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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 18-1353

MICHAEL S. OLIVERIO, APPELLANT,

v.

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

Before ALLEN, *Judge*.

MEMORANDUM DECISION

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

ALLEN, *Judge*: Appellant Michael S. Oliverio served the Nation honorably on active duty in the United States Army from February 1969 to September 1970.¹ In this appeal, which is timely and over which the Court has jurisdiction,² he contests a February 14, 2018, Board of Veterans' Appeals decision that denied entitlement to a total disability rating based on individual unemployability (TDIU) for the period before December 17, 2012.³ Because the Board didn't provide an adequate statement of its reasons or bases for its denial, the Court will set aside the Board decision and remand this matter for further proceedings consistent with this decision.

I. ANALYSIS

Appellant is service connected for PTSD, tinnitus, and hearing loss.⁴ Effective December 2012, his PTSD was rated 100% disabling.⁵ The issue before the Board in the decision on appeal concerned whether appellant is entitled to a TDIU rating in the period before December 2012 when

¹ Record (R.) at 2394.

² See 38 U.S.C. §§ 7266(a), 7252(a).

³ R. at 2-16.

⁴ See R. at 6.

⁵ R. at 719-23.

he was awarded the 100% rating. The Board determined that he was not entitled to TDIU during this period.⁶

TDIU ratings are provided for under 38 C.F.R. § 4.16. Section 4.16(a) addresses schedular TDIU, which applies where a veteran has a single service-connected disability rated at 60% or more, or two disabilities rated collectively at 70% or more where one of them is rated at least 40% or more.⁷ Section 4.16(b) deals with extraschedular TDIU ratings for veterans who do not meet those schedular ratings.⁸ In this case, appellant met the schedular requirements for some of the period at issue, but not others.⁹ Accordingly, the Board applied both subsections (a) and (b) of § 4.16 in the decision on review.¹⁰ The application of these different regulatory provisions is immaterial for the resolution of this appeal. That is so because both sections call for consideration of whether a claimant is "unable to secure and follow a substantially gainful occupation" as a result of service-connected disabilities.¹¹

The Court reviews the Board's findings of fact, including denial of TDIU, under the clearly erroneous standard.¹² The Court will overturn the Board's findings only when, after reviewing all the evidence, and even if some evidence supports the findings, the Court "is left with the definite and firm conviction that a mistake has been committed."¹³ For all findings on a material issue of fact and law, the Board must support its decision with an adequate statement of reasons or bases that enables a claimant to understand the precise bases for the Board's decision and facilitates review in this Court.¹⁴ If the Board failed to do so, remand is appropriate.¹⁵

The Board's statement of reasons or bases for denying appellant a TDIU rating before December 2012 is inadequate. In a September 21, 2016, decision, the Board remanded appellant's claim to obtain an opinion concerning the impact of appellant's service-connected disabilities on

⁶ R. at 14.

⁷ 38 C.F.R. § 4.16(a) (2018).

⁸ 38 C.F.R. § 4.16(b).

⁹ See R. at 6.

¹⁰ *Id.*

¹¹ 38 C.F.R. § 4.16(a), (b).

¹² 38 U.S.C. § 7261(a)(4); *Gilbert v. Derwinski*, 1 Vet.App. 49, 53 (1990).

¹³ *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948).

¹⁴ 38 U.S.C. § 7104(d)(1); *Gilbert*, 1 Vet.App. at 57.

¹⁵ *Tucker v. West*, 11 Vet.App. 369, 374 (1998).

his employment.¹⁶ The Board concluded at the time that the evidence in the record was not sufficient to assess the question concerning TDIU.¹⁷ The Board's remand provided as follows:

Forward the [appellant's] claims file to a **VA vocational specialist** or other appropriately trained person, and ask that he or she review the record. After review of the record, this person should provide an opinion as to whether a service-connected disability (PTSD, bilateral hearing loss and tinnitus), by itself or by their aggregate impairment rendered the [appellant] unable to secure or follow a substantially gainful occupation for the period prior to December 17, 2012.^[18]

On remand, the regional office (RO) did not obtain an opinion from a "VA vocational specialist." Rather, in April 2017, the RO obtained an opinion from Dr. Neil Beesley, who was the Chief of the Social Work Service.¹⁹ Dr. Beesley also submitted an August 2017 addendum opinion.²⁰ Dr. Beesley ultimately opined that he did not believe that appellant's "service connected conditions alone or in the aggregate render [him] unable to secure gainful employment."²¹ Dr. Beesley also stated he "believe[d] [appellant's] training and experience would have allowed the veteran to work in the capacity of Nursing Assistant or perhaps as a Medical Support Assistance [sic] focusing more on scheduling medical appointments and having less physical demands."²² The Board relied on Dr. Beesley's opinions significantly in its decision denying a TDIU rating.²³

The problem with the Board's decision is that it never addresses whether Dr. Beesley qualified as a person who "was appropriately trained" such that he could render a vocational opinion in the same manner as a "VA vocational specialist." Recall that in September 2016, the Board had determined that the then-existing record was insufficient to decide the TDIU question and specifically called for an opinion from a "**VA vocational specialist** or other appropriately trained person."²⁴ In the decision on appeal now, the Board did not mention this remand or consider

¹⁶ R. at 95-99.

¹⁷ R. at 97.

¹⁸ *Id.* (emphasis in original).

¹⁹ R. at 59-60.

²⁰ R. at 45-48.

²¹ R. at 46.

²² R. at 47.

²³ R. at 11-13.

²⁴ R. at 97 (emphasis in original).

in any respect whether Dr. Beesley qualified as a person able to render a vocational opinion. This omission is significant because the Board relied on Dr. Beesley both to support the broad conclusion that appellant is able to "secure and follow a substantially gainful occupation" and also to provide specific examples of jobs the veteran could perform.²⁵

The Board's failure to explain why it was able to rely on Dr. Beesley frustrates the Court's ability to engage in meaningful judicial review. The Board previously concluded the record did not allow it to decide the TDIU question.²⁶ It also specifically determined that it required an opinion on a vocational matter from a vocational expert or someone with similar appropriate expertise.²⁷ Yet, when the matter returned to the Board, the Board said nothing about whether a social worker has the requisite vocational expertise it had deemed important before. And, likewise, it did not explain why it relied on earlier medical examinations when it had determined that the record was not sufficient to make the TDIU determination earlier. There may very well be reasons that support what the Board did, but one can't decide whether this is the case based on the Board's decision. On remand, the Board must explain why it believes Dr. Beesley is qualified to render a vocational opinion as requested in the September 2016 decision, including but not limited to why he is competent to opine as to specific jobs appellant is able to perform.

One final matter. On remand, the Board should also ensure that it fully considers this Court's recent decision in *Ray v. Wilkie*.²⁸ In part, *Ray* provided guidance to the Board concerning the meaning of the phrase "unable to secure and follow a substantially gainful occupation."²⁹ *Ray* is clearly relevant to the Board's consideration of appellant's TDIU claim on remand.

Because the Court is remanding these matters to the Board for readjudication, the Court need not address appellant's remaining arguments now, and appellant can present them to the Board.³⁰ On remand, appellant may submit additional evidence and argument, including the arguments raised before the Court, and has 90 days to do so from the date of VA's postremand

²⁵ R. at 11-13.

²⁶ R. at 97.

²⁷ *Id.*

²⁸ ___ Vet.App. ___, 2019 WL 1192474 (Mar. 14, 2019).

²⁹ *Id.* at *5-*10.

³⁰ See *Best v. Principi*, 15 Vet.App. 18, 19 (2001).

notice.³¹ The Board must consider any such additional evidence or argument submitted.³² The Board must also proceed expeditiously.³³

II. CONCLUSION

After consideration of the parties' briefs, the law, and the record, the Court SETS ASIDE the February 14, 2018, Board decision and REMANDS this matter for further proceedings consistent with this decision.

DATED: April 4, 2019

Copies to:

Zachary M. Stolz, Esq.

VA General Counsel (027)

³¹ *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order); see also *Clark v. O'Rourke*, 30 Vet.App. 92, 97 (2018).

³² *Kay v. Principi*, 16 Vet.App. 529, 534 (2002).

³³ 38 U.S.C. §§ 5109B, 7112.