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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 16-2678

LANCE E. SCOTT, 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 Lance E. Scott appeals through counsel a June 21, 2016, decision of the Board of Veterans' Appeals (Board) that denied a total disability rating based on individual unemployability (TDIU).[1] The parties have neither requested oral argument nor identified issues that they believe require a precedential decision of the Court. For the following reasons, the Board's June 2016 decision will be set aside and the matter remanded for further adjudication.

I. ANALYSIS

Mr. Scott argues that remand is warranted because the Board's assessment of whether pes planus alone caused unemployability was not in accordance with law. A rating of TDIU may be assigned "where the schedular rating is less than total, when the disabled person is, in the judgment

[1] The Board also declined to award compensation under 38 U.S.C. § 1151. Additionally, with respect to pes planus, the Board awarded a 30% disability rating before August 7, 2015, a 50% disability rating as of August 7, 2015, and declined to refer the matter for extraschedular consideration under 38 C.F.R. § 3.321(b) (2017). Mr. Scott does not raise any contentions of error with respect to these parts of the Board's decision, and the Court will not address them on appeal. *See Pederson v. McDonald*, 27 Vet.App. 276, 283 (2015) (en banc) (stating that "this Court, like other courts, will generally decline to exercise its authority to address an issue not raised by an appellant in his or her opening brief").

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 (2017). In determining whether a claimant is unable to secure or follow a substantially gainful occupation, the central inquiry is "whether the veteran's service-connected disabilities alone are of sufficient severity to produce unemployability." *Hatlestad v. Brown*, 5 Vet.App. 524, 529 (1993); *see also Van Hoose v. Brown*, 4 Vet.App. 361, 362 (1993) ("The question is whether the veteran is capable of performing the physical and mental acts required by employment, not whether the veteran can find employment."). In determining whether TDIU is warranted, non-service-connected disabilities may not be considered. *Van Hoose v. Brown*, 4 Vet.App. at 363.

Here, the Board found that "referral for extraschedular consideration of entitlement to TDIU is not warranted, as the preponderance of the evidence weighs against unemployability solely resulting from [Mr. Scott's] pes planus." Record (R.) at 32. In support of this finding, the Board discussed evidence that attributed Mr. Scott's unemployment to low back pain, persistent elbow pain, and arm swelling. The Board discounted medical and Social Security Administration (SSA) records that found Mr. Scott's pes planus caused unemployability because "they reflect findings of unemployability, or disability for SSA purposes, due to a number of disabilities." R. at 32.

The Board's explanation reflects its misapplication of law. Rather than determining whether Mr. Scott's pes planus alone was of sufficient severity to produce unemployability, the Board denied TDIU because unemployment was not solely caused by pes planus. However, the fact that Mr. Scott's unemployment may have been in part caused by nonservice-connected disabilities is not fatal to his TDIU claim. *See Hatlestad*, 5 Vet.App. at 524; *Van Hoose*, 4 Vet.App. at 361; *see also Adams v. Shinseki*, 568 F.3d 956, 962 (Fed. Cir. 2009) ("[T]he inverse of a true proposition is not necessarily true."). Instead, the Board should have addressed whether the severity of his pes planus, considered alone, would be enough to cause unemployability. *See Hatlestad*, 5 Vet.App. at 524; *Van Hoose*, 4 Vet.App. at 361. The Board's failure to address this matter renders its statement of reasons or bases inadequate. *See Schafrath v. Derwinski*, 1 Vet.App. 589 (1991) (Board must consider and discuss all applicable provisions of law and regulation where they are made "potentially applicable through the assertions and issues raised in the record"). Remand is warranted. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) (Board's failure to correctly apply the law warrants remand).

Because the claim is being remanded, the Court need not address Mr. Scott's additional arguments as to other inadequacies in the Board's statement of reasons or bases, including his assertions regarding the Board's definition of sedentary employment. *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."). However, in pursuing his claim on remand, Mr. Scott will be free to submit additional argument and evidence as to the remanded matter, and the Board must consider any such evidence or argument submitted. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002).

II. CONCLUSION

On consideration of the foregoing, the Board's June 21, 2016, decision is SET ASIDE and the matter REMANDED for further proceedings.

DATED: September 22, 2017

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