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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 18-2450

LADELL G. PRESTON, APPELLANT,

v.

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

Before BARTLEY, *Chief Judge*.

MEMORANDUM DECISION

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

BARTLEY, *Chief Judge*: Self-represented veteran Ladell G. Preston appeals an April 27, 2018, Board of Veterans' Appeals (Board) decision denying entitlement to an effective date prior to March 19, 2009, for the award of a total disability evaluation based on individual unemployability (TDIU). Record (R.) at 2-8. For the reasons that follow, the Court will set aside the April 2018 Board decision and remand this matter for readjudication consistent with this decision.

I. FACTS

Mr. Preston served on active duty in the U.S. Navy from April 1969 to January 1973. Following service, he filed a service-connection claim for a torn medial meniscus of his right knee and the VA regional office (RO) awarded service connection with a 20% initial evaluation effective October 23, 1978. R. at 3209. Mr. Preston's combined evaluation was 20% from October 23, 1978. *Id.*

In August 1999, during VA treatment, Mr. Preston reported being unemployed since January 1999, when he injured his back on the job as a delivery driver. R. at 2648. In January 2000, a private physician assessed his right knee as causing inability to squat or kneel with difficulty bending, standing for long periods of time, and walking long distances. R. at 2710. In

August 2000, the RO awarded a separate compensable evaluation for osteoarthritis of his right knee effective October 1, 1999. R. at 2578. Mr. Preston's combined evaluation was 30% from October 1, 1999. R. at 2576.

During a May 2007 VA examination, Mr. Preston reported retiring due to back and leg pain. R. at 1818. During a January 2008 VA examination, he reported retiring in 1999 due to post-traumatic stress disorder (PTSD). R. at 1731.

On March 19, 2009, Mr. Preston filed a claim to reopen his previously denied claim for service connection for PTSD, R. at 1647-48; and in June 2010, the RO awarded service connection for PTSD with a 50% initial evaluation effective March 19, 2009, R. at 1141, 1160, 1171.¹ He immediately appealed this initial evaluation and effective date. R. at 1459. In October 2010, he filed a formal claim for TDIU, reporting that he had last worked in January 1999 and became too disabled to work in January 2005 due to knee problems and depression. R. at 1388. In March 2012, the RO increased his initial PTSD evaluation to 70% in a rating decision, R. at 1170-71, and denied a PTSD service connection effective date prior to March 19, 2009, in a Statement of the Case (SOC), R. at 1140-64. Mr. Preston did not perfect this appeal. R. at 7, 17. His combined evaluation was 80% from March 19, 2009. R. at 1172.

In September 2012, the RO awarded TDIU effective August 2, 2010, R. at 911; and in February 2013, Mr. Preston appealed this effective date, R. at 789-90, 896. In a June 2016 rating decision and SOC, the RO awarded an earlier effective date for TDIU of March 19, 2009, the date of his claim to reopen. R. at 256-87, 291-293. Mr. Preston timely perfected his appeal as to this issue. R. at 244.

In the April 2018 decision on appeal, the Board found that prior to March 19, 2009, Mr. Preston was service connected for right knee torn meniscus and osteoarthritis and did not meet the schedular criteria for TDIU with a 30% combined evaluation. R. at 5. The Board noted evidence of a January 1999 post-service back injury and conflicting lay statements as to the reasons he stopped working. R. at 6-7. The Board concluded that prior to March 19, 2009, his service-connected right knee disabilities alone did not cause unemployability. R. at 7-8.

¹ Mr. Preston initially filed a claim for service connection for PTSD in October 1995, and both the RO and Board denied that claim. R. at 2788-2795, 3057. In April 2002, he filed a claim to reopen his service-connection claim for PTSD. R. at 2142, 2144-45. The RO again denied service connection in May 2003, R. at 2053-55, and the Board denied service connection for PTSD in March 2008 and August 2008, R. at 1666-1675.

II. JURISDICTION AND STANDARD OF REVIEW

Mr. Preston's appeal is timely and the Court has jurisdiction to review the April 2018 Board decision pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). Single-judge disposition is appropriate in this case. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990).

The Board's determination regarding whether a veteran is unable to secure or follow substantially gainful employment is a finding of fact that the Court reviews under the "clearly erroneous" standard set forth in 38 U.S.C. § 7261(a)(4). *See Bowling v. Principi*, 15 Vet.App. 1, 6 (2001). "A factual finding 'is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Hersey v. Derwinski*, 2 Vet.App. 91, 94 (1992) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

The Board's determination as to whether to award TDIU under § 4.16(a) or to refer for extraschedular TDIU consideration under § 4.16(b), as with its determinations on any material issue of fact or law presented on the record, must be supported with an adequate statement of reasons or bases that enables the claimant to understand the precise basis for that determination and facilitates informed review in this Court. *See* 38 U.S.C. § 7104(d)(1); *Washington v. Nicholson*, 19 Vet.App. 362, 366–67 (2005); *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990). To comply with this requirement, the Board must analyze the credibility and probative value of evidence, account for evidence it finds persuasive or unpersuasive, and provide reasons for rejecting material evidence favorable to the claimant. *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table).

III. ANALYSIS

Under a liberal construction of his brief, *see De Perez v. Derwinski*, 2 Vet.App. 85, 86 (1992), Mr. Preston argues that the Board failed to provide adequate reasons or bases for not referring his TDIU claim to VA's Compensation Service Director for consideration of extraschedular TDIU prior to March 19, 2009. Appellant's Brief (Br.) at 8. The Secretary agrees, noting that the Board cited the definition of "substantially gainful employment" found in the VA Adjudication Manual (M21-1), but that since the Board decision in this case the Court issued *Ray v. Wilkie*, which clarified the term "substantially gainful occupation" as used in 38 C.F.R. § 4.16(b). 31 Vet.App. 58 (2019). Secretary's Br. at 6-7.

TDIU is available to veterans who are "unable to secure or follow a substantially gainful occupation as a result of service-connected disabilities." 38 C.F.R. § 4.16 (2019). When such unemployability is shown and the veteran meets certain numeric evaluation requirements, the Board may award TDIU in the first instance, 38 C.F.R. § 4.16(a); otherwise, the Board may only refer the case to the Compensation Service Director for consideration of extraschedular TDIU, 38 C.F.R. § 4.16(b). *See Cantrell v. Shulkin*, 28 Vet.App. 382, 387 (2017).

When determining whether a veteran can secure and follow a substantially gainful occupation, the Board is required to consider and discuss the veteran's educational and occupational history and explicitly relate these factors to the disabilities of the individual veteran. *Cathell v. Brown*, 8 Vet.App. 539, 544 (1996). "[P]otentially relevant factors" include, inter alia, whether the veteran has "the physical ability (both exertional and nonexertional) to perform the type of activities ... required by the occupation at issue," as well as

whether the veteran has the mental ability to perform the activities required by the occupation at issue. Factors that may be relevant include, but are not limited to, the veteran's limitations, if any, concerning memory, concentration, [and the] ability to adapt to change, handle work place stress, get along with coworkers, and demonstrate reliability and productivity.

Ray v. Wilkie, 31 Vet.App. 58, 73 (2019). Although these factors are not a "checklist that must be run completely through in every case," discussion of them is necessary if they are raised by the evidence of record.

Here the Board found that Mr. Preston did not meet the schedular criteria for TDIU under section 4.16(a), and noted that the Board has no authority to grant TDIU on an extraschedular basis under section 4.16(b), but may refer the claim to the Compensation Service Director for extraschedular consideration if there is a plausible basis for concluding that the veteran is unable to secure and follow a gainful occupation. R. at 5. However, the Board made no finding as to whether there is a plausible basis here for concluding that Mr. Preston is unable to secure and follow a gainful occupation. The Board further noted that in the absence of a referral to VA's Compensation Service Director the Board should consider whether a remand for such referral is warranted, but offered no discussion of whether a remand for referral is warranted in this case. *Id.*

Moreover, the Board did not consider the January 2000 private treatment records showing Mr. Preston's limitations related to the service-connected right knee. R. at 6-7, 2710. The Board failed to consider whether his inability to squat or kneel and difficulty bending, standing for long periods of time, and walking long distances impair his physical ability to perform the type of

activities required to secure and follow a substantially gainful occupation. R. at 5-8; *see Ray*, 31 Vet.App. at 73. Without an analysis of such factors, the Court is unable to effectively review the Board's conclusions pertinent to this appealed issue. *See* 38 U.S.C. § 7104(d)(1); *Ray*, 31 Vet.App. at 74; *Allday v. Brown*, 7 Vet.App. 517, 527 (1995). And, the Court is unable to conclude that the Board's inadequate discussion did not prejudice Mr. Preston. *See* 38 U.S.C. § 7261(b)(2); *Southall-Norman v. McDonald*, 28 Vet.App. 346, 356 (2016) (remanding where the Court was unable to conclude that a reasons or bases error was harmless). Accordingly, remand is warranted for the Board to readjudicate Mr. Preston's entitlement to TDIU prior to March 19, 2009, in accordance with this decision. *See Ray*, 31 Vet.App. at 74; *see also Hensley v. West*, 212 F.3d 1255, 1263 (Fed. Cir. 2000) (stating that "appellate tribunals are not appropriate fora for factfinding").

To the extent that Mr. Preston makes arguments concerning his service-connected PTSD supporting an award of TDIU prior to March 19, 2009, the Court notes that the effective date for the award of service connection for PTSD is March 19, 2009. R. at 926. As even he seems to acknowledge, VA may only consider service-connected conditions in adjudicating entitlement to TDIU, and may not consider non-service-connected conditions. Appellant's Br. at 8; *Hatlestad v. Brown*, 5 Vet.App. 524, 529 (1993) ("In determining whether a claimant can secure or follow a substantially gainful occupation, the central inquiry is 'whether the veteran's service-connected disabilities alone are of sufficient severity to produce unemployability.'"). Therefore, prior to March 19, 2009, PTSD cannot support an award of TDIU on either a schedular or extraschedular basis.

In the April 2018 decision on appeal, the Board found that Mr. Preston did not perfect an appeal of the June 2010 rating decision assigning an effective date of March 19, 2009, for the award of service connection for PTSD and that the RO's decision as to this issue was final. R. at 6-7. Mr. Preston makes no argument claiming that he did perfect this appeal, or that the Board's finding that he failed to perfect this appeal is erroneous. As the Secretary correctly argues, Mr. Preston can reach the issue of an earlier effective date for the award of service connection for PTSD by filing a motion for revision of the June 2010 rating decision based on clear and unmistakable error (CUE). *See* 38 C.F.R. § 3.105(a) (2019); *Disabled Am. Veterans v. Gober*, 234 F.3d 682, 686 (Fed. Cir. 2000) (describing a CUE motion as a collateral attack on a prior final agency decision).

On remand, Mr. Preston is free to present any additional arguments and evidence to the Board, including any additional arguments he made to this Court in connection with his appeal, 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 Court reminds the Board that "[a] remand is meant to entail a critical examination of the justification for [the Board's] decision," *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991), and must be performed in an expeditious manner in accordance with 38 U.S.C. § 7112.

IV. CONCLUSION

Upon consideration of the foregoing, the Board's April 27, 2018, decision is SET ASIDE and the matter is REMANDED for readjudication consistent with this decision.

DATED: January 31, 2020

Copies to:

Ladell G. Preston

VA General Counsel (027)