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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 16-3294

JOHN P. CROFT, APPELLANT,

V.

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

Before MEREDITH, *Judge*.

MEMORANDUM DECISION

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

MEREDITH, *Judge*: The appellant, John P. Croft, through counsel appeals an August 19, 2016, Board of Veterans' Appeals (Board) decision that denied a disability rating in excess of 30% for a cervical spine disability. Record (R.) at 1-14. The Board granted an increased disability rating, from 20% to 30%. This is a favorable finding that may not be disturbed by the Court. *Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007); *see Bond v. Derwinski*, 2 Vet.App. 376, 377 (1992) (per curiam order) ("This Court's jurisdiction is confined to the review of final Board . . . decisions which are adverse to a claimant."). The Board remanded the issue of entitlement to a total disability rating based on individual unemployability (TDIU). The remanded matter is not before the Court. *See Breeden v. Principi*, 17 Vet.App. 475, 478 (2004) (per curiam order) (a Board remand "does not represent a final decision over which this Court has jurisdiction"); *Hampton v. Gober*, 10 Vet.App. 481, 483 (1997) (claims remanded by the Board may not be reviewed by the Court). 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. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the following reasons, the Court will vacate the Board's decision and remand the matter for further proceedings consistent with this decision.

I. BACKGROUND

The appellant served on active duty in the U.S. Navy from July 1972 to July 1975. R. at 857-58. In September 1983, a VA regional office (RO) awarded disability compensation benefits for chronic neck strain, rated 10% disabling. R. at 721-22.

In January 2010, the appellant filed a claim for increased disability compensation, R. at 618, and in February 2010, underwent a VA spine examination, R. at 524-27. The appellant reported that he was never pain-free and that his pain caused headaches and difficulty sleeping. R. at 524-25. He also described flare-ups of pain whenever he laid down and stated that any type of activity aggravated his neck. R. at 525. Range of motion testing revealed "flexion [to] 50 degrees times three, extension [to] 30 degrees times three, [with] pain noted throughout the entire range of motion." *Id*. The examiner reported that she "would expect the [appellant] to lose between 10 and 15 degrees of overall range of motion of his neck in addition to pain, fatigability, weakness, [and] lack of coordination due to increased repetitive movements or during flares." R. at 526. The examiner also opined that, if the appellant "were to get any type of work, it would have to be fairly sedentary, where he could change his position frequently, and on a part[-]time basis only." *Id*.

In February 2010, the appellant submitted a statement in support of claim, alleging that his neck disability caused difficulty focusing and with interpersonal communication, and interrupted his sleep. R. at 511. In May 2010, the RO awarded a 20% disability rating for degenerative disc disease and degenerative changes of the cervical spine, effective January 14, 2010. R. at 100-10. The appellant perfected an appeal to the Board, asserting that he was "aware of [his] neck pain 24/7 [with zero] range of motion during flare[-]ups." R. at 71; *see* R. at 74-91, 98.

In April 2015, the appellant underwent another VA spine examination. R. at 54-61. The appellant reported constant, radiating pain "24/7" and that he was taking Vicodin three times per day. R. at 55. The appellant stated that he had difficulty sitting for long periods and did not drive because of pain. *Id*. He also reported functional loss, described as "reduced range of motion . . . due to pain," and flare-ups every few months, lasting 4 to 5 days, where he experienced worse pain and was unable to move his neck. *Id*. The examiner regarded range of motion test results as "abnormal" with pain exhibited on forward flexion, extension, and left lateral flexion. R. at 56. The examiner found no additional loss of function or range of motion following three repetitions, but reported that she was "[u]nable to say w[ithout] mere speculation" whether pain, weakness, fatigability, or incoordination significantly limited functional ability with repeated use over time

because the examination was not "performed under those circumstances." R. at 56-57. The examiner also found that pain, weakness, fatigability, or incoordination significantly limited functional ability with flare-ups. R. at 57. The examiner noted that the appellant "describe[d] a flare as not being able to move his neck at all, in any direction[,]" but stated that she was "unable to estimate the further loss of range of motion in degrees, without resorting to mere speculation." *Id*. Finally, the examiner indicated that the appellant's condition affected his ability to work, noting the appellant's report that he was "unable to drive due to . . . neck pain with reduced [range of motion] and [that he] ha[d] difficulty with sitting for long periods." R. at 60.

In the August 19, 2016, decision on appeal, the Board awarded a 30% schedular disability rating, but no greater, for the appellant's cervical spine disability. R. at 9-10. Based on the February 2010 and April 2015 examiners' findings, and resolving all doubt in the appellant's favor, the Board determined that there was "sufficient evidence establishing that the [appellant] would experience limitation of forward flexion to 15 degrees due to functional loss during period[s] of flare-up[, and that s]uch warrant[ed] the assignment of a 30[% disability] rating." R. at 9. The Board found no evidence to support a 40% disability rating and declined to refer the appellant's claim for consideration of entitlement to an extraschedular rating. R. at 9-11. This appeal followed.

II. ANALYSIS

The appellant argues that the Board erred when it relied on the 2010 and 2015 VA medical examinations, which he asserts are inadequate for rating purposes; failed to factor the everyday effects of his disability into its analysis of the appropriate schedular rating; and provided an inadequate statement of reasons or bases for declining to refer his claim for extraschedular consideration. Appellant's Brief (Br.) at 6-22. The Secretary argues that the examinations are adequate and, in the alternative, that any error was harmless. Secretary's Br. at 4-12. The Secretary further contends that the Board provided an adequate statement of reasons or bases for denying a higher schedular rating, but concedes that the Board's statement of reasons or bases regarding extraschedular referral is inadequate and that the matter should be remanded for readjudication. *Id*. at 12-17.

The appellant's cervical spine disability is rated under the General Rating Formula for Diseases and Injuries of the Spine. 38 C.F.R. § 4.71a, Diagnostic Code 5242 (2017). Disability

ratings from 10% to 40% are assigned for varying degrees of limitation of motion, with the highest disability rating—40%—requiring "[u]nfavorable ankylosis[1] of the entire cervical spine." *Id.*

A veteran may be entitled to a higher disability evaluation than that supported by mechanical application of the rating schedule where there is evidence that his or her disability causes additional functional loss—i.e., "the inability . . . to perform the normal working movements of the body with normal excursion, strength, speed, coordination[,] and endurance"—including as due to pain. 38 C.F.R. § 4.40 (2017). A higher disability evaluation may also be awarded where there is a reduction of a joint's normal excursion of movement in different planes, including changes in the joint's range of movement, strength, fatigability, or coordination. 38 C.F.R. § 4.45 (2017).

A. Adequacy of Medical Examinations

A medical examination or opinion is adequate "where it is based upon consideration of the veteran's prior medical history and examinations," *Stefl v. Nicholson*, 21 Vet.App. 120, 123 (2007), "describes the disability, if any, in sufficient detail so that the Board's 'evaluation of the claimed disability will be a fully informed one,'" *id.* (quoting *Ardison v. Brown*, 6 Vet.App. 405, 407 (1994)) (internal quotation marks omitted), and "sufficiently inform[s] the Board of a medical expert's judgment on a medical question and the essential rationale for that opinion," *Monzingo v. Shinseki*, 26 Vet.App. 97, 105 (2012) (per curiam). A VA joints examination that fails to account for the factors listed in §§ 4.40 and 4.45, including those experienced during flare-ups, is inadequate for evaluation purposes. *DeLuca v. Brown*, 8 Vet.App. 202, 206-07 (1995).

For an examination to comply with § 4.40, the examiner must "obtain information about the severity, frequency, duration, precipitating and alleviating factors, and extent of functional impairment of flares from the veteran[]." *Sharp v. Shulkin*, 29 Vet.App. 26, 34 (2017). It is anticipated that "examiners will offer flare opinions based on estimates derived from information procured from relevant sources, including the lay statements of veterans," *id.* at 35, and the examiner's determination in that regard "should, if feasible, be portrayed in terms of the degree of additional range-of-motion loss due to pain on use or during flare-ups," *DeLuca*, 8 Vet.App. at 206 (internal quotation marks, alteration, and citation omitted). *See Mitchell v. Shinseki*, 25 Vet.App. 32, 44 (2011) (explaining that it is important for a medical examiner to note "whether and at what

[1] Ankylosis is an "immobility and consolidation of a joint due to disease, injury, or surgical procedure." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 94 (32d ed. 2012).

point during the range of motion the [veteran] experience[s] any limitation of motion that [is] specifically attributable to pain"). A medical opinion in which the examiner concludes that a determination cannot be provided without resort to speculation is adequate when it is "clear that an examiner has 'considered all procurable and assembled data'" and the examiner's inability to provide a nonspeculative opinion "'reflect[s] the limitation of knowledge in the medical community at large' and not a limitation—whether based on lack of expertise, insufficient information, or unprocured testing—of the individual examiner." *Sharp*, 29 Vet.App. at 33 (quoting *Jones v. Shinseki*, 23 Vet.App. 382, 390 (2010)).

"Whether a medical [examination or] opinion is adequate is a finding of fact, which the Court reviews under the 'clearly erroneous' standard." *D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008) (per curiam). A finding of fact is clearly erroneous when the Court, after reviewing the entire evidence, "is left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948); *see Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990). As with any material issue of fact or law, the Board must provide a statement of the reasons or bases for its determination, "adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court." *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Gilbert*, 1 Vet.App. at 56-57; *see* 38 U.S.C. § 7104(d)(1).

The appellant argues that the 2010 and 2015 examinations are inadequate because the examiners failed to comply with the requirements of *Correia v. McDonald*, 28 Vet.App. 158, 164, 168-70 (2016) (holding that the final sentence of 38 C.F.R. § 4.59 creates a requirement that an examiner test for pain throughout range of motion in various ways—"'on both active and passive motion, in weight-bearing and nonweight-bearing and, if possible, with the range of the opposite undamaged joint'" (quoting 38 C.F.R. § 4.59)), *Mitchell*, 25 Vet.App. at 44, and *DeLuca*, 8 Vet.App. at 206-07. Appellant's Br. at 6-16. The appellant further asserts that the 2015 examiner failed to explain adequately why she was "'unable to estimate the further loss of range of motion in degrees, without resorting to mere speculation.'" *Id.* at 10 (quoting R. at 57).

In the decision on appeal, the Board provided the following analysis regarding the adequacy of the VA examinations:

> VA has obtained examinations that include the appropriate findings for accurately rating the cervical spine disability. The [appellant] has questioned the adequacy of [the 2015] VA examination by arguing that the examiner failed to properly account for his complaints of flare-ups. The Board does not agree. The April 2015

> examination report clearly records the [appellant's] complaints of flare-up[s], conducted the relevant range of motion studies, and explained that a calculation of any additional loss of motion due to pain could not be calculated because a flare-up was not occurring at the time of the examination and that any such calculation would amount to mere speculation.

R. at 4.

Despite the Secretary's arguments to the contrary, the Court finds that the Board clearly erred in its determination that the 2015 examination properly accounted for the appellant's flare-ups—specifically, that the examiner adequately explained why she was unable to calculate additional loss of motion during flare-ups. The Court's conclusion is controlled by the recent panel decision in *Sharp*, which found that a medical examiner's proclaimed inability to offer an opinion regarding additional functional loss during flares "without directly observing functions under th[o]se circumstances," was "at odds with VA's guidance on the matter" and established caselaw, 29 Vet.App. at 34-35 (internal quotation marks omitted). The Court made clear in *Sharp* that an examiner may not rely on the fact that an examination was not conducted during a flare as the reason why the examiner cannot estimate the veteran's functional loss due to flares. *See id*. Rather, "it must be clear that [the examiner's inability to provide an opinion] is predicated on a lack of knowledge among the 'medical community at large' and not the insufficient knowledge of the specific examiner." *Id*. at 36 (quoting *Jones*, 23 Vet.App. at 390). Accordingly, the Board's determination that the examiner's explanation—"that a calculation of any additional loss of motion due to pain could not be calculated because a flare-up was not occurring at the time of the examination and that any such calculation would amount to mere speculation"—was adequate, is contrary to law and necessitates that this matter be remanded for a new medical examination. R. at 4; *see Sharp*, 29 Vet.App. at 36.

The Secretary argues that any error is harmless because the "next-higher [disability] rating requires a finding of '[u]nfavorable ankylosis of the entire cervical spine.'" Secretary's Br. at 10-11 (quoting 38 C.F.R. § 4.71a (General Rating Formula for Diseases and Injuries of the Spine)). In this respect, the Secretary contends that the appellant has not pointed to any evidence "to suggest that his neck is fixed in one position or that such fixation results in any of the associated manifestations required . . . to support a finding of unfavorable ankylosis of the cervical spine." *Id*. at 11 (referring to the General Rating Formula for Diseases and Injuries of the Spine, Note 5).

The Secretary's argument is not persuasive because, as noted above, the 2015 VA medical examiner did not adequately explain why she was unable to offer an opinion regarding additional

functional loss during flare-ups and, therefore, it is not apparent from the Board's decision or the current record whether the examiner elicited sufficient information to conclude that a higher disability rating may not be warranted. *See* Reply Br. at 6 (arguing, had the examiner estimated the approximate loss of range of motion during a flare-up, the Board may have been provided sufficient information to award a higher disability rating). Moreover, as argued by the appellant, the evidence reflects that he was unable to move his neck during flare-ups. *Id*. at 7. The Secretary asserts that, because the alleged immobility occurs during flare-ups, it is "periodic in nature, which itself means that [the a]ppelant's neck is not ankylosed." Secretary's Br. at 12 n.2. The Board, however, did not discuss this evidence or provide these reasons for finding that a 40% disability was unwarranted. Additionally, the appellant is not arguing that his entire cervical spine is ankylosed. Instead, he contends, had the examiner properly accounted for his complaints of flare-ups and additional functional loss during flare-ups, the Board may have determined that his condition more nearly approximated the criteria for a 40% disability rating. Reply Br. at 7; *see* 38 C.F.R. § 4.7 (2017). Under these circumstances, the Court is persuaded that the inadequacies in the 2015 examination noted above are prejudicial. *See Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) (holding that harmless-error analysis applies to the Court's review of Board decisions and that the burden is on the appellant to show that he suffered prejudice as a result of VA error).

Although the appellant raises several additional arguments concerning the adequacy of the 2010 and 2015 examinations, the appellant did not raise these arguments below and, therefore, the Board did not address any of the alleged deficiencies in its statement of reasons or bases for finding the examinations adequate. *See* R. at 4. Because the Court has already determined that the matter must be remanded and the Board is in the best position to assess the appellant's additional arguments as to whether the examinations are inadequate on grounds other than those discussed above and, if so, to seek clarification from the VA examiners, the Court will exercise its discretion and allow the Board to consider the appellant's arguments in the first instance. *See Maggitt v. West*, 202 F.3d 1370, 1376-77 (Fed. Cir. 2000) (holding that this Court has discretion to either address or remand arguments presented to it in the first instance, provided it otherwise has jurisdiction over the claim); *Nolen v. Gober*, 14 Vet.App. 183, 184 (2000) (per curiam order) (remanding, pursuant to *Maggitt*, for the Board to address the appellant's duty-to-assist argument raised for the first time on appeal); *see also Quirin v. Shinseki*, 22 Vet.App. 390, 395 (2009) (noting that "the Court will not ordinarily consider additional allegations of error that have been rendered moot by

the Court's opinion or that would require the Court to issue an advisory opinion"); *Best v. Principi*, 15 Vet.App. 18, 20 (2001) (per curiam order).

B. Extraschedular Consideration

The VA rating schedule is based, "as far as practicable, upon the average impairments of earning capacity." 38 C.F.R. § 3.321(b)(1) (2017). In exceptional cases, the rating schedule may be found inadequate to compensate a claimant's unique set of symptoms and an extraschedular rating may be approved by the Under Secretary for Benefits or the Director of the Compensation Service. *Id*.

"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 1366 (Fed. Cir. 2009); *see Anderson v. Shinseki*, 22 Vet.App. 423, 427 (2009) (clarifying that the three "steps" identified in *Thun* are necessary "elements" of an extraschedular rating analysis). The first step in the inquiry is 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." *Thun*, 22 Vet.App. at 115. "[I]nitially, there must be a comparison between 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*. If the adjudicator determines that the available schedular ratings are inadequate, the second step of the inquiry requires the adjudicator to "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. Then, if the first two steps have been satisfied, the adjudicator must refer the claim to the Under Secretary for Benefits or the Director of the Compensation Service for a determination of whether an extraschedular rating is warranted. *Id*.

The Board's determination whether referral for an extraschedular disability rating is appropriate is a factual determination that the Court reviews under the "clearly erroneous" standard of review. *Id*. at 115. As always, the Board must support its determination with an adequate statement of reasons or bases. *Allday*, 7 Vet.App. at 527.

The appellant argues that the Board's statement of reasons or bases is inadequate because the Board overlooked favorable evidence and misinterpreted the law when it declined to refer his claim for extraschedular consideration. Appellant's Br. at 16-20. He also avers that the Board prematurely adjudicated the issue of extraschedular consideration in light of its decision to remand

the issue of TDIU for evidentiary development. *Id*. at 20-22. The Secretary concedes that the Board overlooked potentially favorable evidence and failed to analyze properly whether the manifestations of the appellant's cervical spine disability are contemplated by the rating criteria. Secretary's Br. at 15-17. In the event that the Court disagrees with the Secretary's concession of Board error, the Secretary maintains that the Board's decision was not premature. *Id*. at 17-19.

The Court agrees with the parties that the Board's statement of reasons or bases is inadequate. The Board declined to refer the appellant's claim for extraschedular consideration, in part, because it found that "each of the diagnostic criteria adequately describes the severity and symptomatology of the [appellant's] disability such as loss of range of motion." R. at 11. The Board failed to discuss the appellant's lay statements, which describe difficulty focusing, problems with interpersonal communication, and sleep impairment, *see* R. at 511, or explain how rating criteria based on limitation of motion adequately account for these asserted manifestations of the appellant's cervical spine disability, *see Thompson v. Gober*, 14 Vet.App. 187, 188 (2000) (per curiam order) (Board must provide reasons "for its rejection of any material evidence favorable to the claimant"); *Allday*, 7 Vet.App. at 527; *see also Yancy v. McDonald*, 27 Vet.App. 484, 495 (2016) ("When considering whether referral is warranted . . . , the Board first must compare the veteran's symptoms with the assigned schedular rating."); *Thun*, 22 Vet.App. at 115. The Board's failure to adequately support its conclusion frustrates judicial review and requires that the Court vacate the Board's decision and remand the matter for readjudication. *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").

Given the above disposition, the Court will not now address the remaining arguments and issues raised by the appellant. *See Quirin*, 22 Vet.App. at 395; *Best*, 15 Vet.App. at 20. On remand, the appellant is free to submit additional evidence and argument on the remanded matter, including the specific arguments raised here on appeal, and the Board is required to consider any such relevant evidence and argument. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002) (stating that, on remand, the Board must consider additional evidence and argument in assessing entitlement to the benefit sought); *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order). The Court reminds the Board 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), and the Board must proceed expeditiously, in accordance with 38 U.S.C. § 7112.

III. CONCLUSION

After consideration of the parties' pleadings and a review of the record, the Board's August 19, 2016, decision is VACATED and the matter is REMANDED for further proceedings consistent with this decision.

DATED: November 6, 2017

Copies to:

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