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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 16-2960

KENNETH BOWEN, 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. Navy veteran Kenneth Bowen appeals through counsel that portion of a June 10, 2016, Board of Veterans' Appeals (Board) decision that declined to refer his claim for bilateral hearing loss for extraschedular consideration.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 Court will set aside the Board's June 2016 determination as to extraschedular consideration and remand that matter for further proceedings consistent with this decision.

¹ Mr. Bowen does not challenge the Board's determination of schedular disability for bilateral hearing loss, and the Court therefore will not consider this matter. *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"). The Board also remanded the issue of whether new and material evidence had been received to reopen claims for diabetes, acne vulgaris and contact dermatitis, as well as service-connection claims for a skin condition, upper spine condition, lower back condition, left hip and right hip conditions, a lung condition, hypertension, and a psychiatric disorder. The Court is without jurisdiction to address these nonfinal matters. *See Breeden v. Principi*, 17 Vet.App. 478 (2004).

I. ANALYSIS

A. Reasons or Bases

Mr. Bowen asserts, in part, that the Board failed to provide adequate reasons or bases when it denied his claim for extraschedular consideration. The Court agrees.

As with all its material findings of fact and conclusions of law, the Board is required to support its determinations as to extraschedular evaluations with a written statement of 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," *Schafraht v. Derwinski*, 1 Vet.App. 589, 592 (1991).

Section 3.321(b)(1), title 38, Code of Federal Regulations, provides the following:

To accord justice . . . to the exceptional case where the schedular evaluations are found to be inadequate, the Under Secretary for Benefits or the Director, Compensation and Pension Service, upon field station submission, is authorized to approve on the basis of the criteria set forth in this paragraph an extra[] schedular evaluation commensurate with the average earning capacity impairment due exclusively to the service-connected disability or disabilities. 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)(1) (2017).

There are two elements that a claimant must demonstrate before referral for consideration of an extraschedular disability rating is warranted: (1) An exceptional or unusual disability picture and (2) a disability picture that exhibits "other related factors," such as marked interference with employment or frequent periods of hospitalization. *Thun v. Peake*, 22 Vet.App. 111, 116 (2008), *aff'd sub nom. Thun v. Shinseki*, 572 F.3d 1366 (Fed. Cir. 2009). In *Anderson v. Shinseki*, the Court clarified that the steps set forth in *Thun* are "elements that must be established before an extraschedular rating can be awarded" and they are reviewable by the Board. 22 Vet.App. 423, 427 (2009).

"Essentially, the first *Thun* element compares a claimant's symptoms to the rating criteria, while the second addresses the resulting effects of those symptoms." *Yancy v. McDonald*, 27 Vet.App. 484, 494 (2016). In the decision here on appeal, the Board found that Mr. Bowen's hearing loss symptoms were adequately encompassed by the rating criteria and did not present an unusual disability picture. The Board therefore did not reach the second prong of the *Thun* analysis.

The Court recently held in *Doucette v. Shulkin*, in the context of bilateral hearing loss and extraschedular consideration, that

[t]he [schedular] rating criteria for hearing loss contemplate the functional effects of decreased hearing and difficulty understanding speech in an everyday work environment, as these are precisely the effects that VA's audiometric tests are designed to measure. Thus, when a claimant's hearing loss results in an inability to hear or understand speech or to hear other sounds in various contexts, those effects are contemplated by the schedular rating criteria. However, as the rating criteria do not otherwise discuss, let alone account for, other functional effects, such as dizziness, vertigo, ear pain, etc., the Court cannot conclude that the rating schedule, on its face, contemplates effects other than difficulty hearing or understanding speech.

28 Vet.App. 366, 369 (2017). The Court further noted that "a hearing loss claimant could provide evidence of numerous symptoms, including—for purposes of example only—ear pain, dizziness, recurrent loss of balance, or *social isolation due to difficulties communicating*, and the Board would be required to explain whether the rating criteria contemplate those functional effects." *Id.* at 371 (emphasis added).

Mr. Bowen argues first that the Board's statement of reasons or bases is inadequate because the Board failed to discuss relevant evidence pertaining to referral for extraschedular consideration. Specifically, he points to a PTSD examination that included an interview with the following description: "He sees his life as severely disrupted by a variety of physical problems. These problems have left him unhappy with little energy or enthusiasm for concentrating on important life tasks and little hope for improvement in the future." Record (R.) at 196. Later in the interview, Mr. Bowen described himself as "a socially isolated individual." R. at 197. Mr. Bowen argues that the Board should have considered whether his hearing problems, bilateral hearing loss and tinnitus, are among the "physical problems" contributing to his depression and social isolation, which are symptoms not contemplated by the schedular ratings for hearing loss.

Mr. Bowen points to nothing in the record suggesting that his depression and social isolation are attributable, in whole or in part, to his difficulty in communicating. Nevertheless, he will be free on remand to present such evidence.

The Court agrees, however, that the Board overlooked record evidence suggesting symptoms beyond the rating criteria for hearing loss. The audiologist that performed his hearing loss and tinnitus evaluation, suggested that his tinnitus may be a result of his hearing loss. *See R.* at 233 ("Tinnitus is a known symptom of hearing loss."). This observation is consistent with the fact that VA has recognized a relationship between hearing loss and tinnitus in VA Training Letter 10-02. *See Fountain v. McDonald*, 27 Vet.App. 258, 275-76 (2015).

There is evidence that Mr. Bowen's tinnitus negatively affects his ability to sleep and makes him reluctant to drive. *See R.* at 233, 356. The Board should have considered whether these symptoms of tinnitus are manifestations of his bilateral hearing loss. If so, these symptoms are certainly beyond the contemplation of the rating criteria for hearing loss.

B. Legal Standard for Evaluating Combined Effects of Disabilities

Furthermore, the Court agrees with Mr. Bowen that the Board employed the wrong legal standard in evaluating the combined effects of his disability in its extraschedular analysis. *See Johnson v. McDonald*, 762 F.3d 1362 (Fed. Cir. 2014). In the decision here on appeal, the Board rejected an extraschedular rating based on the combined effect of multiple conditions because "there are no additional service-connected disabilities that have not been attributed to a specific service-connected condition. Accordingly, this is not an exceptional circumstance in which extraschedular consideration may be required to compensate the veteran for a disability that can be attributed only to the combined effect of multiple conditions." *R.* at 10.

To the extent that the Board's reasoning is transparent, it imposes requirements not contemplated by the *Johnson* decision. There is no requirement that the service-connected disabilities combine to generate a new service-connected disability. Rather, the requirement is to consider "the compounding negative effects that each individual disability may have on the veteran's other disabilities." 762 F.3d at 1366. Here, there is evidence that the tinnitus, which is related to the hearing disability on appeal, produces effects not contemplated by any rating criteria.

Because the Board did not reach the second *Thun* requirement, the Court is unable to assess whether the Board's error is harmless. The Court only notes that the alleged negative effect of the

tinnitus on Mr. Bowen's ability to drive may be a significant employment effect for a veteran who has made his living as a long-haul truck driver.

Absent an adequate statement of reasons or bases to support the Board's decision, judicial review is frustrated and remand is necessary. *See* 38 U.S.C. § 7104(d)(1); *Allday*, 7 Vet.App. at 527; *see also Tucker v. West*, 11 Vet.App. 369, 374 (1998) (remand is appropriate "where the Board has . . . failed to provide an adequate statement of reasons or bases for its determinations"). In pursuing his claim on remand, Mr. Bowen is free to submit additional evidence and argument in accordance with *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order) and, in fact, is encouraged to do so. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002). The Board must consider such evidence and argument.

II. CONCLUSION

On consideration of the foregoing, the Court SETS ASIDE the Board's June 10, 2016, decision with respect to extraschedular consideration and REMANDS that matter for further proceedings.

DATED: October 18, 2017

Copies to:

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