

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

RICHARD R. DOUCETTE,)	
)	
Appellant,)	
)	
v.)	Vet. App. No. 15-2818
)	
ROBERT A. McDONALD,)	
Secretary of Veterans Affairs,)	
)	
Appellee.)	

SUPPLEMENTAL MEMORANDUM OF LAW

QUESTIONS PRESENTED

On August 3, 2016, the U.S. Court of Appeals for Veterans Claims (Court) ordered the parties to address two issues:

- (1) Whether the Board of Veterans' Appeals (Board), when determining whether referral for extraschedular consideration under 38 C.F.R. § 3.321(b) is warranted for a hearing loss disability, must specifically discuss the functional effects of an appellant's hearing loss in its extraschedular analysis if it has already discussed those effects in its analysis of the proper schedular rating; and
- (2) Whether there is a distinction between symptoms listed in the schedular criteria for a disability and symptoms contemplated by those schedular criteria for the purposes of § 3.321(b), including whether functional effects resulting from hearing loss, though not listed in the schedular criteria for that condition, may nonetheless be contemplated by disability ratings calculated by the mechanical application of audiological testing scores to the rating schedule.

RESPONSE

Before the Court is a claim for entitlement to an initial compensable disability rating for service-connected bilateral hearing loss, which was denied in a June 1, 2015, Board decision. On appeal, Appellant limited his allegations of error to whether the Board properly determined whether referral for extraschedular consideration was warranted. See *Cacciola v. Gibson*, 27 Vet.App. 45, 57 (2015) (holding that, when an appellant expressly abandons an appealed issue *or declines to present arguments as to that issue*, the appellant relinquishes the right to judicial review of that issue, and the Court will not decide it); *Grivois v. Brown*, 6 Vet.App. 136, 138 (1994) (holding that issues or claims not argued on appeal are considered abandoned). As discussed in the Secretary's May 2, 2016, brief, the Board neither applied an erroneous interpretation of 38 C.F.R. § 3.321(b)(1) nor failed to provide an adequate statement of reasons or bases for its decision not to refer Appellant's claim for extraschedular consideration, and Appellant has not established that the manifestations of his service-connected bilateral hearing loss reflected an exceptional or unusual disability picture (or that those manifestations resulted in related factors akin to marked interference with employment or frequent periods of hospitalization) such that referral for extraschedular consideration was warranted.

1. Must the Board, when determining whether referral for extraschedular consideration under 38 C.F.R. § 3.321(b) is warranted for a hearing loss disability, specifically discuss the functional effects of an appellant's hearing loss in its extraschedular analysis if it has already discussed those effects in its analysis of the proper schedular rating?

No. This Court has explained that Board decisions are generally to be read as a whole. See *Prickett v. Nicholson*, 20 Vet.App. 370, 375 (2006) (reviewing “the Board’s discussion as a whole”); *Janssen v. Principi*, 15 Vet.App. 370, 379 (2001) (reviewing the Board’s decision “taken as a whole”); see also *Hood v. Shinseki*, 23 Vet.App. 295, 299 (2009) (“The Court reviews factual findings under the ‘clearly erroneous’ standard such that it will not disturb a Board finding unless, based on the record as a whole, the Court is convinced that the finding is incorrect.”). The ultimate question when considering whether a particular Board decision includes an adequate statement of reasons or bases is whether that decision contains enough information to enable an appellant to understand the precise basis for its decision and to facilitate judicial review in this Court. See 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 (1990). Logically, once the Board has analyzed an issue to include discussing the relevant evidence on appeal, an appellant has been provided the information contained in that analysis and/or discussion. Put another way, it does not matter whether the Board analyzed the functional effects of

Appellant's bilateral hearing loss in that section of its decision pertaining to compensation from a schedular perspective or whether it discussed those effects in both the schedular and extraschedular portions of a decision; it has provided that analysis, and has therefore informed Appellant of the basis for its decision and allowed for the Court's review.

As it relates to the Board's discussion of the functional effects of a claimant's hearing loss in that section pertaining to a schedular rating, so long as it accurately and appropriately reviewed the relevant evidence, there is no reason why the Board must also repeat its discussion of that evidence in that portion of its decision regarding an extraschedular disability rating. As a result of the Board's discussion – anywhere in its decision, both the claimant and the Court have already been notified of the evidence that the Board found relevant regarding the functional effects of the claimant's hearing loss. While the Board must consider whether the Schedule for Rating Disabilities (rating schedule) reasonably describes a claimant's disability level and symptomatology in determining whether the claimant's disability picture is contemplated by the rating schedule, it does not need to repeat its previously provided discussion of any evidence of the functional effects of such disability.

In the present case, the Board discussed the relevant evidence of record, describing Appellant's symptoms and complaints as well as their resultant functional effects and impairments. Specifically, it noted (among

other evidence) that during his appeal, Appellant reported difficulty understanding and difficulty hearing, which was worse in noisy environments; often had to ask others to repeat themselves; needed to turn the television volume up; did not know where sound originated from when in noisy situations or was without his hearing aid; and that a February 2013 Department of Veterans Affairs (VA) examiner opined that Appellant should be able to use a telephone with his right ear without difficulty and communicate in most situations, especially if afforded preferential seating. [Record [R.] at 12]. The Board then explained that Appellant's symptomatology did not constitute an exceptional disability picture, but rather reflected "difficulty hearing," which was typical and neither unusual nor exceptional. [R. at 12-13]. In sum, the Board's analysis informed Appellant of the basis for its decision, allowed for the Court's review, and was not clearly erroneous.

2. Is there a distinction between symptoms *listed* in the schedular criteria for a disability and symptoms *contemplated* by those schedular criteria for the purposes of § 3.321(b), including whether functional effects resulting from hearing loss, though not listed in the schedular criteria for that condition, may nonetheless be contemplated by disability ratings calculated by the mechanical application of audiological testing scores to the rating schedule?

Yes; the rating schedule may contemplate symptoms and functional effects resulting from a disability that are not specifically listed in the schedular criteria for that condition. The criteria set forth in the various

Diagnostic Codes (DCs) generally are not intended to capture every conceivable symptom or manifestation of a disability, but rather are intended to provide an effective, efficient, and uniform means by which the VA can assess the average impairment of earning capacity caused by the disability across a global population of veterans afflicted with that disability notwithstanding the myriad ways in which such a disability might present. For instance, this Court explained in *Mauerhan v. Principi*, 16 Vet.App. 436 (2002), that, as it relates to 38 C.F.R. § 4.130 governing the schedular criteria for rating mental disorders, the use of the term “such as” in the rating criteria demonstrated that the symptoms enumerated after that phrase were not intended to constitute an exhaustive list, but rather operated as examples of the type and degree of the symptoms, or their effects, that justify a particular disability rating. *Id.* at 442-43. According to *Mauerhan*, there is a distinction between symptoms listed and symptoms contemplated by 38 C.F.R. § 4.130, DCs 9201-9440.

As it relates to the rating schedule and the functional effects resulting from hearing loss, there is an obvious distinction between the symptoms listed in the schedular criteria and those contemplated by that criteria. While the rating schedule serves as a guide in the evaluation of service-connected disabilities (and the percentage ratings strive to represent the average impairment in earning capacity resulting from such diseases and injuries and their residual conditions in civil occupations), the

“[a]ssignment of 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); see *Anderson v. Shinseki*, 22 Vet.App. 423, 425 (2009). Accordingly, a review of that portion of the rating schedule pertaining to the evaluation of hearing impairments reflects that it does not technically list *any* symptoms, but rather provides instruction in utilizing the mechanical application based on the results of any audiometric evaluations. See 38 C.F.R. §§ 4.85, 4.86. However, the rating schedule nonetheless contemplates the functional effects of hearing loss.

Pursuant to 38 C.F.R. § 3.385, impaired hearing will be considered to be a disability for VA benefits purposes when specific auditory thresholds are met, or when speech recognition scores do not exceed a specific percentage. As such, the Secretary has chosen to define hearing loss as a disability by using these two means of measuring hearing acuity; and, exercising his authority to adopt and apply a schedule of disability ratings based upon the average impairment in earning capacity resulting from disability, he has chosen to use auditory thresholds and speech discrimination scores to measure the severity of this disability.¹ See

¹ The purpose of speech discrimination is to test the patient’s “clarity or ability to understand speech.” See Johns Hopkins Medicine, Hopkins

38 C.F.R. § 4.85(a) (“An examination for hearing impairment . . . must include a controlled speech discrimination test . . . and puretone audiometry test.”); see *also* 38 U.S.C. § 1155. Scheduling hearing loss thus is evaluated based on the puretone threshold, speech recognition, or a combination of both. See 38 C.F.R. § 4.85(b)-(e), Table VI, Table VIA, Table VII.

Under the rating schedule, the results of the puretone and speech discrimination tests are applied to one of two numeric tables, which yields a Roman numeral designation for each ear, which are then applied to a third table – Table VII. See 38 C.F.R. § 4.85, Tables VI, VIA, VII, DC 6100. Table VII includes a number of possible combinations of levels of hearing impairment for each ear, and a corresponding disability rating for each combination. See 38 C.F.R. § 4.85, Table VII, DC 6100. As such, the rating schedule contemplates the volume and pitch heard and the ability to understand spoken words, and assigns a percentage evaluation

Hearing, Speech Audiometry, http://www.hopkinsmedicine.org/hearing/hearing_testing/speech_audiometry.html (last accessed August 23, 2016). The purpose of puretone audiometry testing is to determine the presence (or absence) of hearing loss. See Johns Hopkins Medicine, Hopkins Hearing, Pure Tone Audiometry, http://www.hopkinsmedicine.org/hearing/hearing_testing/pure_tone_audiometry.html (last accessed August 23, 2016). The first part of this test determines one’s ability to hear a variety of pitches. *Id.* The second part of the test examines air and bone conduction, which allows the tester to determine which part of the auditory system is responsible for the hearing loss. *Id.*

for any impairment. See 38 C.F.R. § 4.85, DC 6100. In sum, reduced ability to hear sound at specific volumes and difficulty understanding speech are the two primary and expected functional manifestations of hearing loss contemplated by the mechanical application of 38 C.F.R. §§ 4.85 and 4.86. In essence, VA utilizes a process (the mechanical application discussed above) whereby the contemplated symptoms involved with hearing loss (namely difficulty hearing and understanding speech) are appropriately compensated via pure tone thresholds and speech discrimination scores. The mechanical application of audiometric evaluations to the rating schedule is ultimately a process that attempts to corroborate a claimant's subjective complaints related to hearing loss. Put another way, a veteran's complaints of difficulty hearing and understanding speech and conversation are verified or substantiated by the mechanical application of pure tone threshold decibel average and speech discrimination results; intuitively, it would not be possible for VA to consistently evaluate claimants' hearing impairments solely on the basis of reported symptomatology.

This is similar to the manner in which VA develops and compensates other disabilities as well. For example, if a veteran reports loss of motion of a joint, VA does not assign a disability rating for that condition on the basis of that report. Rather, VA generally rates the functional impairment involved on the basis of range of motion measurements obtained by using

a goniometer. See 38 C.F.R. § 4.46. This concept applies to many DCs in the rating schedule; objective test results are essentially a way to confirm a claimant's lay statements and assist in providing an independent and demonstrable basis for assigning a specific disability rating in a consistent manner.

The legislative history of 38 C.F.R. §§ 4.85 and 4.86 provides guidance and support for the above analysis. In November 1987, VA revised the manner in which it evaluated hearing loss disabilities, implementing a new method for evaluating the degree of such disabilities, and noting that the amendments were "necessary because of new testing methods which place greater emphasis on decibel loss and speech discrimination in higher frequency ranges," the effect of which would "provide more accurate measurements of hearing impairment and appropriate compensation to hearing disabled veterans." 52 Fed. Reg. 44,117 (Nov. 18, 1987). In April 1994, VA proposed to further amend its rating schedule involving the evaluation of diseases of the ear and other sense organs, in part, to reflect recent medical advances. 59 Fed. Reg. 17,295-98 (April 12, 1994, Proposed Rule).

In furtherance of its desired goal, VA changed the manner in which it applied hearing acuity test scores to the rating schedule to account for the functional effects of hearing loss and "to fairly and accurately assess the hearing disabilities of veterans as reflected in a real life industrial setting."

Id. at 17,296. As part of its rating schedule amendment, VA added 38 C.F.R. § 4.85(d) (now § 4.86(a)), explaining that the proposed change was necessary because “[w]hile results of speech discrimination tests with this type of [exceptional] hearing loss² in a controlled setting are often near normal, they do not reflect the true extent of difficulty understanding speech in the everyday work environment.” *Id.* VA also added 38 C.F.R. § 4.85(e) (now § 4.86(b)) to account for an alternative exceptional pattern of hearing impairment³ that constituted “an extreme handicap in the presence of any environmental noise,” finding that such an addition was “appropriate . . . in order to compensate for th[a]t outcome.” *Id.* Accordingly, though not specifically **listed** in the criteria for rating hearing impairments, 38 C.F.R. § 4.85 (and § 4.86) were drafted to **contemplate** functional effects (difficulty hearing and understanding speech) in an “everyday work environment” and “in the presence of any environmental noise.” *Id.* As VA explained, “[t]he intended effect of these two new provisions [was] to fairly and accurately assess the hearing disabilities of veterans as reflected in a real life industrial setting.” *Id.*

Furthermore, the speech discrimination and decibel loss ranges designated for each level of hearing impairment contemplated by 38

² When the pure tone thresholds at 1000, 2000, 3000, and 4000 Hertz are 55 decibels or more.

³ When the pure tone threshold is 30 decibels or less at 1000 Hertz, but 70 decibels or more at 2000 Hertz.

C.F.R. §§ 4.85 and 4.86 were chosen based on clinical findings of the particular hearing impairments experienced by veterans correlating to certain degrees and types of hearing disabilities. Notably, the rating criteria for hearing loss were last revised in 1999. See 64 Fed. Reg. 25,202 (May 11, 1999, Final Rule). In promulgating these most recent revisions, VA obtained the assistance of the Veteran's Health Administration (VHA) in developing criteria that contemplated situations in which a veteran's hearing loss was of such a type that speech discrimination testing may not have accurately reflected the severity of communicative functioning experienced or where a veteran's hearing loss otherwise resulted in an extreme handicap in the presence of environmental noise, even while utilizing assistive devices such as hearing aids. *Id.* In such rulemaking, VA explained that VHA, through clinical studies involving veterans with hearing loss, had found that when certain patterns of impairment were present, a speech discrimination test conducted in a quiet room with amplification of the sounds did not always reflect the extent of impairment experienced in an ordinary environment and revised the schedular criteria to nonetheless compensate such veterans for their resulting impairment in earning capacity. *Id.*

In sum, the criteria pertaining to hearing impairment contemplates symptomatology involving difficulty hearing and understanding speech, i.e., the symptomatology that the Secretary has chosen as representative of

the nature and severity of hearing loss and the means by which the Secretary has determined that the average impairment in earning capacity caused by hearing loss is to be assessed across the global populations of veterans with a hearing loss disability. The decibel threshold requirements for application of Table VIA are based on the findings and recommendations of VHA [*Id.*], and as touched on above, the intended effect of the regulations is to “fairly and accurately assess the hearing disabilities of veterans as reflected in a real life industrial setting” [59 Fed. Reg. 17,296]. As it relates to the claim on appeal, the Board’s explanation that Appellant’s specific allegations of functional impairment based on his service-connected bilateral hearing loss reflected difficulty hearing, which was typical and not unusual or exceptional for someone with bilateral hearing loss, makes intuitive sense, is supported by the Proposed Rule (in 1994) and the Final Rule (in 1999), and is not clearly erroneous. [Record [R.] at 13].

Finally, a review of the 2002 VA *Clinician’s Guide* illustrates that the above analysis (to include the Board’s analysis discussed immediately above) constitutes VA’s stated interpretation as to what is contemplated by the rating schedule as it relates to hearing impairment. See Compensation & Pension, U.S. Dep’t of Veterans Affairs, *Clinician’s Guide* (Version 3.0 2002) (“*Clinician’s Guide*”). Specifically, the *Clinician’s Guide* explains that “[t]he degree of hearing impairment is classified in terms of the effect of the

loss on the person's ability to understand speech in everyday situations": mild hearing loss (a pure tone threshold average between 26-40 decibels) "may cause difficulty hearing faint speech or normal speech in the presence of background noise"; moderate hearing loss (a pure tone threshold average between 41-54 decibels) "may cause difficulty with speech at normal conversational levels, especially when background noise is present"; moderately severe hearing loss (a pure tone threshold average between 55-69 decibels) "may [result in] difficulty hearing or understanding all but loud speech[and s]peech recognition may be nearly impossible in the presence of background noise"; severe hearing loss (a pure tone threshold average between 70-89 decibels) "may [result in] extreme difficulty understanding spoken words, even in quiet situations"; and profound hearing loss (a pure tone threshold average 90 decibels or worse) involves an individual who "is functionally deaf and may not understand even amplified sounds." *Id.* at 5.10. While the *Clinician's Guide* is not legally binding on VA examiners, but rather serves as a guide to clinicians performing compensation and pension examinations, it does serve to underscore that the rating schedule (via VA audiometric testing) contemplates the exact type of hearing difficulties that Appellant has alleged exist in the present case.

Because the schedular criteria for hearing loss necessarily contemplates volume, pitch, and ability to understand words, complaints of

this kind would not be “exceptional,” and referral for extraschedular consideration of such complaints would not be warranted. As the Board correctly found, these are exactly the kinds of complaints that Appellant alleged in this case. [R. at 12-13 (finding that “the resultant effect of [Appellant’s] symptoms in combination is difficulty hearing. This is typical, not unusual or exceptional, for one with [bilateral hearing loss],” and thus, Appellant’s “symptoms and their resultant effects are contemplated adequately” by the schedular criteria for hearing loss)]; see Appellant’s Brief at 8 (alleging that his hearing loss results in a “difficulty in distinguishing sounds in a crowded environment . . . and difficulty locating the source of sounds” and “difficulty understanding conversational speech, difficulty hearing the television, and difficulty using the telephone”). To be sure, Appellant has not shown, and the record does not reflect, that any of the symptoms of his hearing loss, to include even the functional effects of his hearing loss on his daily life and occupation, are so different from the typical or expected symptoms and manifestations of hearing loss as to be exceptional or unusual.

CONCLUSION

Based on the above law and discussion, the Secretary responds to the Court’s August 3, 2016, Order, and respectfully contends that the Court should affirm the Board’s June 1, 2015, decision that determined that

referral of Appellant's service-connected bilateral hearing loss disability for extraschedular consideration was not warranted because he has not carried his burden of establishing the existence of error, prejudicial or otherwise.

Respectfully submitted,

LEIGH A. BRADLEY
General Counsel

MARY ANN FLYNN
Chief Counsel

/s/ Selket N. Cottle
SELKET N. COTTLE
Deputy Chief Counsel

/s/ Robert Schneider
ROBERT SCHNEIDER
Appellate Attorney
Office of the General Counsel (027i)
U.S. Dept. of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, D.C. 20420
(202) 632-6988

Attorneys for Appellee