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**UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS**

No. 16-3839

DANTE L. SMITH, 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, Dante L. Smith, through counsel appeals an October 19, 2016, Board of Veterans' Appeals (Board) decision that declined to refer the appellant's service-connected lumbar intervertebral disc protrusion at L4-L5 with degenerative disc disease (lumbar spine disability) and radiculopathy of the right lower extremity for consideration of entitlement to an extraschedular disability rating. Record (R.) at 1-19. 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 matters for further proceedings consistent with this decision.

**I. BACKGROUND**

The appellant served on active duty in the U.S. Army from August 1996 to January 1999. R. at 1434. In October 1999, a VA regional office (RO) granted the appellant's disability compensation claim for a lumbar spine disability and assigned a 10% disability rating, effective January 23, 1999. R. at 1495-98. In January 2009, the appellant filed a claim for increased disability compensation, alleging that his lumbar spine disability limited his activities of daily

living and interfered with his employment as a surgical technician. R. at 1221-23. The appellant described constant pressure, daily discomfort, muscle spasms, pain radiating from his back to upper thigh, and pain with "sitting, standing, walking[,] and especially when bending." R. at 1221.

In February 2009, the appellant underwent a VA spine examination. R. at 1182-89. The appellant reported constant, moderate, daily, burning pain; radiating pain; limitation of motion; spasms; and stiffness. R. at 1182-84. The appellant reported that he was able to walk more than 1/4 of a mile, but less than 1 mile. R. at 1184. He also reported that he used a back brace. *Id.*; *see* R. at 1094 (Aug. 2009 treatment record generally reflecting treatment with nonsteroidal anti-inflammatory drugs, a back brace, physical therapy, and a Transcutaneous Electrical Nerve Stimulation (TENS) Unit; and weekly flares of pain). The examiner commented that the appellant had not missed any work because of his lumbar spine disability and that he was able to perform all chores; however, the appellant had several young children and putting them into car seats was painful. R. at 1189.

In April 2010, the appellant perfected an appeal from an April 2009 rating decision that denied his claim for increased compensation. R. at 1069-74, 1075-93, 1140-42, 1168-72. In his Notice of Disagreement, the appellant reported that he continued to experience flareups, and that, from April 26 to May 1, 2009, a VA physician had excused him from work and restricted his activity, upon return to work, to include "no lifting more than 5 [pounds,] or sitting more than 5-10 minutes." R. at 1140. The appellant explained that his employment required lifting, pushing, pulling, and bending, and asserted that his back condition interfered with both his ability to work and activities of daily living. R. at 1140, 1142. In his Substantive Appeal, the appellant stated that treatment had proven ineffective and redundant, and that he experienced pain, flareups, limited range of motion, and tightness. R. at 1071.

In February 2011, the appellant underwent another VA spine examination. R. at 1053-61. The appellant reported experiencing flareups every 2 to 4 weeks, lasting 3 to 4 days, with pain rated as a 10 on a scale of 0 to 10, and pain radiating from his lower back to right thigh. R. at 1054. Treatment included Ibuprofen; Cyclobenzaprine for spasms; Percocet for severe pain; physical therapy; a TENS Unit; and bracing—"with [the] lower back brace providing [the] greatest pain relief." *Id.* The examiner noted that the appellant experienced mild-to-moderate limitation of motion or decrease in function during flares, with prolonged sitting and standing as precipitating factors, and a heating pad, medication, and rest as alleviating factors. *Id.* In the past year, the

appellant reportedly missed 10 days of work because of low back pain. R. at 1055. The RO subsequently increased the appellant's disability rating from 10% to 20%, effective February 5, 2011, the date of the VA examination. R. at 1041-52.

In March 2012, the appellant presented to the emergency department "for evaluation of slowly progressive back pain[, described as] posterior leg pain on the left to the posterior knee and down the right leg with numbness in the foot," which reportedly started to interfere with working and driving. R. at 993. The clinician's impression was "low back pain with radiculopathy." R. at 994.

The appellant testified at a Board hearing and, in February 2013, the Board remanded the appellant's claim for further development, including an additional VA examination. R. at 879-84. At a March 2013 VA spine examination, the appellant reported intermittent low back pain and flareups of pain with standing for 4 hours. R. at 518. The following month, the appellant described incapacitating episodes of low back pain and radicular pain, including burning, tingling, and numbness, which allegedly caused him to miss work. R. at 809. He stated that, in the past year, he experienced 31 days of incapacitating episodes. R. at 811. The appellant also submitted an April 2013 letter from his employer confirming that "on multiple occasions during the past year, [the appellant had] been relieved of his duty as a [s]urgical [t]echnician and left work early to receive care and treatment for his lower back pain." R. at 806.

In January 2014, a VA examiner opined that the appellant's lumbar spine disability affected his ability to work, stating: "No lifting over 25 pounds, needs to be able to have position changes as needed. No prolonged standing, greater than 1 hour continuously." R. at 422. On March 28, 2014, the appellant reported a flareup accompanied by severe pain, which made it difficult to get out of bed and rise from a seated position. R. at 472. He also reported a burning sensation down the back of his right leg, tingling, and weakness. *Id.* The appellant's primary care provider excused him from work from March 28 to April 11, 2014. R. at 469.

In August 2014, the Board granted a 20% disability rating for the appellant's lumbar spine disability prior to February 5, 2011; denied a disability rating greater than 20% throughout the appeal period; and granted a separate 10% disability rating for mild radiculopathy of the right lower extremity. R. at 393-408. The appellant appealed to the Court, and in July 2015, the Court granted the parties' joint motion for partial remand, which was premised on the Board's failure to

consider whether the combined effects of the appellant's service-connected disabilities warranted referral for extraschedular consideration. R. at 52-57.

On remand, the Board ordered additional development, including a VA examination of the appellant's lumbar spine disability and radiculopathy of the right lower extremity. R. at 247-52. In January 2016, the appellant underwent additional examinations, R. at 126-28, 132-40, and the issue of entitlement to referral for extraschedular consideration was returned to the Board.

In the October 2016 decision on appeal, the Board found that the appellant's lumbar spine disability and right lower extremity radiculopathy "do[] not present such an exceptional or unusual disability picture as to render impractical application of the ordinary schedular standards," R. at 4, and therefore declined to refer the matters for extraschedular consideration. R. at 12-17. This appeal followed.

## II. ANALYSIS

The appellant argues that the Board's decision not to refer his claims for extraschedular consideration is based on a misinterpretation of the law and unsupported by an adequate statement of reasons or bases. Appellant's Brief (Br.) at 6-15. The Secretary disputes these contentions and argues for affirmance of the Board's decision. Secretary's Br. at 5-17. The Secretary further argues that the appellant fails to raise any specific allegation of error regarding his right lower extremity radiculopathy, and therefore urges the Court to dismiss the appeal as to this issue. *Id.* at 17-19.

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 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); *see* 38 U.S.C. § 7104(d)(1).

In the decision on appeal, the Board generally listed the appellant's lumbar spine disability and right lower extremity radiculopathy symptoms and functional impairments, such as radiating pain, limitation of motion of the lumbar spine, and decreased ability to walk, sit, bend, or stand, and concluded that the symptoms and impairments are adequately described by the rating schedule. R. at 12-13 (referring to the General Rating Formula for Diseases and Injuries of the Spine and the Formula for Rating Intervertebral Disc Syndrome Based on Incapacitating Episodes—38 C.F.R. § 4.71a, Diagnostic Codes (DCs) 5235-5243 (2016); the applicable DCs for rating peripheral neuritis of the sciatic nerve—38 C.F.R. §§ 4.123, 4.124a, DCs 8520, 8620 (2016); and 38 C.F.R. §§ 4.40, 4.45 (2016)). With regard to the appellant's use of a back brace, the Board stated: "The [appellant's] reported use of a back brace is not mentioned in the rating criteria. However, there is no evidence of further disability, symptoms, or functional loss as a result of such an assistive device or that it otherwise renders application of the ordinary schedular standards impractical." R. at 13.

The appellant's argument that the Board inadequately explained why extraschedular consideration is not warranted is persuasive. Although the Board stated that the rating criteria do not explicitly address the appellant's use of a back brace, the Board failed to explain the basis for its conclusion that use of a back brace does not render application of the ordinary schedular standards impractical. Instead, the Board's analysis focused on whether use of an assistive device—

here, a back brace—results in *additional* disability, symptoms, or functional loss. The Board provided no explanation as to whether use of a back brace might demonstrate a disability level or symptomatology that renders the schedular rating criteria inadequate.

The Secretary argues that use of a back brace is a "commonplace treatment option[.]" which is not extraordinary, and that "for VA to pay additional compensation through an extraschedular rating for a device . . . that improves [the a]ppellant's symptoms would be inconsistent with the purpose of disability compensation." Secretary's Br. at 12. In this regard, he contends that "a back brace is akin to a hearing aid." *Id.* These arguments, however, amount to a post hoc rationalization, which the Court cannot accept. *See Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 156 (1991) ("[L]itigating positions' are not entitled to deference when they are merely appellate counsel's '*post hoc* rationalizations' for agency action, advanced for the first time in the reviewing court."); *Evans v. Shinseki*, 25 Vet.App. 7, 16 (2011) ("[I]t is the Board that is required to provide a complete statement of reasons or bases, and the Secretary cannot make up for its failure to do so."). As conceded by the Secretary, the Board stated that "use of a back brace is not mentioned in the rating criteria." R. at 13; *see* Secretary's Br. at 13. Therefore, the Board, and not the Secretary here on appeal, was required to explain why use of a back brace does not render application of the ordinary criteria impractical.

The Court also agrees that the Board's statement of reasons or bases is inadequate because the Board failed to explain why the *severity* of the appellant's symptoms is contemplated by the schedular rating criteria. *See* Appellant's Br. at 11. 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)). The Board simply listed the appellant's symptoms and stated that such symptoms are contemplated by the rating schedule. Although the Board correctly noted that limitation of motion, sensory disturbances, and pain, including pain during flareups, are contemplated by the rating schedule—*see* 38 C.F.R. §§ 4.40, 4.45, 4.71a, 4.123, 4.124a—and acknowledged that such symptoms might result in functional impairment such as difficulty walking and standing and interference with working time—*see*

38 C.F.R. § 4.1 (2016)—the Board did not explain why, under the facts of this case, the severity of the appellant's symptoms is contemplated by the assigned schedular rating.

Based on the foregoing, the Court concludes that the Board provided inadequate reasons or bases for declining to refer the appellant's service-connected disabilities for extraschedular consideration. *See* 38 U.S.C. § 7104(d)(1); *Allday*, 7 Vet.App. at 527; *Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1990). Remand is therefore required. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) ("[W]here 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, a remand is the appropriate remedy.").

The Secretary argues that the appellant abandoned his appeal regarding entitlement to extraschedular consideration for his right lower extremity radiculopathy, asserting that the appellant fails to make any specific allegation or argument relating to this disability. Secretary's Br. at 17-19. The Court is not persuaded that the appellant's brief and reported symptomatology should be narrowly construed as applying solely to his lumbar spine disability. *See* Appellant's Br. at 13 (arguing that his "disabilities caused a marked interference with his employment" and referring to, among other evidence, the appellant's April 2013 lay statement, *see* R. at 811, which attributes incapacitating episodes to his lumbar spine disability, with radicular pain); Reply Br. at 4-5 (arguing that the appellant's service-connected disabilities are interrelated, and together cause marked interference with employment and interference with the appellant's ability to stand at work); *see also* R. at 469, 472, 809, 811, 1055, 1107. Accordingly, the Court will vacate the Board's decision regarding both service-connected disabilities and remand the matters for readjudication consistent with this decision.

Given this disposition, the Court will not now address the remaining arguments and issues raised by the appellant. *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). 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 October 19, 2016, decision is VACATED and the matters are REMANDED for further proceedings consistent with this decision.

DATED: November 21, 2017

Copies to:

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VA General Counsel (027)