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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 16-0905

RONALD E. DUNBAR, 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, Ronald E. Dunbar, through counsel, appeals a February 8, 2016, Board of Veterans' Appeals (Board) decision in which the Board denied a compensable disability rating for chronic prostatitis for the period prior to May 15, 2006, and denied extraschedular referral for the same condition. Record of Proceedings (R.) at 2-20. Additionally, the Board granted a 40% disability rating for chronic prostatitis from May 15, 2006, to February 3, 2011, and a 60% disability for the same condition for the period beginning February 4, 2011. R. at 4. Because those holdings were favorable to the appellant, the Court will not disturb them. *See 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."). Furthermore, the Board remanded a claim of entitlement to a total disability rating based on individual unemployability (TDIU) and a disability compensation claim for erectile dysfunction, to include as secondary to chronic prostatitis. R. at 14-18. 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). 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 in the U.S. Navy from July 1965 to June 1969. R. at 823. In November 1973, the regional office (RO) awarded service connection and granted noncompensable disability ratings for a right hand injury and chronic prostatitis. R. at 2056-59.

In January 2007, the RO increased the appellant's disability rating for chronic prostatitis to 20%, effective May 15, 2006.¹ R. at 1853-62. In April 2007, the appellant filed a Notice of Disagreement. R. at 1777. In September of the same year, the RO issued a Statement of the Case (SOC), R. at 1789, and that October, the appellant filed his Substantive Appeal. R. at 1748.

In April 2008, the appellant submitted an application for TDIU, claiming that his prostatitis and hand injury (which he identified as a finger injury) prevented him from securing or following any substantially gainful occupation. R. at 1786-87. In June and July 2009, the RO issued Supplemental SOCs continuing the 20% rating for the appellant's chronic prostatitis and the 10% rating for the appellant's right finger injury. R. at 1482-87.

In February 2010 and October 2011, the Board remanded the appellant's claims for further development. R. at 1132-44, 1363-83. In June 2015, the RO continued the appellant's 20% rating for chronic prostatitis.

On February 8, 2016, the Board issued the decision on appeal. R. at 2-20. The Board awarded staged ratings for the appellant's chronic prostatitis, remanded the issue of entitlement to TDIU and a disability compensation claim for erectile dysfunction, and denied referral for extraschedular consideration. R. at 12-18. This appeal followed.

II. ANALYSIS

The appellant does not raise any argument concerning the Board's denial of a compensable disability rating for chronic prostatitis for the period prior to May 15, 2006. Accordingly, the Court will not address this matter. Instead, the appellant argues that the Board erred when it denied referral for extraschedular consideration despite also finding the record incomplete as to the effect

¹ Additionally, the RO continued a 10% disability rating that the appellant had previously been awarded for his right hand injury, effective May 16, 2005. R. at 1861.

of the appellant's chronic prostatitis on his employability, and provided inadequate reasons or bases for its decision. Appellant's Brief (Br.) at 5-8. The Secretary argues that the Board was not required to remand the issue of referral for extraschedular consideration simultaneously when it remanded the issue of entitlement to TDIU because those two issues are not inextricably intertwined. Secretary's Br. at 4.

"Whether 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), *aff'd sub nom. Thun v. Shinseki*, 572 F.3d 1366 (Fed. Cir. 2009); *see Anderson v. Shinseki*, 22 Vet.App. 423, 427 (2009) (clarifying that the three "steps" identified in *Thun* are actually three necessary "elements" of an extraschedular rating analysis). "[T]he first *Thun* element compares a claimant's symptoms to the rating criteria, while the second addresses the resulting effects of those symptoms." *Yancy v. McDonald*, 27 Vet.App. 484, 494 (2016). Although the first and second elements are interrelated, they involve separate and distinct analyses. *Id.* Thus, "an error with respect to one element does not necessarily affect the Board's analysis of the other element." *Id.* "If either element is not met, then referral for extraschedular consideration is not appropriate." *Id.* at 494-95.

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. 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 also Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990). 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 Board stated that referral for extraschedular consideration was not warranted because

[d]uring the period on appeal, the [appellant's] chronic prostatitis was manifested by urine leakage and urinary incontinence that required wearing absorbent material that required changing various times during the day. When comparing this disability picture with the symptoms contemplated by the [r]ating [s]chedule, the Board finds that the [appellant's] experiences are contemplated by the evaluation assigned for this period. The Board finds that the criteria for the evaluation assigned more than reasonably describe[] the [appellant's] disability level and symptomatology during this period, and therefore, the schedular evaluation is adequate, and no referral is required.

R. at 13 (citations omitted). Essentially, the Board determined that the first *Thun* element was not met and, therefore, found no further duty to consider the second element – i.e., whether the appellant's disability picture exhibits other related factors such as marked interference with employment or frequent periods of hospitalization. *See Thun*, 22 Vet.App. at 115; 38 C.F.R. § 3.321(b)(1) (2016). However, the Board remanded the issue of entitlement to TDIU under 38 C.F.R. § 4.16(b) for an "examination and opinion by a vocational rehabilitation expert to determine whether the [appellant's] service-connected disabilities would preclude him from obtaining and maintaining any form of substantially gainful employment." R. at 15. For the following reasons, the Court rejects the appellant's argument that the Board was required to remand the issue of entitlement to an extraschedular rating when it remanded for further development the issue of TDIU.

The Court has held that the issues relevant to a claimant's entitlement to TDIU and entitlement to referral for extraschedular consideration are not necessarily inextricably intertwined because the requirements for each rating contain different standards regarding employment and employability. *See Kellar v. Brown*, 6 Vet.App. 157, 162 (1994); *see also Stanton v. Brown*, 5 Vet.App. 563, 564-70 (1993) (holding that the issue of an extraschedular rating under § 3.321(b)(1) is separate from that of TDIU under 38 C.F.R. § 4.16). However, the appellant relies on *Brambley v. Principi*, 17 Vet.App. 20, 24 (2003), to support his contention that the Board prematurely denied referral for an extraschedular rating. Appellant's Br. at 6-7.

Brambley is distinguishable from this case. Here, as explained above, the Board determined that the appellant's disabilities are adequately contemplated by the rating schedule and

the appellant fails to challenge that determination in his opening brief. Unlike the Board in *Brambley*, the Board here did not decide whether the appellant's disabilities showed marked interference with employment and, therefore, the Board did not take divergent positions regarding the completeness of the record. Although on remand the Board directed that an examination and opinion be obtained, any additional evidence regarding the effects of the appellant's disabilities on his employability will not affect the Board's determination that referral for consideration of an extraschedular disability rating is not warranted.

The appellant also contends that the Board failed to comply with the decision of the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) in *Johnson v. McDonald*, 762 F.3d 1362 (Fed. Cir. 2014) by misstating the law when considering the "collective impact" of all his service-connected disabilities when determining whether referral for extraschedular consideration was appropriate. *Id.* at 8-11; *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 Secretary argues that the Board did not err in its collective impact analysis. *Id.* at 10.

The three-part analysis set forth in *Thun* also applies in considering whether extraschedular 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.*

The Court agrees with the appellant that the Board decision misapplies the law. The Board stated that

under *Johnson* . . . a [v]eteran may be awarded an extraschedular rating based upon the combined effect of multiple conditions in an exceptional circumstance where the evaluation of the individual conditions fails to capture all the service-connected disabilities experienced. However, in this case there are no additional service-connected disabilities that have not been attributed to a specific service-connected condition. Accordingly, this is not an exceptional circumstance in which extraschedular consideration may be required to compensate the [appellant] for a disability that can be attributed only to the combined effect of multiple conditions.

R. at 13-14. This analysis is insufficient to comply with *Johnson*. This Court's holding in *Yancy* echoed the Federal Circuit's rationale that "[l]imiting referrals for extra-schedular evaluation to considering a veteran's disabilities individually ignores the compounding negative effects that each individual disability may have on the veteran's other disabilities." *Yancy*, 27 Vet.App. at 495

(quoting *Johnson*, 762 F.3d at 1366). The appellant correctly notes that the proper "focus of the analysis is not whether the individual symptoms of [a] disability are contemplated by the specific diagnostic codes assigned, but rather when considering the totality of the evidence there are functional limits which present an exceptional or unusual disability picture." Appellant's Br. at 9. Stated differently, the Board's finding that "there are no additional service-connected disabilities that have not been attributed to a specific service-connected condition" is inapposite to the proper analysis of whether the combined effects of the appellant's symptoms present an exceptional or unusual disability picture sufficient to trigger extraschedular referral. Accordingly, because the Board's statement of reasons or bases is inadequate to facilitate judicial review, the Court will remand the matter. 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").

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"). On remand, 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 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 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 February 8, 2016, decision is VACATED and the matter is REMANDED for further proceedings consistent with this decision.

DATED: June 30, 2017

Copies to:

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