IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

JOSEPH SPELLERS,
Appellant,

v.

DAVID J. SHULKIN, M.D.,
Secretary of Veterans Affairs,

Appellee.

ON APPEAL FROM THE BOARD OF VETERANS' APPEALS

BRIEF OF THE APPELLEE SECRETARY OF VETERANS AFFAIRS

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IN THE UNITED STATES COURT OF APPEALS
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	)	
Appellant,	)	
	)	
v.	)	Vet.App. No. 16-4053
	)	
DAVID J. SHULKIN, M.D.,	)	
Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS

BRIEF OF THE APPELLEE
SECRETARY OF VETERANS AFFAIRS

I. ISSUE PRESENTED

Whether the Court of Appeals for Veterans Claims (Court) should affirm the November 17, 2016, Board of Veterans' Appeals' (Board) that denied entitlement to initial ratings in excess of 10% for right and left lower extremity sciatica on an extraschedular basis pursuant to 38 C.F.R. § 3.321, to include as due to the collective impact of all of Appellant's service-connected disabilities.

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

The Court has jurisdiction over the instant appeal pursuant to 38 U.S.C. § 7252(a).

B. Nature of the Case

Appellant, Joseph, Spellers, contests the November 17, 2016, Board decision that denied entitlement to initial ratings in excess of 10% for right and left lower extremity sciatica on an extraschedular basis pursuant to 38 C.F.R. § 3.321, to include as due to the collective impact of all of Appellant's service-connected disabilities. (Record (R.) at 2-22).

C. Statement of Facts

Appellant had active duty service from November 1978 to October 1989. *See* (R. at 3 (2-22)).

In January 2006, the Regional Office (RO) granted Appellant entitlement to service connection for his low back strain, with a rating of 10%. (R at 3007 (3005-15)). In June 2007, the RO granted an increased rating to 20%, effective January 22, 2007. (R. at 2938 (2936-42)). In January 2008, Appellant submitted a request for reconsideration of the rating decision (R. at 2925 (2925-28)), and the RO issued a rating decision in June 2006 that continued his rating at 20% disabling. (R. at 2921 (2917-23)).

Appellant was afforded a VA examination in September 2008. (R. at 2736-39). Appellant claimed that he had intermittent, bilateral sciatica below the knees. *Id*. at 2736. The examiner noted that Appellant did not use assistive devices for ambulation, canes, or braces. *Id*.

In November 2009, a Decision Review Officer (DRO) issued a decision that granted Appellant entitlement to service connection for his left and right

lower extremity sciatica, each rated at 10% disabling, effective September 30, 2008. (R. at 2560-62 (2555-63)). Appellant submitted a notice of disagreement (NOD) in November 2009 (R. at 2539-40), and the RO issued a Statement of the Case (SOC) in September 2010 (R. at 2489-01). Appellant submitted a VA Form 9 in August 2010. (R. at 2484-87), and a Supplemental SOC (SSOC) was issued in June 2013. (R. at 1546-59).

In May 2015, the Board denied a rating in excess of 10% for Appellant's right and left lower extremity sciatica. (R. at 324 (309-28). In March 2016, the Court remanded Appellant's claim pursuant to a joint motion for partial remand (JMPR). (R. at 275). The parties agreed that the Board provided an inadequate statement of reasons or bases regarding entitlement to referral for extraschedular consideration based on the combined effect of Appellant's multiple service-connected disabilities. (R. at 269-70 (268-74)).

Appellant submitted an affidavit regarding his claim in May 2016. (R. at 172-73). Among other things, he claimed that he was unable to walk for more than five to ten minutes, has intense pain in his legs, and used a cane and walker. *Id*. at 172.

III. SUMMARY OF ARGUMENTS

Appellant fails to demonstrate that the Board committed prejudicial error in determining that referral for extraschedular consideration was not warranted for his service-connected left and right sciatica. Appellant does not point to relevant evidence that the Board failed to address. Because Appellant has shown no

clear error in the Board's November 17, 2016, decision, that decision should be affirmed.

IV. ARGUMENT

A. The Board properly determined Appellant was not entitled to referral for extraschedular consideration for his service-connected left and right sciatica

The Board's determination regarding the degree of disability under the rating schedule, to include whether an extraschedular rating is warranted, is a finding of fact subject to the "clearly erroneous" standard of review. *Locklear v. Shinseki*, 24 Vet.App. 311, 319 (2011); *Thun v. Peake,* 22 Vet.App. 111, 115 (2008), *aff'd sub nom Thun v. Shinseki*, 572 F.3d 1366 (2009); 38 U.S.C. § 7261(a)(4).

The "determination of whether a claimant is entitled to an extraschedular rating under 38 C.F.R. § 3.321(b) is a three-step inquiry." *Thun v*, 22 Vet.App. at 115; *see also Barringer v. Peake,* 22 Vet.App. 242, 244 (2008) (stating *Thun* set forth a sequential three-part analysis). The "threshold factor" for extraschedular consideration is a finding that the evidence before VA presents such an exceptional or unusual disability picture such that a schedular evaluation is inadequate. *Thun*, 22 Vet.App. at 115. If the rating criteria "reasonably describe a claimant's disability level and symptomatology, then the claimant's disability picture is contemplated by the rating schedule, the schedular evaluation is, therefore, adequate, and no referral is required." *Id*

Appellant argues that the Board committed prejudicial legal error when it failed to refer his bilateral lower extremity sciatica for extraschedular consideration. (Appellant's Brief (App. Br.) at 7). He contends that it failed to adequately explain how the rating criteria contemplates his use of a cane and walker and alleges that the Board's determination regarding the first threshold element for extraschedular consideration was not supported by the evidence. *Id* at 9-10. Appellant also argues that Board erred when it failed to reach the second element of *Thun* because the evidence of record demonstrated marked interference with employment. *Id*. at 14-16

Here, the Board directly addressed Appellant's argument that the use of a cane and walker is not contemplated in the rating criteria. (R. at 11 (2-22)). The Board expressly found that "[w]hile the use of an assistive device, such as a cane or a walker, is not specifically listed in the rating criteria for evaluating neurological disabilities, assistive devices are provided to alleviate the presence of symptoms and/or functional limitations caused by an individual's disability." *Id*. The Board found that use of an assistive device are contemplated by the rating criteria for evaluating neurological disabilities and that assistive devices are provided to address Appellant's functional limitations. *Id*. at 12.

Contrary to Appellant's argument, the Board fully contemplated the fact that Appellant used a cane and walker for ambulation but properly found that his symptoms were reasonably contemplated by the rating criteria. (R. at 10 (2-22)). The Board directly addressed Appellant's assertion that the rating criteria did not

consider the use of a cane and walker but found that 38 C.F.R. § 4.120 notes neurological impairments are based on impairment of motor functions and found that falls, weakness, giving-away, fatigue, and stiffness are impairments of motor function, which are contemplated by the rating criteria. *Id*. at 11; *see also* 38 C.F.R. § 4.120 ("In rating peripheral nerve injuries and their residuals, attention should be given to the site and character of the injury, the relative impairment in motor function, trophic changes, or sensory disturbances"); 38 C.F.R. § 4.124a, Diagnostic Code (DC) 8520 (provides a 20% rating for moderate paralysis of the sciatic nerve). The Board's decision is supported.

The use of a cane or walker is merely a means of alleviating the *effects* of functional impairment due to Appellant's disability. *See* DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 285, 2102 (31st ed. 2007) ("cane" is defined as a wooden stick or metal rod used for *support in walking*") ("walker" is defined as "an enclosing framework made of lightweight metal tubing, sometimes with wheels (rollator), for patients who need more *support for walking* than that given by a cane or crutch") (emphasis added). Notably, "use of a cane or walker" is not a symptom of Appellant's condition itself but a device used to ameliorate the effects of a symptom such as instability. 38 C.F.R. § 4.124a, DC 8520; 38 C.F.R. § 4.120. The use of a cane or crutch are not separately-compensable symptoms any more than putting a cast on a broken arm would be separately compensable beyond the rating criteria in DC 5202 for impairment of the humerus. *See* 38 C.F.R. § 4.71a.

Given this, the Board appropriately considered Appellant's disability picture, including the use of assistive devices, which would encompass falls, giving away of the legs, and fatigue, but properly determined that it was considered by rating criteria. (R. at 11 (2-22)). Moreover, Appellant fails to explain, at any level, how the use of a cane or walker is so unusual or exceptional in nature such that referral for an extraschedular rating was required. *See Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (holding that the appellant has the burden of demonstrating error on appeal), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000) (table); *see also Locklear*, 20 Vet.App. at 416 (holding that the Court will not entertain underdeveloped arguments). Notably, other evidence of record during the period on appeal show no use of assistive devices or use of devices due to other disabilities. *See* (R. at 2736 (2736-39)) (September 2008 VA examination showing no use of assistive devices); (R. at 2633 (2632-36)) (September 2009 VA back examination showing no use of walker, but use of a cane due to lumbosacral condition); (R. at 899 (899-900)) (January 2012 VA physical therapy note showing independent locomotion and no use of assistive devices); (R. at 951 (947-52)) (January 2012 VA nursing administrative assessment showing no use of assistive devices and ability to bear full weight).

Additionally, while Appellant also argues that the Board erred by failing to reach the second element for extraschedular consideration (App. Br. at 14-16), *Thun* made it clear that once the Board determines that the threshold inquiry - that an exceptional disability picture is not shown - that is the end of the inquiry

and the Board need not address the second element. *See Thun*, 22 Vet.App. at 118-19. Again, Appellant's mere disagreement with this finding is insufficient to establish clear error and the Board's determination is supported in the record. *See Wood v. Derwinski,* 1 Vet.App. 190, 193 (1991); *Gilbert v. Derwinski,* 1 Vet.App. 49, 52 (1990).

As such, the Board did not clearly err or fail to adequately explain why the schedular evaluations assigned were adequate and why referral for extraschedular rating consideration was not warranted. The Board's decision, read as a whole, is understandable and facilitative of judicial review of the issues pertaining to the application of 38 C.F.R. § 3.321(b). Therefore, the Court should find the Board's statement of reasons or bases adequate and affirm its decision.

B. The Board properly determined that Appellant's lay statements were not credible

Appellant also argues that the Board provided an inadequate statement of reasons or bases for determining that his statements regarding the side effects of his pain medication were not credible. (App. Br. at 12). He contends that the Board does not adequately explain how Appellant's report of side effects in his May 2016 affidavit is contradicted by his report of symptoms in his prior treatments. *Id*. at 12-14.

The Board found that Appellant's use of pain medication did not warrant extraschedular consideration, specifically taking into account Appellant's assertions that his narcotic pain medication caused drowsiness and poor

concentration. (R. at 12 (2-22)). It noted that Appellant reported use of pain pills in his VA examinations in April 2007, September 2008, September 2009, April 2013, and August 2014; his August 2014 Board hearing; and an October 2015 VA Social and Industrial Survey, but did not report any side effects at the time. *Id*. The Board also observed that he reported nausea related to his narcotic use in January 2012, but did not report drowsiness or inability to concentrate. *Id*. at 13. It also cited to a July 2009 patient agreement for opioid treatment for chronic pain where Appellant agreed to report any significant side effects related to his use of pain medication. *Id*. at 13.

The Board's decision is supported by the record. *See* (R. at 2943-44) (April 2007 VA examination indicating that Appellant is being treated with pain pills that provide intermittent relief with no report of side effects); (R. at 2736-39) (September 2008 VA examination showing treatment by Vicodin and therapy, but no report of side effects); (R. at 2633 (2633-36)) (September 2009 VA examination showing use of Tylenol and Oxycodone for temporary relief pain and no report of side effects); (R. at 1713-26) (April 2013 VA examination noting use of oxycodone 8 times per day for lower back pain, but no indication of side effects); (R. at 728 (727-33)) (August 2014 VA peripheral nerve examination noting use of oxycodone four times per day, but no report of side effects); (R. at 283 (277-85)) (October 2015 VA Social and Industrial Survey where Appellant indicated poor eating habits and low weight to use of opioids, but did not indicate drowsiness or inability to concentrate). Moreover, the Board correctly noted that

Appellant agreed to report any significant side effects due to opioids in a June 2009 VA pain opiate agreement. (R. at 1046 (1045-48)) ("I understand that I should report any significant side effects due to the opioid"). Most importantly, Appellant reported only nausea on his use of oxycodone in a January 2012 VA nursing admission assessment in the section of the report entitled "Symptoms and Side Effects of pain and pain treatments." (R. at 950 (947-52)).

Given this level of support for the Board's credibility determination in the record, Appellant has not demonstrated how the Board erred determining that his report of side effects of his use of pain medication was not credible. *Wood,* 1 Vet.App. at 193 ("The [Board] has the duty to assess the credibility and weight to be given to the evidence."); *Owens v. Brown,* 7 Vet.App. 429, 433 (1995) (it is the province of the Board to weigh and assess the evidence of record). While Appellant argues that he did not have an obligation to report his symptoms despite the June 2009 pain opiate agreement (App. Br. at 13), he certainly does not explain why he had never mentioned side effects of his pain medication when directly commenting on their side effects. *See, e.g*. (R. at 950 (947-52)) (Appellant describes only nausea when describing "symptoms and Side Effects of pain and pain treatments"). While Appellant argues that the Board's analysis was tantamount to an improper reliance on the lack of contemporaneous medical evidence, this is a mischaracterization of the Board's analysis. Indeed, when assessing the credibility and probative weight of evidence, the Board may consider factors such as facial plausibility, bias, self-interest, and *consistency*

with other evidence of record. *Buchanan v. Nicholson*, 451 F.3d 1331, 1337 (Fed. Cir. 2006); *Caluza*, 7 Vet.App. at 511. The Board directly found that Appellant's report "that he experiences drowsiness and poor concentration related to his use of pain medications lack credibility based on the conflicting evidence in the record." (R. at 19 (2-22)). Moreover, the Secretary notes that the Board may consider "evidence of a prolonged period without medical complaint. . . . Along with other factors." *Maxson v. Gober*, 230 F.3d 1330, 1333 (Fed. Cir. 2000). Here, as noted above, Appellant failed to make any complaint of sleepiness or lack of concentration throughout most of his appellate period. As such, Appellant has not shown error or prejudice in the Board's decision. *See Hilkert,* 12 Vet.App. at 151; *Sanders*, 556 U.S. at 409.

C. The Board provided an adequate statement of reasons or bases addressing the collective impact of Appellant's service-connected disabilities

Appellant argues that the Board erred when it failed to adequately address the collective impact of his service-connected disabilities. (App. Br. at 16). He argues that he is also rated for degenerative arthritis, degenerative disc disease of the lumbosacral spine, right and left shoulder strain, and right and left knee chondromalacia. *Id*. at 16-17. Appellant contends that evidence in the record suggest that his service-connected disabilities may have a collective impact on his functional ability to move. *Id.* at 18. As support, he cites to his use of assistive devices, inability to walk, inability to sit and lie down frequently, problems with his lower back, and inability to lift his arms above his head. *Id*. at

18-19. Appellant contends that his service-connected disabilities affected his physical ability to stand, sit, walk, and lift. *Id*. at 19.

Here the Board acknowledged Appellant's argument that his symptoms combined to render him more disabled than contemplated by his currently assigned ratings, but found that such symptoms are contemplated by the assigned rating criteria. (R. at 18 (2-22)). It held that the reports of Appellant's combined disabilities result in physical symptoms such as radiating pain throughout his body, paresthesia, instability, loss of muscle tone, numbness, and back pain that escalates in his lower extremity symptomatology are contemplated by the assigned rating criteria. *Id*. at 19. The Board also found that there is no indication that Appellant "experiences any unique symptoms that have not been considered in the myriad of [DCs] dedicated to disabilities of the body." *Id*. at 20.

Appellant's argument mainly lists individual symptomatology with little analysis as to how this symptomatology combines to create an exceptional disability picture. *See* (App. Br. at 16-19); *Yancy v. McDonald,* 27 Vet.App. 484, 495 (2016). For example, Appellant avers that he could not sit in one position due to his low back condition but provides no analysis for why this has a combined effect with any other disability. *See id*. at 18. Likewise, his argument that his lower back makes it difficult for him to bend, lift, or carry, does not described a combined effect, but rather, his functional impairment due solely to his lower back disability. *Id*. Similarly, Appellant's sole argument regarding his shoulder strain is that he was prevented from "lifting his arms above his head or

holding his arms out in from him for more than a few second" and does not explain how this combines with any other disability to create an exceptional disability picture. *See id. at* 18.

Absent any analysis or evidence of the combined effect of his disabilities on the claim on appeal, Appellant fails to establish any error on the part of the Board. *See Hilkert v. West,* 12 Vet.App. 145, 151 (1999); *Yancy*, 27 Vet.App. at 486. Appellant's contention here distills to little more than the incorrect assumption that his disability picture is exceptional or unusual simply because he has multiple service-connected disabilities. As such, he fails to establish any prejudicial *Johnson* discussion. *See Yancy*, 27 Vet.App. at 486. Of course, it is not this Court's role to assume that prejudicial error exists. Rather, it is Appellant's burden to demonstrate that it does. *Sanders v. Sander*, 556 U.S. at 396, 409 (2009) ("[T]he party that seeks to have a judgment set aside because of an erroneous ruling carries the burden of showing that prejudice resulted." (internal quotation omitted)). Inasmuch as Appellant has not even attempted to carry this burden, he has demonstrated no basis upon which to disturb the Board's determination that the rating schedule adequately describes his disability picture.

In this case, Appellant has merely cited to independent symptomatology of his various service-connected disabilities, which is not sufficient to raise an exceptional or unusual circumstance or demonstrate the collective impact of Appellant' service-connected disabilities on the claim on appeal *See* (App. Br. at

16-19); *Yancy*, 27 Vet.App. at 486. Accordingly, Appellant has not established error or prejudice in the Board's decision. *Hilkert,* 12 Vet.App. at 151; *Sanders,* 556 U.S. at 409.

The Secretary has limited his response to only those arguments raised by Appellant in his brief, and, as such, urges this Court to find that Appellant has abandoned all other arguments not specifically raised in his opening brief. *See Norvell v. Peake,* 22 Vet.App. 194, 201 (2008). The Secretary, however, does not concede any material issue that the Court may deem Appellant adequately raised and properly preserved, but which the Secretary did not address, and requests the opportunity to address the same if the Court deems it to be necessary.

V. CONCLUSION

In light of the foregoing, Appellee, the Secretary of Veterans Affairs, requests that the Court affirm the November 17, 2016, Board decision.

Respectfully submitted,

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