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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 16-3467

THOMAS MAYLE, APPELLANT,

v.

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

Before SCHOELEN, *Judge*.

MEMORANDUM DECISION

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

SCHOELEN, *Judge*: The appellant, Thomas Mayle, through counsel, appeals a September 6, 2016, Board of Veterans' Appeals (Board) decision in which the Board denied an initial compensable disability rating and extraschedular referral for bilateral hearing loss. Record of Proceedings (R.) at 1-15. Additionally, the Court remanded the issue of an initial disability rating in excess of 20% for diabetes mellitus type II with diabetic nephropathy and erectile dysfunction. R. at 9-13. The remanded claims are not before the Court. *See Hampton v. Gober*, 10 Vet.App. 481, 483 (1997) (claims remanded by the Board cannot 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 lift the stay imposed on November 1, 2017, vacate the Board's decision, and remand the matter for proceedings consistent with this decision.

I. BACKGROUND

The appellant served in the U.S. Army from October 1961 to January 1984. R. at 1207-08, 1675, 1678. In September 2006, the appellant filed a disability compensation claim for, among

other things, bilateral hearing loss. R. at 3838-48. In July 2007, the regional office (RO) granted the appellant's claim and assigned a noncompensable rating. R. at 3663-78. The appellant disagreed with this decision and appealed to the Board. R. at 3133.

In March 2010, the appellant underwent a VA audiological examination where the appellant reported a "'plugged' sensation in both ears," as well as some initial nausea and dizziness. R. at 655. In December 2012, the Board remanded the appellant's hearing loss claim to the RO for additional audiological testing. R. at 3098-3104.

In January 2015, the appellant underwent another VA audiological examination where the audiologist noted the appellant's complaints of plugged ears, an itching sensation in his ears, and episodes of dizziness and staggering. R. at 205. The Board remanded the matter again in February 2016, and after further development, the Board issued the decision on appeal in September 2016. R. at 1-15, 1196-1200.

In the decision on appeal, the Board denied an initial compensable rating for the appellant's bilateral hearing loss and found that the appellant's hearing loss symptoms were adequately contemplated by the schedular rating. R. at 1-15. This appeal followed.

II. ANALYSIS

Generally, disability ratings for hearing loss are derived from the mechanical process of applying the rating schedule to the specific numeric scores assigned by audiology testing. *See Lendenmann v. Principi*, 3 Vet.App. 345, 349 (1992); 38 C.F.R. §§ 4.85, 4.86 (2017). In exceptional cases, VA has authorized the assignment of extraschedular ratings. 38 C.F.R. § 3.321(b)(1) (2017). "[W]hether a claimant is entitled to an extraschedular rating under § 3.321(b) is a three-step inquiry": If (1) the schedular evaluation does not contemplate the claimant's level of disability and symptomatology, and (2) the disability picture exhibits other related factors such as marked interference with employment or frequent periods of hospitalization, then (3) the case must be referred to an authorized official to determine whether, to accord justice, an extraschedular rating is warranted. *Thun v. Peake*, 22 Vet.App. 111, 115 (2008). The Court has held that "[u]nlike the rating schedule for hearing loss, § 3.321(b) does not rely exclusively on objective test results to determine whether a referral for an extraschedular rating is warranted," and therefore, "in addition to dictating objective test results, a VA audiologist must fully describe the

functional effects caused by a hearing disability in his or her final report." *Martinak v. Nicholson*, 21 Vet.App. 447, 455 (2007).

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. *Thun*, 22 Vet.App. at 115. In rendering its decision, the Board must provide a statement of the reasons or bases for its determination, adequate to enable an appellant to understand the precise basis for the Board's decision as well as to facilitate review in this Court. 38 U.S.C. § 7104(d)(1); see *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1990).

Here, the appellant argues that the Board provided an inadequate statement of reasons or bases as to why it denied extraschedular referral for hearing loss. Appellant's Brief (Br.) at 1. Specifically, the appellant contends that the Board failed to adequately explain how the symptoms of his hearing loss – namely, a plugged sensation in his ears, dizziness, and nausea – were contemplated by the rating schedule. *Id.* The Secretary responds that the Court should affirm the Board's decision because the Board provided an adequate statement of reasons or bases and there is no evidence in the record that the appellant's symptoms are related to his bilateral hearing loss. Secretary's Br. at 4-5.

In the decision on appeal, the Board stated:

The symptoms associated with the Veteran's bilateral hearing loss, i.e., difficulty hearing, especially when there is background noise, are contemplated by the rating criteria and the medical evidence fails to show anything unique or unusual about the Veteran's bilateral hearing loss that would render the schedular criteria inadequate. 38 C.F.R. § 3.321 (2015). The Veteran's main complaint is reduced hearing loss, which is precisely what is contemplated in the rating assigned.

R. at 9.

The Court agrees with the appellant that the Board's statement of reasons or bases is inadequate to facilitate judicial review. This Court's decision in *Doucette v. Shulkin* makes clear that "when a claimant's hearing loss results in an inability to hear or understand speech or to hear other sounds in various contexts, those effects are contemplated by the schedular rating criteria." 28 Vet.App. 366, 369 (2017). Examples of symptoms not contemplated by the schedular rating criteria include "dizziness, vertigo, [and] ear pain." *Id.* Here, although the Board discussed the appellant's difficulty hearing, it wholly failed to discuss his documented dizziness. See R. at

205-06, 655-56. Because *Doucette* explicitly lists "dizziness" as a symptom of hearing loss that is not contemplated by the schedular criteria, the Board's statement of reasons or bases is inadequate. Additionally, the Board did not discuss the appellant's other symptoms, such as his plugged ears and nausea, that are potentially not contemplated by the schedular rating criteria. Accordingly, the Court will vacate the Board's decision and remand the matter for the Board to provide an adequate statement of reasons and bases. *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 this disposition, the Court will not, at this time, address the other arguments and issues raised by the appellant. *See Best v. Principi*, 15 Vet.App. 18, 20 (2001) (per curiam order) (holding that "[a] narrow decision preserves for the appellant an opportunity to argue those claimed errors before the Board at the readjudication, and, of course, before this Court in an appeal, should the Board rule against him"). On remand, the appellant is free to submit additional evidence and argument on the remanded matters, 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 benefit sought); *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order). The Court has held 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). The Board must proceed expeditiously, in accordance with 38 U.S.C. § 7112 (requiring Secretary to provide for "expeditious treatment" of claims remanded by the Court).

III. CONCLUSION

The stay imposed by the Court on November 1, 2017, is LIFTED. After consideration of the appellant's and the Secretary's pleadings, and a review of the record, the Board's September 6, 2016, decision is VACATED and the matter is REMANDED for further proceedings consistent with this decision.

DATED: January 9, 2018

Copies to:

Zachary M. Stolz, Esq.

VA General Counsel (027)