IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 17-1350

KENNETH R. DODD,

Appellant,

v.

PETER O'ROURKE,

Acting Secretary of Veterans Affairs,

Appellee.

APPELLANT'S BRIEF

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IN THE UNITED STATES COURT OF APPEALS
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KENNETH R. DODD,	)	
	)	
Appellant,	)	
	)	
v.	)	No. 17-1350
	)	
PETER O'ROURKE,	)	
Acting Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

ON APPEAL FROM THE

BOARD OF VETERANS' APPEALS

APPELLANT'S BRIEF

ISSUES PRESENTED

I. Whether the Board failed to ensure substantial compliance with its 2016 remand, or alternatively, ensure that VA satisfied its duty to assist in obtaining relevant records.

II. Whether the Board provided an inadequate statement of reasons or bases where it failed to discuss favorable evidence, adequately explain its denial of referral for extraschedular consideration, and address the scope of Appellant's initial claim.

JURISDICTION

Appellate jurisdiction is predicated on 38 U.S.C. §§ 7252(a) and 7266(a).

NATURE OF THE CASE

The Appellant, Kenneth R. Dodd, appeals from a decision of the Board of Veterans' Appeals ("Board") of January 26, 2017, which denied entitlement to an initial disability rating in excess of 10 percent for sinusitis status post endoscopic surgery with polypectomy and status post rupture of the sphenoid artery. Appellant requests reversal in part, and vacatur and remand of the Board's decision for further development and readjudication.

STATEMENT OF THE RELEVANT FACTS

Appellant served on active duty in the U.S. Air Force for 23 years, from September 1985 until August 2008, in the security forces and as a formal training instructor, with service in the Southwest Asia theater. *See* Record Before the Agency ("**R.**") at **928** (DD-214).

According to Appellant's March 1985 report of medical examination at entrance, clinical evaluation was normal. **R. 546-47.** Service treatment records ("STR") from June through November 2002 contain assessments of sinusitis with nasal congestion and obstruction, sinus pressure, and nasal discharge. **R. 532** (November 2002 STR), **534** (October 2002 STR), **535** (September 2002 STR), **536** (July 8, 2002, STR), **538** (June 20, 2002, STR). A June 25, 2002, STR reflects an assessment of rhinitis with continued nasal congestion and pressure. **R. 537.** A November 2002 x-ray notes the impression of significant multifocal sinus disease with narrowing of the right maxillary infundibulum and complete obstruction of the left ostiomeatal complex. **R. 487.**

In May 2003, surgery was recommended for Appellant's sinusitis. **R. 530.** Appellant was referred to the Otolaryngology Clinic in August 2003. **R. 525-26.** It was noted that he had chronic nasal congestion and post-nasal drainage and had been treated with multiple rounds of antibiotics and oral and nasal steroids. **R. 525 (525-26).** Appellant was assessed with chronic ethmoid and maxillary sinusitis and acute left frontal sinusitis with polyps, with recommendation of bilateral ethmoidectomies and bilateral maxillary antrostomies. **R. 526 (525-26).** A June 2003 x-ray reflects enlarging mucus retention cyst or polyp, right maxillary sinusitis changes, persistent multifocal sinus mucosal thickening, complete opacification of multifocal left ethmoid air cells, and complete obstruction of the right ostiomeatal complex. **R. 486 (485-86).** An April 2004 STR shows an assessment of rhinitis, with nasal congestion and nasal reconstructive surgery in four months. **R. 521.** An October 2004 STR reflects Appellant's need for surgery. **R. 517.**

January 2005 STRs show that Appellant underwent an anterior ethmoidectomy, median antrostomy, sphenoid left sinus opening, and inferior turbinectomy for his sinusitis. **R. 480, 484, 510-16.** In February 2005, Appellant suffered a nasal hemorrhage following his surgery. **R. 508.** February 2005 STRs reflect follow-up treatment. **R. 504-07.** A November 2005 STR notes Appellant's report of sinus headaches for two weeks. **R. 500.** In August and November 2007, Appellant complained of severe pain in his left sinus causing severe headaches with nasal discharge and blood and was assessed with acute sinusitis. **R. 494-98.** Appellant's May 2008 report of medical examination at separation reflects a normal history and physical, with notation of chronic sinusitis. **R. 479 (476-79).**

In April 2008, VA received Appellant's request for service connection for chronic sinusitis, endoscopic sinus surgery, and rupture of the sphenoid artery/nasal hemorrhage. **R. 937 (935-45).** He stated that his chronic sinus infection began during his station in Missouri, became worse, requiring surgery, and re-occurred from time to time. **R. 942 (935-45).**

In May 2008, Appellant presented for a VA general medical examination. **R. 905-24.** He reported that since 1991, he began experiencing recurrent sinus infections accompanied by sinus headaches, pain, pressure, fevers, and purulent rhinorrhea requiring antibiotics. **R. 906 (905-24).** He described frequent sinus pain, pressure, and congestion for which he underwent surgery, to include a polypectomy in January 2005, but continued to experience recurrent acute sinusitis. *Id*. He reported experiencing a sinus infection on average every two months, with purulent rhinorrhea and sinus pain, pressure, and headaches. *Id*. Symptoms were noted to be difficulty breathing through nose, congestion, and rhinorrhea, and Appellant reported six non-incapacitating episodes over the past 12-month period. **R. 910 (905-24).** Diagnostic testing revealed post-operation bilateral maxillary sinus antrostomies and mild paranasal sinus mucosal thickening. **R. 921 (905-24).** Diagnosis was chronic sinusitis status post endoscopic sinus surgery with polypectomy. **R. 923 (905-24).**

In a September 2008 rating decision, the Lincoln (NE) Regional Office ("RO") granted service connection for chronic sinusitis status post endoscopic sinus surgery with polypectomy and status post rupture of sphenoid artery with subsequent surgical repair and no recurrence with an evaluation of 10%, effective August 1, 2008. **R. 880-92**; **R. 866-70**

(cover letter). The RO explained that the 10% evaluation was based on a history of six non-incapacitating episodes per year of sinusitis. **R. 884 (880-92).** Appellant submitted his notice of disagreement ("NOD") in August 2009. **R. 855-57.** He submitted a duplicate copy of a June 25, 2002, STR reflecting an assessment of rhinitis. **R. 851.**

In March 2010, Appellant submitted additional evidence, arguing that his chronic sinusitis had worsened and that a recent CT scan showed chronic changes and a polyp in his right sinus and that he suffered two additional sinus infections. **R. 801.** An October 2009 private treatment record ("PTR") contains an assessment of sinusitis with report of green nasal drainage and facial pain for eight days and prescription of antibiotics. **R. 807.** A November 2009 PTR reflects that Appellant had green sinus drainage for seven days and noted a history of sinus polyps with surgical removal and that his infection had cleared with antibiotics. **R. 804 (804-06).** A February 2010 CT scan report notes a mucoperiosteal polyp or retention cyst along the medial wall of the right maxillary sinus anteriorly. **R. 802.**

In March 2010, Appellant presented for a VA sinus examination. **R. 781-84, 790-91.** He reported continued sinus symptoms, including runny nose, green mucus, nasal congestion, and sinus pressure. **R. 781 (781-84).** Under the medical history section, the examiner noted a history of sinusitis and current rhinitis symptoms of nasal congestion and excess nasal mucous and current sinus symptoms of purulent nasal discharge and sinus pain. **R. 782 (781-84).** Significant effects on occupation were noted with increased absenteeism and two weeks of time lost in the last 12-month period due to sinus infections and medical appointments. **R. 783-84 (781-84).** Effects included decreased concentration and pain. *Id*. Moderate to severe effects were noted on daily activities. **R. 784 (781-84).**

In June 2010, the RO issued a statement of the case ("SOC"), which continued the evaluation of 10% based on non-incapacitating episodes not greater than six times per year. **R. 763 (751-66).** In August 2010, the RO received Appellant's request for an extension to submit additional evidence. **R. 741.**

A November 2010 PTR noted sinus infections for two to three months. **R. 713-14.** It was noted that nasal steroids and medications were not helping. *Id*. Thereafter, a November 2010 PTR reflects that Appellant was referred to an allergy clinic and reported sinus infections, headaches, and nasal congestion. **R. 711.** In January 2011, Appellant complained of congestion, nasal blockage, post-nasal drip, and bilateral sinus pain for days. **R. 720.** Sinusitis was assessed and antibiotics were prescribed. *Id*. A December 2011 PTR notes that Appellant was on immunotherapy and had one sinus infection that year. **R. 718.** A May 2012 PTR reflects Appellant's report of sinus pain for several days with an assessment of sinusitis and prescription of antibiotics. **R. 721.** In July 2012, Appellant was diagnosed with sinusitis and prescribed antibiotics. **R. 722.**

An April 2012 report of general information reflects that Appellant informed VA that he missed his examination because he did not receive notification until after the date of the examination due to an incorrect address. **R. 704.**

In a May 2012 supplemental SOC, the RO continued the 10% evaluation, noting that Appellant had failed to report for the examination. **R. 701 (698-703).**

A May 2012 deferred rating decision notes that Appellant's August 2010 request for an extension was accepted as his substantive appeal. **R. 697.**

In June 2012, Appellant submitted his disagreement with the supplemental SOC and explained that he missed his appointment due to an updated address. **R. 691.** He noted that he was currently under the care of a Dr. H. of St. John's Clinic for a sinus infection and under the care of Dr. J.K. for allergy shots once a week for the past 18 months. *Id*.

In July 2012, Appellant presented for a VA sinus examination. **R. 676-89.** The examiner diagnosed Appellant with chronic sinusitis. **R. 677 (676-89).** Appellant noted that the ENT clinic did not want him to consider additional surgery because of the complications he had had in the past with sphenoidal artery bleeding. **R. 678 (676-89).** He stated that his symptoms had been worse that year. **R. 678 (676-89).** He was seen for sinus problems in April 2012 and was placed on antibiotics. *Id*. He described difficulty with drainage because the mucous was so thick. *Id*. Appellant reported fatigue, headaches, upset stomach/nausea, sore throat, difficulty breathing, and disturbed sleep due to his sinusitis. *Id*. He worked as a police officer and did not miss work. *Id*. He reported more frequent and severe sinus headaches over the past six to seven months. **R. 680 (676-89).**

An August 2012 supplemental SOC continued the evaluation of 10%. **R. 663-68.** In September 2012, Appellant submitted his substantive appeal, arguing that his case had not been decided on all the evidence, including his weekly allergy shots since 2008. **R. 643.** He stated that his nose was congested and crusty just about every morning and he could not afford to take a lot of time off of work. *Id*. He reiterated that Dr. K. stated he was no longer a candidate for sinus surgery due to the severing of the sphenoid artery in 2005 and that she told him he was the first patient she knew to survive a sphenoid artery severing.

Id. In October 2012, Appellant through his veterans' service organization ("VSO") representative argued that his sinusitis was more severe than evaluated. **R. 656-58.**

In December 2012, the Board remanded the issue of an increased rating for sinusitis. **R. 634-40.** It instructed the RO to attempt to obtain PTRs identified by Appellant. **R. 637 (634-40).** Records from St. John's Clinic were received in April 2013. Appointments were noted in October 2009, November 2009, January 2011, May 2012, and July 2012, containing assessments of sinusitis and reports of nasal drainage, facial pain, and prescription of antibiotics. **R. 590-612.** A May 2012 PTR reflects "Polyp in nasopharynx" under the problem list as of 5/29/2012. **R. 603.**

In a May 2013 supplemental SOC, the Appeals Management Center ("AMC") denied an initial rating in excess of 10% for sinusitis. **R. 564-72.**

In May 2014, the Board remanded the claim again to order a new examination, noting that records associated with the record demonstrated increased sinusitis symptoms and his report that his nose was congested and crusted just about every morning. **R. 551 (550-54).**

In October 2014, Appellant presented for a VA sinus examination. **R. 139-45.** The examiner diagnosed chronic sinusitis. **R. 139 (139-45).** The examiner noted his report that his last three to four sinusitis episodes "'were worse, the pain was almost unbearable, causing even my teeth to hurt.'" **R. 140 (139-45).** He reported having a sinus infection about every other month and requiring antibiotics about five to six times a year. *Id*. Appellant stated that he tries to continue performing work during a sinus infection, but that "'the time before last I couldn't get out of bed for three days'" and that those 3 days

correlated exactly with his 3 days off from work already scheduled, so he did not miss any work at that time, but otherwise would have. *Id.* The examiner found that Appellant's condition met three to six non-incapacitating episodes per year. **R. 144 (139-45).**

In an October 2014 supplemental SOC, the RO denied a higher rating for sinusitis. **R. 116-29.**

In a March 2015 decision, the Board denied an initial rating in excess of 10% for sinusitis. **R. 102-11.** After reviewing the medical records and VA examinations, the Board found that the evidence did not indicate incapacitating episodes or more than six non-incapacitating episodes to warrant a higher rating. **R. 108 (102-11).** The Board also found that the rating criteria contemplate Appellant's disability and declined to refer the issue for extraschedular consideration. **R. 109 (102-11).**

In a December 2015 Joint Motion for Remand ("JMR"), incorporated by a Court order the same month, the parties agreed that the Board failed to provide an adequate statement of reasons or bases. While the October 2014 VA examiner noted that Appellant had brought three PTRs with him to the examination, those records were not associated with the record. **R. 96 (95-100).**

In February 2016, the Board remanded the claim with instructions in accordance with the December 2015 JMR to obtain outstanding PTRs. **R. 79-82.**

In April 2016, the VA Claims Intake Center received faxed copies of PTRs from Appellant. **R. 35-64.** The last page of the submission reflects "P.030/066." **R. 64 (35-64).** The PTRs note appointments in February 2010, January 2011, June 2011, May 2012, July 2012, April 2013, June 2013, September 2013, December 2013, January 2014, June 2014,

August 2014, and April 2015. **R. 35-64.** Assessments of acute sinusitis and symptoms of congestion, nasal blockage, mild bleeding, swollen glands, sinus pain, and prescription of antibiotics were noted. *Id*. A June 2014 PTR contains an assessment of a polyp in the nasopharynx. **R. 41.**

In a June 2016 supplemental SOC, the AMC denied a rating higher than 10% for sinusitis. **R. 17-32.** The evidence section noted the February 2016 Board decision and AMC letter dated February 26, 2016. **R. 19 (17-32).** The AMC noted that the evidence sought by the Board remand could not be obtained due to Appellant's failure to cooperate. **R. 30 (17-32).**

In a December 2016 informal hearing presentation, Appellant through his VSO representative noted his submission of PTRs. **R. 13-14.**

In the January 2017 decision on appeal, the Board denied an initial disability rating in excess of 10% for sinusitis status post endoscopic surgery with polypectomy and status post rupture of the sphenoid artery. **R. 1-10.** The Board noted that pursuant to its most recent remand, PTRs were obtained from February 2010 to April 2015. **R. 5 (1-10).** After calculating the number of medical appointments each year, the Board found that Appellant's sinusitis did not more nearly approximate a 30% rating because at no point did the evidence indicate incapacitating episodes of sinusitis or more than six non-incapacitating episodes per year. **R. 5-6 (1-10).** The Board also determined that referral for extraschedular consideration was not warranted because the rating criteria contemplate Appellant's disability manifested by no more than six non-incapacitating episodes of sinusitis with symptoms of headaches, pain, purulent discharge, and crusting. **R. 7 (1-10).**

SUMMARY OF THE ARGUMENT

Appellant argues that the Board failed to ensure substantial compliance with its February 2016 remand directives to obtain outstanding PTRs. Alternatively, he contends that the Board clearly erred in finding that VA satisfied its duty to assist where the record indicates PTRs remain outstanding.

In addition, Appellant asserts that the Board's statement of reasons or bases is inadequate because it failed: (1) to discuss favorable evidence, including his lay reports of daily sinusitis, unbearable pain, and inability to undergo further surgery; (2) to account for symptoms not contemplated by the applicable rating criteria in determining whether referral for extraschedular consideration was warranted; and (3) to address the scope of his initial claim and whether it reasonably encompassed rhinitis as well as sinusitis.

ARGUMENT

I. The Board failed to ensure compliance with its February 2016 remand, or alternatively, failed to ensure that VA satisfied its duty to assist.

The Board failed to ensure compliance with its February 2016 remand directives. *See Stegall v. West*, 11 Vet. App. 268, 271 (1998); *see also Donnellan v. Shinseki*, 24 Vet. App. 167, 176 (2010) (stating that Board's failure to ensure substantial compliance can constitute the basis for a remand). Subsequent to the December 2015 JMR by the parties, the Board issued a remand instructing VA to obtain the outstanding PTRs identified in the October 2014 VA examination, as well as any other outstanding PTRs. *See* **R. 81 (79-82).**

In April 2016, Appellant submitted some of the identified PTRs. *See* **R. 35-64.** However, the record reflects that the fax transmission from Appellant was incomplete. *See*

R. 64 (35-64). The fax transmission on the PTRs shows that only 30 of the 66 pages for transmission were received. *See id*. ("P. 030/066"). Despite this indication that not all of the PTRs were received, the record reflects no VA efforts to follow up or notify Appellant to obtain a complete set of his PTRs. The June 2016 supplemental SSOC incorrectly notes that evidence sought by the Board's remand could not be obtained due to Appellant's "failure to cooperate." **R. 30 (17-32).** The supplemental SOC failed to even mention or list the incomplete set of PTRs received from Appellant under the evidence reviewed. *See* **R. 19 (17-32).** Because the Board failed to ensure that VA complied with its February 2016 remand and the December 2015 JMR directives, remand is warranted. *See Stegall*, *Donnellan*, *supra*.

Alternatively, the Board clearly erred in finding that VA satisfied its duty to assist because it failed to comply with its duties pursuant to 38 C.F.R. §§ 3.159(c)(1) and (e)(2). *See* 38 U.S.C. § 5103A(a)(1). The Board failed to ensure that VA made reasonable efforts to assist Appellant in obtaining outstanding PTRs. As discussed above, Appellant submitted relevant PTRs to support his claim in April 2016, but those records reflect that the fax transmission was incomplete and that 36 pages are outstanding.

Given the foregoing, VA was plainly put on notice of outstanding PTRs, but failed to notify Appellant of this issue or follow up with him to obtain them. *See* 38 C.F.R. §§ 3.159(c)(1) (requiring at least one follow-up request if private records are not received pursuant to an initial request); 3.159(e)(2) ("If VA becomes aware of the existence of relevant records before deciding the claim, VA will notify the claimant of the records. . ."); *see also Solomon v. Brown*, 6 Vet. App. 396, 401 (1994) ("[W]here . . . VA is on notice

that records supporting an appellant's claim may exist, . . . VA has a duty to assist the appellant to locate and obtain these records."); *Ivey v. Derwinski*, 2 Vet. App. 320, 323 (1992) (holding that evidence of record before VA may "raise[] enough notice of pertinent private medical records to trigger the duty to assist"). Remand is necessary for the Board to ensure that VA assists in obtaining the outstanding PTRs.

At a minimum, remand is required for the Board to adequately explain its findings that there was compliance with its remand instructions and that VA satisfied its duty-to-assist in light of the foregoing deficiency in the record. *See* §§ 3.159(c)(1) and (e)(2). While the Board noted that any deficiencies had been rectified and mentioned the newly submitted PTRs, it entirely failed to address that the record reflects those PTRs are incomplete or explain how there was still compliance with its 2016 remand and the duty-to-assist despite this deficiency. *See* **R. 4-5 (1-10).**

II. The Board failed to provide an adequate statement of reasons or bases.

"It is axiomatic that the Board is required to include in its decision a written statement of the reasons or bases for its findings and conclusions on all material issues of fact and law presented on the record." *Donnellan*, 24 Vet. App. at 171 (citing 38 U.S.C. § 7104(d)(1) and *Gilbert v. Derwinski*, 1 Vet. App. 49, 56-57 (1990)). Such statement "must be adequate to enable an appellant to understand the precise basis for the Board's decision, as well as to facilitate informed review in this Court." *Id*. "To comply with this requirement, the Board must analyze the credibility and probative value of the evidence, account for the evidence that it finds persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the claimant." *Wise v. Shinseki*, 26 Vet. App. 517,

524 (2014) (citing *Caluza v. Brown*, 7 Vet. App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table)).

Appellant's service-connected sinusitis is currently rated under DC 6514, for chronic sphenoid sinusitis, which is rated under the General Rating Formula for Sinusitis. *See* 38 C.F.R. § 4.97, DC 6514. Under DC 6514, the 30% rating criteria requires three or more incapacitating episodes per year of sinusitis requiring prolonged (lasting four to six weeks) antibiotic treatment, or; more than six non-incapacitating episodes per year of sinusitis characterized by headaches, pain, and purulent discharge or crusting. The 50% rating criteria requires following radical surgery with chronic osteomyelitis, or; near constant sinusitis characterized by headaches, pain and tenderness of affected sinus, purulent discharge or crusting after repeated surgeries.

A. Relevant Evidence / Extraschedular Consideration

The Board failed to adequately address the favorable evidence of record in evaluating whether a rating in excess of 10% for Appellant's sinusitis or referral for extraschedular consideration was warranted, including his reports of daily sinus symptoms, unbearable pain, and inability to undergo any future surgery. *See Thompson v. Gober*, 14 Vet. App. 187, 188 (2000) (per curiam order) (stating the Board must provide an adequate statement of reasons and bases "for its rejection of any material evidence favorable to the claimant"); *Caluza*, *supra*.

The Board's discussion focused entirely on the medical evidence of record and the number of non-incapacitating or incapacitating episodes of sinusitis suffered by Appellant, but failed to address additional evidence of record. *See* **R. 5-6 (1-10).** In particular, the

Board did not address, or even mention, Appellant's lay reports of his symptoms, despite acknowledging in its 2014 remand that the evidence suggested a worsening of their severity and ordering a new examination. *See* **R. 551 (550-54)** ("significantly, they demonstrate the Veteran's increased sinusitis symptomatology during the pendency of the appeal, to include treatment for headaches, pain, and congestion"). The Board specifically noted that "in a September 2012 statement, [Appellant] reported that he recently experienced more sinus infections and notably, that his nose was 'congested and crusted just about every morning.'" *Id*.; **R. 643** (September 2012 statement); *see also* **R. 680 (676-89)** (July 2012 VA examination, reporting more frequent and severe sinus headaches over the past six to seven months).

In its role as factfinder, the Board must analyze the credibility and probative value of medical *as well as* lay evidence. *See Buchanan v. Nicholson*, 451 F.3d 1331, 1337 (Fed. Cir. 2006). As is well-established, lay evidence may be used to establish the presence of observable symptomatology. *See Washington v. Nicholson*, 21 Vet. App. 191, 195 (2007) (holding that, "[a]s a layperson, the appellant is competent to provide information regarding visible, or otherwise observable, symptoms of disability"); *Barr v. Nicholson*, 21 Vet. App. 303, 307 (2007). Here, the foregoing statement that Appellant suffered from his sinusitis *almost daily* is supportive of at least a 30% rating under DC 6514, which is met when there are more than six non-incapacitating episodes per year of sinusitis characterized by headaches, pain, and purulent discharge or crusting. *See* 38 C.F.R. § 4.97, DC 6514. Indeed, the Board highlighted this evidence in its 2014 remand, but failed to address it at all in its current decision. Because the Board failed to discuss the probative value of this

evidence in the first instance, judicial review is frustrated. *See Hensley v. West*, 212 F.3d 1255, 1263 (Fed. Cir. 2000) (stating appellate tribunals are not appropriate for a for initial fact finding). Vacatur and remand are warranted for the Board to address whether a higher rating was warranted at any time during the appeal period in light of the foregoing evidence. *See Hart v. Mansfield*, 21 Vet. App. 505, 510 (2007) (providing for the possibility of staged ratings).

Moreover, the record reflects that treatment and alleviation of his symptoms by additional surgery is foreclosed for Appellant due to past complications with sphenoidal artery bleeding following his in-service surgery. *See* **R. 643** ("Doctor Krenning stated I am no longer a candidate for sinus surgery due to the severing of the sphenoid artery in 2005. The surgery would be too risky and dangerous."), **678 (676-89)** ("ENT does not want him to consider additional surgery because of the complications he had in the past with sphenoid artery bleed."). At the October 2014 examination, Appellant described his sinusitis becoming worse and the pain as "'almost unbearable, causing even my teeth to hurt.'" **R. 140 (139-45).**

The foregoing lay evidence reflecting almost daily sinusitis, unbearable pain, and an inability to undergo further surgery, is plainly relevant to determining the severity of Appellant's current sinusitis. Despite this Court's clear jurisprudence on this issue and VA's own regulations, however, the Board failed to discuss *any* of Appellant's lay statements regarding his symptomatology. The Board's failure to evaluate the probative value of this evidence constitutes remandable error. *See Buchanan, Washington, supra*.

Alternatively, the Board failed to adequately explain its determination that referral for extraschedular consideration was not warranted in light of the foregoing evidence. *See* **R. 7-8 (1-10)**; 38 C.F.R. § 3.321(b)(1); *see also Thun v. Peake*, 22 Vet. App. 111, 115 (2008). "[F]or exceptional cases, VA has provided for the assignment of extraschedular ratings in 38 C.F.R. § 3.321(b)(1)," where the traditional schedular analysis may not always adequately encapsulate a veteran's disability picture. *King v. Shulkin*, 29 Vet. App. 174, 178 (2017). In this analysis, the Board must first "compare a veteran's specific symptoms and their severity with those contemplated by the plain language of the rating schedule." *Id*. at 179, citing *Thun*, 22 Vet. App. at 115; *see also Doucette v. Shulkin*, 28 Vet. App. 366 (2017).

The Board found that Appellant's sinusitis symptoms were contemplated by the applicable rating criteria. *See* **R. 7 (1-10).** It further concluded that he had not described other functional effects that are exceptional or not contemplated. *See id*. Yet, DC 6514, under which Appellant is currently evaluated, only contemplates non-incapacitating or incapacitating sinusitis episodes, with headaches, pain, and purulent discharge or crusting, or sinusitis following radical surgery or repeated surgeries. *See* 38 C.F.R. § 4.97, DC 6514.

The record, however, shows that Appellant suffers from symptoms and characteristics not contemplated by DC 6514. Appellant has reported suffering from disturbed sleep, fatigue, difficulty concentrating, and upset stomach/nausea due to his sinusitis, which are not directly contemplated by the assigned schedular rating under DC 6514. *See* **R. 678 (676-89)**; 38 C.F.R. § 4.97; *cf. Doucette*, 28 Vet. App. at 371 (explaining that where the appellant provided evidence of numerous symptoms, the Board would be

required to explain whether the rating criteria contemplate those functional effects); *Kuppamala v. McDonald*, 27 Vet. App. 447, 455 (2015) (remanding for Board analysis of extraschedular rating where it failed to address the appellant's complete disability picture, including symptoms of "disturbed sleep, fatigue, memory and concentration problems" not contemplated by applicable DC); VA Gen. Coun. Op. 06-1996 at para. 7, 8, holding (a) (Aug. 16, 1996) (holding that Board is required to address the issue of entitlement to referral for an extraschedular rating "when the disability picture presented by a veteran would, in the average case, produce impairment of earning capacity beyond that reflected in VA's rating schedule or would affect earning capacity in ways not addressed in the schedule"). None of the DCs for sinusitis explicitly mention sleep impairment, fatigue, or nausea, while other parts of the rating schedule do explicitly account for these symptoms. *Cf.* 38 C.F.R. §§ 4.71a, DC 5025 (Fibromyalgia); 4.88b, DC 6314 (Beriberi); 4.97, DC 6847 (Sleep Apnea Syndromes); 4.104, DCs 7000-7020 (Cardiovascular system); 4.114, DCs 7301 (Peritoneum, adhesions of), 7345 (Chronic liver disease), 7354 (Hepatitis C); 4.130, General Rating Formula for Mental Disorders, 30% criteria. The Board, however, only discussed that Appellant's sinusitis was manifested by symptoms of headaches, pain, purulent discharge, and crusting, and that "[t]hese manifestations are contemplated in the applicable rating criteria." **R. 7 (1-10).**

In addition, the Board failed to adequately explain how a 10% schedular rating adequately contemplates Appellant's level of disability. Appellant's disability is characterized not only by reports of almost daily sinusitis and unbearable pain at times, but by the unique factor that he is unable to undergo additional surgery for his sinusitis as

assessed by his physicians. *See* **R. 643**, **678 (676-89).** DC 6514 provides a 50% rating only for near constant sinusitis *after* repeated surgeries. *See* 38 C.F.R. § 4.97, DC 6514. The Board failed to explain how the schedular evaluations adequately contemplate the severity of Appellant's unique disability picture where he experiences almost daily sinusitis and unbearable pain, *and* is unable to undergo additional surgeries for his sinusitis. *See King*, 29 Vet. App. at 182 ("The first element of *Thun* . . . requires the Board to compare both the symptomatology and *severity* of a disability when determining if schedular ratings adequately contemplate a veteran's symptoms."), citing *Thun*, 22 Vet. App. at 115. The Board thus failed to meaningfully account for evidence favoring a finding that his sinusitis disability picture is exceptional or unusual.

Furthermore, Appellant's chronic sinusitis has been found to have significant effects on his occupation. *See* **R. 783-84 (781-84)** (March 2010 VA examination, report of 2 weeks of time lost from work and finding significant effects on occupation, including decreased concentration and increased absenteeism); *see also* **R. 140 (139-45)** (October 2014 VA examination, "couldn't get out of bed for three days" correlating with 3 days off from work); *Thun*, 22 Vet. App. at 116 (noting marked interference with employment as a related factor). The Board's failure to account for the foregoing evidence and to discuss whether it presented an exceptional disability picture under *Thun* necessitates vacatur and remand. *See Caluza*, *King*, *Kuppamala*, *Thun*, *supra*.

B. Clemons: Scope of Claim

The Board's failure to address the scope of Appellant's initial claim and whether his condition encompassed rhinitis renders its statement of reasons or bases inadequate.

This Court's jurisprudence has been clear and consistent that the scope of a claim should be broadly interpreted in line with a pro se claimant's intent. *See DeLisio v. Shinseki*, 25 Vet. App. 45, 55 (2011) (explaining the crux of this Court's caselaw that "(1) a claimant need not file a claim for benefits for the precise medical causes of his condition, (2) the Secretary must sympathetically read a claimant's filing and investigate potentially applicable theories of service connection, and (3) a claim for benefits for one disability reasonably may encompass other disabilities"); *Clemons v. Shinseki*, 23 Vet. App. 1, 5 (2009) (citing *Ingram v. Nicholson*, 21 Vet. App. 232, 256 (2007)) (recognizing that "[a]s a self-represented layperson at the time his claim [is] filed, the appellant [has] neither the legal or medical knowledge to narrow the universe of his claim or his current condition to [a specific diagnosis]"). Therefore, while "the RO has no duty to read the mind of the claimant, the RO should construe a claim based on the reasonable expectations of the non-expert, self-represented claimant and *the evidence developed in processing that claim*." *Clemons*, *supra* (emphasis added).

Appellant's appeal stems from the initial grant of service connection for sinusitis, such that the scope of the initial claim remains before the Board under *Clemons*. *See* **R. 880-92**; 23 Vet. App. at 5. Appellant's STRs document that he was assessed with rhinitis interchangeably with sinusitis during service. *See* **R. 521** (April 2004 STR), **537** (June 2002 STR). He requested service connection in April 2008, and the RO granted service connection for chronic sinusitis in September 2008. *See* **R. 880-92, 935-45.** Appellant then submitted a duplicate copy of a June 2002 STR assessing rhinitis along with his NOD in response to the September 2008 rating decision. *See* **R. 851, 855-57.** Thereafter, he has

continued to submit evidence of a polyp and argued for a higher rating based on this evidence. *See* **R. 801**; **R. 802**, **713-14**, **603**, **41** (June 2014 PTR, assessment of polyp in the nasopharynx).

While VA does not have a duty to read Appellant's mind, a claim should be construed broadly and based on the reasonable expectations of the pro se veteran and the evidence developed in processing the claim. *See Clemons*, *supra*. In light of Appellant's own submission of STRs documenting rhinitis in his disagreement with the RO's rating decision, VA should have, but failed, to address that his initially claimed condition reasonably encompassed rhinitis as well as sinusitis. *See Clemons*, *supra* ("Although the appellant's claim identified [a disability] without more, it cannot be a claim limited only to that diagnosis, but must rather be considered a claim for any [mental disability] that may reasonably be encompassed by several factors including . . . the symptoms the claimant describes; and the information the claimant submits or that the Secretary obtains in support of the claim."); *DeLisio*, *supra*, at 53 ("Moreover, even if a claimant attempts to identify his diagnosis in his claim for benefits, his claim is not limited necessarily to benefits for that diagnosis."). The Board's failure to address the scope of Appellant's initial claim and his condition given the evidence of record frustrates judicial review and prevents his understanding, requiring vacatur and remand.

CONCLUSION

In light of the Board's errors, Appellant respectfully requests that the January 26, 2017, decision on appeal be reversed in part, and otherwise vacated and remanded for readjudication for the reasons and under the authorities discussed above.

Respectfully submitted,

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