Vet.App. No. 16-3193

IN THE UNITED STATES COURT
OF APPEALS FOR VETERANS CLAIMS

CURTIS J. WASHINGTON,
Appellant,

v.

DAVID J, SHULKIN, M.D.,
Secretary of Veterans Affairs
Appellee.

ON APPEAL FROM THE BOARD OF VETERANS' APPEALS

BRIEF OF THE APPELLEE SECRETARY OF VETERANS AFFAIRS

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	)	
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ON APPEAL FROM THE
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I. ISSUES PRESENTED

1. Whether the Court should affirm the Board of Veterans' Appeals' (Board) March 19, 2016, decision that denied entitlement to an initial compensable disability rating prior to May 16, 2003, and a rating in excess of 10% from May 15, 2003, to June 25, 2010, for patellofemoral syndrome of the right knee on an extraschedular basis.

2. Whether the Court should affirm the Board's March 19, 2016, decision that denied entitlement to an initial disability rating in excess of 40% for the period prior to June 25, 2010, for limitation of extension of the right knee on an extraschedular basis.

3. Whether the Court should affirm the Board's March 19, 2016, decision that denied entitlement to an initial disability rating in

excess of 20% prior to June 25, 2010, and in excess of 40% thereafter, for degenerative disc disease of the lumbar spine with right L-5 radiculopathy on an extraschedular basis.

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

This Court has jurisdiction under 38 U.S.C. § 7252(a) to consider the Board's decision.

B. Nature of the Case

Appellant, Curtis J. Washington, appeals the Board's March 19 2016, decision that denied entitlement to an initial compensable disability rating prior to May 16, 2003, and a rating in excess of 10% from May 15, 2003, to June 25, 2010, for patellofemoral syndrome of the right knee; an initial disability rating in excess of 40% for limitation of extension of the right knee for the period prior to June 25, 2010; and an initial disability rating in excess of 20% prior to June 25, 2010, and in excess of 40% thereafter, for degenerative disc disease of the lumbar spine with right L-5 radiculopathy. [Record (R.) at 1-43]. As Appellant makes no argument regarding the schedular analysis of these claims, this Court should find that Appellant has abandoned his appeal of those issues. *See Pederson v. McDonald*, 27 Vet.App. 276, 285 (2015) (declining to review abandoned issues); *see also Disabled American Veterans v. Gober*, 234 F.3d 682, 688, n.3 (Fed. Cir. 2000) (stating that the Court would "only address those challenges that were briefed"); *Degmetich v. Brown*, 8 Vet.App. 208, 209 (1995), *aff'd*, 104 F.3d 1328 (Fed. Cir. 1997) (issues or claims not argued on appeal are

deemed to be abandoned); *cf Henderson v. West*, 12 Vet.App. 11, 18-19 (1998) (claims are abandoned where appellant did not address them in initial brief, but asserted them in reply brief).

The Board remanded the issues of issues of entitlement to service connection for an acquired psychiatric disorder and headaches; entitlement to a rating in excess of 10% from June 25, 2010, for patellofemoral syndrome of the right knee; entitlement to a rating in excess of 40% for limitation of extension of the right knee from June 25, 2010; and entitlement to a total disability rating based on individual unemployability (TDIU). [R. at 5]. Because the Board's remand of these claims "does not make a final determination with respect to the benefits sought by the [V]eteran, . . . the Board's remand does not represent a final decision over which this Court has jurisdiction." *Breeden v. Principi*, 17 Vet.App. 475, 478 (2004).

The Board denied Appellant's claims of entitlement to an earlier effective date for the award of service connection for limitation of extension of the right knee and entitlement to a separate rating greater than 10% for radiculopathy of the left and right lower extremities. [R. at 7-8]. As Appellant makes no argument regarding these claims, this Court should find that Appellant has abandoned his appeal of those issues. *See Disabled Am. Veterans*, 234 F.3d at 688, n.3; *Pederson*, 27 Vet.App. at 285; *Degmetich*, 8 Vet.App. at 209.

C. Statement of Relevant Facts

Appellant served on active duty from December 1985 to January 1994. [R. at 559]. In an October 1987 service record, Appellant reported a five to ten year history of headaches. [R. at 334-35]. Appellant filed his claim of entitlement to service connection for lower back pain, right knee disabilities, and headache disorder in April 1999. [R. at 3334-37].

In a May 2004 examination, Appellant reported that he had not been able to work since his back surgery in 2002. [R. at 3073 (3065-74)]. In August 2004, the Regional Office (RO) granted Appellant's claim of entitlement to service connection for right knee patellofemoral syndrome, assigning an initial noncompensable disability rating, and for degenerative disc disease of the lumbar spine with right L-5 radiculopathy, assigning an initial 20% disability rating. [R. at 3050-64]. In a September 2005 psychiatric evaluation, Appellant was diagnosed with major depression "secondary to chronic pain." [R. at 1751 (1749-51)]. He stated that his depression began after his mother's death and worsened since the onset of chronic pain. [R. at 1749]. In an August 2006 psychiatric evaluation, Appellant attributed his increasing depression to crises in his life, his mother's death, back surgery, and not working. [R. at 1730 (1729-34)]. In May 2009, Appellant filed a claim of entitlement to service connection for depression and mood disorder. [R. at 2656]. In a July 2009 examination, the examiner provided the impression of chronic daily headache highly associated with emotional problems. [R. at 3558 (3552-59)]. The examiner later provided

an opinion that Appellant's headaches began before service and were not related to service. [R. at 2105-2106].

In February 2010, the RO denied Appellant's claim of entitlement to service connection for dysthymia, claimed as depression and a mood disorder. [R. at 2618-29]. In a March 2010 Rating Decision, the RO granted Appellant an increased disability rating of 10% for his patellofemoral syndrome of the right knee, effective May 16, 2003, and assigned a 40% disability rating for limitation of extension of the right knee, effective July 7, 2009. [R. at 2539-45, 2597-2600]. In a June 2010 examination, Appellant reported that he had limited ambulation and needed a cane for walking. [R. at 2392 (2391-98)]. He also stated that he quit working due to his back pain. *Id*. The examiner found that Appellant had limited ambulation due to his low back pain. [R. at 2398].

After additional procedural development, in April 2015, the Agency of Original Jurisdiction granted Appellant's claim of entitlement to an increased disability rating of 40% for his lumbar spine disability, effective June 25, 2010. [R. at 3584-85]. In a January 2016 evaluation, Appellant stated that he was struck in the head during service by a television and has experienced "almost daily" headaches since that incident. [R. at 674 (673-700)]. The examiner diagnosed Appellant with "posttraumatic chronic headache disorder caused by trauma to his head" and also opined that his depression was "secondary to chronic pain" due to his service-connected disabilities. [R. at 685-86].

The Board issued the decision on appeal in March 2016. [R. at 1-43]. It found that referral for extraschedular consideration was not warranted for Appellant's right knee and back disabilities as it found that Appellant's symptoms associated with his lumbar spine and right knee disabilities "are all specifically contemplated by the rating criteria." [R. at 28]. The Board correctly emphasized that the rating schedule is intended to compensate for the average impairment in earning capacity from service-connected disabilities, and it found that Appellant's disability picture was neither exceptional nor unusual such that he was not adequately compensated by his schedular disability ratings. [R. at 28]. The Board also found that Appellant did not have any symptoms attributed to the combination of his service-connected disabilities. *Id*.

The Board remanded Appellant's claims of entitlement to service connection for headaches and a psychiatric disorder as it found that there was insufficient competent medical evidence regarding those issues. [R. at 34]. Specifically, the Board found that remand was warranted for Appellant's claim of entitlement to service connection for headaches to obtain an opinion regarding the etiology of his headaches as it found that it was unclear whether his headaches preexisted service. [R. at 33]. Regarding Appellant's claim of entitlement to service connection for a psychiatric disorder, the Board remanded for a medical nexus opinion as the Board found that the evidence suggested a link between Appellant's depressive disorder and pain due to his service-connected disabilities but because Appellant had not yet been provided a VA

examination concerning his claimed acquired psychiatric disorder, there was insufficient competent medical evidence on file to make a decision on such a claim. [R. at 34]. The Board ordered the examiner to opine as to whether it was at least as likely as not that any diagnosed acquired psychiatric disorder was caused or made chronically worse by his service-connected disabilities. [R. at 37]. The Board also found that Appellant's claim included consideration of whether Appellant was entitled to TDIU and remanded the issue of TDIU. [R. at 36].

III. SUMMARY OF THE ARGUMENT

The Board provided adequate reasons or bases for its finding that the rating criteria reasonably describe Appellant's disability level and symptoms and Appellant fails to point to any symptom associated with his service-connected disabilities on appeal or with his service-connected disabilities as a whole that the Board did not consider in its discussion.

IV. ARGUMENT

A. Applicable Law

Disability evaluations are based, as far practicable, on the average impairment in earning capacity in civilian occupations, resulting from service-connected disabilities. 38 C.F.R. § 4.1. In general, it is sufficient to evaluate these disabilities under either the corresponding or analogous Diagnostic Codes (DCs) contained in the rating schedule. *See* 38 C.F.R. §§ 4.20, 4.27. However, in rare and exceptional cases, a schedular evaluation may be inadequate to

compensate a veteran for the average impairment in earning capacity caused by his or her disability; in those statistically anomalous cases, it may be appropriate to assign an extraschedular evaluation under 38 C.F.R. § 3.321(b). *Thun v. Peake*, 22 Vet.App. 111, 114 (2008), *aff'd*, 572 F.3d 1366 (Fed. Cir. 2009). "The governing norm in these exceptional cases is: A finding that the case presents such an exceptional or unusual disability picture with such related factors as marked interference with employment or frequent periods of hospitalization as to render impractical the application of the regular schedular standards." 38 C.F.R. § 3.321(b). If "the schedular criteria reasonably describe the claimant's disability level and symptomatology" the Board need not proceed to the second step of the inquiry. *Thun*, 22 Vet.App. at 115. Rather, under such circumstances, "the claimant's disability picture is contemplated by the rating schedule, the assigned schedular evaluation is, therefore, adequate, and no referral is required." *Id*.

The Board is required to provide a written statement of the reasons or bases for its findings and conclusions on all material issues of fact and law presented on the record; the statement 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. 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990). To comply with this requirement, the Board must analyze the credibility and probative value of the evidence, account for the evidence that it finds to be persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the

claimant. *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table); *Gabrielson v. Brown*, 7 Vet.App. 36, 39-40 (1994).

B. As the Board remanded Appellant's claims of entitlement to service connection for headaches and psychiatric disorders, any symptom associated with these conditions is properly considered along with those claims as they are not symptoms of his service-connected disabilities that are on appeal, but are instead distinct disabilities.

Appellant first argues that his headaches and psychiatric disorders are related to his service-connected lumbar spine and right knee disabilities and should have been considered within the Board's extraschedular analysis. Appellant's Brief (App. Br.) at 14-25. Appellant fails to recognize that the Board clearly discussed Appellant's contention that his depression and psychiatric problems were caused or worsened by his service-connected disabilities and found that remand was warranted for those claims. [R. at 31-39]. The Board even specifically ordered that an examiner "provide an opinion as to whether it is at least as likely as not that any diagnosed acquired psychiatric disorder has been caused or made chronically worse by his service-connected disabilities." [R. at 37]. As Appellant notes, he separately applied for entitlement to service connection for a psychiatric disorder and for a headaches disorder, App. Br. at 27, and the Board correctly considered them in the context of the unique disability claims that they represent. [R. at 31-39]; *see* [R. at 2656, 3334-37]. Appellant's headaches and psychiatric disorders are not merely symptoms that are not adequately represented in the schedular criteria for lumbar spine and

knee disabilities, but are instead separate and distinct disabilities that Appellant has argued, and the Board has considered, may be entitled to service connection on their own. [R. at 31-39, 2656, 3334-37]. The Secretary reminds Appellant that secondary service connection is available where a service-connected disability has caused or aggravated another, separate disability, such as the case that he argues is present here with his headaches and psychiatric disorders. App. Br. at 16 ("The evidence before the Board proved that the Appellant's chronic psychiatric disorder was *related to or caused* by his service connected lumbar spine and right knee disabilities.") (emphasis added); *see* 38 C.F.R. § 3.310(a), (b); *Allen v. Brown*, 7 Vet.App. 439 (1995) (en banc). Extraschedular consideration is intended to compensate for *symptoms* of a service-connected disability that are not reasonably described by the schedular criteria which is not the case here. *Thun*, 22 Vet.App. at 115.

As the Board remanded Appellant's claims of entitlement to headaches and psychiatric disorders, the proper place for Appellant to present the evidence cited in his brief, App. Br. at 16-20, regarding a link between his headaches and psychiatric disorders and his service-connected disabilities is to the RO as these claims are not before the Court. 38 U.S.C. § 7266(a) (providing that a claimant may obtain Court review "of a final decision of the Board"); *Tyrues v. Shinseki*, 23 Vet.App. 166, 178 (2009) (en banc) (holding that "this Court's jurisdiction is controlled by whether the Board issued a 'final decision'"), *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). The Secretary notes that Appellant concedes that his claims of entitlement to service connection for headaches and psychiatric disorders have not been finally adjudicated and are, thus, not before the Court. App. Br. at 18. As the Court does not have jurisdiction to determine in the first instance whether Appellant's headaches and psychiatric disabilities were caused or aggravated by his service-connected disabilities, the Court should dismiss any appeal of such claims. 38 U.S.C. § 7266(a).

C. As the Board remanded the issue of TDIU for the AOJ to adjudicate in the first instance and not for further development relevant to an extraschedular analysis, the issues of whether Appellant was entitled to extraschedular consideration and to TDIU are not inextricably intertwined as Appellant suggests.

Appellant asserts that it was premature for the Board to decline to refer his claims for extraschedular consideration where the Board remanded the issue of TDIU in violation of the Court's holding in *Brambley v. Principi*, 17 Vet.App. 20 (2003). App. Br. at 23-25. As an initial matter and as Appellant noted, App. Br. at 24, in *Brambley*, the Court acknowledged that it is well settled that the issues of extraschedular consideration and entitlement to TDIU are not inextricably intertwined. 17 Vet.App. at 24 (citing *Colayong v. West*, 12 Vet.App. 524, 537 (1999); *Kellar v. Brown*, 6 Vet.App. 157, 162 (1994)). The Secretary also asserts that Appellant's reliance on *Brambley* is misplaced. In *Brambley*, the Court held that the Board's decision to deny referral for extraschedular consideration

because the record did not show marked interference with employment was premature where the Board remanded a claim for entitlement to a total disability rating based on individual unemployability to obtain additional employment information. *Brambley*, 17 Vet.App. at 24. The Court stated that "[i]t is difficult to understand how the Board can maintain these divergent positions concerning the completeness of the record" where "here both adjudications require a complete picture of the appellant's service-connected disabilities and their effect on his employability." *Id*. In contrast, here, the Board found that the first step of *Thun* was not satisfied. [R. at 27-28]. The Board therefore had no duty to, and did not, reach the issue of whether referral was warranted based on marked interference with employment, and any examination regarding whether Appellant's service-connected disabilities preclude him from obtaining substantially gainful employment are irrelevant to the extraschedular analysis. *Yancy v. McDonald*, 27 Vet.App. 484, 494 (2016); *Thun*, 22 Vet.App. at 116. Therefore, the Board did not take a "divergent position" with respect to the completeness of the record. *Brambley*, 17 Vet.App. at 24. . Although the Board remanded the issue of Appellant's entitlement to TDIU to obtain a medical opinion "to determine the impact of his service-connected disabilities . . . on his employability," [R. at 40], this evidence does not relate to the Board's determination that the rating schedule adequately accounts for Appellant's right knee and back disabilities under the first *Thun* element. This case is therefore distinguishable from

Brambley, and Appellant's argument that the Board prematurely denied referral for extraschedular consideration is unpersuasive.

D. Appellant fails to point to any evidence that the combination of his service-connected disabilities result in symptoms not compensated by his current disability ratings.

Appellant argues that the Board misinterpreted *Johnson v. McDonald*, 762 F.3d 1362 (Fed. Cir. 2014), and applied the incorrect legal standard. App. Br. at 25-29. In *Johnson*, the U.S. Court of Appeals for the Federal Circuit held that § 3.321(b)(1) may require VA to consider the combined effect of all of a veteran's disabilities that are granted benefits to determine whether referral for extraschedular consideration is appropriate. 762 F.3d at 1366. The Board complied with this requirement and found that "there is no indication that any symptoms have not been attributed to specific service-connected disabilities, and the Board finds *no additional symptoms related to the combination* of the Veteran's service-connected disabilities." [R. at 27] (emphasis added). Contrary to Appellant's argument that the Board misapplied *Johnson*, the Board clearly and correctly applied *Johnson* to find that the collective/combined impact of Appellant's service connected-disabilities did not warrant extraschedular referral. [R. at 27]; 762 F.3d at 1366. Furthermore, Appellant fails to point to any symptoms of the collective impact of his disabilities that the Board did not consider. *Hilkert v. West,* 12 Vet.App. 145, 151 (1999) (en banc) (noting that it is the appellant that bears the burden of persuasion before this Court), *aff'd* 232 F.3d 908 (Fed. Cir. 2000).

Instead, Appellant points to evidence regarding the impact of his disabilities on his employment and argues that the "combination" of his service-connected disabilities preclude him from the "physical" aspects of employment. App. Br. at 27-29. As discussed, because the Board found the first step of *Thun* to be satisfied, it had no duty to discuss evidence regarding any effect his service-connected disabilities had on his employment. [R. at 27-28]; *Yancy*, 27 Vet. App. at 494; *Thun*, 22 Vet.App. at 116. Appellant's arguments regarding the combined effect his service-connected disabilities have on his employment should be raised in the context of his claim for entitlement to TDIU, which the Board remanded. 38 C.F.R. § 4.16(a).

Appellant also argues that the Board failed to discuss evidence that he uses a walking cane and back brace. App. Br. at 27. To the extent that Appellant argues that his service-connected abilities affect his ability to work because they affect his ability to walk and stand, the Board remanded the issue of TDIU and ordered for an examiner to specifically opine as to the effect such restrictions have on his ability to perform sedentary or physical work. [R. at 39]. Appellant states that he uses a walking cane and a back brace "to help with chronic back pain," App. Br. at 27, but pain alone does not demonstrate that his disability picture is so exceptional as to render the schedular ratings inadequate. *See Mitchell v. Shinseki*, 25 Vet.App. 32, 38 (2011) ("[P]ain itself does not rise to the level of functional loss as contemplated by the VA regulations applicable to the musculoskeletal system."); *Sanchez-Benitez v. West*, 13 Vet.App. 282, 285

(1999) (pain alone is not a compensable disability). The Secretary notes that the Board also found that "pain and its effect on Appellant's range of motion" was properly contemplated in the current rating criteria for Appellant's lower back disability. [R. at 23-24]; 38 C.F.R. § 4.71a, DC 5243; *see* 38 C.F.R. §§ 4.40, 4.45. As for the evidence in the June 25, 2010, examination that Appellant used a walking cane to stand and walk due to the pain in his lower back and right leg, the Secretary notes that the Board remanded the issues of entitlement to increased disability ratings for his right knee disabilities from June 25, 2010, for an examination that addresses, inter alia, instability associated with his right knee pain. [R. at 38]. As this claim was remanded and is thus not on appeal, any argument regarding the use of a cane due to his right knee condition for the period from June 25, 2010, is properly addressed at the RO. 38 U.S.C. § 7266(a).

The Secretary has limited his response to only those arguments raised by Appellant in his opening brief, and, as such, urges this Court to find that Appellant has abandoned all other arguments. *See Pieczenik v. Dyax Corp*., 265 F.3d 1329, 1332-33 (Fed. Cir. 2001); *Norvell v. Peake*, 22 Vet.App. 194, 201 (2008); *Woehlaert v. Nicholson*, 21 Vet.App. 456, 463 (2007) ("This Court has consistently held that it will not address issues or arguments that counsel for the appellant fails to adequately develop in his or her opening brief."). The Secretary, however, does not concede any material issue that the Court may deem Appellant adequately raised and properly preserved, but which the

Secretary did not address, and requests the opportunity to address the same if the Court deems it necessary.

V. CONCLUSION

For the foregoing reasons, the Secretary respectfully asserts that the Court should affirm the Board's March 19, 2016, decision.

Respectfully submitted,

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