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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 16-1680

OTTIS R. SUMRALL, APPELLANT,

v.

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

Before KRAMER, *Senior Judge*.¹

MEMORANDUM DECISION

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

KRAMER, *Senior Judge*: The appellant, Ottis R. Sumrall, through counsel, appeals an April 4, 2016, Board of Veterans' Appeals (Board) decision that denied entitlement to an initial compensable rating for bilateral hearing loss and to a total disability rating based upon individual unemployability (TDIU). Record (R.) at 1-15. Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). This appeal is timely, and the Court has jurisdiction over the case pursuant to 38 U.S.C. §§ 7252(a) and 7266.

For the reasons that follow, the Court will vacate that part of the April 4, 2016, decision denying entitlement to TDIU and remand that matter for further proceedings consistent with this decision. Because the appellant presents no argument concerning the Board's denial of entitlement to an initial compensable rating for bilateral hearing loss, the Court holds that Mr. Sumrall has abandoned that issue and will, therefore, dismiss the appeal as to that matter. *See Pederson v. McDonald*, 27 Vet.App. 276, 285 (2015) (en banc).

¹ Judge Kramer is a Senior Judge acting in recall status. *In re: Recall of Retired Judge*, U.S. VET. APP. MISC. ORDER 02-17 (Jan. 13, 2017).

I. BACKGROUND

Mr. Sumrall served on active duty in the U.S. Army from February 1966 to October 1977, including service in Vietnam as an open mess custodian. R. at 482-84. He was last employed as a maintenance person at a community college in 2002, R. at 1514, and is currently in receipt of a combined 80% disability rating, effective February 2004, for sleep apnea, hypertension with hypertensive cardiovascular disease, vasomotor rhinitis, tinnitus, and bilateral hearing loss. R. at 1028.

In May 2002, Mr. Sumrall filed a claim for increased compensation based on unemployability. R. at 1551-53. In November 2004, the Jackson, Mississippi, regional office (RO) issued a rating decision that denied his claim. R. at 1330-33. Mr. Sumrall filed a Notice of Disagreement in November 2004. R. at 1327. The RO issued a Statement of the Case (SOC) in May 2005 continuing to deny entitlement to TDIU. R. at 1267-79. On May 20, 2005, Mr. Sumrall signed a timely VA Form 9 perfecting his appeal to the Board. R. at 1257.

In an April 2009 decision, the Board remanded the issue of entitlement to TDIU to obtain VA examinations assessing the current severity of Mr. Sumrall's sleep apnea and left ear hearing disabilities, as well as medical opinions addressing whether each service-connected disability independently would preclude "obtaining and retaining" substantially gainful employment. R. at 939-40. After further development of the claim, the RO issued a Supplemental SOC (SSOC) in April 2011. R. at 908-17. In February 2012, the appellant underwent further VA examinations, R. at 814-57, and later submitted additional evidence from his VA primary care provider in support of his request for TDIU, R. at 741. In September 2014, the RO issued a new SSOC. R. at 725-27. The Board conducted a hearing in April 2015, R. at 467-77, and in June 2015 again remanded the issue of entitlement to TDIU to obtain opinions "as to the functional and occupational limitations caused by the [appellant's] service-connected disabilities," R. at 453. In September 2015, Mr. Sumrall underwent four VA examinations, R. at 52-68, and in October 2015, the RO issued another SSOC. R. at 34-49.

On April 4, 2016, the Board issued the decision here on appeal denying entitlement to TDIU. R. at 2-19. It explained that

the Veteran claims that his service-connected [disabilities] have some impact on his ability to obtain and maintain substantially gainful employment. However, the Veteran has consistently reported, and the medical evidence shows, that his non service-connected disabilities prevent him from working. As noted above,

nonservice-connected disabilities may not be a consideration when determining eligibility for a TDIU. While the Board is sympathetic to the limitations the Veteran faces, the Board is prevented from considering these disabilities as a factor leading to the Veteran's unemployability. Moreover, the Veteran's limitations due to his service-connected disabilities are considered in the 80 percent combined disability rating he receives. Indeed, the assignment of the 80 percent scheduler rating is recognition of the functional limitations caused by his disabilities and that rating contemplates the severity and overall impact the symptoms have on the Veteran's life. As such the evidence does not persuasively support a finding that the Veteran is unable to obtain and maintain substantially gainful employment due to his service-connected [sic].

R. at 18-19. This timely appeal followed.

II. DISCUSSION

Mr. Sumrall argues that the Board failed to provide adequate reasons or bases for its determination that he is not entitled to TDIU. Appellant's Brief (Br.) at 15. Specifically, he argues that the Board improperly focused on whether his non-service-connected disabilities caused his inability to work; did not discuss whether his service-connected disabilities alone prevented him from performing substantially gainful employment; and did not discuss his ability to work in light of his educational and occupational history. *Id.* at 19, 23. The Court agrees.

Despite its accurate acknowledgement that "non-service-connected disabilities may not be a consideration when determining eligibility for a TDIU," R. at 18, the Board relied on evidence that showed that non-service-connected disabilities prevented the appellant from working. The relevant inquiry is not to what extent that Mr. Sumrall's non-service-connected disabilities prevented him from working, but rather whether the effects of his service-connected disabilities, collectively and independent of his non-service-connected disabilities, rendered him unable to secure employment. In this regard, as to the latter, the Board's finding is impermissibly conclusory and relies primarily on the former. *See Hatlestad v. Brown*, 5 Vet.App. 524, 529 (1993) ("[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."); *Pratt v. Derwinski*, 3 Vet.App. 269, 272 (1992) ("Even if, as it appears, the [Board] determined that appellant's unemployability was a result of his age and non-service-connected heart condition, its task was not finished.").

Moreover, in assessing unemployability, the Board must consider individualized circumstances, including a claimant's education, training, and work history. 38 C.F.R. § 4.16(b)

(2017) ("The rating Board will include a full statement as to the veteran's service-connected disabilities, employment history, educational and vocational attainment and all other factors having a bearing on the issue."); *see Cathell v. Brown*, 8 Vet.App. 539, 544 (1996) (holding that the Board erred in not discussing educational and occupational history). Here, the Board failed to address the appellant's education and training and their effects on TDIU, especially given his work history. *See Gleicher v. Derwinski*, 2 Vet.App. 26, 28 (1991) (holding that the Board must include a reasoned analysis that does not "merely allude to educational and occupational history" and "attempt in no way to relate these factors to the disabilities of the appellant").

The deficiencies in the Board's analysis frustrate judicial review. *See Allday v. Brown*, 7 Vet.App. 517, 527 (1995). In light of this outcome, the Court will not, at this time, address the other arguments and issues raised by Mr. Sumrall. *See Mahl v. Principi*, 15 Vet.App. 37, 38 (2001) (per curiam order) ("[I]f the proper remedy is a remand, there is no need to analyze and discuss all the other claimed errors that would result in a remedy no broader than a remand.").

III. CONCLUSION

After consideration of the parties' briefs and a review of the record, that part of the Board's April 4, 2016, decision denying entitlement to TDIU is VACATED, and that matter is REMANDED for further proceedings consistent with this decision. On remand, the appellant is free 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 Board shall proceed expeditiously, in accordance with 38 U.S.C. §§ 5109 and 7112 (requiring the Secretary to provide for "expeditious treatment" of claims remanded by the Board or the Court).

The appeal is otherwise DISMISSED.

DATED: July 20, 2017

Copies to:

Robert V. Chisholm, Esq.

VA General Counsel (027)