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

**CURTIS J. WASHINGTON**,

Appellant,

v.

**ROBERT L. WILKIE,**
Acting Secretary of Veterans Affairs,

Appellee.

**Vet. App. No. 16-3193**

# APPELLANT'S MOTION FOR RECONSIDERATION/ PANEL REVIEW OF COURT'S MARCH 14, 2018 ORDER

Pursuant to U.S. Vet. App. Rules 35(a) and (b), the Appellant, Curtis J. Washington, files this motion for reconsideration of this Court's March 14, 2018 Order which affirmed the May 19, 2016 Board of Veterans' Appeals (hereinafter, "Board") decision. Alternatively, the Appellant moves the Court for panel review of the Court's decision.

It is respectfully submitted that in its March 14, 2018 decision, this Court erred by applying its erroneous interpretations of the statutory and regulatory provisions pertaining to the Appellant's ability to prove his claims for an increased evaluation for his service connected back and knee disabilities on an extraschedular basis under 38 C.F.R. § 3.321(b)(1) and by ignoring that the Board had failed to state

adequate reasons or bases for its findings and conclusions in view of the Appellant's material evidence favorable to his claims in the record.

## ARGUMENT

### A. THE COURT'S ERROREOUS INTERPRETATIONS OF 38 C.F.R. § 3.321(b)(1).

This Court's March 2018 decision provided in relevant part as follows:

> The appellant has failed to persuade the Court that the Board committed prejudicial error in failing to address the appellant's psychiatric symptoms, secondary to his service-connected disabilities. *See Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (finding that the appellant bears the burden of persuasion on appeals to this Court), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000); *see also* R. at 27–28. If the appellant's psychiatric disorder is found to be "related to or caused by" service-connected disabilities, regulation dictates that the proper treatment of the psychiatric disorder is as a distinct service-connected disability. Appellant's Brief at 16; 38 C.F.R. § 3.310(a) (2017) ("Except as provided in § 3.300(c), disability which is proximately due to or the result of a service-connected disease or injury shall be service connected."). The appellant has already claimed service connection for depression or a mood disorder, and the Board has remanded the matter for a new examination to determine whether "any diagnosed acquired psychiatric disorder has been caused or made chronically worse by [the appellant's] service-connected disabilities." R. at 2656, 37–38. Therefore, the symptomology of the appellant's psychiatric disorder is to be considered as its own claim, and the Board did not have to consider that symptomology as part of its extraschedular analysis as to the appellant's back and knee disabilities. *See Thun*, 22 Vet.App. at 115 ("[T]here must be a comparison between the level of severity and symptomatology of the claimant's *service-*

> *connected disability* with the established criteria found in the rating schedule for *that disability*." (emphasis added)).

(Court Decision, p. 4).

The Court recognized that the medical and lay evidence proved that the Appellant's service connected back and knee disabilities potentially caused his psychiatric symptomology (Decision, pp. 3-4). It is also undisputed that none of the relevant DCs for back and knee disabilities address psychiatric symptomology, headaches, and total disability (Appellant's brief, p. 20).

In its March 2018 decision, the Court recognized that the Board "fail[ed] to address the appellant's psychiatric symptoms, secondary to his service-connected disabilities" in performing its required extraschedular analysis of the evidence under 38 C.F.R. § 3.321(b)(1), but erroneously concluded that the Board's failure was harmless error because the Court, like the Board, misinterpreted the controlling legal standards and applied improper legal standards.

The Court misinterpreted the correct legal standards in concluding that once the Board had remanded the Appellant's claim for secondary service connection for his depression related to his service-connected back and knee disabilities to the VA Regional Office, then the Board was not required to consider psychiatric symptoms in its extraschedular evaluation of his back and knee disabilities claims under section 3.321(b)(1). The Court stated, "Therefore, **the symptomology of the appellant's psychiatric disorder is to be considered as its own claim**, and **the Board did**

**not have to consider that symptomology as part of its extraschedular analysis** as to the appellant's back and knee disabilities." (emphasis added) (Decision, p. 4).

The Court cited *Thun v. Peake*, 22 Vet. App. 111, 115 (2008), *aff'd sub nom Thun v. Shinseki*, 572 F.3d 1366 (Fed. Cir. 2009) as authority for this legal standard, but *Thun* does not support the conclusion that the Board or the VA can ignore any symptomology that the Appellant is caused by his service connected back and knees. The first step of *Thun's* analysis requires that:

> Therefore, initially, there must be a comparison between the level of severity and symptomatology of the claimant's service-connected disability with the established criteria found in the rating schedule for that disability. Under the approach prescribed by VA, if the criteria reasonably describe the claimant's disability level and symptomatology, then the claimant's disability picture is contemplated by the rating schedule, the assigned schedular evaluation is, therefore, adequate, and no referral is required. *See* VA Gen. Coun. Prec. 6-1996 (Aug. 16, 1996) [hereinafter G.C. Prec. 6-96], para. 7 (when service-connected disability affects employment "in ways not contemplated by the rating schedule" § 3.321(b)(1) is applicable).

22 Vet. App. at 115.

Here, the Court explicitly recognized that the Board had not consider the Appellant's psychiatric symptomology caused by his service connected back and knee disabilities in its extraschedular rating analysis and that its failure to consider his psychiatric symptomology was not "prejudicial error" because it was not required to consider it. The Court's improper legal standard is contrary to *Thun v. Peake, supra.* In order to perform its duty under Section 3.321(b)(1), *Thun* requires

that the Board to compare **all** of the symptomology caused by a veteran's service connected disability with the diagnostic codes for that disability and determine whether the evidence before VA presents such an exceptional disability picture that the available schedular evaluations for that service-connected disability are inadequate, a task performed either by the RO or the Board (if an appeal is filed). *See Fisher v. Principi*, 4 Vet. App. 57, 60 (1993) ("[R]ating schedule will apply unless there are 'exceptional or unusual' factors which render application of the schedule impractical."); 38 C.F.R. § 3.321(b)(1).

The Board may determine, in the first instance, that a veteran has not presented evidence warranting referral for extraschedular consideration, provided that it articulates the reasons or bases for that determination. *See* 38 U.S.C. § 7104(d)(1); *Colayong v. West*, 12 Vet. App. 524, 536-37 (1999); *Bagwell v. Brown*, 9 Vet. App. 337, 339 (1996). As with all Board decisions, the Board's decision on referral for an extraschedular rating must be "adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court." *Allday v. Brown*, 7 Vet. App. 517, 527 (1995). The Board's assignment of a degree of disability under the rating code and its determination of whether an extraschedular rating is appropriate are factual determinations that the Court reviews under the "clearly erroneous" standard of review set forth in 38 U.S.C. § 7261(a)(4).

*See Johnston v. Brown*, 10 Vet. App. 80, 84 (1997); *Cromley v. Brown*, 7 Vet. App. 376, 378 (1995); *Gilbert v. Derwinski*, 1 Vet. App. 49, 53 (1990).

Here the Board did not support its findings and conclusions with adequate reasons or bases, and the Court did not address its failure to do so, implicitly affirming its failure. The Court's recognition that the Board did not address the symptoms of depression and headaches in performing its required extraschedular analysis of the evidence under 38 C.F.R. § 3.321(b)(1) of the Appellant's claims for increased ratings for his service connected back and knee disabilities demonstrates that the Board did not address the psychiatric evidence and could not have performed its required duty under step one of *Thun v. Peake,* 22 Vet. App. at 115.

The Court does not dispute the Appellant's arguments that the evidence proved that his service connected back and knee disabilities caused him depression and psychiatric symptoms. The Court recognized that the medical and lay evidence proved that the Appellant's service connected back and knee disabilities caused his psychiatric symptomology (Decision, pp. 3-4). Instead, the Court misinterprets the correct legal standards and creates a new improper legal standard. The Court stated that "[i]f the appellant's psychiatric disorder is found [on remand] to be 'related to or caused by' service-connected disabilities, regulation dictates that the proper treatment of the psychiatric disorder is as a distinct service-connected disability." The Court misinterpreted 38 C.F.R. § 3.321(b)(1) in concluding that the mere potential of entitlement to secondary service connection for psychiatric

symptomology not listed in a DC for the Appellant's service connected back and knee disabilities obviates the Board's duty to consider entitlement to an extraschedular rating where the psychiatric symptomology would otherwise require the Board's extraschedular evaluation.

The Court's new legal standard is contrary to the courts' recognition that the existence of a separate claim or a potential total disability rating based on unemployability (TDIU) does not extinguish the veteran's claim for an extraschedular rating under 38 C.F.R. § 3.321(b)(1). In *Johnson v. McDonald*, the Federal Circuit recognized that there are different legal standards for a TDIU claim and an extraschedular claim under section 3.321(b)(1). The Court stated, "the TDIU provision only accounts for instances in which a veteran's combined disabilities establish total unemployability, i.e., a disability rating of 100 percent. [ ] On the other hand, § 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 total unemployability, but where the collective impact of a veteran's disabilities are nonetheless inadequately represented. Our plain-language interpretation of § 3.321(b)(1) does not render it duplicative of the TDIU provision of § 4.16." 762 F.3d 1362, 1366 (Fed. Cir. 2014).

## B. THE COURT'S ERROREOUS INTERPRETATIONS OF *JOHNSON V. MCDONALD*.

The Court affirmed the Board's clearly erroneous finding that "extraschedular consideration was not appropriate under a collective-impact analysis because all the appellant's service-connected symptoms have been addressed by the rating schedule. R. at 28[. ] Finally, the Board noted that the matter of entitlement to TDIU, based in part on the combined effects of the knee and spine disabilities, had been remanded by the decision. R. at 28." (Decision, p. 3-4).

The Court ignored that the Board's first finding above that "extraschedular consideration was not appropriate under a collective-impact analysis because all the appellant's service-connected symptoms have been addressed by the rating schedule" is also contradicted by the Board's explicit findings in its remand section that recognized that the Appellant's psychiatric symptomology was related to his service connected disabilities (R. 31-36). The Board referred to the "psychiatric evaluation in December 2004[, when] he was assessed with a 'history of depression secondary to pain.' Similarly, at a September 2005 psychiatric evaluation, the Veteran was diagnosed with major depression 'secondary to chronic pain.' … He has also submitted medical journal articles discussing a link between depression and physical disability and has claimed that his psychiatric problems have been caused or worsened by his service-connected disabilities." (R. 32). The Board also stated that

in his January 2016 evaluation, "[t]he physician diagnosed the Veteran … with depression 'secondary to chronic pain' due to [his] service-connected disabilities." (R. 33). The Board further recognized that "[i]n the February 2016 vocational evaluation, a private vocational expert opined that the Veteran is unable to work due both to his service-connected physical disabilities and to his psychiatric disorder, which the evaluator linked to the service-connected disabilities." (*Id.*).

The Court affirmed the Board's failure to remand for extraschedular consideration despite these contradictory findings made by the Board (Decision, p. 4). The Court failed to provide any reasoning or rationale for affirming the Board's findings other than its misinterpretations of law that the procedure under 38 C.F.R. § 3.310(a)(2017) "dictates that the proper treatment of the psychiatric disorder is as a distinct service-connected disability." (Decision, p. 4). The Court established an exclusive procedure entitling the Appellant to no more than potential secondary service connection. The Court, like the Board, misinterpreted *Johnson* when it concluded that "the symptomology of the appellant's psychiatric disorder is to be considered as its own claim, and the Board did not have to consider that symptomology as part of its extraschedular analysis as to the appellant's back and knee disabilities." (*Id.*). The Board's remand of the Appellant's TDIU claim for consideration of his psychiatric symptomology is "based at least in part on the combined effects of his right knee and spine disabilities", according to the Board, does not satisfy the legal obligation of the Board to separately conduct the required

extraschedular rating analysis under section 3.321(b)(1). *See Johnson v. McDonald, supra*, at 1365-366.

## CONCLUSION

Therefore, the Appellant respectfully moves the Court to reconsider its March 14, 2018 Order and to reverse the Board's May 2016 decision based upon the above discussion and to remand these claims to the Board so that it can make the required initial findings of fact under 38 C.F.R. § 3.321(b)(1). Alternatively, the Appellant moves the Court to review the Court's March 14, 2018 decision by panel review.

This 4th day of April 2018.

Respectfully submitted,

/s/John F. Cameron
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## CERTIFICATE OF SERVICE

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

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On this the 4th day of April 2018.

/s/ John F. Cameron
JOHN F. CAMERON