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

NO. 16-1724

RONALD L. LEWIS, APPELLANT,

V.

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

Before MOORMAN, *Senior Judge*.<sup>1</sup>

**MEMORANDUM DECISION**

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

MOORMAN, *Senior Judge*: The appellant, Ronald L. Lewis, appeals through counsel an April 5, 2016, Board of Veterans' Appeals (Board) decision that denied his claim for entitlement to a disability rating in excess of 10% for his service-connected residuals of right leg mid-shaft tibia/fibula fracture. Record (R.) at 2-16. The Board also found that referral for extraschedular consideration of the appellant's service-connected conditions was not warranted. R. at 12-14. This appeal is timely, and the Court has jurisdiction to review the Board's decision pursuant to 38 U.S.C. § 7252(a). Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). Both parties have filed briefs and Mr. Lewis has filed a reply brief. Mr. Lewis does not present any argument concerning the Board's denial of a schedular disability rating in excess of 10% for his service-connected residuals of right leg mid-shaft tibia/fibula fracture. Accordingly, that claim is deemed abandoned. The Court finds no circumstances that would necessitate addressing the abandoned claim and Mr. Lewis's appeal concerning the Board's denial of a schedular disability rating in excess of 10% for his service-connected residuals of right leg mid-shaft tibia/fibula

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<sup>1</sup>Judge Moorman is a Senior Judge acting in recall status. *In re: Recall of Retired Judge*, U.S. VET. APP. MISC. ORDER 14-16 (Dec. 21, 2016).

fracture will, therefore, be dismissed. *See Pederson v. McDonald*, 27 Vet.App. 276, 285 (2015) (en banc). For the following reasons, the Court will vacate the Board's decision denying referral for extraschedular consideration and will remand the matter for readjudication.

## **I. BACKGROUND**

Mr. Lewis served honorably on active duty in the U.S. Army from July 1973 to July 1975. R. at 911. In May 1990, Mr. Lewis was awarded service connection for postoperative residuals of a right tibia fracture. R. at 872-73. A noncompensable disability rating was assigned. *Id.* In January 1992, Mr. Lewis's disability rating was increased to 10%, effective March 1988. R. at 795-96.

In September 2008, Mr. Lewis submitted a claim for an increased disability rating, asserting that his condition had worsened. R. at 693-94. In July 2012 Mr. Lewis was awarded service connection for right knee degenerative arthritis secondary to his service-connected right leg injury and assigned a 10% disability rating for that condition. R. at 393-97. In September 2013, the regional office (RO) awarded Mr. Lewis service connection for osteoarthritis of the right ankle secondary to his right leg disability and assigned a 10% disability rating for that condition. R. at 147-51.

Mr. Lewis was afforded a VA compensation and pension (C&P) examination in January 2015. R. at 73-88. Mr. Lewis reported that after walking for prolonged periods he would have to "stop due to the combined symptoms of the knees and right leg." R. at 75. The examiner noted that Mr. Lewis's right leg pain "combines with the knee pain to limit activity." R. at 86. The RO issued a rating decision the same month awarding Mr. Lewis service connection for degenerative arthritis of his left knee, secondary to his right leg disability, and assigning a 10% disability rating. R. at 69-72.

In the April 5, 2016, decision here on appeal, the Board denied entitlement to a disability rating in excess of 10% for Mr. Lewis's service-connected residuals of a right leg mid-shaft tibia/fibula fracture and found that referral for extraschedular consideration was not warranted. R. at 2-16. The Board noted Mr. Lewis's multiple service-connected disabilities and addressed whether referral for extraschedular consideration was warranted based on the combined effect of

those disabilities. *Id.* The Board found that Mr. Lewis had "not asserted, and the evidence of record ha[d] not suggested, any such combined effect or collective impact of multiple service-connected disabilities that create such an exceptional circumstance to render the schedular rating criteria inadequate." R. at 15. This appeal followed.

## II. ANALYSIS

Once a disability is found to be service connected, the level of disability compensation is determined using the criteria in the rating schedule established in a series of regulations located in part 4 of title 38 of the Code of Federal Regulations. *Thun v. Peake*, 22 Vet.App. 111, 114 (2008). In exceptional cases, the rating schedule may be found inadequate to compensate a claimant's unique set of symptoms and an extraschedular rating may be approved by the under secretary for benefits (Under Secretary) or the director of Compensation Service (Director). 38 C.F.R. § 3.321(b)(1) (2017).

In determining whether referral for an extraschedular rating is appropriate, the RO or the Board must consider 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; *see Anderson v. Shinseki*, 22 Vet.App. 423, 427 (2009) (clarifying that the "steps" discussed in *Thun* "are, in fact, elements that must be established before an extraschedular rating can be awarded"). The RO or Board must also determine whether related factors exist such "as marked interference with employment or frequent periods of hospitalization as to render impractical the application of the regular schedular standards." 38 C.F.R. § 3.321(b)(1); *Thun*, 22 Vet.App. at 116. The Board must also 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 Johnson v. McDonald*, 762 F.3d 1362 (Fed.Cir.2014); *Cantrell v. Shulkin*, 28 Vet.App. 382, 394 (2017). "[T]he Board is required to address whether referral for extraschedular consideration is warranted for a veteran's disabilities on a collective basis only when that issue is argued by the claimant or reasonably raised by the record through evidence of the collective impact of the claimant's service-connected disabilities." *Yancy v. McDonald*, 27 Vet.App. 484, 495 (2016).

The Board's determination of whether referral to the Under Secretary or the Director for extraschedular consideration is appropriate is a factual determination that the Court reviews under the "clearly erroneous" standard of review. *Thun*, 22 Vet.App. at 115; *see Johnston v. Brown*, 10 Vet.App. 80, 84 (1997); *Gilbert v. Derwinski*, 1 Vet.App. 49, 53 (1990). As with all matters adjudicated by the Board, a decision whether to refer a claim for extraschedular consideration must include a written statement of the reasons or bases for the Board's findings and conclusions, 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); *Anderson*, 22 Vet.App. at 426; *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Gilbert*, 1 Vet.App. at 56-57. To comply with this requirement, the Board must analyze the credibility and probative value of the evidence, account for the evidence that 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); *Gilbert*, 1 Vet.App. at 57.

The appellant argues that the Board erred in failing to adequately discuss the collective impact of his multiple service-connected disabilities. Appellant's Brief at 5-9. The Secretary concedes that the "[a]ppellant's service-connected disabilities clearly have a collective impact," and asserts that "[t]he proper inquiry is whether the collective impact of [the a]ppellant's disability is exceptional or unusual." Secretary's Brief at 8-9. The Secretary maintains that the Board adequately addressed the collective impact of the appellant's multiple service-connected disabilities and properly found that his collective disability picture was not exceptional or unusual. *Id.* at 8-11.

In addressing the collective impact of the appellant's multiple service-connected disabilities, the Board found:

In this case, the [v]eteran has not asserted, and the evidence of record has not suggested, any such combined effect or collective impact of multiple service-connected disabilities that create such an exceptional circumstance to render the schedular rating criteria inadequate. In this case, there is neither allegation nor indication that the collective impact or combined effect of more than one service-connected disability presents an exceptional or unusual disability picture to render inadequate the schedular rating criteria.

R. at 14.

The Secretary correctly points out that the Board acknowledged the collective impact of the appellant's service-connected disabilities and that for referral for extraschedular consideration the proper inquiry is whether the collective impact presents an exceptional or unusual disability picture. The Court finds, however, that the Board failed to provide an adequate statement of its reasons and bases for its decision in that regard. The conclusory statement, that "there is neither allegation nor indication that the collective impact or combined effect of more than one service-connected disability presents an exceptional or unusual disability picture to render inadequate the schedular rating criteria," fails to inform the appellant of the precise basis for the Board's decision and frustrates judicial review. *See Anderson*, 22 Vet.App. at 426; *Allday*, 7 Vet.App. at 527. The Secretary attempts in his brief to explain that the only collective impact of the appellant's disabilities is pain and that pain is neither exceptional nor unusual. Secretary's Brief at 10-11. The Secretary's argument not only ignores the evidence of record suggesting that the appellant does experience functional loss due to his pain, *see* R. at 86, it is merely a post hoc rationalization for the Board's lack of reasons or bases. *See In re Lee*, 277 F.3d 1338, 1345-46 (Fed. Cir. 2002) ("[C]ourts may not accept appellate counsel's post hoc rationalization for agency action." (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962))); *Evans v. Shinseki*, 25 Vet.App. 7, 16 (2011) (explaining that "it is the Board that is required to provide a complete statement of reasons or bases, and the Secretary cannot make up for its failure to do so"). Accordingly, a remand is required.

In pursuing the matter 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). "A remand is meant to entail a critical examination of the justification for the decision. The Court expects that the [Board] will reexamine the evidence of record, seek any other evidence the Board feels is necessary, and issue a timely, well-supported decision in this case." *Fletcher*, 1 Vet.App. at 397. The Board must proceed expeditiously, in accordance with 38 U.S.C. §§ 5109B and 7112.

### **III. CONCLUSION**

Based on the foregoing analysis, the appellant's and the Secretary's briefs, and a review of the record on appeal, the Board's April 5, 2016, decision, to the extent the Board found that referral for extraschedular consideration is not warranted, is VACATED and the matter is REMANDED for readjudication. The appeal of the Board's decision denying entitlement to a schedular disability rating in excess of 10% for the appellant's service-connected residuals of right leg mid-shaft tibia/fibula fracture, is DISMISSED.

DATED: July 7, 2017

Copies to:

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