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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 16-0099

ERIC M. HOLMES, APPELLANT,

V.

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

Before ALLEN, *Judge*.

MEMORANDUM DECISION

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

ALLEN, *Judge*: Appellant, Eric M. Holmes, appeals through counsel an October 30, 2015, Board of Veterans' Appeals (Board) decision denying him an increased rating for his bilateral hearing loss. Record (R.) at 2-35. This appeal was timely filed on January 11, 2016, and the Court has jurisdiction to review the Board's decision pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). As discussed below, the Court will set aside the October 30, 2015, decision and remand the matter for further proceedings consistent with this decision.

I. RELEVANT FACTS AND PROCEDURAL HISTORY

Appellant served honorably on active duty in the United States Army from July 1977 to August 1999. R. at 2049. On April 20, 2000, a VA regional office (RO) granted him service connection for bilateral hearing loss at a non-compensable rating. R. at 2024-35. Appellant testified at a February 27, 2013, hearing at the RO before a hearing officer. R. at 513-610. According to the transcript of this hearing, he testified that he had "permanent hearing aids because [he has] tenderness[] [and] ringing[]" in his ears. R. at 531. The RO denied him a compensable rating for hearing loss and, after additional proceedings, he appealed to the Board on September

9, 2013. R. at 1923-37, 1485-1505, 3602-13, 220-21. The Board denied his claim on October 30, 2015, and this appeal followed.

II. ANALYSIS

In *Thun v. Peake*, the Court held that the determination of whether a claimant is entitled to an extraschedular rating is a three-step inquiry. 22 Vet.App. 111, 115 (2008), *aff'd* 572 F.3d 1366 (Fed. Cir. 2009). The first step 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." *Id.* If the adjudicator determines that this is so, 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. Finally, if the first two steps of the inquiry have been satisfied, the third step requires the adjudicator to 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 of whether referral for extraschedular consideration is appropriate is a finding of fact that the Court reviews under the "clearly erroneous" standard of review. *Id.* at 115. "A factual finding 'is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Hersey v. Derwinski*, 2 Vet.App. 91, 94 (1992) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

With respect to entitlement to an extraschedular rating for bilateral hearing loss, the Board stated:

The Board finds that the schedular evaluations assigned for [appellant's] service-connected disabilities are more than adequate in this case. As to hearing loss, and as noted, [appellant's] disabilities is[sic] determined based on the mechanical application of a rating table, and [appellant's] auditory condition simply does not warrant a compensable evaluation. [Appellant] has not described any side effects from his . . . hearing loss that would make [it] unique or unusual. Rather, his main complaint is difficulty hearing which is what the schedular rating criteria is[sic] directly written to consider.

. . . .

Moreover, even if the schedular rating criteria did not adequately describe any disability, there is no indication that [appellant] has been hospitalized in

conjunction with the issues discussed above. VA examiners did not even suggest that these service-connected disabilities caused significant interference with employment. As such, none of the governing norms of an extraschedular rating are shown to be present. Here, [appellant's] manifestations simply do not exceed the available rating criteria, and a special disability picture is not indicated. As such, referral for consideration of an extraschedular rating is not warranted for these disabilities.

R. at 27.

A. *Thun* Step One

Appellant argues that the Board's decision should be remanded because the Board failed to provide an adequate statement of reasons or bases for its conclusion in the first step of its *Thun* analysis that his ear tenderness is contemplated by the rating schedule. Appellant's Substitute Brief (Appellant's Br.) at 6-9.¹ The Court agrees. Indeed, this is not even a close question. The word "tenderness" does not even make an appearance in the Board's extraschedular analysis. *See* R. at 27-28.

The Secretary argues, based solely on his own conjecture, that appellant's statement at the February 2013 hearing that he suffers from "tenderness" in his ears is merely an incorrect transcription of the word "tinnitus." Secretary's Br. at 11. The Board decision is devoid of any discussion of the possibility of a scrivener's error and the Secretary may not substitute his own post hoc explanation to cure the Board's failure to address relevant evidence. *See Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 156 (1991) ("[L]itigating positions' are not entitled to deference when they are merely appellate counsel's '*post-hoc* rationalizations' for agency action, advanced for the first time in the reviewing court." (quoting *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 212 (1988)); *Evans v. Shinseki*, 25 Vet.App. 7, 16 (2011) ("[I]t is the Board that is required to provide a complete statement of reasons or bases, and the Secretary cannot make up for its failure to do so."). On remand, appellant is entitled to an

¹ The Court reminds appellant's counsel of the importance of proof-reading materials submitted to the Court. Appellant's brief contains several careless errors. At a minimum, such errors are distractions for the Court. At some point, they will become something that reflects poorly on appellant's counsel more generally. *See* Appellant's Br. at 6 ("The Board overlooked favorable evidence that Mr. Holmes had ear pair[sic] . . ."), 11 ("Is[sic] something is of a measurably large amount it is more than when something is simply notable.", "The Board relied on inadequate February 200[sic] and July 2013 VA medical examinations . . ."), 14 ("Remand is required for the VA to obtained[sic] adequate medical examination in this case that appropriate[sic] explain . . .", "The Board filed[sic] to consider whether . . ."). The Court underscores that such attention to detail is not merely good practice—although that it surely is—but also something that is required of lawyers. *See* Model Rules of Prof. Conduct R. 1.1 (Competence), 1.3 (Diligence); U.S. VET. APP. R. ADM. & PRAC. 4(a) (adopting the Model Rules of Professional Conduct as the disciplinary standard for practice before this Court).

adequate statement of reasons or bases from the Board discussing why his tenderness is or is not contemplated by the rating schedule.

B. *Thun* Step Two

Appellant argues that the Board failed to provide an adequate statement of reasons or bases for its conclusion in the second step of the *Thun* analysis that there was insufficient evidence of his hearing loss causing "significant" interference with employment to warrant extraschedular referral. Appellant's Br. at 9. He also argues that the Board applied the incorrect legal standard in making this determination and that there was sufficient evidence raised by the record to merit discussion by the Board. *Id.* at 9-11. Again, the Court agrees.

Despite the Board's assertion that "VA examiners did not even suggest that [appellant's] service-connected disabilities caused significant interference with employment," R. at 29, a July 2013 VA medical exam did, in fact, indicate that the appellant's hearing loss "impact[ed] ordinary conditions of life, *including ability to work.*" R. at 3281 (emphasis added). The Board fails to discuss this notation and the Secretary again attempts to rationalize the Board's failure post hoc.

The Secretary also engages in improper post hoc rationalization regarding the Board's lack of discussion concerning a statement appellant made that his disabilities "impact[ed] [his] life and daily activities and force[d] [him] to resign from [the] work force," accusing appellant of "mischaracterize[ing] the record."² Secretary's Br. at 8. The Board's decision did not address this testimony whatsoever, instead stating in conclusory fashion that appellant "has not described any side effects from . . . his hearing loss that would make [it] . . . unique or unusual." R. at 27. Appellant is entitled to an adequate statement of reasons or bases that addresses the relevant evidence contained in the record.

Finally, the determination of the correct legal standard the Board must apply when determining interference with employment under *Thun* is a legal question that the Court reviews de novo. 38 U.S.C. § 7261(a)(1); *Butts v. Brown*, 5 Vet.App. 532, 539 (1993) (en banc) (noting the Court's "longstanding practice of reviewing questions of law de novo without any deference to the [Board's] conclusions of law"). The Court holds, as a matter of law, that the Board here applied the incorrect legal standard under the second step of the *Thun* analysis when it referred to

² The Court takes such accusations seriously. The Secretary alleges twice in his brief that appellant "mischaracterized" the record. Secretary's Br. at 8, 11. The Court finds no support for these accusations and urges the Secretary to be careful before making such accusations in the future. *See Lamb v. Peake*, 22 Vet.App. 227, 237 (2008) ("Unfounded accusations or innuendo of misbehavior reflect poorly on the accuser, not the accused.").

"significant" interference with employment instead of "marked" interference. The Secretary argues that if the Court were to find that the Board's use of the word "significant" instead of "marked" warrants remand, then "it would require the Board to use a prescribed set of talismanic phrases in order to withstand judicial scrutiny, no matter the actual substance of the Board's analysis." Secretary's Br. at 9. Such hyperbole is unwarranted. Requiring the Board to correctly state the law when reviewing the claims of those who have served this country is not so high of a burden. To hold otherwise would allow the Board to change the legal standards that control its actions at its own discretion, an impermissible outcome. For the reasons discussed above, remand is necessary for the Board to provide an adequate statement of reasons or bases applying the correct legal standard. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) (holding that remand is appropriate "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").

Given this disposition, the Court need not address the remaining arguments and issues raised by appellant at this time. *See Best v. Principi*, 15 Vet.App. 18, 20 (2001). On remand, appellant is free to submit additional evidence and argument, including the arguments raised in his briefs to this Court, in accordance with *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order), and the Board must consider any such evidence or argument submitted. *Kay v. Principi*, 16 Vet.App. 529, 534 (2002). 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. §§ 5109B and 7112.

III. CONCLUSION

After consideration of the parties' briefs, and a review of the record, the Board's October 30, 2015, decision is SET ASIDE and the matter is REMANDED to the Board for further proceedings consistent with this decision.

DATED: September 15, 2017

Copies to:

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