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

No. 16-0985

JAMES D. TYNER, 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. Marine Corps veteran James D. Tyner appeals through counsel that portion of a January 21, 2016, decision of the Board of Veterans' Appeals (Board) that declined to refer his claim for bilateral hearing loss for extraschedular consideration.<sup>1</sup> For the following reasons the Court will set aside the Board's January 2016 decision with respect to the appealed matter and remand that matter for further adjudication.

**I. ANALYSIS**

Mr. Tyner argues generally that the Board failed to provide adequate reasons or bases when it declined to refer his bilateral hearing loss claim for extraschedular consideration. Specifically, he asserts that the Board insufficiently explained why his disability picture did not entail "marked interference with employment." He further argues that the Board insufficiently explained why the collective impact of all his service-connected disabilities did not warrant extraschedular consideration, and in fact, may have employed an erroneous standard in its analysis. *See Johnson v. McDonald*, 762 F.3d 1362 (Fed. Cir. 2014). The Court finds merit in both arguments.

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<sup>1</sup> Mr. Tyner raises no argument with respect to the schedular rating that the Board found appropriate with respect to his bilateral hearing loss, and the Court therefore will not consider this matter. *See Pederson v. McDonald*, 27 Vet.App. 276, 285 (2015) (en banc).

Section 3.321(b)(1), title 38, Code of Federal Regulations, provides the following:

To accord justice . . . to the exceptional case where the schedular evaluations are found to be inadequate, the Under Secretary for Benefits or the Director, Compensation and Pension 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). There are two elements that a claimant must demonstrate before referral for consideration of an extraschedular disability rating is warranted: (1) An exceptional or unusual disability picture and (2) a disability picture that exhibits "other related factors," such as marked interference with employment or frequent periods of hospitalization. *Thun v. Peake*, 22 Vet.App. 111, 116 (2008), *aff'd sub nom. Thun v. Shinseki*, 572 F.3d 1366 (Fed. Cir. 2009). In *Anderson v. Shinseki*, the Court clarified that the steps set forth in *Thun* are "elements that must be established before an extraschedular rating can be awarded" and they are reviewable by the Board. 22 Vet.App. 423, 427 (2009).

As with all of its material findings of fact and conclusions of law, the Board is required to support its determination as to an extraschedular evaluation 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 Court recently held in *Doucette v. Shulkin*, in the context of bilateral hearing loss and extraschedular consideration, that

[t]he [schedular] rating criteria for hearing loss contemplate the functional effects of decreased hearing and difficulty understanding speech in an everyday work environment, as these are precisely the effects that VA's audiometric tests are designed to measure. Thus, when a claimant's hearing loss results in an inability to

hear or understand speech or to hear other sounds in various contexts, those effects are contemplated by the schedular rating criteria. However, as the rating criteria do not otherwise discuss, let alone account for, other functional effects, such as dizziness, vertigo, ear pain, etc., the Court cannot conclude that the rating schedule, on its face, contemplates effects other than difficulty hearing or understanding speech.

28 Vet.App. 366, 369 (2017). The Court further noted that "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." *Id.* at 371.

In considering extraschedular consideration, the Board reasoned as follows:

With respect to the first prong of *Thun*, the [v]eteran reports difficulty hearing his family members in conversation, difficulty hearing sirens, difficulty hearing the television or radio, and an inability to hear over background noise. These symptoms were specifically contemplated by the schedular criteria, and do not show such an exceptional disability picture that the available schedular evaluations for bilateral hearing loss are inadequate. However, the [v]eteran also reports feeling angry and having trouble sleeping as a result of his hearing loss. Although the schedular criteria [do] not contemplate trouble sleeping and anger, the evidence of record does not establish marked interference with employment or frequent periods of hospitalization as to render impractical the application of the regular schedule[a]r standards. Therefore, referral for extraschedular consideration is not warranted.

Record (R.) at 11. Mr. Tyner argues that, in addition to difficulty sleeping and anger problems, he experienced social isolation and had safety concerns associated with difficulty hearing sirens, both conditions outside the functional effects contemplated by the schedular criteria.<sup>2</sup> Additionally, the record contains a statement that Mr. Tyner cannot drive because he cannot hear approaching vehicles. *See R.* at 1064. The Court agrees that when evaluating the adequacy of the schedular

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<sup>2</sup> *Doucette* is somewhat ambiguous with respect to the difficulty hearing sirens. *See* 28 Vet.App. at 369 ("[T]he Court cannot conclude that the rating schedule, on its face, contemplates effects other than difficulty hearing or understanding speech."), 371 ("[T]he Court holds that the rating criteria for hearing loss contemplate the functional effects of difficulty hearing and understanding speech . . ."). In applying its holding to the facts of the case, however, the *Doucette* Court stated that difficulty "locating the source of sounds" was among the symptoms contemplated by the rating criteria. *See id.* at 371-72. In his testimony at a Board hearing, Mr. Tyner stated that his difficulty with hearing sirens, was that he could not identify the location of these sounds. Therefore, the Court is unable to conclude that the Board clearly erred in finding that his difficulty hearing sirens was contemplated by the schedular criteria.

criteria, the Board's discussion of extraschedular consideration was inadequate for failure to discuss these matters.

Mr. Tyner interprets the Board's remarks as a concession that the first *Thun* prong was satisfied. He argues that the Board insufficiently explained why his overall disability picture does not produce marked interference with employment in view of record evidence that he had to resign from a job because of his inability to use the telephone and inability to understand speech of people with a Spanish accent.

The Secretary responds that the Board correctly found that the first prong in the *Thun* analysis was not satisfied, but gratuitously discussed the second prong. He asserts that the Board was correct in its evaluation that there was no marked interference with employment because the symptoms that affected Mr. Tyner's ability to work were those specifically contemplated by the schedular criteria, and there was no evidence that the symptoms outside the contemplation of the schedular criteria negatively affected his ability to work.

The Court cannot discern the Board's reasoning with respect to either *Thun* prong. The Board stated that certain symptoms of record did not of themselves establish an exceptional disability picture, but made no finding whether other symptoms, concededly not contemplated by the schedular ratings, established such an exceptional disability picture. Additionally, the Board did not offer any reasoning in support of its bare conclusion that the evidence of record did not demonstrate marked interference with employment. Thus, the Court's review is frustrated, requiring remand. *See* 38 U.S.C. § 7104(d)(1); *Allday*, 7 Vet.App. at 527; *see also Tucker v. West*, 11 Vet.App. 369, 374 (1998) (remand is appropriate "where the Board has . . . failed to provide an adequate statement of reasons or bases for its determinations").

Furthermore, the Secretary's arguments with respect to the second *Thun* prong are not persuasive. The regulation requires that the "disability picture" be exceptional with related factors such as marked interference with employment. 38 C.F.R. § 3.321(b)(1). *See also Johnson*, 762 F.3d at 1366 (section 3.321(b)(1) "accounts for situations in which the veteran's overall disability picture establishes something less than total unemployability" but where the collective impact of veteran's disabilities is inadequately represented by schedular ratings). There is nothing in the regulation requiring that the marked interference be solely attributable to symptoms not contemplated by the regulation. *See Ortiz-Valles v. McDonald*, 28 Vet.App. 65, 71 (2016) ("The

Secretary cannot simply add restrictions to a regulation where they do not exist."). The Secretary cites no other authority for such a bifurcation of symptoms in extraschedular analysis.<sup>3</sup>

Mr. Tyner further argues that the Board erred and provided insufficient reasons or bases in its analysis of the collective effects of his service-connected disabilities. The Board noted that Mr. Tyner was additionally service connected for tinnitus, but the Board went on to state that "in this case . . . there are no additional symptoms 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 [v]eteran for . . . the combined effect of multiple conditions." R. at 12 (emphasis added, citation omitted). Mr. Tyner argues that the Board misinterpreted the requirements of § 3.321(b) as clarified in *Johnson*, 762 F.3d 1362, and applied an incorrect standard. It is unclear what significance the Board attached to the absence of symptoms not attributable to service-connected disabilities, or its reasons for doing so. Again, review is frustrated by the inadequacy of the statement of reasons or bases. *See Allday*, 7 Vet.App. 517.

Additionally, on the same date that the Board decision here on appeal issued, the regional office issued a rating decision granting service connection for depression, secondary to Mr. Tyner's service-connected tinnitus, and rated as 100% disabling. *See* R. at 858. While it is understandable that the Board did not discuss the implications of the rating decision, the evidence supporting that decision, a December 2015 QTC examination report, was constructively if not actually in the record before the Board. *See Bell v. Derwinski*, 2 Vet.App. 611 (1992). Thus, the Board should have considered depression in its analysis of the collective effects of Mr. Tyner's service-connected disabilities.<sup>4</sup> Even before Mr. Tyner's depression was service-connected, the depression was a secondary effect of the tinnitus, which should be considered in an extraschedular analysis. "If such material could be determinative of the claim and was not considered by the Board, a remand for readjudication would be in order." *Bell*, 2 Vet.App. at 613.

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<sup>3</sup> Additionally, as discussed above, it is not clear that the Secretary's analysis constitutes the grounds on which the Board denied the claim. The Court may not generally affirm a Board decision on a ground other than that relied on by the Board. *See SEC v. Chenery Corp.*, 318 U.S. 80, 87-88 (1943); *Newhouse v. Nicholson*, 497 F.2d 1298, 1301 (Fed. Cir. 2007) ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.").

<sup>4</sup> The rating decision will fundamentally alter the collective-effects analysis on remand. *See* 38 C.F.R. § 4.130, Diagnostic Code 9435 (2017) (requiring "total occupational and social impairment" for a 100% disability rating).

In pursuing his claim on remand, Mr. Tyner is free to submit additional evidence and argument in accordance with *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order) and, in fact, is encouraged to do so. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002). The Board must consider such evidence and argument.

## **II. CONCLUSION**

On consideration of the foregoing, the Court SETS ASIDE the Board's January 21, 2016, decision with respect to extraschedular consideration and REMANDS that matter for further proceedings.

DATED: July 28, 2017

Copies to:

Robert V. Chisholm, Esq.

VA General Counsel (027)