

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

JAMES MARKSON,

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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Appellant,)
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ROBERT A. MCDONALD,)
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Vet.App. No. 15-2930

**ON APPEAL FROM THE
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**BRIEF OF THE APPELLEE
SECRETARY OF VETERANS AFFAIRS**

I. ISSUE PRESENTED

Whether the Court should affirm the April 10, 2015, decision of the Board of Veterans' Appeals ("Board"), to the extent that it declined to refer Appellant's claim of entitlement to an initial compensable evaluation for hypertension disability for extraschedular consideration and concluded entitlement to a total disability evaluation based on individual unemployability (TDIU) was not reasonably raised.

II. STATEMENT OF CASE

A. Nature of the Case

Appellant, James Markson (hereinafter referred to as "Appellant"), appeals the April 10, 2015, decision of the Board of Veterans' Appeals ("Board"), to the

extent that it declined to refer Appellant's claim of entitlement to an initial compensable evaluation for hypertension disability for extraschedular consideration and concluded entitlement to a total disability evaluation based on individual unemployability (TDIU) was not reasonably raised. [Record Before the Agency [R.]. at 10-11 (1-14)].

The Secretary notes that Appellant has not raised any arguments as to the Board's denial of entitlement to an initial compensable evaluation for hypertension disability. See *Appellant's Brief (App. Brf.)* at 1-15; *Grivois v. Brown*, 6 Vet.App. 136, 138 (1994) (issues or claims not argued on appeal are considered abandoned).¹

The Board also referred the issues of entitlement to service connection for left ventricular hypertrophy (LVH) as secondary to hypertension and entitlement to an increased evaluation for posttraumatic stress disorder (PTSD) to the Agency of Original Jurisdiction (AOJ). [R. at 3]. Appellant has not raised any argument as to the Board's decision to refer these claims to the AOJ. See *Cromer v. Nicholson*, 19 Vet.App. 215, 217 (2005) (issues not raised on appeal are considered abandoned).

¹ The Secretary also notes that Appellant's opening brief cites to nonprecedential authority that appears to be duplicative of points of law existing in precedential authority. See *App. Brf.* at 7-8, 10-12, 14; VET.APP. R. 30(a) ("Actions designated as nonprecedential by this Court or any other court may be cited only for the persuasive value of their logic and reasoning, provided that the party states that no clear precedent exists on point and the party includes a discussion of the reasoning as applied to the instant case."). However, the Secretary acknowledges that Appellant's opening brief predates the Court's recent decision in *Yancy v. McDonald*, 27 Vet.App. 484 (2016).

B. Statement of Facts and Procedural History

Appellant served on active duty from May 1966 until May 1970. [R. at 16-17]. In March 2012, the Regional Office (RO) assigned a noncompensable rating for Appellant's hypertension as secondary to his service-connected PTSD. [R. at 531-32 (525-32)]. Appellant timely filed a Notice of Disagreement, [R. at 523-24], and the RO issued an April 2013 Statement of the Case continuing Appellant's noncompensable rating. [R. at 281-97]. Appellant perfected his appeal in June 2013. [R. at 403-05].

In November 2013, the Board remanded Appellant's claim for additional development. [R. at 262-67]. Appellant was afforded a February 2014 VA examination. [R. at 256-60]. The examiner noted a 1985 diagnosis of hypertension. [R. at 256-57]. The examiner also noted that Appellant's hypertension impacted his ability to work in that "[h]e cant (sic) do anything strenuous." [R. at 259]. The examiner opined that "[t]hough its quiet (sic) possible that the veteran's BP is aggravated by his PTSD, it can only be proven from post service treatment and/or readings at the time of PTSD episodes . . . Aggravation can not (sic) be established at this time." [R. at 259].

In March 2013, the RO issued a Supplemental Statement of the Case continuing its denial of an initial compensable rating for hypertension. [R. at 245 (243-47)]. In April 2014, Appellant's prior counsel submitted a "Disagreement With SSOC." [R. at 235-36]. The letter stated that Appellant "was diagnosed with Left Ventricular Hypertrophy, which was directly caused by his hypertension.

[Appellant] often suffers from shortness of breath with only mild exertion, is constantly tired and weak, and has required continuous medication to manage his hypertension for 25 years.” [R. at 235].

In April 2015, the Board denied entitlement to an initial compensable evaluation for hypertension disability. [R. at 4]. The Board also found that extraschedular referral was not warranted and that TDIU was not raised as part of Appellant’s increased rating claim for hypertension. [R. at 11-12]. This appeal followed.

III. ARGUMENT

The Court should affirm the Board’s April 10, 2015, decision that denied entitlement to an initial compensable evaluation for hypertension disability, because its decision is supported by an adequate statement of reasons or bases and is supported by a plausible basis in the record. The Board found that “the medical evidence does not demonstrate that [Appellant’s] hypertension more nearly approximates diastolic pressure predominately 100 or more, or systolic pressure predominately 160 or more, or a history of diastolic pressure predominately 100 or more that requires continuous medication for control, as contemplated by a 10 percent rating under Diagnostic Code 7101.” [R. at 10]. The Board also properly found that extraschedular referral was not warranted because Appellant’s “hypertension symptoms are contemplated in the current assigned noncompensable evaluation.” [R. at 11]. The Board also appropriately

concluded that TDIU was not raised as part of Appellant's increased rating claim for hypertension. [R. at 12].

Appellant argues that TDIU was reasonably raised by the record, and the Board failed to provide an adequate statement of reasons or bases for finding TDIU inapplicable in this case. *App. Brf.* at 11. However, Appellant has not asserted, nor cited any evidence of record, that he is unemployable due to his service-connected hypertension.

A request for TDIU "is not a separate claim for benefits, but rather involves an attempt to obtain an appropriate rating for a disability or disabilities, either as part of the initial adjudication of a claim . . . or as part of a claim for increased compensation. *Rice v. Shinseki* 22 Vet.App. 447, 453-54 (2009). It is raised whenever a claimant seeks a higher disability evaluation and "presents cogent evidence of unemployability." *Comer v. Peake*, 553 F.3d 1362, 1367 (Fed. Cir. 2009). However, while a claim for increased disability compensation encompasses the issue of possible entitlement to TDIU, the issue is not raised until evidence of unemployability is actually presented. *See Roberson v. Principi*, 251 F.3d 1378, 1384 (Fed. Cir. 2001) ("Once a veteran submits evidence of a medical disability and makes a claim for the highest rating possible, and additionally submits evidence of unemployability, the 'identify the benefit sought' requirement of 38 C.F.R. § 3.155(a) is met and VA must consider TDIU.").

A claimant bears the burden of demonstrating his or her entitlement to a particular benefit. *See* 38 U.S.C. § 5107(a) (a claimant has the responsibility to

present and support a claim for benefits); *Skoczen v. Shinseki*, 564 F.3d 1319, 1324 (Fed. Cir. 2009) (recognizing that, the responsibilities of developing the evidence aside, the claimant bears the burden of establishing his or her entitlement to the benefits sought); *Ortiz v. Principi*, 274 F.3d 1361, 1365 (Fed. Cir. 2001) (explaining that the evidence must demonstrate entitlement to the benefit).

In this case, the Board found that “while [Appellant] reports that his hypertension disability impacts his ability to function in an occupational setting, he has not asserted, nor does the evidence show, that he is unemployed due to his hypertension disability.” [R. at 12]. Appellant still has not asserted, nor cited any evidence of record, that he is unemployable due to his service-connected hypertension. Indeed, Appellant concedes in his opening brief that he is currently employed. *App. Brf.* at 2 (“Since 2002, [he] has owned and operated his own pest control business, which requires a great deal of physical exertion.”); see also [R. at 613 (608-15) (November 2009 VA examination noting that “since 2002, he has worked full time owning his own pest control business.”)]. Thus, the Board’s finding that TDIU was not reasonably raised as part of Appellant’s claim for hypertension was supported by a plausible basis in the record. [R. at 12]; see *Gilbert v. Derwinski*, 1 Vet.App. 49, 52-53 (1990) (finding of fact is not clearly erroneous if there is a plausible basis for it in the record). Moreover, Appellant has failed to demonstrate that he is entitled to a TDIU. See 38 U.S.C. § 5107(a); *Skoczen*, *Ortiz*, *supra*.

To the extent Appellant asserts that “[t]he Record clearly and overtly demonstrates that the appellant claimed that his hypertension affected his ability to work when he stated that he ‘can’t do anything strenuous,’” this evidence does not demonstrate he is either unemployed or unemployable. *App. Brf.* at 13; see [R. at 259]. The rating schedule is based as far as can be practically determined on average industrial impairment and the degree of disability specified in the schedule is generally “considered adequate to compensate for considerable loss of working time from exacerbations or illness proportionate to the severity of the several grades of disability.” 38 C.F.R. § 4.1. The diminished ability to function under the ordinary conditions of life and employment is thus necessarily contemplated by the criteria used to rate a particular disability under the ratings schedule. Indeed, section 4.10 begins with the express recognition that the ability to function under the ordinary conditions of daily life including employment is the “basis of disability evaluations.” 38 C.F.R. § 4.10. While the evidence cited by Appellant reflects some impediment of his occupational abilities, it does not support the assertion that he is unemployable. As such, Appellant has failed to demonstrate error, much less prejudicial error, in the Board’s discussion of TDIU. See *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (appellant bears the burden of demonstrating error); *Shinseki v. Sanders*, 556 U.S. 396, 409, 129 S.Ct. 1696, 1706 (2009) (holding that the appellant bears the burden of demonstrating prejudicial error).

Appellant also argues that the Board erred in declining to refer his claim for extraschedular consideration because “the schedular criteria in [DC] 7101 fails to contemplate [his] unusual disability picture.” *App. Brf.* at 6. In general, it is sufficient to evaluate a disability using either the corresponding or analogous Diagnostic Codes (DCs) contained in the rating schedule. See 38 C.F.R. §§ 4.20, 4.27. However, an extraschedular evaluation is appropriate where a case presents an exceptional or unusual disability picture with such related factors as marked interference with employment. 38 C.F.R. § 3.321(b) (“The governing norm in these exceptional cases is: A finding that the case presents such an exceptional or unusual disability picture with such related factors as marked interference with employment or frequent periods of hospitalization as to render impractical the application of the regular schedular standards.”).

Determining whether referral for extraschedular consideration is warranted involves a three step process. See *Thun v. Peake*, 22 Vet.App. 111, 115 (2008), *aff'd*, 572 F.3d 1366 (Fed. Cir. 2009). As a threshold matter, the evidence must show that the “disability presents such an exceptional disability picture that the available schedular evaluations for that service-connected disability are inadequate.” *Id.* at 114. “If the rating criteria reasonably describe the claimant’s disability level and symptoms, then the veteran’s disability picture is contemplated by the rating schedule for that disability, the assigned schedular rating is deemed appropriate, and referral for consideration of an extraschedular rating is not warranted.” *Johnson v. Shinseki*, 26 Vet.App. 237, 244 (2013), *rev’d*

by *Johnson v. McDonald*, 762 F.3d 1362 (Fed. Cir. 2014); see also *Yancy v. McDonald*, 27 Vet.App. 484 (2016). If an adjudicator determines that an exceptional disability picture exists, the second step of the inquiry requires the adjudicator to determine whether the claimant's exceptional disability picture exhibits other related factors such as marked interference with employment or frequent periods of hospitalization. *Thun*, 22 Vet.App. at 116. If the first two steps are satisfied, the third step requires the adjudicator to refer the claim for extraschedular consideration. *Id.*

Here, in declining to refer Appellant's claim of entitlement to an initial compensable evaluation for hypertension for extraschedular consideration, the Board found that Appellant's "hypertension symptoms are contemplated in the current assigned noncompensable evaluation." [R. at 11]. The Board explained that "the medical evidence fails to show anything unique or unusual about the disabilities at issue that would render the schedular criteria inadequate." *Id.* Indeed, in the Board's schedular analysis, it noted that VA treatment records "do not reflect diastolic pressure predominately 100 or more or systolic pressure predominately 160 or more." [R. at 9]; see 38 C.F.R. § 4.104, DC 7101. The Board also acknowledged Appellant's reports of increases in his anti-hypertensive medication, stating that "despite [Appellant's] contentions that his blood pressure readings should entitle him to a compensable evaluation, the medical evidence does not show impairment so as to warrant the assignment of a compensable rating for any period of the appeal." [R. at 9-10]. Thus, as the

Board properly found that Appellant's hypertension was adequately contemplated by the rating schedule, extraschedular referral was not appropriate. See *Thun, Johnson, supra*. Appellant has failed to show error in the Board's analysis. *Hilkert, Shinseki, supra*.

Even assuming, *arguendo*, that the Board had found the rating schedule did not adequately contemplate Appellant's disability picture, Appellant has not demonstrated that his disability picture exhibits other related factors such as marked interference with employment or frequent periods of hospitalization. *Thun*, 22 Vet.App. at 116. Appellant contends that the Board failed to consider his quarterly medical appointments, his need for anti-hypertensive medication, and a February 2014 VA examiner's notation that Appellant reported "[h]e can't do anything strenuous." *App. Brf.* at 6. However, scheduled, quarterly medical appointments do not rise to the level of *frequent hospitalizations*. See 38 C.F.R. § 3.321(b)(1). Moreover, the need for continuous medication to control Appellant's hypertension is expressly contemplated by the rating schedule. See 38 C.F.R. § 4.104, DC 7101; see also *Jones v. Shinseki*, 26 Vet.App. 56 (2012). Finally, to the extent, the February 2014 VA examiner's notation that Appellant reported "[h]e can't do anything strenuous," there is no indication in the record that Appellant's hypertension has markedly interfered with his full-time employment as an owner/operator of a pest control business. [R. at 259]; see *App. Brf.* at 2; [R. at 613]. Furthermore, to the extent that the Board did not expressly reference the February 2014 VA examiner's comment in its decision,

this is at best harmless because the Board properly found that Appellant did not pass the threshold requirement of demonstrating an exceptional disability picture. See *Thun*, 22 Vet.App. at 114. As such, Appellant's disability picture would not meet the second element of the *Thun* analysis. 22 Vet.App. at 116; see also *Yancy*, *supra*. Accordingly, Appellant fails to demonstrate that the Board's determination declining to refer the claim for extraschedular consideration was erroneous.

To the extent Appellant takes exception to Board's purported medical conclusion that his symptoms were attributable to his LVH not his hypertension, *App. Brf.* at 6-7, 9, this argument is based on misreading of the Board's decision and insufficient review of his own submissions to VA. The Board stated that it had "considered [Appellant's] assertion that his hypertension disability has resulted in left ventricular hypertrophy which is associated with his symptoms of shortness of breath, fatigue and weakness." [R. at 12]. A plain reading of this sentence indicates that the Board is referencing Appellant's own *assertion*. Indeed, this is confirmed by an April 24, 2014, letter from Appellant's prior counsel, which states "on October 11, 2013 he was diagnosed with Left Ventricular Hypertrophy, which was directly caused by his hypertension. [Appellant] often suffers from shortness of breath with only mild exertion, is constantly tired and weak, and has required continuous medication to manage his hypertension for 25 years." [R. at 235 (235-36)]; see also [R. at 214-15, 220-

21, 230-33].² Thus, contrary to Appellant's assertion, the Board did not attribute the symptoms to his LVH rather than his hypertension. The Board merely reiterated Appellant's assertion as submitted by his prior counsel. *Compare* [R. at 12] with [R. at 235]. In fact, following the Board's acknowledgement of Appellant's assertion, the Board explained that DC 7101 provides that separate ratings are appropriate for hypertension and LVH and, as such, referred the issue of entitlement to service connection for LVH as secondary to hypertension to the AOJ for consideration in the first instance. [R. at 12]; see 38 C.F.R. § 4.104, DC 7101, Note (3). As such, Appellant has again failed to demonstrate error in the Board's decision. *Hilkert, Shineski, supra*.

Finally, Appellant relies on *Johnson v. McDonald*, 762 F.3d 1365 (Fed. Cir. 2014), to assert that his "symptoms should be considered as a collective whole, as opposed to the Board's analysis, which considered each disability individually and ignored the compounding effects of each." *App. Brf.* at 6-7. "Referral for extra-schedular evaluation may be based on the collective impact of [a] veteran's disabilities." *Johnson*, 762 F.3d at 1365. "[T]he Board is required to address whether referral for extraschedular consideration is warranted for a veteran's disabilities on a collective basis only when that issue is argued by the claimant or

² In regards to Appellant's symptoms of shortness of breath, fatigue, and weakness, the Secretary highlights a July 11, 2013, VA mental health outpatient note. [R. at 1323-24]. The author notes that "[Appellant] is swimming @ 6am at the yacht Club now. No longer feels the fatigue he used to. Every now and then he had to take naps and would wake up worse. He states he doesn't know where the fatigue went, but is glad he is feeling better." [R. at 1324].

reasonably raised by the record through evidence of the collective impact of the claimant's service-connected disabilities.” *Yancy v. McDonald*, 27 Vet.App. 484, 495 (2016).

Notably, Appellant argues that his *symptoms* not his *service-connected disabilities* should have been considered collectively in the Board’s extraschedular analysis. *App. Brf.* at 7. Moreover, he fails to expressly assert anywhere in his opening brief, nor does the evidence show, that the collective impact of his service-connected disabilities warranted extraschedular referral. To the extent that his non-service-connected LVH may impact his hypertension, this issue has not been service-connected, nor is it in appellate status as it was referred to the AOJ. *See Yancy*, 27 Vet.App. at 496. Moreover, in its schedular analysis the Board addressed Appellant’s theory that his service-connected PTSD aggravates his service-connected hypertension, and concluded that “fluctuations in blood pressure caused by [Appellant’s] PTSD do not equate to an actual worsening of his hypertension to support a compensable evaluation under Diagnostic Code 7101.” [R. at 10]. Thus, the Secretary is unable to discern the exact nature of Appellant’s argument and it should be rejected. *See Woehlaert v. Nicholson*, 21 Vet.App. 456, 463 (2007) (“The Court has consistently held that it will not address issues or arguments that counsel fails to adequately develop in his or her opening brief.”); *Evans v. West*, 12 Vet.App. 22, 31 (1998) (the Court will not consider a “vague assertion” or an “unsupported contention” of error).

IV. CONCLUSION

Wherefore, for the foregoing reasons, Appellee, Robert A. McDonald, Secretary of Veterans Affairs, respectfully urges the Court to affirm the Board's April 10, 2015, decision.

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