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

NO. 15-3431

JEAN JONES, APPELLANT,

v.

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

Before KASOLD, *Judge*.

**MEMORANDUM DECISION**

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

KASOLD, *Judge*: Veteran Jean Jones appeals through counsel a June 29, 2015, decision of the Board of Veterans' Appeals (Board) that denied an effective date prior to July 25, 2007, for a total disability based on individual unemployability (TDIU) rating. Ms. Jones, who was represented below by the same counsel as on this appeal, argues that the Board erred by failing to (1) conclude that the presumption of regularity was rebutted with regard to the mailing of a decision on her 1978 claims for benefits, and the effect on her 1967 claim, and (2) recognize that the issue of TDIU entitlement was not adjudicated with her October 2000 claim. The Secretary disputes these arguments. Single-judge disposition in this case is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the reasons discussed below, the Board decision on appeal will be affirmed.

*Background*

Ms. Jones served from June 1953 to July 1957. In December 1957, she was awarded VA compensation for a right-knee disability, and, in May 1964, she was awarded service connection for

her left knee, without compensation.<sup>1</sup> In April 1967, Ms. Jones submitted a statement in support of claim in which she sought to reopen her claim and noted her belief that her knee condition had caused her scarring, pain, and limitation of motion. She also noted that she had not worked since November 1966 and did not foresee employability in the future. In November 1967, she was awarded a temporary rating increase to 100% for her right-knee disability, from May to July 1967, that reverted back to 10% from July 1967 forward.

In May 1978, Ms. Jones submitted a claim for TDIU due to pain in her leg and lower back. That claim was denied in an October 1978 deferred rating decision because her service-connected disabilities did not render her unemployable. The record contains a copy of an adjudication worksheet with the notation "FL 21-103" (the designation for the form letter used to notify veterans of disability benefits decisions) in the section marked "form letters," and the worksheet included an outline for a letter to notify her of the decision. The record also contains a copy of the October 1978 deferred rating decision, but it does not include a copy of a decision letter notifying her of the rating decision and her appellate rights.

In October 2000, Ms. Jones sought increased ratings for her bilateral knee conditions, which she was awarded in July 2001. The record does not reflect that she appealed that decision.

In July 2007, Ms. Jones filed for an increased rating. As part of that claim stream, a June 2013 rating decision granted entitlement to TDIU effective April 27, 2010. Ms. Jones filed a Notice of Disagreement concerning the effective date and requested an effective date of April 26, 1967. In the Board decision on appeal, she was granted an effective date as of July 25, 2007, the date of her claim. The Board found that (1) her 1967 and 1978 submissions constituted claims for TDIU, but they were rendered final by the October 1978 rating decision, (2) the fact that a copy of a decision letter notifying her of the rating decision and her appellate rights was not in the claims file did not constitute clear evidence rebutting the presumption of regularity that the decision and notice how to appeal had not been sent to Ms. Jones, and (3) her 2000 claim for an increased rating did not include a request for TDIU.

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<sup>1</sup> The parties initially agreed that the May 1964 decision also awarded an increased rating for Ms. Jones's right knee, but they clarified in a supplemental memorandum that an increase was not awarded.

### 1967 and 1978 Claims

With regard to the 1967 claim, Ms. Jones recognizes that it could have been deemed final by the subsequent October 1978 rating decision if the later decision was final, but she notes that the record contains no final decision letter or notice how to appeal with regard to the October 1978 rating decision, and she reasons that her underlying 1967 and 1978 claims therefore remained open.<sup>2</sup>

It takes clear evidence, however, to rebut the presumption of regularity that a rating decision and notice how to appeal were not properly mailed to a claimant, and the fact that a copy of the decision and notice letter are not in the file is not clear evidence that the letter and notice were not sent. *See Miley v. Principi*, 366 F.3d 1343, 1346 (Fed. Cir. 2004) ("[N]o legal principle bars the use of the presumption of regularity simply because the record does not contain a dated copy of the decision notice itself or some other document reflecting the precise date on which the notice was purportedly sent."); *Butler v. Principi*, 244 F.3d 1337, 1339-40 (Fed. Cir. 2009) (applying the presumption of regularity when the record contained a decision letter stating that notice about appellate rights was attached but the notice was not in the record); *Ashley v. Derwinski*, 2 Vet.App. 307, 308 (1992) ("There is a presumption of regularity under which it is presumed that government officials have properly discharged their official duties." (internal quotation marks omitted)); *see also Clarke v. Nicholson*, 21 Vet.App. 130, 133 (2007) ("Whether clear evidence exists to rebut the presumption of regularity is a question of law that this Court reviews de novo.").

Here, the record evidence reflecting adjudication of Ms. Jones's 1978 request for a TDIU rating and preparation to send the requisite letter support the Board's finding that the RO properly discharged its duties. Succinctly stated, Ms. Jones fails to present clear evidence to rebut the presumption that she was not provided notice of the 1978 rating decision and how to appeal that

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<sup>2</sup> Neither the represented Ms. Jones nor the Board addressed whether or why the November 1967 rating decision awarding a temporary increased rating did not constitute a decision on the April 1967 claim for benefits, including TDIU, raised by the April 1967 statement in support of claim. *See Locklear v. Shinseki*, 24 Vet.App. 311, 316 (2011) ("The award of a disability rating less than 100% generally provides notice as to how the Secretary has rated a claimant's condition and serves as a final decision, if unappealed, with regard to any higher rating associated with the underlying disability."); *Ingram v. Nicholson*, 21 Vet.App. 232, 248 (2007) ("It is reasonable to say that an appellant who receives a disability rating that is less than 100% has notice of how his conditions have been rated. . . . Even if he does not have a clear understanding of TDIU, he does have a clear statement of which disability is being rated and the fact that the Secretary has declared it be less than 100% disabling."). *But see Andrews v. McDonald*, 646 F. App'x. 1001 (Fed. Cir. 2016) (holding that a reasonably raised request for TDIU was not implicitly denied by a rating decision awarding a less than 100% rating when the Secretary had argued that the adjudicated claim did not include a request for TDIU).

decision. *See Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (appellant bears burden of demonstrating error on appeal); *see also Miley, Butler, Clarke, and Ashley*, all *supra*.

Inasmuch as Ms. Jones fails to demonstrate clear evidence to rebut the presumption of regularity regarding the mailing of the 1978 rating decision and notice how to appeal, she fails to demonstrate that it did not become final, and she otherwise fails to demonstrate that the 1967 claim did not become final at the same time. *See Hilkert, supra*; *see also Jones v. Shinseki*, 619 F.3d 1368, 1372 (Fed. Cir. 2010) ("[A] pending claim for benefits can be resolved by later adjudication of an identical claim or a related claim because the later decision provides sufficient notice to the claimant that the pending claim has been finally resolved.").

#### *2000 Claim*

Ms. Jones contends that her 2000 claim for an increased rating reasonably raised a claim for TDIU because a November 2000 medical report noted that she (1) had not worked since 1974, and (2) reported pain and functional-limitation symptoms. Reading the Board decision as a whole, *see Janssen v. Principi*, 15 Vet.App. 370, 379 (2001) (rendering a decision on the Board's statement of reasons or bases "as a whole"), the Board found that Ms. Jones did not specifically raise a claim for TDIU and that such a claim was not reasonably raised by the record because the November 2000 medical report did not contain any language indicating that her asserted unemployability was due to her service-connected disabilities. Based on the record of proceedings, and particularly given the fact that Ms. Jones's 1978 claim for TDIU had been denied because her service-connected disabilities had not rendered her unemployable, the Board's finding that the medical report developed in conjunction with her 2000 claim did not reasonably raise a claim for TDIU is neither clearly erroneous nor otherwise unlawful. *See* 38 U.S.C. § 7261(a)(3) (providing that the Court shall hold unlawful Board decisions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"); *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990) ("A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948))); *see also Hatlestad v. Brown*, 5 Vet.App. 524, 529 (1993) ("[T]he central inquiry in determining whether a veteran is entitled to TDIU is whether

that veteran's service-connected disabilities alone are of sufficient severity to produce unemployability.").

To the extent Ms. Jones contends that she was seeking TDIU with her 2000 claim, it is not clear why the grant of an increased rating, but not TDIU, did not put her on notice that her claim for TDIU had been denied. *See Locklear* and *Ingram*, both *supra*. Given the finding by the Board that a claim for TDIU was not reasonably raised, however, the Board did not address this issue and it is not further addressed herein.

Upon consideration of the foregoing, the June 29, 2015, Board decision on appeal is AFFIRMED.

DATED: November 30, 2016

Copies to:

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