

connection for a psychiatric disorder in the same decision. It is the responsibility and function of the Board to review the evidence and make any and all factual determinations necessary to the disposition of an appeal. These factual determinations may be derived from any number of considerations, to include credibility determinations, physical or documentary evidence, or inferences drawn from other facts. See *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 574 (1985).

The Board's finding that Appellant failed to meet the schedular requirements for TDIU because he was not service connected for any disabilities does not have a plausible basis in the record and is, therefore, clearly erroneous. Earlier in the same decision, the Board granted service connection for an acquired psychiatric condition. [Record (R.) at 6-7 (1-10) (August 2020 Board Decision)]. However, in denying the TDIU claim, the Board reasoned that Appellant failed to meet the minimum schedular requirement for TDIU because he "is not service-connected for any disabilities" without addressing the fact that it granted entitlement to service connection for a psychiatric condition in the same decision. [R. at 8].

Insofar as the Board denied entitlement to TDIU on this basis, it erred because it failed to consider the effect of the grant of service connection for a psychiatric disorder on this finding. Given that the Board granted service connection for a psychiatric disorder, its finding that Appellant is not service connected for any disabilities is inaccurate. On remand, the Board must

readjudicate the claim of entitlement to TDIU giving consideration to Appellant's service-connected psychiatric disorder.¹

Other Considerations

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 the parties' right to appeal the Court's order implementing this joint motion. The parties agree to unequivocally waive any right to appeal the Court's order on this joint motion and respectfully ask that the Court enter mandate upon the granting of this motion.

The Court should vacate the Board decision and remand the appeal for readjudication consistent with the foregoing. On remand, Appellant may submit additional argument to the Board consistent with a notice letter that will be sent by the Board. In any subsequent decision, the Board must set forth adequate reasons or bases for its findings and conclusions on all material issues of fact

¹ The Secretary notes, upon review of Appellant's file in the Veterans Benefits Management System, that, in a September 2020 rating decision pursuant to the Board decision on appeal, the regional office granted Appellant service connection for an adjustment disorder with mixed anxiety and depressed mood with an evaluation of 70%, effective June 7, 2012.

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 is still expected reexamine the evidence of record and conduct a critical examination of the justification for the previous decision. See *Andrews v. McDonough*, 34 Vet.App. 216 (2021). 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.

WHEREFORE, the parties respectfully move the Court to vacate the portions of the August 24, 2020, Board decision that denied entitlement to TDIU and to remand the matter for readjudication of his entitlement to TDIU due to his service-connected psychiatric disorder.

Respectfully submitted,

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