

BRIEF OF APPELLANT

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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

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16-4053

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JOSEPH SPELLERS

Appellant

v.

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

Appellee.

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## **ISSUES PRESENTED FOR REVIEW**

- I. The Board is required to consider extraschedular referral when the evidence presents an exceptional or unusual disability picture that markedly impacts the Veteran's ability to work or causes frequent hospitalizations. Here, the Board determined that the Veteran's functional limitations caused by his bilateral lower extremity sciatica and bilateral knee chondromalacia, as well as his use of assistive devices, were contemplated by his current rating under 38 C.F.R. § 4.124a, Diagnostic Code 8520. Did the Board err when it failed to comply with the prior remand order and provide adequate reasons or bases as to why extraschedular referral was not warranted?
- II. The Board must consider whether the combined impact of a claimant's service-connected disabilities warrants referral for consideration of an extraschedular rating when the claimant or the evidence raises the issue. Here, the Board failed to adequately discuss whether the combined impact of the Veteran's service-connected bilateral lower extremity sciatica, low back disorder, bilateral shoulder strain, and bilateral knee chondromalacia entitled him to extraschedular referral, despite the prior remand instructions to do so. Did the Board commit prejudicial legal error?

## STATEMENT OF THE CASE

Joseph Spellers served honorably in the United States Army from November 1978 to October 1989.<sup>1</sup> R-3 (1-24). During service, the Veteran injured his lower back when he lifted a heavy object from a bomb hole in Germany. R-1236 (1235-37). He also injured his back while lifting a heavy tent. R-1033 (1032-35). Since then, he has experienced persistent back pain. *Id.* Mr. Spellers submitted a claim for service connection and compensation for his back disability in July 2005. R-3179-92. In January 2006, the Regional Office granted him service connection for his low back strain, with a rating of 10 percent, effective from the date of his claim. R-3007 (3005-10).

In April 2007, the Veteran underwent a VA examination for his lumbar spine. R-2806-08. The examiner diagnosed the Veteran with degenerative arthritis and degenerative disc disease in his lumbosacral spine. R-2808. The Veteran experienced stiffness and weakness in his lower back, as well as spasms and fatigue. R-2807. Although he denied flare-ups, his pain increased with activity and he had difficulty with bending, lifting, and carrying. *Id.* Following that examination, the RO granted an increased rating of 20 percent for the Veteran's low back strain, described as degenerative arthritis and degenerative disc disease lumbosacral spine. R-2938 (2936-42) (June 2007 rating decision). The Veteran disagreed with the assigned rating and

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<sup>1</sup> The Veteran's DD-214 is not in the Record Before the Agency. However, the Veteran's record of service is not in dispute in this appeal.

subsequently perfected an appeal. R-2925 (2925-28) (January 2008 notice of disagreement); R-2564-82 (November 2009 statement of the case); R-2536-37 (November 2011 VA Form 9).

In September 2009, the Veteran reported daily pain at a level of eight out of ten, with weekly flare-ups. R-1033. He reported increased pain on the right and left side of his lower back, which also affected his legs. *Id.* After prolonged standing, the Veteran's left leg sometimes gave out. *Id.*

Mr. Spellers was unable to walk for more than five or ten minutes due to his service-connected knee and back disabilities, and he experienced constant pain in his legs in any position. R-64 (64-65) (May 2016 affidavit). He was "unable to comfortably stand still in one place" and could only sit for ten minutes at a time. *Id.* He experienced shooting pain and numbness in his legs and feet due to his sciatica. R-65. He stated, "I spend most of my time lying down in bed or on the couch as a result of my low back condition." *Id.* He took narcotic pain medication, which made him drowsy and impaired his "ability to maintain . . . focus and concentration." R-65. The Veteran could not get dressed or drive on his own. R-65.

In an April 2013 VA examination, the Veteran reported that he experienced flare-ups of his back disability twice a month that lasted approximately half an hour. R-828 (826-35). These flare-ups involved severe pain, which interrupted his activities and forced him to lie in bed. *Id.* Later, he reported weekly flare-ups, with a pain level of eight out of ten. R-65 (May 2016 affidavit). He was diagnosed with cervical and



lumbar spinal stenosis and experienced ongoing pain in his left hand and leg. R-1727 (1727-31).

Additionally, a Decision Review Officer decision granted Mr. Spellers service connection for his left and right lower extremity sciatica in November 2009, rated at 10 percent. R-2560 (2555-63). The Veteran disagreed with that rating in December of that year, which the RO continued in a September 2010 statement of the case. R-2489-501 (statement of the case); R-2539-40 (notice of disagreement). In May 2015, the Board again denied a rating in excess of 10 percent for the Veteran's right and left lower extremity sciatica. R-324 (308-30).

Because of the Veteran's sciatica, he used a cane when walking short distances, but otherwise required a walker with a seat to get around. R-746 (742-66); R-828. The cane and walker also helped with his frequent falling due to weakness in his legs. R-746. VA examiners from September 2009 and April 2013 noted the Veteran's regular use of a cane. R-833; R-1033.

Mr. Spellers was unable to do heavy lifting and walking required at his jobs, and, as a result, had to leave one of his jobs and was fired from two others because he could not adequately perform his duties. R-64; R-747, R-762 (August 2014 hearing transcript). The April 2013 examiner noted that the Veteran's back condition impacted his ability to work, including "difficulty with lifting greater than 10 pounds . . . sitting for long periods of time, and . . . difficulty with mobility in the workplace." R-65; R-834.

In May 2015, the Board denied the Veteran an increased rating in excess of 10 percent for his right and left lower extremity sciatica. R-324. It also denied referral for extraschedular consideration, in part because “the appeal does not involve evaluation of multiple service-connected disabilities.” *Id.* The Veteran appealed this decision, and the parties entered into a joint motion for partial remand (JMPR), which the Court granted in March 2016. R-104-11. The parties agreed that the Board erred because it failed to provide an adequate statement of reasons or bases in support of its decision not to refer the Veteran’s case for extraschedular consideration, including consideration of whether referral was warranted based on the collective effects of all the Veteran’s service-connected disabilities. R-105.

The Board issued the decision currently on appeal in November 2016. R-1-24. It denied Mr. Spellers referral for extraschedular consideration for his right and left lower extremity sciatica. R-4. The Board stated that the Veteran’s use of assistive devices was contemplated by the rating criteria. R-12. It reasoned that “assistive devices are provided to alleviate the presence of symptoms and/or functional limitations caused by an individual’s disability.” R-11. It also denied referral for extraschedular consideration based on the collective impact of the Veteran’s service-connected disabilities, concluding that the symptoms from his service-connected bilateral lower extremity sciatica, low back disorder, bilateral shoulder strain, and bilateral knee chondromalacia are contemplated by his assigned rating criteria. R-20. This appeal ensued.

## **SUMMARY OF THE ARGUMENT**

In denying Mr. Spellers referral for extraschedular consideration of his bilateral lower extremity sciatica, the Board misinterpreted and misapplied the law by concluding that the Veteran's use of a cane and walker was contemplated by the rating criteria. Further, the Board failed to provide adequate reasons or bases for its negative credibility determination when it concluded that the Veteran's delay in reporting the side effects of his pain medication contradicted earlier evidence of a July 2009 patient agreement. The Board also failed to adequately consider the occupational impact of the Veteran's functional limitations or address whether these limitations markedly interfered with his employment. Because the Board did not properly address this evidence, it failed to provide adequate reasons or bases for its decision to deny extraschedular consideration.

Moreover, the Board applied the wrong standard for determining the collective impact of the Veteran's service-connected disabilities. In doing so, it failed to comply with a previous remand order. But for the Board's errors, the Veteran may have been eligible for additional compensation. The Board's errors prejudiced the Veteran in the proper adjudication of his claim and therefore, remand is required.

## **STANDARD OF REVIEW**

A determination regarding an increased rating is an issue of fact. *Hayes v. Brown*, 9 Vet.App. 67, 72 (1996). The Board's answer to this question is subject to review under the clearly erroneous standard. *Davis v. West*, 13 Vet.App. 178, 184

(1999).

The Court reviews claimed legal errors by the Board under the *de novo* standard, by which the Board's decision is not entitled to any deference. 38 U.S.C. § 7261(a)(1); *see Butts v. Brown*, 5 Vet.App. 532, 538 (1993) (en banc). The Court will set aside a conclusion of law made by the Board when that conclusion is determined to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Butts*, 5 Vet.App. at 538. The Court should determine whether the Board's decision is not in accordance with the law.

## ARGUMENT

**I. The Board committed prejudicial legal error when it failed to refer the Veteran's service-connected bilateral lower extremity sciatica for extraschedular consideration based upon a misinterpretation of the law, and failed to provide adequate reasons or bases for its decision.**

**A. The Board misinterpreted and misapplied 38 C.F.R. § 3.321 (2017) and failed to give adequate reasons or bases for determining that the first step of *Thun v. Peake*, 22 Vet.App. 111 (2008) was not fulfilled.**

*a. The Board failed to adequately consider the Veteran's use of assistive devices.*

In denying referral for extraschedular consideration, the Board determined that the Veteran's symptoms impairing his "motor, sensory, or mental function" are contemplated by the assigned schedular rating. R-11. Although the Board acknowledged the Veteran's use of an assistive device is not specifically listed in the rating criteria, it concluded that this was contemplated by the rating criteria. *Id.* It reasoned that "assistive devices are provided to alleviate the presence of symptoms

and/or functional limitations caused by an individual's disability.” *Id.* It then stated that “[t]he symptoms that necessitate use of an assistive device are fully contemplated by the rating criteria and associated regulations, and the use of such assistive device directly addresses a veteran’s functional limitations.” R-12. However, the Board’s determination is unsupported by the evidence. Further, with these statements, the Board misinterpreted and, as a result, misapplied, section 3.321 and the rating criteria. *See* 38 C.F.R. § 3.321.

When a veteran’s disability does not meet the requirements for the next higher schedular rating, but the evidence indicates that the disability is more severe than the veteran’s current rating, an evaluation under section 3.321 is triggered. 38 C.F.R. § 3.321; *see Yancy v. McDonald*, 27 Vet.App. 484, 495 (2016) (“When considering whether referral is warranted . . . the Board first must compare the veteran’s symptoms with the assigned schedular rating[ ].”). The existence of extraschedular rating consideration establishes that schedular evaluations do not necessarily contemplate all of the symptomatology and functional effects exhibited by a veteran’s particular service-connected disability/disabilities. The very purpose of extraschedular consideration is to fill a gap when the veteran’s disability picture does not fit precisely within the established schedular criteria. *See Johnson v. McDonald*, 762 F.3d 1362, 1366 (Fed. Cir. 2014) (holding that extraschedular ratings are meant to account for situations in which a veteran’s disability does not cause total unemployability, but nonetheless is inadequately represented by the assigned rating).

The Court in *Johnston v. Brown* expressly stated that the use of an assistive device “does raise the possibility of ‘an exceptional or unusual disability picture’” that the Board should consider. 10 Vet.App. 80, 88 (1997) (Steinberg, J., concurring). While the veteran in *Johnston* used a wheelchair due to a non-service-connected disability, the Court acknowledged that his service-connected disabilities made his wheelchair-bound life more difficult. *Id.* at 86, 88. In the present case, Mr. Spellers’s use of a cane and walker were, in fact, due to his service-connected disabilities. *See* R-746; R-828. Therefore, the Board should have at least considered his use of assistive devices because they raised the possibility of an exceptional picture of disability. *See Johnston*, 10 Vet.App. at 88.

While no clear precedent exists on point, the Court previously issued several single-judge decisions which speak directly to how the schedular rating criteria does not contemplate the use of an assistive device. U.S. Vet. App. R.30(a) (revised November 20, 2015) (“Actions designated as nonprecedential by this Court or any other court may be cited only for the persuasive value of their logic and reasoning, provided that the party states that no clear precedent exists on point and the party includes a discussion of the reasoning as applied to the instant case.”). A discussion of these cases is instructive in this case.

In *Emerson II v. McDonald*, No. 13-2990, 2014 WL 6885369, at \*1 (Vet.App. Nov. 26, 2014), the Board denied a disability rating in excess of 20 percent for residuals of a right ankle fracture and declined referral for extraschedular

consideration, finding that the criteria for a 20 percent rating reasonably described the Veteran's disability level and symptomatology. However, the Court vacated and remanded the Board's decision, finding that the Board "failed to explain why referral for extraschedular consideration is not warranted given that the use of a cane is not contemplated by the rating criteria." *Id.* at \*1, \*2.

In the present case, also, DC 8520 does not contemplate the Veteran's use of a cane or walker. *See* R-746; R-1727; 38 C.F.R. § 4.124a. The Board was required to adequately explain why referral for extraschedular consideration was not warranted given that the Veteran's use of those assistive devices is not contemplated by the rating criteria. *See* 38 C.F.R. § 4.124a (2017); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995) (the Board's statement of the reasons or bases for its decision "must be adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court."). Because the Board failed to do so, it did not provide adequate reasons or bases for denying referral for extraschedular consideration. *See Thompson v. Gober*, 14 Vet.App. 187, 188 (2000) (the Board is required to provide an adequate statement of reasons or bases "for its rejection of any material evidence favorable to the claimant.").

Similarly, the Court in *Hood v. Shulkin* found that the Veteran's use of a knee brace was "entitled to due consideration in the extraschedular analysis." No. 16-0057, 2017 WL 1418894 at \*5 (Vet.App. Apr. 21, 2017). The Board in that case determined that the veteran's use of a knee brace was not a symptom, but a "method of

addressing his symptoms.” *Id.* However, the Court found that the veteran’s frequent use of a knee brace is a factor that would contribute to an unusual disability picture. *Id.* Therefore, it concluded that the Board’s inadequate extraschedular analysis prejudiced the veteran. *Id.*

In the present case, the Board similarly attempts to differentiate between the Veteran’s symptoms and the assistive devices he uses to address those symptoms. *See* R-11-12, R-20. However, the Veteran relies on a cane for walking short distances and a walker for longer distances with frequent resting. R-1727. Mr. Spellers’s frequent reliance on assistive devices, similar to the veteran’s frequent use of a knee brace in *Hood*, should have been considered a factor capable of presenting an unusual disability picture in the Board’s extraschedular determination. *See id.*; *Hood*, 2017 WL 1418894 at \*5.

In *Foster v. McDonald*, the Court held that “the level of severity referred to in *Thun* is not merely the veteran’s symptoms; it is the severity of the disability.” No. 12-3667, 2014 WL 4365432 at \*4 (Vet.App. Sept. 4, 2014). Although the Secretary attempted to differentiate “symptoms” from “effects of symptoms,” the Court determined that “it is not the symptoms but their effects that determine the level of impairment.” *Id.* (emphasis omitted) (*citing Mauerhan v. Principi*, 16 Vet.App. 436, 443 (2002)). Because the Board failed to explain how the rating criteria contemplate the veteran’s use of assistive devices, side effects of medication, and other effects of her disability, or adequately analyzed those effects on her employability, the Court



concluded that Board did not properly determine whether the veteran's disability picture was contemplated by the rating criteria. *Id.* at \*5, 6.

Here, the Board also fails to adequately explain how the rating criteria contemplate Mr. Spellers's use of a cane and walker to get around. *See id.* at \*5, 6. Instead, it argues that because the symptoms that necessitate use of a walker and cane are contemplated in the rating criteria, the assistive devices, themselves, are also contemplated. R-12. However, the use of assistive devices and other effects of the Veteran's disability, as the Court determined in *Foster*, are encompassed in his level of impairment and, therefore, should have been adequately contemplated by the Board. *See* 2014 WL 4365432 at \*4.

*b. The Board erred in providing inadequate reasons or bases for its credibility determination.*

Additionally, the Board determined that the side effects the Veteran experienced from his pain medication did not warrant referral for extraschedular consideration because his reports of these side effects, including drowsiness and poor concentration, were not credible. R-12-13; *see* R-65. The Board reasoned that the Veteran only reported the side effects in a May 2016 affidavit and not at numerous other times, stating that he failed to report these symptoms to treatment providers "despite his contractual obligation to do so." *Id.* The Board cites a July 2009 patient agreement in which the Veteran agreed to report significant side effects from his pain medication. R-13; R-1045-48. However, this patient agreement was related to his

opioid treatment and did not necessarily constitute a legal or contractual obligation to report symptoms. R-1046. Further, the agreement provided that Mr. Spellers report “any significant side effects.” *Id.* The agreement does not define which side effects would be considered significant, but listed such potential side effects. *See id.* The list does not include drowsiness or poor concentration, which the Veteran later reported in an affidavit. *See id.*; R-65. Therefore, these other symptoms were not necessarily “significant” according to the agreement and Mr. Spellers would not have had to report them. *See* R-1046.

Although the Board may consider the time delay when it weighs the evidence, it “cannot determine that lay evidence lacks credibility merely because it is unaccompanied by contemporaneous medical evidence.” *Buchanan v. Nicholson*, 451 F.3d 1331, 1336-37 (Fed. Cir. 2006); *see also Horn v. Shinseki*, 25 Vet.App. 231, 239 (2012) (observing that the absence of evidence is not necessarily substantive negative evidence). The Board must “first establish a proper foundation for drawing inferences against a claimant from an absence of documentation.” *Fountain v. McDonald*, 27 Vet.App. 258, 272 (2015). Here, the Board did not adequately explain how the Veteran’s report of side effects in his 2016 affidavit contradict the symptoms he reported at earlier appointments. *See* R-12-13. Further, the Board cannot use a lack of objective evidence to show “conflicting contemporaneous evidence of record.” *See* R-13; *Cantrell v. Shulkin, M.D.*, 28 Vet.App. 382, 393 (2017) (finding that “the Board failed to identify a proper foundation in the record for its adverse

credibility determination”). Mr. Spellers is at least competent to report observable events and symptoms. *See* 38 C.F.R. § 3.159(a)(2) (2017) (defining evidence as competent “if it is provided by a person who has knowledge of facts or circumstances and conveys matters that can be observed and described by a lay person”); *see also Davidson v. Shinseki*, 581 F.3d 1313, 1316 (Fed. Cir. 2009). Because the Board failed to adequately discuss why the time delay rendered these statements less persuasive, the Board’s dismissal of such favorable, material evidence is prejudicial to the Veteran.

B. The Board’s failure to reach the second element of *Thun* constituted prejudicial error because evidence showed marked interference with employment.

Here, the Board did not reach the second element of *Thun*. R-10-11, R-20-21. But the Board’s failure to engage in the second element of the *Thun* analysis did not constitute harmless error because it did not adequately consider all the Veteran’s symptoms when it determined that they were contemplated by his assigned rating. *See Yancy*, 27 Vet.App. at 494 n.5 (noting that “an error in the Board’s findings regarding the nature and severity of a claimant’s symptoms could affect the Board’s analysis of both the first and second *Thun* elements”). Had the Board properly conducted the first element of the *Thun* analysis for extraschedular consideration, it might have also found that Mr. Spellers’s disability picture exhibited other related factors such as marked interference with employment. *See* 38 C.F.R. § 3.321; *Thun*, 22 Vet.App. at 115. Its failure to discuss other factors related to extraschedular consideration, including marked interference with employment, constituted prejudicial error because

the evidence showed that the Veteran's service-connected disabilities caused physical limitations that would markedly interfere with his employment. *See* 38 C.F.R. § 3.321(b)(1); *see Johnson*, 762 F.3d at 1366 (holding that extraschedular ratings are meant to account for situations in which a veteran's disability does not cause total unemployability, but nonetheless is inadequately represented by the assigned rating).

Here, the evidence is sufficient to show Mr. Spellers's disabilities caused marked interference with his employment. Although the regulation does not specifically define what constitutes "marked interference," the Oxford English Dictionary defines marked as "clearly noticeable" or "evident." Oxford Dictionary, "marked," [http://www.oxforddictionaries.com/us/definition/american\\_english/marked](http://www.oxforddictionaries.com/us/definition/american_english/marked) (last visited August 24, 2017). The Veteran's inability to perform the required physical activities and duties at his recent jobs, particularly walking, lifting, and carrying, resulted in his termination from two jobs and resignation from another. R-64; R-747, R-762.

Mr. Spellers was unable to walk for more than five to ten minutes and sit for more than 10 minutes. R-64. He also needed a cane for walking short distances and a walker for longer distances, in order to take frequent breaks. R-746; R-1727. The Veteran reported that he could not lift more than 10 pounds. R-64-65. However, his need for a cane or walker to walk would also impair his ability to lift and carry items. The Veteran reported persistent back pain and difficulty with bending, lifting, and carrying. R-1033; R-2807.

Mr. Spellers's physical limitations with walking, standing, and lifting show a marked interference with employment because these limitations had a noticeable effect on his ability to work at his prior jobs. He was terminated from two of his recent jobs because he was "moving too slowly" at one and "wasn't physically qualified for the work" at another. R-64. The Veteran's service-connected disabilities had a clearly noticeable effect on his employability, evidenced by his past terminations due to his physical impairments.

The Board failed to adequately address this evidence in its extraschedular analysis. This constituted prejudicial legal error, because evidence demonstrated that the Veteran's disability resulted in marked interference with employment. The case should therefore be remanded in order for the Board to correctly apply these regulations, offer an adequate statement of reasons or bases for its decision, and comply with the prior remand offer. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) ("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, a remand is the appropriate remedy.").

## **II. The Board failed to adequately address the collective impact of the Veteran's service-connected disabilities.**

Along with bilateral lower extremity sciatica, the Veteran is also service-connected for other disabilities. R-785-86 (780-93). He is rated at 40 percent for degenerative arthritis and degenerative disc disease of the lumbosacral spine, 0 percent

for right and left shoulder strain, and 0 percent for right and left knee chondromalacia. *Id.* The Board denied referral for extraschedular consideration on the basis of the collective impact of the Veteran's service-connected disabilities because it found that the Veteran's "symptomology does not indicate that evaluation of the individual conditions fails to capture all of the symptoms associated with his service-connected disabilities." R-20. However, the Board's approach in this case "improperly focused on individual symptoms, rather than the collective impact of those symptoms on the Veteran's overall disability picture." *See Cantrell*, 28 Vet.App. at 395.

The Board's statement is inapposite to the proper analysis of whether the combined effects of the Veteran's symptoms present an exceptional or unusual disability picture sufficient to trigger extraschedular referral. "[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). Therefore, the Board's conclusion that no additional symptoms existed that were not attributed to the Veteran's service-connected disabilities is a misinterpretation of the law because it fails to consider whether these disabilities, together, produce "compounding negative effects." *See id.* (emphasis added).

In denying Mr. Spellers referral for extraschedular consideration, the Board failed to adequately contemplate the combined effects of his service-connected

disabilities. The Board concluded that the Veteran's "symptomology does not indicate that evaluation of the individual conditions fails to capture all of the symptoms associated with his service-connected disabilities." R-20. However, this analysis shows the Board looked at the individual impact of the Veteran's disabilities, rather than the collective impact. *See* R-20. While it later found that "there has been no showing that the rating criteria do not account for his particular symptoms of his service-connected disabilities, either individually or collectively," this nod to collective effects is largely conclusory. R-20-21. Had the Board adequately looked at the collective effects of the Veteran's disabilities, it would have found that the collective impact impaired his movements, including his ability to walk, stand, sit, and lift.

Evidence in the record suggests that Mr. Spellers's service-connected disabilities did have a collective impact on his functional ability to move. The Veteran stated that he had to use assistive devices to walk because of instability and weakness in his legs, caused, in part, by his sciatic disability. R-746. He was unable to walk for more than five to ten minutes due to both his service-connected knee and back disabilities and could not comfortably stand still because of his legs. R-64. He was also unable to sit in one position for more than 10 minutes at a time and had to lie down frequently because of his low back condition. R-64-65. The pain, stiffness, and weakness in his lower back made it difficult for him to bend, lift, and carry. R-2807. His bilateral shoulder strain also prevented him from lifting his arms above his head or holding his arms out in front of him for more than a few seconds. R-65. The

Veteran's service-connected disabilities affected his physical ability to stand, sit, walk, and lift. *See* R-64-65. Because of his multiple disabilities, similar to *Yancy*, Mr. Spellers was unable to sit and stand, as well as bend and walk. *Compare* 27 Vet.App. at 496, *with* R-64-65, R-746, R-2807. Therefore, there is evidence to suggest that the combined effect of Mr. Spellers's service-connected disabilities created an exceptional disability picture that the Board should have discussed. The Board's failure to apply the proper standard was prejudicial to the Veteran's claim because evidence in the record suggests that the combined effects of multiple service-connected disabilities may impact the Veteran's functionality in ways not necessarily contemplated by the rating criteria for any given condition.

Moreover, the Board's failure to give adequate reasons or bases for its denial of extraschedular consideration based on the collective impact of the Veteran's service-connected disabilities constituted a failure to follow the Court's previous remand order. *See* R-105-06. The parties agreed that because the entitlement to extraschedular consideration based on this combined effect was reasonably raised by the evidence, the Board's failure to discuss such evidence was prejudicial. R-105. The Court granted the JMPR based on the parties' agreement that the Board "failed to discuss this reasonably raised theory of entitlement." R-106; R-111. A remand imposes upon the Secretary of Veteran's Affairs a concomitant duty to ensure compliance with the terms of the remand. *Stegall v. West*, 11 Vet.App 268, 270 (1998)



(holding that RO compliance with remand directives is not optional or discretionary and the Board errs as a matter of law when it fails to ensure remand compliance).

The Board's failure to adequately consider whether the Veteran's symptoms from his service-connected disabilities render him more disabled than contemplated by the rating criteria was prejudicial because it did not give adequate reasons or bases for its denial of referral for extraschedular consideration based on this collective impact. *See* R-18-21. Had the Board properly considered the above-cited evidence, it might have determined that the Veteran's collective disability picture resulted in "compounding negative effects" which were not contemplated by his assigned ratings. *See Johnson*, 762 F.3d at 1366. Therefore, remand is necessary. *See Tucker*, 11 Vet.App. at 374.

## **CONCLUSION**

The Board erred when it misinterpreted the rating criteria, and therefore, misapplying the requirements of extraschedular consideration, when it failed to adequately consider the Veteran's use of assistive devices in determining whether he presented an exceptional picture of disability. The Board also erred in its determination that the Veteran's statements made regarding side effects of his pain medication in a May 2016 affidavit were not credible. The July 2009 patient agreement did not contractually obligate the Veteran to disclose his side effects earlier.

The Board's failure to consider whether the Veteran's disabilities caused a marked interference with his employment was also prejudicial because the evidence

showed occupational impairment. Further, the Board did not give adequate reasons or bases as to why the combined effect of the Veteran's bilateral lower extremity sciatica and bilateral knee chondromalacia, as well as his other service-connected disabilities, did not present an unusual or exceptional picture of disability.

For the foregoing reasons, the Court should vacate the Board decision that denied entitlement to extraschedular referral for the Veteran's service-connected disabilities and remand his claim for proper readjudication.

Respectfully submitted,  
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