ALD-249 **July 9, 2020**

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. Nos. **20-1317 & 20-1318** (consolidated)

KEVIN L. TUCKER, Appellant

VS.

DAVID SHULKIN, SECRETARY OF DEPT. OF VETERANS AFFAIRS

(E.D. Pa. Civ. No. 2:17-cv-03598)

Present: MCKEE, SHWARTZ and PHIPPS, Circuit Judges

Submitted are:

(1) By the Clerk is the within appeal for possible dismissal under 28 U.S.C. § 1915(e)(2)(B) or for possible summary action under 3rd Cir. LAR 27.4 and Chapter 10.6 of the Court's Internal Operating Procedures; and

(2) Appellant's argument in support of appeal

in the above-captioned case.

Respectfully,

Clerk

ORDER

This appeal presents no substantial question. See 3d Cir. LAR 27.4 and I.O.P. 10.6; see also Murray v. Bledsoe, 650 F.3d 246, 247 (3d Cir. 2011) (per curiam). We summarily affirm the District Court's September 3, 2019 and January 14, 2020 decisions. Tucker could not state a prima facie case of discrimination under the Rehabilitation Act because he could not demonstrate that he was qualified for his position, based on his repeated affirmations, over the course of several years, that he was totally and permanently unable to work so that he could receive 100% VA benefits, including explicitly affirming that his service-related disabilities prevented him from being able to remain employed. See Macfarlan v. Ivy Hill SNF, LLC, 675 F.3d 266, 274 (3d Cir. 2012); Hohider v. United Parcel Serv., Inc., 574 F.3d 169, 186 (3d Cir. 2009); Turner v. Hershey Chocolate U.S., 440 F.3d 604, 611 (3d Cir. 2006) (citation omitted). Next,

Tucker could not state a prima facie case of retaliation under the Rehabilitation Act based on his termination because the record did not indicate any causal connection between his complaints of discrimination in November 2013 and April 2014 and his termination in October 2014. See Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 362 (2013); Carvalho-Grevious v. Del. State Univ., 851 F.3d 249, 260 (3d Cir. 2017); Krouse v. Am. Sterilizer Co., 126 F.3d 494, 500 (3d Cir. 1997). Finally, we summarily affirm the District Court's January 14, 2020 dismissal decision because Tucker's remaining retaliation claim was not redressable, as he cannot recover compensatory or punitive damages as remedies for retaliation under the Rehabilitation Act, see Alvarado v. Cajun Operating Co., 588 F.3d 1261, 1270 (9th Cir. 2009); Kramer v. Banc of Am. Sec., LLC, 355 F.3d 961, 965 (7th Cir. 2004), and cannot recover equitable damages for work that he has repeatedly affirmed he was unable to perform due to his service-related disabilities, see NLRB v. Louton, Inc., 822 F.2d 412, 415 (3d Cir. 1987).

By the Court,

s/ *Peter J. Phipps*
Circuit Judge

Dated: July 24, 2020
Tmm/cc: Kevin L. Tucker
Judith A. Amorosa, Esq.

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Clerk

ORDER

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By the Court,

s/ Peter J. Phipps
Circuit Judge

Dated: July 24, 2020
Tmm/cc: Kevin L. Tucker
Judith A. Amorosa, Esq.

Certified as a true copy and issued in lieu of a formal mandate on

Teste:
Clerk, U.S. Court of Appeals for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KEVIN L. TUCKER,	:	
Plaintiff,	:	CIVIL ACTION
	:	No. 17-3598
v.	:	
	:	
DAVID SHULKIN, SECRETARY OF DEPT. OF VETERANS AFFAIRS,	:	
Defendant.	:	

EXPLANATION AND ORDER

Plaintiff Kevin L. Tucker filed suit against Defendant David Shulkin, Secretary of the Department of Veteran Affairs, alleging discrimination and retaliation in violation of the Rehabilitation Act ("RA"), 29 U.S.C. § 794 *et seq.* On September 3, 2019, the Court granted Shulkin's motion for summary judgment on Tucker's discrimination claims because he was not qualified to perform the essential functions of the job with or without reasonable accommodations. Ct. Summ. J. Mem. 17-22, ECF No. 53. The Court held that Tucker was not qualified to perform the essential functions of the job because he was collecting 100% permanent and total disability from the Department of Veteran Affairs ("VA") while simultaneously working for the VA. The Court denied Shulkin's motion for summary judgment on Tucker's claim that he was constructively discharged in retaliation for engaging in protected activity. Shulkin now moves to dismiss Tucker's retaliation claim pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(h)(3) for lack of subject matter jurisdiction because Tucker does not have standing to bring his sole remaining claim.[1]

[1] On January 13, 2020, the Court heard oral argument on the motion.

I. LEGAL STANDARD

"The objection that a federal court lacks subject-matter jurisdiction, see Fed. Rule Civ. Proc. 12(b)(1), may be raised by a party, or by a court on its own initiative, at any stage in the litigation, even after trial and the entry of judgment." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 506 (2006). Federal Rule of Civil Procedure 12(h)(3) provides: "If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." Fed. R. Civ. P. 12(h)(3). "Article III standing is essential to federal subject matter jurisdiction . . . ." *Hartig Drug Co. Inc. v. Senju Pharm. Co.*, 836 F.3d 261, 269 (3d Cir. 2016).

The plaintiff bears the burden of establishing standing. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016), *as revised* (May 24, 2016). In order to establish standing a plaintiff must have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Id.* "In order for an injury to be redressable, a plaintiff must show that she 'personally would benefit in a tangible way from the court's intervention.'" *Freedom from Religion Found. Inc v. New Kensington Arnold Sch. Dist.*, 832 F.3d 469, 482 (3d Cir. 2016) (Smith, J., concurring) (quoting *Warth v. Seldin*, 422 U.S. 490, 508 (1975)).

II. DISCUSSION

Shulkin contends that Tucker lacks standing because there is no legal or equitable relief that could be awarded to Tucker if he prevailed on his retaliation claim—hence his alleged injury is not redressable.

Neither compensatory or punitive damages are available remedies for retaliation under the ADA. *See Alvarado v. Cajun Operating Co.*, 588 F.3d 1261, 1265 (9th Cir. 2009); *Kramer v. Banc of Am. Sec., LLC*, 355 F.3d 961, 965 (7th Cir. 2004); *Bowles v. Carolina Cargo, Inc.*,

100 F. App'x 889, 890 (4th Cir. 2004). The Seventh Circuit has aptly explained why these remedies are not available to a plaintiff making a retaliation claim:

> Remedies available to a party making a retaliation claim against an employer under the ADA are first determined by reference to 42 U.S.C. § 12117. Section 12117, in turn, provides that the available remedies are those provided by the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e–4 through e–9, 42 U.S.C. § 12117(a). Section 2000e–5(g)(1) provides that a court may order certain equitable relief including, but not limited to, back pay, but it does not provide for compensatory or punitive damages.
>
> However, the 1991 Civil Rights Act, 42 U.S.C § 1981a(a)(2), expands the remedies available under § 2000e–5(g)(1) in certain circumstances, to provide for compensatory and punitive damages. . . .
>
> A close reading of the plain language of § 1981a(a)(2) makes it clear that the statute does not contemplate compensatory and punitive damages for a retaliation claim under the ADA. Section 1981a(a)(2) permits recovery of compensatory and punitive damages (and thus expands the remedies available under § 2000e–5(g)(1)) only for those claims listed therein. With respect to the ADA, § 1981a(a)(2) only lists claims brought under §§ 12112 or 12112(b)(5). Because claims of retaliation under the ADA (§ 12203) are not listed, compensatory and punitive damages are not available for such claims. Instead, the remedies available for ADA retaliation claims against an employer are limited to the remedies set forth in § 2000e–5(g)(1).

Kramer, 355 F.3d at 964–65; *see also Shellenberger v. Summit Bancorp., Inc.*, No. 99-5001, 2006 WL 1531792, at *4 (E.D. Pa. June 2, 2006) ("While the Third Circuit has not addressed the issue, the *Kramer* analysis has been adopted by judges in the Eastern and Western Districts of Pennsylvania."). Thus, a plaintiff who prevails on an ADA retaliation claim is only entitled to equitable relief. *Alvarado*, 588 F.3d at 1270; *Kramer*, 355 F.3d at 966. For the same reasons, only equitable remedies are available to a plaintiff who succeeds on a RA retaliation claim. *See Wishkin v. Potter*, 476 F.3d 180, 184 (3d Cir. 2007) ("The Rehabilitation Act expressly makes the standards set forth in the 1990 Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, applicable to federal employers and to employers receiving federal funding."); *see also Iceberg v. Martin*, No. 15-1232, 2017 WL 396438, at *6 (W.D. Wash. Jan. 30, 2017) (holding that

compensatory damages are not available for retaliation under the RA); *McCoy v. Dep't of Army*, 789 F. Supp. 2d 1221, 1234 (E.D. Cal. 2011) (same); *Hale v. Pace*, No. 09-5131, 2011 WL 1303369, at *7 (N.D. Ill. Mar. 31, 2011) (same).

Equitable remedies generally available to plaintiffs in Title VII cases include back pay, front pay, and reinstatement. *Donlin v. Philips Lighting N. Am. Corp.*, 581 F.3d 73, 84-86 (3d Cir. 2009). "[B]ack pay makes a plaintiff whole from the time of discrimination until trial . . . . [C]ourts may award front pay where a victim of employment discrimination will experience a loss of future earnings because she cannot be placed in the position she was unlawfully denied. Front pay is an alternative to the traditional equitable remedy of reinstatement . . . ." *Id.* at 86 (citation omitted). Although equitable remedies are generally available to plaintiffs who bring retaliation claims, Shulkin argues that Tucker is not entitled to any equitable relief because he is completely disabled and has been since before he was constructively discharged.

"An employer is not generally liable for backpay for periods when an employee is unavailable for work due to a disability." *N.L.R.B. v. Louton, Inc.*, 822 F.2d 412, 415 (3d Cir. 1987); *see also Starceski v. Westinghouse Elec. Corp.*, 54 F.3d 1089, 1101 (3d Cir. 1995) ("As a general rule, an employment discrimination plaintiff will not be allowed back pay during any periods of disability and an employer who has discriminated need not reimburse the plaintiff for salary loss attributable to the plaintiff and unrelated to the employment discrimination." (internal quotation marks omitted)). "Similarly, [a] plaintiff's request for front pay must be dismissed [if the] plaintiff continues to receive benefits for a disability that prevents him from being gainfully employed." *Shomide v. ILC Dover, Inc.*, 521 F. Supp. 2d 324, 335 (D. Del. 2007); *see also Hatter v. Fulton*, No. 92-6065, 1997 WL 411623, at *6 (S.D.N.Y. July 21, 1997), *aff'd sub nom. Hatter v. New York City Hous. Auth.*, 165 F.3d 14 (2d Cir. 1998) (holding that the totally

disabled plaintiff was not entitled to front pay because front pay "can only be awarded where the claimant is capable of working"). Additionally, a currently disabled plaintiff is not entitled to reinstatement. *Balsamel v. Roadway Exp., Inc.*, No. 87-336, 1989 WL 135563, at *2 (D.N.J. Nov. 6, 1989); *Hatter*, 1997 WL 411623, at *6. "[W]hen the plaintiff cannot meet the requirements of the position, reinstatement is not warranted." *Balsamel*, 1989 WL 135563, at *2 (citing *Johnson v. Orr*, 776 F.2d 75 (3d. Cir. 1985)).

In *Shomide*, the district court determined that the plaintiff was not entitled to front pay or back pay because he was receiving SSA disability benefits based on his representation that he was unable to work. *Shomide*, 521 F. Supp. 2d at 335 ("Given plaintiffs representation to the SSA that he is disabled and can no longer perform the position he held with defendant, he is estopped from claiming that he can now perform the same job."); *see also McKenna v. City of Philadelphia*, No. 98-5835, 2010 WL 2891591, at *16-17 (E.D. Pa. July 20, 2010) (relying on evidence that the plaintiff had collected Social Security disability benefits to determine that the plaintiff was completely disabled and not entitled to back pay). Similarly, in *Hatter*, the district court determined that the plaintiff was not entitled to back pay, front pay, or reinstatement because she continued to receive Workers Compensation based on "her assertions that she is totally disabled." *Hatter*, 1997 WL 411623, at *6.

This Court has already held at summary judgment that Tucker is not qualified to perform the essential functions of the job because of his receipt of 100% permanent and total disability from the VA. Ct. Summ. J. Mem. 17-22, ECF No. 53. The unrefuted evidence demonstrates that Tucker has been collecting 100% permanent and total disability from the VA for a time period that started before his constructive discharge and continues to the present. Because Tucker is, and has been, completely disabled he is not entitled to back pay, front pay, or

reinstatement. Tucker does not argue that he is entitled to any other type of equitable remedy. Tucker has not shown that his alleged injury is redressable. Therefore, Tucker has failed to meet his burden of establishing standing. The Court lacks subject matter jurisdiction because Tucker does not have standing to bring his RA retaliation claim.

III. CONCLUSION

For the above reasons, I grant Shulkin's motion to dismiss Tucker's RA retaliation claim for lack of subject matter jurisdiction.

S/ ANITA B. BRODY, J.
ANITA B. BRODY, J.

ORDER

AND NOW, this 14th day of January, 2020, it is **ORDERED** that Defendant's Motion to Dismiss (ECF No. 59) is **GRANTED**. The Clerk of Court is directed to close this case.

S/ ANITA B. BRODY, J.
ANITA B. BRODY, J.

Copies **VIA ECF** on 1/14/2020

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 20-1317 & 20-1318

KEVIN L. TUCKER,
Appellant

v.

DAVID SHULKIN, SECRETARY OF DEPT. OF VETERANS AFFAIRS

(E.D. Pa. Civ. No. 2-17-cv-03598)

SUR PETITION FOR REHEARING

Present: SMITH, Chief Judge, McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, and PHIPPS, Circuit Judges

The petition for rehearing filed by Appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/ *Peter J. Phipps*
Circuit Judge

Date: December 14, 2020
Lmr/cc: Kevin L. Tucker
Judith A. Amorosa

No. 06-14909
United States Court of Appeals, Eleventh Circuit

Proctor v. Fluor

494 F.3d 1337 (11th Cir. 2007)
Decided Aug 13, 2007

No. 06-14909.

1338August 13, 2007. *1338

James Rebarchak, Kirkland Edward Reid, Miller, Hamilton, Snider Odom, LLC, Mobile, AL, for Defendant-Appellant.

Glenda G. Cochran, Stephen J. Becker, Cochran Associates, Birmingham, LA for Proctor.

Appeal from the United States District Court for the Northern District of Alabama.

Before EDMONDSON, Chief Judge, HULL, Circuit Judge, and FORRESTER,- District Judge.

- Honorable J. Owen Forrester, United States District Judge for the Northern District of Georgia, sitting by designation.

1341*1341

HULL, Circuit Judge:

In this diversity case, defendant Fluor Enterprises, Inc. ("Fluor") appeals the entry of judgment of nearly $2.5 million following a jury trial on plaintiff Bobby Proctor's negligence claim under Alabama law. Fluor contends that it is entitled to (1) judgment as a matter of law because Proctor failed to establish that Fluor breached a duty of care that proximately caused Proctor's injuries arising from a manufacturing plant accident or, alternatively, (2) a new trial based on the district court's erroneous decisions to exclude evidence on the borrowed servant doctrine and admit expert testimony on the cause of Proctor's stroke. After review and oral argument, we affirm the district court's denial of Fluor's motion for judgment as a matter of law but conclude that Fluor is entitled to a new trial.

I. BACKGROUND

Because this appeal involves issues about the sufficiency of the evidence, we first outline the evidence presented at trial.

A. Decatur Plant Accident

Plaintiff Proctor testified about the manufacturing plant accident and his subsequent injuries. Proctor worked at Solutia, Inc. ("Solutia") in its acrylic manufacturing plant in Decatur, Alabama. Proctor had worked at the plant for over thirty-five years, the last ten years as a senior operator. Proctor, as a Solutia senior operator, oversaw

six "TM" machines, which are a series of connected tubs that contain chemical solution baths used in the manufacture of acrylic fiber. Proctor was responsible for maintaining quality control by recording readings related to temperature, pressure, and speed of the machines.

On January 30, 2002, Solutia's night supervisor at its Decatur plant, John Peck, told Proctor that one of the TM machines had fluctuating pressure problems and that Proctor should call an electrical and instrumentation ("EI") technician to troubleshoot the machine. EI technicians were responsible for diagnosing problems and making repairs to the machines. Solutia had contracted with Fluor, an engineering and construction contractor, to provide construction, maintenance, and engineering technicians to Solutia.

Proctor radioed for EI technicians, and Darrell Terry and Charles Lawrence soon arrived. Terry was a direct Solutia employee, and Lawrence was a Fluor contract employee working full time at Solutia's Decatur plant. Lawrence had responded to Proctor's requests for an EI technician numerous times and carried a manual temperature probe. Proctor had witnessed Lawrence take a manual temperature of the solution bath in troubleshooting TM machines approximately a hundred times. *1342

After troubleshooting the machine, Lawrence told Proctor that the vortex breaker in the TM machine was clogged and that Proctor needed to clean it. Proctor had previously checked vortex breakers for pluggage over a hundred times, and he discovered that the breaker was actually clogged only twenty percent of those times.

Based on Lawrence's diagnosis, Proctor prepared to check the solution bath for pluggage. Proctor put on a neoprene glove, a metallic sleeve, and a rubber glove to protect himself from the hot liquid bath. Proctor noticed that the temperature controller on the TM machine read 96 degrees Celsius, one degree below the desired temperature and four degrees below the solution bath's boiling point of 100 degrees Celsius. Proctor reduced the pressure and temperature on the control panel about twenty percent. According to Proctor, the solution bath was not boiling out or spilling. As Proctor reached into the bath, the solution bath vaporized and blew out over him, causing second-degree burns over twenty percent of Proctor's body. Proctor testified that he had never seen a similar accident during his tenure as a senior operator. Proctor was rushed first to a local hospital and then to a burn unit in Birmingham, where he remained for twelve days.

Peck, Solutia's night supervisor who reported the TM machine malfunction to Proctor, testified that EI technicians carry manual temperature probes with them and measure the solution bath temperature when troubleshooting TM machines. Peck previously had seen Lawrence measure the bath temperature when troubleshooting pressure problems on TM machines.

Lawrence testified that after receiving Proctor's request for troubleshooting, he first checked the liquid level in the solution bath and found no problem. Lawrence checked the pressure indicator and then walked down to the basement to inspect the machine pumps and pipes. Lawrence had "never seen the pipes shake like they were shaking" and called for Terry to join him in the basement. Based on this violent shaking, Lawrence concluded that the pump was cavitating. Lawrence returned upstairs and informed Proctor that, in his opinion, the vortex breaker was clogged and needed cleaning. Lawrence admitted that he never took a manual temperature of the solution bath. Lawrence had taken a manual temperature of the solution bath as part of his troubleshooting duties on over a hundred occasions, but he claimed that he never took a temperature when troubleshooting a pressure problem.

Proctor also presented the testimony of Scott Curry, an EI technician at Solutia's Decatur plant. Curry testified that EI technicians are responsible for troubleshooting and diagnosing problems with the TM machines and that senior operators correct problems based on the EI technicians' diagnoses. According to Curry, the three

potential causes of pump cavitation are low liquid level, improper temperature, and pluggage. When Curry troubleshoots a pressure problem, he first checks the liquid level of the bath and the pressure gauges and then takes a manual temperature of the solution bath using a digital thermometer that every EI technician carries. If the liquid and temperature levels are correct, Curry concludes that there is pluggage in the machine. Curry confirmed that there was no written procedure on how to troubleshoot a TM machine.

Dr. Marvin McKinley, Ph.D., testified as Proctor's expert witness on the cause of the accident. Dr. McKinley opined that the accident occurred because the temperature controller failed and overheated the solution. The solution then vaporized, and *1343 the excess temperature caused the solution to blow out from the pump. Dr. McKinley identified the three causes of pump cavitation as low liquid level, high temperature, and an obstruction in the machine. Dr. McKinley claimed that the "logical progression" to troubleshoot pump cavitation would be to check the liquid and temperature level first because these potential causes were easy to detect, while a clog is more difficult to uncover. According to Dr. McKinley, had Lawrence used his probe thermometer to perform a manual check on the TM machine's temperature, the excessive temperature would have been discovered and the accident could have been avoided.

Proctor also introduced into evidence a shift report from the Decatur plant on February 1, 2002, the first day in which the malfunctioning TM machine was restarted after the accident. This shift report stated that the machine's pumps began cavitating again. Solutia personnel determined that the temperature controller was malfunctioning, causing the actual bath temperature to be 101 degrees Celsius, which was four degrees higher than the controller set point. No clog in the vortex breaker was noted.

Fluor called Terry, who worked with Lawrence as an EI technician, as its witness. Terry described his efforts to troubleshoot the malfunctioning TM machine at the time of the accident. When Terry joined Lawrence in the basement, he noticed that the pumps were vibrating more violently than he had ever seen them vibrate. After consulting with Lawrence and a mechanic, Terry returned upstairs and told Proctor he was going to get a hook to check for a clog in the solution bath. Terry claimed that he did not know at the time that excess temperature could cause the pump cavitation, but he conceded that he now knows that temperature is a possible cause.

B. Medical Evidence

Proctor described his burn treatment at the Birmingham hospital. During his twelve-day hospital stay, Proctor was wrapped in bandages and underwent "extremely" painful treatment. Dr. James M. Cross, M.D., the medical director of the Birmingham burn unit, testified that Proctor suffered scalding burns over approximately twenty percent of his body and was in constant pain during his entire hospital stay. Proctor underwent daily hydrotherapy, a painful process that washed off loose skin from the burns. Dr. Cross prescribed physical therapy after the hospitalization.

Following his release from the hospital, Proctor was confined to his bed at home for three to four weeks. By March, the pain from Proctor's burns had mostly gone away, but he testified that he still suffers blisters and irritation from the burns. Proctor continued a regular course of out-patient treatment for his burns and physical and occupational therapy from soon after his February 11 hospital discharge until April 8, 2002. Proctor suffered a stroke on April 10, 2002. After several days of hospitalization, Proctor underwent physical, speech, and occupational therapy for eighteen weeks. Proctor has not returned to work since the accident.

Dr. Darin K. Bowling, D.O., testified about Proctor's stroke. Dr. Bowling is a licensed doctor of osteopathy with a family practice and has treated approximately a hundred stroke patients. To ascertain the cause of Proctor's stroke, Dr. Bowling performed a complete physical examination, including diagnostic testing with a

computed tomography ("CT") scan, echocardiogram, and magnetic resonance imaging ("MRI") scan. Dr. Bowling considered Proctor's history of hypertension but concluded that the hypertension was under control
1344with medication and that it was not *1344 the main cause of his stroke. Based on differential etiology, Dr. Bowling ruled out a hemorrhagic stroke and determined that Proctor suffered an embolic stroke arising from blocked arteries. Dr. Bowling concluded that the main cause of Proctor's stroke was likely the change in lifestyle and stress related to the Solutia accident and burns. As a result of the stroke, Proctor was totally disabled. However, on cross-examination, Dr. Bowling stated that he was not a stroke expert and had no special training in strokes.[1]

[1] On appeal, Fluor contends that it is entitled to a new trial because the district court should have excluded Dr. Bowling's testimony on the cause of Proctor's stroke as unreliable expert testimony under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). Because, as discussed later, we find that a new trial is warranted based on the district court's erroneous exclusion of evidence about Solutia's care, control, custody, and supervision of Lawrence, we need not consider whether the district court erred in admitting Dr. Bowling's testimony and express no opinion on that issue, especially given the district court's discretion to revisit the issue in the new trial and the plaintiffs' discretion as to the selection of experts at the new trial.

Dr. Charles D. Coffee, M.D., testified as Proctor's family physician from 1992 to 2002. According to Dr. Coffee, Proctor had high blood pressure and took blood pressure medication prior to August 1992. Based on Proctor's lower blood pressure in September 1992, Dr. Coffee reduced his blood pressure medication and subsequently prescribed no more blood pressure medication. Dr. Coffee also diagnosed Proctor as suffering post-traumatic stress syndrome from his military experience in Vietnam.

C. Pre-Trial Proceedings

In December 2002, Proctor filed a complaint against Fluor, alleging negligence arising out of Lawrence's failure to check the temperature and make a proper diagnosis of the malfunctioning TM machine. In its January 2003 answer, Fluor denied the material allegations and asserted, *inter alia*, the affirmative defense that Proctor's claims against Fluor were barred by the Alabama Workers' Compensation Act ("AWCA"), Ala. Code §§ 25-5-1 to -340.

Part of this appeal involves the fact that while Fluor's answer referred to the AWCA's exclusivity bar, Fluor's answer made no mention of the borrowed servant doctrine. Under Alabama law, the borrowed servant doctrine recognizes that an employee may be in the general service of and paid by his employer (Fluor) and nevertheless be transferred for a particular work assignment to a third-party employer (Solutia). *See U.S. Fid. Guar. Co. v. Russo Corp.*, 628 So.2d 486, 488 (Ala. 1993). Accordingly, the third-party employer that borrowed the employee accepts liability for the employee's work on that particular assignment, and the general employer is not liable. *See id.* "The ultimate test in determining whether an employee has become a loaned servant is a determination of whose work the employee was doing and under whose control he was doing it." *Id.* at 489.

Discovery proceeded for about six months. During discovery, Fluor deposed Lawrence and several Solutia employees about Lawrence's work duties and whether Fluor or Solutia had care, control, custody, and supervision over Lawrence's work at the plant at the time of the accident.

On October 29, 2003, Fluor moved for summary judgment, arguing, *inter alia*, that Proctor had failed to produce sufficient evidence of negligence and that his claims were barred by the AWCA's exclusivity provisions pursuant to the borrowed servant doctrine. Fluor argued that Lawrence was a loaned servant of
1345Solutia and thus a co-employee of Proctor and that, *1345 under the AWCA, Proctor could not sue Lawrence (his co-employee) or, in turn, Fluor, but instead could pursue only workers' compensation.

With its motion for summary judgment, Fluor also proffered forty-one pages of deposition testimony and two affidavits from Lawrence, five Solutia employees, and a Decatur plant shop foreman employed by Fluor. According to this deposition testimony, Lawrence submitted his timesheets to Fluor's shop foreman at the Decatur plant and received his paychecks from Fluor. Fluor's contract with Solutia stated that Fluor, as an independent contractor, maintained "complete control" of employees and that Fluor employees did not become agents or employees of Solutia.[2]

[2] Specifically, Fluor's contract with Solutia stated:

> Contractor [Fluor] is and shall remain an independent contractor in the performance of the Work, maintaining complete control of his workmen and operations. Neither Contractor nor anyone employed or engaged by him shall become an agent, representative, servant or employee of Solutia in the performance of the Work or any part thereof.

However, Fluor's evidence also showed that Lawrence worked permanently under the supervision of Solutia in Solutia's maintenance department and received his daily work assignments directly from Solutia. Solutia did not distinguish between Solutia employees and Fluor contract employees when distributing work assignments. Additionally, Solutia provided all the tools and equipment for Lawrence's work duties and trained him on the operation of Solutia machines. Although Fluor retained the ultimate power to terminate employees, Solutia previously had asked Fluor to remove several contract employees at the Decatur plant, and Fluor complied.

In his November 12, 2003 response to Fluor's motion for summary judgment, Proctor asserted that Fluor's answer had not pled the borrowed servant doctrine as an affirmative defense, and he thus moved to strike consideration of the borrowed servant doctrine pursuant to Federal Rule of Civil Procedure 8(c).[3]

[3] Federal Rule of Civil Procedure 8(c) provides that "[i]n pleading to a preceding pleading, a party shall set forth affirmatively . . . any . . . matter constituting an avoidance or affirmative defense."

In its November 26, 2003 reply, Fluor argued that it implicitly pled the borrowed servant doctrine by asserting in its answer that "[s]ome or all of the plaintiff's claims may be barred by the Alabama Workers Compensation Act." Fluor also argued that, notwithstanding its failure to plead the borrowed servant doctrine explicitly, Proctor had notice of the defense by virtue of the extensive depositions taken about Solutia's care, control, custody, and supervision of Lawrence and that Proctor would suffer no prejudice from Fluor raising the defense.

On September 8, 2005, the district court denied Fluor's motion for summary judgment on the negligence claim and granted Proctor's motion to strike consideration of the borrowed servant doctrine.[4] The district court determined that the borrowed servant doctrine is a separate affirmative defense from the AWCA's exclusivity bar because the borrowed servant doctrine applies even to injuries not covered under the AWCA. The district court found that "regardless of whether the Plaintiff realized, *1346 recognized, or inquired as to facts that may give rise to such a defense, the Defendant maintains a burden of pleading such an affirmative defense in its first response." Because Fluor failed to plead the borrowed servant doctrine as an affirmative defense in its answer, the district court found that Fluor waived the defense pursuant to Federal Rule of Civil Procedure 8(c).

1346

[4] Proctor's complaint also made a claim for wantonness. The district court granted Fluor's motion for summary judgment on the wantonness claim after Proctor conceded that he had no evidence to establish the culpable mental state required for wantonness under Alabama law. Proctor has not cross-appealed that ruling.

On September 16, 2005, Fluor requested leave to amend its answer to add the borrowed servant defense, but the district court denied the motion. The district court also denied Fluor's effort to include the borrowed servant doctrine in the final pre-trial order filed on October 14, 2005.

Five days before trial, the district court held a hearing on various motions in limine filed by both parties. The district court granted Proctor's motion to exclude testimony that Lawrence was under the care, control, custody, and supervision of Solutia on the basis that such evidence was relevant only to the borrowed servant defense, which the court already had determined that Fluor had waived. The district court denied Fluor's motion to exclude expert testimony from Dr. Bowling.

D. Trial

On February 13, 2006, the jury trial began. At the close of Proctor's case, Fluor moved for judgment as a matter of law, pursuant to Federal Rule of Civil Procedure 50(a). Fluor contended that (1) Proctor had failed to establish that Lawrence breached any duty or that the accident was foreseeable, and (2) Dr. Bowling's testimony did not establish stroke causation. The district court reserved ruling on Fluor's motion.

At the close of all the evidence, Fluor reasserted its motion for judgment as a matter of law, which the district court denied. Proctor also moved for judgment as a matter of law. The district court granted Proctor's motion only on the respondeat superior issue, concluding as a matter of law that Lawrence was working in the scope of his duties as a Fluor employee at the time of Proctor's incident.

Following deliberations, the jury found Fluor liable for Proctor's accident and awarded Proctor $1,401,351 as damages for his burns and $1,018,000 as damages for his stroke, for a total award of $2,419,351. The district court entered judgment on the jury's verdict.

E. Post-Trial Proceedings

Post-trial, Fluor renewed its motion for judgment as a matter of law, pursuant to Federal Rule of Civil Procedure 50(b), and also moved for a new trial, pursuant to Federal Rule of Civil Procedure 59(a). Fluor contended that it was entitled to judgment as a matter of law based on insufficient evidence of Lawrence's negligence and of the cause of Proctor's stroke. Fluor argued, in the alternative, that it was entitled to a new trial based on the district court's error in admitting Dr. Bowling's testimony on stroke causation and in excluding testimony about Lawrence's work conditions and the borrowed servant doctrine. The district court denied Fluor's motion. Fluor timely appealed.

II. DISCUSSION

A. Sufficiency of the Evidence of Negligence

Under Alabama law, "in order to prove a claim of negligence a plaintiff must establish that the defendant breached a duty owed by the defendant to the plaintiff and that the breach proximately caused injury or damage to the plaintiff." *Zanaty Realty, Inc. v. Williams*, 935 So.2d 1163, 1167 (Ala. 2005) (quotation marks and
1347citation omitted). On appeal, Fluor challenges *1347 whether Proctor presented sufficient evidence to establish three of the elements of negligence: duty, breach, and causation.[5] *1. Duty*

[5] We review a district court's denial of a Federal Rule of Civil Procedure 50(b) motion for judgment as a matter of law *de novo*. *Christopher v. Florida*, 449 F.3d 1360, 1364 (11th Cir.2006). We view all evidence and draw all reasonable inferences in the light most favorable to the nonmoving party. *Ledbetter v. Goodyear Tire Rubber Co.*, 421 F.3d 1169, 1177 (11th Cir.2005), *aff'd*, ____U.S.____, 127 S.Ct. 2162, 167 L.Ed.2d 982 (2007). Judgment as a matter of law "is appropriate when a plaintiff presents no legally sufficient evidentiary basis for a reasonable jury to find for him on a

material element of his cause of action." *Christopher*, 449 F.3d at 1364. "But if there is substantial conflict in the evidence, such that reasonable and fair-minded persons in the exercise of impartial judgment might reach different conclusions, the motion must be denied." *Id.* (quotation marks and citation omitted).

First, Fluor contends that the accident that injured Proctor was not foreseeable and that Lawrence had no legal duty to prevent that type of harm. "In Alabama, the existence of a duty is a strictly legal question to be determined by the court."[6] *Pritchett v. ICN Med. Alliance, Inc.*, 938 So.2d 933, 937 (Ala. 2006) (quotation marks and citation omitted). "The ultimate test of a duty to use care is found in the foreseeability that harm may result if care is not exercised." *Zanaty Realty, Inc.*, 935 So.2d at 1168 (quotation marks and citation omitted).

[6] Proctor disputes whether duty is a question of law, arguing that although duty is normally a legal question, "it is not error to submit the question to the jury if the factual basis for the question is in sufficient dispute....." *Pritchett v. ICN Med. Alliance, Inc.*, 938 So.2d 933, 937 (Ala. 2006) (quotation marks and citation omitted). However, the district court did *not* submit the question to the jury; instead, the district court made a legal determination that Lawrence had a duty to diagnose the TM machine in a non-negligent manner and only asked the jury to find whether Lawrence was negligent.

Fluor asserts that Proctor provided no evidence of foreseeability because this specific type of accident had never happened before January 30, 2002. Fluor stresses that even Proctor confirmed on cross-examination that he "had never seen an accident like this" in his twelve years working with the machines and that "no one could expect this accident to happen....."

However, under Alabama law, in determining foreseeability, "it is not necessary to anticipate the *specific* event that occurred, but only that some general harm or consequence would follow." *Smith v. AmSouth Bank, Inc.*, 892 So.2d 905, 910 (Ala. 2004). The fact that no such blow-out accident had happened in the past is not dispositive. If Proctor presented evidence that some harm was foreseeable when care is not exercised, it does not matter that a similar blow-out had not happened previously. *See Lance, Inc. v. Ramanauskas*, 731 So.2d 1204, 1208-10 (Ala. 1999) (concluding that it was foreseeable that someone might be electrocuted by a vending machine, despite no reports of prior electrocution deaths involving those vending machines, when the defendant did not follow the safety manual's installation instructions). Accordingly, Proctor did not need to show that a blow-out was a foreseeable result of a malfunctioning TM machine, but only that some harm would follow from improper troubleshooting of a malfunctioning TM machine.

And, Proctor presented sufficient evidence that some harm foreseeably could result if due care was not exercised in troubleshooting the TM machine. Lawrence and Terry knew that the TM machine contained a heated chemical solution. They admitted that they had never before seen a TM machine's pumps shake as
1348violently *1348 as they did before the accident. Lawrence and Terry also carried a digital thermometer designed to check the manual temperature of the solution bath, indicating the risk of potential overheating. Dr. McKinley testified that a failure in the TM machine's temperature controller would cause the chemical solution to heat above the normal operating temperature, vaporize, and blow out of the pump. The safety equipment that Proctor donned before reaching into the hot chemical bath also highlights the inherent danger of an overheated chemical solution. Viewing the evidence in the light most favorable to Proctor, it was reasonably foreseeable that some harm would result from Lawrence's improper diagnosis of a malfunctioning, violently shaking TM machine that was filled with a superheated chemical solution and in telling a machine operator (Proctor) to reach into such a machine. The district court did not err in determining that Lawrence owed Proctor a duty of ordinary care.

2. Breach

Even if a duty of care existed, Fluor contends that there was no proof that Lawrence breached this duty. Specifically, Fluor contends that because there is no prescribed priority order in troubleshooting TM machines, Lawrence was not negligent for attempting to address one of the three potential causes of pump cavitation — i.e., pluggage — when the accident occurred.

Under Alabama law, whether a party breached a legal duty is a question of fact for the jury. *See Pritchett*, 938 So.2d at 938. Viewing the evidence in the light most favorable to Proctor, we conclude that there was sufficient evidence that Lawrence breached his duty of care by telling Proctor to check for pluggage without ever manually checking the temperature.

For example, Dr. McKinley testified that because of the ease of checking the solution level and the solution temperature, it was a "logical progression" to check these two possible causes of pump cavitation prior to checking for pluggage, which cannot be detected easily. Curry testified that this was the exact progression he followed as an EI technician — he checked the liquid level and temperature prior to checking for pluggage when troubleshooting pressure problems in TM machines. Additionally, Curry testified that each EI technician carried a digital thermometer designed to take the manual temperature of solution baths.

Furthermore, regardless of whether there was a prescribed order of troubleshooting, it is undisputed that Lawrence *never* checked one of the three potential causes of the pump cavitation (and one of the easiest potential causes to detect) prior to making a diagnosis that pluggage was the problem and telling Proctor to check for pluggage. Based on all this testimony, the jury reasonably could find that Lawrence breached his duty of care by failing to check the solution temperature manually prior to telling Proctor to clean the vortex breaker.

3. Causation

Finally, Fluor contends that Proctor provided no evidence that there was a temperature problem or that excessive temperature caused the chemical blow-out. Fluor stresses that Proctor and Peck did not observe any chemical solution boiling prior to the accident, which is an indicator of excess temperature.

Proctor, however, presented sufficient evidence from which a jury reasonably could find that Lawrence's failure to diagnose excess temperatures in the TM machine caused the chemical accident. First, the shift report from
1349February 1, *1349 2002, which was the first day that the malfunctioning TM machine was restarted following the accident, noted that the pump was cavitating again and indicated that the temperature controller was overheating the chemical solution to a boiling temperature of 101 degrees Celsius. No pluggage or liquid level problem was noted on the report.

Most importantly, Dr. McKinley provided an expert opinion on the accident's cause after reviewing depositions, the February 1 shift report, photographs taken of the machine at the Solutia site, and articles on pumps and liquid vaporization. Based on his review of this material, Dr. McKinley opined that "[t]he temperature controller failed and overheated the solution ..... Once [the solution] got into the pump, this excess temperature caused it to blow out the suction." Dr. McKinley averred that the accident could have been prevented by checking the temperature manually, which would have revealed the excess temperature. Dr. McKinley also testified that the accident could not have been caused by any other factor besides excess temperature. The jury was entitled to credit Dr. McKinley's testimony, and Fluor provided no expert testimony to counter Dr. McKinley's testimony on causation. For all of these reasons, the jury reasonably could have found that Lawrence's failure to diagnose the excess temperature caused the accident that injured Proctor.

Viewing the evidence and drawing all reasonable inferences in the light most favorable to Proctor, we conclude that Proctor presented sufficient evidence for a reasonable jury to find that he established all elements of negligence. Accordingly, we affirm the district court's denial of Fluor's motion for judgment as a matter of law on the negligence claim.

B. Evidence of Lawrence's Work Conditions

Alternatively, Fluor contends that errors in the district court's evidentiary rulings substantially affected the jury's verdict and require a new trial.[7] Specifically, Fluor argues that the district court erred in excluding its proffered testimony about how Lawrence was under the care, control, custody, and supervision of Solutia.

[7] We review a district court's evidentiary rulings for abuse of discretion. *See United States v. Perez-Oliveros*, 479 F.3d 779, 783 (11th Cir.), *cert. denied*, ____U.S.____, 127 S.Ct. 2964, 168 L.Ed.2d 284 (2007).

The district court excluded this evidence on the grounds that (1) this evidence was relevant only to the borrowed servant doctrine, and (2) the court already had barred the borrowed servant defense due to Fluor's failure to plead that affirmative defense in its answer.[8] The district court also rejected Fluor's assertion that, even without the borrowed servant doctrine, this testimony was relevant to Proctor's negligence claim.

[8] The district court stated that "[t]he only reason I can see for this to come in is to go to the borrowed servant issue, which I have already determined in writing . . . is not a part of this trial."

To gain a reversal based on a district court's evidentiary ruling, a party must establish that (1) its claim was adequately preserved; (2) the district court abused its discretion in interpreting or applying an evidentiary rule; and (3) this error affected "'a substantial right.'" *United States v. Stephens*, 365 F.3d 967, 974 (11th Cir.2004) (quoting Fed.R.Evid. 103(a)). We conclude that Fluor has satisfied all of these requirements.

1. Preservation of Objection

1350 Fluor properly preserved its objection to the district court's exclusion of *1350 evidence about Lawrence's work conditions. To preserve an objection to the district court's exclusion of evidence, "the substance of the evidence [must be] made known to the court by offer or [be] apparent from the context within which questions were asked." Fed.R.Evid. 103(a)(2). Once the court makes a definitive ruling excluding the evidence, a party need not renew its objection or offer of evidence to preserve the issue on appeal. *See* Fed.R.Evid. 103(a). Here, in response to Proctor's motion to strike, Fluor objected and proffered forty-one pages of deposition testimony and two affidavits from seven fact witnesses relating to Lawrence's work duties and supervision. Fluor also objected to Proctor's motion in limine to exclude this same evidence. On appeal, Fluor raised this same issue in its initial brief. Therefore, the issue was properly preserved.

2. Abuse of Discretion in Evidentiary Rulings

We next consider whether the district court abused its discretion in concluding that the evidence about Solutia's care, control, custody, and supervision of Lawrence was irrelevant because Fluor had waived the borrowed servant defense. No one now disputes that, if Fluor could raise that defense, then evidence of Lawrence's work conditions was relevant and should have been admitted. Therefore, the underlying question on this evidentiary issue actually becomes a procedural issue about whether the district court properly concluded that Fluor waived the defense.[9]

[9] We review a district court's procedural ruling on waiver of an affirmative defense for abuse of discretion. *E.E.O.C. v. White Son Enters.*, 881 F.2d 1006, 1009 (11th Cir. 1989). "[W]hen employing an abuse-of-discretion standard, we must affirm unless we find that the district court has made a clear error of judgment, or has applied the wrong legal standard." *United States v. Frazier*, 387 F.3d 1244, 1259 (11th Cir.2004) (*en banc*).

Federal Rule of Civil Procedure 8(c) states that "[i]n pleading to a preceding pleading, a party shall set forth affirmatively . . . any . . . matter constituting an avoidance or affirmative defense." Fed.R.Civ.P. 8(c); *see also Steger v. Gen. Elec. Co.*, 318 F.3d 1066, 1077 (11th Cir.2003). In diversity actions, we look to state law to inform the determination of whether a certain defense is "any other matter constituting an avoidance or affirmative defense" under the federal rule. *See Troxler v. Owens-Illinois, Inc.*, 717 F.2d 530, 532 (11th Cir.1983); *Morgan Guar. Trust Co. v. Blum*, 649 F.2d 342, 344 (5th Cir. Unit B 1981) ("In diversity of citizenship actions, state law defines the nature of defenses, but the Federal Rules of Civil Procedure provide the manner and time in which defenses are raised and when waiver occurs.").[10] Under Alabama law, the borrowed servant doctrine is an affirmative defense for which the defendant bears the burden of pleading and proof. *See Hosea O. Weaver Sons, Inc. v. Towner*, 663 So.2d 892, 896-97 (Ala. 1995). Thus, we accept that the borrowed servant doctrine is an affirmative defense covered by Rule 8(c) in this case.

[10] This Court has adopted as binding precedent the decisions of the former Fifth Circuit rendered prior to October 1, 1981. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (*en banc*).

In general, a party's failure to raise an affirmative defense in the pleadings results in a waiver of the defense. *See Steger*, 318 F.3d at 1077. In deciding waiver issues under Rule 8(c), this Court in some cases has examined whether a plaintiff had notice of the unpled defense or was prejudiced by the lack of notice. *See Sweet v. Sec'y, Dep't of Corr.*, 467 F.3d 1311, 1321 n. 4 (11th Cir.2006) (concluding *1351 that a plaintiff is not prejudiced by a defendant's failure to comply with Rule 8(c) if the plaintiff has notice of the affirmative defense by some other means), *cert. denied*, ____U.S.____, 127 S.Ct. 2139, 167 L.Ed.2d 871 (2007); *Grant v. Preferred Research, Inc.*, 885 F.2d 795, 797-98 (11th Cir.1989) (same); *Hassan v. U.S. Postal Serv.*, 842 F.2d 260, 263 (11th Cir.1988) (examining whether "the opposing party has notice of any additional issue that may be raised at trial so that he or she is prepared to properly litigate it" (citing *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 350, 91 S.Ct. 1434, 1453, 28 L.Ed.2d 788 (1971))); *Jones v. Miles*, 656 F.2d 103, 107 n. 7 (5th Cir. Unit B 1981).

On appeal, Fluor contends it implicitly pled the borrowed servant doctrine in its answer by claiming an affirmative defense under the AWCA's exclusivity provisions, because the only basis for asserting an affirmative defense under the AWCA's exclusivity provisions would have been under the theory that Lawrence was a borrowed servant of Solutia and thus a co-employee of Proctor. Fluor also contends that Proctor had other notice of the defense and was not prejudiced. The district court concluded that Fluor had not actually pled the defense and thus waived the defense "regardless of whether the Plaintiff realized, recognized, or inquired as to facts that may give rise to such a defense ....." The district court said nothing about, much less made a finding about, whether Proctor, in fact, either had notice of Fluor's borrowed servant defense or would be surprised and prejudiced. Instead, the district court considered Proctor's notice of the defense to be unimportant.

We conclude that, given the circumstances presented in this case, the district court abused its discretion by concluding that Fluor waived the borrowed servant defense by failing to plead it separately in its answer. The general rule of waiver is more easily applied when a party fails to set forth one of the nineteen defenses specifically listed in Rule 8(c); waiver becomes less clear when a party fails to assert affirmatively some "other

matter" that pre-existing federal case law has not clearly construed as "constituting an avoidance or affirmative defense" under Rule 8(c). Here, we can find no pre-existing federal case law in this Circuit discussing Alabama's borrowed servant doctrine under the federal rule.

Moreover, although we make no determination about the validity of Fluor's "implicit pleading" argument, we do note that the results in some Alabama cases arguably support Fluor's contention that, because its putative servant Lawrence was immune from suit under the AWCA, no liability can be visited upon Fluor as the putative master. *See Towner v. Hosea O. Weaver Sons*, 614 So.2d 1020, 1022-23 (Ala. 1993) ("If Hilliard was a loaned servant from Weaver to B G, then Hilliard would be Towner's co-employee, and the . . . action [against Weaver] would be barred by the . . . [AWCA]"); *Gunnels v. Glenn Mack. Works, Inc.*, 547 So.2d 448, 449 (Ala. 1989) ("If Hall was, in fact, a loaned servant to F G, then he would be considered a co-employee of Tony Gunnels, and the Gunnelses' action based on negligence would be barred by the exclusivity provisions of the [AWCA]."). Thus, we cannot say that even Alabama law *clearly* establishes that pleading the AWCA's exclusivity bar was insufficient to raise the borrowed servant issue here. This case is not one in which the defendant had to know that it was violating a sharp-edged procedural rule when it failed to spell out the
1352borrowed servant doctrine as a separate affirmative defense in its answer. *1352

In a case like this one, the reality of notice and the reality of prejudice in fact must be considered. The record supports the view that Proctor had notice of Fluor's borrowed servant defense and was not prejudiced. Fluor conducted depositions of seven fact witnesses relating to Solutia's care, control, custody, and supervision of Lawrence, and Proctor cross-examined witnesses about Lawrence's work conditions. *See Hassan*, 842 F.2d at 263-64. In addition, Fluor specifically raised the borrowed servant doctrine in its summary judgment motion filed in October 2003, which was long before any trial date had been set or even a pre-trial order entered in October 2005 and indeed more than two years before the February 2006 trial. Under these circumstances, the district court erred in declining to consider whether the plaintiff actually had been prejudiced by the defendant's failure to plead the borrowed servant defense expressly in the answer. In turn, because the record shows that Proctor, in fact, had ample notice of the defense, the district court erred in excluding evidence of Lawrence's work conditions.[11] *3. Effect on Substantial Rights*

[11] Fluor claims that the district court improperly struck its borrowed servant defense both at the summary judgment phase and also at the pre-trial and trial stages, stressing our decision in *Grant*. Because Proctor had notice of the borrowed servant defense at the summary judgment stage after Fluor had conducted depositions about Solutia's control and supervision of Lawrence and because the district court excluded this evidence at trial based solely on its prior decision to strike consideration of the borrowed servant doctrine at the summary judgment stage, we need not address whether prejudice would result if Fluor had not filed the summary judgment motion based on the borrowed servant defense and only raised that defense for the first time in the pre-trial order.

Although the district court erred in excluding evidence about Solutia's care, control, custody, and supervision of Lawrence, an erroneous evidentiary ruling is a basis for reversal only if the complaining party's substantial rights were affected. *See Tran v. Toyota, Motor Corp.*, 420 F.3d 1310, 1316 (11th Cir.2005) ("We will only reverse a district court's ruling concerning the admissibility of evidence where the appellant can show that the judge abused his broad discretion and that the decision affected the substantial rights of the complaining party." (quotation marks and citation omitted)). To satisfy this standard, Fluor bears the burden of proving that the error "probably had a substantial influence on the jury's verdict." *Stephens*, 365 F.3d at 977 (quotation marks and citation omitted).

Because Alabama law recognizes the borrowed servant doctrine as a complete defense to liability, we conclude that the exclusion of Fluor's evidence about Solutia's care, control, custody, and supervision of Lawrence precluded the jury from considering that defense and thus had a substantial impact on the jury's verdict. To demonstrate that impact, we review three Alabama cases upholding the borrowed servant doctrine as a complete defense to liability. In *Hendrix v. Frisco Builders, Inc.*, 282 Ala. 473, 213 So.2d 208 (Ala. 1968), the defendant Tractor Company appealed a jury verdict against it after the state trial judge did not read its requested jury instruction on the borrowed servant doctrine. *See id.* at 208-09. Three employees, in the general employment and on the payroll of the Tractor Company, were attempting to install a butane tank on the plaintiff's property, when the tank caught fire and damaged the plaintiff's property. *Id.* at 209. The acting manager of the Gas Company, which provided the butane tank, asked the three employees to deliver' and set up
1353the tank *1353 and agreed to pay the employees in cash. *Id.* The Tractor Company gave them permission to install the tank, but the Tractor Company had no interest in the installation of the tank. *Id.* At the time of the accident, the three employees operated solely under the instructions of the Gas Company's acting manager. *Id.* at 209-10. However, the motor vehicle used to transport the tank was the property of the Tractor Company. *Id.* at 210.

Based on this evidence in *Hendrix*, the Alabama Supreme Court concluded that the three men were in the employment of the Gas Company, not the defendant Tractor Company, at the time of the accident. *Id.* The Alabama Supreme Court noted that although the three men were in the general employment of the Tractor Company, "it is the reserved right of control rather than its actual exercise that furnishes the true test of relationship. He is master who has the supreme choice, control and direction of the servant and whose will the servant represents in the ultimate result and in all its details." *Id.* (citations omitted). The Alabama Supreme Court stated that "'[a]n employee may be in the general service of another, and, nevertheless, with respect to particular work, may be transferred . . . to the service of a third person, so that the employee becomes the servant of such third person with all the legal consequences of the new relation.'" *Id.* at 211 (quoting *Alabama Power Co. v. Smith*, 273 Ala. 509, 142 So.2d 228, 239 (Ala. 1962)).

Furthermore, although the employees in *Hendrix* were paid by their general employer (the Tractor Company), the Alabama Supreme Court determined that their payroll status did not prevent them from being loaned servants of the Gas Company for the particular task at issue. *Id.* at 210. The Alabama Supreme Court concluded that while the borrowed servant doctrine is ordinarily a question of fact for the jury, the only inference that could be drawn was that the three employees were loaned servants of the Gas Company, which assumed all legal consequences of this relationship. *Id.* at 211. Accordingly, the Alabama Supreme Court in *Hendrix* reversed the judgment and concluded that the Tractor Company was not liable for the accident. *Id.*

In *Coleman v. Steel City Crane Rentals, Inc.*, 475 So.2d 498 (Ala. 1985), the Alabama Supreme Court considered whether the jury properly found that defendant Steel City Crane Rentals, Inc. ("Steel City") was not liable under the borrowed servant doctrine for plaintiff's injuries caused by its crane even though Steel City owned the crane at issue and was the general employer of the negligent crane crew employees. *Id.* at 499-500. Plaintiff Evan Coleman was an employee of Illinois Central Gulf Railroad Company ("ICG") and was removing wreckage from a train derailment. *Id.* at 499. ICG had leased the crane and was paying Steel City for the services of its crane crew. *Id.* at 500. The crane broke off a tree limb, which fell and injured Coleman. *Id.* at 499.

Although Steel City determined which employees to send on a particular crane assignment and retained the ultimate power to terminate employees, ICG could dismiss the entire crane crew. *Id.* at 500. Although the crane crew maintained discretion in positioning the crane, ICG specified how the rail line was to be cleared and when

the crane crew could leave and signaled when the crane crew should lift a rail car. *Id.* The jury returned a verdict against ICG but in favor of Steel City, so the jury necessarily found that the crane crew employed by Steel City had become the "loaned servants" of ICG, making ICG alone liable for their negligence. *Id.*

1354 Based on these facts in *Coleman*, the Alabama Supreme Court concluded that *1354 there was sufficient evidence for a jury to find that the crane crew had become borrowed servants of ICG, thus absolving Steel City of liability. *Id.* at 501. The Alabama Supreme Court noted that the "ultimate test" in determining whether an employee has become a loaned servant is which employer maintained the "reserved right to control the employee" and that "mere suggestions as to details necessary for a cooperative effort must be distinguished from actual authoritative direction and control." *Id.* at 500. In affirming the verdict in favor of Steel City, the Alabama Supreme Court concluded that "[a]lthough the question is a close one, there is sufficient evidence from which the jury could have concluded that ICG employees went beyond suggestions for a cooperative effort and exercised supervisory control over the actions of the Steel City Crane crew." *Id.* at 501.

In *United States Fidelity Guaranty Co. v. Russo Corp.*, the Alabama Supreme Court again applied the borrowed servant doctrine in a crane case. The plaintiff construction company owned a crane and sued Russo Corporation ("Russo") after Russo employee Ronald McClelland negligently operated the plaintiff's crane and damaged the plaintiff's property. *Russo Corp.*, 628 So.2d at 487. Russo employed McClelland to operate the crane and was a subcontractor on the plaintiff's construction project. *Id.* Although all other Russo employees left the construction site after Russo's subcontractor work was complete, the plaintiff asked McClelland to remain to operate the crane, and Russo consented. *Id.* McClelland delivered his time sheets to Russo and was paid by Russo, which was then reimbursed by the plaintiff. *Id.* at 488. Russo retained the right to move McClelland to another job site or terminate him, and it provided him with workers' compensation insurance and health insurance coverage. *Id.* However, McClelland reported directly to the plaintiff, which directed his daily work activities. *Id.*

After McClelland negligently operated the crane and the plaintiff filed a negligence claim against Russo, Russo moved for summary judgment, contending that McClelland was the plaintiff's borrowed servant at the time of the accident. *Id.* at 487. The trial court granted summary judgment to Russo. *Id.*

Affirming the grant of summary judgment to Russo, the Alabama Supreme Court recognized that "one [McClelland] in the general employ of one master [Russo] may *with respect to particular work* be transferred to the service of a third person [plaintiff] in such a way that he becomes *for the time being* the servant of that person, with all the legal consequences of that relationship." *Id.* at 488 (emphasis added). Relying on *Hendrix*, the Alabama Supreme Court reasoned that because the plaintiff directed McClelland to operate the crane, the plaintiff assumed complete control of him, notwithstanding the fact that Russo paid McClelland's salary and insurance benefits. *Id.* at 489. Accordingly, the Alabama Supreme Court concluded that the plaintiff, and not Russo, was liable for any negligence attributable to McClelland. *Id.* [12]

[12] The borrowed-servant cases of *Hendrix*, *Coleman*, and *Russo* do not mention the AWCA or rely on the AWCA's statutory exclusivity bar. Instead, these cases involved master-servant agency principles under Alabama common law.

Given these Alabama cases, Lawrence's potential status as a borrowed servant of Solutia is critical because Alabama law recognizes the borrowed servant doctrine as a complete defense to liability. Moreover, Fluor proffered sufficient evidence to raise a jury question about whether Lawrence was in fact a borrowed servant of
1355 Solutia. *1355

As noted earlier, Fluor proffered forty-one pages of deposition testimony from seven witnesses relating to Solutia's care, control, custody, and supervision of Lawrence. Lawrence and several Solutia employees testified that Lawrence worked permanently under the supervision of Solutia and received training, tools, equipment, and his daily work assignments directly from Solutia. Although Lawrence submitted his timesheets to a Fluor employee, received his paychecks from Fluor, and could be fired only by Fluor, Lawrence could still be a borrowed servant of Solutia if Solutia reserved the right to control Lawrence's work and controlled Lawrence's work at the time of the accident. *See Russo Corp.*, 628 So.2d at 488-89; *Coleman*, 475 So.2d at 500-01; *Hendrix*, 213 So.2d at 210. Accordingly, the erroneous exclusion of Fluor's evidence about Solutia's care, control, custody, and supervision of Lawrence affected Fluor's substantial rights by denying it the opportunity to rebut Proctor's respondeat superior claim.

We recognize that Proctor emphasizes that Fluor's contract with Solutia stated that Fluor was an independent contractor that "maintain[ed] complete control" of its employees. Notwithstanding this contract, the jury reasonably could find after considering the actual facts of Lawrence's employment that Lawrence temporarily had an implied contract with Solutia by virtue of Solutia's supervision and direction of his daily work assignments and that Solutia thus reserved the ultimate right of control over Lawrence. *See Gaut v. Medrano*, 630 So.2d 362, 364, 368 (Ala. 1993) (noting that an employee loaned to a third-party employer may enter an implied contract of hire with that employer and remanding for a jury determination of the employee's status).[13]

[13] In *Gaut*, the Alabama Supreme Court reversed a grant of summary judgment to defendant Holnam, Inc. ("Holnam") based on the trial court's finding that plaintiff Richard Gaut, an employee of Industrial Services of Mobile, Inc. ("Industrial"), had become a "special employee" loaned to Holnam and was thereby barred from bringing a tort claim against Holnam under the AWCA's exclusivity provisions. 630 So.2d at 362, 368. Industrial contracted with Holnam to provide employees at Holnam's plant and was designated as a "contractor" throughout the agreement. *Id.* at 363. Industrial hired Gaut, paid his wages, furnished tools and equipment bearing Industrial's name, coordinated his work schedule, and provided supervisors at Holnam's plant, and Holnam did not reserve a right to terminate Industrial employees based in Holnam's plant. *Id.* Despite this evidence, the Alabama Supreme Court concluded that it was a factual question for the jury whether Gaut had an implied contract with Holnam and had become a "special employee" of Holnam, triggering the AWCA's exclusivity bar, or remained solely an Industrial employee and able to sue Holnam. *Id.* at 367-68.

The Alabama Supreme Court has repeatedly held that vicarious liability stemming from master-servant relationships is usually a question of fact for the jury. *See Ware v. Timmons*, 954 So.2d 545, 553-54 (Ala. 2006); *Coleman*, 475 So.2d at 501 ("If reasonable persons can reach different conclusions on the question of whether a servant of one employe[r] has temporarily become the servant of another, it is a question of fact for the jury.").

After reviewing the evidence proffered by Fluor, we cannot say *as a matter of law* whether Lawrence was a Fluor employee or Solutia's borrowed servant at the time of the accident. Because Fluor's evidence could potentially convince a reasonable jury that Lawrence was Solutia's borrowed servant, and such a finding would serve as a complete defense to liability, the district court's erroneous exclusion of evidence regarding Solutia's
1356care, control, custody, and supervision of Lawrence likely had a substantial impact on the jury's verdict. *1356
Accordingly, Fluor is entitled to a new trial.

III. CONCLUSION

For the foregoing reasons, we affirm the district court's denial of Fluor's motion for judgment as a matter of law, but we reverse the district court's denial of Fluor's motion for a new trial, vacate the final judgment in favor of Proctor, and remand this case to the district court for a new trial consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, VACATED, AND REMANDED.

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 15-3439

ERIC C. CANTRELL, APPELLANT,

V.

DAVID J. SHULKIN, M.D.,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

On Appeal from the Board of Veteran's Appeals

(Argued February 27, 2017 Decided April 18, 2017)

Barbara J. Cook, of Cincinnati, Ohio, with whom *Elizabeth E. Olien* and *Christian A. McTarnaghan* were on the brief, both of Providence, Rhode Island, for the appellant.

Omar Yousaf, Appellate Attorney, with whom *Leigh A. Bradley*, General Counsel; *Mary Anne Flynn*, Chief Counsel; and *Kenneth A. Walsh*, Deputy Chief Counsel, all of Washington, D.C., were on the brief, for the appellee.

Before LANCE, SCHOELEN, and BARTLEY, *Judges*.

BARTLEY, *Judge*, filed the opinion of the Court. LANCE, *Judge*, filed a concurring opinion.

BARTLEY, *Judge*: Veteran Eric C. Cantrell appeals through counsel an August 13, 2015, Board of Veterans' Appeals (Board) decision denying (1) referral for consideration of an extraschedular evaluation for service-connected ulcerative colitis with resection, status post laparoscopic and open total proctocolectomy with j-pouch ileoanal anastomosis, pouchitis, and diverting ileostomy[1] (hereinafter, post-surgery ulcerative colitis); and (2) entitlement to a total

[1] A "proctocolectomy" is "surgical removal of the rectum and colon." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1521 (32d ed. 2012) [hereinafter DORLAND'S]. "Ileonal anastomosis" is a surgical procedure where a portion of the small intestine is sutured into a pouch and attached to the anus to allow continent passage of stools. *Id.* at 75, 1505, 1626; *see Total Proctocolectomy and Ileal-Anal Pouch*, NAT'L INSTS. OF HEALTH, MEDLINE PLUS MEDICAL ENCYCLOPEDIA, https://medlineplus.gov/ency/article/007380.htm (last visited March 20, 2017). "Pouchitis" is inflammation of the ileoanal pouch. DORLAND'S at 1506.

disability evaluation based on individual unemployability (TDIU). Record (R.) at 2-18.[2] This matter was referred to a panel of the Court, with oral argument, to address VA's standard for determining whether employment qualifies as "in a protected environment" for TDIU purposes.[3] For the reasons that follow, the Court will set aside the portions of the August 13, 2015, Board decision denying referral for consideration of an extraschedular evaluation for service-connected post-surgery ulcerative colitis and entitlement to TDIU, and remand those matters for readjudication consistent with this decision.

I. FACTS

Mr. Cantrell served on active duty in the U.S. Army from January 1988 to September 1988 and in the U.S. Air Force from May 2003 to August 2003. R. at 1319, 1347.

The current appeal stems from a September 2006 claim for service connection for ulcerative colitis, R. at 1778-92, which was granted by the Board in December 2011, R. at 1011-16. The next month, a VA regional office (RO) assigned staged evaluations for that condition, including a 40% evaluation for post-surgery ulcerative colitis effective April 1, 2007. R. at 2024-35. Mr. Cantrell filed a timely Notice of Disagreement as to that decision, requesting an increased initial evaluation for post-surgery ulcerative colitis. R. at 936. Since that time, he claimed and was granted secondary service connection for urge incontinence, degenerative joint disease (DJD) of the left and right hips, hemorrhoids, erectile dysfunction, and pouchitis, R. at 464-75, 791-804,

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[2] The Board also granted an earlier effective date of September 27, 2011, for the grant of service connection for urge incontinence. R. at 4, 7-8. Inasmuch as this finding is favorable to the veteran, the Court will not disturb it. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007) ("The Court is not permitted to reverse findings of fact favorable to a claimant made by the Board pursuant to its statutory authority."). In addition, the Board denied entitlement to a schedular evaluation in excess of 40% for post-surgery ulcerative colitis; denied an effective date earlier than September 27, 2011, for the grant of service connection for urge incontinence; and dismissed claims for increased evaluations for service-connected urge incontinence and hemorrhoids. R. at 5, 7-14. Because Mr. Cantrell has not challenged those portions of the Board decision, the appeal as to those issues will be dismissed. *See Pederson v. McDonald*, 27 Vet.App. 276, 281-85 (2015) (en banc) (declining to review the merits of an issue not argued on appeal and dismissing that portion of the appeal); *Cacciola v. Gibson*, 27 Vet.App. 45, 48 (2014) (same).

[3] The Court held oral argument for this case on February 27, 2017. On February 23, 2017, less than seven days before oral argument, Mr. Cantrell filed a motion for leave to file a notice of supplemental authority out of time, along with the notice itself. *See* U.S. VET. APP. R. 30(b) ("In no case will supplemental authority—pertinent and significant or otherwise—be accepted by the Clerk for filing fewer than 7 days preceding a scheduled oral argument, without leave of the Court.") The Court will grant the motion for leave and will consider the authorities cited in the February 23, 2017, notice in making this decision.

936; *see* R. at 464-75; requested and was denied entitlement to TDIU, R. at 424-61, 721-27; and perfected timely appeals to the Board of, inter alia, the RO's denials of an increased initial evaluation for post-surgery ulcerative colitis and entitlement to TDIU, R. at 93-94, 154-56. As relevant here, the veteran's combined disability evaluation has met or exceeded 70% since September 27, 2011. R. at 15.

The record of proceedings contains extensive evidence regarding Mr. Cantrell's service-connected disabilities. In October 2008, a private physician sent VA a letter indicating that the veteran had loose stools and abdominal discomfort that made it difficult for him to stand or be away from a bathroom for prolonged periods of time, R. at 1245; a September 2009 treatment note from the same physician reflects the veteran's report of having up to 10 bowel movements per day, R. at 1248. At an April 2010 VA examination, Mr. Cantrell reported 6 to 10 bowel movements per day, with occasional episodes of pouchitis. R. at 1123. He reiterated those symptoms in an August 2010 statement in support of claim (SSC), and added that, during pouchitis episodes, he had 12 to 18 bowel movements per day, needed to wear absorbent pads, had to change his underwear 3 to 5 times per day, and could not eat lunch at work for fear of soiling himself. R. at 1109.

At an April 2011 VA examination, Mr. Cantrell again reported 6 to 10 bowel movements per day when feeling well and 16 to 20 bowel movements during monthly episodes of pouchitis, which lasted three to four days. R. at 1095. He told the examiner that he worked as a park ranger and spent most of his day in the car; he was only able to do that work because he had "bathrooms mapped out on his routes." R. at 1095-96. He indicated, however, that he needed to stay home from work when he had pouchitis. R. at 1096. The examiner opined that the veteran's monthly bouts of pouchitis "interfered with his work on many . . . occasions[,] making it difficult for him to perform his job." *Id.*

At a September 2011 Board hearing, Mr. Cantrell testified that he ordinarily had 6 to 10 bowel movements per day and 10 to 20 during an episode of pouchitis. R. at 1037-38. He stated that during pouchitis flare-ups he had watery diarrhea with urinary and fecal leakage, which required him to change his underwear two to three times per day. R. at 1038-39. He also testified that he had to resign from his previous job as a highway patrolman due to ulcerative colitis. R. at 1040-41. Regarding his current job as a park ranger, the veteran stated that he was able to work

around his condition by knowing the location of every restroom in the park and by avoiding eating anything at work during pouchitis episodes. R. at 1044-45. He stated that his condition prevented him from attending training lunches or doing physical training exercises for fear of soiling himself. R. at 1045. In an April 2012 SSC, he described recurring bouts of pouchitis that caused decreased sphincter control and increased bowel movements of 12 to 20 per day. R. at 967.

In July 2012, a VA examiner opined that Mr. Cantrell's service-connected ulcerative colitis impacted his ability to work because he needed to use the restroom frequently and had disabling abdominal pain during episodes of pouchitis. R. at 906-07. At another VA examination in November 2012, the veteran reported that he had to take time off from his job as a park ranger whenever he had pouchitis, R. at 753, and he complained of abdominal cramping with excessive, bloody diarrhea two to three times per month; abdominal pain two to three times per week; diarrhea 7 to 14 times per day; nausea five to six times per month; occasional vomiting; and pulling pain upon physical activity, R. at 755-56.

In his December 2012 application for TDIU, Mr. Cantrell indicated that he was working fulltime as a park ranger, a position that he held since 2007, and had made $32,950 the prior year. R. at 723. He explained that he was only able to maintain that job because of the many accommodations made by his employer, including being assigned only to duty stations near restrooms, not being required to remain at emergency scenes, and always having another ranger on call for him in case he needed to leave work early for medical reasons. R. at 727. Mr. Cantrell further stated that about three times per month he got so sick that he had to leave work early and that another two to three times per month he was unable to go to work at all. *Id.* According to the veteran, his employer was thinking of moving him to the night shift because he had recently been absent more often than he had been at work due to medical appointments and illness. *Id.* A March 2013 employer letter indicated that the veteran had been switched to the night shift due to repeated absences for medical appointments. R. at 679. The employer noted that he only assigned the veteran jobs near bathrooms and that it would have been too costly to employ the veteran without these accommodations. R. at 679-80.

An October 2014 VA medical examination report noted that the veteran's service-connected bilateral hip problems impacted his ability to work by causing, inter alia, difficulty walking and bending. R. at 482.

In March 2015, Mr. Cantrell submitted an employability assessment completed by a private vocational expert. R. at 79-91. The vocational expert noted that the veteran required 10 to 15 bathroom breaks per workday, lasting around 20 minutes each, and that his employer gave him "full liberty" to take rest breaks as needed to use the bathroom, stop and stretch his hips, or lie down to restore his composure and energy. R. at 81-83. The vocational expert opined that Mr. Cantrell's work as a park ranger was "tantamount to a 'protected employment' situation" because "no typical employer can or would allow/accommodate a worker to take three and one third (3 1/3) hours per workday/work shift for bathroom break purposes." R. at 84. He stated that it was reasonable for an employer to terminate an employee if "off task" work exceeds 45 to 60 minutes per workday and concluded that the veteran's "above-noted need for bathroom/rest breaks renders him totally unemployable for any competitive occupation and that his present employment situation far exceeds the bounds of typical or normally-expected employer accommodation of a disabled worker." *Id.* The vocational expert ultimately classified Mr. Cantrell's employment situation as an "unprecedented accommodation" that was "completely contingent upon the unprecedented beneficence" of his employer. R. at 85.

In August 2015, the Board issued the decision currently on appeal. R. at 2-18. As relevant here, the Board denied entitlement to TDIU because it found that Mr. Cantrell's current employment as a park ranger was substantially gainful, despite the numerous accommodations provided by his employer. R. at 15-17. The Board discounted the March 2015 vocational expert's opinion that the veteran's job qualified as "protected employment" because the symptoms the veteran reported to the vocational expert were inconsistent with the veteran's prior statements regarding his symptoms when he was not experiencing pouchitis. R. at 16-17. Relying on the other evidence of record, the Board reasoned that the veteran's employment was not "marginal employment akin to employment in a protected environment" because it entailed substantial responsibilities and "the accommodations made by [his] employer have allowed him to perform his job successfully and on a full[-]time basis." R. at 17. The Board also considered whether Mr. Cantrell was entitled to referral for consideration of an extraschedular evaluation based on the combined effects of his service-connected disabilities but concluded that he was not because "there are no additional service-connected symptoms that have not been attributed to a specific service-connected disability." R. at 15. This appeal followed.

In February 2017, Mr. Cantrell notified the Court that he had retired from his job as a park ranger in January 2017 due to service-connected ulcerative colitis, urge incontinence, and left and right hip disabilities. Appellant's February 7, 2017, Notice at 1 & Exhibit 1. However, on April 5, 2017, the veteran notified the Court that he had not retired in January 2017, but rather, he had provided his employer with a letter of resignation declaring his intent to retire. Appellant's April 5, 2017, Notice at 1 & Exhibit 1.

II. ANALYSIS

A. TDIU

TDIU will be awarded when a veteran is unable to secure or follow a substantially gainful occupation as a result of service-connected disabilities. 38 C.F.R. § 4.16 (2016); *see Hatlestad v. Brown*, 5 Vet.App. 524, 529 (1993) ("[T]he central inquiry in determining whether a veteran is entitled to a TDIU rating is whether the veteran's service-connected disabilities alone are of sufficient severity to produce unemployability."). When such unemployability is shown and the veteran meets certain numeric evaluation requirements, the Board may award TDIU in the first instance, 38 C.F.R. § 4.16(a); otherwise, the Board may only refer the case to the Compensation Service Director for consideration of extraschedular TDIU, 38 C.F.R. § 4.16(b).[4] *See generally Pederson*, 27 Vet.App. at 285-86.

Relevant to this appeal, § 4.16 states that "[m]arginal employment shall not be considered substantially gainful employment." 38 C.F.R. § 4.16(a); *see Ortiz-Valles v. McDonald*, 28 Vet.App. 65, 70 (2016) (concluding that the terms "substantially gainful occupation" and "substantially gainful employment" in § 4.16 are "synonymous"). The regulation continues:

> For purposes of this section, marginal employment generally shall be deemed to exist when a veteran's earned annual income does not exceed the amount established by the U.S. Department of Commerce, Bureau of the Census, as the poverty threshold for one person. Marginal employment may also be held to exist, on a facts found basis (includes but is not limited to employment in a protected environment such as a family business or sheltered workshop), when earned annual

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[4] The parties do not dispute the Board's finding that Mr. Cantrell has met or exceeded § 4.16(a)'s numeric criteria for schedular TDIU since September 27, 2011, and that, prior to that date, he was only eligible for TDIU via extraschedular referral pursuant to § 4.16(b). R. at 15.

> income exceeds the poverty threshold. Consideration shall be given in all claims to the nature of the employment and the reason for termination.

38 C.F.R. § 4.16(a).[5] In other words, "a veteran can establish marginal employment *either* by demonstrating an income less than the poverty threshold established by the U.S. Census Bureau *or* by the facts of his [or her] particular case." *Ortiz-Valles*, 28 Vet.App. at 71 (emphasis added). Regardless of the method, "if the evidence or facts reflect that a veteran is capable only of marginal employment, he [or she] is incapable of securing or following a substantially gainful occupation and is therefore entitled to [TDIU] if [his or her] service-connected disabilities are the cause of that incapability." *Id.* The instant case involves the second method of establishing marginal employment—i.e., on a facts found basis where earned annual income exceeds the poverty threshold.

As with any finding on a material issue of fact and law presented on the record, the Board must support its TDIU determination with an adequate statement of reasons or bases that enables the claimant to understand the precise basis for that determination and facilitates review in this Court. 38 U.S.C. § 7104(d)(1); *Pederson*, 27 Vet.App. at 286; *Todd v. McDonald*, 27 Vet.App. 79, 88 (2014); *Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1990). To comply with this requirement, the Board must analyze the credibility and probative value of evidence, account for evidence it finds persuasive or unpersuasive, and provide reasons for its rejection of material evidence favorable to the claimant. *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table).

1. The Parties' Arguments

Mr. Cantrell principally argues that the Board provided inadequate reasons or bases for its determination that his employment as a park ranger did not qualify as "in a protected environment" for TDIU purposes. Appellant's Brief (Br.) at 14-20; Reply Br. at 1-5.[6] He asserts that, although

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[5] Although the term "marginal employment" appears only in § 4.16(a), there is nothing in the regulation to suggest, nor has the Secretary asserted, that VA is precluded from determining that marginal employment exists for the purposes of referring a case for consideration of extraschedular TDIU under § 4.16(b).

[6] Although § 4.16(a) lists employment in a protected environment as an example of marginal employment and expressly states that marginal employment may be held to exist in other situations when earned annual income exceeds the poverty threshold, Mr. Cantrell does not argue that the Board erred in finding that his employment as a park ranger did not qualify as marginal employment on any other basis, *see* Appellant's Br. at 14-20; Reply Br. at 1-5, and he asserted at oral argument that it was not necessary for the Court to address marginal employment outside of

VA did not define employment "in a protected environment" in § 4.16(a), that term's meaning can be discerned from the plain language of the regulation—namely, "a work environment in which [] a veteran [is] allowed to maintain employment because the employer provide[s] accommodations that protect the veteran by allowing him or her to work despite not being able to meet the normal criteria required for an occupation." Appellant's Br. at 15. In his reply brief, Mr. Cantrell offers a slightly different definition—namely, that "employment in a protected environment" exists when a veteran "is only able to work because his employer protects him from termination." Reply Br. at 2. Relying on these definitions, Mr. Cantrell contends that the Board, in finding that his employment as a park ranger did not qualify as "in a protected environment" because he was given significant responsibilities and was able to perform his job successfully with accommodations, imposed too high a standard that is not supported by the regulation. Appellant's Br. at 14-20; Reply Br. at 1-5. In the alternative, he argues that the Board erred in finding his statements to the March 2015 vocational expert less credible than those made during medical treatment. Appellant's Br. at 20-24; Reply Br. at 5-8.

The Secretary disputes these contentions and urges the Court to affirm the Board decision because the Board adequately assessed entitlement to TDIU on a facts found basis as required by § 4.16, including properly discounting the March 2015 vocational expert's opinion. Secretary's Br. at 12-21. In his supplemental memorandum of law, the Secretary asserts that "VA has purposely chosen not to define 'employment in a protected environment,' leaving it to the discretion of the factfinder on [a] case-by-case basis." Secretary's Supplemental Memorandum of Law (Supp. Memo) at 12. The Secretary requests that the Court defer to this intentional ambiguity, which he contends is consistent with the language of § 4.16(a) and VA policy and reflects the agency's fair and considered judgment that VA adjudicators must possess the utmost leeway in making this "factual determination." *Id.* at 12-14.

Mr. Cantrell vociferously objects to the Secretary's position, characterizing it as "unfettered" and "unlinked to any authoritative standard," inviting arbitrary and capricious

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the protected environment context, Oral Argument at 21:43-22:17. Therefore, the Court will focus solely on the Board's determination that Mr. Cantrell's employment did not qualify as "in a protected environment" and will not address any other possible form of marginal employment. *See Grivois v. Brown*, 6 Vet.App. 136, 138 (1994) (explaining that the Court has discretion to deem abandoned issues not argued on appeal).

decisionmaking by VA. Appellant's Supp. Memo at 3-9. He argues that, without an articulated standard for employment "in a protected environment," he cannot discern and the Court cannot determine whether the factors the Board considered in this case were appropriate. *Id.* at 8-9. The Court agrees with this latter contention.

2. Employment in a Protected Environment

This case involves the interpretation of the term employment "in a protected environment" in § 4.16(a). We therefore begin our analysis with an examination of the language of that regulatory provision. *See Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 409 (1993) ("The starting point in interpreting a statute [or regulation] is its language."); *Petitti v. McDonald*, 27 Vet.App. 415, 422 (2015) ("Regulatory interpretation begins with the language of the regulation, the plain meaning of which is derived from its text and its structure."); *see generally Southall-Norman v. McDonald*, 28 Vet.App. 346, 351 (2016). If the plain meaning of the term employment "in a protected environment" is clear from the language of the regulation, then that meaning controls and "that is 'the end of the matter.'" *Tropf v. Nicholson*, 20 Vet.App. 317, 320 (2006) (quoting *Brown v. Gardner*, 513 U.S. 115, 120 (1994)); *see Pacheco v. Gibson*, 27 Vet.App. 21, 25 (2014) (en banc). If, however, the language is ambiguous, then the Court must defer to the agency's interpretation of its regulation unless that interpretation is inconsistent with the language of the regulation, is otherwise plainly erroneous, or does not represent the agency's considered view on the matter. *Southall-Norman*, 28 Vet.App. at 351; *see Auer v. Robbins*, 519 U.S. 452, 461-62 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); *Smith v. Nicholson*, 451 F.3d 1344, 1349-50 (Fed. Cir. 2006).

The meaning of employment "in a protected environment" is not clear from the plain language of § 4.16. VA did not expressly define that term in the regulation and the nonexhaustive list of examples of what may constitute employment in a protected environment that VA did provide in § 4.16(a)—i.e., a family business or sheltered workshop—does not resolve this uncertainty. To the contrary, that list of examples suggests that VA may have intended employment "in a protected environment" to be a term of art that differs from the ordinary, accommodation-based dictionary definition proffered by the veteran. *See* 55 Fed. Reg. 31,579, 31,580 (Aug. 3, 1990) (agreeing with a commenter that it was necessary to clarify the definition of marginal employment when earned income exceeds the poverty threshold and providing the list

of examples rather than resorting to a dictionary definition). While family businesses and sheltered workshops often involve employment accommodations, the presence of such accommodations is not the only similarity between the two and is not even a necessary characteristic for employment in a family business. Moreover, no other VA disability compensation regulation mentions employment in a protected environment, much less defines it, and the regulations surrounding § 4.16 in the Code of Federal Regulations do nothing to elucidate the term's meaning. *See Correia v. McDonald*, 28 Vet.App. 158, 166 (2016) (examining the placement of 38 C.F.R. § 4.59 within the regulatory scheme to determine its meaning); *cf. King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991) ("[T]he meaning of statutory language, plain or not, depends on context."). Given that the language and context of § 4.16(a) "leave in doubt" the meaning of employment "in a protected environment," the Court concludes that the term is ambiguous and must decide whether VA's definition is entitled to deference. *Smith*, 451 F.3d at 1350; *see Seminole Rock & Sand Co.*, 325 U.S. at 414 (explaining that, when a court is interpreting a regulation, it "must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt").

The problem, however, is that the Secretary has refused to proffer any definition of employment "in a protected environment" for the Court to analyze. In fact, when ordered by the Court to provide one, the Secretary responded that "VA has purposely chosen not to prescribe a precise definition of 'protected environment,' allowing the factfinder to make the determination on a case-by-case basis." Secretary's Supp. Memo at 12. In the Secretary's view, this ambiguity by design is a beneficial feature of § 4.16(a), providing VA adjudicators with "the broad discretion in assessing the factual particularities of each case" that is necessary to determine whether a veteran's employment qualifies as employment in a protected work environment. *Id.* at 13. Essentially, the Secretary is asking the Court to defer to a "we know it when we see it" definition of employment in a protected environment and to trust that the hundreds of VA adjudicators across the country will uniformly and consistently apply that undefined term without guidance from the Secretary.

The flaw in this reasoning is obvious: Without a definition of the phrase or, at the very least, a list of factors that VA adjudicators should consider in making that determination, there is no standard against which VA adjudicators can assess the facts of a veteran's case to determine whether he or she is employed in a protected environment. While that determination of course requires consideration of the particular facts of each veteran's case, the Secretary's incantation in

his pleadings of the phrase "facts found" does not conjure a standard for employment "in a protected environment" or otherwise imbue that phrase with meaning. Nor does the list of examples provided in § 4.16(a) because, although the Secretary stated at oral argument that the "common thread that exists between these examples" is that the employer incurs "some type of loss" in employing the veteran, Oral Argument at 26:05-20, the Secretary steadfastly maintained—in briefing, memoranda, and oral argument before the Court—that VA adjudicators decide whether employment qualifies as "in a protected environment" based on the "facts found" in each case and that there is no defining feature or factor, including loss, that guides that case-specific assessment. *See, e.g.*, Secretary's Br. at 15-16; Secretary's Supp. Memo at 12-18; Oral Argument at 27:40-55. The Board certainly did not apply a standard of loss to the employer in this case, *see* R. at 16-17, and the Court doubts that the Board would have been able to meaningfully apply that standard, if applicable, based on the record VA developed below.

In short, absent an articulated standard for employment "in a protected environment" that is capable of consistent application by VA and meaningful review by this Court, we cannot defer to the Secretary's decision not to define that term in § 4.16(a). *See Hood v. Brown*, 4 Vet.App. 301, 303 (1993) (rejecting the Secretary's interpretation of a term in a diagnostic code that was "the equivalent of 'because I say so'"); *cf. Burlington Truck Lines, Inc., v. United States*, 371 U.S. 156, 167 (1962) ("Expert discretion is the lifeblood of the administrative process, but '[u]nless we make the requirements for administrative action strict and demanding, expertise, the strength of modern government, can become a monster which rules with no practical limits on its discretion.'" (quoting *New York v. United States*, 342 U.S. 882, 884 (1951) (Black, J., dissenting))).

Although "the law does not demand perfect consistency in administrative decisionmaking," *South Shore Hosp., Inc. v. Thompson*, 308 F.3d 91, 103 (1st Cir. 2002), "overly ambiguous standards almost inevitably lead to inconsistent application," *King v. LaMarque*, 464 F.3d 963, 966 (9th Cir. 2006). This point is amply illustrated by VA's past experience with this very regulation. Prior to 1990, VA considered marginal employment not substantially gainful employment for TDIU purposes, but § 4.16 did not specify that fact. *See* 38 C.F.R. § 4.16 (1989); 54 Fed. Reg. 35,507, 35,508 (proposed Aug. 28, 1989) ("It has been VA policy that marginal employment is not to be considered substantially gainful employment. It is proposed to amend § 4.16(a) to define marginal employment. . . ."). In September 1987, the U.S. General Accounting

Office (now the Government Accountability Office) issued a report examining VA's process of determining, on a "case-by-case basis" and without overarching guidance from the Secretary, whether a veteran was engaged in marginal employment for TDIU purposes. U.S. GEN. ACCOUNTING OFFICE, IMPROVING THE INTEGRITY OF VA'S UNEMPLOYABILITY COMPENSATION PROGRAM (Sept. 21, 1987). The General Accounting Office surveyed VA adjudicators from nine ROs and "could not obtain a consistent interpretation," noting that "VA uses at least five different approaches" to answer that question. *Id.* at 4. It cautioned that VA's use of these different approaches could result in different outcomes for similarly situated veterans and give "the appearance of arbitrary and inequitable decisionmaking." *Id.* at 18, 42. Thus, to avoid such unjust and disparate treatment and to bring uniformity to VA decisionmaking in this area, the General Accounting Office recommended that VA adopt an agency-wide definition of marginal employment, *id.* at 5, which it did in August 1990, *see* 54 Fed. Reg. at 35,508 (citing the 1987 General Accounting Office report as the impetus for amending § 4.16(a)); 55 Fed. Reg. at 31,579 (final rule effective Aug. 3, 1990). Given VA's prior failures consistently applying an undefined term on a case-by-case basis to determine entitlement to TDIU, the Court has little confidence that VA has or will be able to determine employment "in a protected environment" in a consistent manner without further guidance from the Secretary.

Here, the Board determined that Mr. Cantrell's employment as a park ranger did not constitute employment "in a protected environment" because it entailed substantial responsibilities—including being allowed to carry a weapon and drive a patrol car and being required to deal with rule violators—and "the accommodations made by [his] employer have allowed him to perform his job successfully and on a full[-]time basis." R. at 17. Although the magnitude of a veteran's job responsibilities and the degree of accommodation necessary for successful, full-time work might be appropriate factors to consider in determining whether a veteran is employed in a protected environment, VA's failure to define employment "in a protected environment" or to otherwise specify the factors that adjudicators should consider in making that determination frustrates judicial review of that issue because the Court is unable to meaningfully assess the propriety of the Board's reliance on the factors it cited in this case. *See Hood*, 4 Vet.App. at 303; *Gilbert*, 1 Vet.App. at 56-57. The Court simply cannot sanction a statement of reasons or bases that amounts to finding that Mr. Cantrell was not employed in a protected environment

"because I say so." *Hood*, 4 Vet.App. at 303. Accordingly, the Court concludes that the Board provided inadequate reasons or bases for denying entitlement to TDIU, necessitating remand. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) (holding that remand is the appropriate remedy "where the Board has incorrectly applied the law, failed to provide an adequate statement of reasons or bases for its determinations, or where the record is otherwise inadequate").

To the extent that Mr. Cantrell requests that the Court define the term employment "in a protected environment" for TDIU purposes, *see* Appellant's Br. at 15; Reply Br. at 1-2, we decline to do so at this time. "It is VA's responsibility to define the terms contained within its regulations," *Ortiz-Valles*, 28 Vet.App. at 72, and, as we have done in the past when reviewing previously undefined regulatory terms, we will give VA the first opportunity to do so.[7] *See, e.g., id.* (declining to define the term "substantially gainful employment" in § 4.16 and remanding with encouragement to VA to do so); *Moore v. Derwinski*, 1 Vet.App. 356, 359 (1991) (same); *Ferraro v. Derwinski*, 1 Vet.App. 326, 333 (1991) (same); *cf. Gray v. McDonald*, 27 Vet.App. 313, 326-27 (2015) (noting VA's "discretionary authority to define the scope of [a] presumption" and declining "to usurp the Agency's authority and impose its own line"); *see also Hood*, 4 Vet.App. at 304 ("The Board is statutorily mandated to provide a statement of reasons or bases for its decision. If the Board is unable to do so because of a regulation's syntax, then it may be necessary for the Secretary to change that regulation by amendment or interpretation.").

3. Credibility

In addition, the Court agrees with the veteran that the Board provided inadequate reasons or bases for finding his reports to the vocational expert of his ulcerative colitis symptoms to be inconsistent with his prior reports to treating physicians.

The Board's analysis of the vocational expert's opinion focuses not on the number of times that Mr. Cantrell used the restroom each workday, but rather on the amount of time that the veteran spent in the restroom each workday. Specifically, the Board noted the vocational expert's estimate

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[7] The Court notes that VA has stated that, in addition to "income," "the frequency and type of service performed" are relevant factors in assessing whether a veteran is engaged in substantially gainful employment in a tightly held corporation. VA ADJUDICATION PROCEDURES MANUAL (M21-1), pt. IV, subpt. ii, ch. 2, § F(3)(d); *see id.* at § F(3)(c) (equating a tightly or closely held corporation with a family business). The Court notes that no attempt was made in this case either by the Secretary or the Board to apply such factors.

that, based on Mr. Cantrell's reports, he "lost 3 1/3 hours per workday to bathroom breaks," which significantly exceeded the 45 to 60 minutes of "off task" work time that, in the expert's experience, would justify reasonable termination of an employee. R. at 16. The Board found Mr. Cantrell's reports to the vocational expert not credible because they were "inconsistent with the rest of the record" insofar as the veteran had "not previously reported that he spends nearly half of his work shift in the restroom on days when he is not experiencing pouchitis." R. at 17.

Although the Board is correct that Mr. Cantrell had not previously stated that he spent half of his workday in the restroom when he was not experiencing pouchitis, the record does not contain any evidence other than the March 2015 vocational expert's report in which the veteran quantified the amount of time spent in the restroom each day, as opposed to the number of bowel movements he had each day, and none of the medical records referenced by the Board addresses that matter. *See* R. at 10-12, 640, 747-60, 886-917, 1095-97, 1122-23, 1245, 1246, 1248. In other words, the record lacks any statements as to total time spent in the restroom on a workday, and thus no statements that may be inconsistent, upon which the Board's discounting of the vocational expert's opinion was based.

Accordingly, the Court concludes that the Board failed to identify a proper foundation in the record for its adverse credibility determination, further diminishing the adequacy of its reasons or bases for denying entitlement to TDIU and justifying remand of that issue. *See Southall-Norman*, 28 Vet.App. at 355 (holding that the Board provided inadequate reasons or bases for impugning the appellant's credibility based on inconsistencies that were not present in the record); *Fountain v. McDonald*, 27 Vet.App. 258, 273-75 (2015) (concluding that the Board erred in not adequately explaining several putative discrepancies between the appellant's lay statements and the other evidence of record); *Tucker*, 11 Vet.App. at 374; *Caluza*, 7 Vet.App. at 506; *Gilbert*, 1 Vet.App. at 57.

B. Extraschedular Referral

The Board generally must consider referral for consideration of an extraschedular evaluation "'[w]here there is evidence in the record that shows exceptional or unusual circumstances or where the veteran has asserted that a schedular rating is inadequate.'" *Yancy v. McDonald*, 27 Vet.App. 484, 493 (2016) (quoting *Colayong v. West*, 12 Vet.App. 524, 536 (1999)). In *Thun v. Peake*, 22 Vet.App. 111, 115 (2008), *aff'd sub nom. Thun v. Shinseki*, 572 F.3d

1366 (Fed. Cir. 2009), the Court outlined the framework for determining entitlement to an extraschedular evaluation. First, the Board must determine whether the evidence "presents such an exceptional disability picture that the available schedular evaluations for that service-connected disability are inadequate." *Id.*; *see Sowers v. McDonald*, 27 Vet.App. 472, 478 (2016) ("The rating schedule must be deemed inadequate before extraschedular consideration is warranted."). This obliges the Board to compare "the level of severity and symptomatology of the claimant's service-connected disability with the established criteria found in the rating schedule for that disability." *Thun*, 22 Vet.App. at 115. When this requirement is satisfied, the Board must determine whether the veteran's exceptional disability picture exhibits other related factors such as "'marked interference with employment' or 'frequent periods of hospitalization.'" *Id.* at 116 (quoting 38 C.F.R. § 3.321(b)(1)). If both these inquiries are answered in the affirmative, the Board must refer the matter to the Under Secretary for Benefits or the Compensation Service Director for the third inquiry, i.e., a determination of whether, "[t]o accord justice," the veteran's disability picture requires the assignment of an extraschedular evaluation. *Id.*; *see generally Doucette v. Shulkin*, Vet.App. __, __, No. 15-2818, 2017 WL 877340 at *3, 2017 U.S. App. Vet. Claims LEXIS 319, at *9-10 (Mar. 6, 2017); *Todd*, 27 Vet.App. at 89-90; *Anderson v. Shinseki*, 22 Vet.App. 423, 427 (2009) (outlining the "elements that must be established before an extraschedular rating can be awarded"). In making the extraschedular referral determination, the Board must consider the collective impact of multiple service-connected disabilities whenever that issue is expressly raised by the claimant or reasonably raised by evidence of record. *See Johnson v. McDonald*, 762 F.3d 1362, 1365 (Fed. Cir. 2014); *Yancy*, 27 Vet.App. at 495; *Robinson v. Peake*, 21 Vet.App. 545, 552 (2008), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009).

Mr. Cantrell argues that the Board provided inadequate reasons or bases for denying referral for consideration of an extraschedular evaluation for his service-connected post-surgery ulcerative colitis because it did not adequately consider the reasonably raised issue of the collective impact of all his service-connected disabilities in violation of *Johnson*. Appellant's Br. at 24-28. The Secretary disputes this contention and asserts that the record did not contain evidence demonstrating that the veteran's service-connected disabilities interacted to cause an exceptional or unusual disability picture not already contemplated by the schedular evaluation criteria. Secretary's Br. at 21-24. Mr. Cantrell responds by pointing to evidence of record that allegedly

reflects that his service-connected post-surgery ulcerative colitis and hip disabilities collectively caused difficulties with standing and walking that are greater than the impairment caused by those individual disabilities alone. Reply Br. at 8-10. The Court agrees with the veteran.

Contrary to the Secretary's contention, the record before the Board reasonably raised the issue of referral for consideration of an extraschedular evaluation on a collective basis because evidence of record addressed the collective impact of Mr. Cantrell's service-connected disabilities. *See Yancy*, 27 Vet.App. at 496 (finding the issue reasonably raised because "the record contain[ed] evidence of the collective impact of [the appellant's] service-connected disabilities"). For example, evidence of record at the time of the Board decision reflected that the veteran's post-surgery ulcerative colitis symptoms of loose stools and abdominal discomfort make it difficult for him to stand, R. at 1245; his service-connected bilateral hip disabilities impair his walking, R. at 482; and, despite these difficulties, the best way for him to attain temporary relief from his symptoms is to "stand/walk about," R. at 83.

As in *Yancy*, where the Court held that the issue of the collective impact of the veteran's service-connected disabilities was reasonably raised by evidence of record that showed that the veteran could not stand or sit for long periods as a result of multiple service-connected disabilities, 27 Vet.App. at 496, the above-cited evidence that Mr. Cantrell could not stand or walk without difficulty as a result of multiple service-connected disabilities is sufficient to reasonably raise the applicability of *Johnson* in this case. *See Southall-Norman*, 28 Vet.App. at 354 (holding that the Board's failure to discuss a potentially applicable provision of law rendered inadequate its reasons or bases for its decision (citing *Schafrath v. Derwinski*, 1 Vet.App. 589, 593 (1991)); *Robinson*, 21 Vet.App. at 552. To the extent that the Board found otherwise because "there are no additional service-connected symptoms that have not been attributed to a specific service-connected disability," R. at 15, it did not adequately account for the foregoing evidence, which is material and potentially favorable to the veteran's claim. *See Caluza*, 7 Vet.App. at 506.

Moreover, the Board's approach in this case improperly focused on individual symptoms, rather than the collective impact of those symptoms on the veteran's overall disability picture. As the U.S. Court of Appeals for the Federal Circuit explained in *Johnson*:

> Limiting referrals for extra-schedular evaluation to considering a veteran's disabilities individually ignores the compounding negative effects that each individual disability may have on the veteran's other disabilities. It is not difficult

> to imagine that, in many cases, the collective impact of all of a veteran's disabilities could be greater than the sum of each individual disability's impact.

762 F.3d at 1766; *see Yancy*, 27 Vet.App. at 495 (endorsing that principle). Given that the Board considered only whether Mr. Cantrell had symptoms not listed in the respective evaluation criteria for each service-connected disability and not whether those disabilities collectively caused an exceptional disability picture not contemplated by the rating schedule, the Court concludes that the Board provided inadequate reasons or bases for denying extraschedular referral. *See Yancy*, 27 Vet.App. at 496; *Gilbert*, 1 Vet.App. at 57. Remand of the extraschedular referral issue is therefore warranted. *See Tucker*, 11 Vet.App. at 374.

III. CONCLUSION

Upon consideration of the foregoing, Mr. Cantrell's February 23, 2017, motion for leave to file a notice of supplemental authority out of time is granted.

The portions of the August 13, 2015, Board decision denying referral for consideration of an extraschedular evaluation for service-connected post-surgery ulcerative colitis and entitlement to TDIU are SET ASIDE and those matters are REMANDED for readjudication consistent with this decision. On remand, Mr. Cantrell may present any additional arguments and evidence pertinent to those matters to the Board in accordance with *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order). *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002). The Court reminds the Board that "[a] remand is meant to entail a critical examination of the justification for [the Board's] decision," *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991), and must be performed in an expeditious manner in accordance with 38 U.S.C. § 7112.

The balance of the appeal is DISMISSED.

LANCE, *Judge*, concurring: I fully join the Court's opinion and concur that we should not defer to the Secretary's "facts found" definition of "protected environment," as that standard is essentially non-reviewable. I also agree that the Secretary should be afforded the first opportunity to clarify his regulation. I write separately to raise two issues regarding the nature of a "protected environment."

First, although the TDIU regulation provides that income below the poverty threshold constitutes "marginal employment," *see* 38 C.F.R. § 4.16(a), I believe that a claimant's income—

and, specifically, whether the claimant receives the same pay as similarly situated coworkers who are not disabled—is also a factor relevant to whether the claimant is employed in a protected environment. VA disability ratings are "based, as far as practicable, upon the average impairments of earning capacity resulting from such injuries in civil occupations," 38 U.S.C. § 1155, and "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," 38 C.F.R. § 4.1 (2016). An award of TDIU under § 4.16(a) merely provides an alternative avenue for a veteran to obtain a total disability rating. If a claimant's disabilities do not result in lost income, then there is no loss of earning capacity, and an award of TDIU would not be appropriate.

Second, I believe the Secretary should be mindful of the Americans with Disabilities Act (ADA) when formulating his definition of "protected environment," especially its mandate that employers provide reasonable accommodations for individuals with disabilities such as "job restructuring, part-time or modified work schedules, . . . [and] acquisition or modification of equipment or devices." 42 U.S.C. § 12111(9)(B). Where a claimant's employer is required by law to provide reasonable accommodations pursuant to the ADA and those accommodations allow the claimant to engage in a substantially gainful occupation, a TDIU award would, in effect, constitute a second paycheck on the back of the taxpayer.

TDIU awards serve an important role in ensuring that veterans who are unable to work due to their service-connected disabilities are properly compensated. Where, however, a veteran's disabilities do not result in lost income or where legally required accommodations permit a veteran to maintain gainful employment, an award of TDIU does not serve its intended purpose. I believe the Secretary would be well served to keep these issues in mind as he considers how to define "protected environment."