UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 19-6707

PATRICIA K. SNIDER, APPELLANT,

V.

DENIS MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

On Appeal from the Board of Veterans' Appeals

(Decided November 19, 2021)

Sandra E. Booth, of Columbus, Ohio, for the appellant.

Mark D. Vichich, Appellate Attorney, with whom *Richard J. Hipolit*, Deputy General Counsel; *Mary Ann Flynn*, Chief Counsel; and *Megan C. Kral*, Deputy Chief Counsel, were on the brief, all of Washington, D.C., for the appellee.

Before PIETSCH, TOTH, AND FALVEY, *Judges*.

FALVEY, *Judge*: Patricia K. Snider, surviving spouse of deceased Army veteran Norman J. Snider, through counsel, appeals a June 4, 2019, Board of Veterans' Appeals decision denying a total disability rating based on individual unemployability (TDIU).[1] In a July 16, 2021, memorandum decision, the Court affirmed the part of the Board decision denying Mr. Snider TDIU. On August 6, 2021, Ms. Snider timely moved for single-judge reconsideration or, in the alternative, panel review. On October 5, 2021, the Court issued a panel order granting the motion for panel review and withdrawing the July 16, 2021, single-judge decision.

In *Ray v. Wilkie*, 31 Vet.App. 58, 66 (2019), a case where the Board referred for extraschedular TDIU consideration but later denied TDIU benefits, the Court held that the initial extraschedular referral decision under 38 C.F.R. § 4.16(b) addresses whether there is sufficient evidence to substantiate a reasonable possibility that a veteran is unemployable because of service-connected disabilities. We are asked to decide whether this holding applies to situations like in Ms. Snider's case, in which the Board denied both the referral for extraschedular TDIU

[1] The Board also granted an initial 30% rating for sinusitis. This is a favorable determination that the Court may not disturb. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007). Because a grant of this benefit is not an adverse decision, the Court has no jurisdiction over this part of the Board decision. *See* 38 U.S.C. § 7261(a)(4).

consideration and TDIU benefits. Because granting or denying a referral for extraschedular TDIU consideration addresses the same question—Is referral warranted?—we hold that *Ray's* "reasonable possibility" standard applies to the Board's decision to grant or deny the referral.

And because *Ray* applies to this case and the Board did not consider the evidence under the "reasonable possibility" standard when determining whether referral was warranted, remand is necessary for the Board to do so, especially because both parties agree that the Court cannot make this factual determination in the first instance. Thus, we will set aside the part of the June 2019 Board decision denying TDIU and remand the matter for readjudication.

I. BACKGROUND

A. Facts

Mr. Snider served on active duty from November 1942 to February 1946. Record (R.) at 6895. VA granted him service connection for a hemorrhoidectomy with a 0% rating effective February 1946. R. at 6851. VA later granted a 10% rating for hemorrhoids effective December 2003, R. at 5251, 5269, and then increased the rating to 20% effective July 2016, R. at 4610. VA also granted service connection for sinusitis with a 10% rating effective March 1997. R. at 6186.

In an October 2017 statement, Mr. Snider explained that for his sinusitis he used Breathe Right strips as well as a saline nasal spray six times a day and that if he did not do so his "sinuses clog up and I cannot breathe." R. at 4861. He stated that with this treatment he only had flare-ups about four times a year, which included a sore throat, post-nasal drip, and headache pressure and pain. *Id*.

In May 2019, Mr. Snider applied for TDIU. R. at 3603. The veteran noted that he completed high school and attended business school for a year and a half but did not graduate. R. at 3604. He stated that from 1971 to 1984 he oversaw a bowling alley bar and restaurant, working at least 40 hours a week, and he delivered flowers from 1986 to 1996, working about 20 hours a week. R. at 3604, 3606-07. He reported that his sinusitis and hemorrhoids worsened by the 1990s. R. at 3606. He again stated that, to control his sinusitis symptoms, he used Breathe Right strips and followed a rigorous schedule of using a saline solution six times a day for many years, requiring him to be in a sitting position with his head tilted back and then nose blowing to clear the debris. *Id*. He noted that even with this treatment, however, liquid sometimes dripped from his nose. *Id*. He reported that he also regularly applied hemorrhoid ointments. R. at 3607. He stated that, based on his

experience in the food and beverage industry, a restaurant or bar would not hire him on a full- or part-time basis because of his need to often use the bathroom to perform his saline cleansing procedures and apply his hemorrhoid cream and because customers did not want to see his unpleasant symptoms while eating and drinking. *Id*. He also stated that he did not have other skills consistent with substantially gainful employment because, although he had delivered flowers part-time, he would be unable to work full-time in such a job given his need for frequent bathroom stops. *Id*.

B. Board Decision

In the June 2019 decision on appeal, the Board granted an initial 30% sinusitis rating but denied TDIU. R. at 5. The Board found that referral for extraschedular TDIU consideration was not warranted because the evidence did not support a finding that Mr. Snider's service-connected sinusitis and hemorrhoids rendered him unable to obtain or maintain substantially gainful employment. R. at 12. The Board found that he did not have constant sinusitis symptoms but experienced exacerbations or nonincapacitating episodes about four times a year and that he regularly used saline and over-the-counter medications to prevent these exacerbations. *Id*. The Board determined that, although Mr. Snider suggested that performing the saline regimen six times a day and applying hemorrhoid cream multiple times a day would prevent him from gainful employment, the evidence did not support this because those tasks did not take an extraordinary amount of time each day and could be performed during non-work hours or while on breaks. *Id.* The Board noted that, although some employers may not permit an employee to take multiple breaks, the Americans with Disabilities Act (ADA) required that employers provide employees with disabilities with reasonable accommodations that may include allowing an employee to work a modified schedule to allow for such breaks. R. at 12-13. The Board then considered Mr. Snider's contention that he could not work in the food service industry due to mucous dripping from his nose, but noted that he had experience working in other venues, such as delivering flowers, and that his service-connected symptoms would not interfere with the tasks of a delivery person, such as driving and carrying packages. R. at 13. The Board also determined that, because Mr. Snider reported overseeing a bowling alley lounge and restaurant, he had some managerial skills and that, although he may be unable to work as a manager in a restaurant or lounge, his management skills were transferrable to other industries not involving food or extensive contact with customers. *Id.* The Board concluded that, given Mr. Snider's occupational history, he could work in occupations

other than those involving food service where symptoms such as dripping mucous and taking six bathroom breaks a day would not interfere with the completion of work duties. *Id*.

C. Single-Judge Decision and Motion for Reconsideration or Panel Review

Previously, in the July 16, 2021, single-judge decision, the Court affirmed the part of the Board decision denying TDIU. Relevant to the panel issue, the Court found:

> [R]egardless of whether a lower, "reasonable possibility" standard or a higher, on-the-merits standard applied, any Board error in failing to discuss that portion of *Ray* when denying referral of Mr. Snider's TDIU claim is harmless because the evidence would not satisfy either standard. *See* 38 U.S.C. § 7261(b)(2) (providing that the Court must take due account of the rule of prejudicial error). Like the Board, the Court acknowledges Mr. Snider's statements that performing the saline cleanse regimen six times a day and applying hemorrhoid cream multiple times a day could prevent him from gainful employment and that he could not work in the food service industry, but, consistent with the Board's appropriate inferences and weighing of the evidence, *see Bastien* [*v. Shinseki*, 599 F.3d 1301, 1306 (Fed. Cir. 2010) (finding that "the evaluation and weighing of evidence and the drawing of appropriate inferences from it are factual determinations committed to the discretion of the fact-finder"), *overruled on other grounds by Francway v. Wilkie*, 940 F.3d 1304 (Fed. Cir. 2019)]; *Owens* [*v. Brown*, 7 Vet.App. 429, 433 (1995) (holding that the Board is responsible for assessing the weight of evidence and that the Court may overturn the Board's decision only if it is clearly erroneous)], those assertions alone did not substantiate a reasonable possibility that Mr. Snider was unemployable due to his service-connected disabilities, *see Ray*, 31 Vet.App. at 66; R. at 12-13 (the Board finding that the saline and hemorrhoid regimens did not take a long amount of time and could be performed during non-work hours or while on breaks, that the veteran had experience working in venues other than the food industry, and that the skills Mr. Snider gained from overseeing a bowling alley lounge and restaurant could be used in other industries). Thus, the Court finds this argument unpersuasive.

Snider v. McDonough, No. 19-6707, 2021 WL 3012326 at *5 (Vet. App. July 16, 2021).

On August 6, 2021, Ms. Snider timely moved for single-judge reconsideration or, in the alternative, panel review, arguing that, because the "reasonable possibility" standard depends on factual determinations, the Court may not make the initial decision about whether the evidence was sufficient under the applicable legal standard. Appellant's Motion (Mot.) at 6-7.

On August 12, 2021, the Court ordered the Secretary to respond to Ms. Snider's motion and for her to then reply to the Secretary. On September 2, 2021, the Secretary responded that he agreed with Ms. Snider that, *if* the Board had erred, the Court inappropriately made a factual finding in the first instance. Secretary's Response (Resp.) at 1-2 (noting that the legal standard here is a factual one and citing *Pederson v. McDonald*, 27 Vet.App. 276, 286 (2015)). But he maintains

that the Board did not err. *Id*. On September 16, 2021, Ms. Snider replied, reiterating that *Ray's* "reasonable possibility" standard applies and that the Board thus erred by not reviewing the evidence under that standard. Appellant's Sept. Reply at 1-5.

On October 5, 2021, the Court issued a panel order granting the motion for panel review and withdrawing the July 16, 2021, single-judge decision.

II. PARTIES' ARGUMENTS

Ms. Snider argues that the Board erred or provided inadequate reasons or bases for not referring TDIU for extraschedular consideration because the Board did not address the veteran's claim under the "reasonable possibility" standard discussed in *Ray*, 31 Vet.App. at 66 (holding that the initial extraschedular referral decision under § 4.16(b) addresses whether there's sufficient evidence to substantiate a reasonable possibility that a veteran is unemployable because of service-connected disabilities). Appellant's Brief (Br.) at 15-17, 24; Appellant's Reply Br. at 1-6. Ms. Snider also argues that, once the veteran submitted competent, credible evidence that his service-connected disabilities interfered with his ability to obtain substantially gainful employment, the burden of production shifted to VA and that, because the Board relied on its own conjecture rather than evidence, its finding that it did not need to refer the TDIU claim was clearly erroneous. Appellant's Br. at 14-22 (asserting that there was no evidence that he could obtain or maintain substantially gainful employment). Finally, Ms. Snider contends that VA failed to satisfy the duty to assist because it did not provide an expert vocational opinion. *Id*. at 22-24.

As to whether the "reasonable possibility" standard applies, the Secretary argues that *Ray* decided an issue different from the situation in this case, stating that *Ray* "framed the issue as 'what is the effect, if any, of the Board's determination to refer a case for extraschedular consideration under 38 C.F.R. § 4.16(b) when the Board later reviews the Director [of Compensation Services's] decision not to award an extraschedular TDIU rating?'" Secretary's Br. at 8. The Secretary thus asserts that, although *Ray* held that "the initial extraschedular referral decision under § 4.16(b) addresses whether there's sufficient evidence to substantiate a reasonable possibility that a veteran is unemployable by reason of his or her service-connected disabilities," that holding must be read in context. *Id*. He notes that *Ray* resolved the conceptual difficulty faced when the Board (which may review the Director of Compensation Services's decision and reach the ultimate benefits decision), rather than the regional office (RO), refers a case. He argues that the Court in *Ray*

applied the "reasonable possibility" standard retrospectively, that is after the Board had referred the matter. *Id*. at 11. But he asserts that where the Board denies a referral, such as in Ms. Snider's case, *Ray* is not on point; instead, *Pederson* is. *Id*. He contends that in *Pederson*, 27 Vet.App. at 287, the Board applied the standard from *Thun v. Shinseki*, 572 F.3d 1366, 1370 (Fed. Cir. 2009), which held that the plain language of § 4.16(b) "requires such referrals to be made only when it has been determined that the claimant is 'unemployable by reason of service-connected disabilities,'" and that the *Pederson* Court affirmed the Board's referral denial. Secretary's Br. at 7-8. The Secretary also disputes Ms. Snider's other arguments and urges the Court to affirm the Board decision.

As to the panel matter, Ms. Snider responds that the issue in *Thun* was the correct interpretation of 38 C.F.R. § 3.321(b)(1) and that it did not address the issue of the evidence threshold required for the initial § 4.16(b) referral decision. Appellant's Reply Br. at 5. She also notes that *Ray* addressed *Pederson* and relied on it to reject the Secretary's argument there that the referral decision is not a factual finding. *Id*. She asserts that the holding in *Ray* is clear and leaves no room for the Secretary's current argument that the lower "reasonable possibility" evidentiary standard applies when it favors the Secretary but does not apply when it is unfavorable to the Secretary. *Id*. at 3. She states that, if the Secretary wanted to challenge *Ray's* interpretation of § 4.16(b), he could have sought en banc review of the decision or appealed it to the U.S. Court of Appeals for the Federal Circuit, but did not do so. *Id*. at 6.

III. ANALYSIS

A. Legal Landscape and *Ray*

TDIU will be awarded when a veteran cannot secure or follow a substantially gainful occupation as a result of service-connected disabilities and meets certain rating requirements. 38 C.F.R. § 4.16(a) (2021). When the veteran does not meet those rating requirements, TDIU may be granted on an extraschedular basis under 38 C.F.R. § 4.16(b), which instructs VA adjudicators to refer to the Director of Compensation Services "all cases of veterans who are unemployable by reason of service-connected disabilities." 38 C.F.R. § 4.16(b); *see Ray*, 31 Vet.App. at 64.

In *Ray*, the Board referred for extraschedular TDIU consideration and, after the Director of Compensation Services denied TDIU, the Board ultimately denied TDIU benefits. 31 Vet.App. at 63. The veteran argued that the Board's referral was a binding factual finding that the Board

impermissibly changed when it later denied benefits. *Id*. at 64. The Court in *Ray* agreed that the referral decision was a factual finding but disagreed that the finding was binding on the Board so that the Board could not later deny TDIU benefits. *Id*. at 65. The Court concluded that the referral and benefits determinations necessarily employed different evidentiary standards and stated: "[W]e hold that the initial extraschedular referral decision under § 4.16(b) addresses whether there's sufficient evidence to substantiate a reasonable possibility that a veteran is unemployable by reason of his or her service-connected disabilities." *Id*. at 66.

As the Secretary notes, *Ray* addressed a slightly different scenario than the one in Ms. Snider's case—that is, it answered what was the effect of the Board's earlier determination to refer a case for extraschedular consideration under § 4.16(b) when the Board later reviews the Director of Compensation Services's decision not to award an extraschedular TDIU rating and ultimately denies TDIU. 31 Vet. App. at 62. True enough. But *Ray's* holding is clear—that when first deciding whether extraschedular referral under § 4.16(b) is warranted, the evidence is considered under a "reasonable possibility" standard—and this holding applies to all TDIU extraschedular referral decisions. The Secretary's attempt to distinguish an initial decision to refer from an initial decision to deny referral is unpersuasive. Both are determinations by the Board on the same issue—that is, whether or not referral for TDIU extraschedular consideration is warranted. And *Ray* determined the standard for making that decision.

B. *Thun*

The Secretary argues that the Federal Circuit in *Thun*, 572 F.3d at 1370, held that the plain language of § 4.16(b) requires that a referral be made only when VA has determined that the claimant is "unemployable by reason of service-connected disabilities" and that this supports his argument that the "reasonable possibility" standard does not apply when the Board denies TDIU extraschedular referrals. *See* Secretary's Br. at 9-12, 19; Secretary's Resp. at 5. But in *Ray*, the Court noted that the plain language of § 4.16(b) did not explain how the referral and ultimate benefits decisions are different. 31 Vet.App. at 65. Thus, *Ray* considered § 4.16(b) within the regulatory structure and scheme VA created to award extraschedular TDIU and determined that the Board's initial decision to refer necessarily could not be based on the same evidentiary standard as that used to decide whether to ultimately award benefits; otherwise, the Board would be prevented from denying TDIU when it had earlier referred a case. *Id*. at 64-65 (citing *Atencio v.*

O'Rourke, 30 Vet.App. 74, 82-83 (2018), for the propositions that the Court must avoid absurd results when interpreting regulations and that regulation text cannot be taken in isolation).

The panel here, even if it could find *Ray's* precedential determination incorrect, discerns no error in its analysis of § 4.16(b) within the regulatory structure and scheme VA created to award extraschedular TDIU. Nor do we find that applying *Ray's* holding to the Board's determination to deny extraschedular TDIU referrals conflicts with *Thun's* holding.

Thun's plain language determination focused on referrals by the RO. 572 Fed. Cir. at 1370 (holding that VA's interpretation of § 3.321(b)(1) (general extraschedular ratings) was supported by § 4.16(b) because, under that regulation, a finding of unemployability is a condition precedent to a referral by the RO and the RO thus makes a threshold inquiry before referral). The Secretary states that § 4.16(b) appears to contemplate that the RO, rather than the Board, would be making referrals and he then discusses the difference between the RO and the Board doing so; that is, although the Board may review the RO's or the Director of Compensation Services's determination, it cannot initially award extraschedular TDIU, but if the Director does not award extraschedular TDIU, then the Board may determine whether to grant TDIU. Secretary's Br. at 9. The Secretary contends that *Ray* resolved this conceptual difficulty faced when the Board, rather than the RO, referred a case and that the Court in *Ray* applied the "reasonable possibility" standard retrospectively, that is after the Board had referred the matter, so that the Board's initial referral did not prevent it from ultimately denying benefits. *Id*. at 11.

We find that *Ray* addressed a question not considered by *Thun*—what the standard is for determining whether to refer for extraschedular TDIU consideration under § 4.16(b) when that determination is made by the Board, rather than the RO. And, although in *Ray* the Board determined that a referral for extraschedular consideration was warranted and in this case the Board determined that it was not, the Board was still faced with deciding whether to refer under § 4.16(b) in both cases.

Thus, we find that *Ray's* interpretation of § 4.16(b) and its holding—that the initial extraschedular referral considers whether there's sufficient evidence to substantiate a reasonable possibility that a veteran is unemployable because of service-connected disabilities—applies whether the Board referred the matter but ultimately denied benefits, or denied both the referral and benefits in the same decision. We see no reason to apply a different standard when the Board denies referral versus when it grants referral.

C. *Bowling* and *Pederson*

We find unpersuasive the Secretary's argument that extending *Ray* to cases like Ms. Snider's would conflict with *Bowling* and *Pederson*. As Ms. Snider points out, the Court in *Ray* was not only aware of *Pederson*, but it relied on that case to hold that a referral decision is a factual determination. Similarly, the Court in *Ray* was aware of *Bowling* and, although it did not discuss it like it did *Pederson*, the Board still cited that case. What's more, the Secretary had a chance to challenge *Ray* if he disagreed with its holding and how it fit with those line of cases, but he did not do so.

As for the substance of those cases, *Bowling* reversed the Board's determination that the veteran's claim was ineligible for referral because there was plausible evidence that the veteran could not secure and follow substantially gainful employment and the Board had not relied on any affirmative contrary evidence. The Secretary argues that this differs from reversing where the plausible evidence reflects only that the veteran may be unemployable. Secretary's Resp. at 6. We acknowledge that *Ray* does seem to expand when the Court could reverse, or remand, the Board's decision to deny referral; that is, not just when the evidence shows that the veteran is unemployable but also when it shows or could show a reasonable possibility that the veteran is unemployable. But simply because a new evidentiary standard allows for reversal or remand where the evidence satisfies or could satisfy that lower threshold does not mean that that case's holding diverges from prior cases. *See also* Appellant's Sept. Reply at 4-5 (citing *Webster v. Fall*, 266 U.S. 507, 511 (1925), for the proposition that, because *Bowling* and *Pederson* did not address the legal standard regarding referrals versus later entitlement to benefits, neither case was precedent on that issue and thus does not conflict with *Ray*).

In *Pederson*, the Court found that the Board provided adequate reasons or bases for its decision to deny referral, where the Board noted § 4.16(b) (that all veterans who cannot secure or follow a substantially gainful occupation because of service-connected disabilities must be rated as totally disabled), properly considered the veteran's educational and occupational history, and did not improperly consider his non-service-connected disabilities. The Secretary argues that the Court in *Pederson* applied the standard in § 4.16(b) rather than the "reasonable possibility" standard. But *Ray* had not yet introduced the "reasonable possibility" standard when *Pederson* was decided, and simply because the Court affirmed on the facts in that case and the legal

understanding of the regulation at that time does not make applying *Ray's* holding to referral denials incompatible with past precedent.

D. A Determination Much Like *McLendon*

We note that, with the Court's holding today, the Board, if it denies a referral, will be making two determinations in its decision: (1) that a referral for extraschedular TDIU consideration is not warranted because there is insufficient evidence to substantiate a reasonable possibility that a veteran is unemployable because of service-connected disabilities; and (2) that TDIU benefits are not warranted because service-connected disabilities did not render the veteran unemployable. The Board makes similar determinations when it first concludes that a VA examination is not warranted under *McLendon v Nicholson*, 20 Vet.App. 79 (2006), and then in the same decision ultimately denies the claim. Indeed, *Ray* noted this similarity, stating that *McLendon* supported its holding because in that case there were also different evidentiary standards at different times in the analysis. 31 Vet.App. at 66.

We also note that *McLendon* held that the Board's conclusion that speculative VA examinations could not establish a nexus (higher standard for service connection) did not necessarily mean that the evidence did not indicate that there may be an association between the in-service injury and the current disability (lower standard for a VA examination). *McLendon*, 20 Vet.App. at 84. Similarly, because the standard for denying TDIU (unemployability) is higher than the standard for denying the initial referral (reasonable possibility of unemployability), we cannot say that a Board finding that the higher standard is not met necessarily means that the lower standard would not be met for referral. Thus, in such instances, remand would likely be warranted for the Board to first review the evidence under the lower evidentiary standard for referral.

E. VA's *Adjudications Procedures Manual* (M21-1)

Before moving on to how the Court's holding today applies to Ms. Snider's case, we will address the M21-1, a point of contention in the parties' pleadings. *Ray* stated that VA's own internal guidance supported its holding, given that the "M21-1 provides that referral is appropriate, in part, when 'there is evidence that the Veteran may be unable to secure or follow a substantially gainful occupation because of a service-connected disability.'" 31 Vet.App. at 66 (citing M21-1, pt. III, subpt. iv, ch. 6, § B). As the Secretary points out, however, the part of the M21-1 that *Ray* cites concerns whether the issue of extraschedular TDIU was raised, rather than whether the RO should refer for extraschedular TDIU consideration. Secretary's Resp. at 4. Indeed, that part of the

M21-1 instructs VA to "[c]onsider the issue of entitlement to an extra-schedular evaluation in compensation claims under . . . § 4.16(b) whenever the issue is expressly stated, there is evidence that the [v]eteran may be unable to secure or follow a substantially gainful occupation because of [a service-connected] disability, and [TDIU] cannot be awarded on a schedular basis" and the note to that section discusses the veteran raising extraschedular entitlement. M21-1, pt. III, subpt. iv, ch. 6, § B.4.a. And other sections—M21-1, pt. III, subpt. iv, ch. 6, § B.4.b-c—concern referral and state that only the Director of Compensation Services may approve extraschedular evaluations under § 4.16(b) and that VA should "[s]ubmit compensation claims to Compensation Services for extra-schedular consideration under . . . § 4.16(b) if . . . [a] total rating cannot be assigned solely because the minimum schedular requirements of § 4.16 are not met and a total rating is considered warranted."

Although *Ray* cited a part of the M21-1 concerning whether extraschedular TDIU was raised, rather than whether referral was warranted, its holding is still sound. This is so because *Ray* did not rely solely on the M21-1; instead, it also considered § 4.16(b) within the regulatory structure and scheme VA created to award extraschedular TDIU and found support in *McLendon*. Additionally, there appears to be support in the M21-1 for *Ray*'s holding: a note to the part concerning referrals instructs that "ROs are only required to refer claims for extra-schedular consideration when that issue, whether or not argued by the claimant, is *reasonably substantiated* by the evidence of record." M21-1, pt. III, subpt. iv, ch. 6, § B.4.c (emphasis added); *see also Ray*, 31 Vet.App. at 66 (holding that the extraschedular referral decision addresses whether there is sufficient evidence to *substantiate a reasonable possibility* that a veteran is unemployable). And finally, we again note that the Secretary had a chance to challenge *Ray*, including based on an argument that the M21-1 provision on which that case relied was incorrect, but the Secretary did not do so.

F. Application to Ms. Snider's Case

As stated, the Court finds that *Ray's* holding—that the initial extraschedular referral decision under § 4.16(b) addresses whether there's sufficient evidence to substantiate a reasonable possibility that a veteran is unemployable because of service-connected disabilities—applies whether the Board decides to refer or not to refer for extraschedular TDIU consideration because both concern the same decision—whether referral is warranted.

In this case, the Board determined that referral for extraschedular TDIU consideration was not warranted because the evidence did not support a finding that the veteran's service-connected sinusitis and hemorrhoids rendered him unable to obtain or maintain substantially gainful employment. R. at 12. The Board did not consider the evidence under *Ray's* "reasonable possibility" standard when making its referral decision. Because that standard applies to all extraschedular TDIU referral decisions, including this case, and because the Board here did not employ that standard, remand is necessary for the Board to do so. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) (holding that remand is the appropriate remedy where the Board incorrectly applied the law or did not provide an adequate statement of reasons or bases or where the record is otherwise inadequate). As the parties agree, the Court cannot make the initial decision about whether the evidence was sufficient under the "reasonable possibility" standard. Appellant's Mot. at 6-7; Secretary's Resp. at 1-2; Appellant's Sept. Reply at 1-5.

On remand, "the Board will 'reexamine the evidence of record, seek any other evidence [if the AOJ failed to satisfy its duty to assist] . . . and issue a timely, well-supported decision.'" *Andrews v. McDonough*, 34 Vet.App. 151, 159 (2021) (quoting *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991) (first alteration in original)). And a remand must be performed in an expeditious manner. 38 U.S.C. § 7112.

G. Ms. Snider's Other Arguments

In her briefs, Ms. Snider argued that the Court should reverse the Board's finding that the evidence preponderated against referral for extraschedular TDIU consideration and then remand with an order to the Board to refer the matter to the Director of Compensation Services. Appellant's Br. at 1, 14, 22, 26; Appellant's Reply Br. at 13. In her motion for reconsideration and September reply, she asserts that where the Board incorrectly applied the law, remand is the appropriate remedy. Appellant's Mot. at 4; Appellant's Sept. Reply at 10 (asking the Court to remand for a new decision on entitlement to a referral under § 4.16(b) applying the correct legal standard). Because the Board did not apply *Ray's* "reasonable possibility" standard when determining whether referral for extraschedular TDIU consideration was warranted, remand is the proper remedy, *see Tucker*, 11 Vet.App. at 374, particularly because the Court cannot decide whether the evidence satisfied that standard in the first instance, *see Deloach v. Shinseki*, 704 F.3d 1370, 1380 (Fed. Cir. 2013) (explaining that reversal is appropriate only "where the Board has performed the necessary

factfinding and explicitly weighed the evidence"); *Owens*, 7 Vet.App. at 433 (holding that the Board is responsible for assessing the weight of evidence).

Because we are remanding the TDIU matter for the Board to consider whether the evidence warrants referral for extraschedular consideration under *Ray's* "reasonable possibility" standard, it would be premature to now address Ms. Snider's other arguments: that once the veteran submitted competent, credible evidence that his service-connected disabilities interfered, or there was a reasonable possibility that they interfered, with his ability to obtain substantially gainful employment, the burden of production shifted to VA and that, because the Board relied on its own conjecture rather than evidence, its finding that it did not need to refer the TDIU claim was clearly erroneous. Appellant's Br. at 14-26 (also arguing that VA should have provided an expert vocational opinion); Appellant's Reply Br. at 1-13; Appellant's Mot. at 7-13; Appellant's Sept. Reply at 5-10; *see Best v. Principi*, 15 Vet.App. 18, 19-20 (2001) (per curiam order). Thus, we will not do so.

IV. CONCLUSION

On consideration of the above, the part of the June 4, 2019, Board decision denying TDIU is SET ASIDE and the matter is REMANDED for readjudication consistent with this decision. The rest of the appeal is DISMISSED.