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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 18-1735

JOHNNIE L. EVANS, APPELLANT,

V.

ROBERT L. WILKIE,
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, Johnnie L. Evans, served in the U.S. Marine Corps from January 1986 to January 1990 and February 1991 to March 1991, and in the U.S. Army from March 2000 to June 2004. Record (R.) at 2903, 2904, 4494. He appeals, through counsel, a January 25, 2018, Board of Veterans' Appeals (Board) decision that denied entitlement to a total disability rating based on individual unemployability (TDIU) prior to October 21, 2011. R. at 1-10. Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). This appeal is timely, and the Court has jurisdiction over the case pursuant to 38 U.S.C. §§ 7252(a) and 7266. For the reasons that follow, the Court will vacate the Board's January 2018 decision and will remand the matter for further proceedings consistent with this decision.

The appellant argues that the Board misinterpreted and misapplied the law and provided inadequate reasons or bases when it determined that, prior to October 21, 2011, he was not employed in a protected work environment and that his employment was not marginal. Appellant's Brief (Br.) at 9-17. He also contends that the Board failed to ensure compliance with the duty to assist when it adjudicated his claim based on insufficient information and failed to ensure that he was afforded an adequate hearing. *Id.* at 17-21. Finally, he asserts that the Board failed to consider

whether he was capable of maintaining substantially gainful employment. *Id.* at 21-24. The Secretary disputes the appellant's contentions. Secretary's Br. at 5-19.

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 (2019); *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."). Section 4.16 states that "[m]arginal employment shall not be considered substantially gainful employment," and further provides that "[m]arginal employment may . . . be held to exist, on a facts found basis (includes but is not limited to employment in a protected environment such as a family business or sheltered workshop), when earned annual income exceeds the poverty threshold." 38 C.F.R. § 4.16(a).

In *Cantrell v. Shulkin*, the Court found that the plain language of § 4.16(a) does not expressly define employment "in a protected environment" and that it was unable to defer to the Secretary's definition, finding that "the Secretary ha[d] refused to proffer any definition of employment 'in a protected environment' for the Court to analyze." 28 Vet.App. 382, 390 (2017) (noting that the Secretary had argued that "'VA has purposely chosen not to define 'employment in a protected environment,' leaving it to the discretion of the factfinder on [a] case-by-case basis'"). The Court concluded that, absent an articulated standard for employment "in a protected environment," it was unable to effectively review the Board's decision. *Id.* at 392; *see Allday v. Brown*, 7 Vet.App. 517, 527 (1995) (the Board must include a written statement of the reasons or bases for its findings and conclusions on all material issues of fact and law presented on the record adequate to enable an appellant to understand the precise basis for the Board's decision, and to facilitate informed review in this Court).

The Court concludes that *Cantrell* is dispositive here. In the decision on appeal, the Board found that the evidence did not establish that the appellant's employment prior to October 21, 2011, constituted a protected environment. R. at 6. The Board reasoned that his employment was not marginal because "[his] employer was always able to move [him] to a different full-time position that accommodated his limitations, and he was paid at a normal rate." R. at 7. The Board also found no indication that the appellant's absences from work due to service-connected disabilities caused him to be terminated from his position. R. at 7-8. The Board looked to the Department of

Labor's definition of the term "sheltered workshop" and found that the appellant's situation did not meet those criteria. R. at 8.

However, the Board did not define "employment in a protected environment." Although the Board relied on the fact that the appellant's employer paid him at a regular rate, accommodated him, and did not terminate him despite his multiple absences, R. at 6-8, as the appellant notes, Appellant's Br. at 12, a person can work and still be entitled to TDIU if that employment were in a protected environment, *see Ortiz-Valles*, 28 Vet.App. at 71. Further, the Board did not explain why its findings that the appellant's employer paid him at a normal rate, accommodated him, and did not terminate him for his multiple absences were relevant or authoritative in assessing whether his employment was in a protected environment, or why the Department of Labor's definition of a "sheltered workshop" should be used in VA's context. The lack of any articulated standard of "employment in a protected environment" necessarily renders the Board's decision incapable of review by the Court. *See Cantrell*, 28 Vet.App. at 392; *see also Allday*, 7 Vet.App. at 527; *Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990). Accordingly, the Court holds that the Board provided inadequate reasons or bases for its decision and that remand is required.

Given this disposition, the Court need not address the appellant's remaining arguments, which could not result in a remedy greater than remand. *See Best v. Principi*, 15 Vet.App. 18, 20 (2001). 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 Board shall proceed expeditiously, in accordance with 38 U.S.C. §§ 5109 and 7112 (requiring the Secretary to provide for "expeditious treatment" of claims remanded by the Board or the Court).

After consideration of the parties' briefs and a review of the record, the Board's January 25, 2018, decision denying entitlement to TDIU prior to October 21, 2011, is VACATED, and the matter is REMANDED for further proceedings consistent with this decision.

DATED: August 13, 2019

Copies to:
Zachary M. Stolz, Esq.
VA General Counsel (027)