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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 15-3810

JAMES SPELLMAN, JR., APPELLANT,

V.

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

Before BARTLEY, *Judge*.

MEMORANDUM DECISION

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

BARTLEY, *Judge*: James Spellman, Jr., appeals through counsel a September 3, 2015, Board of Veterans' Appeals (Board) decision denying entitlement to a total disability evaluation based on individual unemployability (TDIU). Record (R.) at 2-15. This appeal is timely and the Court has jurisdiction to review the Board decision pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). Single-judge disposition is appropriate in this case. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the reasons that follow, the Court will set aside the September 3, 2015, Board decision and remand the matter for readjudication consistent with this decision.

I. FACTS

Mr. Spellman served on active duty in the U.S. Army from November 1972 to November 1974. R. at 79. In April 2006, the veteran filed a claim for service connection for a bilateral shoulder condition. R. at 1233-34. A May 2007 VA contract examiner diagnosed right shoulder acromioclavicular degenerative joint disease (DJD). R. at 1083. In July 2007, a VA regional office (RO) granted service connection for right shoulder DJD with a noncompensable evaluation. R. at 1062. In September 2007, the veteran filed a Notice of Disagreement (NOD) as to the assigned

evaluation. R. at 1060. The RO issued a Statement of the Case (SOC) in February 2008 continuing the noncompensable evaluation for right shoulder DJD. R. at 1048. In May 2008, the veteran perfected his appeal. R. at 939.

In May 2009, the RO increased Mr. Spellman's right shoulder evaluation to 10%, effective October 2007, citing an October 2007 private medical record indicating limited motion with pain. R. at 902. In June 2009, the veteran filed an NOD as to the evaluation, stating that he was unable to work because of a bilateral shoulder condition. R. at 891.

In December 2009, the RO denied entitlement to TDIU, stating that the veteran's 10% right shoulder evaluation did not meet the schedular requirements for TDIU and that his case had not been submitted for extraschedular consideration because evidence failed to show he was unemployable due to service-connected disabilities. R. at 850-51. The RO stated that Mr. Spellman had reported on VA Form 21-8940, Veteran's Application for Increased Compensation based on Unemployability, that he could not work due to a bilateral shoulder and spine condition, but noted that he was not service connected for a left shoulder or a spine condition. R. at 851. The RO stated that the veteran's employer listed "removal effective January 6, 2006" as the reason for his termination and could not verify the amount of leave, if any, the veteran expended due to service-connected disability. *Id.* In March 2010, the veteran filed an NOD as to the December 2009 decision. R. at 640.

In March 2011, Mr. Spellman filed claims for service connection for, inter alia, bilateral shoulder, cervical spine, and right knee conditions. R. at 809, 814. During a November 2010 VA contract examination, the veteran reported experiencing right knee flare-ups precipitated by physical activity as often as once per day lasting six hours with a severity level of 10 out of 10 and resulting in functional impairment including painful bending, standing, and walking. R. at 632. The examiner opined that the effect of the condition on the veteran's usual occupation was knee pain with ambulation, stair climbing, and prolonged sitting. R. at 633. In March 2011, the RO granted service connection for right knee strain, evaluated as 20% disabling, effective March 2010. R. at 611.

In April 2011, the RO issued an SOC continuing to deny TDIU, stating that the veteran's combined 30% evaluation for service-connected right knee and right shoulder conditions did not meet schedular requirements and evidence showed he was unemployable due to non-service-connected conditions. R. at 583. Mr. Spellman perfected his appeal in June 2011, stating that due

to pain in his arms and shoulders he could not lift heavy weight and that he was 100% disabled given his arm, shoulder, foot, and leg problems. R. at 583.

In September 2011, the RO increased the veteran's right shoulder DJD evaluation to 20%, effective May 2011, due to decreased range of motion shown in a May 2011 VA examination. R. at 512-13. In October 2011, Mr. Spellman disagreed with the March 2011 rating decision that granted a 20% right knee evaluation. R. at 495.

A November 2011 VA contract examiner opined that the impact of the veteran's right knee/lower leg condition on his ability to work was "bending, problem putting on cloth[es] and shoes." R. at 426. The examiner noted that the veteran constantly used a cane for ambulation and reported flare-ups with pain down his leg to his ankle and hips. R. at 425. A January 2012 examiner indicated, without further explanation, that Mr. Spellman's back, right shoulder, knee, and ankle conditions prevented him from continuing to work. R. at 375. In February 2012, the RO issued a decision denying an increased right knee evaluation. *See* R. at 357.

During a May 2012 Board hearing, Mr. Spellman testified that because of his right shoulder condition it was difficult to complete tasks as an electronic mechanic because he could not bend his head or lift his arm due to pain, he could not work above his head, and he could not push or pull heavy objects. R. at 301-02. He stated that his right shoulder condition was one of the reasons he left his job. R. at 302.

In July 2013, the Board remanded Mr. Spellman's pending claims, finding that a VA right shoulder examination was warranted and noting that the TDIU claim was inextricably intertwined with other issues on appeal. R. at 263, 268. During a December 2013 VA examination, the veteran reported that he medically retired due to problems with his neck, ankles, legs, back, and shoulders, stating he could no longer do the required work. R. at 181. The examiner noted that after discharge the veteran worked at moderately laborious jobs for 31 years without significant limitation until 2005, R. at 183, the veteran's shoulder condition did not impact his ability to work, R. at 215, and the veteran was "capable of sedentary to light duty gainful employment if he so chooses," R. at 187.

In October 2014, the Board denied an increased right shoulder evaluation, entitlement to TDIU, and service connection for several conditions, including the spine, left shoulder, and right foot. R. at 100, 127. As to TDIU, the Board found that the record did not suggest that "the combined

effects of the [v]eteran's service-connected right knee and right shoulder disabilities preclude all forms of substantially gainful employment." R. at 126. The Board stated that although it was cognizant that the veteran

may have difficulty working in a physical capacity, the preponderance of the evidence of record demonstrates that the [v]eteran is not precluded from securing and following substantially gainful sedentary employment. While the evidence suggests that he spent most of his career as an electrician, a more labor-intensive field, he should be well qualified for sedentary work given his educational background of having completed four years of college. Although most of the [v]eteran's prior jobs involved physical activities, the Board believes that the [v]eteran is still capable of sedentary jobs consistent with his level of educational attainment.

R. at 126.

Mr. Spellman appealed to this Court and in July 2015 the parties filed a joint motion for partial remand (JMPR). R. at 92, 96. Therein, the veteran asserted that he did not wish to pursue an appeal with respect to an increased evaluation for his right shoulder condition or entitlement to service connection for the spine, left shoulder, and right foot. R. at 92. The parties agreed that the Board provided inadequate reasons or bases as to its decision to deny TDIU, stating that the Board must consider and discuss the relevance of the veteran's educational level, prior vocational training, and work experience when determining whether service-connected disabilities precluded him from substantially gainful employment. R. at 92-94. The parties stated that the Board's discussion was conclusory in nature and indicated that an analysis, rather than a recitation of evidence, was required. R. at 94. The Court granted the JMPR later that month, stating that the matter was remanded for action consistent with the terms of the joint motion. R. at 97.

The September 2015 Board decision on appeal found that Mr. Spellman's service-connected disabilities were not so disabling as to warrant referral for consideration of an extraschedular TDIU evaluation. R. at 15. The Board stated that the record did not suggest that "the combined effects of the [v]eteran's service-connected right knee and right shoulder disabilities preclude all forms of substantially-gainful employment." R. at 14. The Board stated that although it was cognizant that the veteran

may have difficulty working in a physical capacity, the preponderance of the evidence of record demonstrates that the [v]eteran is not precluded from securing and following substantially-gainful sedentary employment due to service-connected

conditions. While the evidence suggests that he spent most of his career as an electrician, a more labor-intensive field, he should be well qualified for sedentary work given his educational background of having completed four years of college. Although much of the [v]eteran's prior jobs involved physical activities, the Board believes that the [v]eteran is still capable of sedentary jobs consistent with his level of educational attainment when considering only that level of impairment resulting from service-connected conditions.

R. at 14. The Board concluded that the veteran was capable of performing acts required by employment when only service-connected conditions were considered because medical professionals opined that he could not work only in the context of non-service-connected disabilities, such as his back and neck condition. *Id.* This appeal followed.

II. ANALYSIS

Mr. Spellman argues that the Board erred in denying an extraschedular TDIU referral because it failed to support its conclusion that the veteran could perform sedentary work given his education, work experience, and service-connected disabilities. Appellant's Reply Brief (Br.) at 10. The Secretary disputes the veteran's arguments and urges the Court to affirm the September 2015 Board decision. Secretary's Br. 7-24. The Secretary references the fact that, from 2005 to 2012, several physicians opined that Mr. Spellman was unable to or had difficulty working due to non-service-connected spinal conditions. Secretary's Br. at 5 (citing R. at 279, 639, 762, 994).

TDIU will be awarded when a veteran is "unable to secure or follow a substantially gainful occupation as a result of service-connected disabilities" and meets certain numeric evaluation requirements. 38 C.F.R. § 4.16(a) (2016) (if there is one service-connected disability, it must have an evaluation of 60% or more, and if there are two or more disabilities, at least one must have an evaluation of 40% or more and the combined evaluation must be 70% or higher). Where the veteran's service-connected disabilities do not meet the numeric evaluation requirements for TDIU set forth in § 4.16(a), the veteran may be granted TDIU on an extraschedular basis. 38 C.F.R. § 4.16(b).

When determining whether a veteran's service-connected disabilities preclude him or her from securing or following substantially gainful employment, the Board is required to consider and discuss the veteran's educational and occupational history and explicitly relate these factors to the disabilities of the individual veteran. *Cathell v. Brown*, 8 Vet.App. 539, 544 (1996); *see Pederson*

v. McDonald, 27 Vet.App. 276, 286 (2015) (en banc) ("[W]hen the Board conducts a TDIU analysis, it must take into account the individual veteran's education, training, and work history."). The Board may not "merely allude to educational and occupational history, attempt in no way to relate these factors to the disabilities of the appellant, and conclude that some form of employment is available." *Gleicher v. Derwinski*, 2 Vet.App. 26, 28 (1991); *see Cathell*, 8 Vet.App. at 544.

Here, the Board acknowledged that Mr. Spellman spent most of his career in a labor-intensive field as an electronic mechanic performing physical activities, R. at 14; however, it failed to relate this occupational history to the veteran's service-connected disabilities and resulting impairment. *See Cathell*, 8 Vet.App. at 544. Instead, the Board offered a conclusory statement that, because the veteran completed four years of college, "he should be well qualified" for sedentary employment, without even mentioning his field of study. R. at 14. After alluding to Mr. Spellman's educational history, the Board concluded that some form of employment was available without explaining how it arrived at the determination that the veteran was "well qualified" for sedentary employment given that he had performed physically laborious tasks as an electronic mechanic for the vast majority of his career. *See Gleicher*, 2 Vet.App. at 28. The Board's failure is akin to the error made in *Beaty v. Brown*, 6 Vet.App. 532, 538 (1994), where the Court found that the Board erred in concluding that the veteran could perform substantially gainful sedentary employment without accounting for, *inter alia*, the veteran's 30- to 40-year work history as a farmer, "the 'only occupation' he knew." As in *Beaty*, 6 Vet.App. at 538-39, the Board's error in this regard rendered inadequate its reasons or bases for denying entitlement to TDIU. *See also Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990).

In addition, in the July 2015 JMPR granted by the Court, the parties agreed that the October 2014 Board decision contained inadequate reasons or bases as to its decision to deny TDIU, stating that on remand the Board must consider and discuss the relevance of the veteran's educational level, prior vocational training, and work experience when determining whether service-connected disabilities precluded him from substantially gainful employment, rather than the recitation of evidence and conclusory statement that the Board provided. *See* R. at 92-94, 97. But in September 2015, the Board provided an almost verbatim analysis to that provided in October 2014. *Compare* R. at 126 *with* R. at 14.

The only distinction between the October 2014 and September 2015 analyses is that the latter Board decision stated that Mr. Spellman was capable of performing acts required by employment when only his service-connected conditions were considered. *See* R. at 14, 126. However, as stated, merely concluding that some form of employment was available without discussing the relevance of the veteran's labor-intensive occupational history as an electronic mechanic or explaining how he was "well qualified" for sedentary employment based on four years of college in an unspecified field renders the Board's reasons or bases for denying entitlement to TDIU inadequate. *See Cathell*, 8 Vet.App. at 544; *Beaty*, 6 Vet.App. at 538-39; *Gleicher*, 2 Vet.App. at 28; *Gilbert*, 1 Vet.App. at 57.

Moreover, because the Board failed to discuss the relevance of the veteran's educational level and work experience, and instead provided a recitation of evidence and a conclusory statement, it failed to ensure compliance with the terms of the JMRP. *See Forcier v. Nicholson*, 19 Vet.App. 414, 425 (2006) (the terms of a joint motion for remand granted by the Court are enforceable, regardless whether the Court's order expressly incorporates them); *see also Russell v. Shinseki*, 25 Vet.App. 26, 28 (2011) ("If the Board does not ensure compliance, a claimant may appeal to the Court and, absent a valid reason for not enforcing a requirement in the JMR, the JMR is enforceable."); *Kernea v. Shinseki*, 23 Vet.App. 135 (2009) (on remand, the Board must ensure compliance with terms of the JMR or explain why such terms will not be fulfilled).

The Court finds that the July 2015 JMRP provided clear and specific instructions to the Board, *see Forcier*, 19 Vet.App. at 426 (before the Court can conclude that the Board erred by failing to enforce a JMR, it must determine that the JMR enumerated clear and specific instructions to the Board), and that in September 2015 the Board failed to substantially comply with those instructions because it did not discuss the relevance of Mr. Spellman's occupational and educational history when determining whether service-connected disabilities precluded him from substantially gainful employment and instead simply repeated the October 2014 analysis that had, by joint agreement of the parties, been found deficient, R. at 14, 126; *see Dyment v. West*, 13 Vet.App. 141, 147 (1999) (clarifying that "substantial[]" compliance with Board remand is required).

The veteran is free on remand to submit additional evidence and argument, including the arguments raised in his briefs to this Court, in accordance with *Kutscherousky v. West*, 12 Vet.App. 369, 372–73 (1999) (per curiam order), and the Board must consider any such evidence or argument

submitted. *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.

III. CONCLUSION

Upon consideration of the foregoing, the September 3, 2015, Board decision is SET ASIDE and the matter is REMANDED for readjudication consistent with this decision.

DATED: January 31, 2017

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