inextricably intertwined," *Colayong v. West*, 12 Vet. App. 524, 537 (1999); *see Kellar v. Brown*, 6 Vet. App. 157, 162 (1994), here both adjudications of the extraschedular evaluation and the TDIU claim require a complete picture of the Appellant's service-connected disabilities and their effect on his employability. 38 C.F.R. §§ 3.321(b)(1), 4.16; *see also* 38 C.F.R. §§ 4.1, 4.2, 4.10. Thus, it was premature for the Board to deny extraschedular consideration where the Board itself recognized that the record was significantly incomplete in a number of relevant areas probative of the issue of the veteran's employability. In *Brambley v. Principi*, 17 Vet. App. 20, 24, (2003), this Court stated,

As the terms of the remand order make clear, the Board did not consider evidence as to the appellant's employment and medical record sufficiently complete to enable it to adjudicate the TDIU claim properly and fairly.

It is difficult to understand how the Board can maintain these divergent positions concerning the completeness of the record. With respect to extraschedular consideration, the Board found the record sufficient to conclude that the appellant's service-connected disabilities do not show a "marked interference with employment," 38 C.F.R. § 3.321(b)(1). Nevertheless, the Board concluded that

additional employment and medical information was necessary to adjudicate fairly the TDIU claim.

Therefore, the Court should order the Board, on remand, to make the requisite findings of fact and provide an adequate statement of reasons or bases on the issue of whether referral of the extraschedular consideration issue is warranted in light of the terms of the TDIU remand order. *See Id.*

B. THE BOARD MISINTERPRETED THE LEGAL STANDARD CREATED IN *JOHNSON V. MCDONALD* AND APPLIED AN IMPROPER LEGAL STANDARD TO THE COMBINED EXTRASCHEDULAR EVALUATION ISSUE. THE BOARD FAILED TO STATE ADEQUATE REASONS OR BASES FOR ITS DENIAL OF EXTRASCHEDULAR CONSIDERATION FOR THE COMBINATION OF THE APPELLANT'S SERVICE CONNECTED DISABILITIES IN VIEW OF THE MATERIAL EVIDENCE WHICH WAS FAVORABLE TO HIS CLAIMS.

The Board referred to the Court's decision in *Johnson v. McDonald*, 762 F.3d 1362 (Fed. Cir. 2014), but it misinterpreted the legal standard established in that decision.

The Board stated in relevant part as follows:

The Board further notes that under *Johnson v. McDonald*, 762 F.3d 1362 (Fed. Cir. 2014), a claimant may be awarded an extra-schedular rating based upon the combined effect of multiple service-connected disabilities in an exceptional *circumstance where the evaluation of the individual disabilities fails to address all the service-connected symptoms*. However, *in this case, there is no indication that any symptoms have not been attributed to specific service-connected disabilities[,] and the Board finds no additional symptoms related to the combination of the Veteran's service-connected disabilities*. Accordingly, the Board concludes that this is not an exceptional circumstance in which extra-schedular consideration may be required to compensate the

Veteran for a disability that can be attributed only to the combined effect of multiple conditions.

(R. 28).

The Board misinterpreted the court's decision in *Johnson v. McDonald*, *supra*, in concluding, "a claimant may be awarded an extra-schedular rating based upon the combined effect of multiple service-connected disabilities in an exceptional circumstance where the evaluation of the individual disabilities fails to address all the service-connected symptoms." The Court in *Johnson* did not address whether the "the evaluation of the individual disabilities fails to address all the service-connected symptoms." The Court in *Johnson* concluded that 38 C.F.R. § 3.321(b)(1) entitles a veteran to consideration for referral for extra-schedular evaluation based on multiple disabilities, the combined effect of which is exceptional and not captured by schedular evaluations. The plain language of § 3.321(b)(1) provides for referral for extra-schedular consideration based on the collective impact of multiple disabilities. The Court concluded, "§ 3.321(b)(1) performs a gap-filling function. It accounts for situations in which a veteran's overall disability picture establishes something less than total unemployability, but where the collective impact of a veteran's disabilities are nonetheless inadequately represented." *Id.* at 1366. The Court did not establish a legal standard whether the relevant diagnostic codes "address all the service-connected symptoms." As a result of its misinterpretation, the Board applied an improper legal standard to evaluate whether the Appellant was entitled to extraschedular consideration of the combination of his service connected disabilities.

The Board also failed to state adequate reasons or bases for its finding that the record did not demonstrate that there was no effect due to the combination of the Appellant's service connected lumbar spine and right knee disabilities in view of the material evidence which was favorable to his claims.

The VA's examining physicians and the Appellant's private physicians have concluded that the permanent restrictions caused by the Appellant's combination of service connected lumbar spine and right knee disabilities preclude him from performing physical activities that are required for competitive gainful employment. In his May 19, 2004 VA C&P report, the VA's examining physician concluded that

The veteran has not been able to work since the surgery in 2002[,] due to increasing back pain radiating to both hips and to the right leg up to the right knee. The veteran has constant headaches, a dull aching pain. The patient also has pain in the right knee at least twice a week. The veteran needs a walking cane to walk for the last two years. The patient also needs a corset to walk. The veteran has restricted walking, standing[,] and limitation of range of motion, which prevents him from doing any kind of work. He has done labor work in the past[,] but he is not able to do any kind of labor work because of the aggravation of the pain. The pain is constant. Even on sitting he has a pain score of 7 out of 10. When he is standing the pain [score] is a 7 out of 10. *The patient is in constant pain[,] and he is not able to do any kind of gainful employment.* (emphasis added).

(R. 3073, 3065-074). This physician stated that “[t]he patient has been using a walking cane since the year 2002. The veteran was given a back brace a year ago by the pain clinic, a pain management center in the Spine Center”, and he concluded that “[t]he veteran needs to continue using the walking cane and the back support to help with the chronic back pain.” (R. 3067).

In June 2010, Dr. Shivashankara, the same VA physician, performed another C&P examination and prepared a report to “determine the nature, extent and severity of the service-connected lumbar spine disability” (R. 2391-403). This physician concluded that the Appellant was “unable to do physical work due to constant pain [in his] low back and both legs.” (R. 2392). He stated that the effects on his occupational activities would include “[d]ecreased mobility; [p]roblems with lifting and carrying, [d]ecreased strength: lower extremity, [p]ain.” (*Id.*). He stated the Appellant would have “limited ambulation [because he] needs a walking cane to stand and walk.” The physician made a diagnosis of degenerative disease at the L5-S1 level with residuals of right lumbar laminectomy and chronic low back pain with sciatica (lumbar radiculopathy) both legs (R. 2398).

Dr. Shivashankara concluded that the “effects on usual occupation and resulting work problem(s)” included “limited ambulation[,] standing[,] and walking; persistent pain [in] low back[, and] unable to concentrate.” (*Id.*). He further concluded that the Appellant would experience “[d]ecreased concentration; [d]ecreased mobility; [p]roblems with lifting and carrying; [l]ack of stamina; [w]eakness or fatigue; [d]ecreased strength: lower extremity; [p]ain” and would be “unable to sit still[,] has to keep chang[ing] his position[,] standing for few minutes, walking to release the stiffness of low back pain” and “unable to drive”. (*Id.*). This VA examiner’s conclusion that the Appellant’s service connected disabilities currently preclude him from any physical

work and suggest that he cannot perform any sedentary work because he is “unable to sit still[,] has to keep chang[ing] his position” and is “unable to concentrate.”

In October 2006, the Social Security Administration (SSA) found the Appellant to be totally disabled and unable to engage in any competitive employment from August 1, 2002, solely due to his lumbar spine disabilities, low back pain radiating into his right leg, and his depression (R. 1632, 1630-638, 1641). The Board did not address any of this favorable, material evidence proving that his service connected disabilities cause a marked interference with employment or preclude all potential competitive employment in reaching its finding that the Appellant’s service connected disabilities did not cause him a greater combined disability (R. 28).

The Board improperly ignored all of this favorable, material evidence in denying the Appellant entitlement to a higher rating for his service connected lumbar spine and right knee disabilities on an extraschedular basis and in denying his entitlement to an extraschedular rating for the combined effects of these service connected disabilities. *See Johnson v. McDonald*, 762 F.3d 1362, 1365-366 (Fed. Cir. 2014) (“The plain language of § 3.321(b)(1) provides for referral for extra-schedular consideration based on the collective impact of multiple disabilities.”).

VIII. CONCLUSION

The Appellant moves the Court to vacate the Board's May 2016 decision on these claims and to remand his claims to the Board for re-adjudication of his claims consistent with the above discussion.

This 19th day of June 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have electronically filed the foregoing Appellant's Brief with the Clerk of the Court using the CM/ECF system which will send electronic notification of such filing to:

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This 19th day of June 2017.

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