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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 16-3697

HERBERT W. BROWN, APPELLANT,

V.

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

Before TOTH, *Judge*.

MEMORANDUM DECISION

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

TOTH, *Judge*: Herbert W. Brown challenges a September 29, 2016, Board decision denying entitlement to a disability rating above 30 percent for bilateral hammer toes. He believes that the Board should have assigned a separate rating for arthritis and also remanded his increased rating claim for extraschedular consideration. The Court will vacate the Board decision and remand the matter for readjudication consistent with this decision.

I. FACTS

Mr. Brown served in the Army from 1967 to 1968. In 1969, the VA regional office (RO) assigned a 10% rating for bilateral hammer toes/pes cavus under 38 C.F.R. § 4.71a, Diagnostic Code (DC) 5278, and in 1976 increased it to his current rating of 30%.[1] In 2009, Mr. Brown filed a claim for an increased rating. Records showed that there was x-ray evidence of osteoarthritic changes in several toe joints and that Mr. Brown complained of severe foot pain and difficulty walking. R. at 9-10.

[1] Although the Board rated him under DC 5278, which is for "pes cavus," the Board called his rating a "hammertoes" rating, which is DC 5282. R. at 7. The Board found that the veteran's disability level and symptoms could not be compensated under DC 5282, so instead rated him under DC 5278. *Id.* For the sake of clarity and consistency, the Court will refer to the veteran's DC 5278 rating as the "hammertoes rating."

In the decision on appeal, the Board reviewed the history of Mr. Brown's claims concerning his foot condition, summarized the relevant diagnostic codes, and analyzed his service-connected disabilities in light of the applicable codes. 38 C.F.R. §§ 4.40, 4.45, and 4.71a, DCs 5003, 5278, 5282 (2017). It determined that the assigned 30% hammertoes rating contemplated the veteran's disability level and symptoms. R. at 10-11. For this reason, the Board did not refer the claim for extraschedular consideration. It also denied a separate rating for arthritis under DC 5003 because arthritis is rated on the basis of limitation of movement, and the veteran's hammertoes rating contemplated such limitation. R. at 12. The Board explained that a separate rating for arthritis would result in duplicate compensation, otherwise known as "pyramiding" (discussed below). However, it did remand the claim for referral regarding the issue of an extraschedular total disability rating based on individual unemployability consideration, directing the RO to "undertake any development" necessary to adjudicate the matter. R. at 16. Mr. Brown appeals from this decision.[2]

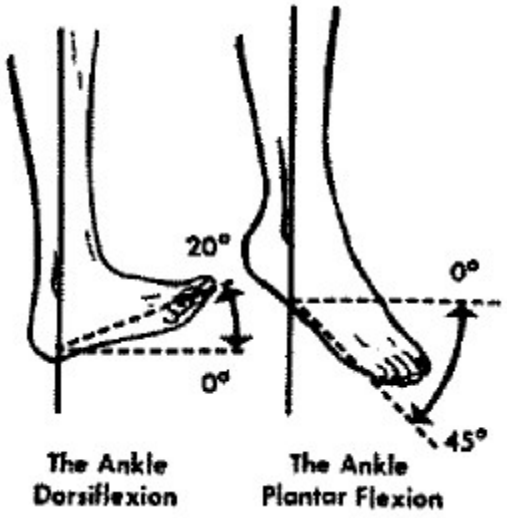
II. ANALYSIS

Mr. Brown first argues that the Board should have assigned a separate rating for arthritis under DC 5003 because his hammertoes rating does not contemplate or compensate limitation of motion. When evaluating disabilities, including musculoskeletal disabilities, the Board's aim is to compensate, but not overcompensate, a claimant for the actual level of his impairment. *See Amberman v. Shinseki*, 570 F.3d 1377, 1380 (Fed. Cir. 2009). To that end, VA regulation forbids compensation for the same manifestation of disability under different diagnoses, which is known as duplicate compensation or "pyramiding." 38 C.F.R. § 4.14 (2017). However, when a certain manifestation of a disability (such as limitation of motion) has not been compensated under an assigned rating under a particular DC (such as hammertoes), rating of that manifestation under a different DC (such as arthritis) would not constitute pyramiding. A manifestation of disability has not been compensated by an assigned rating if the manifestation is "distinct and separate" from the manifestations that form the basis of the assigned rating. *Murray v. Shinseki*, 24 Vet.App. 420, 423 (2011) (explaining that separate knee ratings may be warranted where symptoms are distinct and separate). DC 5003 expressly contemplates "limitation of motion," while DC 5278 expressly

[2] Since the Board remanded the issue of entitlement to extraschedular TDIU, the Court cannot review this issue. *See Sharp v. Shulkin*, 29 Vet.App. 26, 29 n.1 (2017).

contemplates "all toes tending to dorsiflexion, limitation of dorsiflexion at ankle to right angle, shortened plantar fascia, and marked tenderness under metatarsal heads." 38 C.F.R. § 4.71a, DCs 5003, 5278.

So, the question is whether Mr. Brown's hammertoes rating compensates him for limitation of motion of the toes. He argues that "toes tending to dorsiflexion" does not contemplate limitation of motion. The Secretary responds that dorsiflexion necessarily implicates limitation of motion and that a separate rating for arthritis would result in double compensation. The Court agrees with the Secretary. Dorsiflexion is an anatomical term used to describe joint motion.[3] The VA regulation titled "Measurement of ankylosis and joint motion" clearly shows that dorsiflexion, and flexion generally, describe joint motion:



38 C.F.R. § 4.71, Plate II (2017). Thus, "toes tending to dorsiflexion" are toes tending to be stuck in a dorsiflexed position. In other words, dorsiflexion stymies toe-joint motion. Thus, the veteran's hammertoes rating compensates him for limitation of motion of the toes. To grant a separate arthritis rating would result in duplicate compensation for limitation of motion. The Board, therefore, properly declined to grant a separate arthritis rating on this basis.

Mr. Brown also argues that he warrants a separate arthritis rating because there is x-ray evidence of two or more minor joint groups affected by limitation of motion. *See* 38 C.F.R. § 4.71a, DC 5003. Under certain circumstances, such evidence can provide the basis

[3] Flexion is defined as "that *motion* which bends the parts involved in the *movement* of any jointed part of the body," and dorsiflexion as "the *movement* which straightens the normally curved-downward toes." *Flexion* and *Dorsiflexion*, ATTORNEY'S DICTIONARY OF MEDICINE AND WORD FINDER D-197, F-113 (3d ed. 1962) (emphases added).

for an arthritis rating. However, such circumstances were not present here. DC 5003 is composed of three parts, each of which addresses how to rate arthritic pain in the following situations: (1) when it causes limitation of motion that is *compensable* under a DC that rates according to limitation of motion, (2) when it causes limitation of motion that is *noncompensable*, and (3) when it does not cause limitation of motion. *Mitchell v. Shinseki*, 25 Vet.App. 32, 39 (2011). Under the second or third part, DC 5003 directs the Board to grant a 10 or 20% arthritis rating when there is certain evidence of minor joint groups affected by limitation of motion, but it forbids the Board from combining this rating with other ratings based on limitation of motion. *Id.* ("a noncompensable disability is a prerequisite for compensation under the second or third parts of DC 5003"); 38 C.F.R. § 4.71, DC 5003, Note (1) (10 and 20% ratings "will not be combined with ratings based on limitation of motion.").

Mr. Brown's hammertoes rating compensates limitation of motion. The Board, therefore, correctly rated him under the first part of DC 5003. Consequently, the Board had no reason to discuss the alternative parts under which arthritic pain is rated. Furthermore, the regulation proscribes combining an arthritis rating with other ratings based on limitation of motion, such as the veteran's hammertoes rating. 38 C.F.R. § 4.71a, 5003, Note (1). Under these circumstances, the Board cannot rate Mr. Brown under both DCs 5278 and 5003.

Next, Mr. Brown argues that the Board failed to provide an adequate statement of reasons or bases for its decision not to refer his increased rating claim for extraschedular consideration. He contends that the Board's remand instructions, directing the RO to further develop the issue of extraschedular TDIU, could lead to the discovery of new evidence that might significantly impact the issue of extraschedular consideration for his hammertoes disability. For this reason, Mr. Brown believes that the Board should also have remanded the issue of extraschedular consideration. The Court agrees.

The determination whether a claim should be referred for extraschedular consideration is a three-step inquiry. *Thun v. Peake*, 22 Vet.App. 111, 115 (2008). The only relevant step in this case is the first: whether the evidence presents such an exceptional disability picture that the available schedular ratings for that disability are inadequate. *Id.* If not, then extraschedular consideration is unnecessary. *Id.* In cases where the Board does not refer a claim for extraschedular consideration, the Board must provide an adequate statement of reasons or bases for that decision. *Brambley v. Principi*, 17 Vet.App. 20, 23 (2003). Ordinarily, the Court reviews the Board's

statement of reasons or bases regarding an issue when it is challenged, but, under some circumstances and in the interest of judicial economy, the Court may instead remand the issue on appeal (here, extraschedular consideration for hammertoes) if it could be significantly impacted by another issue that was remanded (here, extraschedular TDIU) by the Board for further development. *See id.* Such circumstances exist here.

The Board determined that the Mr. Brown's assigned rating captured his disability level and symptoms and so did not remand the issue of extraschedular consideration for referral. But in its remand instructions for the extraschedular TDIU issue, the Board instructed the RO to collect "any pertinent private medical records," "any additional VA treatment records," and any other evidence "deemed warranted" to adjudicate the issue. R. at 16-19. These instructions were not limited to gathering evidence specific to a TDIU determination, but also evidence describing Mr. Brown's overall medical condition caused by his foot disability. Consequently, the Board's conclusions regarding the sufficiency of the record as to extraschedular consideration for hammertoes might well be called into question by evidence developed on remand with respect to TDIU. The Court, therefore, concludes that these instructions were open-ended enough to allow for the discovery of evidence that could significantly impact the issue of extraschedular consideration for hammertoes. *See Todd v. McDonald*, 27 Vet.App. 79, 90 (2014). On remand, the Board should address the issue of extraschedular consideration after any newly gathered evidence pertaining to his disability is associated with the claims file. *Id.*

Since remand is warranted, the Board will not address Mr. Brown's other arguments regarding extraschedular consideration. The Board should address the veteran's other arguments in its next decision if necessary. *See Best v. Principi*, 15 Vet.App. 18, 20 (2001) (remand requires the Board to adjudicate the case anew, so the veteran can reassert the errors of a former adjudication in the context of the new adjudication).

III. CONCLUSION

Accordingly, the Court vacates the September 29, 2016, Board decision and remands the matter for readjudication consistent with this decision.

DATED: February 21, 2018

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