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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 17-0889

ELEANOR G. JOYCE, APPELLANT,

v.

PETER O'ROURKE,
ACTING 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*: Eleanor Joyce, widow of U.S. Army veteran Thomas G. Joyce, appeals through counsel a January 12, 2017, Board of Veterans' Appeals (Board) decision that denied entitlement to a total disability rating based on individual unemployability (TDIU) from November 22, 1955, to November 28, 1990, for accrued-benefits purposes. The parties have neither requested oral argument nor identified issues that they believe require a precedential decision of the Court. For the following reasons, the Court will affirm in part, reverse in part, and set aside in part, the Board's January 2017 decision and remand the case for further proceedings consistent with this decision.

I. ANALYSIS

After a short period of active duty during the Korean conflict, Mr. Joyce received a medical discharge in 1955 for a duodenal ulcer. This condition continued to trouble him after service and a long history of claims for VA disability benefits followed.¹ At the time of his death in July 2008,

¹ A precedential decision of this Court that the presumption of aggravation had not been rebutted led to a determination that there was clear and unmistakable error (CUE) in the 1955 denial of Mr. Joyce's initial claim. *See Joyce v. Nicholson*, 19 Vet.App. 36 (2005); Record (R.) at 414-21 (Mar. 2007 Board decision), 474 (copy of Court decision).

Mr. Joyce had been awarded a 60% disability rating for duodenal ulcer with hiatal hernia and TDIU from November 1990, plus a 30% disability rating from November 1955 to November 1990. Mr. Joyce appealed the Board decisions as to the disability rating and denial of TDIU for the period from November 1955 through November 1990; those appeals remained pending at the time of his death. In August 2008, Mrs. Joyce filed a claim for accrued benefits based on those pending claims.

As to the decision here on appeal, Mrs. Joyce argues that the Board incorrectly applied the provisions of 38 C.F.R. § 4.16(a) (2017), and its predecessor regulation, 38 C.F.R. § 3.166(a) (1955).² She asks that the Court reverse the Board's denial and order an award of TDIU for the entire 35-year period, 1955 to 1990. In the alternative, she asks that the Court award TDIU and accrued benefits for each year that Mr. Joyce's earnings did not exceed the poverty threshold. The Secretary concedes that the Board's statement of reasons or bases was inadequate to support its findings, and argues for a remand, but opposes reversal.

The regulation currently controlling TDIU determinations reads as follows:

Total disability ratings for compensation may be assigned, where the schedular rating is less than total, when the disabled person is, in the judgment of the rating agency, unable to *secure or follow* a substantially gainful occupation as a result of service-connected disabilities.

* * * *

Marginal employment shall not be considered substantially gainful employment. For purposes of this section, marginal employment *generally shall be deemed to exist* when a veteran's earned annual income does not exceed the amount established by the U.S. Department of Commerce, Bureau of the Census, as the poverty threshold for one person. Marginal employment may also be held to exist, on a facts found basis . . . when earned annual income exceeds the poverty threshold. Consideration shall be given in all claims to the nature of the employment and the reason for termination.

38 C.F.R. § 4.16(a) (emphasis added). The marginal employment analysis pertains to both employed and unemployed veterans. *Ortiz-Valles v. McDonald*, 28 Vet.App. 65 (2016). In this

² Because Mr. Joyce's disability rating for his service-connected ulcer condition for the period at issue was only 30% at the time of his death in 2008, Mrs. Joyce's briefs consistently refer to an "extraschedular disability rating," referring to the provisions of 38 C.F.R. § 4.16(b). The Board correctly noted, however, that a June 2014 Board decision awarded a 60% rating for the ulcer condition from November 1955 for accrued-benefits purposes and stated that "[t]he question is whether a schedular total rating, under [§§] 3.166(a), 4.16, or 4.16(a) is warranted." R. at 12.

regulation, "substantially gainful occupation" and "substantially gainful employment" are synonymous. *Id.* at 70.

In 1955, the antecedent regulatory provision read as follows:

Total disability will be considered to exist when there is present any impairment of mind or body which is sufficient to render it impossible for the average person to follow a substantially gainful occupation: Provided, That permanent total disability shall be taken to exist when the impairment is reasonably certain to continue throughout the life of the disabled person.

38 C.F.R. § 3.166(a). This regulation was effective until March 1963 when it was superseded by 38 C.F.R. § 4.16, which contained the language of the present § 4.16(a), except for the passage on marginal employment. Although the definitional language pertaining to marginal employment was not added to the regulation until 1990, prior VA policy provided that, for TDIU purposes, marginal employment was not to be considered substantially gainful employment. *See Cantrell v. Shinseki*, 28 Vet.App. 382, 391 (2017) (citing 54 Fed. Reg. 35,507, 35,508 (Aug. 28, 1989)).

The Court reviews the Board's determination whether a veteran is able to secure or follow a substantially gainful occupation under the "clearly erroneous" standard. *Bowling v. Principi*, 15 Vet.App. 1, 6 (2001). A finding of fact is clearly erroneous when the Court, after reviewing the entire evidence, "is left with the definite and firm conviction that a mistake has been committed." *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

As with all findings of material fact, the Board must support its TDIU determinations with a written statement of the reasons or bases adequate to enable an appellant to understand the precise basis for the Board's decision as well as to facilitate review in this Court. 38 U.S.C. § 7104(d)(1); *see Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Gilbert*, 1 Vet.App. at 56-57. The 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), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1335 (Fed. Cir. 2009), 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, 593 (1991).

Mr. Joyce's Social Security earnings record shows a pattern of sporadic employment from 1955 through 1988,³ with intermittent years of earnings above the poverty threshold interspersed with years of little or no earnings. *See* R. at 375. The last sustained period of earnings above the poverty threshold was from 1955 to 1960. From 1961 to 1971, however, Mr. Joyce's earnings were substantially below the poverty threshold, including 5 years in which he had no earnings at all. His earnings were above the poverty threshold in 1972, 1977, and 1978; he had no earnings from 1973 through 1976, and from 1979 through 1985. His income fell below the poverty threshold in 1986,⁴ and in excess of the poverty threshold in 1987 and 1988. The Secretary apparently concedes that Mr. Joyce's earnings exceeded the poverty level in only 9 of the 35 years at issue. *See* Secretary's Brief (Br.) at 5 ("The Board also failed to consider the fact that the [v]eteran exceeded the poverty level in only nine of the 35 years on appeal.").

Mr. and Mrs. Joyce presented lay evidence that his employment difficulties were caused by persistent and worsening symptoms of his duodenal ulcer. In a Notice of Disagreement (NOD) with a March 2007 Board decision, Mr. Joyce referred to his affidavit stating that he began experiencing severe ulcer symptoms in 1959 when he was laid off from his job because of his symptoms of stomach pain, cramping, nausea, frequent vomiting, and weight loss.⁵ *See* R. at 379; *see also* R. at 2585 (Dec. 1959 letter from clinic to insurance company stating that the veteran "stated that he had been sick for about a month but managed to work until September 22, 1959"). The NOD further states that his ulcer condition was severe from 1961 to 1971, and "prevented him from gaining substantial employment" from 1982 to 1986. R. at 379. In a 1967 letter to then-President Lyndon Johnson, Mrs. Joyce wrote: "In [March 1965 Mr. Joyce] was admitted to [the Kansas City VA hospital] and the [doctor] said he is in bad shape. This I know as he can't hold a job, he can't sleep, and is in pain day and night." R. at 2545. The NOD further states that Mr.

³ The record does not reflect whether he had earnings in 1989 or 1990, although the Board noted earnings only through 1988. *See* R. at 16.

⁴ It is not clear what source the parties employed to determine the years Mr. Joyce's earnings exceeded the poverty level. The Court notes that according to www.census.gov/data/tables/time-series/income-poverty/historical-poverty-thresholds.html (last visited May 10, 2018), Mr. Joyce's earnings for 1986 would be below the poverty threshold.

⁵ Unfortunately, the record of proceedings does not contain the affidavits from Mr. or Mrs. Joyce. There does not seem to be any dispute, however, as to the content of those documents. The Court takes its summary of those documents from counsel's submissions to VA.

Joyce's affidavit mentioned that he was forced to go through a personal bankruptcy proceeding and depend on help from his family and church. *See* R. at 381 (Feb. 2008 NOD).

There is medical evidence that corroborates these lay statements. As the Board acknowledged, R. at 12-13, Mr. Joyce was hospitalized at least four times between June 1966 and February 1971 for complaints related to a bleeding ulcer. *See* R. at 1662, 1669 (Mar. 1971 discharge record after readmission for suspicion of upper gastrointestinal hemorrhage), 1663 (Oct. 1967 discharge summary of treatment for bleeding duodenal ulcer), 1667-68 (Oct. 1970 hospital treatment record for "chronic duodenal ulcer"), 2070 (June 1966 hospital record). After reviewing his medical records and his affidavit, Mr. Joyce's treating physician, Dr. Vogelsang, in March 2005, opined that "it is as likely as not that [Mr. Joyce's] service[-]connected duodenal ulcer with hiatal hernia prevented him from obtaining and maintaining substantially gainful employment between 1961 to 1985." R. at 362.⁶

In the decision here on appeal, the Board found that "the [v]eteran's and the appellant's statements of record are competent evidence regarding the impact of his service-connected disability on his occupational functioning," and noted that "the medical evidence of record supports [these statements] concerning severe symptomatology associated with his service-connected duodenal ulcer with hiatal hernia and the resulting frequent hospitalizations." R. at 16. The Board further found that "[p]rior to November 28, 1990, the [v]eteran's duodenal ulcer with hiatal hernia was productive of severe impairment of health." R. at 6. In awarding an increased disability rating from 1955 to 1990, the Board in June 2014 stated that "the foregoing evidence, including competent *and credible* lay statements from the [v]eteran and the appellant, demonstrates that the [v]eteran's duodenal ulcer with hiatal hernia was manifested by severe pain, frequent vomiting, and recurrent [bleeding]." R. at 111 (emphasis added).

Nevertheless, the Board found that "the preponderance of evidence is against a finding that the [v]eteran's service-connected disability prevented him from *following* a substantially

⁶ The Board discounted this opinion because, in the Board's view, it lacked sufficient reasoning or explanation of its conclusions. *See Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 304 (2008). Nevertheless, at minimum, the Vogelsang opinion was sufficient to trigger a VA obligation to furnish its own medical opinion. *See id.* (a conclusory opinion may furnish enough evidence of current disability or nexus so as to call for a VA medical examination); *McLendon v. Nicholson*, 20 Vet.App. 79, 83 (2006) (same). The Board offered no explanation for VA's failure to obtain such an opinion in the months between the Vogelsang opinion and Mr. Joyce's death, or at any time during the prosecution of his appeal.

gainful occupation." R. at 15 (emphasis added). The Board's principal reasoning for this finding was as follows:

[D]espite his frequent hospitalizations, and difficulty performing in a job due to severe ulcer symptoms, the [v]eteran actually worked from 1956 to 1960, 1962 to 1967, 1972, 1978, 1979, and from 1987 to 1988 during the rating period on appeal, which is from November 2, 1955, the effective date for service connection, to November 28, 1990. This is compelling evidence that he was able to work even with his ulcer and contradicts his and the [a]ppellant's assertion that he was unable to do so.

R. at 16. Essentially, the Board reasoned that because Mr. Joyce was able to obtain some work in some years, he must have been able to follow a substantially gainful occupation or during all years in the appeal period.

This reasoning is largely fallacious, supported by no medical evidence of record. VA evaluates marginal employment annually, on the basis of the year-to-year poverty threshold data. *See* 55 Fed. Reg. 31579, 31579 (Aug. 3, 1990). Therefore, to project earnings from one year into another year for purposes of determining whether a claimant's disability prevents him or her from performing in a substantially gainful occupation, is an inappropriate, essentially medical determination. Further, Mr. Joyce's earnings from 1962 through 1967 were far below the poverty threshold, which means that "marginal employment generally shall be deemed to exist" for those years.⁷ 38 C.F.R. § 4.16(a). "[I]f the evidence or facts reflect that a veteran is capable only of marginal employment, he is incapable of securing or following a substantially gainful occupation and is therefore entitled to [TDIU] if his service-connected disabilities are the cause of that incapability." *Ortiz-Valles*, 28 Vet.App. at 71. The lay statements and hospitalization records support the conclusion that the service-connected disability caused the marginal employment in the years 1961 to 1971, and there is no evidence to the contrary.

As to the years following 1971, the Board further observed that there were "hospitalizations for the [v]eteran's ulcer disability intermittently [sic] from the mid 60's to 1971 only. Thereafter, his condition was stable enough that he was followed by a doctor on an outpatient basis, even at times when the veteran was not working." R. at 17. On the basis of this observation, the Board

⁷ The Board did not point to any other definition of "marginal employment" that may have been operative in the years before 1990, and the record contains none.

rejected the lay evidence that Mr. Joyce's ulcer condition worsened in the years in which he had no earnings.

"[I] is the prerogative of the factfinder . . . to interpret the evidence and draw reasonable inferences from it." *Evans v. McDonald*, 27 Vet.App. 180, 187 (2014). The operative word, however, is "reasonable." Here, the Board attempted to draw two telescoping inferences from the evidence on hospitalizations: (1) The absence of hospitalizations after 1971 signaled some improvement in Mr. Joyce's ulcer condition, and (2) that improvement was sufficient to enable him to follow a substantially gainful occupation.

The first inference is inherently unreasonable, and both inferences amount to unsupported medical conclusions. *See Kahana v. Shinseki*, 24 Vet.App. 428, 435 (2011) ("[W]hen a Board inference results in a medical determination, the basis for that inference must be independent and it must be cited."); *see also Bankhead v. Shinseki*, 29 Vet.App. 10, 21 (2017) (Board erred in applying hospitalization as the standard for assessing severity of suicidal ideations). There are multiple reasons, having nothing to do with improvement in his basic health, why Mr. Joyce's hospitalizations might have ceased. Among these reasons are shifts in medical philosophy as to when hospitalizations are appropriate, and the unavailability of medical insurance. *See* R. at 1667 (Oct. 1970 hospital record: "Because [Mr. Joyce] has no health insurance, hospitalization was required to be as brief as possible."). There is no medical evidence that Mr. Joyce's ulcer condition improved after 1971, much less that any improvement would have been sufficient to enable him to follow a substantially gainful occupation.

The Court concludes that the Board erred in determining that Mr. Joyce was able to follow a substantially gainful occupation during the years when he had no earnings or earned below the poverty threshold, that is, 1961 to 1971, 1973 to 1976, and 1979 to 1986. There is only one view of the evidence as to these years, and it supports a conclusion of marginal employment caused by the service-connected ulcer condition. *Gutierrez v. Principi*, 19 Vet.App. 1 (2004). The Court will therefore reverse the Board's determinations and direct that the Board award TDIU for those years.

The Court is unable to conclude, however, that the Board erred in its determinations for the years 1955 to 1960. The earnings in those years were above the poverty level and there is no evidence that Mr. Joyce was unable to follow a substantially gainful occupation in those years. The Court therefore will affirm the Board's denial of TDIU for those years.

As to the remaining years, 1972, 1977, 1978, 1989, and 1990, the Court's review is frustrated by the lack of evidence and a definition of the phrase "follow a substantially gainful occupation." There is no evidence in the record what Mr. Joyce's earnings may or may not have been in 1989 and 1990. The concept of "following" a substantially gainful occupation would seem to connote working at a pursuit in which one reasonably expects to continue working. Otherwise, there would be no reason for the regulation to distinguish between "secur[ing]" and "follow[ing]" a substantially gainful occupation. The Board, however, did not discuss the meaning of "following," which the Board employed in its decision.

The regulation also mandates that the Board must consider "the nature of the employment and the reason for termination." 38 C.F.R. § 4.16(a) (2016). The Board noted that Mr. Joyce's affidavit stated that after losing his job in 1959 as a result of his ulcer, he "would work at numerous odd jobs when he was able to do so," and that in 1972, 1977, and 1978 he made "substantially gainful income" while "working in various jobs." R. at 14. The Board opinion contains no further discussion of the nature of the jobs Mr. Joyce held in those years, or the reasons for termination. In sum, the Board's statement of reasons or bases was inadequate for the Court to review its determination that Mr. Joyce's employment in the years mentioned above constituted "follow[ing]" a substantially gainful occupation."

The Court therefore will set aside the Board's determinations with respect to 1972, 1977, 1978, and 1987 to 1990 and remand the issue of TDIU in those years for a more thorough explanation of the reasons or bases for those determinations. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) (remand is appropriate "where the Board has . . . failed to provide an adequate statement of reasons or bases for its determinations, or where the record is otherwise inadequate"). On remand, Mrs. Joyce is free to submit additional argument based on the record at the time of the veteran's death,⁸ and the Board is required to consider any such argument. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002).

II. CONCLUSION

On consideration of the foregoing, the Court AFFIRMS the Board's January 12, 2017, denial of TDIU for the years 1955 to 1960; REVERSES its decision with respect to the years 1961

⁸ As the Board correctly noted, R. at 7, only evidence actually or constructively in the claims file at the time of Mr. Joyce's death may be considered for purposes of accrued benefits. 38 C.F.R. § 3.1000(d)(4) (2017).

to 1971, 1973 to 1976, and 1979 to 1986, and DIRECTS that TDIU be awarded for those years; and SETS ASIDE its determinations for the years 1972, 1977, 1978, and 1987 to 1990, and REMANDS the issue of TDIU for those years for further proceedings consistent with this decision.

DATED: May 31, 2018

Copies to:

Kenneth M. Carpenter, Esq.

VA General Counsel (027)