

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 15-2887

ROBERT W. GALLIART, APPELLANT,

v.

ROBERT A. McDONALD,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before DAVIS, *Chief Judge*.

MEMORANDUM DECISION

*Note: Pursuant to U.S. Vet. App. R. 30(a),
this action may not be cited as precedent.*

DAVIS, *Chief Judge*: U.S. Navy veteran Robert W. Galliart appeals through counsel from an April 9, 2015, Board of Veterans' Appeals (Board) decision that denied entitlement to a total disability rating based on individual unemployability (TDIU). For the following reasons, the Court will set aside the Board's April 2015 decision and remand the matter for further proceedings.

I. ANALYSIS

TDIU will be awarded when a veteran is unable to secure or follow a substantially gainful occupation as a result of service-connected disabilities. A "substantially gainful occupation" is "one that provides annual income that exceeds the poverty threshold for one person," *Faust v. West*, 13 Vet.App. 342, 356 (2000), and is not considered "marginal employment." 38 C.F.R. § 4.16(a)(2016).

Whether Mr. Galliart meets these criteria is a finding of fact subject to the "clearly erroneous" standard of review. *See Pederson v. McDonald*, 27 Vet.App. 276, 286 (2015). "[T]he central inquiry in determining whether a veteran is entitled to TDIU is whether the veteran's service-connected disabilities alone are of sufficient severity to produce unemployability." *Hatlestadt v. Brown*, 5 Vet.App. 524, 529 (1993).

When making factual determinations, the Board must provide a written statement of the

reasons and bases for its findings. *See* 38 U.S.C. § 7104(d)(1); *McClain v. Nicholson*, 21 Vet.App. 319, 312 (2007); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995). This statement of reasons or bases must explain the Board's reasons for discounting favorable evidence, *Thompson v. Gober*, 14 Vet.App. 187, 188 (2000), discuss all issues raised by the claimant or the evidence of record, *Robinson v. Peake*, 21 Vet.App. 545, 552 (2008), and discuss all provisions of law and regulation where they are made "potentially applicable through the assertions and issues raised in the record," *Schafrath v. Derwinski*, 1 Vet.App. 589, 592 (1991); *see also Majeed v. Principi*, 16 Vet.App. 421, 431 (2002). When the Board "conducts a TDIU analysis, it must take into account the individual veteran's education, training, and work history." *Pederson*, 27 Vet.App. at 286.

The Board found that Mr. Galliard could obtain and maintain sedentary employment, and was therefore not unemployable. In reaching this conclusion, the Board relied on reports from two separate VA examinations performed by the same examiner.

Mr. Galliard argues first that VA did not fulfill its duty to assist because it failed to obtain records from the Social Security Administration (SSA). Although the record includes a facsimile response from the SSA indicating that there were no medical records pertaining to Mr. Galliard in its possession (Record (R.) at 54),¹ Mr. Galliard asserts that VA should have obtained "Social Security award data." Appellant's Brief (Br.) at 2.

This argument is not persuasive. The duty to assist pertains only to relevant documents held by a Federal department or agency. 38 C.F.R. § 3.159(c)(2) (2016). Assuming that records pertaining to Mr. Galliard's SSA disability award exist, they would apparently not be medical records. Furthermore, the record reflects that Mr. Galliard began receiving SSA disability in 2002, and has been unemployed since that time as a result of a bipolar condition, for which he is not service connected. *See* R. at 73, 74. Because the issue here is the effect of Mr. Galliard's service-connected disabilities on his employability, he has failed to suggest how any SSA award documents might be relevant to his claim.

More persuasive is Mr. Galliard's argument that the VA examination reports were inadequate to support the Board's determination that he was capable of securing or following a substantially

¹The record contains a communication from Mr. Galliard indicating that "he keeps everything" and would supply the SSA records himself. R.at 53. No documents were subsequently submitted.

gainful occupation. In his November 2012 report, the VA examiner concluded that "[the] Veteran's low back condition with radiculopathy, and left knee would not be aggravated by sedentary work such as clerical which would not demand excessive ambulation or filing." R. at 73.² In an August 2012 report, the examiner reported that Mr. Galliard's thoracolumbar spine condition consisted of arthritis and degenerative disc disease (R. at 91, 101), which would not impact his ability to work. R. at 104.

As Mr. Galliard notes, however, the examiner did not explain how either of these conclusions is consistent with Mr. Galliard's reports that his spine condition is aggravated by either sitting or standing for more than 10 minutes. *See* Appellant's Br. at 8; R. at 92. Furthermore, although the examiner noted that Mr. Galliard was taking 40 milligram doses of morphine sulfate for his pain,(R. at 92), the examiner did not discuss how such medication might affect his alertness and ability to concentrate, leaving the Board with no medical basis to evaluate that issue. *See Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 301 (2008) (medical examination report must contain not only clear conclusions and supporting data, but also a reasoned medical explanation connecting the two); *Mingo v. Dewrwinski*, 2 Vet.App. 51, 54 (1992) (concluding that the Board provided inadequate reasons or bases for denying TDIU when it failed to consider evidence that medications used to control the veteran's headaches rendered her unable to function).

In addition, the Court agrees that the Board's statement of reasons or bases is inadequate for other reasons. *See Geib v. Shinseki*, 733 F.3d 1350, 1354 (Fed. Cir. 2013) ("[A]pplicable regulations place responsibility for the ultimate TDIU determination on [] VA not a medical examiner"). There are factors in Mr. Galliard's work history that weigh against the Board's conclusion that sedentary employment is feasible. There is no evidence in the record that Mr. Galliard has ever held the type of desk job contemplated by the Board's conclusion. Rather, he has worked as a construction supervisor, and had brief periods of employment with Walmart, with no indication that these assignments featured clerical or desk work. *See Beaty v. Brown*, 6 Vet.App. 532, 538 (1994)

² The Court notes that the November 2012 report contains what may be a vestige of a report pertaining to another patient. The result is a paragraph of text that is simply incoherent. *See* R. at 61-62. In the following medical history section of the report, there is a reference to "vaginal complaints of daily pain and stiffness left knee" (R. at 62), without explanation of how the term "vaginal" might apply to Mr. Galliard's condition. The inclusion of such material in what is supposed to be a well-considered professional medical report adds neither weight nor credibility to the report.

(reversing Board finding that veteran could perform in a sedentary occupation when evidence of record showed that he had only worked as a farmer for 40 years). Although the Board noted that Mr. Galliard had completed 4 years of high school, there is no evidence in the record pertaining to what sort of sedentary occupation he may be qualified to perform.

Therefore, the Court will set aside the April 2015 Board decision and remand the matter for further proceedings. On remand, Mr. Galliard will be free to submit additional evidence and argument on the remanded matter, and the Board is required to consider such evidence and argument. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002).

II. CONCLUSION

For the foregoing reasons, the Court SETS ASIDE the Board's April 9, 2015, decision and REMANDS the matter for further proceedings.

DATED: November 29, 2016

Copies to:

Molly Steinkemper, Esq.

VA General Counsel (027)