

**LENARD W. GRAHAM,**

**V.**

Vet. App. No. 17-1519

Acting Secretary of Veterans Affairs,

Appellee.

The portion of the Board's decision granting entitlement to a total disability rating based on individual unemployability (TDIU) is a favorable finding and should not be disturbed. See *Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007). Appellant's claims for: (1) an increased evaluation for his left shoulder disability, (2) an increased evaluation for his cervical spine disability, (3) an increased evaluation for his left upper extremity radiculopathy, (4) an earlier effective date for the grant of service connection for left upper extremity

radiculopathy, (5) an increased evaluation for left knee degenerative joint disease with instability, (6) an increased evaluation for left knee degenerative joint disease with limitation of extension, and (7) an increased evaluation for bilateral hearing loss, were remanded by the Board and are therefore outside the Court's jurisdiction. See *Breeden v. Principi*, 17 Vet.App. 475, 477-78 (2004).

### **BASIS FOR REMAND**

Throughout the pendency of this appeal the parties disagreed on whether Appellant effectively withdrew his appeal for an initial compensable rating for scars to the left eye brow and inner upper lip at his September 2016 Board hearing. The parties also disagreed on whether the Court's decision in *DeLisio v. Shinseki*, 25 Vet.App. 45 (2011) applied to the instant appeal, and if it applied, whether the Board was required to discuss whether Appellant had a full understanding of the consequences of his withdrawal as prescribed by *DeLisio*. During the pendency of this appeal, the United States Court of Appeals for the Federal Circuit (Federal Circuit) rendered a decision in *Acree v. O'Rourke*, No. 2017-1749, 2018 U.S. App. LEXIS 14959 (Fed. Cir. June 4, 2018) which provides binding authority on the interpretation of 38 C.F.R. § 20.204 and clarified the legal controversy between the parties.

The parties now agree that the Board erred when it failed to provide an adequate statement of reasons or bases for its determination that Appellant withdrew his appeal for an initial compensable rating for scars to the left eye brow and inner upper lip at his September 2016 Board hearing. 38 U.S.C.

§ 7104(d)(1); see *Allday v. Brown*, 7 Vet.App. 517, 527 (1995) (the Board must provide a statement of the reasons and bases for its determination, adequate to enable an appellant to understand the precise basis for the Board's decision as well as to facilitate review in this Court).

The Board determined that Appellant "indicated that he was withdrawing his appeal of the denial of [the] claim for entitlement to an increased compensable rating for scars, left eye brow and inner upper lip" and cited the September 2016 Board hearing transcript in support. [R. at 10-11]; see also [R. at 24, 22-100]. The Board cited its authority to dismiss an appeal under 38 U.S.C. § 7105(d)(5) and 38 C.F.R. § 20.204 and determined that because Appellant withdrew his appeal on the record at his Board hearing, the Board no longer had jurisdiction over the appeal. [R. at 10-11]. The parties agree that the Board's explanation as to whether Appellant withdrew his appeal at his September 2016 Board hearing was incomplete and required a more detailed analysis.

The Federal Circuit held in *Acree* that the standard established in *DeLisio* is a reasonable standard and applies to hearing withdrawals under 38 C.F.R. § 20.204(b)(1). *Acree*, slip op. at 9. Thus, to effectively verbally withdraw an appeal at a Board hearing under 38 C.F.R. § 20.204(b)(1) it must be "be explicit, unambiguous, and undertaken with a full understanding of its consequences . . . ." *Id.* at 7-8; see also *DeLisio*, 25 Vet.App. at 57. Because the Board failed to provide any analysis as to whether Appellant explicitly, unambiguously, and

with a full understanding of the consequences, withdrew his appeal for an initial compensable rating for scars to the left eye brow and inner upper lip at his September 2016 Board hearing, the Board's statement of reasons and bases for its dismissal was inadequate. *Acree*, slip op. at 10. The parties further agree that because the Board decision lacks a determination as to whether Appellant explicitly, unambiguously, and with a full understanding of the consequences, withdrew his claim at his September 2016 Board hearing, necessary fact finding by the Board is required. *Id.* at 11-12; see *Byron v. Shinseki*, 670 F.3d 1202, 1206 (Fed. Cir. 2012) (stating the general rule that where there are facts that remain to be found in the first instance, a remand is the proper course); see also *Hensley v. West*, 212 F.3d 1255, 1263 (Fed. Cir. 2000) (stating that "appellate tribunals are not appropriate fora for initial fact finding").

On remand, the Board must reassess whether Appellant fulfilled the necessary requirements for a valid verbal withdrawal of an appeal at a Board hearing. The Board must specifically determine whether Appellant explicitly, unambiguously, and with a full understanding of the consequences withdrew his appeal for an initial compensable rating for scars to the left eye brow and inner upper lip at his September 2016 Board hearing. The Board must substantiate its findings with an adequate statement of reasons and bases.

### **CONCLUSION**

The parties agree that the Board's decision dismissing Appellant's appeal for an initial compensable rating for scars to the left eye brow and inner upper lip,

should be vacated and the matter should be remanded for development and readjudication in accordance with the foregoing discussion.

The parties agree that this joint motion and its language are the product of the parties' negotiations. The Secretary further notes that any statements made herein shall not be construed as statements of policy or the interpretation of any statute, regulation, or policy by the Secretary. Appellant also notes that any statements made herein shall not be construed as a waiver as to any rights or VA duties under the law as to the matter being remanded except the parties' right to appeal the Court's order implementing this JMR. The parties agree to unequivocally waive any right to appeal the Court's order on this JMR and respectfully ask that the Court enter mandate upon the granting of this motion.

On remand, Appellant will be free to submit additional evidence and argument on the questions at issue, and the Board may "seek other evidence it feels is necessary" to the resolution of Appellant's claim. *Kutscherousky v. West*, 12 Vet.App. 369, 372 (1999). Before relying on any additional evidence developed, the Board should ensure that Appellant is given notice thereof, an opportunity to respond thereto, and the opportunity to submit additional argument or evidence. See *Austin v. Brown*, 6 Vet.App. 547 (1994); *Thurber v. Brown*, 5 Vet.App. 119 (1993).

The Board is obligated to reexamine the evidence and conduct a critical examination of the justification for its previous decision. *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991). If the Court grants this motion, the Board shall

obtain copies of this motion and the Court's order, and incorporate them into Appellant's claims file. The Board shall provide this claim expeditious treatment, as required by 38 U.S.C. § 7112.

**WHEREFORE**, the parties respectfully request that the Court vacate part of the March 1, 2017, Board decision and remand the matter for action consistent with the foregoing.

Respectfully submitted,

**FOR APPELLANT:**

DATE: 06/11/18

/s/ Evan T. Snipes

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