Date: August 16, 1996 VAOPGCPREC. 6-96

From: General Counsel (022)

Subj: Issues Related to *Floyd v. Brown*, 9 Vet. App. 88 (1996)

From: Chairman, Board of Veterans' Appeals (01)

QUESTIONS PRESENTED:

a. Under what circumstances must the Board of Veterans' Appeals (Board) address the issue of entitlement to an extraschedular rating under 38 C.F.R. § 3.321(b)(1) or 38 C.F.R. § 4.16(b) in reviewing claims for an increased evaluation for a service-connected disability or a total disability rating for compensation based on individual unemployability?

b. In circumstances where the issue of entitlement to an extraschedular rating under section 3.321(b)(1) or 4.16(b) must be addressed, what procedure should the Board follow when the issue was not addressed by the regional office (RO)? Does the Board have jurisdiction over extraschedular claims raised for the first time by the record or the appellant before the Board?

c. Is the issue of entitlement to an extraschedular evaluation inextricably intertwined with the underlying claim for an increased evaluation or a total disability rating based on individual unemployability, such that the issues may not be separated by the Board for purposes of taking final action on appeal?

d. If the appellant or the representative raises the issue of a rating under section 3.321(b)(1) or 4.16(b) but submits no argument or evidence, and the record on appeal contains no evidence that would make such a claim plausible, may the Board dismiss the claim as not well-grounded or conclude that the RO's failure to address the issue of an extraschedular evaluation was harmless error because the claim is not plausible?

DISCUSSION:

1. In Floyd v. Brown, 9 Vet. App. 88, 95 (1996), the CVA held that the Board may not assign an extraschedular disability rating under 38 C.F.R. § 3.321(b)(1) in the first instance, because section 3.321(b)(1) establishes a specific procedure requiring all claims under that provision to be referred to the Under Secretary for Benefits or the Director of VA's Compensation and Pension Service for initial decision. However, the CVA held that the Board may be required to *consider* the applicability of section 3.321(b)(1) when the issue had been raised before the Board. Specifically, the CVA stated that "the regulation does not preclude the Board from *considering* whether referral to the appropriate first-line officials is required" and "[t]he procedural requirements of 38 C.F.R. § 3.321(b)(1) do not derogate from the ability or obligation of the Board to seek out all issues which are reasonably raised from a liberal reading of the documents or oral testimony submitted prior to the [Board's] decision." Id. at 95-96. The court further stated that "the correct course of action for the Board in extraschedular consideration cases such as this one is to raise the issue and remand it for the proper procedural actions outlined in 38 C.F.R. § 3.321(b)(1)." Id. at 95; see also id. at 96 ("the Board is in fact obligated to consider the applicability of the extraschedular rating regulation, but must then refer the matter for decision in the first instance by the appropriate VA officials."). In a July 15, 1996, order, the CVA denied VA's motion for reconsideration and en banc review in Floyd.

2. You have raised a number of questions regarding the effect of Floyd on the Board's procedures with respect to issues concerning extraschedular disability ratings under 38 C.F.R. § 3.321(b)(1) and total disability ratings based on individual unemployability (TDIU ratings) under 38 C.F.R. § 4.16(b). At the outset, it is necessary to distinguish the types of extraschedular ratings available for purposes of service-connected disability compensation. Under 38 C.F.R. § 3.321(b)(1), the Under Secretary for Benefits and the Director of VA's Compensation and Pension Service, upon field station submission, are authorized to assign extraschedular disability ratings "commensurate with the average earning capacity impairment due exclusively to the service-connected disability or disabilities"

when the evaluations in VA's rating schedule are found to be inadequate. Under 38 C.F.R. § 4.16(a), a rating board may as-

sign a total disability rating based on individual unemployability for compensation purposes, without referral to any other official, if the claimant has one service-connected disability rated at least 60-percent disabling or, in cases of multiple service-connected disabilities, one disability rated at least 40-percent disabling and a combined rating of at least 70-percent, and is unable to secure or follow a substantially gainful occupation as the result of such disability or disabilities. Under 38 C.F.R. § 4.16(b), if a claimant's service-connected disabilities do not meet the percentage requirements of section 4.16(a), but the claimant is unable to secure and follow a substantially gainful occupation by reason of such service-connected disability, the rating board must submit the case to the Director of VA's Compensation and Pension Service for consideration of entitlement to a TDIU rating. Although Floyd dealt only with ratings under section 3.321(b)(1), the analysis in that opinion would appear to apply also to TDIU ratings under section 4.16(b), in view of that section's similar requirement of referral to the Director of VA's Compensation and Pension Service and CVA precedents requiring consideration of section 4.16(b) when the issue is raised in an increased-rating case. See Stanton v. Brown, 5 Vet. App. 563, 570 (1993); Fanning v. Brown, 4 Vet. App. 225, 229 (1993).

3. You have asked whether the Board must address the issue of entitlement to a rating under section 3.321(b)(1) or 4.16(b) in all cases (by which we presume you mean all rating-increase cases) and, if not, what circumstances would require the Board to consider entitlement under those provisions. We do not believe that the Board would be required to address the issue of extraschedular entitlement in all rating-increase claims. As explained below, the governing regulations and CVA precedents establish that 38 C.F.R. § 3.321(b)(1) applies only in "exceptional" cases where the ratings in VA's Schedule for Rating Disabilities (rating schedule) are inadequate to compensate for the average loss of earning capacity attributable to specific disabilities. In the absence of evidence or an assertion by the claimant that the schedular ratings are inadequate, the Board would not be required to address the applicability of section 3.321(b)(1). Further, 38 C.F.R. § 4.16(b) applies only where a claimant is unable to secure or follow a substantially

gainful occupation by reason of service-connected disability. In the absence of evidence or an assertion by the claimant that he or she is unemployable due to service-connected disability, VA would not be required to address section 4.16(b).

4. VA is required by statute to adopt and apply a schedule of disability ratings "based, as far as practicable, upon the average impairments of earning capacity resulting from [injuries] in civil occupations." Accordingly, the rating assigned to a claimant's disability generally must be based on VA's objective determinations, as reflected in the ratings schedule, of the average impairments resulting from such disability in civil occupations. See 38 C.F.R. §§ 3.321(a) ("The 1945 Schedule for Rating Disabilities will be used for evaluating the degree of disabilities), and 4.1 ("Generally, 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."). Section 3.321(b)(1) states that the ratings provided in the schedule will sometimes be inadequate to compensate for the average impairments in earning capacity due to certain disabilities and that VA must from time to time readjust the rating schedule in accordance with experience. Section 3.321(b)(1) further provides:

> To accord justice, therefore, to the exceptional case where the schedular evaluations are found to be inadequate, the Chief Benefits Director or the Director, Compensation and Pension Service, upon field station submission, is authorized to approve on the basis of the criteria set forth in this paragraph an extraschedular evaluation commensurate with the average impairment of earning capacity due exclusively to the service-connected disability or disabilities. The governing norm in these exceptional cases is: A finding that the case presents such an exceptional or unusual disability picture with such related factors as marked interference with employment or frequent periods of hospitalization as to render impractical the application of regular schedular standards.

Section 3.321(b)(1), therefore, makes clear that extraschedular ratings are warranted only in "exceptional" circumstances and

only where the schedular ratings are inadequate to compensate for the "average" impairment of earning capacity due to a particular disability. The fact that some other circumstance specific to a particular veteran, such as lack of education, may cause the effects of a service-connected disability to be more profound in that veteran's case ordinarily would not provide a

basis for awarding an extraschedular rating under section 3.321(b)(1). Rather, an extraschedular rating under that provision is warranted only where the disability picture presented by the 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, such as by requiring frequent hospitalization or otherwise interfering with employment.

5. Section 4.16(b) provides for a TDIU rating when a veteran, whose service-connected disabilities do not meet the percentage requirements of 38 C.F.R. § 4.16(a), is rendered unable to engage in a substantially gainful occupation by reason of such service-connected disabilities. In contrast to section 3.321(b)(1), section 4.16(b) does not require a finding that the schedular ratings are inadequate to compensate for the average impairments in earning capacity caused by particular disabilities, but requires only a finding that the service-connected disabilities render a particular veteran unemployable.

6. As the CVA stated in Floyd, the Board must address all issues which are reasonably raised from a liberal reading of the documents or oral testimony submitted prior to the Board's decision. Floyd at 95-96 (citing EF v. Derwinski, 1 Vet. App. 324, 326 (1991), and Myers v. Derwinski, 1 Vet. App. 127, 129 (1991)). Accordingly, where the claimant has not expressly raised the issue of entitlement to a rating under section 3.321(b)(1) or section 4.16(b), the Board will be required to address the issue only if the evidence and argument before the Board reasonably indicate that those regulations are potentially applicable. With regard to extraschedular ratings under 38 C.F.R. § 3.321(b)(1), the CVA has indicated that the Board is required to address the issue only where there is evidence of circumstances which the appropriate VA officials might find so "exceptional or unusual" as to warrant an extraschedular rating. Shipwash v. Brown, 8 Vet. App. 218, 227 (1995); see

also Stanton, 5 Vet. App. at 566 (failure to address § 3.321(b)(1) is harmless error where no exceptional or unusual circumstances are presented); Fisher v. Principi, 5 Vet. App. 57, 60 (1993) (same). Accordingly, when a claimant does not raise the issue of extraschedular entitlement and there is no evidence of potentially exceptional or unusual circumstances, the Board is not required to address the issue.

7. In determining whether the issue of extraschedular entitlement under section 3.321(b)(1) is raised by the record, the provisions of that paragraph, in connection with the provisions of the rating schedule, may provide guidance. Section 3.321(b)(1) applies when the ratings schedule is inadequate to compensate for the average impairment of earning capacity from a particular disability. The "governing norm" for such cases requires an exceptional or unusual disability picture with such factors as marked interference with employment or frequent hospitalization so as to render impractical application of the ratings schedule. Where a claimant asserts that he or she meets the schedular requirements for a higher rating, section 3.321(b)(1) is not implicated. On the other hand, when a claimant submits evidence that his or her service-connected disability affects employability in ways not contemplated by the rating schedule, the Board should consider the applicability of section 3.321(b)(1). For example, if the schedular ratings for a musculoskeletal disability are based solely on range of motion, but the evidence indicates that the claimant's musculoskeletal disability impairs earning capacity by requiring frequent hospitalization or because medication required for that disability interferes with employment, it may be necessary to address section 3.321(b)(1). In Fanning, 4 Vet. App. at 229, the CVA held that the Board was required to consider extraschedular entitlement under section 3.321(b)(1) where the record contained evidence that the veteran's disability (hernia residuals rated under diagnostic codes 7338 and 8630) required frequent hospitalization and bed rest which interfered with employability. In Moyer v. Derwinski, 2 Vet. App. 289, 293 (1992), the CVA held that the Board was required to address the applicability of section 3.321(b)(1), as well as a TDIU rating under section 4.16(b), where the rating schedule prohibited assignment of higher than an 80-percent combined rating for the veteran's disabilities, but evidence indicated that the disabilities may have rendered the veteran unemployable.

8. Although section 3.321(b)(1) identifies "marked interference with employment" as a potentially "exceptional or unusual" circumstance which may warrant an extraschedular rating, the mere assertion or evidence that a disability interferes with employment would not in all cases require consideration of section 3.321(b)(1). The rating schedule is itself based upon the average impairment of earning capacity due to diseases, and application of the schedule clearly recognizes that the rated disabilities interfere with employment. 38 U.S.C. § 1155. Accordingly, the fact that a disability interferes with employ-

ment generally would not constitute an "exceptional or unusual" circumstance rendering application of the rating schedule impractical. Rather, the provisions of section 3.321(b)(1) would be implicated only where there is evidence that 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. Although the Board would not be required to address section 3.321(b)(1) based on a mere assertion that a disability affects employability, it may be advisable in individual cases where such assertions are raised to state that the ratings in VA's rating schedule provide an adequate basis for assessing the effects of the disability upon the claimant's earning capacity.

9. Further, the mere fact that a claimant seeks a TDIU rating would not require consideration of extraschedular entitlement under section 3.321(b)(1). As noted above, entitlement to an extraschedular rating under section 3.321(b)(1) and a TDIU rating under section 4.16(b) are based on different factors. See Kellar v. Brown, 6 Vet. App. 157, 161 (1994). A claimant's assertion that he or she is unemployable due to service-connected disability within the purview of section 4.16(b) would not inherently implicate an assertion that the schedular ratings are inadequate to compensate for the average impairment of earning capacity due to the claimant's disabilities. Rather, section 4.16(b) merely requires a determination that the particular claimant is rendered unable to secure or follow a substantially gainful occupation by reason of his or her service-connected disabilities.

10. In determining whether a TDIU claim under section 4.16(b) is raised by the record, the primary consideration is whether

the record contains assertions or evidence that the claimant is unable to secure or follow a substantially gainful occupation due to his or her service-connected disabilities. Examples of evidence which may require consideration under section 4.16(b) include physician's statements that a veteran is unemployable due to service-connected disability, VA documents indicating that vocational rehabilitation is infeasible due to service-connected disability, see James v. Brown, 7 Vet. App. 495, 497 (1995), and a veteran's testimony that he or she is unable to obtain employment due to service-connected disability, see Stanton, 5 Vet. App. at 570. In cases where there is evidence that the claimant may be unemployable, but it is not clear

whether he or she may be unemployable due solely to service-connected conditions, it may be necessary to consider carefully whether the evidence reasonably raises a claim for a TDIU rating under section 4.16(b).

11. You have requested our views concerning the procedural requirements and jurisdictional limitations affecting the Board's actions in cases where the RO did not address the issue of extraschedular entitlement under section 3.321(b)(1) or TDIU ratings under section 4.16(b). The CVA's precedents indicate that in an appealed claim for an increased rating, the Board would have jurisdiction to address the questions of entitlement to an extraschedular rating or a TDIU rating even though the RO did not expressly address those questions. Under 38 U.S.C. § 7104(a), the Board has jurisdiction to address all "questions" in a "matter" which has been decided by the RO and appealed to the Board. In Bernard v. Brown, 4 Vet. App. 384 (1993), the CVA held that the Board has jurisdiction to address questions which were not addressed by the RO, but which pertain to the same "matter" decided by the RO. See also VAOPGCPREC 16-92 (O.G.C. Prec. 16-92). In Floyd, the CVA held that the question of extraschedular entitlement under section 3.321(b)(1) is part of the same "matter" as a general claim for an increased rating and the Board, therefore, may consider the question of extraschedular entitlement in cases where the RO did not address that question. Floyd, 9 Vet. App. at 96; see also Bagwell v. Brown, No. 95-238, slip op. at 4 (Vet. App. July 3, 1996). Although some CVA opinions refer to separate "claims" for increased ratings, extraschedular ratings, and TDIU ratings, Floyd indicates that when the issue of extraschedular entitlement is raised in the context of an appealed

increased-rating claim, it should be viewed as a component of the increased-rating claim rather than a separate claim.

12. The CVA has not expressly indicated whether a TDIU claim pertains to the same "matter" as an underlying claim for an increased rating within the meaning of Bernard and VAOPGCPREC 16-92. However, the CVA has held that the Board is required to address the issue of entitlement to a TDIU rating under section 4.16(b) when it is reasonably raised by the record before the Board on a claim for an increased rating. See Caffrey v. Brown, 6 Vet. App. 377, 382 (1994); Fanning, 4 Vet. App. at 229. In VAOPGCPREC 16-92, we stated that, in considering appealed "issues," such as entitlement to service connection,

the Board has authority to consider "subissues," such as whether service connection may be granted on a particular basis, that were not addressed by the RO. In the present context, where the appealed "issue" concerns entitlement to an increased rating for a service-connected disability, we believe the Board would have jurisdiction to address, as a "subissue," the question of whether an increased rating may be warranted on a particular basis, including an extraschedular rating under section 3.321(b)(1) or a TDIU rating under section 4.16(b). The question of entitlement to a TDIU rating for a particular service-connected disability is in many respects similar to the question of entitlement to an extraschedular rating for such disability, although the questions are governed by separate regulations and different standards. Both questions concern entitlement to an increased rating for a service-connected disability on a basis other than the evaluations provided in VA's ratings schedule. Accordingly, the question of entitlement to a TDIU rating, when properly raised, may be considered a component of an increased-rating claim to the same extent that the question of extraschedular entitlement may be. We note, however, that the question of TDIU entitlement may be considered a component of an appealed increased-rating claim only if the TDIU claim is based solely upon the disability or disabilities which are the subject of the increased-rating claim. If the veteran asserts entitlement to a TDIU rating based in whole or in part on other service-connected disabilities which were not the subject of the appealed RO decision, the Board would lack jurisdiction over the TDIU claim except where appellate jurisdiction is assumed in order to grant a benefit, pursuant to 38 C.F.R. § 19.13(a).

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13. Because the Board would have jurisdiction over the question of entitlement to an extraschedular rating or a TDIU rating for a particular disability or disabilities raised in connection with a claim for an increased rating for such disability or disabilities, the proper method of returning the case to the RO for any required further action would be by remand rather than referral. See Godfrey v. Brown, 7 Vet. App. 398, 409 (1995); In cases where the Board would not have jurisdiction over a TDIU claim, such as where the claim involves service-connected disabilities which were not the subject of the appealed claim, referral to the RO, rather than remand, would be the appropriate action.

14. You have asked whether the issue of entitlement to an extraschedular rating is "inextricably intertwined" with the un-

derlying issue of an increased evaluation or a TDIU rating such that the Board would be precluded from remanding the extraschedular-rating issue while taking final action on the increased-rating or TDIU issue. The concept of "inextricably intertwined" claims has been employed by the CVA to describe a limitation on its own jurisdiction. In Harris v. Derwinski, 1 Vet. App. 180, 182-83 (1991), the CVA held that when an issue decided by the Board is "inextricably intertwined" with another claim which remains pending before VA, the Board decision is not "final" for purposes of CVA's jurisdiction under 38 U.S.C. §§ 7252(a) and 7266(a) until the related claim has been finally decided. However, nothing in Harris or other CVA decisions concerning inextricably intertwined claims imposes a limit on the Board's authority to issue final decisions on certain questions and remanding distinct but related questions for further development. To the contrary, the CVA has indicated that it is reasonable for the Board, in issuing final decisions, to remand to the RO any questions which were not previously decided by the RO. See Holland v. Brown, 6 Vet. App. 443, 447 (1994) (in adjudicating increased-rating claim, it was not inappropriate for Board to "refer" TDIU claim to RO for further adjudication); Kellar v. Brown, 6 Vet. App. 157, 160 (1994) (same). Accordingly, the fact that two claims or questions may be "inextricably intertwined" for purposes of the CVA's jurisdiction would not necessarily preclude the Board from separating the claims or questions for purposes of remanding one and issuing a final decision on another, if there is a reasonable basis

for doing so. Although the questions of an increased schedular rating, an extraschedular rating, and a TDIU rating may be viewed as pertaining to the same claim or appealed "matter" for purposes of the Board's jurisdiction, we are not aware of any statute or regulation precluding the Board from issuing a final decision on one of those questions and remanding the other questions to the RO.

15. Further, the CVA's precedents suggest that a claim for an extraschedular rating would not be "inextricably intertwined" with an underlying claim for an increased schedular rating or a TDIU rating. In Kellar, 6 Vet. App. at 162, the CVA held that a claim for an extraschedular rating for a particular disability is not inextricably intertwined with a claim for a TDIU rating for the same disability. Further, the CVA has held that the issue of entitlement to a TDIU rating is not "inextricably

intertwined" with the issue of entitlement to an increased schedular evaluation and that, therefore, the CVA had jurisdiction to review the increased-rating issue even though the TDIU issue remained pending before VA. Parker v. Brown, 7 Vet. App. 116, 118 (1994); Vettese v. Brown, 7 Vet. App. 31, 34-35 (1994); Holland, 6 Vet. App. at 446-47; but see Holland, 6 Vet. App. at 446 (CVA would not have jurisdiction to review TDIU claim if increased-rating claim remained pending before VA). In Holland, 6 Vet. App. at 446-47, the CVA explained that the question of a TDIU rating is distinct from the question of a higher schedular evaluation, since a TDIU rating is based on the assertion that the rating schedule is inadequate to determine whether a veteran is totally disabled due to service-connected disability. For similar reasons, we believe that the question of entitlement to an extraschedular rating under section 3.321(b)(1) would not be inextricably intertwined with the question of entitlement to a higher schedular rating. In Bagwell, slip op. at 5, the CVA stated, without reference to the above-cited precedents, that the issue of the appellant's entitlement to an increased rating was "inextricably intertwined" with the issues of an extraschedular rating or a TDIU rating. However, the CVA's conclusion in Bagwell was expressly based on the "unique circumstances presented" by that case and, therefore, should not be construed to overrule the above-cited precedents.

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16. You have asked whether, when an appellant raises the issue of an extraschedular rating or a TDIU rating but presents no evidence or argument which would render the claim plausible, the Board may dismiss the claim as not well grounded or conclude that the RO's failure to address the issue of an extraschedular evaluation was harmless error. The doctrine of harmless error, applicable to the CVA under 38 U.S.C. § 7261(b), generally provides that an appellate court should not reverse a decision of a lower court or administrative body due to error which was not prejudicial. Accordingly, the CVA will affirm a Board decision which contains only nonprejudicial error. See e.g., Edenfield v. Brown, 8 Vet. App. 384, 390 (1995). Unlike the CVA, however, the Board does not merely affirm or reverse RO decisions. Rather, except in cases it remands, the Board is required to decide all material issues presented in a claim and enter an order granting or denying the benefits sought or dismissing the appeal. 38 C.F.R. § 19.7(b). Accordingly, where the issue of entitlement to an extraschedular rating or a TDIU rating is raised on the record before the

Board, the Board must either remand the matter to the RO or reach a decision on that issue. The conclusion that the RO committed harmless error in failing to address the issue does not clearly state a decision as to the merits of the issue. Therefore, the Board should not dispose of extraschedular or TDIU rating issues solely by concluding that the RO's failure to address the issue was harmless error.

17. In Fisher, 4 Vet. App. at 60, the CVA stated that "in the absence of exceptional or unusual circumstances, the failure to deal with § 4.16(b) would at the most be harmless error, as there would be no well-grounded claim." Although that statement would appear to justify the Board in disposing of appropriate cases on the ground that there is no well-grounded claim for an extraschedular rating or a TDIU rating, we do not believe it would be appropriate to rely on that rationale in the types of cases contemplated by your opinion request. As noted above, Floyd, 9 Vet. App. at 96, indicates that when the question of extraschedular or TDIU rating arises in connection with a claim for an increased rating, that question is considered a component of the increased-rating claim, rather than as a separate claim. See also Bagwell, slip op. at 4. If the underlying increased-rating claim is well grounded, there would be no

apparent basis for dismissing the component question of extraschedular or TDIU entitlement as not well grounded, if those issues do not constitute distinct claims. There may be circumstances where a claim for an extraschedular rating or TDIU rating will constitute a distinct claim subject to the requirement of well groundedness, such as when a claimant files a specific claim for an extraschedular rating. However, when those issues are raised in the context of a well-grounded claim for an increase, the Board should not dispose of the question on the basis that it is not well grounded.

18. When the claimant has raised the issue of entitlement to an extraschedular rating or TDIU rating and the record contains no evidence that would make such a claim plausible, the Board may conclude that there is no evidence of exceptional or unusual circumstances which could support an extraschedular rating or no evidence of unemployability due to the service-connected disability or disabilities at issue which could support a TDIU rating. In Bagwell, slip op. at 4, the CVA stated: "we do not read [section 3.321(b)(1)] as precluding the BVA from affirming an RO conclusion that a claim does not meet the criteria for

submission pursuant to 38 C.F.R. § 3.321(b)(1) or from reaching such a conclusion on its own." (Emphasis added.) Bagwell held that it was proper for the Board to determine, in the first instance, that the veteran had not presented evidence warranting referral for consideration of an extraschedular rating, although the CVA remanded for a more complete statement of reasons or bases. In Shipwash, 8 Vet. App. at 227, the CVA held that the Board is not required to address the issue of extraschedular entitlement when the record presents no evidence of exceptional or unusual circumstances which would support such entitlement. See also Stanton, 5 Vet. App. at 566 (failure to address issue is harmless error); Fisher, 4 Vet. App. at 60. Those precedents further support the conclusion that the Board may determine that there is no evidence warranting remand for referral to the appropriate officials for consideration of an extraschedular rating or a TDIU rating. We do not believe that such a determination would be significantly different from a determination that the claim is not well grounded. See Edenfield, 8 Vet. App. at 390 (determination that claim is not well grounded may be viewed as disallowance on the merits based on insufficiency of evidence). As indicated in Bagwell, however, the Board would be required to ex

plain the basis for determining that the record presents no evidence warranting referral.

19. Further, before determining in the first instance that there is no evidence warranting referral, the Board must consider, in accordance with VAOPGCPREC 16-92 and Bernard, whether the claimant would be prejudiced by the Board considering the issue in the first instance. Floyd, 9 Vet. App. at 96. The central inquiry in that determination is "whether the claimant has been given adequate notice of the need to submit evidence or argument on that question and to address the question at a hearing and, if not, whether the claimant will be prejudiced thereby." Bernard, 4 Vet. App. at 394. We have stated that "if the appellant has raised an argument or asserted the applicability of a law or [CVA] analysis, it is unlikely that the appellant could be prejudiced if the Board proceeds to decision on the matter raised." VAOPGCPREC 16-92 at 7-8. In Bagwell, slip op. at 4, the CVA held that the appellant was not prejudiced by the Board's initial consideration of section 3.321(b)(1) because the appellant had the full opportunity to present his increased-rating claim before the RO, the appellant raised the issue of extraschedular entitlement to the Board and

presented evidence to the Board regarding that issue. Accordingly, where the appellant has raised the issue of an extraschedular rating or TDIU rating and had the opportunity to submit evidence relating to that issue, he or she generally would not be prejudiced by the Board's consideration of that issue or its determination that the evidence does not warrant referral.

20. Finally, we note the CVA's holding in Floyd that the Board may not award extraschedular ratings, is based upon the regulatory language in section 3.321(b)(1) providing that such ratings may be assigned by the Under Secretary for Benefits or the Director of the Compensation purposes upon field station submission. Similar requirements are stated in section 4.16(b) with regard to certain TDIU ratings. In his dissent from the CVA's July 15, 1996, order denying reconsideration and en banc review in Floyd, Judge Steinberg suggested that VA could revise its regulations to provide that the referral procedures specified therein apply only to decisions at the RO level and do not preclude the Board from assigning extraschedular ratings in

cases before the Board. We have recommended to the Compensation and Pension Service informally that it revise sections 3.321(b)(1) and 4.16(b) to address the issue raised in Floyd.

HELD:

a. The Board is required to address the issue of entitlement to an extraschedular rating under 38 C.F.R. § 3.321(b)(1) only in cases where the issue is expressly raised by the claimant or the record before the Board contains evidence of "exceptional or unusual" circumstances indicating that the rating schedule may be inadequate to compensate for the average impairment of earning capacity due to the disability. The Board is required to address the issue of entitlement to a total disability rating based on individual unemployability (TDIU rating) under 38 C.F.R. § 4.16(b) only in cases where the issue is expressly raised by the claimant or the record before the Board contains evidence that the appellant may be unable to secure or follow a substantially gainful occupation due to his or her service-connected disability.

b. When the issue of entitlement to an extraschedular rating or a TDIU rating for a particular service-connected disability

or disabilities is raised in connection with a claim for an increased rating for such disability or disabilities, the Board would have jurisdiction to consider that issue. If the Board determines that further action by the RO is necessary with respect to the issue, the Board should remand that issue.

c. When the issue of entitlement to an extraschedular rating or a TDIU rating arises in connection with an appeal in an increased rating case, the Board is not precluded from issuing a final decision on the issue of an increased schedular rating and remanding the extraschedular-rating or TDIU-rating issue to the RO.

d. Where the appellant has raised the issue of entitlement to an extraschedular rating or a TDIU rating but the record contains no evidence which would render the claim plausible, the Board may, subject to the considerations expressed in

VAOPGCPREC 16-92 and Bernard v. Brown, determine that the referral to the appropriate officials for consideration of an extraschedular rating or a TDIU rating is not warranted.

Mary Lou Keener