



BOARD OF VETERANS' APPEALS
FOR THE SECRETARY OF VETERANS AFFAIRS

IN THE APPEAL OF
LARRY MAY


Docket No. 15-42 472

DATE: July 30, 2019

ORDER

The issue of entitlement to an increased rating for posttraumatic stress disorder (PTSD) is dismissed without prejudice.

Entitlement to a rating of total disability based on individual unemployability is denied.

FINDING OF FACT

1. In November 2016 statement, the Veteran indicated his desire to withdraw his claim seeking an increased rating for PTSD.
2. The evidence of record does not show that the Veteran is unable to secure and follow a substantially gainful occupation due to service connected disabilities.

CONCLUSION OF LAW

1. The criteria for withdrawal of the substantive appeal as to the issue of entitlement to an increased rating for PTSD have been met. 38 U.S.C. § 7105; 38 C.F.R. §§ 20.101, 20.202, 20.204.
2. The criteria for entitlement to a rating of TDIU have not been met. 38 U.S.C. §§ 1155, 5103, 5103A, 5107(b); 38 C.F.R. §§ 3.340, 3.341, 4.16.

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REASONS AND BASES FOR FINDING AND CONCLUSION

The Veteran served on active duty from August 1974 to May 1976, from December 1990 to May 1991, and from May 1991 to July 2000.

Withdrawal of Claim

A veteran may withdraw his appeal in writing at any time before the Board promulgates a final decision. 38 C.F.R. § 20.204. When a veteran does so, the withdrawal effectively creates a situation in which an allegation of error of fact or law no longer exists. In such an instance, the Board does not have jurisdiction to review the appeal, and a dismissal is then appropriate. 38 U.S.C. § 7105(d); 38 C.F.R. §§ 20.101, 20.202.

Here, in November 2016, the Veteran submitted a statement indicating that he wished to withdraw his claim for an increased rating for PTSD. In view of the Veteran's expressed desire, the Board concludes that his intent was to withdraw these claims and further action concerning these claims is not appropriate.

Entitlement to a rating of total disability based on individual unemployability

On July 10, 2012, the Veteran applied for a TDIU rating. However, as unemployability was raised by the record in an increased rating claim dated March 9, 2012 for the Veteran's service-connected shoulder disability, a TDIU claim is inferred under *Rice v. Shinseki*, 22 Vet. App. 447 (2009) as of that date. Thus, the period for the Veteran's TDIU claim begins on March 9, 2012.

The Veteran seeks a total disability rating based on individual unemployability (TDIU). His claim is based primarily on the severity of his PTSD and his right shoulder disability. The Board is unable to grant TDIU in this matter because the Board does not find the Veteran incapable of securing and following substantially gainful employment *due to service-connected disabilities*. The Board finds that any unemployability is more due to the Veteran's non-service connected disabilities.

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Total disability is considered to exist when there is any impairment which is sufficient to render it impossible for the average person to follow a substantially gainful occupation. 38 C.F.R. § 3.340(a)(1). A total disability rating for compensation purposes may be assigned on the basis of individual unemployability when the disabled person is, in the judgment of the rating agency, unable to secure or follow a substantially gainful occupation as a result of service-connected disabilities. 38 C.F.R. § 4.16(a). In such an instance, if there is only one such disability, it must be rated at 60 percent or more; if there are two or more disabilities, at least one disability must be rated at 40 percent or more, and sufficient additional disability must bring the combined rating to 70 percent or more. *Id.*

If a Veteran fails to meet the threshold minimum percentage standards enunciated in 38 C.F.R. § 4.16(a), rating boards should refer to the Director of Compensation and Pension Service for extra-schedular consideration all cases where the Veteran is unable to secure or follow a substantially gainful occupation by reason of service-connected disability. 38 C.F.R. § 4.16(b). *See also Fanning v. Brown*, 4 Vet. App. 225 (1993). The Board must consider if the Veteran can obtain employment more than marginal income (outside of a protected environment) as determined by the U.S. Department of Commerce to be the poverty threshold for one person. *See Ray v. Wilkie*, 31 Vet. App. 58 (2019).

Thus, the Board must evaluate whether there are circumstances in the Veteran's case, apart from any non-service-connected conditions and advancing age, which would justify a TDIU. 38 C.F.R. §§ 3.341(a), 4.19. *See Van Hoose v. Brown*, 4 Vet. App. 361 (1993); see also *Hodges v. Brown*, 5 Vet. App. 375 (1993); *Blackburn v. Brown*, 4 Vet. App. 395 (1993). The Veteran's service-connected disabilities, employment history, educational and vocational attainment, and all other factors having a bearing on the issue must be addressed. 38 C.F.R. § 4.16(b).

After a review of the evidence of record, the Board determines that TDIU is not warranted.

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While the Veteran formally applied for TDIU in July 2012, his increased rating claim for his right shoulder disability dates back a few months earlier, to March 2012. However, the Veteran was granted a temporary 100 percent rating in a May 2012 rating decision, effective until July 1, 2012. Because the Veteran is already rated at 100 percent for a single disability until July 1, 2012, the period on appeal begins July 1, 2012. *See Bradley v. Peake*, 22 Vet. App. 280 (2008).

The Veteran's service connected disabilities consist of PTSD, currently rated at 70 percent from November 9, 2010; residuals of a right shoulder injury, rated 20 percent from July 1, 2012, and 40 percent from February 9, 2018; tinnitus currently rated at 10 percent; and residuals of a right shoulder scar, currently rated at noncompensable. Thus, the Veteran's combined rating for the period on appeal is 80 percent. He has met the schedular criteria for TDIU under 38 C.F.R. 4.16(a).

However, the Board concludes that TDIU is not warranted, based on the evidence of record, because any inability of the Veteran to secure or follow a substantially gainful occupation is not a result of his service-connected disabilities. *See* 38 C.F.R. § 4.16(b).

With respect to the medical evidence, the Veteran's VA medical treatment records indicate that he was not necessarily precluded from work, and that any inability to secure or follow a substantially gainful occupation was a result of non-service connected disabilities. Specifically, the Veteran has not worked in his usual occupation as bricklayer since before the appeal period. Further, in a statement dated April 2012, the Veteran states he is not able to work due to service connected conditions. An SSA decision dated April 2014 specifies that the Veteran has been disabled since June 15, 2009 because of PTSD and a right shoulder disability (but also disabilities of the low back and neck – which are not service connected.) Indeed, the evidence of record shows that the Veteran's ability to work is impaired by psychiatric and physical limitations. In a November 2015 letter from Dr. B.R., MD, she opines that the Veteran is disabled from gainful employment for "psychiatric reasons." While she does not elaborate, the record shows that the Veteran's ability to understand and remember detailed instructions is markedly limited. Further, a June 2012 Disability Benefits Questionnaire response indicates

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that he has intrusive flashbacks, hypervigilance, and poor concentration due to PTSD. The Veteran has difficulty in crowds, and his February 2016 examiner reports that his wife has often found the Veteran hiding in the closet. The Veteran's January 2017 C&P examiner reported that the Veteran has at least a low average intellectual ability, cannot read or write, and can has difficulty with basic calculations. As for his shoulder, the Veteran's May 2018 C&P examiner explained that his right shoulder symptoms, include neuropathy, as well as an inability to reach overhead, lift, carry, or grip using his right hand; these symptoms generally preclude the Veteran, who is right handed, from using his right hand. Thus, the Board acknowledges the medical and lay evidence indicating an inability to work due to PTSD and the inability to use his right arm or hand.

However, the fact that even a medical professional finds a Veteran unemployable due to a service-connected disability is not dispositive, as the Board has ultimate responsibility for determining whether a veteran is unemployable. *See Geib v. Shinseki*, 733 F.3d 1350, 1354 (Fed. Cir. 2013). Here, the Board finds that despite his limitations, the Veteran is not unemployable. The Board notes that even before his shoulder disability advanced to the point where he could not use his right arm, the Veteran's psychiatric disorder did not prevent him from working. This implies that were it not for the shoulder disability, he would still be able to work in some capacity. Moreover, the evidence, including the Veteran's January 2017 C&P examination report, indicates that the Veteran's psychiatric disability does not prevent him from working in a setting where he can avoid potential stressors.

The report also notes that despite his right shoulder disability, the Veteran can learn to use his left arm and hand for basic activities. Indeed, the record shows that during the appeal period, the Veteran was capable of recreational fishing – an activity that requires the strenuous use of at least one arm. Since the Veteran has been observed as capable of doing basic activities despite his right shoulder disability, this shoulder disability does not preclude substantially gainful employment. Accordingly, the Board determines that despite his psychiatric limitations and the inability to use his right arm, the Veteran is not incapable of finding and keeping substantially gainful employment.

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Because the Board finds that the Veteran is not unable to work due to service-connected conditions, a TDIU rating cannot be awarded. The Board's decision in this case is binding only with respect to the instant matter decided. This decision is not precedential, and does not establish VA policies or interpretations of general applicability. 38 C.F.R. § 20.1303.



B.T. KNOPE
Veterans Law Judge
Board of Veterans' Appeals

ATTORNEY FOR THE BOARD

Z. Maskatia, Associate Counsel



YOUR RIGHTS TO APPEAL OUR DECISION

The attached decision by the Board of Veterans' Appeals (Board) is the final decision for all issues addressed in the "Order" section of the decision. The Board may also choose to remand an issue or issues to the local VA office for additional development. If the Board did this in your case, then a "Remand" section follows the "Order." However, you cannot appeal an issue remanded to the local VA office because a remand is not a final decision. *The advice below on how to appeal a claim applies only to issues that were allowed, denied, or dismissed in the "Order."*

If you are satisfied with the outcome of your appeal, you do not need to do anything. Your local VA office will implement the Board's decision. However, if you are not satisfied with the Board's decision on any or all of the issues allowed, denied, or dismissed, you have the following options, which are listed in no particular order of importance:

- Appeal to the United States Court of Appeals for Veterans Claims (Court)
- File with the Board a motion for reconsideration of this decision
- File with the Board a motion to vacate this decision
- File with the Board a motion for revision of this decision based on clear and unmistakable error.

Although it would not affect this BVA decision, you may choose to also:

- Reopen your claim at the local VA office by submitting new and material evidence.

There is *no* time limit for filing a motion for reconsideration, a motion to vacate, or a motion for revision based on clear and unmistakable error with the Board, or a claim to reopen at the local VA office. Please note that if you file a Notice of Appeal with the Court and a motion with the Board at the same time, this may delay your appeal at the Court because of jurisdictional conflicts. If you file a Notice of Appeal with the Court *before* you file a motion with the Board, the Board will not be able to consider your motion without the Court's permission or until your appeal at the Court is resolved.

How long do I have to start my appeal to the court? You have **120 days** from the date this decision was mailed to you (as shown on the first page of this decision) to file a Notice of Appeal with the Court. If you also want to file a motion for reconsideration or a motion to vacate, you will still have time to appeal to the court. *As long as you file your motion(s) with the Board within 120 days of the date this decision was mailed to you*, you will have another 120 days from the date the Board decides the motion for reconsideration or the motion to vacate to appeal to the Court. You should know that even if you have a representative, as discussed below, *it is your responsibility to make sure that your appeal to the Court is filed on time*. Please note that the 120-day time limit to file a Notice of Appeal with the Court does not include a period of active duty. If your active military service materially affects your ability to file a Notice of Appeal (e.g., due to a combat deployment), you may also be entitled to an additional 90 days after active duty service terminates before the 120-day appeal period (or remainder of the appeal period) begins to run.

How do I appeal to the United States Court of Appeals for Veterans Claims? Send your Notice of Appeal to the Court at:

Clerk, U.S. Court of Appeals for Veterans Claims
625 Indiana Avenue, NW, Suite 900
Washington, DC 20004-2950

You can get information about the Notice of Appeal, the procedure for filing a Notice of Appeal, the filing fee (or a motion to waive the filing fee if payment would cause financial hardship), and other matters covered by the Court's rules directly from the Court. You can also get this information from the Court's website on the Internet at: <http://www.uscourts.cavc.gov>, and you can download forms directly from that website. The Court's facsimile number is (202) 501-5848.

To ensure full protection of your right of appeal to the Court, you must file your Notice of Appeal **with the Court**, not with the Board, or any other VA office.

How do I file a motion for reconsideration? You can file a motion asking the Board to reconsider any part of this decision by writing a letter to the Board clearly explaining why you believe that the Board committed an obvious error of fact or law, or stating that new and material military service records have been discovered that apply to your appeal. It is important that your letter be as specific as possible. A general statement of dissatisfaction with the Board decision or some other aspect of the VA claims adjudication process will not suffice. If the Board has decided more than one issue, be sure to tell us which issue(s) you want reconsidered. Issues not clearly identified will not be considered. Send your letter to:

Litigation Support Branch
Board of Veterans' Appeals
P.O. Box 27063
Washington, DC 20038

Remember, the Board places no time limit on filing a motion for reconsideration, and you can do this at any time. However, if you also plan to appeal this decision to the Court, you must file your motion within 120 days from the date of this decision.

How do I file a motion to vacate? You can file a motion asking the Board to vacate any part of this decision by writing a letter to the Board stating why you believe you were denied due process of law during your appeal. *See* 38 C.F.R. 20.904. For example, you were denied your right to representation through action or inaction by VA personnel, you were not provided a Statement of the Case or Supplemental Statement of the Case, or you did not get a personal hearing that you requested. You can also file a motion to vacate any part of this decision on the basis that the Board allowed benefits based on false or fraudulent evidence. Send this motion to the address on the previous page for the Litigation Support Branch, at the Board. Remember, the Board places no time limit on filing a motion to vacate, and you can do this at any time. However, if you also plan to appeal this decision to the Court, you must file your motion within 120 days from the date of this decision.

How do I file a motion to revise the Board's decision on the basis of clear and unmistakable error? You can file a motion asking that the Board revise this decision if you believe that the decision is based on "clear and unmistakable error" (CUE). Send this motion to the address on the previous page for the Litigation Support Branch, at the Board. You should be careful when preparing such a motion because it must meet specific requirements, and the Board will not review a final decision on this basis more than once. You should carefully review the Board's Rules of Practice on CUE, 38 C.F.R. 20.1400-20.1411, and *seek help from a qualified representative before filing such a motion*. See discussion on representation below. Remember, the Board places no time limit on filing a CUE review motion, and you can do this at any time.

How do I reopen my claim? You can ask your local VA office to reopen your claim by simply sending them a statement indicating that you want to reopen your claim. However, to be successful in reopening your claim, you must submit new and material evidence to that office. *See* 38 C.F.R. 3.156(a).

Can someone represent me in my appeal? Yes. You can always represent yourself in any claim before VA, including the Board, but you can also appoint someone to represent you. An accredited representative of a recognized service organization may represent you free of charge. VA approves these organizations to help veterans, service members, and dependents prepare their claims and present them to VA. An accredited representative works for the service organization and knows how to prepare and present claims. You can find a listing of these organizations on the Internet at: <http://www.va.gov/vso/>. You can also choose to be represented by a private attorney or by an "agent." (An agent is a person who is not a lawyer, but is specially accredited by VA.)

If you want someone to represent you before the Court, rather than before the VA, you can get information on how to do so at the Court's website at: <http://www.uscourts.cavc.gov>. The Court's website provides a state-by-state listing of persons admitted to practice before the Court who have indicated their availability to the represent appellants. You may also request this information by writing directly to the Court. Information about free representation through the Veterans Consortium Pro Bono Program is also available at the Court's website, or at: <http://www.vetsprobono.org>, mail@vetsprobono.org, or (855) 446-9678.

Do I have to pay an attorney or agent to represent me? An attorney or agent may charge a fee to represent you after a notice of disagreement has been filed with respect to your case, provided that the notice of disagreement was filed on or after June 20, 2007. *See* 38 U.S.C. 5904; 38 C.F.R. 14.636. If the notice of disagreement was filed before June 20, 2007, an attorney or accredited agent may charge fees for services, but only after the Board first issues a final decision in the case, and only if the agent or attorney is hired within one year of the Board's decision. *See* 38 C.F.R. 14.636(c)(2).

The notice of disagreement limitation does not apply to fees charged, allowed, or paid for services provided with respect to proceedings before a court. VA cannot pay the fees of your attorney or agent, with the exception of payment of fees out of past-due benefits awarded to you on the basis of your claim when provided for in a fee agreement.

Fee for VA home and small business loan cases: An attorney or agent may charge you a reasonable fee for services involving a VA home loan or small business loan. *See* 38 U.S.C. 5904; 38 C.F.R. 14.636(d).

Filing of Fee Agreements: If you hire an attorney or agent to represent you, a copy of any fee agreement must be sent to VA. The fee agreement must clearly specify if VA is to pay the attorney or agent directly out of past-due benefits. *See* 38 C.F.R. 14.636(g)(2). If the fee agreement provides for the direct payment of fees out of past-due benefits, a copy of the direct-pay fee agreement must be filed with the agency of original jurisdiction within 30 days of its execution. A copy of any fee agreement that is not a direct-pay fee agreement must be filed with the Office of the General Counsel within 30 days of its execution by mailing the copy to the following address: Office of the General Counsel (022D), Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420. *See* 38 C.F.R. 14.636(g)(3).

The Office of the General Counsel may decide, on its own, to review a fee agreement or expenses charged by your agent or attorney for reasonableness. You can also file a motion requesting such review to the address above for the Office of the General Counsel. *See* 38 C.F.R. 14.636(i); 14.637(d).