



BOARD OF VETERANS' APPEALS
FOR THE SECRETARY OF VETERANS AFFAIRS

IN THE APPEAL OF
LADELL G. PRESTON
Represented by
The American Legion

[REDACTED]
Docket No. 16-29 039

DATE: September 15, 2020

ORDER

Entitlement to an earlier effective date prior to March 19, 2009 for TDIU is denied.

FINDING OF FACT

Prior to March 19, 2009, the Veteran does not meet the schedular criteria for TDIU, nor does the record reflect probative evidence for referral under extraschedular consideration.

CONCLUSION OF LAW

The criteria for entitlement to an earlier effective date prior to March 19, 2009 for TDIU have not been met. 38 U.S.C. §§ 5101, 5107, 5110; 38 C.F.R. §§ 3.340, 3.341, 3.400, 4.3, 4.16.

REASONS AND BASES FOR FINDING AND CONCLUSION

The Veteran served on active duty from April 1969 to January 1973.

This case comes before the Board of Veterans' Appeals (Board) on appeal from the September 2012 and June 2016 rating decisions issued by the Department of Veterans Affairs (VA) Regional Office (RO).

In March 2018, the Veteran testified before the undersigned Veterans Law Judge (VLJ) before a live videoconference Board Hearing. A transcript of the hearing is of record.

This matter was previously before the Board in April 2018, where the Board issued a denial for entitlement to an earlier effective date prior to March 19, 2009. The Veteran appealed the Board's decision to the United States Court of Appeals for Veterans Claims (CAVC), resulting in the January 2020 Memorandum Decision, which set aside the April 2018 Board decision, and remanded the matters for re-adjudication consistent with its decision.

Entitlement to an earlier effective date prior to March 19, 2009 for TDIU.

The Veteran contends he was unemployable prior to March 19, 2009 due to his service-connected disabilities.

TDIU rating may be assigned where the schedular rating is less than total, when it is found that the disabled person is unable to secure or follow a substantially gainful occupation resulting from a single service-connected disability ratable at 60 percent or more, or as a result of two or more disabilities, provided at least one disability is ratable at 40 percent or more, and there is sufficient additional service-connected disability to bring the combined rating to 70 percent or more. 38 C.F.R. §§ 3.340, 3.341, 4.16(a).

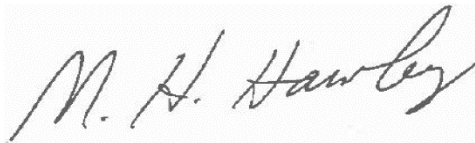
In determining whether unemployability exists due to a service-connected disability or disabilities, consideration may be given to the Veteran's level of education, special training, and previous work experience; however, age and impairment caused by nonservice-connected disabilities are not factors for consideration. Unemployability associated with advancing age or intercurrent disability may not be used as a basis for assignment of TDIU. 38 C.F.R. §§ 3.341, 4.16, 4.19.

Also, it is necessary that the record reflect some factor(s) that places the Veteran in a different category than other veterans with equal ratings of disability. The sole fact that a veteran is unemployed or has difficulty obtaining employment is not enough. The ultimate question is whether the veteran can perform the physical and mental acts required by employment, not whether the veteran can find employment. *See Van Hoose v. Brown*, 4 Vet. App. 361 (1993).

Prior to March 19, 2009, the Veteran's service-connected disabilities consisted of the following: torn medial meniscus residuals of the right knee, rated as 20 percent disabled from October 23, 1978; and osteoarthritis, right knee high grade chondromalacia patella medial meniscus tear, rated as 10 percent disabled from October 1, 1999. Based on this, the Veteran had a combined schedular rating of 30 percent; and therefore, does not meet the schedular requirements for TDIU under 38 C.F.R. § 4.16(a).

However, where a veteran does not meet the schedular requirements of 38 C.F.R. § 4.16(a), the Board may nevertheless refer the claim to the Director of Compensation Service for extraschedular consideration if the veteran is unable to secure and/or maintain substantially gainful employment by reason of service-connected disabilities. *See Wages v. McDonald*, 27 Vet. App. 233 (2015). However, a review of the record, to include the Veteran's VA and private treatment records (reflecting that the Veteran has complained of and received treatment for his right knee disabilities, with a January 2000 notation of the inability to squat, kneel, bend, stand, or walk for long periods and several notations of the use of a knee brace for ambulation) and VA examinations of the right knee (an April 2003 VA examination reflecting no functional limitations or impairments; and a January 2008 VA examination reflecting that the Veteran is unable to walk more than 1/4 mile or stand for more than 3 hours), does not show and/or suggest that his service-connected right knee disabilities alone rendered him unemployable, nor has the Veteran supplied any evidence to the contrary. Therefore, while the Board notes that the Veteran's service-connected right knee disabilities resulted in the Veteran having some functional limitations, these limitations do not rise to the level of being deemed completely unemployable as to warrant referral to the Director of Compensation Services for consideration on an extraschedular basis.

Accordingly, the Board finds that the preponderance of the evidence is against the Veteran's claim; and entitlement to an earlier effective date prior to March 19, 2009 for TDIU, to include referral to the Director of Compensation Service, is not warranted. The claim is denied.



M. H. HAWLEY
Veterans Law Judge
Board of Veterans' Appeals

Attorney for the Board

B. Hodges, 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.cave.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).