

Vet. App. No. 15-3367

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

KIM M. FILARSKY,

Appellant,

v.

ROBERT A. MCDONALD,

Secretary of Veterans Affairs,
Appellee.

**ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS**

**BRIEF OF THE APPELLEE
SECRETARY OF VETERANS AFFAIRS**

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realizes that 38 U.S.C. § 7252(b) limits the Court's review to the record of proceedings before the Secretary and the Board. However, the Court has also held that "[i]n all cases before this Court, the parties are under a duty to notify the Court of any developments that could deprive the court of jurisdiction or otherwise affect its decision" and explained that parties "have a continuing obligation to ensure that the tribunal is aware of significant events that may bear directly on the outcome of litigation," and, indeed, "of any development which *may conceivably affect* an outcome," to include whether a controversy becomes moot. *Solze v. Shinseki*, 26 Vet.App. 299, 301-302 (2013) (per curiam order) (internal citations omitted) (emphasis original).

With such obligations in mind, the Secretary informs the Court that subsequent to the Board decision on appeal, Appellant was granted entitlement to TDIU for the period from September 15, 2012, to January 10, 2013, and was evaluated as having a combined schedular disability rating of 100 percent as of January 10, 2013. This combined schedular rating includes, among other things, a 40 percent evaluation for radiculopathy of the right upper extremity associated with cervical disc herniation, effective September 20, 2010, and a 30 percent evaluation for radiculopathy of the left upper extremity associated with cervical spine disc herniation, effective February 26, 2008. Because a remand is not a final Board decision, the Court does not have jurisdiction over these issues and should not address them. *Breeden v. Principi*, 17 Vet.App. 475, 478 (2004).

STATEMENT OF FACTS

Appellant served on active military duty from November 1989 to December 1993. [R. at 98]. In March 2008, Appellant filed a Department of Veterans Affairs (VA) claim for entitlement to service connection for a neck injury. [R. at 1178-1195].

In June 2008, Appellant was provided a VA examination. [R. at 1122-1131]. Appellant reported activity and prolonged sitting caused pain. [R. at 1123, (1122-1131)]. She described the pain as sharp, moderate, constant, daily pain that radiated to her arms and fingertips. *Id.* Appellant had flexion of 45 degrees without objective evidence of painful motion, extension to 45 degrees with objective evidence of painful motion at 40 degrees, left and right lateral flexion to 45 degrees each with no objective evidence of painful motion, and left and right lateral rotation to 80 degrees with objective evidence of painful motion at 80 degrees. [R. at 1128-1129, (1122-1131)]. Diagnostic testing revealed normal cervical spine. [R. at 1129, (1122-1131)]. Appellant reported she lost two weeks from work within the past 12 months due to neck pain and weakness. [R. at 1129-1130, (1122-1131)]. The examiner diagnosed cervical spine disc herniation C6-C7. [R. at 1130, (1122-1131)]. The examiner noted significant effects on her occupation as assignment of different duties and increased absenteeism, decreased manual dexterity, problems with lifting and carrying, weakness or fatigue, decreased upper extremity strength, and pain. *Id.*

A June 2008 rating decision granted entitlement to service connection for cervical spine herniated disc, and awarded a noncompensable rating. [R. at 1117, (1113-1121)]. Appellant filed a Notice of Disagreement (NOD) in October 2008. [R. at 1111-1112]. A Statement of the Case (SOC) was issued in May 2009 [R. at 1088-1108], and in June 2009, Appellant perfected her appeal. [R. at 1082].

Private medical records dated from September 2010 to July 2012 were received. [R. at 825-856]. A September 2010 magnetic resonance imaging (MRI) revealed no evidence of disc herniation or central canal stenosis. [R. at 856, (851-856)]. In October 2010, Appellant complained of neck pain from her right shoulder blade to her posterior hand. [R. at 851, (851-856)]. She reported loss of strength in her right upper extremity, difficulty sleeping, and pain when turning when driving or looking up. *Id.* Appellant stated her job did not require lifting, pushing, or pulling heavy objects. [R. at 852, (851-856)]. Testing revealed flexion to 44 degrees, extension to 23 degrees positive for increased pain, right side bend to 36 degrees positive for significant increased pain, left side bend to 37 degrees positive for moderate increased pain, and bilateral lateral rotation to 70 degrees pain with overpressure. [R. at 853, (851-856)]. A June 2012 MRI revealed mild spondylosis with no evidence of disc herniation or central canal stenosis. [R. at 832]. A Supplemental SOC (SSOC) was issued in March 2013. [R. at 937-943].

In June 2014, Appellant submitted a statement. [R. at 374]. Appellant reported worsening neck pain and stated the pain affected her daily activities such as dressing, driving, working, and sleeping. *Id.*

That same month, Appellant was provided a VA examination. [R. at 359-369]. The examiner noted diagnoses of degenerative disc disease (DDD)/disc protrusion, and cervical radiculopathy. [R. at 360, (359-369)]. Appellant reported increased pain since her last VA examination in 2008. She stated pain radiated to her arm and caused difficulty turning her neck. *Id.* Appellant reported she left a job due to issues with her feet and neck, and said she had flare ups every two months. [R. at 361, (359-369)]. The examiner noted additional limitation of range of motion after repetitive testing, and functional loss and/or functional impairment consisting of less movement than normal, weakened movement, and pain on movement. [R. at 363, (359-369)]. Diagnostic testing revealed normal cervical spine. [R. at 368, (359-369)]. The examiner opined Appellant's disability affected her ability to work as lifting and carrying aggravated pain, that she could not lift over 20 pounds, she was unable to transfer patients without assistance, and she had to change positions frequently. [R. at 369, (359-369)]. The examiner further explained that during flare ups when the neck is moved repetitively, pain may limit functional ability. *Id.*

A July 2014 rating decision increased Appellant's service-connected cervical spine disability rating from noncompensable to 10 percent disabling from

February 2008 (the date of her initial application for benefits) to June 2014, and 30 percent disabling thereafter. [R. at 353, 356, (353-358)]. A SSOC was issued that same month. [R. at 339-342].

Appellant was provided a Board hearing in July 2015. [R. at 2049-2058]. Appellant testified that she had been at the current level of disability for about 12 years. [R. at 2052, (2049-2058)]. She reported her disability affected her daily driving, working, and getting dressed. *Id.* Appellant reported flare ups that occurred twice a month for the past four to five years. [R. at 2053, (2049-2058)]. Appellant stated she was unemployed and maintained her disability caused her unemployment. [R. at 2054, (2049-2058)]. Subsequent to the hearing, Appellant filed an application for entitlement to TDIU. [R. at 91-93].

The Board considered medical evidence from August 2007 to February 2014, [R. at 10-12, (1-19)], and determined that a higher rating was not warranted for the period prior to June 2014 because Appellant did not report flare ups during this period, and she had forward flexion greater than 15 degrees but not greater than 30 degrees, or combined range of motion not greater than 170 degrees at the June 2008 VA examination. [R. at 12, (1-19); see R. at 1122-1131]. The Board acknowledged that Appellant reported muscular spasms, but it found no evidence that her muscle spasms were severe enough to result in abnormal gait or spinal contour. *Id.*

The Board considered functional loss due to flare ups of pain, fatigue, incoordination, pain on movement, and weakness, but determined that an increased evaluation was not warranted because Appellant maintained forward flexion to 45 degrees and there was no additional loss of motion on repetitive testing. [R. at 12-13, (1-19)]. The Board also considered alternative Diagnostic Codes (DCs), but found that none were applicable. [R. at 13, (1-19)]. It noted that in June 2014, Appellant was granted a separate 40 percent disability rating for radiculopathy symptoms. [*Id.*; See R. at 353-358]. The Board determined that extraschedular consideration was not warranted because Appellant's disabilities are specifically contemplated in the rating criteria. [R. at 14-15, (1-19)]. This appeal ensued.

THE COURT SHOULD AFFIRM THE BOARD'S DECISION BECAUSE THERE IS A PLAUSIBLE BASIS FOR THE BOARD'S DETERMINATIONS AND APPELLANT FAILED TO DEMONSTRATE PREJUDICIAL ERROR.

The Court should affirm the Board's decision because there is a plausible basis for the Board's determinations and Appellant has not demonstrated the Board's decision is clearly erroneous or the result of prejudicial error. *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) (Appellant bears the burden of demonstrating prejudicial error).

Disability evaluations are generally determined by applying the criteria in VA's Schedule for Rating Disabilities, which is based on average impairment in

earning capacity. 38 U.S.C. § 1155; 38 C.F.R. § 4.1 The Board's determination of the appropriate degree of disability is a finding of fact subject to the “clearly erroneous” standard of review set forth in 38 U.S.C. § 7261(a)(4). *Johnston v. Brown*, 10 Vet.App. 80, 84 (1997). A factual finding is “clearly erroneous” when although there is evidence to support it, the court has a definite and firm conviction that a “mistake has been committed.” *Hersey v. Derwinski*, 2 Vet.App. 91, 94 (1992); see *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948).

The Board must provide a statement of reasons or bases that is adequate to enable an appellant to understand the precise basis for its decision as well as to facilitate review in this Court. To comply with this requirement, 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. 38 U.S.C. § 7104(d)(1); *Buczynski v. Shinseki*, 24 Vet.App. 221, 223 (2011).

Appellant asserts the Board did not properly interpret or apply 38 C.F.R. §§ 4.40, 4.45, and the holdings of *Mitchell v. Shinseki*, 25 Vet.App. 32 (2011) and *Deluca v Brown*, 8 Vet.App. 202 (1995). [Appellant’s Brief (App. Br.) at 10. Essentially, Appellant asserts the Board did not consider how her disability affects her lifestyle and earning capacity due to her functional loss. [App. Br. at 11-12].

When evaluating a musculoskeletal disability, the Board must consider functional loss due to pain and weakness that causes any additional disability beyond that reflected in the range of motion measurements. 38 C.F.R. §§ 4.40 (measuring functional loss), 4.45 (evaluating joints); see *DeLuca v. Brown*, 8 Vet.App. at 206. In *Thompson v. McDonald*, 815 F.3d 781 (Fed. Cir. 2016), the Federal Circuit addressed the question of the relationship and interplay between 38 C.F.R. §§ 4.40 and 4.71a. The Federal Circuit noted that while 38 C.F.R. § 4.40 discusses how functional loss may be due to pain, VA placed that regulation under the umbrella heading of the musculoskeletal system, followed by separate sections that explicitly list relevant disability ratings. *Id.* at 785 (citing to 38 C.F.R. § 4.71a). Consequently, “it is clear that § 4.40 must be viewed in light of the explicitly listed disability ratings for the musculoskeletal system in § 4.71a.” *Id.* The Federal Circuit went on to reiterate that “it is clear that the guidance of § 4.40 is intended to be used in understanding the nature of a veteran’s disability, after which a rating is determined based on the § 4.71a criteria.” *Id.* Therefore, even though § 4.40 demonstrates that functional loss can be due to pain, the ultimate rating is to be understood and completed in terms of the criteria and range of motion thresholds in § 4.71a. *Id.* at 785-86.

Likewise, § 4.45 also does not provide an independent basis for a disability rating. In *Thompson*, the Federal Circuit distinguished those regulatory sections that explicitly provide ratings (i.e., §§ 4.71a, 4.73) from those that discuss

“general principles concerning ratings for the musculoskeletal system or particular parts thereof,” and specifically used §§ 4.40 and 4.45 as examples of such regulatory sections that discuss general principles. *Id.* at 782. The Federal Circuit’s subsequent discussion of § 4.40 alluded to these other regulatory sections as well, as it noted that “VA carefully located § 4.40 and *similar guidance* under the umbrella heading of the musculoskeletal system.” *Id.* at 785 (emphasis added). Accordingly, because the Federal Circuit considered § 4.45 akin to § 4.40 in that it simply offers guidance, it too does not provide a separate basis for a disability rating apart from the schedular requirements of 38 C.F.R. § 4.71a.

Appellant’s service-connected cervical spine disc herniation is rated pursuant to 38 C.F.R. § 4.71a, DC 5237 (lumbosacral or cervical strain). [R. at 1120, (1113-1121)]. A 10 percent disability rating is warranted for forward flexion of the cervical spine greater than 30 degrees but less than 40 degrees; or combined range of motion of the cervical spine of greater than 170 degrees but less than 335 degrees; or muscle spasms, guarding, or localized tenderness not resulting in abnormal gait; or vertebral body fracture with loss of 50 percent or more of height. A 30 percent evaluation is warranted for forward flexion of the cervical spine of 15 degrees or less; or favorable ankyloses of the entire cervical spine. 38 C.F.R. § 4.71a, DC 5237.

There is no evidence that Appellant's forward flexion was reduced to 15 degrees or less prior to June 2014. The evidence shows Appellant complained of neck pain that affected her driving, sleep, getting dressed, and her job as a nurse. [R. at 374; 1083, (1082-1083); 1112, (1111-1112); 1129-1130, (1122-1131)]. However, the evidence does not reveal that the normal working movements of her neck are impeded by pain or other symptoms, such as spasms, to a degree that would ordinarily warrant an evaluation of the 10 percent rating currently assigned. See 38 C.F.R. § 4.1 (explaining that "the percentage ratings represent as far as can practically be determined the average impairment in earning capacity. . .").

The Board found no evidence of flare ups or forward flexion of less than 15 degrees prior to June 2014. [R. at 12, (1-19)]. The Board acknowledged Appellant suffered muscle spasms, but found no evidence that the spasms were severe enough to result in abnormal gait or abnormal spine contour. As the Board pointed out, the June 2008 VA examination noted normal posture, head position, symmetry in appearance, and gait type, and private treatment records dated from 2010 to 2012 noted no spine deformities. [R. at 825-856; 1124, (1122-1131)].

The Board specifically considered functional loss due to flare ups, fatigability, incoordination, pain on movement, and weakness, but found that Appellant's symptoms were already contemplated by her 10 percent disability

award. [R. at 13, (1-19)]. Appellant argues that the evidence showed she had difficulty sleeping and at work and the June 2008 VA examiner opined that she suffered significant effects on her work from her disabilities. [App. Br. at 12]. However, the Board considered this evidence. Appellant has been granted service connection for her current disability and evaluated under the rating schedule for the severity of her condition, thus there is no doubt that Appellant experiences effects on her work from her disability. Having difficulty sleeping or working due to Appellant's neck condition does not suggest or establish that these effects of her neck disability are not adequately compensated by the evaluation currently assigned under the rating schedule. The Board explicitly noted that Appellant reported difficulty with sleep and with computer use at work at the June 2008 VA examination. [R. at 10, (1-19)]. Although the Board did not list each and every symptom Appellant reports in her brief [App. Br. at 13], it did not error as the Board is not required to discuss every piece of evidence of record, but only the relevant evidence. *Dela Cruz v. Principi*, 15 Vet.App. 143, 149 (2001). The Board discussed the records relevant to Appellant's diagnosis, treatment, and symptoms insofar as they relate to the increased rating claim on appeal. Further, "[t]here is a presumption that VA considered all of the evidence of record." *Newhouse v. Nicholson*, 497 F.3d 1298, 1302 (Fed.Cir.2007). Read as a whole, the Board's statement is understandable and facilitative of judicial

review. See *Janssen v. Principi*, 15 Vet.App. 370, 379 (2001) (rendering a decision on the Board's statement of reasons or bases “as a whole”).

Appellant emphasizes that she has episodic tingling in the right hand, generalized weakness in the right upper extremity, and difficulty with prolonged grip or with opening jars, difficulty using the computer, and trouble with manual dexterity, lifting and carrying. [App.Br. at 12, 13]. Appellant faults the Board for not adequately considering this “functional loss” which she contends is not evaluated under “normal range-of-motion testing.” [App.Br. at 13]. However, Appellant has been granted a separate, 40 percent evaluation for radiculopathy of the right upper extremity associated with her cervical spine disc herniation. See [R. at 353 (353-358)]. Given that Appellant has been granted a separate disability rating to compensate for such symptomatology, she has failed to explain why BVA was required to discuss it in the context of assigning a rating under 38 C.F.R. § 4.71a, DC 5237 for her cervical spine disc herniation, or how assigning a rating for these symptoms under multiple diagnostic codes would not violate the general prohibition against pyramiding. See 38 C.F.R. § 4.14.

Appellant also contends the Board did not adequately explain why extraschedular consideration could not be granted. [App. Br. at 14]. She argues that evidence showed she had muscle spasms and poor posture but determined that it did not result in abnormal gait or spinal contours. [App. Br. at 15].

In exceptional cases “where the schedular evaluations are found to be inadequate,” the case may be referred for extraschedular evaluation. 38 C.F.R. § 3.321(b)(1) (2015). Extraschedular evaluation is warranted when (1) the established schedular criteria are inadequate to describe the severity and symptoms of the disability; (2) there are other indicia of an exceptional or unusual disability picture, such as marked interference with employment or frequent periods of hospitalization; and (3) an extraschedular evaluation award is “in the interest of justice.” *Thun v. Peake*, 22 Vet.App. 111, 115–16 (2008), *aff’d*, 572 F.3d 1366 (Fed.Cir.2009); *Anderson v. Shinseki*, 22 Vet.App. 423, 427 (2009); 38 C.F.R. § 3.321(b)(1). The Court reviews extraschedular referral determinations for “clear error” as set forth in 38 U.S.C. § 7261(a)(4). *Thun*, 22 Vet.App. at 115

The Board determined that Appellant’s symptomatology and impairments were contemplated by the schedular ratings assigned and referral for extraschedular consideration was not required. [R. at 15, (1-19)]. The Board explained that Appellant did not expressly raise the issue of entitlement to an extraschedular rating and that her cervical spine disability symptomatology was specifically contemplated symptomatology of the schedular rating. *Id.* The Board specifically noted that Appellant asserted her cervical spine disorder was more severe than reflected in the assigned disability rating and considered her contentions. *Id.* This evidence includes Appellant’s previously mentioned muscles spasms and posture. As noted above, because specific symptoms

Appellant cites—such as episodic tingling in the right hand, generalized weakness in the right upper extremity, and difficulty with prolonged grip or with opening jars, difficulty using the computer, and trouble with manual dexterity, lifting and carrying—are assigned separate and distinct ratings under various DCs, and because neither Appellant nor the record reasonably raise the issue that the various schedular ratings assigned are inadequate. As there is a presumption that the Board considered all of the evidence of record, *Newhouse v. Nicholson*, 497 F.3d at 1302, and the Board decision should be read as a whole, the Board's statement is understandable and facilitative of judicial review. *Janssen v. Principi*, 15 Vet.App. at 379.

In making an extraschedular referral determination, the Board must consider the collective impact of multiple service-connected disabilities whenever that issue is expressly raised by the claimant or reasonably raised by evidence of record. *Yancy v. McDonald*, 27 Vet.App. 484, 495 (2016) (citing *Johnson v. McDonald*, 762 F.3d 1362, 1365 (Fed.Cir.2014)). Although the Board must consider the combined effects of all service-connected disabilities, its consideration is limited to their “impact [on] the disability picture of the disabilities on appeal”. *Id.* at 496 The Board “lacks jurisdiction to consider whether referral is warranted solely for any disability or combination of disabilities not in appellate status, just as it lacks jurisdiction to examine the proper schedular rating for a disability not on appeal.” *Id.*

The Board determined that even considering the combined effect of Appellant's other service-connected disabilities a higher disability rating was not warranted. [R. at 15, (1-19)]. As the Board noted, Appellant did not expressly raise the issue, nor is it reasonably raised by the evidence of record, especially given that the record shows Appellant receives compensation under a variety of DCs for separate and distinct conditions secondary to or resulting from her cervical spine condition. See e.g. [R. at 353 (343-348; 353-358)] (Rating Code Sheet). Appellant did not explain how any of her other service-connected conditions combined with her cervical spine disability to cause effects that might warrant a higher overall rating than that assigned under the various DCs under which she already receives compensation for the period at issue prior to June 4, 2014. [App. Br. at 17]. Appellant has not carried her burden of demonstrating the Board provided inadequate reasons or bases for its determinations and failed to demonstrate any prejudicial error warranting remand. 38 U.S.C. § 7104(d)(1); *Buczynski v. Shinseki*, 24 Vet.App. at 223.

Moreover, once the Board determined that the first element of the *Thun* inquiry had not been satisfied, the Board had no duty to further consider whether referral was warranted for Appellant's service-connected cervical spine disability based on marked interference with employability. See *Yancy v. McDonald*, 27 Vet.App. at 494. In the instant case, the Board remanded the issue of TDIU to obtain a VA examination addressing whether "the aggregate effect of the

[appellant's] service-connected disabilities precludes him from securing and maintaining substantially gainful employment.” R. at 20. Because this evidence does not relate to the Board's determination that the rating schedule adequately accounted for Appellant's neck disability under the first *Thun* element, the facts in *Brambley v. Principi*, 17 Vet.App. 20 (2003) and *Todd v. McDonald*, 27 Vet.App. 79 (2014) are distinguishable. Appellant’s argument that the Board’s determination was premature is without merit. [App. Br. at 18].

CONCLUSION

Appellant waives any arguments not raised in his principal brief. *Cacciola v. Gibson*, 27 Vet.App. 45, 47 (2015) (when an appellant declines to present arguments as to an issue, the appellant relinquishes the right to judicial review of that issue, and the Court will not decide it). The Secretary herein responds to the arguments Appellant, through his attorney, actually argued. Appellant has not met his burden of demonstrating prejudicial error. The Court should affirm the Board’s decision to the extent that it denied Appellant a rating in excess of 10 percent for her cervical spine disc herniation prior to June 2014, because Appellant has not demonstrated that it is clearly erroneous. *Shinseki v. Sanders*, 556 U.S. at 409.

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