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

No. 16-2687

JACKUELINE L. BARNES, APPELLANT,

v.

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

Before MEREDITH, *Judge*.

**MEMORANDUM DECISION**

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

MEREDITH, *Judge*: The appellant, Jackueline L. Barnes, through counsel appeals a June 28, 2016, Board of Veterans' Appeals (Board) decision that denied an initial disability rating in excess of 70% for major depressive disorder (MDD). Record (R.) at 1-18. The Board granted an increased disability rating from 30% to 70% for MDD. This is a favorable finding that may not be disturbed by the Court. *Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007); *see also Bond v. Derwinski*, 2 Vet.App. 376, 377 (1992) (per curiam order) ("This Court's jurisdiction is confined to the review of final [Board] decisions which are adverse to a claimant."). The Board remanded the issue of entitlement to a total disability rating based on individual unemployability (TDIU). The remanded matter is not before the Court. *See Breeden v. Principi*, 17 Vet.App. 475, 478 (2004) (per curiam order) (a Board remand "does not represent a final decision over which this Court has jurisdiction"); *Hampton v. Gober*, 10 Vet.App. 481, 483 (1997) (claims remanded by the Board may not be reviewed by the Court).

This appeal is timely, and the Court has jurisdiction to review the Board's decision pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the following reasons, the Court will vacate the Board's decision and remand the matter for further proceedings consistent with this decision.

## **I. BACKGROUND**

The appellant served on active duty in the U.S. Air Force from October 1979 to August 1985. R. at 783. In August 2010, the appellant filed a disability compensation claim for depression. R. at 1403-09. In June 2011, the appellant was afforded a VA mental health examination. R. at 785-90. The VA examiner diagnosed the appellant with MDD, recurrent, moderate and found that the appellant's MDD had a moderate impairment in employment and social functioning. R. at 785-90. In July 2011, a VA regional office (RO) granted entitlement to disability compensation for MDD and assigned a 30% disability rating, effective August 25, 2010. R. at 2471-80. The appellant disagreed with the decision and perfected an appeal to the Board, alleging that her symptoms met the rating criteria for a 70% disability rating. R. at 644-46, 652-80, 769-70.

During the development of her claim, the appellant testified at a personal hearing before the RO, R. at 695-700, and, in July 2013 and January 2015, underwent two additional VA examinations to assess the severity of her MDD, R. at 685-90, 1410-13. On June 28, 2016, the Board awarded an increased disability rating from 30% to 70% for MDD, but denied entitlement to a 100% schedular rating and referral for extraschedular consideration. R. at 1-18. This appeal followed.

## **II. ANALYSIS**

The appellant argues that the Board misapplied the rating criteria when it denied a schedular disability rating greater than 70% for MDD, prematurely denied referral for extraschedular consideration, and inadequately explained how it accounted for evidence of unemployability when it denied referral for extraschedular consideration but found the record incomplete as to the issue of TDIU. Appellant's Brief (Br.) at 8-19; Reply Br. at 1-9. The Secretary asserts that the appellant's arguments regarding the schedular rating amount to a disagreement with the Board's weighing of the evidence and that the Board properly adjudicated the issue of extraschedular consideration even though the issue of TDIU was remanded for development. Secretary's Br. at 3-10.

The VA rating schedule is based, "as far as practicable, upon the average impairments of earning capacity." 38 C.F.R. § 3.321(b)(1) (2017). 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 or the Director of the Compensation

Service. *Id.* A separate provision, 38 C.F.R. § 4.16, provides in certain circumstances that "[t]otal disability ratings for compensation may be assigned, where the schedular rating is less than total, when the disabled person is, in the judgment of the rating agency, unable to secure or follow a substantially gainful occupation as a result of service-connected disabilities." 38 C.F.R. § 4.16(a) (2017).

"The determination of whether a claimant is entitled to an extraschedular rating . . . is a three-step inquiry." *Thun v. Peake*, 22 Vet.App. 111, 115 (2008), *aff'd sub nom. Thun v. Shinseki*, 572 F.3d 1366 (Fed. Cir. 2009); *see Anderson v. Shinseki*, 22 Vet.App. 423, 427 (2009) (clarifying that the three "steps" identified in *Thun* are necessary "elements" of an extraschedular rating analysis). The first step in the inquiry is to determine whether "the evidence before VA presents such an exceptional disability picture that the available schedular evaluations for that service-connected disability are inadequate." *Thun*, 22 Vet.App. at 115. "[I]nitially, there must be a comparison between the level of severity and symptomatology of the claimant's service-connected disability with the established criteria found in the rating schedule for that disability." *Id.* If the adjudicator determines that the available schedular ratings are inadequate, the second step of the inquiry requires the adjudicator to "determine whether the claimant's exceptional disability picture exhibits other related factors," such as marked interference with employment or frequent periods of hospitalization. *Id.* at 116. Then, if the first two steps have been satisfied, the adjudicator must refer the claim to the Under Secretary for Benefits or the Director of the Compensation Service for a determination of whether an extraschedular rating is warranted. *Id.*

The Board's determination whether referral for an extraschedular disability rating is appropriate is a factual determination that the Court reviews under the "clearly erroneous" standard of review. *Id.* at 115. As with any material issue of fact or law, the Board must provide a statement of the reasons or bases for its determination, "adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court." *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *see also* 38 U.S.C. § 7104(d)(1).

In the present case, the Board stated that the "rating criteria accurately describe the [appellant's] disability level and symptomatology level, and [that] her symptoms are well within the criteria associated with a rating of 70[%], which is not the highest rating available." R. at 12. The Board concluded that the schedular evaluation was adequate and that referral for extraschedular consideration was not warranted. *Id.* However, the Board remanded the issue of

entitlement to TDIU under 38 C.F.R. § 4.16(b) because the issue had not undergone evidentiary development and directed VA to afford the appellant an examination addressing whether her MDD precludes her from obtaining and maintaining substantially gainful employment. R. at 13-14.

The appellant argues that the Board prematurely denied referral for extraschedular consideration and inadequately explained how adjudication of the issue was proper, considering the Board's seemingly divergent finding that the record was incomplete regarding the effect the appellant's MDD had on her employability. Appellant's Br. at 16-19 (citing *Brambley v. Principi*, 17 Vet.App. 20, 24 (2003)). The Secretary asserts that the Board denied referral for extraschedular consideration solely on the basis that the rating schedule adequately describes the appellant's disability picture, without regard to her employability – i.e., that the appellant failed to meet the first step of *Thun* – and, therefore, the issue of entitlement to an extraschedular rating was separate from entitlement to TDIU. Secretary's Br. at 10.

"Although it is well settled that extraschedular consideration and [entitlement to] TDIU . . . are not necessarily 'inextricably intertwined,'" adjudication of both issues may "require *a complete picture* of the appellant's service-connected disabilities and their effect on [the appellant's] employability." *Brambley*, 17 Vet.App. at 24 (citations and internal quotation marks omitted); *see also Yancy v. McDonald*, 27 Vet.App. 484, 494 n.5 (2016) (recognizing that "[a]lthough the first and second *Thun* [steps] involve separate factual questions, both inquiries require a full and accurate description of a claimant's disability picture" and that "the Board's findings regarding the nature and severity of a claimant's symptoms [may] affect the Board's analysis of both the first and second *Thun*" steps). In *Brambley*, "the Board concluded that the evidence of record did not support referral of the appellant's back disabilities for extraschedular consideration." *Id.* at 23. Yet, when "remanding his TDIU-rating claim, the Board acknowledged that 'additional development' was necessary . . . [because] the Board did not consider evidence as to the appellant's employment and medical record sufficiently complete to enable it to adjudicate the TDIU claim properly and fairly." *Id.* at 23-24. On appeal, the Court concluded that, by denying referral for extraschedular consideration but remanding the issue of TDIU for further development, the Board impermissibly maintained "divergent positions concerning the completeness of the record." *Id.* at 24. Because "it was premature for the Board to decline extraschedular consideration where the record was significantly incomplete in a number of relevant areas probative of the issue of employability," the Court remanded the case so that the Board could "make the requisite findings of fact and provide

an adequate statement of reasons or bases on the issue of whether referral of the extraschedular consideration issue [was] warranted in light of the terms of the TDIU remand order." *Id.*

*Brambley* is analogous to the present case. The Board denied referral for extraschedular consideration because it found that the rating criteria adequately described the appellant's disability, but remanded for evidentiary development the issue of entitlement to TDIU. R. at 12-14. Given that the schedular rating criteria for mental disorders require an adjudicator to assess the effects of a claimant's mental health disorder on his or her occupational functioning, *see* the General Rating Formula for Mental Disorders, 38 C.F.R. § 4.130, Diagnostic Code (DC) 9434 (2017), the Court finds that the Board, like the Board in *Brambley*, took divergent positions when it determined that additional evidence was necessary to evaluate the effects of the appellant's MDD symptoms on her employability but adjudicated whether the evidence supported referral for extraschedular consideration. R. at 13-14; *see Bankhead v. Shulkin*, 29 Vet.App. 10, 21 (2017) (noting that the "evaluation of mental disorders requires, among other things, that adjudicators consider the effects of each of the veteran's mental symptoms on his or her social and occupational situation to determine the severity of the symptom" (citing *Vazquez-Claudio v. Shinseki*, 713 F.3d 112, 116-17 (Fed. Cir. 2013); *Mauerhan v. Principi*, 16 Vet.App. 436, 442 (2002))); *see also* 38 C.F.R. § 4.130, DC 9434 (providing disability ratings from zero to 100% for MDD based, in part, on the level of occupational and social impairment caused by a claimant's disability).

Because the effects of the appellant's MDD symptoms on her ability to work is central to *both* the adequacy of schedular rating criteria in this case and the issue of TDIU, the Secretary's argument that the Board properly denied extraschedular consideration based solely on the adequacy of the rating schedule is not persuasive. In fact, as noted by the appellant in her reply brief, the development ordered by the Board for TDIU may affect the appellant's entitlement to a higher schedular disability rating. Reply Br. at 8; *see Bankhead*, 29 Vet.App. at 21. The Board failed to explain its implicit determination that the record was complete to adjudicate the issue of extraschedular consideration but incomplete regarding the issue of TDIU. Absent such a discussion, the Board's statement of reasons or bases is inadequate to facilitate the Court's review. *See Allday*, 7 Vet.App. at 527.

Accordingly, the Court will vacate the Board's decision denying referral for extraschedular consideration and remand the matter to the Board for further adjudication. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) (holding that remand is the appropriate remedy "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"). Additionally, because the development ordered by the Board may also affect the Board's analysis concerning the appellant's schedular rating, the Court finds the issues inextricably intertwined and will further remand the matter of the appellant's entitlement to a higher schedular rating. *See Tyrues v. Shinseki*, 23 Vet.App. 166, 177-78 (2009) (en banc) (finding that the Court has discretion to determine whether claims denied by the Board are so inextricably intertwined with a matter still pending before VA that claims should be remanded to await development or disposition of a claim not yet finally decided), *aff'd*, 631 F.3d 1380 (Fed. Cir. 2011), *vacated*, 565 U.S. 802 (2011), *reinstated as modified*, 26 Vet.App. 31 (2012) (per curiam order), *aff'd*, 732 F.3d 1351 (Fed. Cir. 2013).

Given this disposition, the Court will not at this time address the remaining arguments and issues raised by the appellant. *See Best v. Principi*, 15 Vet.App. 18, 20 (2001) (per curiam order). 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) (stating that, on remand, the Board must consider additional evidence and argument in assessing entitlement to the benefit sought); *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order). The Court reminds the Board 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), and the Board must proceed expeditiously, in accordance with 38 U.S.C. § 7112.

### **III. CONCLUSION**

After consideration of the parties' pleadings, and a review of the record, the Board's June 28, 2016, decision is VACATED and the matter is REMANDED for further proceedings consistent with this decision.

DATED: September 13, 2017

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