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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 15-4613

JIMMY C. BRITTLE, 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. Army veteran Jimmy C. Brittle appeals through counsel a November 10, 2015, decision of the Board of Veterans' Appeals (Board) that declined to refer his bilateral hearing loss claim for extraschedular consideration. For the following reasons, the Court will set aside the Board's November 2015 determination with respect to extraschedular consideration and remand the matter for further adjudication consistent with this decision.

I. ANALYSIS

Mr. Brittle asserts, in part, that the Board failed to provide adequate reasons or bases for declining to refer his claim for benefits for bilateral hearing loss for extraschedular consideration. The Court agrees.

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 entitlement to an extraschedular disability rating is warranted: (1) An exceptional or unusual disability picture and (2) whether the disability picture 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*, 572 F.3d 1366 (Fed. Cir. 2009).

The Court held in *Doucette v. Shulkin*,¹ 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.

Here, Mr. Brittle has alleged that his hearing loss is exceptional or unusual because he has lost confidence in his ability to do his job properly and has become anxious at his job as a result of his difficulties hearing and conveying information. *See* Record (R.) at 313. These are symptoms similar to social isolation, a functional effect the Court in *Doucette* noted may not be contemplated by the rating criteria. Whether these symptoms rise to the level of an exceptional or unusual

¹ On September 26, 2016, the Secretary filed a motion to stay this case, pending disposition in *Doucette v. Shulkin*, 28 Vet.App. 366 (2017). The Court granted the motion on November 17, 2016, and ordered the Secretary to file his brief within 15 days after the issuance of *Doucette*. The Court received the Secretary's brief on March 21, 2017, and Mr. Brittle filed a reply brief on May 19, 2017.

disability picture is a factual determination that must be made by the Board in the first instance. *See Washington v. Nicholson*, 19 Vet.App. 362, 366-67 (2005) (Board has the duty to determine the credibility and probative weight of the evidence); *see also Hensley v. West*, 212 F.3d 1255, 1263 (Fed. Cir. 2000) (stating that "appellate tribunals are not appropriate for a for initial fact finding"). Here, the Board's discussion of extraschedular consideration is devoid of any mention of Mr. Brittle's loss of confidence and anxiety that has resulted from his hearing difficulties, and the Court may not conclude that these effects are contemplated by the schedular criteria. *See Doucette*, 28 Vet.App. at 369 (holding that the rating criteria for hearing loss do not necessarily "contemplate all functional impairment due to a claimant's hearing loss"); *see also Robinson v. Peake*, 21 Vet.App. 545, 552 (2008), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1335 (Fed. Cir. 2009) (Board is required to address all issues raised either by the claimant or by evidence of record).

Absent an adequate statement of reasons or bases to support the Board's decision, judicial review is frustrated and remand is necessary. *See* 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995). In view of this remand, the Court need not address Mr. Brittle's additional arguments as to other inadequacies in the Board's discussion. *See Mahl v. Principi*, 15 Vet.App. 37, 38 (2001) (per curiam order) ("[I]f the proper remedy is a remand, there is no need to analyze and discuss all the other claimed errors that would result in a remedy no broader than a remand."). In pursuing his claim on remand, however, Mr. Brittle will be free to submit additional argument and evidence as to the remanded matter, and the Board must consider any such argument and evidence. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002).

II. CONCLUSION

On consideration of the foregoing, the Court SETS ASIDE the Board's November 10, 2015, decision and REMANDS the matter for further proceedings.

DATED: August 8, 2017

Copies to:

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