

**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)	

APPELLANT’S RESPONSE TO AUGUST 3, 2016, COURT ORDER

On August 3, 2016, the Court directed the parties to respond to two questions regarding extraschedular consideration pursuant to 38 C.F.R. § 3.321(b) (2016) in the context of cases pertaining to hearing loss disability. Appellant submits that the Board must specifically discuss the functional effects of an appellant’s hearing loss disability in the Board’s extraschedular analysis, even if it has already discussed those effects in its analysis of the proper schedular rating. And there is no distinction between symptoms listed and symptoms contemplated by the schedular criteria, but the functional effects resulting from hearing loss are not listed or contemplated by the schedular criteria.

I. The Board must specifically discuss the functional effects of an appellant's hearing loss in its extraschedular analysis, even if it has already done so in its analysis of the proper schedular rating.

The Board must discuss the functional effects of an appellant's hearing loss in its extraschedular analysis because that analysis serves a different purpose and rests on different criteria than the schedular analysis. The separate discussion is the only way to ensure that the relevant issues are properly addressed, and that a claimant is properly compensated for any functional effects of a hearing loss disability. If the Board simply discusses the functional effects in its schedular analysis and concludes that those effects are contemplated by the schedular rating criteria, the Board has failed to comply with established law on the issue.

The assignment of disability ratings for hearing impairment has two components. First is the 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). Second is an inquiry into the effects of disability upon the person's ordinary activity." 38 C.F.R. § 4.10 (2016).

In *Martinak v. Nicholson*, 21 Vet. App. 447, 455 (2007), the Court rejected the Secretary's argument that merely including objective test results satisfies section 4.10's requirement to account for the functional effects of the disability on a veteran's ordinary activities. Instead, the Court determined that requiring VA audiologists to provide information on the functional effects caused by a hearing loss disability made sense in the context of extraschedular rating consideration. *Id.* The Court reasoned

that, “unlike the rating schedule for hearing loss, § 3.321(b) does not rely exclusively on objective test results to determine whether a referral for an extraschedular rating is warranted.” *Id.* Requiring VA audiologists to “fully describe the functional effects caused by a hearing disability” facilitates the determination of whether a referral for extraschedular consideration may be warranted. *Id.* This is consistent with VA’s recognition that the schedular standards are based on testing in a quiet environment with amplification, but that such does not always reflect the impairment in the ordinary environment. *See* 64 Fed. Reg. 25202, 25203 (May 11, 1999) (Veterans Health Administration study indicating, *inter alia*, when certain “pattern of [hearing] impairment is present, a speech discrimination test conducted in a quiet room with amplification of the sounds does not always reflect the extent of impairment experienced in the ordinary environment.”).

In order for the Board to properly determine whether extraschedular referral is warranted, it must consider not only the nature of the symptoms manifested by a veteran’s disability, but also the “level of severity.” *Thun v. Peake*, 22 Vet.App. 111, 115 (2008). If the schedular evaluation does not contemplate the claimant’s disability level and symptomatology, and the disability picture exhibits other related factors such as marked interference with employment or frequent periods of hospitalization, then the case must be referred to an authorized official to determine whether, to accord justice, an extraschedular rating is warranted. *Id.* Because the mechanical application of the rating schedule to audiometric testing results obtained in a sound-controlled

environment does not necessitate consideration of the functional effects of the disability, the schedular rating criteria do not cover the severity and level of symptomatology of the Veteran's disability picture.

This Court has already determined that merely including objective test results does not satisfy § 4.10's requirement to account for the functional effects of the disability on a person's ordinary activities. *Martinak*, 21 Vet.App. at 455. That can only be properly accomplished in the Board's extraschedular rating discussion. The Board must discuss the functional effects caused by a hearing loss disability in its analysis of whether an extraschedular referral may be warranted because that analysis accounts for impacts of the disability separate and apart from the hearing loss accounted for by the audiometric testing.

The Board's analysis of entitlement to a schedular rating for a hearing loss disability will always be limited to whether the claimant's disability falls in the objective criteria defined by 38 C.F.R. §§ 4.85-4.86. In contrast, the Board's analysis of the severity of, as well as any unusual or exceptional characteristics of the claimant's functional effects, occurs only in the context of an analysis of whether extraschedular referral is warranted.

Board decisions must be read as a whole. *Prickett v. Nicholson*, 20 Vet.App. 370, 375 (2006). And this longstanding tenet is consistent with requiring that the Board undertake rigorous schedular and extraschedular analyses. Discussing the functional effects of the hearing disability in the schedular analysis does not satisfy the Board's

obligation to adequately address those functional effects because the purposes of the two analyses differ. The purpose of the schedular discussion is to determine what the claimant's schedular rating should be based on a mechanical application of the rating schedule to objective test results. *Lendenmann*, 3 Vet. App. at 349. The purpose of its extraschedular discussion is to address whether those functional effects create an exceptional or unusual disability picture with a specific discussion as to how the effects impact a claimant's functional and occupational capabilities. A discussion of the functional effects within the context of a schedular rating would not meet this purpose as the impact from the functional effects is meaningless within the context of the mechanical application of the hearing test results.

The extraschedular discussion, furthermore, must address the veteran's whole disability picture. *See Johnson v. McDonald*, 762 F. 3d 1362, 1366 (Fed. Cir. 2014). By definition, that discussion does not occur when addressing entitlement to a rating for a specific disability.

Simply put, nothing in the rating criteria ensures that the Board will provide a higher schedular rating in instances where the functional effects may cause a marked interference with employment, but do not result in objectively measurable hearing loss or cause total unemployability. This remains the case even in instances where the evidence demonstrates a significant impact on the veteran's occupational capabilities.

The Board's discussion of functional effects in its schedular analysis does not mean that it will properly consider whether their severity and the resulting difficulties

will warrant an increased rating. This can only be properly considered through an adequate extraschedular analysis, including an analysis of the severity of the veteran's symptoms and whether they cause marked interference with employment. Even when functional effects are discussed in the schedular analysis and the Board's decision is read as a whole, its extraschedular analysis will not be adequate absent such a discussion and analysis.

Permitting the Board to merge its discussion of the functional impact from hearing loss with the mechanical application of the audiometric test results encourages the Board to conflate the two aspects of hearing loss disability. To that extent, the Board's decision would violate its mandate to make express "findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented on the record." 38 U.S.C. § 7104(d)(1). The Board must specifically discuss the functional effects of an appellant's hearing loss disability in its extraschedular analysis even if it has already discussed those effects in its analysis of the proper schedular rating.

II. There is no distinction between the symptoms listed in the schedular criteria for a disability and the symptoms contemplated by those schedular criteria, but the functional effects resulting from hearing loss are neither listed nor contemplated by the schedular rating criteria.

There is no distinction between symptoms *listed* in the schedular criteria and those *contemplated* because the list contained in the schedule is the exhaustive criteria the Secretary saw fit to include in 38 C.F.R. § 4.85-4.86 & Tables VI-VII. This is why

the Board must conduct a vigorous extraschedular investigation as contemplated in *Martinak*. There is no mechanism within the schedular rating criteria by which the Board must consider the severity of a veteran's hearing loss, because it is only required to apply the rating schedule to specific numeric scores. *Martinak*, 21 Vet.App. at 455.

Doing this may comply with the schedular criteria. But it falls short of ensuring that the numerous functional effects which may result from a hearing loss disability are properly considered in the rating the claimant receives because the loss measured by the audiometric testing is just one component of the veteran's disability due to hearing loss. *See* 64 Fed. Reg. at 25203 (VHA study indicating, *inter alia*, when a certain "pattern of [hearing] impairment is present, a speech discrimination test conducted in a quiet room with amplification of the sounds does not always reflect the extent of impairment experienced in the ordinary environment."); *cf. Johnston v. Brown*, 10 Vet.App. 80, 88 (1997) (Steinberg, J. concurring) (noting that effect of appellant's wheelchair-based life on service-connected conditions, "even if that effect has not been articulated in terms of effect on employment or frequent hospitalization, does raise the possibility of an 'exceptional or unusual disability picture'"); *Thun*, 22 Vet.App. at 115 (requiring a comparison between the level of severity and symptomatology of the claimant's service-connected disability with the established criteria found in the rating schedule).

38 C.F.R. § 4.1 (2016) provides that “percentage ratings represent as far as can practicably be determined the average impairment in earning capacity resulting from such diseases and injuries and their residual conditions in civil occupations” and that “the degrees of disability specified are considered adequate to compensate for considerable loss of working time from exacerbations or illnesses proportionate to the severity of the several grades of disability.” The schedular rating criteria for hearing loss contemplate “difficulty hearing” based on audiometric testing results obtained in a sound-controlled environment.

However, the varying functional effects resulting from that hearing difficulty are not listed or contemplated by the schedular rating criteria, and may manifest in any number of ways which may or may not cause marked interference with a claimant’s occupational functioning. *See Martinak*, 21 Vet.App. at 455 (unlike the rating schedule for hearing loss, § 3.321(b) does not rely exclusively on objective test results to determine whether a referral for an extraschedular rating is warranted.) Audiological testing results obtained in a sound-controlled environment do not sufficiently account for the functional effects the disability has on a person’s ordinary activities. *Martinak*, 21 Vet.App. at 455. This is precisely why the Court in *Martinak* required examiners to “fully describe the functional effects caused by a hearing disability.” *Id.* If the functional effects were contemplated by the schedular ratings, there would be no reason for the Court to require examiners to do so.

In fact, there have been several Memorandum Decisions issued by this Court that demonstrate the differing nature of the two aspects of hearing disability and why the functional effects are not contemplated in the schedular rating. *See* U.S. Vet. App. R. 30(a).¹ In *Hill v. Gibson*, No. 13-1739, 2014 WL 2800745 (Vet.App. Jun. 20, 2014), for example, the Veteran had difficulty hearing in background noise and hearing his children. *Hill*, No. 13-1739 at *2. In *Warlick v. McDonald*, No. 14-3109, 2015 WL 5255012, at *2 (Vet.App. Sept. 10, 2015), the Veteran had a limited ability to hear women's voices and participate in telephone conversations. And in *Boles v. McDonald*, No. 15-0175, 2015 WL 6605443 (Vet.App. Oct. 30, 2015), the claimant reported that he needed to use visual cues to communicate because he could not hear or understand conversation in a quiet setting. *Boles*, No. 15-1075 at *2.

In each, the Court set aside the Board's denial of an extraschedular rating, implicitly finding that the functional effects were not contemplated by the schedular criteria. *See Soyini v. Derwinski*, 1 Vet.App. 540, 546 (1991) (remand not required where eligibility could not be established). The Court was correct to do so because the complaints voiced by each veteran related to subjectively felt and measured ramifications of the disability. Those are neither listed in nor contemplated by the

¹ This rule allows for the citation of non-precedential decisions as for persuasive authority. There is no clear precedent on point directly addressing the Court's questions in this case. Appellant submits that the reasoning in the cases below demonstrate that the Court has rendered decisions that closely resemble Mr. Doucette's case in a favorable manner for appellants.

schedular rating. But they are, as VA has long-recognized, an aspect “of [the] impairment experienced in the ordinary environment.” 64 Fed. Reg. at 25203.

Respectfully submitted,
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