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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 17-4578

STEVEN E. TOTH, APPELLANT,

v.

ROBERT L. WILKIE,
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*: U.S. Army veteran Steven E. Toth, appeals, through counsel, a November 2, 2017, Board of Veterans' Appeals (Board) decision that denied a disability rating higher than 20% for radiculopathy of the left lower extremity before August 13, 2014, and 60% thereafter, and denied a disability rating higher than 10% for radiculopathy of the right lower extremity before May 31, 2016, and assigned a 20% disability rating thereafter.¹ Single-judge disposition is appropriate because the issue is of "relative simplicity" and "the outcome is not reasonably debatable." *Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the reasons set forth below, the Court will vacate the November 2017 decision and will remand the matter for further proceedings consistent with this decision.

¹ The Board remanded Mr. Toth's claim for entitlement to service connection for cysts of the mouth. As the remanded claim is not a final Board decision, the Court is without jurisdiction to address this matter. *See Breeden v. Principi*, 17 Vet.App. 475, 478 (2004) (holding that a Board remand "does not represent a final decision over which this Court has jurisdiction"). Also, as Mr. Toth presents no arguments challenging the 60% disability rating for radiculopathy of the left lower extremity from August 13, 2014, or for the disability ratings assigned for radiculopathy of the right extremity, the Court deems the appeal of these matters abandoned and will not address them further. *See Pederson v. McDonald*, 27 Vet.App. 276, 283 (2015) (en banc) (holding that, where an appellant abandons an issue or claim, the Court will not address it); *Grivois v. Brown*, 6 Vet.App. 136, 138 (1994) (holding that issues or claims not argued on appeal are considered abandoned).

I. BACKGROUND

Mr. Toth served on active duty from August 1967 to August 1969, including service in the Republic of Vietnam. Several months after discharge, he filed a claim for benefits for a back condition. VA granted service connection for chronic lumbosacral strain and assigned a 10% disability rating under 38 C.F.R. § 4.71a, Diagnostic Code (DC) 5295 (Lumbosacral strain) (1970), effective August 1969. *See* Record (R.) at 9793. In November 2007, Mr. Toth was diagnosed with radiculopathy of the left lower extremity. In July 2011, VA granted service connection for radiculopathy and assigned a 10% disability rating due to mild incomplete paralysis under 38 C.F.R. § 4.124a, Diagnostic Code (DC) 8520 (Paralysis of the sciatic nerve) (2018). *See* R. at 6474. In June 2016, VA continued the 10% disability rating for his left lower extremity effective November 2007, but increased his disability rating to 60% from May 31, 2016. *See* R. at 3211. After several appeals and Board remands for additional development, the Board issued a November 2, 2017, decision that awarded a 20% disability rating for "moderate" incomplete paralysis of the sciatic nerve in the lower left extremity before August 13, 2014, and a 60% disability rating for "severe" incomplete paralysis thereafter. The Board also denied additional special monthly compensation (SMC) for loss of use of his left foot. On appeal before the Court is the Board's November 2017 decision.

II. ANALYSIS

Board disability rating determinations are findings of fact subject to the "clearly erroneous" standard of review. *See Smallwood v. Brown*, 10 Vet.App. 93, 97 (1997). "A factual finding 'is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Hersey v. Derwinski*, 2 Vet.App. 91, 94 (1992) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

When making factual determinations, the Board is required to provide a written statement of the reasons or bases for its findings and conclusions 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); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Gilbert v. Derwinski*, 1 Vet.App. 49, 56–57 (1990). To comply with this requirement, the Board must analyze the credibility and probative value of the evidence, account for the evidence that it finds persuasive or

unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the claimant. *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table); *Gilbert*, 1 Vet.App. at 57.

SMC may be awarded when a veteran loses the use of a foot. 38 U.S.C. § 1114(k). VA's regulation defines the loss of use of a foot "when no effective function remains other than that which would be equally well served by an amputation stump at the site of election below . . . [the] knee with use of a suitable prosthetic appliance." 38 C.F.R. 3.350(a)(2) (2018).

The Board assigned disability ratings to compensate Mr. Toth for radiculopathy of the left lower extremity by applying the rating criteria found in DC 8520 for the impairment of the sciatic nerve. That provision instructs VA adjudicators to assign a disability rating for incomplete paralysis of the sciatic nerve by generalizing the level of severity of the symptoms resulting from that disorder. A 10% disability rating is appropriate for "[m]ild" symptoms; a 20% disability rating is appropriate for "[m]oderate" symptoms; a 40% disability rating is appropriate for "[m]oderately severe" symptoms; and a 60% disability rating is appropriate when a veteran has "[s]evere [symptoms], with marked muscular atrophy." 38 C.F.R. § 4.124a, DC 8520. Peripheral neuritis² characterized by organic changes, such as "loss of reflexes, muscle atrophy, sensory disturbances, and constant pain, at times excruciating, is to be rated on the scale provided for injury of the nerve involved," with the maximum rating as severe, incomplete paralysis. 38 C.F.R. § 4.123 (2018). Moreover, "[i]n rating peripheral nerve injuries and their residuals, attention should be given to the site and character of the injury, the relative impairment in motor function, trophic changes, or sensory disturbances." 38 C.F.R. § 4.120 (2018).

A. Scheduling Rating

Mr. Toth argues that the Board failed to explain why his left lower extremity was characterized as "moderate," warranting a 20% disability rating, rather than "moderately severe," warranting a 40% rating. Appellant's Brief (Br.) at 10-12. He asserts that the Board did not provide adequate reasons or bases for awarding a disability rating no higher than 20% before August 13, 2014.

² "Peripheral neuritis" is "the inflammation of one or more of the peripheral nerves, with pain, tenderness, anesthesia and paresthesias, paralysis, wasting, and disappearance of the reflexes." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY, 1263 (32d ed. 2012) [DORLAND'S].

After reviewing the medical evidence from 2007 to 2017, the Board concluded that before August 13, 2014, Mr. Toth's radiculopathy of the left lower extremity rated no higher than a moderate 20% rating under DC 8520. The Board noted that Mr. Toth experienced sensory disturbances, such as moderate constant pain, severe numbness, tingling, weakness, moderate paresthesias³ and dysesthesias,⁴ as well as slight nonsensory changes as evidenced by motor and reflex testing. Noting that the presence of nonsensory changes did not, in and of itself, equate to a moderate evaluation, the Board found that Mr. Toth's reported falls and his reliance on a cane or walker supported a 20% disability rating. *See Miller v. Shinseki*, 28 Vet.App. 376, 380 (2017) (holding that the plain language of the note preceding § 4.124a provides a maximum rating for wholly sensory manifestations of incomplete paralysis of a peripheral nerve, and the presence of nonsensory manifestations does not necessarily equate to a rating higher than moderate (20%)). However, the Board's statement that a higher, "moderately severe," 40% disability rating was not warranted is inadequate.

In denying a 40% disability rating, the Board tersely concluded that Mr. Toth's radiculopathy did not result "in some of the more severe organic changes such as muscle atrophy and excruciating pain." R. at 11. DC 8520, however, does not list muscle atrophy or excruciating pain as symptoms of a "moderately severe," 40% disability rating; rather, DC 8520 lists marked muscle atrophy as a factor in the "severe" level that warrants a 60% disability rating. Muscle atrophy and constant pain (at times excruciating) are mentioned in rating peripheral neuritis. Peripheral neuritis "characterized by loss of reflexes, muscle atrophy, sensory disturbances, and constant pain, at times excruciating, is rated on the scale provided for injury of the nerve involved with a maximum [rating] equal to severe, incomplete paralysis." 38 C.F.R. § 4.123. The maximum rating for peripheral neuritis, with sciatic nerve involvement, is a "moderately severe" rating when the neuritis *is not* characterized by organic changes such as muscle atrophy and constant pain, at times excruciating. *See Id.* Therefore, the Board's explanation for denying a "moderately severe," 40% disability rating – because Mr. Toth had no severe organic changes, such as muscle atrophy and excruciating pain – is not understandable and frustrates judicial review. *See Allday*, 7 Vet. App. at 527.

³ "Paresthesias" is "an abnormal touch sensation, such as burning [or] prickling . . . often in the absence of an external stimulus." DORLAND'S at 1383.

⁴ "Dysesthesias" is "an unpleasant abnormal sensation produced by normal stimuli." *Id.* at 577.

Further, although the Board is not bound by VA's *Adjudications Procedures Manual* (M21-1), see *Gray v. Shinseki*, 875 F.3d 1102, 1108 (Fed. Cir. 2017), where there are relevant M21-1 provisions, the Board must address them, see *Overton v. Wilkie*, 30 Vet.App. 257, 264 (2018). The M21-1 contains general guidelines for distinguishing between "mild," "moderate," "moderately severe," and "severe," levels of incomplete paralysis of the lower peripheral nerves, and the level of incomplete paralysis of the lower extremities is the precise question presented by Mr. Toth's appeal. Because there are M21-1 provisions that describe conditions that support each specific level of incomplete paralysis, the Board's discussion of these provisions is part of its duty to provide an adequate statement of reasons or bases. The Board's failure to discuss relevant M21-1 provisions, or otherwise explain its denial of a moderately severe, 40% disability rating before August 13, 2014, renders its statement of reasons or bases inadequate. See *Allday*, 7 Vet.App. at 527. Accordingly, remand is warranted. See *Tucker v. West*, 11 Vet.App. 369, 374 (1998) (holding that remand is the appropriate remedy "where the Board . . . failed to provide an adequate statement of reasons or bases for its determinations").

B. Special Monthly Compensation

Mr. Toth also argues that the Board provided an inadequate statement of reasons or bases for not awarding SMC for the loss of use of his left foot. In light of the remand for the Board to address the severity and appropriate scheduler rating assigned to Mr. Toth's lower left extremity, including his left foot, the issue of SMC based on loss of use of the left foot is inextricably intertwined with the scheduler rating and remand is also warranted. See *Harris v. Derwinski*, 1 Vet.App. 180, 183 (1991) (holding that where a decision on one issue may have a "significant impact" upon another, the two claims are inextricably intertwined), *overruled on other grounds by Tyrues v. Shinseki*, 23 Vet.App. 166 (2009) (en banc), *aff'd*, 631 F.3d 1380, 1383 (Fed. Cir. 2011), *vacated and remanded for reconsideration*, 132 S. Ct. 75 (2011), *modified*, 26 Vet.App. 31 (2012); *Anglin v. West*, 11 Vet.App. 361, 367 (1998) (remanding a claim because it was "inextricably intertwined" with another matter the Court was remanding).

Mr. Toth, however, is free to present his argument for SMC for loss of use of his left foot and for a higher scheduler disability rating, as well as any additional arguments and evidence, to the Board in accordance with *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order). See *Kay v. Principi*, 16 Vet.App. 529, 534 (2002). The Board shall proceed expeditiously,

in accordance with 38 U.S.C. §§ 5109 and 7112 (requiring the Secretary to provide for "expeditious treatment" of claims remanded by the Board or the Court).

C. Extraschedular Rating

In his principal brief, Mr. Toth argued that the Board erred in failing to address whether an extraschedular rating was warranted based on his use of assistive devices, which he alleges were not contemplated by the rating schedule. He expressly withdrew this argument in his reply brief and acknowledged that *Spellers v. Wilkie*, 30 Vet.App. 211, 219 (2019) (holding that under DC 8520 the symptoms of sciatica that cause a claimant to use assistive devices are contemplated by the rating schedule), issued after he filed his principal brief, is controlling. *See* Appellant's Reply Brief at 1. Therefore, the Court will not address this matter further.

III. CONCLUSION

After consideration of the parties' briefs and a review of the record, the Board's November 2, 2017, decision is VACATED and the matter REMANDED for further proceedings consistent with this decision.

DATED: April 5, 2019

Copies to:

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