

APPELLANT'S REPLY BRIEF

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

No. 16-3193

CURTIS J. WASHINGTON,

Appellant,

v.

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

Appellee.

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CURTIS J. WASHINGTON**

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III. ARGUMENT

- A. THE BOARD IMPROPERLY DENIED MR. WASHINGTON'S CLAIMS FOR HIGHER RATINGS FOR HIS SERVICE CONNECTED LUMBAR SPINE AND RIGHT KNEE DISABILITIES ON AN EXTRASCHEDULAR BASIS WHERE IT FAILED TO STATE ADEQUATE REASONS OR BASES FOR ITS DECISION IN VIEW OF MATERIAL, FAVORABLE EVIDENCE THAT WAS IGNORED BY THE BOARD.
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The Appellant had argued that the Board's May 2016 decision failed to state adequate reasons or bases for its denial of higher ratings on an extraschedular basis because it did not address the material evidence which is favorable to his claims (App's brief [AB], pp. 16-23). The Appellant had argued that the Diagnostic Codes are not adequate to compensate him for the nature of his service connected right leg and lumbar spine disabilities because the rating criteria do not address symptoms of depression and headache disorder which, according to the medical evidence, are caused by his right knee and lumbar spine disabilities (AB, 20-23).

In response, the Secretary argues that "the Board clearly discussed Appellant's contention that his depression and psychiatric problems were caused or worsened by his service-connected disabilities and found that remand was warranted for those claims." (Sec's brief, p. 9). The Secretary does not dispute that the Board failed to address the "Appellant's contention that his depression and psychiatric problems" in

connection with his extraschedular claims, and it failed to state adequate reasons or bases for its findings that he was not entitled to extraschedular consideration. On the contrary, the Secretary argues that the Board's decision is correct because the depression and headache disorder were "not merely symptoms" associated with his service connected right knee and lumbar spine disabilities, "but are instead separate and distinct disabilities that ... may be entitled to service connection on their own." (SB, 9-11).

The Appellant agrees with the Secretary's argument that this Court does not have jurisdiction of the remanded depression and headache disorder claims (SB, 11). Of course, the Court does have jurisdiction to address the Board's decision denying higher ratings on an extraschedular basis for his service connected right knee and lumbar spine disabilities. *See* 38 U.S.C. §§ 7261(a)(1), (3).

The Secretary attempts to distinguish *Brambley v. Principi*, 17 Vet. App. 20, 24 (2003). The Secretary argues that in this 2016 decision "the Board found that the first step of *Thun v. Peake*, 22 Vet. App. 111 (2008)] was not satisfied." The Secretary argues that "the Board remanded the issue of Appellant's entitlement to TDIU to obtain a medical opinion 'to determine the impact of his service-connected disabilities ... on his employability,' [and] this evidence does not relate to the Board's determination that the rating schedule adequately accounts for Appellant's right knee and back disabilities under the first *Thun* element." (SB, 11-12).

In its 2016 decision, the Board concluded that “[t]he Board further f[ou]nd[] that at no time during the period at issue has the Veteran’s right knee or lumbar spine disability been shown to be so exceptional or unusual as to warrant the referral for consideration of any higher ratings on an extra-schedular basis. *See* 38 C.F.R. § 3.321(b)(1).” The Board also explicitly found that “his symptoms are all specifically contemplated by the criteria discussed above.” The Board also concluded “[t]hus, based on the record before it, the Board does not find that the medical evidence demonstrates any unusual disability with respect to the claims that is not contemplated by the rating schedule. The very symptoms the Veteran experiences are all addressed by the rating schedule. *Thun v. Peake*, 22 Vet. App. 111 (2008). As a result, the Board concludes that a remand for referral of the rating issues to the VA Central Office for consideration of extra-schedular evaluation is not warranted.” (R. 28). Of course, the Secretary does not dispute that the Board failed to state adequate reasons or bases for its decision at step one in view of the material evidence that is favorable to his claims.

The Secretary argues that *Brambley* is distinguishable because “[t]he Board therefore had no duty to, and did not, reach the issue of whether referral was warranted based on marked interference with employment, and any examination [upon remand] regarding whether Appellant’s service-connected disabilities preclude him from obtaining substantially gainful employment are irrelevant to the

extraschedular analysis. Therefore, the Board did not take a ‘divergent position’ with respect to the completeness of the record.” (SB, 11-12).

In its decision, the Board did address whether referral was appropriate based on marked interference with employment (“Here, there is an absence of evidence of frequent periods of hospitalization, or evidence that the Veteran’s right knee or lumbar spine disability, without consideration of other disabilities, has rendered impractical the application of the regular schedular standards.”) (R. 27-28). Of course, the Secretary does not dispute that the Board failed to state adequate reasons or bases for its decision on this issue in view of the material evidence that is favorable to his claims.

B. THE BOARD MISINTERPRETED THE LEGAL STANDARD CREATED IN *JOHNSON V. MCDONALD* AND APPLIED AN IMPROPER LEGAL STANDARD TO THE COMBINED EXTRASCHEDULAR EVALUATION ISSUE. THE BOARD FAILED TO STATE ADEQUATE REASONS OR BASES FOR ITS DENIAL OF EXTRASCHEDULAR CONSIDERATION FOR THE COMBINATION OF THE APPELLANT’S SERVICE CONNECTED DISABILITIES IN VIEW OF THE MATERIAL EVIDENCE WHICH WAS FAVORABLE TO HIS CLAIMS.

The Secretary disputes the Appellant’s argument that the Board misinterpreted the controlling legal standard in the Court’s decision in *Johnson v. McDonald*, 762 F.3d 1362 (Fed. Cir. 2014) (SB, 13). The Secretary argues that the Board’s finding of “no

additional symptoms related to the combination of the veteran's service-connected disabilities[]" was a correct statement of the law. On the contrary, the Court in *Johnson* did not address a veteran's "symptoms" at any point. The Court concluded, "The plain language of § 3.321(b)(1) provides for referral for extra-schedular consideration based on the collective impact of multiple disabilities." *Id.* at 1365. Symptoms¹, as used by the Board, refer to subjective manifestations of a disability or disease process experienced by the patient. On the other hand, the "collective impact", as used by the Federal Circuit, contemplates how the combination of service-connected disabilities actually affects the veteran's ability to perform work activity or cause marked interference with work activity. The Court emphasized its meaning when it concluded "...§ 3.321(b)(1) performs a gap-filling function. It accounts for situations in which a veteran's overall disability picture establishes something less than

¹ Symptom is any subjective evidence of disease or of a patient's condition, i.e., such evidence as perceived by the patient; a noticeable change in a patient's condition indicative of some bodily or mental state. *Dorland's Online Medical Dictionary*. Copyright 2013. Elsevier (USA). Web. 30 Nov 2017. www.dorlands.com.

Symptom is any subjective evidence of disease. In contrast, a sign is objective. Blood coming out a nostril is a sign; it is apparent to the patient, physician, and others. Anxiety, low back pain, and fatigue are all symptoms; only the patient can perceive them. © 1996-2017 MedicineNet, Inc. Web. 30 Nov 2017. <https://www.medicinenet.com/script/main/art.asp?articlekey=5610>.

Symptom is any morbid phenomenon or departure from the normal in structure, function, or sensation, experienced by the patient and indicative of disease. *Stedman's Medical Dictionary for the Health Professions and Nursing*. Illustrated Sixth Edition. 2008. Wolters Kluwer Health | Lippincott Williams & Wilkins. p. 1519.

total unemployability, but where the collective impact of a veteran's disabilities are nonetheless inadequately represented." *Id.* at 1366.

The Secretary does not seriously dispute that the Board failed to state adequate reasons or bases for its findings. The Secretary even argues that the Board "had no duty to discuss evidence regarding any effect his service-connected disabilities had on his employment[.]" because "the Board found the first step of *Thun* to be [not?] satisfied[.]" (SB, 14).

The Secretary's argument that the Appellant's arguments should be addressed to the VA because the Board remanded the TDIU claim ignores the importance of 38 C.F.R. § 3.321(b)(1) to a disabled veteran who cannot establish the higher standard of total disability (SB, 14).

Johnson required the Board to address the combination of the Appellant's service connected disabilities and determine the collective impact on his ability to work where the diagnostic codes are inadequate.

IV. CONCLUSION

The Appellant moves the Court to vacate the Board's May 2016 decision on these claims and to remand his claims to the Board for re-adjudication of his claims consistent with the above discussion.

This 30th day of November 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have electronically filed the foregoing Appellant's Reply Brief with the Clerk of the Court using the CM/ECF system which will send electronic notification of such filing to:

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This 30th day of November 2017.

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