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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 16-1629

JOHN F. BURKE, APPELLANT,

V.

DAVID J. SHULKIN, M.D.,
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*: Veteran John F. Burke appeals through counsel a February 24, 2016, Board of Veterans' Appeals (Board) decision denying entitlement to a total disability evaluation based on individual unemployability (TDIU). Record (R.) at 2-11. Single-judge disposition is appropriate in this case. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). 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). For the reasons that follow, the Court will set aside the February 2016 Board decision and remand the matter for readjudication consistent with this decision.

I. FACTS

Mr. Burke served on active duty in the U.S. Marine Corps from December 1967 to October 1969. R. at 14. He is currently service connected for left ankle traumatic arthritis, pelvic fracture residuals with left hip strain, limitation of extension of the left hip, and limitation of adduction of the left hip, with a combined evaluation of 40%. R. at 8; *see* R. at 42. The current appeal stems from a request for TDIU reasonably raised during the course of a February 1999 claim for service connection for a pelvic fracture with left hip strain. *See* R. at 3, 297-303, 903-10.

The record reflects that Mr. Burke has had a variety of jobs since service, including as a deck hand and cook on fishing boats, a gold miner and prospector, a painter and wallpaper hanger, a clerk at a roadside tourist stand and state fairs, and a laborer at a fishery, a garage, and construction sites. R. at 122, 449, 469, 512, 767, 853, 1063, 1258, 1262, 1381. He last worked full-time from October 1986 to March 1987 and for one day in June 1987. R. at 122, 124.

At an August 2001 hearing before a decision review officer (DRO), the veteran testified that his left hip pain prevented him from standing or sitting for more than 10 minutes at a time. R. at 912. He underwent a VA medical examination in September 2006 and reported that he used a cane and needed to take breaks from walking every 15 to 20 minutes due to left ankle and hip pain. R. at 767. In an April 2009 statement in support of claim, he indicated that his left ankle and hip problems prevented him from obtaining manual labor jobs, that he could "[]not hold down any regular employment" during flareups of those conditions, and that he had to "work odd jobs and live a hand to mouth existence." R. at 674.

At an April 2011 VA hip examination, Mr. Burke complained of left hip pain, stiffness, fatigue, and weakness. R. at 610. He reported that he used a cane for ambulation and that he was only able to walk 100 yards and stand for one hour at a time. *Id.* Although the examiner noted that Mr. Burke had been unemployed for more than 20 years, he opined that the veteran's left hip problems had "no significant effects" on his employability because they were consistent with his age. R. at 614. A different VA hip examiner reached substantially the same conclusion in August 2011. R. at 561. In the meantime, Mr. Burke underwent a VA fee-basis knee examination in June 2011 and that examiner found that the veteran's left ankle arthritis limited his usual occupation and daily activities of living by preventing him from standing, walking, or sitting for extended periods of time. R. at 591.

Mr. Burke was afforded another VA examination in April 2014 and the examiner found that the veteran's left ankle and hip disabilities rendered him unable to walk more than 50 yards at a time, climb ladders or stairs, load or carry more than five pounds, and perform any construction-like work. R. at 100. The examiner opined that the veteran could not perform physically active work but could engage in sedentary employment if he were allowed to stand up two times per hour to relieve his pain. R. at 104.

In June 2015, the Board referred the issue of entitlement to TDIU to the VA Compensation Service Director (Director) for extraschedular consideration. R. at 59-60. In an August 2015 memorandum, the Appeals Management Center (AMC) recommended that the Director deny entitlement to extraschedular TDIU prior to June 22, 2012,[1] because VA treatment records did "not indicate the [veteran's] service[-]connected conditions have an impact on his ability to maintain employment" and his receipt of Social Security disability benefits since 1969 was "suggestive of non-service[-]connected conditions which may attribute to his current unemployment." R. at 28. The Director issued a decision later that month finding that entitlement to TDIU on an extraschedular basis was not warranted because the medical evidence of record did "not show that the [v]eteran would be unemployable in all environments, including a sedentary one, due solely to his service-connected disabilities." R. at 27. The case was subsequently returned to the AMC, which issued an October 2015 Supplemental Statement of the Case implementing the Director's decision. R. at 20-26.

In February 2016, the Board issued the decision currently on appeal. R. at 2-11. The Board reviewed the VA examinations of record and agreed with the Director that extraschedular TDIU was not warranted. R. at 8-10. The Board stated, in pertinent part, "[a]lthough the [v]eteran clearly could not engage in any type of labor that would require prolonged standing or performing any strenuous activity that would require the full use of his left hip and ankle, the disability picture presented is not inconsistent with less strenuous/sedentary types of employment." R. at 9-10. The Board therefore concluded that the evidence did not establish that the veteran's service-connected left ankle and hip disabilities alone precluded him from securing and maintaining a substantially gainful occupation. R. at 10. This appeal followed.

II. ANALYSIS

Mr. Burke argues, inter alia, that the Board provided inadequate reasons or bases for finding that he was capable of performing substantially gainful sedentary employment because it (1) did not adequately account for favorable evidence that his service-connected disabilities prevented him from sitting for prolonged periods, and (2) failed to address the reasonably raised

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[1] It is unclear from the record why the AMC limited its analysis to the period prior to this date, as Mr. Burke has not been granted TDIU after that date.

issue of whether any sedentary employment he could perform would be more than marginal. Appellant's Brief (Br.) at 11-14, 17-18. The Secretary disputes these contentions and urges the Court to affirm the Board decision. Secretary's Br. at 13-20.

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 (2017); *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."); *Van Hoose v. Brown*, 4 Vet.App. 361, 363 (1993) (explaining that, for TDIU, "[t]he question is whether the veteran is capable of performing the physical and mental acts required by employment "). When such unemployability is shown and the veteran does not meet the numeric evaluation requirements set forth in § 4.16(a), the Board may only refer the case to the Compensation Service Director for consideration of extraschedular TDIU, 38 C.F.R. § 4.16(b). *See Cantrell v. Shulkin*, 28 Vet.App. 382, 387 (2017). However, after the Director has issued a determination on entitlement to extraschedular TDIU, the Board may review the issue de novo and award extraschedular TDIU. *Wages v. McDonald*, 27 Vet.App. 233, 236-37 (2015).

As with any finding on a material issue of fact and law presented on the record, the Board must support its TDIU determination with an adequate statement of reasons or bases that enables the claimant to understand the precise basis for that determination and facilitates review in this Court. 38 U.S.C. § 7104(d)(1); *Pederson v. McDonald*, 27 Vet.App. 276, 286 (2015) (en banc); *Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990). To comply with this requirement, the Board must analyze the credibility and probative value of evidence, account for evidence that it finds persuasive or unpersuasive, and provide reasons for its rejection of material evidence favorable to the claimant. *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table).

In this case, the Board found that Mr. Burke's service-connected left ankle and hip disabilities did not render him unable to secure and follow a substantially gainful occupation because, "[a]lthough the [v]eteran clearly could not engage in any type of labor that would require prolonged standing or performing any strenuous activity that would require the full use of his left

hip and ankle," he could perform "less strenuous/sedentary types of employment." R. at 9-10. This analysis is flawed for two reasons.

First, as mentioned above, the Board did not account for evidence of record that reflects that Mr. Burke's service-connected disabilities prevented him for sitting for long periods of time, a hallmark of sedentary employment. Specifically, the Board did not mention the veteran's August 2001 hearing testimony indicating that his left hip pain "limited . . . sitting to 10 minutes" at a time. R. at 912. Nor did the Board acknowledge or analyze the June 2011 VA contract examiner's finding that the veteran's left ankle arthritis caused occupational impairment by, inter alia, precluding him from sitting for extended periods. R. at 591. Although the Board appears to have implicitly found the April 2014 VA examiner's opinion that Mr. Burke could perform sedentary employment if he were allowed to take periodic breaks from sitting to be the most probative evidence on the matter, R. at 9 (citing R. at 104), the Board did not explain why that opinion outweighed the contrary evidence of record or otherwise reconcile these seemingly conflicting accounts of the veteran's tolerance for prolonged sitting and the resulting effects on his employability. The Board's failure to address this favorable material evidence renders inadequate its reasons or bases for denying entitlement to extraschedular TDIU. *See Caluza*, 7 Vet.App. at 506; *Gilbert*, 1 Vet.App. at 57.

Second, the Board failed to address the reasonably raised issue of whether any employment that Mr. Burke was capable of performing was more than marginal. As the Court held in *Ortiz-Valles v. McDonald*, 28 Vet.App. 65, 71 (2016), § 4.16 "does not permit VA to limit consideration of marginal employment to only currently employed veteran," meaning that, "when the facts of the case reasonably raise the issue of whether the veteran's ability to work might be limited to marginal employment, the Board's statement of reasons or bases must address this issue."

The record reasonably raised the marginal employment issue in this case because it reflects that Mr. Burke last worked full-time in 1987, R. at 122; his service-connected disabilities have limited him to primarily seasonal employment, such as working at state fairs, or odd jobs, such as panning for gold, R. at 449, 469, 512, 767, 853, 1063; and he has described his post-service life as a "hand to mouth existence," R. at 674; *Moore v. Derwinski*, 1 Vet.App. 356, 358, 359 (1991) (describing substantially gainful employment as work that is more than "marginal" and that permits the individual to earn a "living wage"). *See Ortiz-Vailles*, 28 Vet.App. at 72 (finding the marginal

employment issue reasonably raised when the record reflected that the veteran was unemployed and capable of only semi-sedentary, part-time work). Despite this evidence that suggests that Mr. Burke has only been able to engage in marginal employment since 1987, the Board did not address whether any employment he is capable of performing—sedentary or otherwise—would be more than marginal. The Board's failure to do so further diminishes the adequacy of the Board's reasons or bases for denying entitlement to extraschedular TDIU, necessitating remand. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) (holding that remand is the appropriate remedy "where the Board has incorrectly applied the law, failed to provide an adequate statement of reasons or bases for its determinations, or where the record is otherwise inadequate").

Given this disposition, the Court need not address Mr. Burke's additional reasons-or-bases arguments, which could not result in a remedy greater than remand. *See* Appellant's Br. at 11-20; Reply Br. at 1-10. He is free to present those arguments, as well as any additional arguments and evidence, to the Board on remand in accordance with *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order). *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 February 24, 2016, Board decision is SET ASIDE and the matter is REMANDED for readjudication consistent with this decision.

DATED: September 27, 2017

Copies to:

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