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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 15-3732

JEFFREY S. RAMSEY, APPELLANT,

V.

ROBERT D. SNYDER,
ACTING SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before PIETSCH, *Judge*.

MEMORANDUM DECISION

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

PIETSCH, *Judge*: The appellant, Jeffrey S. Ramsey, appeals through counsel an August 25, 2015, Board of Veterans' Appeals (Board) decision in which the Board denied him entitlement to a total disability rating based on individual unemployability (TDIU). Record (R.) at 1-11. This appeal is timely and the Court has jurisdiction over the matters on appeal pursuant to 38 U.S.C. §§ 7252(a) and 7266. Single-judge disposition is appropriate when the issues are of "relative simplicity" and "the outcome is not reasonably debatable." *Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the reasons that follow, the Court will vacate the Board's decision and remand the matter on appeal for further proceedings consistent with this decision.

I. BACKGROUND

The appellant served on active duty in the U.S. Army from April 1999 until December 1999. R. at 40. The Board found that he presently is entitled to receive disability benefits for an anxiety disorder, the residual effects of interstitial cystitis, irritable bowel syndrome with gastroesophageal reflux disorder, a right foot sprain, and a calcaneal spur in his left foot. R. at 5.

The appellant maintained gainful employment for the first several years after his active service ended. R. at 1122. He repeatedly has alleged that he stopped working in May 2004 after he

was "fired for having to[o] many bathroom breaks." R. at 368, 533, 667, 896, 910, 1025-26, 1122-23, 1598. He briefly worked for a pest control company in 2011 before leaving for similar reasons, and he has managed rental properties. R. at 368, 667, 719, 1416, 1599. Otherwise, he has not been employed since 2004.

In February 2007, the appellant filed a request for TDIU. R. at 1122-23. In March 2008, the VA regional office (RO) denied his request. R. at 1006-14.

In July 2012, a VA medical examiner indicated, without explanation, that the appellant's "condition(s) of the bladder or urethra" do not "impact his ability to work." R. at 696. In December 2012, a VA physician opined that his foot disorder affects his ability to work because he "cannot stand for over 2 hour[s] on feet. Develops 'pins and needles' parasthesias." R. at 604.

In February 2013, the Board remanded the appellant's TDIU request for additional development. R. at 558-76. In April 2013, a VA medical examiner opined that he is not unemployable "just due to his anxiety disorder." R. at 502. In May 2013, a VA medical examiner concluded that he "is able to secure a substantially gainful occupation in pr[e]sence of" his esophageal, intestinal, and foot disorders. R. at 425-26. In September 2013, the VA medical examiner who wrote the May 2013 examination report opined that the residual effects of the appellant's interstitial cystitis, along with his irritable bowel syndrome and gastroesophageal reflux disease, "together do not render him unable to secure or follow a substantially gainful occupation." R. at 449.

In May 2013, the Board denied the appellant entitlement to TDIU. R. at 320-31. He appealed to the Court. In March 2015, the parties filed a joint motion to vacate the Board's decision and remand the appellant's TDIU request for further proceedings consistent with their joint motion. R. at 249-52. On March 24, 2015, the Court granted the parties' motion. R. at 253.

On August 25, 2015, the Board issued the decision here on appeal. R. at 1-11.

II. ANALYSIS

The appellant is entitled to TDIU if the evidence demonstrates that he is "unable to secure or follow a substantially gainful occupation as a result of service-connected disabilities." 38 C.F.R.

§ 4.16(a) (2016). The Board found that it does not. The explanation that it gave for its decision is deficient for a number of reasons.

First, its findings are stated in a manner that makes them difficult to review. The appellant has not worked for several years.[1] That fact raises two issues. First, the Board must determine whether the appellant is not working by choice, because he is "unable to secure or follow a substantially gainful occupation," or for some other reason. 38 C.F.R. § 4.16(a). If the answer is that he cannot work, then the question is whether his inability to obtain substantially gainful employment is "a result of service-connected disabilities." *Id.*

The Board considered these two issues simultaneously. Consequently, its conclusions are unclear and the statement of reasons or bases supporting those conclusions is difficult to decipher. The Board decision on remand will be easier for the appellant to understand and for the Court to review on appeal if the Board first states whether the appellant is able to maintain substantially gainful employment and then, if it finds in his favor on that point, states whether his unemployability is caused by his service-connected disabilities.

Second, the Board made the following observation:

> Although the [appellant] has indicated that he has been unable to find a job, the question is not whether the [appellant] is able to find a job. Rather the question is whether, given the [appellant's] education, employment history, and vocational attainment, the [appellant's] service-connected disabilities prevent him from securing and following a substantially gainful occupation.

R. at 9.

Whether the appellant is "unable to find a job" certainly plays a role in the TDIU analysis. *Id*. The Board seems to have agreed with the appellant that he is "unable to find a job." *Id.* If that is so, then it should have concentrated its analysis on why that is the case. If it did not agree with him, then it should have cited the evidence that convinced it that his statements are not accurate. It should not, however, have dismissed his assertions only because they were not stated in the precise language used in § 4.16(a).

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[1] As noted above, the record indicates that the appellant has managed rental properties. The Board did not find, however, that his activities represent an "occupation" as that word is used in § 4.16(a).

Third, the Board stated that it "recognizes that there is no examination report that assesses the combined impact of all of the [appellant's] service-connected disabilities on his ability to work." *Id.* It noted, however, that it is not legally impermissible for the Board to draw conclusions about the combined effects of the appellant's disorders from multiple examination reports each addressing one or a few of his diagnoses, and it proceeded to do so. *Id.*

Although the Board is allowed to compile the results of multiple medical reports and draw conclusions from them, it cannot fill in the medical gaps left by those disparate opinions or answer unresolved medical questions by reaching its own unsupported medical conclusions. *Kahana v. Shinseki*, 24 Vet.App. 428, 435 (2011) (holding that when a Board inference "results in a medical determination, the basis for that inference must be independent and it must be cited"); *Colvin v. Derwinski*, 1 Vet.App. 171, 172 (1991) (holding that, when the Board reaches a medical conclusion, it must support its findings with "independent medical evidence"). Also, although the Board is not required to obtain a combined medical opinion in all multiple-disability TDIU cases, it should conduct a "case-by-case" analysis of the evidence and determine whether it needs one to reach an accurate decision. *See Floore v. Shinseki*, 26 Vet.App. 376, 381 (2013).

The Board stated that "by systematically considering the effects of each disability on his occupational functioning, the examination reports are sufficient, in the aggregate, for the Board to come to such an assessment on its own." R. at 9. The Board later noted, however, that at least three of the appellant's service-connected disorders affect his ability to work. *Id.* Other service-connected disorders, the Board found, do not. The Board should have more thoroughly explained why a combined-effects opinion was not necessary even though multiple disorders produce work-related deficiencies. *Floore*, 26 Vet.App. at 381.

Furthermore, the Board gave "great weight" to the May and September 2013 VA examiner's statement that the appellant's interstitial cystitis, irritable bowel syndrome, and gastroesophageal reflux disorder "together do not render him unable to secure or follow a substantially gainful occupation." R. at 9, 449. The Board failed to note, however, that in June 2007 a VA examiner stated that he *could not opine* about whether the effects of the appellant's interstitial cystitis render him unemployable. R. at 1027; *see Jones v. Shinseki*, 23 Vet.App. 382, 390 (2010) ("An examiner's conclusion that a diagnosis or etiology opinion is not possible without resort to speculation is a

medical conclusion just as much as a firm diagnosis or a conclusive opinion").[2] Moreover, the December 2012 and May and September 2013 VA examiners disagreed about whether the appellant's foot disorder causes occupational deficiencies. The Board did not discuss these contradictions in the medical evidence. It should do so on remand and decide whether they indicate that, to properly decide this case, it needs a medical examiner to resolve the examiners' disagreements and describe the combined occupational effects of the appellant's disorders.

Fourth, the Board acknowledged that the appellant's interstitial cystitis, irritable bowel syndrome, and gastroesophageal reflux disorder cause him "to take multiple bathroom breaks during the day and [he] cannot sit for at least two hours because of that necessity." R. at 9. The Board failed to acknowledge that the appellant has repeatedly asserted that he *was fired* in 2004 because he took too many bathroom breaks. R. at 368, 533, 667, 896, 910, 1025-26, 1122-23, 1598. The appellant also has stated that his need for frequent bathroom breaks forced him to leave the job that he briefly held in 2011, and he stated that a workforce development organization "has tried many times to help me get a job" but has failed to do so. R. at 368, 667, 719, 1122, 1416, 1599. The Board should thoroughly discuss those facts on remand. *See Thompson v. Gober,* 14 Vet.App. 187, 188 (2000) (stating that the Board must provide an adequate statement of reasons or bases "for its rejection of any material evidence favorable to the claimant").

Fifth, the Board did not sufficiently support its conclusion that the April, May, and September 2013 VA medical opinions are adequate to allow it to make a well-informed decision about whether the appellant is unemployable. *See Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 301 (2008) (holding that a medical opinion must "contain not only clear conclusions with supporting data, but also a reasoned medical explanation connecting the two"); *Stefl v. Nicholson*, 21 Vet.App. 120, 123 (2007) (holding that a medical opinion is adequate "where it is based upon consideration of the veteran's prior medical history and examinations and also describes the disability, if any, in sufficient detail so that the Board's 'evaluation of the claimed disability will be a fully informed one.'") (quoting *Ardison v. Brown*, 6 Vet.App. 405, 407 (1994)).

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[2] The June 2007 examiner may have realized that, as a medical rather than legal expert, he was not competent to reach a conclusion about whether the appellant's interstitial cystitis caused him to be legally unemployable. That point is discussed in greater detail below.

The Board stated that the examination reports are adequate in part because "[t]wo of the examiners noted that the [appellant] was looking for work" and the "April 2013 mental disorders examiner noted that the [appellant] reported he thought he could obtain employment that he could physically tolerate."[3] R. at 9. That the appellant is looking for work does not mean that he is able to find it or that he generally is employable. More importantly, one page after the Board made the statements quoted here, it found that the appellant "is not competent to state that his service-connected disabilities alone have rendered him unemployable" because that is a medical opinion that he lacks sufficient training to give. R. at 10. The Board therefore erred by using his statement that "he thought he could obtain employment that he could physically tolerate" against him. R. at 9. His opinion on that matter is, as the Board found, outside of his competency. By relying on his statements, the examiners used an incompetent non-expert's medical opinion to support what is purportedly their expert opinions.

The rationale given by the May and September 2013 examiner for his opinions includes his observations that the appellant is "independent in [activities of daily living] can ambulates with normal gait and balance, he works around the house, drive fairly long distances." R. at 426, 449. The examiner did not explain why the appellant's ability to work "around the house" and complete activities of daily living indicates that he is capable of performing sufficiently in an occupational setting. The examiner also did not discuss the appellant's inability to stand for long periods and a 2005 "activities of daily living questionnaire" indicating that the appellant doesn't use kitchen tools and that he has trouble opening "twist lids," writing, turning pages on a magazine or newspaper, holding a toothbrush, carrying items like trash bags or groceries, and reaching overhead. R. at 470-72.

Next, although the examiners' rationale seem to include at least some medical observations, their opinions are stated in the language of § 4.16(a). That suggests that they may have impermissibly reached a legal conclusion about whether the appellant qualifies for TDIU rather than a medical determination about whether his service-connected disorders affect his ability to function in a workplace setting. *See Geib v. Shinseki*, 733 F.3d 1350, 1354 (Fed. Cir. 2013) ("[A]pplicable

[3] That was the only rationale that the examiner gave for his opinion. R. at 502.

regulations place responsibility for the ultimate TDIU determination on the VA, not a medical examiner").

Finally, the May and September 2013 VA examiner concluded that the appellant's foot disorder does not "impact his . . . ability to work." R. at 439. In its decision, the Board gave "great weight" to the examiner's opinion, but also concluded that the "evidence . . . reflects that [the appellant's] foot problems impact his ability to work because he cannot stand for more than two hours." R. at 9. The Board failed to recognize that this factual finding *directly contradicts* the May and September 2013 examiner's opinion. On remand, it should fully discuss the ramifications of its conclusion. *See Reonal v. Brown*, 5 Vet.App. 458, 461 (1993) ("An opinion based on an inaccurate factual premise has no probative value."). The Board should review this and the other matters discussed above before deciding whether it has before it medical evidence sufficient to allow it to make a well-informed decision.

Sixth, the Board stated that the appellant's "work experience, his education, and the extent of his disabilities make some occupations difficult . . ., [but] do not limit the occupations that he can engage in to the extent that they make him" unemployable. R. at 9-10. The Board did not discuss the appellant's work experience and education in any detail. It should do so on remand.

Seventh, the Board made the following finding about the appellant's lay statements:

> [T]he [appellant] has been inconsistent in reporting on his ability to work. On his TDIU Application and in documentation submitted in support of his claim for Social Security disability benefits, the [appellant] reported that he last worked in 2004. During an April 2013 examination, the [appellant] reported that he thought he could work, but that he would have to find a job that he could do with his foot condition. The [appellant] also reported working in 2011 and indicated that he was let go because he did not agree with a company policy. In September 2013, the [appellant] reported that he was looking for a job. Additionally, on October 2011 VA mental disorders examination and during June 2013 VA treatment the [appellant] reported that he was managing rental properties left to him by his father.

R. at 10.

It is not clear what inconsistency the Board has found. The appellant filed both his Social Security claim and his TDIU request between 2004 and 2011. That means that, at the time that he made the statement that he "last worked in 2004," it was accurate. R. at 10.

Also, once again, the Board has not found that the appellant's rental property management is an "occupation" in the context of TDIU. 38 C.F.R. § 4.16(a). To the extent that it insinuated as much, it should have discussed evidence indicating that, despite the income from his rental properties, the appellant relied on VA benefits and state aid to survive. R. at 368, 501, 667, 1483, 1600; *see Thompson,* 14 Vet.App. at 188; 38 C.F.R. § 4.16(a) ("Marginal employment shall not be considered substantially gainful employment. 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 . . . as the poverty threshold for one person.").

Finally, the Board should have discussed evidence indicating that (1) the appellant experiences "regurgitation anytime he eats or drinks," "sleep disturbance caused by esophageal reflux," and "persistently recurrent epigastric distress"; (2) his bowel condition causes cramping and urgency that is occasionally so severe that if he is not near a bathroom, "he has an accident"; (3) he has experienced urinary incontinence and "[u]ncontrolled bladder movements"; (4) he no longer participates in recreational activities; (5) his bowel disturbance is often accompanied by nausea and vomiting; and (6) he has "alternating diarrhea and constipation with more or less constant abdominal distress along with passing blood" and bloating that "affects my ability [to] breath[e] and just bend over to tie my shoes." R. at 366, 472, 533, 594-95, 911, 998-99, 1018, 1027; *see Thompson,* 14 Vet.App. at 188.

The Court need not at this time address any other arguments that the appellant has raised. *See Best v. Principi*, 15 Vet.App. 18, 20 (2001) (per curiam order) (holding that "[a] narrow decision preserves for the appellant an opportunity to argue those claimed errors before the Board at the readjudication, and, of course, before this Court in an appeal, should the Board rule against him"). On remand, the appellant is free to submit additional evidence and argument on the remanded matter, and the Board is required to consider any such relevant evidence and argument. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002); *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order). The Court has held that "[a] remand is meant to entail a critical examination of the justification for the decision." *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991). The Board must proceed expeditiously, in accordance with 38 U.S.C. § 7112 (requiring the Secretary to provide for "expeditious treatment" of claims remanded by the Court).

III. CONCLUSION

After consideration of the appellant's and the Secretary's briefs and a review of the record, the Board's August 25, 2015, decision is VACATED and the matter on appeal is REMANDED for further proceedings consistent with this decision.

DATED: January 27, 2017

Copies to:

Robert V. Chisholm, Esq.

VA General Counsel (027)