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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 16-0798

DENNIS W. LIMBS, APPELLANT,

v.

DAVID J. SHULKIN, M.D.,
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*: Dennis W. Limbs appeals through counsel a January 7, 2016, Board of Veterans' Appeals (Board) decision that denied entitlement to a total disability rating based on individual unemployability (TDIU). This appeal is timely and the Court has jurisdiction to review the Board's decision pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). Single-judge disposition is appropriate as the issue is 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 January 7, 2016, Board decision and remand the matter for readjudication consistent with this decision.

I. FACTS

Mr. Limbs served on active duty in the U.S. Army from July 1959 to June 1962. In May 1999, a VA regional office (RO) granted Mr. Limbs VA benefits for pes planus and assigned a 30% disability rating. Treatment records from October 1999 indicate that Mr. Limbs reported that his foot condition prevented him from working.

Mr. Limbs filed a claim for entitlement to a rating of TDIU in February 2010, at which time he reported that he last worked full time in February 1998. At an October 2010 VA

examination, Mr. Limbs reported experiencing crushing, aching pain in both feet. The examiner found no tenderness, painful motion, weakness, edema, heat, redness, instability, atrophy, or disturbed circulation of Mr. Limb's feet. The examiner opined that Mr. Limb's foot condition did not affect his occupation or daily activities. In December 2010, the RO denied entitlement to TDIU.

In January 2012, Mr. Limbs was treated by a private physician, who stated that Mr. Limbs was able to sit for 60 minutes at one time and stand for 5 minutes at one time. The physician stated that, during an eight-hour workday, Mr. Limbs could sit between four to five hours, stand for less than two hours, and walk for less than two hours. An April 2012 Disability Benefits Questionnaire (DBQ) reflects that Mr. Limbs's bilateral pes planus impacted his ability to work because it caused bilateral foot pain, stiffness, and difficulty with prolonged walking.

Mr. Limbs underwent a VA examination in November 2013, at which he reported that he sometimes has difficulty getting up to use the bathroom when his feet are sore. The examiner found that his foot condition impacted his ability to work. In a March 2015 DBQ completed by a private physician, Mr. Limbs stated that he had limited motion with pain and swelling upon activity. The physician opined that he had a chronic pain bilateral foot condition that was progressive and caused functional loss, thereby preventing any gainful activities, including activities of daily living. The physician opined that Mr. Limbs could not perform gainful employment.

At a July 2015 Board hearing, Mr. Limbs testified that he retired in 1998 from his construction job because he could not stand for long periods of time. He stated that he was unemployable in the construction industry because it requires frequent standing, which he is unable to do. He also stated that his foot condition would affect his ability to perform a sedentary job because he would need to get up to move around every hour.

On January 7, 2016, the Board issued the decision on appeal. In that decision, the Board denied entitlement to a rating of TDIU because it found that the majority of the evidence demonstrated that he was capable of mostly sedentary employment.

On appeal, Mr. Limbs argues that the Board erred by finding that he is capable of sedentary employment. Alternatively, he argues that the Board erred by failing to provide adequate reasons or bases for its decision. Specifically, he argues that the Board failed to explain what standard it used for finding him capable of sedentary employment and failed to explain why it rejected the March 2015 private medical opinion.

In response, the Secretary argues that the Board did not err in finding that Mr. Limbs was capable of sedentary employment and, thus, not entitled to a rating of TDIU. He argues that Mr. Limbs has not shown that his bilateral pes planus precludes him from obtaining substantially gainful employment. The Secretary also argues that the Board was not required to define sedentary employment or identify a specific occupation that Mr. Limbs could perform.

II. ANALYSIS

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.").

The Court recently addressed the meaning of employment "in a protected work environment." *Cantrell v. Shulkin*, 28 Vet.App. 382, (2017). The Court found that the plain language of § 4.16(a) does not expressly define employment "in a protected environment" and that it was unable to defer to the Secretary's definition, finding that "the Secretary ha[d] refused to proffer any definition of employment 'in a protected environment' for the Court to analyze." *Id.* at 390. (noting that the Secretary had argued 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'"). Absent an articulated standard for employment "in a protected environment," the Court concluded that it was unable to effectively review the Board's decision. *Id.* at 392; *see Allday v. Brown*, 7 Vet.App. 517, 527 (1995) (the Board must include a written statement of the reasons or bases for its findings and conclusions on all material issues of fact and law presented on the record adequate to enable an appellant to understand the precise basis for the Board's decision, and to facilitate informed review in this Court).

The Court finds this case similar to *Cantrell*. The relevant regulations concerning TDIU do not address sedentary work. Further, the Board failed to adequately explain its determination that Mr. Limbs is capable of obtaining and maintaining substantially gainful sedentary work. Nowhere in its decision did the Board define sedentary work or explain what standard it was using to reach its determination. The lack of any articulated standard necessarily renders the Board's

decision incapable of review by the Court. *See Cantrell*, 28 Vet.App. at 392; *see also Allday*, 7 Vet.App. at 527; *Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990). Accordingly, the Court finds that the Board provided inadequate reasons or bases for its decision and that remand is required.

Because the Court finds that remand is warranted, the Court will decline to address Mr. Limbs's remaining arguments. *See Best v. Principi*, 15 Vet.App. 18, 20 (2001) (noting that the factual and legal context may change following a remand to the Board and explaining 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, he 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 (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).

III. CONCLUSION

Upon consideration of the foregoing analysis, the record of proceedings before the Court, and the parties' pleadings, the January 7, 2016, Board decision is VACATED and the matter is REMANDED for readjudication consistent with this decision.

DATED: June 30, 2017

Copies to:

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