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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 16-3684

PAUL D. KELLY, 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, Paul D. Kelly, through counsel appeals an August 19, 2016, Board of Veterans' Appeals (Board) decision that denied entitlement to an increased disability rating for left sciatic radiculopathy, currently rated 10% disabling, and to an increased disability rating for residuals of a back injury with degenerative disc disease, currently rated 40% disabling, and declined to refer his service-connected back disability for consideration of entitlement to an extraschedular disability rating. Record (R.) at 1-18. 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). The appellant does not raise any argument concerning the Board's denial of an increased schedular disability rating for his back disability. *See generally* Appellant's Brief (Br.); Reply Br. Therefore, the Court finds that he has abandoned his appeal of that issue and the Court will dismiss the appeal as to the abandoned issue. *See Pederson v. McDonald*, 27 Vet.App. 276, 285 (2015) (en banc). 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 matters for further proceedings consistent with this decision.

I. BACKGROUND

The appellant served on active duty in the U.S. Navy from March to May 1974. R. at 101. In August 2003, a VA regional office (RO) granted his April 2000 claim for benefits for a back disability based on an in-service injury and assigned a 20% disability rating. R. at 1746-48. In March 2004, the RO increased the appellant's disability rating to 40%, effective January 14, 2004. R. at 1694-97. In August 2004, the RO granted the appellant's claim for benefits for left sciatic radiculopathy and assigned a 10% disability rating. R. at 1552-54.

In November 2005, the appellant sought an increased disability rating for his service-connected back condition and submitted affidavits from friends regarding their observations of his increasing back pain and difficulty walking. R. at 1499-1507. In April 2006, the RO continued the assigned 40% disability rating, R. at 1427-31; the appellant filed a Notice of Disagreement (NOD) requesting a medical examination, R. at 1409; and the appellant ultimately appealed to the Board, R. at 1378-80. Neither the parties' briefs nor the record reveals what became of this appeal. *See* Appellant's Br. at 6; Secretary's Br. at 4.

The parties agree that the appellant sought increased disability ratings for both of his service-connected conditions multiple times between December 2010 and February 2012. R. at 994-97, 1006, 1037-41. He again submitted statements from friends regarding their observations of his difficulty walking. R. at 1051-60.

In February 2013, the appellant underwent a VA spine examination. R. at 770-82. The examiner diagnosed the appellant with spondylosis of the lumbar spine with intermittent neuritis of the legs. R. at 772. The appellant reported stabbing pain in his back, aggravated by leaning forward and by prolonged standing or walking. R. at 773. He stated that he could walk approximately 20 feet without the aid of a walker. *Id.* He also reported persistent numbness in his left big toe and calf. *Id.* The examiner noted that the appellant experienced functional loss or impairment in the spine after repetitive use in the nature of less movement than normal and stated that, after repetitive use, the appellant stood "forward flexed about 15 degrees." R. at 775. Muscle strength tests of the hips, knees, ankles, and big toes were normal. R. at 776. On reflex testing, the examiner noted that the appellant had absent deep tendon reflexes in his knees and ankles. R. at 777. Sensory examination revealed decreased sensation to light touch in the appellant's left lower leg/ankle and left foot/toes. *Id.* In evaluating radiculopathy, the examiner recorded only "mild" numbness in the appellant's left lower extremity. R. at 778. The examiner indicated that

the appellant's radiculopathy involved only the left sciatic nerve. *Id.* The examiner concluded that the appellant suffered from mild left side radiculopathy. *Id.* The examiner recorded the appellant's regular use of a walker. R. at 779. X-rays confirmed "[m]oderate degenerative changes" at the "mid and lower part of the lumbar spine." R. at 782.

In March 2013, the RO continued the assigned disability ratings for the appellant's service-connected back disability and left sciatic radiculopathy. R. at 587-92. The appellant filed an NOD with that decision, R. at 214, and again appealed to the Board, R. at 94.

In August 2016, the Board issued the decision on appeal. The Board determined that the appellant's radiculopathy symptoms were no more than mild throughout the appeal period and that, therefore, a disability rating in excess of the currently assigned 10% was not warranted. R. at 14-15. The Board then found that the appellant's lumbar spine disability picture was not exceptional or unusual and therefore declined to refer that claim for consideration of entitlement to an extraschedular rating. R. at 17. This appeal followed.

II. ANALYSIS

On appeal, the appellant raises two arguments: First, that the Board failed to provide adequate reasons or bases for its determination that his radiculopathy was mild, as opposed to moderate or severe, and second, that the Board failed to adequately consider favorable evidence, including that he requires a walker to ambulate, before concluding that his back disability picture is not exceptional or unusual. Appellant's Br. at 8-17. The Secretary generally disputes these contentions. Secretary's Br. at 6-22.

A. Schedular Disability Rating for Radiculopathy

The appellant's left sciatic radiculopathy is rated under 38 C.F.R. § 4.124a, Diagnostic Code 8520, which provides ratings for incomplete paralysis of the sciatic nerve. That diagnostic code provides a 10% rating for mild incomplete paralysis, a 20% rating for moderate incomplete paralysis, a 40% rating for moderately severe incomplete paralysis, and a 60% rating for severe incomplete paralysis with marked muscular atrophy. 38 C.F.R. § 4.124a, Diagnostic Code 8520 (2017). The terms "mild," "moderate," "moderately severe," and "severe" are not defined in the rating schedule. A note preceding the rating schedule for diseases of the peripheral nerves states that, "[w]hen the involvement is wholly sensory, the rating should be for the mild, or at most, the moderate degree." 38 C.F.R. § 4.124a, Diseases of the Peripheral Nerves, Note (2017). The Court

recently explained that this note "provides only a maximum disability rating for wholly sensory manifestations of incomplete paralysis of a peripheral nerve" and does not require a certain minimum disability rating where there are also non-sensory manifestations. *Miller v. Shulkin*, 28 Vet.App. 376, 380 (2017).

In this case, relying on the February 2013 VA examination, the Board explained that the appellant's "left lower extremity neurological symptoms" included "pain, numbness, diminished light touch sensation, and absent reflexes." R. at 14. The Board also noted that the appellant had "full strength in the left lower extremity." R. at 15. The Board concluded: "Because the [appellant's] lower extremity neurological symptoms were predominantly sensory in nature, and because they were assessed by the VA examiner to be mild, the Board finds that left lower extremity sciatic radiculopathy is not shown to be more than mild in degree." *Id.*

The Board must provide a statement of the reasons or bases for its determination that is "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); *see* 38 U.S.C. § 7104(d)(1); *Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1990). Here, the appellant contends that the Board failed to do so in several respects.

The appellant first argues that the Board failed to define the term "mild" in the context of Diagnostic Code 8520 and that this failure prevents him from understanding the basis for the Board's decision. Appellant's Br. at 12-13. The appellant further argues that, even if such definition was not required, the Board failed to adequately explain its conclusion that his condition is mild. Appellant's Br. at 14-15. The Court agrees that the Board's reasons or bases are inadequate.

The Board is required to "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." *Buczynski v. Shinseki*, 24 Vet.App. 221, 224 (2011); *see Allday*, 7 Vet.App. at 527. Here, the Board made no such attempt to explain its conclusion. The Board simply listed the appellant's symptoms, identified them as "predominantly"—but not wholly—sensory, and relied on the examiner's classification of the condition as mild to conclude that the appellant was not entitled to a disability rating higher than 10%. R. at 15. The Board provided no analysis of why the symptoms of pain, numbness, diminished light touch sensation, and absent deep tendon

reflexes necessarily lead to the conclusion that the appellant's radiculopathy is mild. This frustrates judicial review. *See* 38 U.S.C. § 7104(d)(1); *Allday*, 7 Vet.App. at 527; *Gilbert*, 1 Vet.App. at 56-57. Remand is necessary for the Board to reevaluate the evidence of record and provide a sufficient explanation for any conclusion it reaches.

The Court acknowledges that the appellant raises additional arguments regarding the Board's denial of an increased disability rating for left sciatic radiculopathy, specifically that the Board (1) adopted the February 2013 VA examiner's opinion that his condition was mild, (2) failed to consider evidence of weakness in the left lower extremity, and (3) failed to consider the guidance provided in the *VA Adjudication Procedures Manual* regarding the assignment of a disability rating under Diagnostic Code 8520.¹ Given the disposition of this issue, however, the Court will not address these remaining arguments. *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"); *see Best v. Principi*, 15 Vet.App. 18, 20 (2001) (per curiam order).

B. Extraschedular Consideration for Back Disability

The appellant argues that the Board inadequately supported its conclusion that his service-connected back disability does not warrant referral for extraschedular consideration. Specifically, he contends that the Board failed to adequately account for his regular use of a walker and that, although the Board mentioned his limitation of motion, it did not "adequately consider his limitation of *mobility* in determining the severity of his symptoms." Appellant's Br. at 18. The Court agrees that the Board's reasons or bases are inadequate.

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*,

¹ The Court notes that, in his principal brief, the appellant argued that the *VA Adjudication Procedures Manual* is binding on the Board. Appellant's Br. at 11. In his reply brief, the appellant conceded that, in light of *Disabled American Veterans v. Secretary of Veterans Affairs*, 859 F.3d 1072, 1077 (Fed. Cir. 2017), which was issued after he filed his principal brief, this is not accurate. Reply Br. at 3-4.

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 provide an adequate statement of reasons or bases for its conclusions. *See* 38 U.S.C. § 7104(d)(1); *Allday*, 7 Vet.App. at 527; *Gilbert*, 1 Vet.App. at 56-57.

Here, the Board stated:

[T]he symptomatology and impairment caused [by] the [appellant's] lumbar spine disability are specifically contemplated by the schedular rating criteria, and no referral for extraschedular consideration is required. The schedular rating criteria specifically provide for disability ratings for the lumbar spine based on limitation of motion and function, to include as due to flare-ups of pain, weakness, fatigability, and based on incapacitating episodes due to intervertebral disc syndrome. The rating criteria also allows for separate ratings for neurological manifestations, such as radiculopathy. The [appellant's] lumbar spine disability is characterized by limitation of motion in the lumbar spine, pain, and mild radiculopathy in the sciatic nerve of the left lower extremity. These symptoms are part of or similar to symptoms listed under the schedular rating criteria and higher ratings are available based on more severe degrees of limitation of motion and neurological symptoms. For these reasons, the Board finds that the schedular rating criteria are adequate to rate the [appellant's] service-connected lumbar spine disability and radiculopathy and referral for consideration of an extraschedular evaluation is not warranted.

. . . In this case, the problems reported by the [appellant], to include difficulty with mobility and ambulation due to pain and radiculopathy, are specifically

contemplated by the criteria discussed above, and this includes the effect of his disability on occupational or daily functioning. While the [appellant] is in receipt of a high [schedular] rating under the applicable diagnostic criteria for his lumbar spine disability, higher ratings are available based on a greater degree of impairment based on unfavorable ankylosis of the spine, which is not shown in this case. In the absence of exceptional factors associated with the lumbar spine disability and radiculopathy, the Board finds that the criteria for referral for consideration of an extraschedular rating pursuant to 38 C.F.R. § 3.321(b)(1) are not met.

R. at 16-17.²

The Board's analysis contains no explicit discussion of the *severity* of the appellant's symptoms as required by the Court's caselaw. *See 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 ("[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." (emphasis added)). Here, the Board simply listed the appellant's symptoms and stated that such symptoms are contemplated by the rating schedule. R. at 16-17. Although the Board accurately noted that limitation of motion and pain are contemplated by the rating schedule for back disabilities—*see* 38 C.F.R. §§ 4.40, 4.45, 4.71a—and that such symptoms might result in some difficulty in ambulation, the Board did not engage in any analysis regarding the *severity* of *the appellant's symptoms* to determine whether, *in this case*, they render the schedular rating criteria inadequate.

Although the Board's decision must be read as a whole, *Janssen v. Principi*, 15 Vet.App. 370, 379 (2001) (per curiam), the Board's earlier schedular analysis of the appellant's back disability symptoms, any appeal of which the appellant has abandoned, focused on the absence of ankylosis of the thoracolumbar spine, the only avenue by which a higher schedular rating could be attained under 38 C.F.R. § 4.71a, Diagnostic Code 5243. *See* R. at 10-13. That discussion is

² In concluding that referral for extraschedular consideration is not warranted in this case, the Board twice referred to the availability of higher schedular ratings. Although the appellant did not raise this issue in his briefs, and the Court will therefore not address it, *see Pederson*, 27 Vet.App. at 285, the Court notes that the question of what role, if any, the possibility of a higher schedular disability rating plays in an extraschedular analysis is currently before a panel of the Court in *King v. Shulkin*, U.S. Vet. App. No. 16-2959 (oral argument held Nov. 16, 2017).

irrelevant to the discussion of whether the appellant's back disability picture is so exceptional or unusual as to warrant referral for extraschedular consideration.

In light of this discussion, the Court concludes that the Board provided inadequate reasons or bases for declining to refer the appellant's service-connected back disability for extraschedular consideration. *See* 38 U.S.C. § 7104(d)(1); *Allday*, 7 Vet.App. at 527; *Gilbert*, 1 Vet.App. at 56-57. Remand is therefore warranted.

Although the appellant raises arguments related to the second step of the *Thun* analysis, because the Board did not reach that step, there is not yet a Board decision on that issue for the Court to review. *See* Appellant's Br. at 21-22. Accordingly, the Court will not address that argument.

On remand, the appellant is free to submit additional evidence and argument on the remanded matters, 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

The appeal of the Board's August 19, 2016, decision denying entitlement to a schedular disability rating in excess of 40% for residuals of a back injury with degenerative disc disease is **DISMISSED**. After consideration of the parties' pleadings and a review of the record, the Board's August 19, 2016, decision that denied entitlement to an increased disability rating for left sciatic radiculopathy and declined to refer the appellant's service-connected back disability for extraschedular consideration is **VACATED** and the matters are **REMANDED** for further proceedings consistent with this decision.

DATED: November 20, 2017

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