Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 17-0140

THOMAS L. FISCHER, APPELLANT,

V.

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

Before GREENBERG, *Judge*.

MEMORANDUM DECISION

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

GREENBERG, *Judge*: Them appellant, Thomas L. Fischer, appeals through counsel, a December 2, 2016, Board of Veterans' Appeals (Board) decision that denied entitlement to a total disability rating based on individual unemployability (TDIU).[1] Record (R.) at 2-10. The appellant argues that the Board clearly erred in denying TDIU because the only competent evidence of record supported a finding of unemployability. Appellant's Brief at 10-18. Alternatively, the appellant argues that that Board improperly interpreted the term "substantially gainful employment" and that the denial of TDIU was arbitrary and capricious because it was based on an indecipherable standard for what constitutes "sedentary" work. Appellant's Brief at 19-29. For the following reasons, the Court will vacate the December 2016 Board decision and remand the matter for readjudication.

Justice Alito noted in *Henderson v. Shinseki* that our Court's scope of review in this appeal is "similar to that of an Article III court reviewing agency action under the Administrative Procedure Act, 5 U.S.C. § 706." 562 U.S. 428, 432 n.2 (2011); *see* 38 U.S.C. § 7261. The creation of a special court solely for veterans, and other specified relations such as their widows, is consistent with congressional intent as old as the Republic. *See Hayburn's Case*, 2 U.S. (2 Dall.)

[1] As of December 12, 2008, the appellant met the schedular criteria for TDIU. Record (R.) at 666. Therefore, TDIU was considered under 38 C.F.R. § 4.16(a) as of this date, and under § 4.16(b) before that.

409, 410 n., 1 L. Ed. 436 (1792) ("[T]he objects of this act are exceedingly benevolent, and do real honor to the humanity and justice of Congress."). "The Court may hear cases by judges sitting alone or in panels, as determined pursuant to procedures established by the Court." 38 U.S.C. § 7254. Accordingly, the statutory command of Congress that a single judge may issue a binding decision, pursuant to procedures established by the Court, is "unambiguous, unequivocal, and unlimited." *Conroy v. Aniskoff*, 507 U.S. 511, 514 (1993); *see generally Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990).

From the beginning of the Republic statutory construction concerning congressional promises to veterans has been of great concern. "By the act concerning invalids, passed in June, 1794, vol. 3. p. 112, the secretary at war is ordered to place on the pension list, all persons whose names are contained in a report previously made by him to congress. If he should refuse to do so, would the wounded veteran be without remedy? Is it to be contended that where the law, in precise terms, directs the performance of an act, in which an individual is interested, the law is incapable of securing obedience to its mandate? Is it on account of the character of the person against whom the complaint is made? Is it to be contended that the heads of departments are not amenable to the laws of their country?" *Marbury v. Madison*, 5 U.S. 137, 164, 2 L. Ed. 60, 69 (1803).

The appellant served on active duty in the U.S. Navy between November 1986 and April 1989. R. at 1237. He completed high school, and received certification in high-voltage maintenance (HVAC) and light rail signal work. R. at 1119. While in the service, the appellant attended the Navy engineering school. R. at 553. The appellant stated that he had not worked since 2003, at which point he had worked as a mechanical engineer. R. at 552-53.

In May 2008, the appellant entered VA vocational rehabilitation and began training 2 months later. R. at 767, 741-43. However, he was advised to repeat the basic training portion of the course because he failed to regularly attend the course. R. at 743-44. By July 2008, the appellant was suffering "great pain" in his knees and feet, which diminished his functionality and ability to maintain a daily routine. R. at 1665. In November 2008, the appellant was enrolled in computer courses at Ivy Tech Community College, where he struggled as a result of insomnia and racing thoughts. R. at 1289. The appellant left the program after only two semesters. R. at 773.

In December 2008, the appellant filed for benefits based on service connection for foot pain and depression. R. at 1605. The appellant reported that pain in his foot prevented him from working, lifting, pulling, or carrying, and that this pain and loss of functionality caused depression. R. at 1605.

The appellant attended a VA examination in May 2009. The examiner noted that the appellant suffered from insomnia, depression, and pain. R. at 1261-62. A June 2009 VA examination noted that the appellant experienced depression and daily foot pain upon walking, and that "all medical conditions likely cause him difficulties obtaining employment." R. at 1202.

By October 2009, the appellant had begun working as a volunteer at the information desk at his local VA hospital. R. at 771. According to supervisors, the appellant "wasn't very enthusiastic" about helping coworkers, patients, or visitors, and rarely volunteered to guide visitors. R. at 771. On several occasions, the appellant failed to appear for work. R. at 770. After learning that his shift might be changed, the appellant confronted one of his supervisors, prompting the police staff to intervene; the supervisor stated that he was not willing to allow the appellant to return to his reception duties R. at 769.

In March 2010, the VA vocational rehabilitation staff sent to the rating board a "Notification of infeasibility for employment goal." R. at 766-67. The notification author noted that the appellant had not been employed competitively since 2002 and had only lasted as a volunteer at the VA hospital for 6 months. R. at 767.

At a regional office (RO) hearing in November 2012, the appellant testified that he was prevented from working as a result of depression, "unbelievable" pain in his foot and multiple joints, and sleep deprivation, the last of which he attributed to both depression and pain. R. at 870-73. That same month, a VA psychologist stated that the appellant's depression "*d[id] not appear to impede his capacity* for physical and/or sedentary employment." R. at 845 (emphasis added).

In June 2013, the Board remanded the matter of TDIU in order to determine the impact of the appellant's service-connected disabilities on his ability to secure and follow substantially gainful employment. R. at 681-708. In September 2013, a VA examiner found that the appellant's ankle degenerative joint disease (DJD) hindered his ability to work. R. at 531. The examiner noted that the appellant was limited to standing only 10 to 15 minutes at a time. R. at 531.

In September 2013, a VA psychologist found that the appellant's depression impaired the appellant's occupational and social functioning by dampening his motivation, mood, and ability to concentrate. R. at 534-38. The appellant reported being unable to sleep for days at a time, having racing thoughts on things such as the death of innocent people, seeing a demonized toy, and believing that he had been blacklisted. R. at 537-38. Nevertheless, the psychologist opined that "*there is likely some kind* of sedentary and/or solitary work that the veteran would be capable of performing." R. at 538 (emphasis added).

A VA examiner opined in October 2015 that the appellant's ankle disability "would not be expected to make an impact regarding working in an office or sedentary type of job." R. at 43. The examiner suggested that the appellant would be best suited for "*less than full-time work*" during which he could stretch his ankle and use a cane. R. at 43 (emphasis added).

The appellant was scheduled to attend a VA psychiatric examination in October 2015. When the psychiatrist invited the appellant to enter the examining room, the appellant screamed, cursed, and threatened the examiner, who reported the incident to the police. R. at 39.

In December 2016, the Board denied entitlement to TDIU. R. at 2-10. The Board found that "there is nothing in the record to suggest that [the appellant] would be unable to perform a sedentary job." R. at 9. Consequently, the Board found that the appellant is not precluded from obtaining and maintaining substantially gainful employment. R. at 9. The Board found that the appellant attended 2 years of college, the Navy Engineering School in 1986, and vocational rehabilitation. R. at 6, 9. In light of this finding, the Board concluded that appellant was capable of performing sedentary work despite his labor-intensive work history. R. at 9.

The Court concludes that the Board failed to provide an adequate statement of reasons or bases for its determination that the appellant's disability did not preclude him from securing substantially gainful employment. *See* 38 U.S.C. § 7104(d)(1) ("Each decision of the Board shall include . . . a written statement of the Board's findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented in the record."); *Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1990) (finding that Congress mandated, by statute, that the Board provide a written statement of reasons or bases for its conclusions that is adequate to enable the appellant to understand the precise basis for the Board's decision and to facilitate review in this Court).

The Board conceded that the appellant had no sedentary work history. R. at 9. Yet it provided mere conjecture for finding that that he was capable of securing sedentary work, and relied instead on a lack of evidence "to suggest that [the appellant] would be unable to perform a sedentary job." R. at 9. *See Beaty v. Brown*, 6 Vet.App. 532, 537 ("[T]he [Board] may not reject that claim without producing evidence, as distinguished from mere conjecture, that the veteran can perform work that would produce sufficient income to be other than marginal."). The Board does not discuss the functional limitations highlighted by VA examiners in making its factual determination that the appellant was capable of performing sedentary work. *See* R. at 9.

Additionally, the Board failed to explain its factual determination that the appellant's educational background is sufficient to support a career of sedentary work. *See* R. at 9. While the Board concluded that the appellant had completed 2 years of college, it is unclear where this finding is supported. *See* R. at 9. The appellant has reported that he left Ivy Tech College after 2 semesters, not 2 years. R. at 773. Furthermore, while the Board noted that the appellant had attended vocational rehabilitation, it failed to acknowledge that the appellant had dropped out of his training program. *See* R. at 9, 741-44.

Finally, the Board failed to discuss whether the appellant would be limited to marginal employment. *See* 38 C.F.R. § 4.16(a) (2017) (a veteran's employment is "marginal" when it is not substantially gainful, either because his earned annual income is below the U.S. poverty threshold for an individual or because the veteran works in a protected environment such as a family business or sheltered workshop). The Board noted that October 2015 VA examiner opined that the appellant would be best suited for "less than full-time work." R. at 8-9; *see also* R. at 43. Remand is required for an adequate statement of reasons and bases for the Board's determination on these issues. *See Gilbert, supra*.

Because the Court is remanding the appellant's claim, it will not address the appellant's remaining arguments. *See Dunn v. West*, 11 Vet.App. 462, 467 (1998). On remand, the appellant may present, and the Board must consider, any additional evidence and arguments. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002). This matter is to be provided expeditious treatment. *See* 38 U.S.C. § 7112; *see also Hayburn's Case*, 2 U.S. (2 Dall.) at 410, n. ("[M]any unfortunate and meritorious [veterans], whom Congress have justly thought proper objects of immediate relief, may suffer great distress, even by a short delay, and may be utterly ruined, by a long one.").

For the foregoing reason, the December 2, 2016, Board decision on appeal is VACATED and the matter is REMANDED for readjudication.

DATED: February 27, 2018

Copies to:

April Donahower, Esq.

VA General Counsel (027)