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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 16-2665

TODD R. DIETRICH, APPELLANT,

v.

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

Before PIETSCH, *Judge*.

MEMORANDUM DECISION

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

PIETSCH, *Judge*: Todd R. Dietrich appeals through counsel a June 20, 2016, Board of Veterans' Appeals (Board) decision that denied entitlement to a disability rating in excess of 10% for a left foot callus. 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 as the issue is of "relative simplicity" and "the outcome is not reasonably debatable." *Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the reasons that follow, the Court will vacate the June 20, 2016, Board decision and remand the matter for readjudication consistent with this decision.

I. FACTS

Mr. Dietrich served on active duty in the U.S. Air Force from December 1981 to January 2003. He received treatment for a callus on his left foot multiple times during service. In September 2002, he was granted VA benefits for plantar wart and callus of the left foot and assigned a noncompensable disability rating for that condition.

In February 2008, Mr. Dietrich sought an increased disability rating for his left foot disability. He underwent a VA examination in July 2008, at which he had a painful callus on his

left foot. The examiner noted that Mr. Dietrich underwent surgery on his left foot in 2006 and 2008. Upon physical examination, he was found to have a well healed postsurgical incision scar on the dorsum of the second metatarsal with pain at the site of the surgery. He reported using orthotic inserts, which helped to reduce his pain, but stated that he was unable to wear them at work. He also reported missing work for his surgery and podiatrist visits. The examiner diagnosed him with a callus on the left foot, which resulted in a significant effect on his job as a plant engineer as a result of increased absenteeism.

Mr. Dietrich underwent another VA examination in November 2008. At that time, he was again found to have a callus formation on his left foot for which he used shoe inserts. The examiner found objective evidence of painful motion and tenderness, but no evidence of instability or weakness. After a VA regional office continued to deny entitlement to a higher disability rating, Mr. Dietrich reported that the surgeries for his calluses left scarring, which restricted his mobility. He also reported having to attend frequent podiatry appointments, including having the calluses scraped monthly. He also reported being unable to stand for an extended period and having a limp, which caused back pain.

After his claim was remanded by the Board, Mr. Dietrich underwent another VA examination in January 2014. At that time, he reported having hard and painful calluses on the plantar surface of his left foot, which required that he see a podiatrist every 30 to 40 days. The examiner noted that the pain associated with the calluses on Mr. Dietrich's left foot limited his ability to stand to one and a half hours and impaired his mobility, both of which impaired his ability to work.

On June 20, 2016, the Board issued the decision on appeal. In that decision, the Board granted entitlement to a 10% rating for a left foot callus under 38 C.F.R. § 4.118, Diagnostic Code (DC) 7804, which provides for a maximum 10% disability rating for a superficial scar that is painful on examination. The Board found that no other diagnostic codes related to scars were applicable to Mr. Dietrich's left foot callus disability. The Board also denied entitlement to a higher rating under 38 C.F.R. § 4.71a, DC 5284, because Mr. Dietrich's callus did not cause any functional impairment. Further, the Board determined that extraschedular consideration was not appropriate because the rating criteria adequately contemplated his level of disability.

On appeal, Mr. Dietrich argues that the Board erred by failing to adequately explain why he was not entitled to a higher disability rating under DC 5284. He also argues that the Board failed to explain why referral for extraschedular consideration was not warranted because it failed to identify how DC 7804 adequately contemplated his left foot callus disability.

In response, the Secretary argues that the Board's finding that Mr. Dietrich was not entitled to a higher disability rating is supported by the evidence of record. The Secretary contends that Mr. Dietrich's disability is properly rated under DC 7804 and that the Board sufficiently explained why a higher rating under DC 5284 was not appropriate. The Secretary also contends that the Board provided adequate reasons or bases explaining why referral for extraschedular consideration was not necessary.

II. ANALYSIS

A. DC 5284

The Board's determination of the appropriate degree of disability is a finding of fact subject to the "clearly erroneous" standard of review. 38 U.S.C. § 7261(a)(4); *see Smallwood v. Brown*, 10 Vet.App. 93, 97 (1997). "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)). In rendering its decision, the Board must provide a statement of the reasons or bases adequate to enable an appellant 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). To comply with this requirement, the Board must analyze the credibility and probative value of the evidence, account for the evidence it finds 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).

DC 5284 applies to "Foot injuries, other," and provides for 10%, 20%, and 30% disability ratings for moderate, moderately severe, and severe disabilities, respectively. 38 C.F.R. § 4.71a,

DC 5284 (2017). The rating schedule does not define "moderate," "moderately severe," or "severe." *See id.*

In discussing DC 5284, the Board found Mr. Dietrich's left foot callus was characterized by pain and tenderness without any other functional impairment and, therefore, did not meet or more nearly approximate the criteria for a moderate level of impairment under DC 5284. Although the Board discussed Mr. Dietrich's medical records and left foot disability symptoms in the beginning of its decision, it failed to provide any meaningful discussion or even acknowledgement of those symptoms in its analysis concerning DC 5284. Mr. Dietrich's symptoms included not only pain and tenderness, but also inability to stand or walk for any significant periods of time and reduced mobility. As noted by the Board, medical records showed that his callus would grow and cause increased pain and pressure, requiring frequent trips to the podiatrist to have the area scraped. Without any discussion of these symptoms in its analysis concerning DC 5284, the Court finds that the Board's reasons or bases are inadequate. *See Buczynski v. Shinseki*, 24 Vet.App. 221, 224 (2011) (noting that "[t]he Board must explain, in the context of the facts presented, the rating criteria used in determining the category into which a claimant's symptoms fall; it is not sufficient to simply state that a claimant's degree of impairment lies at a certain level without providing an adequate explanation"). Thus, remand is required. *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").

Because the Court finds that remand is warranted, the Court will decline to address Mr. Dietrich's remaining arguments concerning DC 5284. *See Best v. Principi*, 15 Vet.App. 18, 20 (2001) (noting that the factual and legal context may change following a remand to the Board and explaining that "[a] narrow decision preserves for the appellant an opportunity to argue those claimed errors before the Board at the readjudication, and, of course, before this Court in an appeal, should the Board rule against him.").

B. Extraschedular Consideration

Mr. Dietrich also argues that the Board erred by failing to adequately explain why he was not entitled to extraschedular consideration. Whether referral for an extraschedular rating is appropriate involves a three-step inquiry. *Thun v. Peake*, 22 Vet.App. 111, 115 (2008); 38 C.F.R. § 3.321(b)(1) (2017). The first step is considering 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. Under the second step, the Board "must 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. If those steps are met, then the case must be referred to an authorized official to complete the third step: determining whether, to accord justice, an extraschedular rating is warranted. *Id.*

The Board found that extraschedular consideration was not necessary because the rating criteria "reasonably describe [Mr. Dietrich's] disability level and symptomatology, to specifically include his complaints of pain and tenderness." R. at 10. However, the Board's discussion again fails to consider the other symptoms that Mr. Dietrich experiences as a result of the callus on his left foot. Without any discussion of how his full disability picture is contemplated by the rating criteria, the Court finds that the Board's reasons or bases frustrate judicial review and are, therefore, inadequate. *See* 38 U.S.C. § 7104(d)(1). Accordingly, the Court finds remand is needed for the Board to readjudicate whether entitlement to referral for extraschedular consideration is warranted. *See Tucker*, 11 Vet.App. at 373.

On remand, Mr. Dietrich 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); *Kutscherousky v. West*, 12 Vet.App. 369, 372 (1999) (per curiam order). The Court has held 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).

III. CONCLUSION

Upon consideration of the foregoing analysis, the record of proceedings before the Court, and the parties' pleadings, the June 20, 2016, Board decision is VACATED and the matter is REMANDED for readjudication consistent with this decision.

DATED: October 13, 2017

Copies to:

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