

APPELLANT’S REPLY BRIEF

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

NO. 15-2930

JAMES MARKSON

APPELLANT

V.

**ROBERT A. MCDONALD,
SECRETARY OF VETERANS AFFAIRS**

APPELLEE

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ARGUMENT

James Markson (“Markson”) respectfully submits this Reply Brief asking the Court to remand this case so that Markson may be given the proper – and just – adjudication of his claim because of the numerous errors in the Board’s analysis.

Markson’s moving brief laid out the relevant background facts, procedural history, and the summary of argument.¹ App. Br., 1-4. To briefly summarize, Markson identified three deficiencies with the Board’s review of his claim:

- (1) The Board failed to provide adequate reasons and bases for denying Markson’s extraschedular rating;
- (2) The Board erroneously associated all of Markson’s symptoms of left ventricular hypertrophy with his hypertension; and
- (3) The Board failed to provide any reason and bases for denying Markson’s Total Disability due to Individual Unemployability (“TDIU”) claim.

In opposition to Markson’s well-founded arguments, the Secretary simply rehashes the Board’s erroneous finding and advances several arguments that do not serve to meet the Board’s burden or counter Markson’s position.

I. Markson Raised His Employability And The Board Must Conduct A Comprehensive Assessment Of This Issue.

The Board reasoned that because Markson did not *explicitly* raise a TDIU claim, no inquiry was necessary regarding his entitlement to TDIU. RBA at 10. The plain language of the Board’s determination contradicts this point, as the Board acknowledged

¹ Throughout this Reply, Markson’s Appellant’s Brief will be referred to as “App. Br.” The Secretary’s Response will be referred to as “Sec. Opp.”

that Markson “reports that his hypertension disability impacts his ability to function in an occupational setting.” *Id.* This should have triggered the Board’s duty to consider all legal theories that Markson’s claim could be based upon.

The Secretary compounds this error by arguing that, “[Markson] concedes in his opening brief that he is currently employed.” Sec. Opp., 6. In other words, the Secretary seeks to create a bright line rule that any type employment bars a finding of TDIU. And the Secretary’s ultimate conclusion - that Markson did not raise the issue of employability - does not logically flow from the fact that Markson was employed. *Id.* Indeed, Markson candidly acknowledge in his brief that he was employed, but noted that his service-connected hypertension hindered his ability to adequately perform his job because he can no longer perform any strenuous activities. App. Br., 2.

At bottom, the Secretary’s Opposition does nothing to change the fact that Markson adequately raised the issue of his employability, and thus the Board failed to “fully and sympathetically develop the veteran’s claim to its optimum before deciding it on the merits.” *Norris v. W.*, 12 Vet. App. 413, 420 (1999). And because the Board failed to even consider the issue of employability, the Board unequivocally failed to provide Markson with adequate reasons and bases for the denial of his claim. 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; *Scott v. Shineski*, 2009 U.S. App. Vet. Claims LEXIS 723, at *17. A remand is thus appropriate.

II. Markson’s Collective Symptoms Warrant An Extraschedular Rating

This Federal Circuit has held that the language of § 3.321(b)(1) “provides for referral for extra-schedular consideration based on the collective impact of multiple

disabilities.” *Johnson v. McDonald*, 762 F.3d 1362, 1365 (Fed. Cir. 2014) (stating that [l]imiting referrals for extra-schedular evaluation to considering a veteran’s disabilities individually ignores the compounding negative effects that each individual disability may have on the veteran’s other disabilities.”). As Markson argued in his moving brief, the Board failed to do so in this case. App. Br., 6-7.

In response, the Secretary argues that Markson “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.” Sec. Opp., 13. The former argument is wrong and the latter is based on a flawed premise.

First, Markson did assert in his opening brief that the collective impact of his service-connected disabilities warranted extraschedular referral when he argued that, “the Board collapsed its analysis for left ventricular hypertrophy and hypertension into one impermissible analysis...In giving consideration to Markson’s claim for an extraschedular rating for hypertension, the Board incorrectly stated that all of his symptoms - shortness of breath, fatigue, and weakness - were associated with left ventricular hypertrophy as opposed to hypertension.” App. Br., 7.

Second, the Secretary’s focus on what the evidence shows misses the mark, as it is the Board’s failure to consider the collective evidence in the first place that gave rise to the reversible error. The Secretary cannot now shift the burden to Markson when it was the Board’s duty to consider this collective evidence when determining the application of an extraschedular rating.

Notwithstanding this improper burden shifting, the record evidence shows that Markson has in fact established that his collective symptoms warrant an extraschedular

rating. Indeed, the record shows that Markson suffers from service-connected PTSD, hypertension, and left ventricular hypertrophy, each of which are serious in their own right, but collectively paint a unique disability portrait which demands an extraschedular rating. RBA 256-60, 578, 586, 607-615, 1281-84. This ignores Markson's other debilitating symptoms, which include frequent night terrors. RBA 607-615.

At bottom, the Secretary's Opposition failed to counter Markson's well-articulated arguments supporting an extraschedular rating. *Johnson*, 762 F.3d at 1366. A remand is justified for this reason, as well.

III. The Board's Failure To Follow Proper Procedure Requires A Remand

While the Secretary's brief focuses on certain discrete points in Markson's Brief, it misses the bigger picture – that the Board's repeated failure to follow proper procedure or to apply the proper standards warrants a remand. While these arguments are fleshed out in greater detail in Markson's moving brief, they warrant mention again:

- The Board failed to properly apply the three-step inquiry necessary to fairly adjudicate his extraschedular rating claim;
- The Board failed to properly consider numerous factors and governing norms that render the schedular rating inadequate in Markson's case;
- The Board's vague and unsupported analysis focused on Markson's left ventricular hypertrophy, but not on his hypertension;
- The Board ignored the medical evidence proving the functional impact Markson's hypertension has on his life;
- The Board ignored the fact that Markson clearly raised his TDIU claim;
- The Board failed to take into consideration any of the subjective factors unique to Markson that would have warranted a finding that his hypertension rendered him unemployable; and
- The Board completely disregarded its duty when it concluded that since the issue of TDIU was not expressly raised, it was inapplicable.

When all of these failures are added together, it becomes clear that the Board failed to adequately provide Markson with the bases and reasons for denying his claim; erred in denying extraschedular ratings for hypertension when it associated all of Markson's symptoms with left ventricular hypertrophy; and failed to provide Markson with adequate reasons and bases for denying his Total Disability due to Individual Unemployability claim. Under these circumstances, a remand is justified.

CONCLUSION

For these reasons, Markson respectfully requests the Court vacate the Board's decision and remand his appeal so that it may obtain an adequate medical opinion and re-adjudicate his claim.

Respectfully submitted,

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