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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 16-2137

MICHAEL E. DAVIS, APPELLANT,

v.

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

Before BARTLEY, *Judge*.

MEMORANDUM DECISION

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

BARTLEY, *Judge*: Veteran Michael E. Davis appeals through counsel an April 21, 2016, Board of Veterans' Appeals (Board) decision denying entitlement to a disability evaluation higher than 10% for Tietze's syndrome (costochondritis)¹ on an extraschedular basis and total disability benefits based on individual unemployability (TDIU) on an extraschedular basis. Record (R.) at 2-21. This appeal is timely and the Court has jurisdiction to review the Board decision pursuant to 38 U.S.C. §§ 7252(a) and 7266. Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the reasons that follow, the Court will set aside the April 2016 decision and remand for readjudication consistent with this decision.

I. FACTS

Mr. Davis served on active duty in the U.S. Air Force from March 1966 to January 1970. R. at 1520. In a July 1970 rating decision, the regional office (RO) granted him entitlement to service connection for Tietze's syndrome (costochondritis) assigning a noncompensable

¹ Tietze syndrome is "idiopathic painful nonsuppurative swellings of one or more costal cartilages, especially of the second rib; the anterior chest pain may mimic that of coronary artery disease." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1850 (32d ed. 2012) (hereinafter DORLAND'S). Costochondritis is "inflammation of the cartilaginous junction between a rib or ribs and the sternum." DORLAND'S at 423.

evaluation. R. at 1558. In February 2000, the RO increased his evaluation to 10% disabling. R. at 1452.

In August 2007, Mr. Davis submitted a claim for an increased evaluation, R. at 1406, that the RO denied after further development in April 2008, R. at 1178. He filed a timely Notice of Disagreement (NOD), R. at 1173, and the RO continued to deny a higher evaluation in a May 2009 Statement of the Case (SOC), R. at 1158. Mr. Davis timely perfected his appeal to the Board. R. at 1140. In an April 2011 decision, the Board denied a schedular evaluation higher than 10% disabling. R. at 990. Based on evidence of unemployment, the Board also remanded to determine whether Mr. Davis "is entitled to extra[]schedular consideration under 38 C.F.R. §§ 3.321(b)(1) and 4.16(b)" and "[i]f he is" for referral to the Under Secretary for Benefits or the Director of Compensation Service (Director). R. at 995.

In a May 2012 Supplemental SOC (SSOC), the RO denied entitlement to a higher evaluation and TDIU on an extraschedular basis. R. at 940. Specifically, the RO determined that "there is no evidence to suggest" that 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" was warranted. *Id.* In August 2012, the Board remanded to obtain additional treatment records, a new examination, and a determination as to whether referral for extraschedular consideration was warranted. R. at 912-15. The Board specifically outlined the different standards for extraschedular evaluation and extraschedular TDIU and directed the examiner to address them. R. at 914-15.

After further development, in a February 2013 SSOC, the RO determined that "[a] careful review of the evidence [of] record does not show that your condition is worse or has worsened to a degree of severity, to warrant a higher evaluation. As a result, entitlement to a rating higher than a 10[%] for Tietze's Syndrome (costochondritis) on an extra[]schedular basis remains denied." R. at 861. The RO further found that "possible entitlement" to an extraschedular evaluation was not warranted "as there is no evidence that the current issue presents such an unusual disability case as to render impractical the application of the regular standards." R. at 861-62. In November 2014, the Board remanded Mr. Davis's claim for an examination to assess the functional impairment caused solely by his service-connected disability on his capacity to obtain and maintain employment. R. at 849-50. The Board also, without further discussion, directed the RO to refer

Mr. Davis's case to the Director for consideration of a higher evaluation on an extraschedular basis and TDIU on an extraschedular basis. R. at 850.

In March 2015, Mr. Davis underwent an examination where the examiner chronicled his work and education experience, R. at 50-51, and conducted clinical testing, R. at 52-54. The next month, a decision review officer (DRO) noted that the veteran's "prior work history shows his ability to obtain and maintain work"; determined that "[a] higher evaluation would not be warranted unless the evidence shows a marked decreased ranged of motion of the affected joint(s) or respiratory involvement evidenced by pulmonary function"; found "[t]here is no evidence of such an exceptional or unusual disability picture with such related factors as marked interference with employment or frequent periods of hospitalization as to render the application of the regular schedular standards [sic]"; and denied TDIU on an extraschedular basis. R. at 48-49.

In May 2015, the Director found that neither an evaluation higher than 10% on an extraschedular basis nor TDIU on an extraschedular basis were warranted. R. at 48. Specifically, the Director quoted § 3.321(b)'s language and found that "as there is no evidence of an unusual or exceptional disability picture that would make the application of the regular evaluation standards inapplicable," extraschedular evaluation is not warranted. *Id.*

In the April 2016 decision on appeal, the Board denied a higher evaluation and TDIU, both on an extraschedular basis. R. at 21. In its increased evaluation analysis, the Board detailed word-for-word the Director's finding and "agree[d] with that assessment." R. at 14. The Board relied on Mr. Davis "consistently report[ing] being able to secure work and maintain it"; a lack of "unsatisfactory performance or outright inability to perform his job's responsibilities owing to his costochondritis"; his "back pain at least contribut[ing] equally to his decision to retire"; and "no more than intermittent symptoms" and a "moderate degree of pain" from costochondritis. R. at 14-15. The Board ultimately found that "[t]he most persuasive evidence simply does not support finding that the costochondritis 'markedly' interfered with his employment." R. at 15. This timely appeal followed.

II. ANALYSIS

A. Extraschedular Evaluation for Costochondritis

Mr. Davis argues that the Board misapplied the standard for "marked interference with employment" under § 3.321(b)(1) and impermissibly considered his non-service-connected back

condition as part of its analysis. Appellant's Brief (Br.) at 8-13. Alternatively, he asserts that the Board's substitution of the Director's and 2015 medical examiner's opinions for its own analysis and failure to articulate a "marked interference with employment standard" rendered its reasons or bases inadequate. Appellant's Br. at 13-17. The Secretary argues that the Board correctly applied the law, did not rely on evidence of non-service-connected conditions in its determination, and provided adequate reasons or bases for its decision. Secretary's Br. at 6-20.

VA's schedule of disability ratings is based on the average impairment in earning capacity in civil occupations from specific injuries or combinations of injuries. 38 U.S.C. § 1155; 38 C.F.R. § 3.321(a) (2017). However, "[t]o accord justice" in the "exceptional case where the schedular evaluations are found to be inadequate," the VA Under Secretary for Benefits or the Compensation Service Director is authorized to approve an "extra-schedular evaluation for impairments that are due to service-connected disability or disabilities." 38 C.F.R. § 3.321(b)(1). "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." *Id.*

The Court has explained the three-step framework for determining entitlement to referral for extraschedular consideration. *Thun v. Peake*, 22 Vet.App. 111, 115 (2008), *aff'd sub nom. Thun v. Shinseki*, 572 F.3d 1366 (Fed. Cir. 2009). First, the Board must determine whether the evidence "presents such an exceptional disability picture that the available schedular evaluations for that service-connected disability are inadequate." *Id.* This obliges the Board to compare "the level of severity and symptomatology of the claimant's service-connected disability with the established criteria found in the rating schedule for that disability." *Id.* When this requirement is satisfied, the Board must determine whether the veteran's exceptional disability picture exhibits other related factors such as "'marked interference with employment' or 'frequent periods of hospitalization.'" *Id.* at 116 (quoting 38 C.F.R. § 3.321(b)(1)). If both of these inquiries are answered in the affirmative, the Board must refer the matter to the Under Secretary for Benefits or the Director for the third inquiry, i.e., a determination of whether, "[t]o accord justice," the veteran's disability picture requires the assignment of an extraschedular evaluation. *Thun*, 22 Vet.App. at 111. The elements set forth in *Thun* "must be established before an extraschedular rating can be awarded." *Anderson v. Shinseki*, 22 Vet.App. 423, 427 (2009).

After referral for extraschedular consideration, "[t]he Board reviews the entirety of the Director's decision de novo" and is authorized to "assign an extraschedular [evaluation] when appropriate." *Kuppamala v. McDonald*, 27 Vet.App. 447, 458 (2015). "[T]he Director's decision is in essence the de facto decision of the agency of original jurisdiction and, as such, is not evidence" that the Board may assign probative weight. *Wages v. McDonald*, 27 Vet.App. 233, 239 (2015). Extraschedular consideration is a question of fact that requires "assessing a veteran's unique disability picture and whether that picture results in an average impairment in earning capacity significant enough to warrant an extraschedular rating." *Kuppamala*, 27 Vet.App. at 458. As with any finding on a material issue of fact and law presented on the record, the Board must support its extraschedular-evaluation determination with an adequate statement of reasons or bases that enables the claimant to understand the precise basis for that determination and facilitates review in this Court. 38 U.S.C. § 7104(d)(1); *Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990).

Here, the Board's reasons or bases are inadequate in several regards. First, the Board failed to assess Mr. Davis's disability picture. In November 2014, the Board directed the RO to refer the veteran's claim to the Director for extraschedular consideration. R. at 850. Although it provided no discussion or analysis comparing Mr. Davis's symptoms to the schedular criteria of his disability, the Board implicitly determined that Mr. Davis's disability picture sufficiently required referral for extraschedular consideration. *Id.* After referral, the Director, in a one-sentence discussion, determined that extraschedular evaluation was not warranted because "there is no evidence of an unusual or exceptional disability pattern that would make the application of the regular evaluation standards inapplicable." R. at 47. Thereafter, in the April 2016 decision on appeal, the Board's de novo review of the Director's decision consisted of "agree[ing] with that assessment." R. at 14.

The Board's complete absence of analysis frustrates the Court's ability to review the Board's assessment of Mr. Davis's disability picture. *See Anderson*, 22 Vet.App. at 429 (finding that "because the Board's assessment of [the appellant's] disability picture presented by the record is incomplete, its analysis of whether that disability picture is adequately contemplated by the rating schedule is necessarily flawed"). Moreover, despite four Board decisions, two SSOCs, a DRO decision, and the Director's decision on the matter, the record lacks a VA analysis comparing Mr. Davis's symptoms with the schedular criteria to determine whether he suffers from an unusual or exceptional disability picture not contemplated by those criteria. *See Thun*, 22 Vet.App. at 115.

Furthermore, although the Board merely expressed its agreement with the Director's determination, it failed to ensure that the law in *Thun*'s step-one analysis was properly applied. *See* 38 C.F.R. § 3.321(b)(1) ("[T]he 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.") (emphasis added). After the November 2014 remand directive to refer Mr. Davis's claims for extraschedular consideration, a DRO found "[t]here is no evidence of such an exceptional or unusual disability picture with such related factors as marked interference with employment or frequent periods of hospitalization as to render the application of the regular schedular standards [sic]." R. at 48. The May 2015 Director's decision quoted § 3.321(b)'s language and found that because there was no evidence of an unusual or exceptional disability picture that would make the application of the regular evaluation standards "inapplicable," extraschedular evaluation was not warranted. R. at 47. The April 2016 Board decision merely "agree[d]." R. at 14.

The Court notes that the plain meaning of "inapplicable" used by the Director is a far cry from § 3.321(b)(1)'s "impractical" language and, indeed, even farther from *Thun*'s "inadequate" standard. *Thun*, 22 Vet.App. at 115 ("presents such an exceptional disability picture that the available schedular evaluations for that service-connected disability are *inadequate*") (emphasis added). Indeed, the Secretary provides for extraschedular evaluation "to the exceptional case where the schedular evaluations are found to be *inadequate*. 38 C.F.R. § 3.321(b)(1) (emphasis added). The Director's misapplication of the law renders the Board's acquiescence with his assessment, devoid of its own analysis, an even greater error. *See Gilbert*, 1 Vet.App. at 57.

Second, the Board's reasons or bases for finding that Mr. Davis did not have "marked interference with employment" due to his service-connected disability are also inadequate. As an initial matter, the Director's decision is absent mention of marked interference with employment and instead, as stated, conclusorily determined that Mr. Davis did not have an unusual or exceptional disability picture. R. at 47. If the Board had indeed concurred with the Director's determination that Mr. Davis does not present an exceptional disability picture, and supported that determination with adequate reasons or bases, its denial of an extraschedular evaluation would have been sufficient to facilitate this Court's review of its decision. *See Anderson*, 22 Vet.App. at 427; *Gilbert*, 1 Vet.App. at 57. However, to the extent that the Board did conduct a marked-interference-with-employment analysis, its discussion is inadequate.

In its decision, the Board correctly identified that "'the effect of a service-connected disability appears to be measured differently for purposes of extra[s]chedular consideration under 38 C.F.R. § 3.321(b)(1) . . . and for the purposes of a TDIU claim under 38 C.F.R. § 4.16.'" R. at 10 (quoting *Kellar v. Brown*, 6 Vet.App. 157, 162 (1994)). The Board also noted that "'extraschedular consideration [under § 3.321] may be warranted for disabilities that present a loss of earning capacity that is less severe than one where the Veteran is totally unemployable.'" *Id.* (quoting *Thun*, 22 Vet.App. at 111). Applying the law to the instant case, the Board found that, "even accepting the lesser standard," it "concur[red] with the Director's decision" to not grant a higher rating for the costochondritis on an extraschedular basis. *Id.*

As reasons or bases for its decision, the Board first noted that Mr. Davis "has consistently reported being able to secure work and maintain it during the over 30-year period from the time of his separation from service until his eventual retirement." R. at 14. This analysis is problematic in that it relies on Mr. Davis's employment status as a reason for finding no impairment to his earning capacity. *See* R. at 10; *Kuppamala*, 27 Vet.App. at 458.

Next, the Board notes the lack of evidence of "unsatisfactory performance or outright inability to perform his job's responsibilities" due to his costochondritis. R. at 14. Although this reasoning addresses whether there are related factors such as marked interference with employment, it improperly relies on the absence of evidence as substantive negative evidence without any foundation, in that a disability may cause marked interference with employment without ever having generated an unsatisfactory performance report. *See Horn v. Shinseki*, 25 Vet.App. 231, 239 (2012) (holding that the absence of evidence cannot be substantive negative evidence without "a proper foundation . . . to demonstrate that such silence has a tendency to prove or disprove a fact"). Moreover, the Board's reasoning also imposes the higher TDIU-like standard of an "outright inability" to perform work rather than the lesser extraschedular standard. *See* R. at 10; *Thun*, 22 Vet.App. at 111.

Finally, the Board relies on Mr. Davis's reports that non-service-connected back pain "at least contributed equally to his decision to retire" as symptoms of service-connected costochondritis. R. at 14. However, an extraschedular evaluation is not based on whether and to what degree non-service-connected disabilities interfere with a veteran's employment, but rather whether the symptoms of service-connected disability are so unusual that they are not

contemplated by the rating criteria and whether there are related factors such as marked interference with employment. 38 C.F.R. § 3.321(b)(1).

In sum, the Court holds that remand is required for the Board to provide adequate reasons or bases for its assessment of whether Mr. Davis is entitled to an extraschedular evaluation. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) (remand is appropriate where the Board has incorrectly applied the law and failed to provide adequate reasons or bases for its determination). On remand, Mr. Davis is free to submit additional evidence and argument, including those presented in his briefs, in accordance with *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order). *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002). "A remand is meant to entail a critical examination of the justification for the decision" by the Board. *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991). In addition, the Board shall proceed expeditiously, in accordance with 38 U.S.C. § 7112 (expedited treatment of remanded claims).

B. TDIU on an Extraschedular Basis

Mr. Davis argues that the Board provided inadequate reasons or bases for denying entitlement to extraschedular TDIU. Appellant's Br. at 17-21. Specifically, he asserts that the Board abrogated its role as adjudicator, impermissibly considered his non-service-connected back condition, misinterpreted "sedentary work" and "substantially gainful employment," and failed to provide a discernable standard for "substantially gainful employment." *Id.* The Secretary argues that the Board considered all evidence of record and provided adequate reasons or bases for its determination, and urges affirmance. Secretary's Br. at 20-30.

Where a service-connected disability is less than total, a veteran may be entitled to a total disability evaluation if "unable to secure or follow a substantially gainful occupation" as a result of service-connected disabilities. 38 C.F.R. § 4.16(a) (2017). When such unemployability is shown, and a veteran has one disability evaluated at 60% or more, or two or more disabilities (at least one of which is evaluated at 40%) with a combined evaluation of at least 70%, the Board may award TDIU on a schedular basis. *Id.*; *see Hatlestad v. Brown*, 5 Vet.App. 524, 529 (1993) ("[T]he central inquiry in determining whether a veteran is entitled to TDIU is whether the veteran's service-connected disabilities alone are of sufficient severity to produce unemployability."). A veteran who fails to meet the percentage requirements set forth in § 4.16(a) may be granted TDIU on an extraschedular basis after referral to the Director. 38 C.F.R. § 4.16(b). The Board must support its extraschedular TDIU determination with an adequate statement of reasons or bases that

enables the claimant to understand the precise basis for that determination and facilitates review in this Court. 38 U.S.C. § 7104(d)(1); *Gilbert*, 1 Vet.App. at 57.

In the instant case, the Board, after considering the matter, "concur[red] with the Director's determination" that entitlement to TDIU on an extraschedular basis is not warranted. R. at 20. In so finding, the Board determined that the record lacked evidence that Mr. Davis is "unemployable solely due to impairment from his service-connected costochondritis." *Id.* The Board further found that, according to the veteran's statements during examinations, he stopped seeking employment "at least equally as much" due to his non-service-connected back disorder as to his service-connected costochondritis. *Id.* The Board also noted that the record lacked a medical opinion that indicated that Mr. Davis's functional impairment due to costochondritis precluded him from "returning to the workforce" and "engaging in employment that would be considered substantially gainful" when considering his level of education, prior work experience, and training. *Id.*

The Board's analysis is deficient in several regards. First, the Board misapplied the law for the employability standard for TDIU. R. at 20. As the Board noted in its presentation of the relevant law, the record must support a finding that the veteran is not capable of "substantially gainful employment" and not the higher standard of total unemployability to qualify for TDIU. R. at 19; *see Roberson v. Principi*, 251 F.3d 1378, 1385 (Fed. Cir. 2001); *see also* 38 C.F.R. § 4.16(b). To the extent that the Board appears to require that Mr. Davis be "unemployable," R. at 20, the Court notes that such a finding is not required to qualify for TDIU. Next, although the Board correctly stated that the veteran's employability determination must be based "solely" on impairment due to his service-connected costochondritis, nevertheless the Board incorrectly factored in the effect of Mr. Davis's non-service-connected back condition on his decision to retire and remain unemployed. *See Hatlestad*, 5 Vet.App. at 529.

Finally, the Board also improperly relied on the absence of a favorable medical opinion as to Mr. Davis's employability. R. at 20. It is the role of the Board, not a medical examiner, to assess a veteran's ability to secure and follow substantially gainful employment. *Geib v. Shinseki*, 733 F.3d 1350, 1354 (Fed. Cir. 2013) ("[A]pplicable regulations place responsibility for the ultimate TDIU determination on the VA, not a medical examiner."). Moreover, in assessing employability, it is the Board, and not a medical examiner, that must consider individualized circumstances, including a claimant's education, training, and work history. *See* 38 C.F.R. § 4.16(b) ("The rating Board will include a full statement as to the veteran's service-connected

disabilities, employment history, educational and vocational attainment and all other factors having a bearing on the issue."); *see also Cathell v. Brown*, 8 Vet.App. 539, 544 (1996) (holding that the Board erred in not discussing educational and occupational history). Although in many cases VA would be better off obtaining a medical opinion as to a veteran's employability, *see Floore v. Shinseki*, 26 Vet.App. 376, 385 (Bartley, J., concurring), the absence of such a medical opinion is never a reason to deny a TDIU claim.

In sum, the Board failed to perform the required analysis in assessing entitlement to TDIU. *Floore v. Shinseki*, 26 Vet.App. 376, 381 (2013) (explaining that entitlement to TDIU is an adjudicatory determination and that the adjudicator is charged with analyzing whether a veteran's service-connected disabilities preclude substantially gainful employment). This deficiency further diminished the adequacy of the Board's reasons or bases for denying entitlement to TDIU, warranting remand. *See Tucker*, 11 Vet.App. at 374.

On remand, Mr. Davis is free to submit additional evidence and argument, including those presented in his briefs, in accordance with *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order). *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002). "A remand is meant to entail a critical examination of the justification for the decision" by the Board. *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991). In addition, the Board shall proceed expeditiously, in accordance with 38 U.S.C. § 7112 (expedited treatment of remanded claims).

III. CONCLUSION

Upon consideration of the foregoing, the Court will SET ASIDE the April 21, 2016, decision denying entitlement to an extraschedular evaluation higher than 10% for costochondritis and TDIU on an extraschedular basis and REMAND the matters for readjudication consistent with this decision.

DATED: October 24, 2017

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