



BOARD OF VETERANS' APPEALS

DEPARTMENT OF VETERANS AFFAIRS

IN THE APPEAL OF
SCOTT L. BRAUN
REPRESENTED BY
Stacey Penn Clark, Attorney

SS [REDACTED]
Docket No. 17-06 388

DATE: June 21, 2019

ORDER

A total disability rating due to individual unemployability (TDIU) as a result of service-connected disabilities is denied.

FINDING OF FACT

The Veteran's service-connected disability did not preclude him from securing and following substantially gainful employment consistent with his educational and occupational experience.

CONCLUSION OF LAW

The criteria for entitlement to a TDIU have not been met. 38 U.S.C. §§ 1155, 5107; 38 C.F.R. §§ 3.340, 3.341, 4.1, 4.10, 4.15, 4.16, 4.19.

REASONS AND BASES FOR FINDING AND CONCLUSION

The Veteran served on active duty from April 1985 to May 1991.

This matter comes before the Board of Veterans' Appeals (Board) on appeal from an October 2013 rating decision issued by a Department of Veterans Affairs (VA)

Regional Office (RO). This matter was previously before the Board in February 2019, at which time it was remanded for further development.

TDIU

A total disability rating may be granted where the schedular rating is less than 100 percent and the veteran is unable to secure or follow a substantially gainful occupation as a result of service-connected disabilities. Generally, to be eligible for a TDIU, a percentage threshold must be met. 38 C.F.R. §§ 3.340, 3.341, 4.16(a).

If there is only one service-connected disability, or two or more with the same etiology or affecting the same body system, the disability rating must be 60 percent or more. *Id.* If there are two or more disabilities, there shall be at least one disability rated at 40 percent or more, and sufficient additional disabilities to bring the combined rating to 70 percent or more. *Id.*

The Veteran is service connection for posttraumatic stress disorder (PTSD), evaluated as 70 percent disabling effective March 22, 2012. The criteria for schedular consideration for TDIU have been met per 38 C.F.R. § 4.16(a).

The remaining question concerns whether the Veteran is unable to secure or follow a substantially gainful occupation as a result of service-connected disabilities. *See* 38 C.F.R. § 4.16 (a). The fact that a veteran is unemployed or has difficulty finding employment does not warrant assignment of a TDIU alone as a high rating itself establishes that his disability makes it difficult for him to obtain and maintain employment. *See Van Hoose v. Brown*, 4 Vet. App. 361, 363 (1993).

Rather, the evidence must show that he is incapable “of performing the physical and mental acts required” to be employed. *See Van Hoose*, 4 Vet. App. at 363. Thus, the central question is “whether the [V]eteran’s service connected disabilities alone are of sufficient severity to produce unemployability,” and not whether the Veteran could find employment. *Hatlestad v. Brown*, 5 Vet. App. 524, 529 (1993). Consideration may be given to a veteran’s education, training, and special work experience, but not to his age or to impairment caused by nonservice-connected disabilities. *See* 38 C.F.R. §§ 3.341, 4.16, 4.19; *see also Van Hoose v. Brown*,

4 Vet. App. 361, 363. Entitlement to TDIU is based on an individual's particular circumstances. *Rice v. Shinseki*, 22 Vet. App. 447, 452 (2009).

The Board concludes that the preponderance of the evidence is against finding that the Veteran is unable to secure or follow a substantially gainful occupation as a result of his service-connected disability.

His November 2012 VA 21-8940 shows that he last worked between 2005 to 2012 as a postal clerk. He reported being a high school graduate with no other education or training. In a June 2012 statement, he asserted that he had missed work because of physical and emotional problems.

An August 2013 VA 21-4192 from his last employer documented that he resigned from his position and was absent for any concessions or lost time during his employment. Medical records show that in January 2013 and March 2013, he reported that stopped working as a result of symptoms associated with neuropathy.

Records obtained from the Social Security Administration (SSA) indicate that the Veteran became disabled in November 2012 due primarily to peripheral arterial disease and secondarily to diabetic/peripheral neuropathy. The accompanying March 2013 evaluation found that with regard to vocational capacity, there was no evidence of limitation when following and understanding simple directions or performing simple tasks independently. He was also not limited in relating adequately with others, or appropriately dealing with stress. He had limitations when attempting to maintain attention/concentration and performing complex tasks independently.

In September 2013, a VA examiner determined that the Veteran's claimed anxiety did not cause functional impairment and did not impact gainful employment. It was noted that the Veteran did not have panic attacks nor other disabling symptoms.

At a March 2019 PTSD VA examination, the Veteran's symptoms were found to manifest in occupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupation tasks although generally functioning satisfactorily, with routine behavior, self-care, and conversation normal. The examiner noted that his ability to work well with

co-workers, supervisors, subordinates, and customers in most employment settings would not likely be adversely affected. However, he would be adversely affected by a work setting that involved unexpected loud noises and crowded situations. His ability to concentrate and follow instructions were also affected by his symptoms. Overall, the examiner indicated that the Veteran's PTSD was not likely to have a substantial adverse effect on his ability to be productive and reliably get his work done in most employment settings.

Based on the evidence above, the Board finds that the evidence does not reflect that the Veteran was unable to secure or follow a substantially gainful occupation due to his service-connected disability. The evidence of record, including SSA documentation and his own reports, indicate that he became disabled primarily due to peripheral arterial disease and secondarily to diabetic/peripheral neuropathy. However, the Board may not consider any disabilities other than the Veteran's service-connected disabilities during this period. *Rice*, 22 Vet. App. at 455. The evidence shows that, while the Veteran's service-connected PTSD does have some adverse effect on his mental abilities, the service-connected disability alone did not render him unemployable. The Board finds that the current 70 percent combined evaluation compensates the Veteran for the functional impact of his symptomatology. 38 C.F.R. § 4.1.

(Continued on the next page)

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Accordingly, the claim is denied. 38 U.S.C. § 1155; 38 C.F.R. § 4.16. In reaching this conclusion, the Board has considered the applicability of the benefit-of-the-doubt doctrine. However, as the preponderance of the evidence is against the claim, that doctrine is not applicable. 38 U.S.C. § 5107(b). |



Paul Sorisio
Veterans Law Judge
Board of Veterans' Appeals

ATTORNEY FOR THE BOARD

K. Cruz, Associate Counsel

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.



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).