
IN THE UNITED STATES COURT OF
APPEALS FOR VETERANS CLAIMS

ROBERT W. GALLIART

Appellant,

v.

ROBERT A. MCDONALD,

Secretary of Veterans Affairs, Appellee.

ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS

APPELLANT'S PRINCIPAL BRIEF

Pursuant to U.S. Vet. App. R 26(a), Appellant submits this Principal Brief in support of his request that the April 9, 2015, decision of the Board of Veterans' Appeals (BVA or Board) denying the issue of:

1) Entitlement to a Total Disability rating based upon Individual Unemployability (TDIU)
be reversed and remanded.

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STATEMENT OF THE FACTS

On April 9, 2015, the BVA issued a decision denying entitlement to TDIU. R at 3-9.

Appellant served honorably in the United States Navy from February 22, 1984, through February 21, 1988. R at 225.

On September 19, 2012, Appellant submitted a claim for entitlement to TDIU. R at 137-140.

On October 7, 2012, the Department of Veterans Affairs (DVA or VA) received employment information from Walmart. R at 114-119.

On October 9, 2012, the DVA ordered a compensation examination. R at 120-122.

On October 11, 2012, Appellant submitted a statement in support of claim notifying the DVA that he was in receipt of Social Security benefits. R at 106.

On October 16, 2012, the DVA ordered a compensation examination. R at 108-110.

On November 14, 2012, Appellant attended a DVA compensation examination for his knee and leg. R at 91-103.

On February 20, 2013, the DVA received a "Formal Finding of Unavailability of Social Security Records". R at 63.

On March 7, 2013, Appellant received a DVA rating decision denying entitlement to TDIU. R at 47-61.

On March 8, 2013, Appellant submitted a Notice of Disagreement (NOD). R at 46.

On May 24, 2013, the DVA provided a Statement of the Case (SOC). R at 22-40.

On May 29, 2013, Appellant submitted a substantive appeal. R at 21.

On April 9, 2015, the Board issued a decision denying the appealed issue. R at 3-9.

APPELLANT'S CONTENTIONS

- I. The DVA failed in its duty to assist Appellant by not requesting SSA award information
- II. The Board failed to provide a reasons and bases addressing Appellant's education, training, work experience, or receipt of SSA benefits in the May 15, 2015 denial of entitlement to TDIU.
- III. The August 7, 2012 and November 13, 2012 exams relied on by the Board in the May 15, 2015 decision were inadequate for TDIU rating purposes.

ARGUMENTS

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I. DUTY TO ASSIST

The August 7, 2012, DVA compensation examination acknowledged that Appellant was in receipt of Social Security Administration (SSA) benefits. R at 172. On October 11, 2012, Appellant formally notified the DVA that he was in receipt of SSA benefits from approximately 2002. R at 106. On November 19, 2012, the DVA requested SSA medical records. R at 63. On November 27, 2012, SSA notified the DVA that no medical records were available. R at 70. In February 2013, the DVA issued a Formal Finding of Unavailability of Social Security Records. R at 63.

Although the record indicates the unavailability of Social Security *medical* records, Appellant contends that the DVA failed in its duty to assist by not requesting Social Security award data. Despite Appellant's inability to independently submit SSA records, Appellant contends that DVA's single request for SSA medical records was not sufficient to satisfy its duty to assist.

Appellant has not been substantially gainfully employed since 2001, at age 47. A finding by SSA that

Appellant is permanently disabled and not capable of substantially gainful employment is relevant to his claim for TDIU. Appellant further contends that SSA administrative findings are relevant, specifically whether he had been awarded RSDI or SSI benefits, and whether an Administrative Law Judge (ALJ) proffered an opinion. An ALJ opinion offers evidentiary support for a finding of inability to obtain or maintain substantial gainful employment. The SSA findings support Appellant's contentions of unemployability, and the exclusion of such evidence is not a harmless error. *See* CONWAY v PRINCIPI, 353 F.3d, 1369, 1374(Fed Cir 2004).

II. REASONS AND BASES

Appellant is service-connected for a lumbar spine condition with degenerative changes (40%); right lower extremity radiculopathy (20%); left lower extremity radiculopathy (20%); tinnitus (10%); left knee strain (10%); and left knee laxity (0%). Appellant has a combined rating of seventy (70%) percent.

A total rating for compensation purposes may be assigned where the scheduler rating is less than total, when it is found that the disabled person is unable to secure or follow a substantially gainful occupation as a result of a single service-connected disability ratable at 60 percent or more, or as a result of two or more service-connected 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 U.S.C.A. § 1155; 38 C.F.R. §§ 3.340, 3.341, 4.16(a).

In this case, Appellant has one disability rated at 40%, and sufficient additional disabilities for a combined rating of 70%, thereby meeting criteria under 38 C.F.R. § 4.16(a) for consideration of TDIU.

For a veteran to prevail on a claim for a TDIU, the sole fact that a veteran is unemployed or has difficulty obtaining employment is not enough. The question is whether the veteran is capable of performing the physical and mental acts required by employment, not whether the veteran can find employment. VAN HOOSE v BROWN, 4 Vet. App. 361 (1993). In determining whether a veteran is entitled to TDIU, consideration may be given to a veteran's level of education, special training, and previous work experience. See 38 C.F.R. §§ 3.341,4.16,4.19.

On September 19, 2012, Appellant submitted a claim for entitlement to TDIU. He stated that he last worked full-time in 2001 as a construction superintendent. In 2010, Appellant worked 1 month, averaging 25 hours per week, and in 2011 he worked two months averaging 25 hours per week. R at 137-140. Appellant's only work experience has been in the construction industry, with less than three months of limited sales experience. Appellant has a high school education and no supplemental training of any sort. R at 137-140. The Board asserts that Appellant's service-connected disabilities do not prevent him from sedentary employment; however, the Board does not provide a reasons and bases and fails to address Appellant's level of education, (lack of) special training, and (lack of) previous work experience.

III. COMPENSATION EXAMINATIONS INADEQUATE FOR TDIU RATING PURPOSES

In this case, the DVA is required to evaluate Appellant's lumbar spine, right lower extremity radiculopathy, left lower extremity radiculopathy, tinnitus, left knee strain, and left knee laxity as each and combined affect his ability to secure or follow substantially gainful employment. The Board relied upon two

compensation examinations to support its conclusions: an August 7, 2012, back examination; and a November 13, 2012, knee and lower leg examination. R at 91-103, and R at 159-174. See also the April 9, 2015, BVA decision. R at 3-9.

On August 2, 2012, the DVA ordered a compensation examination citing “veteran claims SC conditions prevent him from obtaining and maintaining gainful employment. Request IU language with exam”. The request identified the issues of IU, lumbar spine, bilateral lower extremity radiculopathy and left knee strain to include laxity. The request stated that no new exams were needed for lumbar spine and bilateral lower extremity radiculopathy. R at 120.

A Board determination that a medical examination is not necessary is reviewed under the “arbitrary and capricious, and abuse of discretion, or otherwise not in accordance with the law” standard of review. *MCLENDON v NICHOLSON*, 20 Vet. App. 79,81(2006); 38 U.S.C. § 7261(a)(3)(A). Any medical opinion on which the Board relies must be adequate to support judicial review. *STEFEL v NICHOLSON*, 21 Vet. App. 120, 124(2007)(a medical opinion must support its conclusions with an analysis that the Board can consider and weigh against contrary opinions); *NIEVES-RODRIGUEZ V PEAKE*, 22 Vet. App. 295,301(2008)([A] medical examination report must contain not only clear conclusions with supporting data, but also a reasoned medical explanation connecting the two).

Although, there is no reasons and bases requirement imposed on examiners, an adequate medical report must rest on correct facts and reasoned medical judgement so as to inform the Board on a medical

question and facilitate the Board's consideration and weighing of the report against any contrary reports.

When the Board relies on a medical opinion, that opinion must be adequate to allow judicial review. D'ARIES v PEAKE, 22 Vet. App. 97,104(2008). An opinion based on an inadequate factual premise has no probative weight. RENOAL v BROWN, 5 Vet. App. 460, 461 (1993). Where the Board relies on an inadequate medical examination or opinion to support its decision, remand is appropriate. Stefl, Supra.

With any material issue of fact or law presented on the record, the Board must support its determination as to whether a medical examination is required or adequate, with an adequate statement of reasons or bases that enables the claimant to understand the precise basis for that finding and facilitates review in this Court. See 38 U.S.C. § 7104(d)(1); WASHINGTON v NICHOLSON, 19 Vet. App. 362,366-67(2005). To comply with this requirement, the Board must analyze the credibility and probative value of the evidence, account for the evidence it finds persuasive or unpersuasive, and provide reasons for its rejection of any material evidence favorable to the claimant. CALUZA v BROWN, 7 Vet. App. 498,506(1995). When the Board's reasons or bases are inadequate, remand is required. TUCKER v WEST, 11 Vet. App. 369,374(1998).

An October 9, 2012 IU DBU Medical Opinion requested:

"whether or not the Veteran's service-connected disability(ies) render him or her unable to secure and maintain substantially gainful employment, to include describing the disabilities' functional impairment and how that impairment impacts on physical and sedentary employment. If the veteran has multiple service connected disabilities, please also provide an opinion as to whether the Veteran's inability to work solely originates from a single service connected disability or if it originates from multiple service

connected disabilities.” The service connected disabilities listed were lumbar spine, bilateral lower extremity radiculopathy, tinnitus and left knee strain and laxity. R at 120-122.

Pursuant to 38 U.S.C. § 5103A(a)(1), the Secretary shall make every reasonable effort to assist the claimant in obtaining evidence necessary to substantiate the claimant’s claim. These efforts include providing a medical opinion when such a medical opinion is necessary to make a decision on the claim. *See* § 5103A(d). Once the Secretary decides to provide a medical opinion, the opinion must (1) be based on the veterans’ previous medical history; (2) describe the disability in sufficient detail so that the Board’s evaluation of the claimed disability will be a fully informed one, *ARDISON v BROWN*, 6 Vet. App. 405, 407(1994)(quoting *GREEN v DERWINSKI*, 1 Vet. App. 121, 124 (1991)); and (3) support its conclusion with an analysis that the Board can consider and weigh against contrary opinions. *SELF v NICHOLSON*, 21, *Supra*. If an examination report relied upon by the Board fails with respect to any of the above elements, “it is incumbent on the rating board to return the report as inadequate for rating purposes”. *See* 38 C.F.R. § 4.2, *BOWLING v PRINCIPI*, 15 Vet. App. 1, 12 (2001)(emphasizing Board’s duty to return inadequate examination reports). *STEGALL v WEST*, 11 Vet. App. 268, 270-71(1998)(remanding where VA examination was inadequate for evaluation purposes). *HICKS v BROWN*, 8 Vet. App. 417, 421(1995)(concluding that inadequate medical examination frustrates judicial review).

In this case, Appellant’s August 7, 2012 and November 13, 2012 examinations failed in the first and

third elements. The examinations failed to provide a full and descriptive evaluation of Appellant's histories. For the examination and subsequent medical opinion to be adequate, a thorough work and educational history were necessary. Appellant has a high school education, no additional training, and has been in receipt of SSA benefits since 2002.

The August 7, 2012, DVA compensation examination was for Appellant's back condition. R at 159-172. The report stated: "currently (Appellant) is on medication to relieve pain in the form of morphine sulfate 40mg SA b.i.d." Appellant stated that he had flare-ups that impacted prolonged sitting/standing greater than 10 minutes. The examination reported a functional impairment of less movement than normal, pain on movement, guarding or muscle spasms, and an abnormal gait. The examiner's rationale and analysis of Appellant's ability to obtain or maintain substantial gainful employment consisted of: "This veteran has been on Social Security disability and unemployed since 2001, but not secondary to lumbar spine". The examiner's conclusion is unsupported by analysis or fact. The examiner did not state that he had reviewed the Social Security records, or provide any reference for his conclusion that Appellant's award of Social Security Disability benefits was not due to his lumbar spine. Although the November 7, 2012 examination is thorough and comprehensive regarding the physical components, it is inadequate for a TDIU determination. The examiner did not discuss the Appellant's education or work history, and how such would affect his ability to obtain or maintain substantial gainful employment.

The November 13, 2012, compensation examination was for Appellant's knee and lower leg

condition. R at 91-103. The same examiner provided unsupported and inadequate rationale and conclusions.

The rationale simply stated:

C. file has been reviewed. In terms of individual unemployability this veterans left knee and low back condition with radiculopathy would likely - prevent physical demanding work such as construction as the low back and left knee would likely be aggravated from such employment. This veterans service-connected tinnitus would not be affected by physical or sedentary work. Veterans low back condition with radiculopathy, and left knee would not be aggravated by sedentary work such as clerical which did not demand excessive ambulation or filing.

The examiner's conclusions are unsupported. The examiner provided a conclusion regarding Appellant's service-connected tinnitus without the benefit of an audiology examination or clinical review of tinnitus in his own examination. The examiner determined that Appellant's knees and radiculopathy would prevent employment in construction.

In the April 9, 2015 decision, the Board failed to address employment restrictions considering Appellant's documented flare-ups that impacted prolonged sitting/standing greater than 10 minutes. The Board further failed to explain how Appellant's alleged ability to perform sedentary employment amounts to substantially gainful employment. The fact that Appellant may be physically able to perform some form of generally sedentary employment, does not mean that Appellant is educationally and vocationally qualified to perform such employment. SMITH v SHINSEKI, 647 F.3d 1380, 1396(Fed Cir 2001)(a claimant's education and work experience are relevant to the issue of TDIU). *See also* BEATTY v BROWN, 6 Vet. App. 532, 537

(1994). The Board failed to provide an adequate statement of reasons and bases that sedentary employment could amount to substantially gainful employment, especially in light of Appellant's work history and educational history. *See*. GLIECHER v DERWINSKI, 2 Vet. App. 26 (1991).

CONCLUSION

Appellant has met the requirements of 38 C.F.R. § 4.16 for a grant of TDIU. Appellant has a high school education, no additional vocational training, and limited work experience.

The Board failed to provide a reasons and bases addressing Appellant's receipt of Social Security benefits, past work history, or educational level.

The VA compensation examination and medical opinion were inadequate for TDIU rating purposes. The examiner did not consider Appellant's education and work history when deciding whether Appellant could maintain substantial gainful employment. The examiner also failed to address the Appellant's receipt of Social Security benefits. The examination for TDIU did not include an audiology examination addressing the effect Appellant's tinnitus had on his claim for TDIU.

CERTIFICATE OF SERVICE

Pursuant to Rule 33 on the 11th day of January, 2016, Appellant's Principal Brief, was transmitted electronically to:

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I certify under the penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

/s/Molly Steinkemper
Attorney for Appellant