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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 20-3923

CHARLES D. SMART, APPELLANT,

v.

DENIS McDONOUGH,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before MEREDITH, *Judge*.

MEMORANDUM DECISION

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

MEREDITH, *Judge*: The appellant, Charles D. Smart, through counsel appeals an April 30, 2020, Board of Veterans' Appeals (Board) decision that denied an initial disability rating in excess of 50% for bilateral hearing loss. Record (R.) at 4-17. The Board remanded the matters of entitlement to a compensable rating for chloracne and a total disability rating based on individual unemployability (TDIU). The remanded matters are not before the Court. *See Breeden v. Principi*, 17 Vet.App. 475, 478 (2004) (per curiam order) (a Board remand "does not represent a final decision over which this Court has jurisdiction"); *Hampton v. Gober*, 10 Vet.App. 481, 483 (1997) (claims remanded by the Board may not be reviewed by the Court). The appellant does not raise any argument concerning the Board's denial of a schedular disability rating in excess of 50% for bilateral hearing loss. Therefore, the Court finds that he has abandoned his appeal of this issue, and the Court will dismiss the appeal as to the abandoned issue. *See Pederson v. McDonald*, 27 Vet.App. 276, 285 (2015) (en banc). This appeal is timely, and the Court has jurisdiction to review the Board's decision pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the following reasons, the Court will vacate the Board's decision to the extent that it failed to consider

all possible schedular rating alternatives for manifestations of the appellant's bilateral hearing loss, and the Court will remand the matter for further proceedings consistent with this decision.

I. BACKGROUND

The appellant served on active duty in the U.S. Army from January 1971 to October 1972. R. at 514. He filed a disability compensation claim for bilateral hearing loss in June 2018 and underwent a VA examination shortly thereafter. R. at 344-53, 494-97. The examiner diagnosed bilateral sensorineural hearing loss; opined that the appellant's preexisting right ear hearing loss was aggravated by military service and that his left ear hearing loss was more likely than not caused by in-service acoustic trauma; and recorded the appellant's report that his hearing disability impacted his ability to work because, "even with his hearing aids[,] he [had] trouble understanding people." R. at 349; *see* R. at 344-53.

A VA regional office (RO) granted the claim in August 2018 and assigned a 50% disability rating, effective June 25, 2018. R. at 315-32. The appellant disagreed with the assigned rating and perfected an appeal to the Board. R. at 51-53, 137-62, 200-02. In his Substantive Appeal, the appellant asserted in part that he cannot hear anything without hearing aids, that he "suffer[s] from inadequate sleep due to worrying about possible emergencies that could arise with regard[] to [his] elderly mother" who lives with him, and that, if he is awakened, he is "startled, defensive, and . . . combative until [he] get[s his] bearings." R. at 52. He further reported that he retired for "safety reasons" in 2018, which was earlier than he had planned, due to his hearing loss disability. R. at 52-53.

In April 2020, the Board relied on the results of audiological evaluations of record to deny a disability rating in excess of 50% for bilateral hearing loss, explaining that, although it "in no way discount[ed] the difficulties that the [appellant] experiences because of his hearing loss, . . . disability ratings for hearing impairment are derived by a mechanical application of the rating schedule." R. at 12. The Board noted that the appellant raised for the first time in his Substantive Appeal that he suffers from anxiety and chronic sleep impairment, as well as his report that he retired earlier than he intended, but the Board stated that no request for extraschedular compensation had been made. R. at 11-12. The Board further concluded, "in light of [its] decision to remand the issue of [TDIU], . . . [that] the issue[s] raised are not relevant to the determination before the Board for this issue at this time." R. at 12. This appeal followed.

II. ANALYSIS

The appellant argues that the Board failed to fulfill its duty to maximize benefits because it recognized that he suffers from anxiety and chronic sleep impairment due to his service-connected hearing loss yet neglected to assess whether he was entitled to separate disability ratings for those complications, including secondary service connection. Appellant's Brief (Br.) at 3-9 (citing *Morgan v. Wilkie*, 31 Vet.App. 162 (2019)). He asserts that, but for this error, the Board would have remanded his claim for VA to provide him with examinations to assess his hearing loss complications. *Id.* at 9-12.

The Secretary counters that the appellant has not pointed to evidence that a disability secondary to hearing loss was reasonably raised by the record and that the Board fulfilled its duty to maximize benefits when it recognized that TDIU had been raised by the record and remanded that matter for further development. Secretary's Br. at 5, 8-11. He contends that there is no evidence indicating that the appellant's inadequate sleep and worrying impact his earning capacity, and therefore "the Board properly exhausted all schedular benefits" by finding that his Substantive Appeal only raised an issue of TDIU. *Id.* at 10-11. The Secretary further argues that the Board had no duty to provide a VA examination or adjudicate secondary service connection. *Id.* at 11-17. The appellant disputes these contentions in his reply brief and urges the Court to remand the matter for appropriate development. Reply Br. at 1-15.

The VA rating schedule is based, "as far as practicable, upon the average impairments of earning capacity." 38 C.F.R. § 3.321(b)(1) (2021). In exceptional cases, the rating schedule may be found inadequate, and an extraschedular rating may be approved by the Under Secretary for Benefits or the Director of the Compensation Service. *Id.* However, there is a "threshold question" that VA must consider before turning to § 3.321(b)(1). *Morgan*, 31 Vet.App. at 168. Specifically, "VA's duty to maximize benefits requires it to first exhaust *all* schedular alternatives for rating a disability *before* the extraschedular analysis is triggered." *Id.* Although "[t]he Board is not required to discuss each of [the schedular rating] tools in every case, . . . it must do so when possible schedular alternatives for rating a disability are either raised by the claimant or reasonably raised by the record." *Id.*

Pursuant to established caselaw, the appellant's 50% schedular rating for hearing loss, which is derived from the mechanical process of applying the rating schedule to the specific numeric scores obtained by audiology testing, see *Lendenmann v. Principi*, 3 Vet.App. 345, 349

(1992); 38 C.F.R. §§ 4.85, 4.86 (2021), "contemplate[s] the functional effects of decreased hearing and difficulty understanding speech in an everyday work environment, as these are precisely the effects that VA's audiometric tests are designed to measure," *Doucette v. Shulkin*, 28 Vet.App. 366, 369 (2017). Here, the appellant argues that the Board erred because it failed to address whether separate ratings, including secondary service connection, are warranted for anxiety and chronic sleep impairment. The Court agrees. *See Morgan*, 31 Vet.App. at 164 ("[S]chedular rating concepts—including, but not limited to, secondary service connection . . . [and TDIU]—are critical components of the duty to maximize benefits."); *see also Bailey v. Wilkie*, 33 Vet.App. 188, 203 (2021) ("VA is required to develop and adjudicate related claims for secondary service connection for disabilities that are reasonably raised during the adjudication of a formally initiated claim for the proper evaluation level for the primary service-connected disability.").

Contrary to the Secretary's suggestion, this is not a matter of whether the record reasonably raised the issue because the Board here expressly acknowledged the appellant's lay assertion that he experiences symptoms not contemplated by the applicable diagnostic code—he "suffers from anxiety and chronic sleep impairment due to his bilateral hearing loss." R. at 11-12. Additionally, as argued by the appellant, the Board did not discount those statements but instead found him "competent to testify to facts or circumstances that can be observed and described." R. at 12; *see id.* ("The Board in no way discounts the difficulties that the [appellant] experiences because of his hearing loss."). And, by failing to question the credibility of those statements, the Court may conclude that the Board implicitly found the appellant credible. *See Miller v. Wilkie*, 32 Vet.App. 249, 260 (2020) ("[W]hen the record includes the veteran's lay reports, which the Board did not find to be not credible, we may ordinarily conclude that it made an implicit credibility determination.").

Notwithstanding the foregoing, the Board did not address whether the appellant's sleep impairment and anxiety may be compensated by other schedular means. *See Morgan*, 31 Vet.App. at 167. Instead, the Board noted that "no direct request for entitlement to extraschedular compensation [had been] made" and found, because of its "decision to remand the issue of TDIU . . . [that] the issue[s] raised are not relevant to the determination before the Board for this issue at this time." R. at 12. But the Board's finding that the appellant did not request extraschedular compensation is a secondary matter because, as the Court held in *Morgan*, "VA's duty to maximize benefits requires it to first exhaust *all* schedular alternatives for rating a disability *before* the

extraschedular analysis is triggered." 31 Vet.App. at 168; *see id.* (explaining that VA's duty to examine all possible rating methods is a threshold analysis); Appellant's Br. at 8.

Moreover, although the Secretary notes correctly that the Board recognized that TDIU had been raised by the record and remanded that issue for further development, the Court is not persuaded that the Board's recognition of one alternative rating method fully satisfied the Board's duty to maximize benefits by "examining *all* possible rating methods" raised by the claimant or reasonably raised by the record. *Morgan*, 31 Vet.App. at 168 (emphasis added); *see* Secretary's Br. at 11 ("[T]he Board properly exhausted all schedular benefits by finding that his statements only raised an issue of . . . TDIU."). In that regard, the Board did not explain why remanding the issue of TDIU otherwise satisfied its duty to consider alternative rating tools, *see* 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995), and the Court will not accept the Secretary's explanations as a substitute for the Board's, *see Martin v. Occupational Safety & Health Rev. Comm'n*, 499 U.S. 144, 156 (1991) ("[A]gency 'litigating positions' are not entitled to deference when they are merely appellate counsel's 'post hoc rationalizations' for agency action, advanced for the first time in the reviewing court."); *Evans v. Shinseki*, 25 Vet.App. 7, 16 (2011) ("[I]t is the Board that is required to provide a complete statement of reasons or bases, and the Secretary cannot make up for its failure to do so."). Remand is thus required. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) ("[W]here the Board . . . failed to provide an adequate statement of reasons or bases for its determinations, . . . a remand is the appropriate remedy.").

On remand, the appellant is free to submit additional evidence and argument on the remanded matter, including the specific arguments raised here on appeal, and the Board is required to consider any such relevant evidence and argument. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002) (stating that, on remand, the Board must consider additional evidence and argument in assessing entitlement to the benefit sought); *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order). The Court reminds the Board that "[a] remand is meant to entail a critical examination of the justification for the decision," *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991), and the Board must proceed expeditiously, in accordance with 38 U.S.C. § 7112.

III. CONCLUSION

The appeal of the Board's April 30, 2020, decision denying an initial schedular disability rating in excess of 50% for bilateral hearing loss is DISMISSED. After consideration of the parties'

pleadings and a review of the record, the Board's decision is VACATED to the extent that it failed to consider all possible schedular rating alternatives for manifestations of the appellant's bilateral hearing loss, and the matter is REMANDED for further proceedings consistent with this decision.

DATED: August 6, 2021

Copies to:

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