

*Designated for electronic publication only*

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

No. 16-3795

GILBERT JOHNSON, APPELLANT,

v.

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

Before PIETSCH, *Judge*.

**MEMORANDUM DECISION**

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

PIETSCH, *Judge*: The appellant, Gilbert Johnson, appeals through counsel a September 28, 2016, Board of Veterans' Appeals (Board) decision in which the Board (1) denied him entitlement to a compensable disability rating for bilateral hearing loss for the period from December 18, 1989, until December 16, 2014, and a disability rating greater than 20% for the period beginning on December 16, 2014; (2) declined to refer his hearing loss claim to an appropriate agency official for extraschedular consideration; and (3) remanded two other issues for further development. Record (R.) at 2-19.

The issues remanded by the Board are not before the Court and the Court may not review them at this time. *See Breeden v. Principi*, 17 Vet.App. 475, 478 (2004); *see also Howard v. Gober*, 220 F.3d 1341, 1344 (Fed. Cir. 2000). The appellant does not challenge the Board's decision to deny him entitlement to increased schedular disability ratings for his hearing loss. That issue is therefore deemed to be abandoned on appeal. *See Ford v. Gober*, 10 Vet.App. 531, 535 (1997) (arguments not raised before the Court are considered abandoned on appeal). The Court will dismiss the appellant's appeal of the Board's disposition of that matter without reviewing the portion of the Board's decision addressing it. *See Cacciola v. Gibson*, 27 Vet.App. 45, 56-57 (2014).



This appeal is timely and the Court has jurisdiction over the matter on appeal pursuant to 38 U.S.C. §§ 7252(a) and 7266. Single-judge disposition is appropriate when the issues are of "relative simplicity" and "the outcome is not reasonably debatable." *Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the reasons that follow, the Court will vacate the Board's conclusion that the appellant's hearing loss claim should not be referred to an appropriate agency official for extraschedular consideration and it will remand that matter for further proceedings consistent with this decision.

## **I. BACKGROUND**

The appellant served on active duty in the U.S. Army from June 1964 until June 1967. R. at 1429. In December 1989, he filed a claim for entitlement to disability benefits for bilateral hearing loss. R. at 1618-21. In March 1990, the VA regional office (RO) denied his claim. R. at 1564-65.

After many years and additional development, the appellant's case reached the Board. In October 2008, the Board granted him entitlement to disability benefits for bilateral hearing loss. R. at 1026-38. In November 2008, the RO implemented the Board's decision but declined to assign his disorder a compensable disability rating. R. at 1012-13.

The appellant challenged the RO's rating determination. In January 2015, the RO increased the disability rating assigned to his disorder to 20% effective December 16, 2014. R. at 158-65. In February 2015, he again appealed to the Board. R. at 129-30. On September 28, 2016, the Board issued the decision presently under review. R. at 2-19.

## **II. ANALYSIS**

The appellant has experienced dizziness, headaches, nausea, and other similar symptoms. He argues that these symptoms are related to his hearing loss and that they are not contemplated by the schedular rating criteria. The Board did not discuss them in the decision presently on appeal. The question is whether it was legally required to do so.

The record contains a piece of evidence that suggests that the appellant's symptoms and his hearing loss may be related. In September 2006, a VA medical examiner, reviewing the appellant's case to determine whether he was suffering from the residual effects of an in-service "closed head injury," opined that the appellant experienced post-traumatic headaches that "resolved." R. at



1282-83. The examiner, however, also noted in the "impression" portion of his opinion that the appellant had "possible post-traumatic vestibulopathy causing intermittent dizziness and cochlear damage? Resulting tinnitus and decreased hearing (however referral to ENT/audiology for full evaluation)." R. at 1283. The examiner further explained that the appellant's "symptoms of tinnitus, reduced hearing and intermittent dizziness . . . are suggestive of (because of their temporal relation to the previous concussion) vestibular and cochlear damage secondary to acoustic trauma." R. at 1283. The examiner noted that "dizziness with vertiginous sensations/vertigo, decreased hearing and tinnitus" are all "significant symptoms of vestibulopathy." R. at 1283.

There is no indication that VA accepted the examiner's recommendation and investigated the connection between the appellant's dizziness and hearing loss. The examiner's opinion indicates that dizziness and related symptoms may be part of the same etiological process that caused the appellant's hearing loss to develop. Remand is warranted, therefore, for the Board to consider whether the appellant's additional symptoms are unusual manifestations of his hearing loss disorder.<sup>1</sup> See *Doucette v. Shulkin*, 28 Vet.App. 366, 372 (2017) ("[A] hearing loss claimant could provide evidence of numerous symptoms, including . . . ear pain, dizziness, [and] recurrent loss of balance, . . . and the Board would be required to explain whether the rating criteria contemplate those functional effects").

There is an additional matter that the Board should attend to on remand. The appellant asserted before VA that he suffers from an auditory processing disorder. R. at 35-38. The Board concluded that his argument constituted an improperly filed informal claim for entitlement to disability benefits and declined to consider his contentions. The appellant, however, explicitly linked his assertions about an auditory processing disorder to his service-connected hearing loss. He argued that an auditory processing disorder causes him to hear "better in the sound booth" during audiometric testing than "when I step out [into] the world." R. at 35. Consequently, he seemed to assert, in his case, audiometric testing does not provide a reliable estimation of the effects of his hearing loss and, as a result, the rating criteria do not adequately compensate him for

---

<sup>1</sup> The Board should take an expansive view of the record and try to determine the exact nature of the disease process at work within the appellant's head and inner ear. Its analysis may suggest that the appellant has raised a claim for entitlement to disability benefits for his additional symptoms that has not been adjudicated. See *Robinson v. Peake*, 21 Vet.App. 545, 552 (2008); *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 1999). It also may reveal that his bilateral hearing loss is in fact only a symptom of a more significant ear disease. See *Clemons v. Shinseki*, 23 Vet.App. 1, 5 (2009).



the actual reduction in occupational efficiency that he has suffered. The Board should review this matter on remand and determine whether the appellant has raised an additional theory of entitlement to referral of his claim to an appropriate agency official for extraschedular consideration. *See Robinson*, 21 Vet.App. at 552.

The Court need not at this time address any other arguments that the appellant has raised. *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 [or her]"). On remand, the appellant is free to submit additional evidence and argument on the remanded matter, and the Board is required to consider any such relevant evidence and argument. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002); *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 the Secretary to provide for "expeditious treatment" of claims remanded by the Court).

### **III. CONCLUSION**

After consideration of the appellant's and the Secretary's briefs and a review of the record, the portion of the Board's September 28, 2016, decision declining to forward the appellant's hearing loss claim to an appropriate agency official for extraschedular consideration is VACATED and that matter is REMANDED for further proceedings consistent with this decision. The appellant's appeal of the portion of the Board's decision denying him entitlement to a compensable schedular disability rating prior to December 16, 2014, and a schedular disability rating greater than 20% after that date for bilateral hearing loss is DISMISSED.

DATED: January 23, 2018

Copies to:

Zachary M. Stolz, Esq.

VA General Counsel (027)