

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

MICHELLE A. CHRYSTAL )  
Appellant, )  
 ) Vet.App. No. 15-4104  
v. )  
 )  
ERIC K. SHINSEKI, )  
Secretary of Veterans Affairs, )  
Appellee. )

**MOTION FOR RECONSIDERATION, AND, IF DENIED,  
FOR PANEL DECISION**

Pursuant to U.S.Vet.App. Rules 35(a) and 35(b), Appellant, Michelle A. Chrystal, through counsel, respectfully moves this Court for reconsideration of its November 30, 2016 single judge (Greenberg, J.) Memorandum Decision (“Memorandum Decision”). This Court vacated and remanded the Board decision for compliance with only one of the terms of the 2015 JMR. She asks the Court to reconsider its decision. Specifically, she asks this Court to issue a new decision that requires the Board to comply with all of the appealed terms of the 2015 JMR. Alternatively, if reconsideration is denied, she requests panel review so this Court can address whether the Board has a duty to comply with all appealed terms of a previous JMR, in this case the 2015 JMR, where the Court only addresses one of the terms and does not mention others?

**ARGUMENT**

The “protracted circumstances of this case” demonstrate Appellant’s compelling need to hold that the 2015 JMR conferred upon her, as a matter of law, the right to require Board compliance with *all* of the terms of that remand. *Stegall v. West*, 11 Vet.App. 268 (1998). As a rule, a remand confers an enforceable right to require VA to substantially comply with remand orders and the Board errs in failing to ensure compliance. *Id.*; *Dymment v. West*, 13 Vet.App. 141, 146-47 (1999).

The circumstances of this case have been even more protracted than usual. The claim dates back to 1989 and the noncompliance with JMR presently on appeal have been subject to two previous Court remands. R. 359-368 (CAVC 14-3161 (2015)); 745-51 (CAVC 07-1039 (2009)). The 2009 JMR and 2015 JMR both required the Board to reconsider the veteran’s PTSD rating in light of the retrospective 1997 VA examination and GAF scores and account for the veteran’s severe PTSD, major depression symptoms. *Id.* Also, both the 2009 and 2015 remands required the Board to factor symptomatic substance abuse into his PTSD rating from 1989, address the 1997 VA finding of permanent and total disability as of October 1993 and adjudicate TDIU under 38 C.F.R. 4.16. *Id.* Thus, Appellant has had to appeal her enforceable right to compel the Board to substantially comply with all of these terms twice before.

The Secretary's duty to ensure compliance is defined by a broad phrase "the terms of the remand." *See* U.S. VET. APP. R. 27 (a)(2) & (3); *Forcier v. Nicholson*, 19 Vet. App. 414 (2005). The 2015 JMR clearly set forth the same terms that were set forth in 2009. The Board was required to (1) determine whether the veteran’s depression was related to his PTSD or service; (2) address the retrospective 1997 VA medical opinion

and apply it and the assigned GAF scores retrospectively, taking the veteran's "long periods of depression," and his active substance abuse into consideration; (3) address whether the 1997 NSC pension decision was binding for purposes of rating or TDIU, and (4) address the veteran's eligibility for TDIU under 38 C.F.R. sec. 4.16. R. 359-368. The JMR also stated that Appellant had enforceable rights per *Stegall*. R. 368. The Court's order incorporated the JMR by reference and cited *Stegall* and *Forcier*. R. 369.

Notwithstanding these clearly stated instructions, the Board only complied with the first requirement. R. 16 (2-25). In its 2015 decision, the Board failed for the second time, to substantially comply with a Court. As this Court noted, it failed factor depression into the veterans PTSD rating. Memo.Dec. at 1. But it also did not factor in his substance abuse symptoms between 1989 and 1994, apply 38 C.F.R. 4.16 as part of its unemployability determination,<sup>1</sup> or address whether VA's 1997 finding that the veteran was permanently and totally disabled as of October 1993 for pension purposes was applicable to compensation or TDIU. R. 2-25.

On November 30, 2016, this Court vacated the Board decision and remanded for the Board to provide an adequate statement of reasons and basis regarding the veteran's PTSD rating. Memo.Dec. at 1 (Nov. 30, 2016). The court decision did not require the Board to account for substance abuse on remand. Thus, this Court's decision ordered partial compliance with one - the second - term of the JMR. This Court did not address

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<sup>1</sup> Inexplicably, as in 2014, the Board applied 38 C.F.R. 3. 3.321(b). R. 23-24. It made his same mistake in its 2014 decision. R. 370-92.

the remaining contested terms of the remand, i.e. the Board's failure to (1) factor substance abuse into his PTSD rating, (2) address whether the 1997 VA's pension decision finding that the veteran became permanently and totally disabled in October 1993 was binding for TDIU purposes; and (3) apply 38 C.F.R. 4.16 in making its unemployability determination - even those issues were argued on appeal. App. Br. at 13-28; ReplyBr. 1-13.

Thus, as it stands now, the Court's narrow decision negatively impacts Appellant's legal right to enforce the uncomplied with terms of either the 2015 or the 2008 JMR. *Stegall, supra*, 11 Vet. App. at 171. Moreover, even though the Court's decision gives Appellant the right to raise arguments on remand, raising arguments is less powerful than the legal right to enforce substantial compliance with terms of a remand. Cf. *Newhouse v. Nicholson*, 497 F.3d 1298, 1302 (Fed. Cir. 2007) (absent specific evidence indicating otherwise, the Board is presumed to have considered all evidence of record). Appellant therefore urges the Court to preserve her legal right to enforce all of the terms of the 2015 JMR by remanding with instructions for the Board to comply with all of its terms. Moreover, the Board's failure to substantially comply with these terms was prejudicial to Appellant because the evidence shows this veteran was unemployable since 1989.

Therefore, this Court's remand should require the Board to factor substance abuse into the veteran's rating between 1989 and 1994, state whether the 1997 VA pension decision, which found that the veteran was permanently and totally disabled as of October 1993 was binding for purposes of TDIU, and 38 C.F.R. sec. 4.16 its unemployability analysis.

Moreover, there is a separate legal basis for this Court to remand TDIU because unemployability is “part and parcel” of this Court’s current decision to remand for the correct initial PTSD rating. *Rice v. Shinseki*, 22 Vet. App. 447 (2009). Thus, even if Appellant didn’t have an enforceable right to compliance with the 2015 JMR, this issue should be remanded. SEE *Comer v. Peake*, 552 F.3d 1362, 1367 (Fed. Cir. 2009) (IU is “implicitly raised whenever a veteran presents cogent evidence of unemployability and seeks the highest rating possible.). The veteran raised unemployability in 1989 when he first wrote in his application for service connection “Unable to keep a job due to emotional problems from Vietnam and drug use that started there.” R. 3714 (3714-15). Therefore, because unemployability is “part and parcel” of his initial PTSD rating the interests of judicial economy compels the conclusion that TDIU should also be remanded.

On remand, Appellant asks this Court to instruct the Board to apply 38 C.F.R. sec. 4.16, because it has not done so despite two previous Court remands.

With respect to the time period between January 1989 and March 1994, the veteran’s rating is not yet clear so it is likewise unclear which provision of 38 C.F.R. 4.16 applies. However, after the Board reconsiders the PTSD rating and hopefully factors in depression and substance abuse, the Board *must attempt* to discern the effects of his service connected PTSD with depression and substance abuse upon his ability to secure and/or maintain substantially gainful employment. 38 C.F.R. 4.16(a), (b). Further, where a veteran has both service connected and nonservice connected disabilities and such a distinction is not possible, VA *must attribute* such effects to the service-connected

disability. *Mittleider v. West*, 11 Vet.App. 181, 182 (1998). On remand, the Board must apply 38 C.F.R. 4.16 not 38 C.F.R. 3.321(b) to determine Appellant's eligibility for TDIU.

With respect to the March 1994 to March 1997 time period, Appellant asks this Court to instruct the Board that 38 C.F.R. sec. 4.16(a) applies because the veteran's PTSD rating during this time was 70%. The relevant determination for the Board is "whether the veteran's *service connected* disabilities alone are of sufficient severity to prevent him from securing and following substantial gainful employment." *Hatlestad v. Brown*, 5 Vet.App. 524, 529 (1993). The question is not, as the Board erroneously determined, whether his service connected psychiatric symptoms caused total impairment. *Roberson v. Principi*, 251 F.3d 1378, 1385 (Fed. Cir. 2001) (Eligibility for TDIU does not require total impairment.) The veteran last worked full time in 1972-73 and last worked at all in January 1991.<sup>2</sup> See App.Br. at 25-28, ReplyBr. 8-13.

Alternatively, panel review is requested for a determination as to whether, if this Court only addresses one of several contested terms of a previous JMR and only remands that one term, the unaddressed terms remain legally enforceable?

## CONCLUSION

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<sup>2</sup> Further, given the substantial evidence of unemployability in the RBA and because the Board failed to apply 38 C.F.R. 4.16 at all, despite the 2008 and 2015 JMR's, Appellant also argued for reversal based on legal error. App.Br. at 28.

Appellant respectfully requests reconsideration of the Court's November 30, 2016 decision. Upon reconsideration, Appellant asks that this Court requires the Board, at a minimum, to substantially comply with all of the terms of the 2015 JMR. Thus, the Board must take account of the veteran's depression and substance abuse in its rating determination for the period between 1989 and 1994; address the veteran's eligibility for TDIU under 38 C.F.R. 4.16; and address whether VA's 1997 finding that the veteran was permanently and total disabled as of October 1993 was relevant to VA's compensation and TDIU determinations.

Alternatively, if reconsideration is denied, she requests panel review to set forth whether all JMR provisions that were appealed for non-compliance must be addressed by the Court where prejudice is shown.

RESPECTFULLY SUBMITTED,  
MICHELLE A. CHRYSTAL

By: /s/ Mary Anne Royle

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