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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 16-2677

HAROLD D. HALDEMAN, APPELLANT,

v.

ROBERT L. WILKIE,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before GREENE, *Senior Judge*.¹

MEMORANDUM DECISION

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

GREENE, *Senior Judge*: The appellant, Harold D. Haldeman, appeals, through counsel, a June 21, 2016, Board of Veterans' Appeals (Board) decision that denied a rating of total disability based on individual unemployability (TDIU). Record (R.) at 2-13. Single-judge disposition is appropriate. *See 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 for further proceedings consistent with this decision.

I. BACKGROUND

Mr. Haldeman served on active duty in the U.S. Army from November 1966 to September 1968. R. at 1534. He is service connected for a number of disabilities. R. at 3. In a September 2013 Board decision concerning his service-connected left leg disability, the Board found that a TDIU claim was reasonably raised by the record and remanded that matter for additional development. R. at 862-84. In October 2013, he was given a TDIU examination. *See* R. at 262-80. In February 2016, VA denied his claim, and he appealed to the Board. R. at 16-18, 25-37.

¹ Judge Greene is a Senior Judge acting in recall status. *In re: Recall of Retired Judge*, U.S. VET. APP. MISC. ORDER 01-18 (Jan. 16, 2018).

The Board also denied Mr. Haldeman's TDIU claim, finding that his service-connected disabilities did not render him incapable of securing and maintaining substantially gainful employment. R. at 12. The Board considered the lay and medical evidence of record, including Mr. Haldeman's April 2015 reports that he had "unbearable pain in his leg hip and knee," he was "unable to stand for any length of time," and he was "unable to walk very far," R. at 11, as well as the October 2013 examiner's opinion, which the Board found to be "highly probative," that "none of the disabilities addressed impact sedentary employment," R. at 10. Based on the evidence, the Board decided that Mr. Haldeman, a high school graduate, was able to perform "sedentary work." R. at 12-13. The Board determined that Mr. Haldeman "has much experience in performing" such work including 25 years in a managerial position at his family's propane business, which did not "require[] any heavy physical labor." R. at 12. The Board found "particularly relevant" that "the bulk of the [v]eteran's work experience (including the last 25 plus years) was sedentary, not physical." R. at 12. Further, the Board noted that Mr. Haldeman had not asserted that he was unable to perform sedentary employment. R. at 13. Thus, it found a TDIU was not warranted.

Mr. Haldeman has appealed to this Court, arguing that the Board misinterpreted and misapplied the terms "sedentary employment" and "substantially gainful employment" in denying TDIU. Appellant's Brief (Br.) at 6-9, 12-16; Reply Br. at 5-12. Similarly, he asserts that the Board erred by not providing articulable standards regarding these terms. Appellant's Br. at 16-19; Reply Br. at 4. He also argues that the Board erred by relying on the opinion of the 2013 VA examiner concerning the issue of unemployability. Appellant's Br. at 10-12; Reply Br. at 12-14. The Secretary disputes Mr. Haldeman's contentions and urges the Court to affirm the Board decision. Secretary's Br. at 9-28.

On December 4, 2017, the Court, sua sponte, stayed proceedings in this case, pending the issuance of a decision by the Court in *Withers v. Wilkie*, No. 16-1543. On August 10, 2018, the Court issued a decision on this matter. 2018 WL 3814883 (Vet. App. Aug. 10, 2018). By order dated August 16, 2018, the Court lifted the stay of proceedings.

II. ANALYSIS

A rating of TDIU may be assigned to certain veterans who are unable to secure and follow a substantially gainful occupation by reason of service-connected disabilities. 38 C.F.R. § 4.16

(2018). To determine whether a TDIU rating is warranted in a given case, "VA conducts a holistic and individualized assessment of the veteran." *Withers*, 2018 WL 3814883, at *3. When conducting a TDIU analysis, the Board "'must take into account the individual veteran's education, training, and work history.'" *Id.* (quoting *Pederson v. McDonald*, 27 Vet.App. 276, 286 (2015) (en banc)).

If the Board bases its denial of TDIU, as it did here, "in part[,] on the conclusion that a veteran is capable of sedentary work, then it must explain how it interprets that concept in the context of that case." *Id.* at *6. As the Court explained in *Withers*, this interpretation must include, "where necessary":

an explanation of how a finding that a veteran is capable of sedentary employment squares with the veteran's educational and occupational history. In other words, the meaning of "sedentary work" is arrived at inductively with the facts cited providing the context for understanding how the observation applies in a given situation. This allows for individualized assessment; absent such factual context however, the phrase can be regarded as conclusory and meaningless on its own.

Id. (internal citations omitted). Further, when "an examiner describes certain types of functional limitations and still opines that a veteran is capable of sedentary work, the Board may need to determine whether a common-sense inference can be drawn that the concept of sedentary work, as understood by the examiner, does not encompass the physical or mental acts that the veteran is incapable of performing." *Id.*

Whether a veteran is unable to secure or follow substantially gainful employment is a finding of fact that this Court reviews under the "clearly erroneous" standard of review. 38 U.S.C. § 7261(a)(4); *Bowling v. Principi*, 15 Vet.App. 1, 6 (2001). As with any material issue of fact or law, the Board must provide a statement of the reasons or bases for its determination "adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court." *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); see 38 U.S.C. § 7104(d)(1); *Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1990).

In this case, the Board did not provide adequate reasons or bases for its determination that Mr. Haldeman's disabilities did not warrant a TDIU rating. The Board denied TDIU after determining that Mr. Haldeman was capable of performing "sedentary work," a concept it apparently understood as limited to non-physical labor. R. at 11-13 (defining Mr. Haldeman's prior experience as "sedentary, not physical," and not "requir[ing] any heavy physical labor[;]

[i]nstead, the evidence suggests this work was sedentary in nature"). The Board lumped the "managerial" work Mr. Haldeman had performed for 25 years, until 2008, into this category, and deemed him competent to resume such similar employment, because there was "no evidence that this work required any heavy physical labor." *Id.* However, the Board had initially noted that Mr. Haldeman's service-connected right knee and left femur disabilities caused functional limitations aside from his heavy physical labor restrictions, i.e., he was precluded from "excessive standing and squatting," "excessive standing and walking as well as ladder climbing." R. at 10. The Board did not explain whether its understanding of the concept of sedentary work excluded such functional limitations. *See Withers*, 2018 WL 3814883, at *6. Similarly, it is unclear whether Mr. Haldeman may have been suffering from the same functional limitations prior to 2008, when he performed what the Board characterized as sedentary work. R. at 9-10.

These errors in the Board's statement of reasons and bases require remand. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) (remand is appropriate where the Board has "failed to provide an adequate statement of reasons or bases for its determinations, or where the record is otherwise inadequate."). "A remand is meant to entail a critical examination of the justification for the decision. The Court expects that the [Board] will reexamine the evidence of record, seek any other evidence the Board feels is necessary, and issue a timely, well-supported decision in this case." *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991). In particular, the Board must clarify its definition of "sedentary work," including whether Mr. Haldeman's standing, squatting, walking, and ladder-climbing restrictions affect his ability to perform such work, and "undertake any additional fact finding it deems necessary to accomplish that task." *Withers*, 2018 WL 3814883, at *7.

Since this matter is being remanded, the Court will not address Mr. Haldeman's remaining arguments. *See Dunn v. West*, 11 Vet.App. 462, 467 (1998). On remand, he may 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) (stating that, on remand, the Board must consider additional evidence and argument in assessing entitlement to the benefit sought); *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order). The Board must proceed expeditiously, in accordance with 38 U.S.C. §§ 5109B and 7112.

III. CONCLUSION

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

DATED: September 14, 2018

Copies to:

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