

**IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS**

HECTOR AHORRIO-TOLEDO,

Appellant,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,

Appellee.

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Vet.App. No. 20-1992

JOINT MOTION FOR PARTIAL REMAND

Pursuant to U.S. Vet.App. R. 27 and 45(g)(2), the parties, through their respective attorneys, respectfully move the Court to vacate and remand the November 21, 2019, decision of the Board of Veterans' Appeals (BVA or Board) insofar as it denied entitlement to total disability based on individual unemployability (TDIU) prior to May 16, 2012. [Record Before the Agency (R.) at 1-29].

However, the parties respectfully request the Court not disturb those parts of the instant Board decision that denied entitlement to effective dates prior to December 27, 2011, for the grants for service connection for status post degenerative joint disease with spinal stenosis of the lumbar spine, right lower extremity radiculopathy, and midline lumbar spine scar; to an effective date prior to May 16, 2012, for the grant of service connection for diagnosed depressive disorder NOS; to an initial rating in excess of 40% for status post degenerative

joint disease with spinal stenosis of the lumbar spine; to an initial rating in excess of 20% for right lower extremity radiculopathy; to a compensable rating for midline lumbar spine scar; to an initial rating in excess of 70% for diagnosed depressive disorder NOS; and to Dependents' Educational Assistance under Chapter 35 of 38 U.S.C. prior to May 16, 2012. Appellant is no longer pursuing his appeal of these claims and they should be dismissed. See *Pederson v. McDonald*, 27 Vet.App. 276, 283-85 (2015) (en banc).

BASES FOR REMAND

In the decision now on appeal, the Board denied entitlement to TDIU prior to May 16, 2012; however, the parties agree that remand is warranted in this case because the Board erred by providing an inadequate statement of reasons or bases for its determinations under the requirements of 38 U.S.C. § 7104(d).

The parties agree that remand is warranted for the Board to address relevant evidence of record and whether entitlement to TDIU is warranted prior to May 16, 2012. At a January 2008 private treatment visit, Appellant reported that his back disability caused moderate discomfort when bathing and dressing and severe discomfort when bending forward, sitting, standing, and walking. [R. at 2023 (2023-27) (January 9, 2008 private treatment record from Select Physical Therapy)]. In the instant decision, the Board found that, prior to May 16, 2012, Appellant met the schedular percentage requirements for entitlement to TDIU. [R. at 23-24]. The Board further noted that Appellant reported having experience as a warehouse manager, building manager, and facility manager with two years of

college education and additional training for logistics. [R. at 24]; [R. at 2111-13 (November 5, 2015 Veteran's Application for Increase Compensation Based on Unemployability)]. The Board found that, prior to May 16, 2012, Appellant's lumbar spine disability did not prevent Appellant from securing or following substantially gainful employment. [R. at 24]. Specifically, the Board found:

While [Appellant's] lumbar spine disability may have prevented [Appellant] from performing physical activities, the evidence of record does not illustrate that [his] service-connected lumbar spine disability prevented him from working with or under the supervision of others, from interacting with the public, or from performing any of the other mental tasks required by employment.

Id. First, the Board erred by not addressing the January 2008 private treatment record and the effects of Appellant's lumbar spine disability on his ability to bend, sit, stand, and walk. *Ray v. Wilkie*, 31 Vet.App. 58, 73-74 (2019). Second, although it noted Appellant's education and work history, the Board erred by providing no analysis as to how it factored his education, training, and working history into its determination that he was not precluded from securing or following substantially gainful employment, as required by the Court's holding in *Ray*. *Id.* Therefore, remand is warranted for the Board to provide an adequate statement of reasons or bases as to whether entitlement to TDIU is warranted prior to May 16, 2012.

CONCLUSION

The Court should vacate the Board decision and remand the appeal for readjudication consistent with the foregoing. In any subsequent decision, the

Board must set forth adequate reasons or bases for its findings and conclusions on all material issues of fact and law presented on the record. See 38 U.S.C. § 7104(d)(1); *Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990). The Board shall incorporate copies of this joint motion and the Court's order into Appellant's record. The Board shall provide this claim expeditious treatment as required by 38 U.S.C. § 7112.

The parties agree that this Joint Motion and its language are the product of the parties' negotiations. The Secretary further notes that any statements made herein shall not be construed as statements of policy or the interpretation of any statute, regulation, or policy by the Secretary. Appellant also notes that any statements made herein shall not be construed as a waiver as to any rights or VA duties under the law as to the matter being remanded, except that, pursuant to Rule 41(c)(2), the parties agree to unequivocally waive further Court review of and any right to appeal the Court's order on this Joint Motion. The parties respectfully ask that the Court enter mandate upon the granting of this motion.

Respectfully submitted,

FOR APPELLANT:

11/23/2020
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