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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 17-1350

KENNETH R. DODD, APPELLANT,

v.

ROBERT L. WILKIE,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before DAVIS, *Chief Judge*.

MEMORANDUM DECISION

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

DAVIS, *Chief Judge*: U.S. Air Force veteran Kenneth R. Dodd appeals a January 26, 2017, Board decision that denied an initial disability rating in excess of 10% for sinusitis. The Secretary has conceded that the Board failed to ensure substantial compliance with a previous remand order, and agrees that remand is required to remedy this error. Mr. Dodd also argues that the Board provided an inadequate statement of reasons or basis for denying (1) an increased rating for sinusitis and (2) referral for extraschedular consideration. The Secretary disagrees, arguing that apart from the conceded error, the Board made no other errors within its decision. Because the Court agrees with the Secretary's concession as well as Mr. Dodd's contentions regarding an inadequate statement of reasons or bases, the Board's decision will be set aside and the matter remanded for readjudication.

I. ANALYSIS

A. The Board clearly erred in failing to discuss whether there was substantial compliance with its previous remand order.

Whether there is substantial compliance with a previous remand order is a finding of fact that this Court reviews under the "clearly erroneous" standard.¹ A finding of fact is clearly erroneous when the Court, after reviewing the entire evidence, "is left with the definite and firm conviction that a mistake has been committed."²

In its January 2017 decision the Board denied Mr. Dodd an increased rating, without first addressing whether there had been substantial compliance with its February 2016 remand order.³ Mr. Dodd contends,⁴ and the Secretary concedes,⁵ that this was an error. The Court agrees with this concession and concludes that the Board's failure to discuss whether there was substantial compliance with the February 2016 remand order was a clear error that frustrates judicial review and remand is required for the Board to rectify it.⁶

B. The Board provided an inadequate statement of reasons and bases for its schedular determination.

Additionally, the Board must support its determinations with an adequate statement of reasons or bases that enables a claimant to understand the precise basis for its decision and facilitates review in this Court.⁷ The statement of reasons or bases must explain the Board's reasons for discounting favorable evidence,⁸ discuss all issues raised by the claimant or the evidence of record,⁹ and discuss all provisions of law and regulation where they are made "potentially applicable through the assertions and issues raised in the record."¹⁰

Mr. Dodd's sinusitis is currently rated under Diagnostic Code (DC) 6514, which details that a 10% rating is awarded when a veteran exhibits "[o]ne or two incapacitating episodes per year of sinusitis requiring prolonged (lasting four to six weeks) antibiotic treatment, or; three to

¹ 38 U.S.C. § 7261(a)(4); *Bowling v. Principi*, 15 Vet.App. 1, 6 (2001).

² *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948); see *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990).

³ Record (R.) at 26.

⁴ Appellants (App.) Brief (Br.) at 11-13.

⁵ Secretary (Sec.) Br. at 5-6.

⁶ *Gilbert*, 1 Vet.App. at 52.

⁷ 38 U.S.C. § 7104(d)(1); *Gilbert*, 1 Vet.App. at 57.

⁸ *Thompson v. Gober*, 14 Vet.App. 187, 188 (2000).

⁹ *Robinson v. Peake*, 21 Vet.App. 545, 552 (2008), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1335 (Fed. Cir. 2009).

¹⁰ *Schafraath v. Derwinski*, 1 Vet.App. 589, 593 (1991).

six non-incapacitating episodes per year of sinusitis characterized by headaches, pain, and purulent discharge or crusting"; a 30% rating is awarded when a veteran exhibits "[t]hree 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"; and a 50% rating is warranted when a veteran has "near constant sinusitis characterized by headaches, pain and tenderness of affected sinus, and purulent discharge or crusting after repeated surgeries."¹¹

Mr. Dodd alleges that the Board failed to consider his reports of consistent crusting in September 2012.¹²

The Court agrees with Mr. Dodd and concludes that the Board failed to provide an adequate reasons-or-bases analysis for its denial.¹³ Specifically, the Board failed to discuss Mr. Dodd's September 2012 lay statement that he experienced nasal crusting "just about every morning."¹⁴ Though the Court notes that Mr. Dodd's most recent examinations do not evidence this symptomatology, Mr. Dodd may still be entitled to an increased staged rating for the period during which he exhibited these symptoms.¹⁵ On remand the Board should discuss whether these symptoms entitled Mr. Dodd to an increased rating for that period.¹⁶

C. On remand the Board should re-assess whether Mr. Dodd is entitled to referral for extraschedular consideration.

Mr. Dodd also argues that the Board erred in failing to refer his matter for extraschedular consideration.¹⁷ "The determination of whether a claimant is entitled to an extraschedular rating . . . is a three-step inquiry."¹⁸ The first step in the inquiry is to determine whether "the evidence before VA presents such an exceptional disability picture that the available schedular evaluations

¹¹ 38 C.F.R. § 4.97, DC 6514 (2018).

¹² App. Br. at 15-16.

¹³ *Gilbert*, 1 Vet.App. at 57.

¹⁴ R. at 643.

¹⁵ See 38 C.F.R. § 4.1 (2018) ("Over a period of many years, a veteran's disability claim may require reratings in accordance with changes in . . . his or her physical or mental condition.").

¹⁶ See *Hart v. Mansfield*, 21 Vet.App. 505, 510 (2007) (requiring that VA consider staged ratings when "factual findings show distinct time periods where the service-connected disability exhibits symptoms that would warrant different ratings").

¹⁷ App. Br. at 16-22.

¹⁸ *Thun v. Peake*, 22 Vet.App. 111, 115 (2008), *aff'd sub nom. Thun v. Shinseki*, 572 F.3d 1368 (Fed. Cir. 2009).

for that service-connected disability are inadequate."¹⁹ If the adjudicator determines that the available schedular ratings are inadequate, the second step of the inquiry requires the adjudicator to "determine whether the claimant's exceptional disability picture exhibits other related factors," such as marked interference with employment or frequent periods of hospitalization.²⁰ If the first two steps have been satisfied, the adjudicator must refer the claim to the Under Secretary for Benefits or the director of the Compensation and Pension Service for a determination of whether an extraschedular rating is warranted.

In its decision, the Board determined that Mr. Dodd's condition was adequately contemplated by the rating schedule and found that based on the first step of the *Thun* analysis, Mr. Dodd was not entitled to referral for extraschedular consideration.²¹ Mr. Dodd argues that the Board's discussion failed to account for his unique circumstances, namely that a doctor has recommended he not undergo surgery for his sinusitis, as well as his nausea symptomatology.²² The Secretary disagrees, and argues that Mr. Dodd's condition is fully contemplated by the rating schedule.

The Board's discussion regarding whether Mr. Dodd's symptomatology entitled him to extraschedular consideration failed to discuss relevant and exceptional aspects of his sinusitis. Namely, the extraschedular analysis did not explain how the recommendation that Mr. Dodd not have surgery for sinusitis affected step one of its *Thun* analysis. Given that the Board noted the doctor's recommendation in another portion of its decision, and that a 50% rating under DC 6514 requires symptomatology after a *surgery*, the doctor's recommendation should have been discussed within its extraschedular analysis. Further, the Secretary's argument surrounding Mr. Dodd's nausea symptomatology is nothing more than post hoc rationalization for the Board's failure to address it in its extraschedular analysis.²³ Therefore, on remand, the Board should address whether

¹⁹ *Id.*

²⁰ *Id.* at 116.

²¹ R. at 6-8.

²² App. Br. at 16-22.

²³ See *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 156 (1991) ("[L]itigating 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.").

Mr. Dodd's situation surrounding surgery, and his nausea symptomatology, entitles him to extraschedular referral.

II. CONCLUSION

On consideration of the foregoing, the Court SETS ASIDE the Board's January 26, 2017, decision and REMANDS the matter for further development and readjudication.

DATED: February 26, 2019

Copies to:

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