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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 18-6893

GUADALUPE M. DELEON, APPELLANT,

v.

ROBERT L. WILKIE,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before FALVEY, *Judge*.

MEMORANDUM DECISION

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

FALVEY, *Judge*: Self-represented Army veteran Guadalupe M. Deleon appeals a September 5, 2018, Board of Veterans' Appeals decision that denied an initial compensable rating for right ear hearing loss. This appeal is timely, the Court has jurisdiction to review the Board decision, and single-judge disposition is appropriate. *See* 38 U.S.C. §§ 7252(a), 7266(a); *Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990).

Generously construing the appellant's brief, we are asked to decide whether the Board erred in denying an increased rating for right ear hearing loss and failing to address lay evidence that the veteran's hearing loss causes depression, anxiety, and trouble understanding words. *See De Perez v. Derwinski*, 2 Vet.App. 85, 86 (1992) (the Court generously construes the arguments of pro se appellants). Because the Board failed to address whether Mr. Deleon's hearing-related impairments were ratable under alternative means, a threshold analysis that is required under VA's duty to maximize benefits, the Court will set aside the Board decision and remand the matter for further adjudication.

I. FACTS

Mr. Deleon served on active duty from March to September 1964. In a February 2001 rating decision, a regional office (RO) granted service connection for right ear hearing loss and assigned a noncompensable rating. In the same decision, the RO denied service connection for left ear hearing loss because it found that severe left ear hearing loss predated enlistment. Record (R.) at 792-94.

In September 2012, Mr. Deleon filed a claim for an increased rating for his service-connected right ear hearing loss. R. at 316-18. In a February 2013 statement, he reported being unable "to make out what people were saying" and said that he is depressed because his hearing loss causes "people [to] make fun of [him] all the time." R. at 270.

In March 2013, the veteran attended a VA audiology examination, which revealed an average puretone threshold of 64 hertz in the right ear, with a speech discrimination score of 76%. R. at 255. In an April 2013 rating decision, the RO continued a noncompensable rating for the right ear. R. at 240. Mr. Deleon filed a Notice of Disagreement in July 2013; in April 2016, the RO issued a Statement of the Case (SOC) continuing to deny a compensable rating for the veteran's right ear. R. at 222, 145. In June 2016, Mr. Deleon filed an appeal along with two private audiograms and a statement in which he reiterated that he experiences insults and anxiety because of his hearing loss. R. at 100.

At a December 2016 VA audiology examination, the veteran displayed an average puretone threshold of 70 hertz in the right ear, and a speech discrimination score of 60%. R. at 64. In September 2017, Mr. Deleon's wife submitted a statement verifying that the veteran had trouble hearing words and that he became frustrated, anxious, angry, and upset, and had trouble sleeping because of his hearing loss. R. at 42. In a June 2018 Supplemental SOC, the RO continued a noncompensable rating for the veteran's right ear. In the September 2018 decision on appeal, the Board denied an increased rating for the veteran's right ear hearing loss because it manifested in impairment no higher than Level VII on table VI of 38 C.F.R. § 4.85. R. at 4.

II. ANALYSIS

Mr. Deleon argues that the Board erred in assigning a noncompensable rating for his right ear because the Board "did not give me any recognition for words spoken to me that I cannot make out. I only hear mumbl[ling]." Appellant's Informal Brief (Br.) at 1. He further asserts that he

"wants to be compensated for [being] unable to understand the words spoken to me, for nights without sleep and for anxiety." *Id.* at 3.

The evaluation of hearing loss is addressed in 38 C.F.R. § 4.85 and Tables VI through VII. These provisions, unlike those for most disabilities addressed in the general schedule for rating disabilities, do not set forth specific symptoms or functional impairments corresponding to specific evaluations. *Doucette v. Shulkin*, 28 Vet.App. 366, 368 (2017). Rather, "disability ratings for hearing impairment are derived by a mechanical application of the rating schedule to the numeric designations assigned after audiometric evaluations are rendered." *Lendenmann v. Principi*, 3 Vet.App. 345, 349 (1992).

As with any issue of material fact or law, the Board must support its disability-rating findings with an adequate statement of reasons or bases that enables the claimant to understand the precise basis for that finding and facilitates 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). To comply with these requirements, the Board must analyze the credibility and probative value of the evidence, account for the evidence 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).

Here, to the extent that Mr. Deleon argues that his difficulty with understanding speech is secondary to hearing loss, this effect is contemplated by the schedular rating criteria for hearing loss. *Thun v. Peake*, 22 Vet.App. 111, 115 (2008) (referral for extraschedular consideration is not warranted unless the evidence "presents such an exceptional disability picture that the available schedular evaluations for that service-connected disability are inadequate"), *aff'd sub nom. Thun v. Shinseki*, 572 F.3d 1366 (Fed. Cir. 2009); 38 C.F.R. § 4.85 (2019). However, the Board failed to investigate whether his other symptoms, including depression, anxiety, and trouble sleeping, were ratable under alternative means, a threshold analysis required under VA's duty to maximize benefits. *See Bradley v. Peake*, 22 Vet.App. 280, 294 (2008); *see also Tatum v. Shinseki*, 23 Vet.App. 152, 157 (2009). As we held in *Morgan v. Wilkie*, "VA has powerful, ready-made *schedular* rating tools with which it can better adjudicate claims that include symptoms and effects not contemplated by an applicable diagnostic code." 31 Vet.App. 162, 167 (2019). Thus, remand is warranted for the Board to address, in the first instance, whether Mr. Deleon's symptoms are related to hearing loss and can be compensable under any relevant statute or regulation. *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").

III. CONCLUSION

Upon consideration of the foregoing, the Board's September 5, 2018, Board decision denying a compensable disability rating for right ear hearing loss is SET ASIDE and the matter is REMANDED for further development, if necessary, and readjudication consistent with this decision.

DATED: November 15, 2019

Copies to:

Guadalupe M. Deleon

VA General Counsel (027)