

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

HEZEKIAH GREEN, JR.,)	
)	
Appellant,)	
)	
v.)	Vet. App. No. 16-0740
)	
DAVID J. SHULKIN, M.D.,)	
Secretary of Veterans Affairs,)	
)	
Appellee.)	

JOINT MOTION FOR PARTIAL REMAND

Pursuant to U.S. Court of Appeals for Veterans Claims (Court) Rules 27(a) and 45(g), the parties respectfully move the Court to vacate that part of the January 15, 2016, Board of Veterans' Appeals (BVA or Board) decision that denied entitlement to initial ratings in excess of 10% disabling for left and right lower extremity radiculopathy. Record Before the Agency (R.) at 5.¹

¹ In its decision, the Board remanded the issue of entitlement to a total rating based on individual unemployability (TDIU). *Id.* at 3, 16-17. As such, this Court lacks jurisdiction to review that claim. See *Kirkpatrick v. Nicholson*, 417 F.3d 1361 (Fed. Cir. 2005) (holding that a Board remand is not a final decision within the meaning of 38 U.S.C. § 7252(a)). Appellant does not challenge that part of the Board decision that denied entitlement to VA benefits based on service connection for a bilateral eye disorder. (R. at 4). Therefore, he should be deemed to have abandoned any potential challenges thereto. See *Pederson v. McDonald*, 27 Vet.App. 276, 285 (2015) (en banc) (dismissing appeal as to issues abandoned by a represented appellant).

BASIS FOR REMAND

The parties agree that the Board erred when it provided an inadequate statement of reasons or bases, as required under 38 U.S.C. § 7104(d)(1), for its finding that Appellant was not entitled to ratings in excess of 10% for his service-connected left and right lower extremity radiculopathy under 38 C.F.R. § 4.124a, Diagnostic Code (DC) 8520. Specifically, the Board provided inadequate reasons or bases for its determination that Appellant was not entitled to higher ratings where it did not consider whether staged ratings were warranted. See *Schafrath v. Derwinski*, 1 Vet.App. 589, 593 (1991) (The Board must address all provisions of law and regulation where they are made "potentially applicable through the assertions and issues raised in the record."). Therefore, remand is warranted.

As the Board explained, under DC 8520, a Veteran will receive ratings of 10, 20, 40, or 60% for mild, moderate, moderately severe, or severe incomplete paralysis. (R. at 10). See 38 C.F.R. § 4.124a (DC 8520). Incomplete paralysis indicates a degree of lost or impaired function substantially less than the type pictured for complete paralysis given with each nerve. When the involvement is wholly sensory, the rating can be for a mild (10%), or at most a moderate degree (20%), but as high as 40% for sciatic neuritis even without organic changes. 38 C.F.R. § 4.123.

In the decision on appeal, the Board concluded that Appellant was not entitled to ratings in excess of 10% for left and right lower extremity neuropathy

based, in part, on its finding that his reports of symptoms have been largely complaints of pain, numbness, and tingling and occasionally weakness. (R. at 13). The Board conceded that VA examination results varied with respect to strength, sensation, reflexes, and atrophy but concluded that the evidence more nearly approximates mild incomplete paralysis. (R. at 14). In this regard, the Board explained, “the presence of normal results *at times* in the VA examinations indicates the symptoms may be marginal and are likely mild.” (R. at 14) (emphasis added). It found this was supported by the *majority* of examiners whereas only one examiner found symptoms to be moderate. *Id.* See (R. at 334 (325-37) (April 2013 VA examination noting moderate left-sided radiculopathy); (R. at 429-30 (428-46)) (March 2013 VA examination noting moderate symptoms)).

Insofar as the Board conceded that one examiner found Appellant’s symptoms were moderate and that his symptoms were varied, the parties agree that the Board should have discussed whether staged ratings were warranted. *Hart v. Mansfield*, 21 Vet.App. 505, 510 (2007) (The Board’s consideration of a staged rating is triggered “when the factual findings show distinct time periods where the service-connected disability exhibits symptoms that would warrant different ratings.”). Consequently, remand is required in order for the Board to address this evidence in its determination of whether Appellant was entitled to staged ratings for his service-connected lower extremity radiculopathy. See *Schafraath*, 1 Vet.App. at 593; see also *Tucker v. West*, 11 Vet.App. 369, 374

(1998) (remand is appropriate "where the Board has incorrectly applied the law, failed to provide an adequate statement of reasons or bases for its determinations, or where the record is otherwise inadequate").

On remand, Appellant is entitled to submit additional evidence and argument. See *Kutscherousky v. West*, 12 Vet.App. 369, 372 (1999) (*per curiam* order). The Board must also "reexamine the evidence of record, seek any other evidence the Board feels is necessary, and issue a timely, well-supported decision in this case." *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991). In any subsequent decision, the Board must set forth adequate reasons or bases for its findings and conclusions on all material issues of fact and law. See 38 U.S.C. § 7104(d)(1). The Board is further directed to obtain copies of Appellant's brief, the Court's order, and this motion and to incorporate them into Appellant's file for appropriate consideration in subsequent decisions on this claim. The Secretary "shall take such actions as may be necessary to provide for the expeditious treatment" of this claim. 38 U.S.C. § 7112. Finally, the Court has noted that a remand confers on the Appellant a right to VA compliance with the terms of the remand order and imposes on the Secretary a concomitant duty to ensure compliance with those terms. See *Stegall v. West*, 11 Vet. App. 268, 271 (1998).

WHEREFORE, the parties respectfully move the Court to issue an Order setting aside that part of the January 15, 2016, Board decision to the extent that it denied entitlement to ratings in excess of 10% for left and right lower extremity

radiculopathy, and remanding this appeal for further action consistent with the foregoing.

Respectfully submitted,

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