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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 16-2537

ELMER C. LANE, JR., 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 Elmer C. Lane, Jr., appeals through counsel a May 24, 2016, decision of the Board of Veterans' Appeals (Board) that declined to refer his irritable bowel syndrome (IBS) claim for extraschedular consideration under 38 C.F.R. § 3.321(b). 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 May 2016 decision will be set aside and the matter remanded for further adjudication.

I. ANALYSIS

Mr. Lane argues that the Board erred in determining that nausea, pain, and vomiting are contemplated by the rating schedule for IBS. He furthermore argues that the Board inadequately explained its findings regarding the combined effect of his service-connected disabilities.

"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 1368 (Fed. Cir. 2009). The first step in the inquiry requires the adjudicator 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.* "The Board is

required to address whether referral for extraschedular consideration is warranted for a veteran's disabilities on a collective basis . . . when that issue is argued by the claimant or reasonably raised by the record through evidence of the collective impact of the claimant's service-connected disabilities." *Yancy v. McDonald*, 27 Vet.App. 484, 495 (2016).

The Board is required to support its decision with a written statement of the reasons or bases that is understandable by the claimant and facilitates review by this Court. *See* 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995). The statement of reasons or bases must explain the Board's reasons for discounting favorable evidence, *Thompson v. Gober*, 14 Vet.App. 187, 188 (2000), discuss all issues raised by the claimant or the evidence of record, *Robinson v. Peake*, 21 Vet.App. 545, 552 (2008), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1335 (Fed. Cir. 2009), and discuss all provisions of law and regulation where they are made "potentially applicable through the assertions and issues raised in the record," *Schafraath v. Derwinski*, 1 Vet.App. 589, 592 (1991).

Here, the Board found that Mr. Lane's symptoms were contemplated by the rating schedule because "[a] disability manifested by diarrhea [and] constipation and constant abdominal distress would be expected to manifest with such symptoms as . . . daily nausea." Record (R.) at 7. The Board provided no basis, however, for its determination that nausea is an expected symptom of IBS. *See Colvin v. Derwinski*, 1 Vet.App. 171, 172 (1990) (Board "must consider only independent medical evidence to support their findings rather than provide their own medical judgment in the guise of a Board opinion"). As Mr. Lane points out, the Diagnostic Code (DC) under which his disability is rated, DC 7319, does not mention nausea, and, furthermore, nausea is not listed as a symptom in the medical definition of IBS. 38 C.F.R. § 4.114, DC 7319 (2017) ("Irritable colon syndrome") (providing for the highest, 30%, disability rating when the following criteria are met: "Severe; diarrhea or alternating diarrhea and constipation, with more or less constant abdominal distress"); *see also* Appellants Brief at 13-14. Moreover, the Board did not address Mr. Lane's vomiting or pain or explain whether they are symptoms contemplated by the rating schedule. The Board's failure to address whether Mr. Lane's pain and vomiting are contemplated by the rating schedule and its unsupported finding regarding nausea renders its statement of reasons or bases inadequate and warrants remand. *See Thompson*, 14 Vet.App. at 188; *Allday*, 7 Vet.App. at 527; *see also Tucker v. West*, 11 Vet.App. 369, 374 (1998) (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").

With respect to whether a referral was warranted based on the combined effect of Mr. Lane's disabilities, the Board found no evidence "that there is a combined effect when acting with his IBS that makes his disability picture an unusual or exceptional one." R. at 9. As Mr. Lane argues, however, the record includes evidence that his IBS causes him to be unable to stay in one place at work, R. at 2881, leg pain makes it difficult for him to walk, R. at 1694, and he gets stressed easily and cannot complete tasks as a result of PTSD, R. at 2243. The Board failed to address this evidence or explain why the combination of these effects did not suggest an unusual or exceptional disability picture. *See Thompson*, 14 Vet.App. at 188; *Allday*, 7 Vet.App. at 527. The Board's failure to do so renders its statement of reasons or bases inadequate and warrants remand. *See Tucker*, 11 Vet.App. at 374.

Because the claim is being remanded, the Court need not address Mr. Lane's additional arguments that would result in no broader remedy than a remand. *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. Lane 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 May 24, 2016, decision is SET ASIDE and the matter is REMANDED for further proceedings.

DATED: September 29, 2017

Copies to:

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