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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 16-2675

ABBIE J. DAVIS, 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*: The appellant, Abbie J. Davis, appeals through counsel a June 21, 2016, Board of Veterans' Appeals (Board) decision in which the Board denied her entitlement to a total disability rating based on individual unemployability (TDIU). Record (R.) at 2-17. This appeal is timely and the Court has jurisdiction over the matters on appeal pursuant to 38 U.S.C. §§ 7252(a) and 7266. Single-judge disposition is appropriate when the issues are 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 Board's decision and remand the matter on appeal for further proceedings consistent with this decision.

I. BACKGROUND

The appellant served on active duty in the U.S. Navy from May 1973 until June 1976. R. at 1820. She currently is entitled to receive disability benefits for "obstructive ventilatory defect (also claimed as a fungus disease of the lungs," right ear hearing loss, chest scars, tinnitus, and the residual effects of a "thoracotomy with excision of hilar mass." R. at 6, 284, 1823.

In August 2006, the appellant filed a request for TDIU. R. at 576-77. In December 2006, the VA regional office (RO) denied her request. R. at 435-40. In October 2007, she challenged

the RO's decision. R. at 427. She also filed additional requests for TDIU in June 2012 and January 2013. R. at 375-76, 397-98.

In November 2013, the RO again denied the appellant entitlement to TDIU. R. at 277-86. On June 21, 2016, the Board issued the decision presently under review. R. at 2-17.

II. ANALYSIS

The issue before the Court is whether the appellant is "unable to secure or follow a substantially gainful occupation as a result of service-connected disabilities." 38 C.F.R. § 4.16(a) (2017). That is a difficult question to answer in the best of circumstances. *See Ortiz-Valles v. McDonald*, 28 Vet.App. 65, 72 (2016) (noting that neither the Secretary nor the Court has defined the phrase "substantially gainful occupation"); *see also Cantrell v. Shulkin*, 28 Vet.App. 382, 390-91 (2017) (refusing to accept "a 'we know it when we see it' definition" of an undefined regulatory term). The facts of this case add several complications to the usual analysis.

The appellant has multiple service-connected and non-service-connected disabilities. No medical examiner has discussed the combined effects of her service-connected disabilities and plainly separated those effects from the effects of her non-service-connected disabilities. *See Hatlestad v. Brown*, 5 Vet.App. 524, 529 (1993) (holding that the Board must determine "whether the veteran's service-connected disabilities alone are of sufficient severity to produce unemployability"). Consequently, the Board faced the unenviable task of discerning the combined occupational effects only of her service-connected disabilities by synthesizing multiple pieces of lay and medical evidence that arrived at VA over the course of a dozen years, are at times contradictory, and are of varying quality. The Board did not do so effectively and remand is warranted for several reasons.

First, the Board did not satisfactorily weigh medical evidence submitted in 2013. In September 2013, a VA medical examiner opined that the appellant's respiratory disorder and scars have "no significant effects on physical or sedentary employability." R. at 308. In December 2013, however, a VA medical examiner opined that the appellant's respiratory disorder "causes impairment in securing or maintaining substantial gainful employment" and that her scarring "hinders her from maintaining or securing gainful employment either sedentary or physical." R. at 3018, 3023.

The Board did not acknowledge that the September 2013 and December 2013 examiners reached diametrically opposed conclusions about the question raised by this case. Instead, it used the September 2013 examiner's opinion against the appellant and, through some rhetorical sleight of hand, neutralized the December 2013 examiner's opinion without finding it to be inadequate or otherwise unconvincing. One of the examiners must be wrong. About that there is no doubt. On remand, the Board should decide which one.[1]

Second, the Board's conclusion that VA medical examination reports submitted in July 2013 are adequate is clearly erroneous. *See Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 301 (2008) (holding that a medical opinion must "contain not only clear conclusions with supporting data, but also a reasoned medical explanation connecting the two"); *Stefl v. Nicholson*, 21 Vet.App. 120, 123 (2007) (holding that a medical opinion is adequate "where it is based upon consideration of the veteran's prior medical history and examinations and also describes the disability, if any, in sufficient detail so that the Board's 'evaluation of the claimed disability will be a fully informed one.'") (quoting *Ardison v. Brown*, 6 Vet.App. 405, 407 (1994)).

On July 22, 2013, a medical examiner submitted a prefabricated form that he partially completed. On it, he discusses (that word is used very loosely) the appellant's respiratory disorder and her scarring. The form asked the examiner whether the appellant's disorders "impact . . . her ability to work." R. at 348. He placed an "X" next to the word "No." That "X" is not accompanied by any discussion.

The examiner also did not perform diffusion capacity of the lung for carbon monoxide (DLCO) by a single breath method testing on the appellant. It was the results from DLCO testing that convinced the December 2013 examiner that the appellant's respiratory disorder affects her ability to work. R. at 3023 ("Veteran's respiratory disability, especially her severe reduction in DLCO causes impairment in securing or maintaining substantial gainful employment"). The form

[1] On a few occasions in its decision, the Board stated that the medical opinions in the record considered "as a whole" reveal that the appellant is not entitled to the benefit that she seeks. *See* R. at 15. The Board routinely uses the "as a whole" concept when it wishes to consider medical opinions that are individually inadequate. The legality of doing so is unclear. In the context of this case, the Court cannot understand what "as a whole" means. If medical examiners reach opposing conclusions, what good will considering their opinions "as a whole" do? It seems likely that the Board used the "as a whole" concept as a convenient way to avoid the thorny issues raised by the medical evidence.

states that if an examiner chooses not to administer a DLCO test, he should "provide reason" by placing an "X" next to one of the given choices. R. at 364. The July 2013 examiner did not do so.

Lastly, VA recognized the deficiencies in the July 2013 report and ordered an addendum opinion in September 2013 to correct those deficiencies. The official who requested the addendum asked the September 2013 examiner to "provide *an opinion* on the impact of the veteran[']s service connected disabilities listed below on employment" and acknowledged that the July 2013 "respiratory exam *is insufficient* as veteran has been diagnosed with coccidomycosis and section 6 mycotic lung disease should have been completed." R. at 306-07 (emphasis added). For this and the other reasons discussed above, the Board's conclusion that the July 2013 examination report is adequate is clearly erroneous.

The same is true of the portion of a July 2013 VA audiology report addressing the appellant's tinnitus. The audiologist, like the July 2013 medical examiner, opined that the appellant's tinnitus does not "impact ordinary conditions of daily life, including ability to work" by placing an "X" next to the word "No." R. at 332. She did not accompany her opinion with analysis.

The form that the audiologist filled out instructed her to ask the appellant to describe "the effects of disability (i.e. the current complaint of tinnitus on occupational functioning or daily activities)." *Id*. She did not do so (or at least did not record the appellant's response). Consequently, her report does not contain the factual bases for her opinion. The Board's conclusion that it is adequate is clearly erroneous.

Third, the Board did not satisfactorily explain its conclusion that the September 2013 examination report is adequate. Again, the examiner opined that the appellant's respiratory disorder and scars "have no significant effects on physical or sedentary employment." R. at 308. He supported his statement by listing a number of factual observations (none of which describe the physical limitations caused by the appellant's service-connected disorders), but did not explain the importance of those observations. Also, the examiner conducted no additional testing. He stated that he "reordered" a pulmonary functioning test. *Id.* He did not explain how he was able to form his opinion without first obtaining the results of the test that he requested.

Lastly, the examiner stated that the appellant experiences "shortness of breath" that she "notices . . . particularly when trying to talk on the phone." R. at 307. Given that the appellant last worked as a telemarketer, the Board should have acknowledged that statement and explained

whether it undermines the examiner's conclusion that the appellant's disorder has no effect on her employability.[2] The Board should review these matters and carefully reconsider whether the September 2013 examination report is adequate.

Fourth, if the Board concludes on remand that the September 2013 examination report is adequate and weighs that report against the December 2013 medical opinion, it should note that the December 2013 medical examiner reviewed test results that were not available in September 2013. The Board should discuss whether those test results reveal that the December 2013 examiner had a more complete medical record before him than did the September 2013 examiner and whether that, in turn, indicates that his report deserves more probative value.

Fifth, the Board noted that in September 2013, a VA audiologist opined that the appellant "should be able to function well in any position for which she is qualified and has adequate training, provided it does not require her to localize sounds." R. at 13. The Board assumed that this statement is evidence against the appellant's TDIU request and left it at that. It should have discussed whether the appellant's past work history reveals that she is qualified for positions other than those that require her to "localize sounds." *Id*.; *see Pederson v. McDonald*, 27 Vet.App. 276, 286 (2015).

Furthermore, the Board ignored other statements that the audiologist made that bring the appellant's occupational deficiencies into greater relief. The examiner opined that the appellant "will also have difficulty hearing in background noise with only one good ear" and that it "would not be advisable for her to work in a hazardous noise environment as her residual hearing must be protected." R. at 3459. The Board should have discussed whether these additional limitations preclude her from obtaining substantially gainful employment.

Sixth, the December 2013 examiner reported that the appellant's scarring limits "her ability to raise her left arm, lift things, hold on to things." R. at 3018. The examiner further opined that the appellant's respiratory disorder produces "shortness of breath with exertion which causes dizziness and falls." R. at 3023. Finally, the Board noted that the "December 2013 hearing loss/tinnitus examination report provides that the [appellant] reported a constant static sound that generates migraine headaches." R. at 14.

[2] The Board found it noteworthy that the examiner "stressed that there was no record of treatment for a current pulmonary condition." R. at 13. It is unclear why that fact is important. The question here is whether the appellant's disorder produces occupational deficiencies. Whether she has sought treatment for it adds nothing to that analysis, at least nothing that the Board or the examiner identified.

The Board did not find these opinions to be inadequate or the lay statements on which they are partially premised to be not credible. Instead, it responded with the following statement of reasons or bases:

> Notwithstanding the December 2013 VA medical opinions, the record of evidence is against a finding that the [appellant's] service-connected disabilities prevent her from being able to obtain and secure substantially gainful employment. The Board acknowledges that the December 2013 examiners' opinions indicate that the [appellant's] service-connected disabilities hinder or impair her ability to perform certain work in both sedentary and physical capacities, particularly if such work required a certain degree of exertion or if it required the [appellant] to raise, or lift or hold items, with her left arm. However, the question before the Board is not whether the [appellant's] service-connected disabilities hinder or impair her ability to secure and maintain substantially gainful employment, as rating criteria for service-connected disabilities contemplate impairment in earning capacity resulting from such disabilities, and the degrees of disability, in general, compensate for considerable loss of working time. . . . Instead, the Board must determine whether the evidence establishes that the [appellant] is unable to secure and follow any substantially gainful occupation as a result of service-connected disabilities. . . . In light of the foregoing, the Board concludes that the most probative evidence of record weighs against a finding that the [appellant's] service-connected disabilities preclude her from securing or following substantially gainful employment. When considering the VA medical opinions as a whole, the Board finds that although the competent medical evidence of record establishes that the [appellant's] service-connected disabilities affect her ability to perform in certain occupational environments, the evidence fails to indicate that such disabilities prevent her from securing or maintaining any type of substantially gainful employment.

R. at 14-15.

This analysis is full of conclusory statements and lacks any kind of detailed evidentiary review. The Board also avoided the implications of the December 2013 examination reports by making it seem as though the words "hinder" and "impair" apply to the combined effects of the appellant's service-connected disabilities. They do not. The word "hinder" applies *only* to the appellant's scarring and the word "impair" applies *only* to the appellant's respiratory disorder. The question that the Board did not answer is whether a veteran with one service-connected disorder that hinders occupational functioning, another disorder that impairs occupational functioning, and extensive hearing loss to boot is able to maintain substantially gainful employment.

The Board went on to write that it has "also considered the [appellant's] previous work experience, including her last position as a telemarketer." R. at 15. It "acknowledges that given her right ear hearing loss, she may not be able to perform similar work." *Id.* The phrase "may

not" conveys an unacceptable level of equivocation that, of late, appears regularly in Board decisions addressing close questions. Will she or won't she? The Board should have specifically answered that question.

The Board apparently believed that it need not answer that question because, "particularly when considering the [appellant's] varied work experience and educational background, the evidence indicates that the [appellant's] service-connected disabilities do not preclude her from all substantially gainful employment." *Id.* What work experience the Board considered and how the Board believed that experience shows that the appellant is employable is a mystery to all but the Board. The Court and the appellant certainly cannot understand how it reached its conclusion.

The record contains ample evidence describing the extent of the appellant's symptoms and her work and educational history. The Board barely scratched the surface. On remand, the Board should recall that, based on medical opinions that it found to be adequate and its own acknowledgements, the appellant's scars reduce her ability to use her left arm, respiratory deficiency causes her to become short of breath and lightheaded after exertion or talking on the phone, her hearing loss causes her to be unable to localize sounds and function well in noisy environments. Combining these, as the Board must, they show that the appellant struggles to hear effectively, exert herself, and use her left arm. She must be able to secure or maintain substantially gainful employment that comports with her educational and occupational histories despite these functional deficiencies, or she is entitled to the benefit that she seeks.[3] *See Pederson*, 27 Vet.App. at 286 ("[W]hen the Board conducts a TDIU analysis, it must take into account the individual veteran's education, training, and work history").

The appellant graduated from high school and completed three semesters in college studying accounting. R. at 482, 1533. In the military, she received training in "personnel/records, filing, pay records, entries." R. at 1533. She later studied to become a cosmetologist and her "principal occupation" after leaving service was "clerk typist." R. at 1533-34.

[3] The Board wrote that, although the appellant's "service-connected disabilities *might* affect her ability to engage in employment that would involve *a certain degree* of exertion, necessitate localizing sounds, or require *particular* activities, such as raising, lifting, or holding items with her left arm, it weighs against a finding that service-connected disabilities alone would prevent her from obtaining and sustaining any kind of employment, including sedentary employment." R. at 16 (emphasis added). Once again, the Board equivocates, downplays, and then tacks on a conclusory statement. On remand, the Board should state, exactly and without hedge words like "might" or "may," what occupational effects the appellant's service-connected disorders produce. It should then review her occupational and educational history in detail and explain whether, with her limitations, she can obtain substantially gainful employment that fits her experience.

The appellant held jobs as a prep cook, in janitorial maintenance, as a billing clerk, as a letter carrier, in a temporary clerical position, as a floor worker at a charity bingo, and in "claims," "customer service phones," and "patient services" at a medical center. R. at 397, 477, 576. She stated that she "emptied trash carried it about 50 f[ee]t. Placed chairs on table tops, move and straightened tables. Carried cards to office when I worked the window." *Id.* She frequently lifted about 10 pounds, stood and walked for 5-6 hours a day, knelt, crouched, and handled both large and small objects. *Id.* She stopped working in about 2001. R. at 577.

Once more, on remand, the Board should specifically compare this evidence to medical evidence describing deficiencies in the appellant's occupational functionality. *See Van Hoose v. Brown*, 4 Vet.App. 361, 363 (1993) ("The question is whether the veteran is *capable* of performing the physical and mental acts required by employment"); *Gleicher v. Derwinski*, 2 Vet.App. 26, 28 (1991) ("[T]o merely allude to educational and occupational history, attempting in no way to relate these factors to the disabilities of the appellant, and conclude that some form of employment is available, comes very close to placing upon the appellant the burden of showing he can't get work").

Seventh, the Board did not discuss several pieces of evidence that appear to be favorable to the appellant's assertions. In March 2006, a medical examiner wrote that the appellant has "some dyspnea on exertion at as little as 50 yards." R. at 725. The appellant stated that she left her job as a letter carrier "due to fainting . . . overexertion" and left her telemarketing job because it was a "strain to hear customers." R. at 577. In 2010, she failed to complete an online business management course. R. at 398. She reported that the location of her surgery became "very painful" and that the "ringing in her ear gets so loud at times and I often experienced pain behind my ears." R. at 377. In September 2013, the appellant stated that she notices her shortness of breath "particularly when trying to talk on the phone." R. at 307. On remand, the Board should carefully consider this evidence and explain why it does not show that the appellant's limitations cause her to be unemployable.[4] *See Thompson v. Gober*, 14 Vet.App. 187, 188 (2000) (stating that the Board must provide an adequate statement of reasons or bases "for its rejection of any material evidence favorable to the claimant").

[4] Merely listing this evidence, as the Board did here, is not sufficient. *See Dennis v. Nicholson*, 21 Vet.App. 18, 22 (2007).

Finally, the Board concluded that the record reasonably raised a claim for entitlement to disability benefits for scoliosis, and it referred that matter to the RO for initial adjudication. R. at 3-4. The December 2013 VA medical examiner reported that the appellant's scoliosis is an "additional reason[] why she is unable to maintain employment either physical or sedentary." R. at 3016. Other evidence in the record also indicates that her scoliosis causes her to be unemployable. Consequently, the Court suggests that the Board wait to revisit its TDIU analysis until the RO decides whether the appellant is entitled to disability benefits for scoliosis. *See Henderson v. West*, 12 Vet.App. 11, 20 (1998) ("[W]here a decision on one issue would have a 'significant impact' upon another, and that impact in turn 'could render any review by this Court of the decision [on the other claim] meaningless and a waste of judicial resources,' the two claims are inextricably intertwined") (quoting *Harris v. Derwinski*, 1 Vet.App. 180, 183 (1991)) (alteration in original).

The Court need not at this time address any other arguments that the appellant has raised. *See Best v. Principi*, 15 Vet.App. 18, 20 (2001) (per curiam order) (holding 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 [her]"). On remand, the appellant 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, 372-73 (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). Once the Board is prepared to act, it must proceed expeditiously, in accordance with 38 U.S.C. § 7112 (requiring the Secretary to provide for "expeditious treatment" of claims remanded by the Court).

III. CONCLUSION

After consideration of the appellant's and the Secretary's briefs and a review of the record, the Board's June 21, 2016, decision is VACATED and the matter on appeal is REMANDED for further proceedings consistent with this decision.

DATED: October 13, 2017

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