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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 16-1841

ROY C. SMITH, JR, 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, Roy C. Smith, Jr., appeals, through counsel, an April 20, 2016, Board of Veterans' Appeals (Board) decision that denied entitlement to an initial compensable disability rating for bilateral hearing loss. Record (R.) at 2-22. This appeal is timely, and the Court has jurisdiction pursuant to 38 U.S.C. §§ 7252(a) and 7266. Both parties submitted briefs. 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 that part of the April 20, 2016, decision denying entitlement to an initial compensable rating for bilateral hearing loss and remand that matter for further proceedings consistent with this decision. As the appellant does not challenge the Board's denial of entitlement to an initial rating greater than 10% for status post medial meniscectomy of the right knee, the Court holds that he has abandoned his appeal as to that matter. *See Pederson v. McDonald*, 27 Vet.App. 276, 285 (2015) (en banc).

I. BACKGROUND

The appellant served in the U.S. Navy from April 1963 to May 1983, including service in the Republic of Vietnam. R. at 4, 495.

In April 2008, he submitted a claim for entitlement to service connection for bilateral hearing loss. R. at 517. He underwent a VA hearing loss examination in September 2008. R. at 266-70. In a November 2008 rating decision, the VA regional office (RO) granted entitlement to service connection for bilateral hearing loss, effective April 14, 2008, rated as noncompensable. R. at 240. He submitted a timely Notice of Disagreement, R. at 205, the RO issued a Statement of the Case, R. at 131-44, and he perfected his appeal, R. at 126.

In December 2012, the Board remanded the appellant's claim for additional development. R. at 94-107. In accordance with the remand, he underwent a second VA hearing loss examination in April 2013. R. at 48-54. In June 2013, his wife submitted a statement on his behalf. R. at 29. In a September 2015 submission to the Board, the appellant's representative stated that the appellant "indicated his hearing condition has adversely impacted him socially." R. at 777.

In the April 2016 decision on appeal, the Board determined that the appellant is not entitled to an initial compensable schedular disability rating for his hearing and that his appeal should not be referred to an appropriate agency official for extraschedular consideration. R. at 17-18.

II. ANALYSIS

The appellant does not challenge the Board's determination as to the proper schedular disability rating for his bilateral hearing loss. *See Ford v. Gober*, 10 Vet.App. 531, 535 (1997) (arguments not raised before the Court are considered abandoned on appeal). Rather, his principal argument is that the Board misapplied 38 C.F.R. § 3.321(b)(1) and provided an inadequate statement of reasons or bases for its determination that he was not entitled to referral for extraschedular consideration of his claim for entitlement to an initial compensable rating for bilateral hearing loss. Appellant's Brief (Br.) at 3-12. He contends that the Board failed to explain how the rating schedule contemplates the functional effects of his disability, adequately consider the severity of his symptoms, and address favorable evidence of record. *Id.* The Secretary responds that the Board's finding that the appellant was not entitled to referral for extraschedular consideration was not clearly erroneous and that the Board provided an adequate statement of reasons or bases to support its decision. Secretary's Br. at 5-17.

When VA assigns a schedular disability rating for a veteran's service-connected hearing loss, it does so through the mechanical application of a veteran's audiometric testing results to a

rating table. *Doucette v. Shulkin*, 28 Vet.App. 366, 368 (2017); *Lendenmann v. Principi*, 3 Vet.App. 345, 349 (1992). However, pursuant to 38 C.F.R. § 3.321(b)(1), in

the exceptional case where the schedular evaluations are found to be inadequate, the Under Secretary for Benefits or the Director, Compensation Service, upon field station submission, is authorized to approve on the basis of the criteria set forth in this paragraph an extra-schedular evaluation commensurate with the average earning capacity impairment due exclusively to the service-connected disability or disabilities. The governing norm in these exceptional cases is: A finding that the case presents such an exceptional or unusual disability picture with such related factors 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) (2017).

The Court has reduced this regulation to a three-part test. First, the "threshold factor" is whether "the evidence before VA 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). To determine whether the evidence presents an "exceptional disability picture," the adjudicator must compare "the level of severity and symptomatology of the claimant's service-connected disability with the established criteria for that disability." *Id.* If the claimant's symptoms are reasonably described by the rating criteria, then the claimant's disability picture is contemplated by the rating schedule, the assigned schedular evaluation is adequate, and referral is not required. *Id.* If, however, the severity and symptomatology of the appellant's disability are unusual, then the adjudicator should proceed to the second step of the inquiry. *Id.* at 115-16. Under that step, the Board "must determine whether the claimant's exceptional disability picture exhibits other related factors such as those provided by the regulation as 'governing norms.'" *Id.* at 116. If such governing norms as marked interference with employment or frequent periods of hospitalization exist, then the matter must be referred to an appropriate VA official to determine whether, "to accord justice," an extraschedular disability rating should be assigned. *Id.*

The assignment of a disability rating is a factual finding that the Court reviews under the "clearly erroneous" standard of review. *Johnston v. Brown*, 10 Vet.App. 80, 84 (1997). In support of its decision, the Board must include 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 adequate to enable

an appellant to understand the precise basis for the Board's decision and to facilitate informed review in this Court. 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995).

The Board failed to provide an adequate statement of reasons or bases to support its determination that referral for extraschedular consideration was not warranted. *See* 38 U.S.C. § 7104(d)(1); *Allday*, 7 Vet.App. at 527. The Board did not address his statement that his bilateral hearing loss has had an adverse impact on him socially. Appellant's Br. at 8; *see* R. at 2-22. In the appellant's September 2015 submission, his representative stated that the appellant "indicated his hearing condition has adversely impacted him socially." R. at 777. Reading the Board's decision as a whole, *see Prickett v. Nicholson*, 20 Vet.App. 370, 375 (2006), the Board considered only evidence of the appellant's inability to hear speech and other sounds and failed to address the social impact caused by his hearing loss. *See Doucette*, 28 Vet.App. at 371 (explaining that although the rating criteria contemplate the functional effects of difficulty hearing and understanding speech, "a hearing loss claimant could provide evidence of numerous symptoms, including—for purposes of example only—ear pain, dizziness, recurrent loss of balance, or social isolation due to difficulties communicating, and the Board would be required to explain whether the rating criteria contemplate those functional effects.").

Without a discussion or analysis of the September 2015 evidence, the Court cannot understand the precise basis for the Board's determination that "the rating criteria reasonably describe the [appellant]'s disability levels and symptomatology," R. at 19, and the Court's review is frustrated. *See* 38 U.S.C. § 7104(d)(1); *Allday*, 7 Vet.App. at 527; *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995) (holding that 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), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table). The Court will, thus, vacate the decision on appeal and remand the appellant's claim. *See 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.").

Although the Court has determined that a remand is necessary, it will address two of the appellant's remaining arguments. *See Quirin v. Shinseki*, 22 Vet.App. 390, 396 (2009) (holding that the Court may address an appellant's other arguments to provide guidance on remand). The Court is not persuaded that the Board failed to address the appellant's other cited symptoms of

hearing loss, including difficulty hearing others talk, difficulty communicating with others, difficulty understanding speech when not facing a speaker, frequently asking others to repeat themselves, listening to the radio and television loudly, speaking loudly, and slowly recognizing sounds. Appellant's Br. at 8 (citing R. at 29, 51, 54); *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) ("An appellant bears the burden of persuasion on appeals to this Court."), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000) (table). In *Doucette*, the Court held that "the rating criteria for hearing loss contemplate the functional effects of decreased hearing and difficulty understanding speech in an everyday work environment" and thus contemplate situations where hearing loss "results in an inability to hear or understand speech or to hear other sounds in various contexts." 28 Vet.App. at 369. *Doucette* is directly applicable to the above symptoms, as each of the symptoms amounts to decreased hearing acuity in various environments and contexts. *Id.*; Appellant's Br. at 8. Here, the Board determined that "having difficulty hearing conversations and an inability to hear background noise" are "contemplated by the schedular criteria and do not show such an exceptional disability picture that the available schedular evaluations" are inadequate and "functional impairment due to hearing loss that is compounded by background or environmental noise is a disability picture that is considered in the current schedular rating criteria" and the appellant's "struggle to comprehend verbal conversations and other noises is a factor contemplated by the regulations and rating criteria." R. at 17-19.

Moreover, to the extent that the appellant relies on *Martinak v. Nicholson*, 21 Vet.App. 447 (2007), for support, his argument is misplaced. Appellant's Br. at 9-12. The Court in *Doucette* clearly held that

Martinak imposes neither a general requirement on the Board to engage in an extraschedular analysis nor specific requirements on the Board once it decides that an extraschedular discussion is warranted. Rather, *Martinak* held that the applicable regulatory provisions require VA examiners to elicit information from a claimant concerning the functional effects of his or her disability.

28 Vet.App. at 370-71 (emphasis in original).

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); *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, that part of the Board's April 20, 2016, decision denying entitlement to an initial compensable rating for bilateral hearing loss is VACATED and the appeal of that matter is REMANDED for further proceedings consistent with this decision. The appeal is otherwise DISMISSED.

DATED: July 19, 2017

Copies to:

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