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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 16-0588

STANLEY A. TILLBERG, APPELLANT,

V.

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

Before DAVIS, *Chief Judge*.

MEMORANDUM DECISION

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

DAVIS, *Chief Judge*: U.S. Marine Corps veteran Stanley A. Tillberg appeals through counsel from a January 6, 2016, Board of Veterans' Appeals (Board) decision that denied entitlement to a total disability rating based on individual unemployability (TDIU).¹ For the following reasons, the Court will set aside the Board's January 2016 determination with respect to TDIU and remand that matter for further proceedings.

I. ANALYSIS

Mr. Tillberg argues that the Board erred by not considering the combined effects of his service-connected disabilities in determining whether he was capable of obtaining and maintaining a substantially gainful occupation. He further argues that the Board erred in relying on medical examiners' conclusions regarding employability, and in ignoring internal inconsistencies in the VA medical examination reports. The Court finds merit in both arguments.

¹The Board also denied a disability rating in excess of 30% for penile adhesion and granted a separate 40% disability rating for penile fissures. Mr. Tillberg raises no contentions of error with respect to these matters, and the Court will not address them. *See Pederson v. McDonald*, 27 Vet.App. 276, 283 (2015) (en banc) (stating that "this Court, like other courts, will generally decline to exercise its authority to address an issue not raised by an appellant in his or her opening brief").

TDIU will be awarded when a veteran is unable to secure or follow a substantially gainful occupation as a result of service-connected disabilities. A "substantially gainful occupation" is "one that provides annual income that exceeds the poverty threshold for one person," *Faust v. West*, 13 Vet.App. 342, 356 (2000), and is not considered "marginal employment." 38 C.F.R. § 4.16(a) (2016).

Whether Mr. Tillberg meets these criteria is a finding of fact subject to the "clearly erroneous" standard of review. See *Pederson v. McDonald*, 27 Vet.App. 276, 286 (2015). "[T]he central inquiry in determining whether a veteran is entitled to TDIU is whether the veteran's service-connected disabilities alone are of sufficient severity to produce unemployability." *Hatlestadt v. Brown*, 5 Vet.App. 524, 529 (1993).

When making factual determinations, the Board must provide a written statement of the reasons and bases for its findings. See 38 U.S.C. § 7104(d)(1); *McClain v. Nicholson*, 21 Vet.App. 319, 312 (2007); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995). This statement of reasons or bases must explain the Board's reasons for discounting favorable evidence, *Thompson v. Gober*, 14 Vet.App. 187, 188 (2000), discuss all issues raised by the claimant or the evidence of record, *Robinson v. Peake*, 21 Vet.App. 545, 552 (2008), and discuss all provisions of law and regulation where they are made "potentially applicable through the assertions and issues raised in the record," *Schafraath v. Derwinski*, 1 Vet.App. 589, 592 (1991); see also *Majeed v. Principi*, 16 Vet.App. 421, 431 (2002). When the Board "conducts a TDIU analysis, it must take into account the individual veteran's education, training, and work history." *Pederson*, 27 Vet.App. at 286.

The Board noted that Mr. Tillberg was service connected for seven disabilities, including major depressive disorder, coronary artery disease (CAD), bilateral hearing loss, and tinnitus. Record (R.) at 21. The Board conceded that Mr. Tillberg had met the schedular requirements for TDIU since November 2009. Although the Board noted that Mr. Tillberg filed his claim for TDIU in March 2011, it stated that "[t]he substantive question . . . remains whether his service-connected disabilities prevented him from maintaining gainful employment since his *May 2011* claim for the benefit." *Id.* (emphasis added).²

² Mr. Tillberg raises this discrepancy as an issue in the appeal. Because a remand is required on other grounds, this matter may be raised below, and the Court need not discuss it further.

In assessing claims for TDIU, "full consideration must be given . . . to the effect of combinations of disability." 38 C.F.R. § 4.15 (2016); *see also Geib v. Shinseki*, 733 F.3d 1350, 1354 (Fed. Cir. 2013) (acknowledging requirements of § 4.15). Here, there is evidence that, Mr. Tillberg tires easily and cannot perform vigorous physical work because of the stent that was implanted in a blood vessel to cope with the effects of his service-connected CAD, that he loses concentration and persistence due to the effects of his service-connected depression, and that he has difficulty understanding speech and using the telephone as a result of his service-connected hearing difficulties. The Board simply did not consider the combined effects of these disabilities on his employability, and there is no medical evidence in the record that considers these disabilities in the aggregate.

The Secretary argues that the Board did not err in failing to address any combined effects because neither the record nor Mr. Tillberg raised the issue whether his disabilities presented an unusual or exceptional disability picture. Secretary's Brief at 15-16 (citing *Yancy v. McDonald*, 27 Vet.App. 484, 495 (2016)). This argument inappropriately conflates the requirements for extraschedular consideration under 38 C.F.R. § 3.321(b) with those for TDIU. Mr. Tillberg argues persuasively that § 4.15 requires a combined-effects analysis in all TDIU claims.

With respect to the medical evidence of record, the Board's statement of reasons or bases was inadequate. In concluding that Mr. Tillberg could obtain gainful employment, the Board incorporated the cursory medical conclusions of three 2010 VA examiners³ (R. at 95, 108, 267), rather than thoroughly addressing the medical issues raised in these and other medical reports. *See Geib*, 733 F.3d at 1354 ("[A]pplicable regulations place responsibility for the ultimate TDIU determination on the VA not a medical examiner."). In so doing, the Board neglected several significant issues raised by the medical evidence of record.

First, the Board did not address the effects of Mr. Tillberg's prescribed medications despite indications that they may affect his ability to work. *See* R. at 96 (continuous medication required to control service-connected ischemic heart disease), 268 (continuous medication required to control

³Each examiner focused on separate disabilities. An examination for ischemic heart disease dealt with Mr. Tillberg's CAD disability, a general examination considered his hearing loss and fatigability, and a mental disorders examination dealt with his depression.

hypertension), 1563 (spouse's testimony that fatigability related to medications); *Mingo v. Derwinski*, 2 Vet.App. 51, 54 (1992) (concluding that the Board provided inadequate reasons or bases for denying TDIU when it failed to consider evidence that medications used to control the veteran's headaches rendered her unable to function).

Further, the Board failed to consider portions of the examination reports that appear contradictory on their face. With respect to the March 2014 mental disabilities examination, the Board stated that "[t]he examiner found no obstacles to gainful employment from a psychological standpoint." R. at 23. The report indicates, however, that "[h]is concentration, persistence, and pace can be expected to be mildly impaired in a work setting due to his depression." R. at 110. With respect to the March 2014 heart examination, the Board emphasized that Mr. Tillberg was performing physical activities such as cutting firewood, mowing grass and wheat, and plowing snow. The Board did not discuss, however, the examiner's remark that moderate exercise led to symptoms of fatigue and dyspnea, which is consistent with the testimony of Mr. Tillberg's spouse that he falls asleep after he does moderate yard work. *See* R. at 97, 1563. Finally, the Board quoted the examiner in a July 2011 general medical examination as assessing Mr. Tillberg as a healthy appearing male "with the only complaint he could come up with being [that he] tired easily after working in the yard."⁴ R. at 22, 281. The Board did not discuss, however, the examiner's observation that "ordinary (moderate) physical activity results in cardiac symptoms, such as fatigue, dyspnea, etc." R. at 280.

Moreover, the Board offered no explanation for its conclusion that "[t]he [v]eteran's prior work skills provide him with the skills needed for employment." R. at 23. The evidence of record shows that Mr. Tillberg had worked as a logger, heavy machinery operator, and machine shop operator. The Board failed to discuss how his physical limitations would affect his ability to resume this type of physically demanding work. The record includes a May 2011 letter from a prospective employer stating that he knew Mr. Tillberg to be a hard worker, but did not feel he could hire Mr. Tillberg due to the physical demands of the job for which he was applying. *See* R. at 493.

To the extent that the Board may have concluded that Mr. Tillberg is capable of sedentary

⁴The Court notes that this statement is perilously close to displaying the type of negative bias that is entirely inappropriate in a VA examination. The statement seems to imply that Mr. Tillberg is attempting to advance spurious reasons to support his TDIU claim, a suggestion that is offensive to the Court.

employment, such a conclusion is entirely unexplained. *See* R. at 23 (quoting an examiner that "he could do physical or sedentary work at this time."). There is no evidence in the record that Mr. Tillberg has ever held the type of desk job that would support such a conclusion. Rather, the uncontroverted evidence is that he has no computer or office skills, and has trouble distinguishing speech and using the telephone. He obtained a GED after service, and has no further formal education. *See Beaty v. Brown*, 6 Vet.App. 532, 538 (1994) (reversing Board finding that veteran could perform in a sedentary occupation when evidence of record showed that he had only worked as a farmer for 40 years). There is no evidence in the record pertaining to what sort of sedentary occupation Mr. Tillberg may be qualified to perform.

The Court will therefore set aside the January 2016 Board decision and remand the matter for further proceedings. It is left to the Board's discretion whether further medical evidence is needed. On remand, Mr. Tillberg will be free to submit additional evidence and argument on the remanded matter, and the Board is required to consider such evidence and argument. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002). 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).

II. CONCLUSION

For the foregoing reasons, the Court SETS ASIDE the Board's January 6, 2016, determination with respect to TDIU and REMANDS that matter for further proceedings.

DATED: March 31, 2017

Copies to:

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