



**BOARD OF VETERANS' APPEALS**  
**FOR THE SECRETARY OF VETERANS AFFAIRS**  
**WASHINGTON, DC 20038**

Date: May 10, 2019

HENRY WILSON, JR  
6352 Longdale Drive  
North Highlands, CA 95660

Dear Appellant:

The Board of Veterans' Appeals (Board) has made a decision in your appeal, and a copy is enclosed.

<i>If your decision contains a</i>	<i>What happens next</i>
Grant	The Department of Veterans Affairs (VA) will be contacting you regarding the next steps, which may include issuing payment. Please refer to VA Form 4597, which is attached to this decision, for additional options.
Remand	Additional development is needed. VA will be contacting you regarding the next steps.
Denial or Dismissal	Please refer to VA Form 4597, which is attached to this decision, for your options.

If you have any questions, please contact your representative, if you have one, or check the status of your appeal at <http://www.vets.gov>.

Sincerely yours,

K. Osborne  
Deputy Vice Chairman

Enclosures (1)  
CC: Disabled American Veterans



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**BOARD OF VETERANS' APPEALS**  
**FOR THE SECRETARY OF VETERANS AFFAIRS**

IN THE APPEAL OF  
**HENRY WILSON, JR.**  
REPRESENTED BY  
**Disabled American Veterans**

[REDACTED]  
Docket No. 14-11 099A  
**Advanced on the Docket**

DATE: May 10, 2019

**ORDER**

Entitlement to a total disability rating based on individual unemployability due to service-connected disability (TDIU) is denied.

**FINDING OF FACT**

The Veteran's service-connected hypertensive heart disease and hypertension do not preclude him from securing or following substantially gainful employment consistent with his education and industrial background.

**CONCLUSION OF LAW**

The criteria for entitlement to a TDIU are not met. 38 U.S.C. §§ 1155, 5107; 38 C.F.R. §§ 3.340, 3.341, 4.15, 4.16 4.18, 4.19.

## **REASONS AND BASES FOR FINDING AND CONCLUSION**

The Veteran served on active duty from September 1962 to September 1982.

This matter is on appeal from a May 2012 decision of a Department of Veterans Affairs (VA) Regional Office (RO).

In March 2017, a videoconference hearing was held before the undersigned. A transcript of the hearing is in the record.

This matter was previously before the Board of Veterans' Appeals (Board) in August 2017, when the matter was remanded for further development.

### **TDIU**

The Veteran contends that he is unable to secure or follow substantially gainful employment due to his service-connected disabilities.

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. 38 C.F.R. §§ 3.340, 3.341, 4.16(a). If there is only one such disability, it must be rated at 60 percent or more, and if there are two or more disabilities, there shall be at least one disability rated at 40 percent or more, and sufficient additional disability to bring the combined rating to 70 percent. 38 C.F.R. § 4.16(a).

The established policy of VA reflects that all Veterans who are unable to secure and follow a substantially gainful occupation by reason of service-connected disabilities shall be rated totally disabled. 38 C.F.R. § 4.16(b). Factors such as employment history and educational and vocational attainments are to be considered. *Id.* For VA purposes, the term "unemployability" is synonymous with an inability to secure and follow a substantially gainful occupation.

VAOPGCPREC 75-91; 57 Fed. Reg. 2317 (1992). The United States Court of Appeals for Veterans Claims (Court) recently held that “substantially gainful occupation” contains both economic and noneconomic components. *Ray v. Wilkie*, No. 17-0781, 2019 U.S. App. Vet. Claims LEXIS 386 (Vet. App. Mar. 14, 2019). The economic component “simply means an occupation earning more than marginal income (outside of a protected environment) as determined by the U.S. Department of Commerce as the poverty threshold for one person. *Id.* The non-economic component requires consideration of the Veteran’s history, education, skill, and training, and physical and mental ability to perform the activities required by an occupation. The word “substantially” suggests an intent to impart flexibility into a determination of overall employability, as opposed to requiring the appellant to prove that he is 100 percent unemployable. *Roberson v. Principi*, 251 F.3d 1378 (Fed. Cir. 2001). Moreover, age is not a factor to be considered in evaluating the Veteran’s unemployability. 38 C.F.R. § 4.19.

In this case, the Veteran has the following compensable service-connected disabilities: hypertensive heart disease, rated at 60 percent, and hypertension, rated at 10 percent. As he has a single disability rated at 60 percent, the schedular requirements for a TDIU rating are met. The question remaining is whether the Veteran’s service-connected disabilities alone render him incapable of participating in a substantially gainful employment.

In this case, a May 2010 VA examination shows that the examiner noted the Veteran’s severe lumbar condition and history of surgeries. The Veteran reported that he was able to walk at an average pace with light use of hand tools, driving, walking, and carrying light articles. He reported generalized fatigue during some activities.

In his January 2011 VA Form 21-8940, Veteran’s Application for Increased Compensation Based on Unemployability, the Veteran reported being unable to work due to his hypertensive heart disease and hypertension. He reported that he last worked full time in 2002 in aircraft quality control. He indicated that he had 3 years of college and additional training in aircraft quality control. He reported that since retiring in 2002 he had undergone 3 back surgeries, a neck surgery for a bulging disc, and prostate surgery.

A March 2011 VA examination report, completed by nurse practitioner S.D., notes that the Veteran was employed as supply and engineering while in service. The Veteran reported chest pain episodes irradiating to the left arm one or two times per month and lasting ten to fifteen minutes. The examiner noted that the Veteran walks up to one mile three times per week very slowly due to low back pain and has to stop intermittently due to low back pain associated with numbness in the right leg and feet as well as a pain sensation in the right knee. The Veteran was unable to undergo a treadmill evaluation due to his history of several spine surgeries. However, the examiner provided an estimated METs level of 3 to 5 and noted that his METs were limited due to his lower back condition, rather than his cardiac condition. The examiner opined that the Veteran's service-connected hypertension and hypertensive heart disease rendered him unable to work in a physical occupation but able to work in a sedentary occupation. Further, the examiner opined that the Veteran's nonservice-connected lower back condition limits him from working in a physical or sedentary occupation due to chronic pain and limited mobility. The Board assigns a moderate degree of probative value to the March 2011 opinion as it reflects consideration of the Veteran's medical history and considered the Veteran's reports regarding his functional limitations.

In an April 2012 VA examination addendum, nurse practitioner S.D. provided an addendum opinion stating that the Veteran was unable to work in a physical or sedentary occupation due to his lower back condition, which is not a service-connected condition. The examiner provided a rationale explaining that, based on his normal ejection fraction and recent normal myocardial perfusion studies, his service-connected hypertension and hypertensive heart disease do not preclude him from working in a physical or sedentary occupation. The Board assigns a high degree of probative value to this opinion as it delineates the effects of the Veteran's various service-connected and nonservice-connected disabilities.

A July 2012 letter contains a private medical opinion from Dr. B.D., who opined that the Veteran's diagnoses cause him to be unable to work now or in the future. The doctor listed the diagnoses as cervical disc disease, chronic low back pain, gastroesophageal reflux disease, hyperlipidemia, hypertension, left ventricular atrophy, lumbar radiculopathy, cervical myelopathy, and osteoarthritis of the knees. Although this opinion indicates the Veteran's service-connected disabilities impair his ability to work, it also lists multiple nonservice-connected conditions that affect his ability to work and it does not explain whether the service-connected disabilities alone cause unemployability. Therefore, the Board finds that this opinion holds little weight of probative value.

A May 2014 letter contains a VA medical opinion from Dr. Z.S., who opined that the Veteran's chronic low back pain has caused him to become unemployable. The opinion contains a brief rationale detailing the Veteran's medical history relating to his low back condition. This opinion is probative to the extent that it reflects that the Veteran's nonservice-connected back disability contributes to his unemployability. However, the opinion provides no probative value on the issue of whether his service-connected disabilities alone, which are not discussed in the opinion, cause unemployability.

An October 2016 letter contains a private medical opinion from Dr. C.W., who stated that the Veteran has a diagnosis of hypertension and left ventricular hypertrophy. Further, the doctor opined that the Veteran was not fit for employment. The statement does not expressly state that the noted diagnoses were the cause of unemployability. However, even if the Board were to construe this statement in such a manner, the opinion contains no rationale for such an opinion. The Board therefore finds that this letter has no probative value.

The Veteran attended a VA examination in January 2019 in which the examiner, Dr. E.B. opined that, based solely on the hypertension and left ventricular hypertrophy, the Veteran would be expected to function adequately in sedentary work settings, semi-sedentary work settings, and very light physical labor. The examiner noted that METs testing in May 2018 had shown METs of 7 and that there was no evidence of ischemia, failure, or pathologic wall motion abnormalities. Lab testing was normal, indicating no renal disease due to hypertension. The examiner provided a comprehensive review of the Veteran's medical history and considered the various contributing factors to his unemployability, to include the nonservice-connected disabilities. In addition, the examiner considered reports by the Veteran that he retired primarily due to location changes, elevated blood pressure due to stress, and back problems. The examiner noted that the Veteran graduated high school and did not acquire any further formal degrees but had classes in quality assurance and computer skills in service. The examiner also considered and discussed the prior medical opinions of record. Given the examiner's thorough review and consideration of the record, including the Veteran's history, education, skill, and training, and physical and mental ability to perform the activities required by an occupation, the Board assigns a high degree of probative value to the January 2019 VA opinion.

The Veteran has provided various lay statements discussing his unemployability. The Veteran stated in a June 2012 notice of disagreement that he was unemployable due to multiple health conditions, to include hypertensive heart disease, hypertension, four back surgeries, a neck condition, and prostate surgeries. The Veteran also reported during the May 2010 VA examination that he had retired in 2002 due to his low back condition. During the March 2017 hearing, the Veteran stated that he last worked in 2003 and did not look for more work due to his heart condition. Therefore, the Veteran has even indicated that his nonservice-connected back disability at least contributed to his inability to obtain and maintain substantially gainful employment.

The Board finds that the preponderance of the evidence of record is against a finding that the Veteran is unable to obtain or maintain substantially gainful employment because of his service-connected disabilities. The highly-probative

IN THE APPEAL OF  
**HENRY WILSON, JR.**

  
Docket No. 14-11 099A

April 2012 medical opinion from S.D. and January 2019 opinion from Dr. E.B. reflect that the Veteran's service-connected disabilities alone do not preclude the Veteran from obtaining and maintaining gainful employment. These and the other opinions of record also indicate that the Veteran's nonservice-connected disabilities, particularly his back disability, have an impact on his ability to obtain and maintain substantially gainful employment. Therefore, entitlement to TDIU is denied. 38 C.F.R. § 4.16(a).



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M. SORISIO  
Veterans Law Judge  
Board of Veterans' Appeals

ATTORNEY FOR THE BOARD

M. H. White, Associate Counsel

*The Board's decision in this case is binding only with respect to the instant matter decided. This decision is not precedential, and does not establish VA policies or interpretations of general applicability. 38 C.F.R. § 20.1303.*



## YOUR RIGHTS TO APPEAL OUR DECISION

The attached decision by the Board of Veterans' Appeals (Board) is the final decision for all issues addressed in the "Order" section of the decision. The Board may also choose to remand an issue or issues to the local VA office for additional development. If the Board did this in your case, then a "Remand" section follows the "Order." However, you cannot appeal an issue remanded to the local VA office because a remand is not a final decision. *The advice below on how to appeal a claim applies only to issues that were allowed, denied, or dismissed in the "Order."*

If you are satisfied with the outcome of your appeal, you do not need to do anything. Your local VA office will implement the Board's decision. However, if you are not satisfied with the Board's decision on any or all of the issues allowed, denied, or dismissed, you have the following options, which are listed in no particular order of importance:

- Appeal to the United States Court of Appeals for Veterans Claims (Court)
- File with the Board a motion for reconsideration of this decision
- File with the Board a motion to vacate this decision
- File with the Board a motion for revision of this decision based on clear and unmistakable error.

Although it would not affect this BVA decision, you may choose to also:

- Reopen your claim at the local VA office by submitting new and material evidence.

There is *no* time limit for filing a motion for reconsideration, a motion to vacate, or a motion for revision based on clear and unmistakable error with the Board, or a claim to reopen at the local VA office. Please note that if you file a Notice of Appeal with the Court and a motion with the Board at the same time, this may delay your appeal at the Court because of jurisdictional conflicts. If you file a Notice of Appeal with the Court *before* you file a motion with the Board, the Board will not be able to consider your motion without the Court's permission or until your appeal at the Court is resolved.

**How long do I have to start my appeal to the court?** You have **120 days** from the date this decision was mailed to you (as shown on the first page of this decision) to file a Notice of Appeal with the Court. If you also want to file a motion for reconsideration or a motion to vacate, you will still have time to appeal to the court. *As long as you file your motion(s) with the Board within 120 days of the date this decision was mailed to you*, you will have another 120 days from the date the Board decides the motion for reconsideration or the motion to vacate to appeal to the Court. You should know that even if you have a representative, as discussed below, *it is your responsibility to make sure that your appeal to the Court is filed on time*. Please note that the 120-day time limit to file a Notice of Appeal with the Court does not include a period of active duty. If your active military service materially affects your ability to file a Notice of Appeal (e.g., due to a combat deployment), you may also be entitled to an additional 90 days after active duty service terminates before the 120-day appeal period (or remainder of the appeal period) begins to run.

**How do I appeal to the United States Court of Appeals for Veterans Claims?** Send your Notice of Appeal to the Court at:

**Clerk, U.S. Court of Appeals for Veterans Claims  
625 Indiana Avenue, NW, Suite 900  
Washington, DC 20004-2950**

You can get information about the Notice of Appeal, the procedure for filing a Notice of Appeal, the filing fee (or a motion to waive the filing fee if payment would cause financial hardship), and other matters covered by the Court's rules directly from the Court. You can also get this information from the Court's website on the Internet at: <http://www.uscourts.cavc.gov>, and you can download forms directly from that website. The Court's facsimile number is (202) 501-5848.

To ensure full protection of your right of appeal to the Court, you must file your Notice of Appeal **with the Court**, not with the Board, or any other VA office.

**How do I file a motion for reconsideration?** You can file a motion asking the Board to reconsider any part of this decision by writing a letter to the Board clearly explaining why you believe that the Board committed an obvious error of fact or law, or stating that new and material military service records have been discovered that apply to your appeal. It is important that your letter be as specific as possible. A general statement of dissatisfaction with the Board decision or some other aspect of the VA claims adjudication process will not suffice. If the Board has decided more than one issue, be sure to tell us which issue(s) you want reconsidered. Issues not clearly identified will not be considered. Send your letter to:

**Litigation Support Branch  
Board of Veterans' Appeals  
P.O. Box 27063  
Washington, DC 20038**

Remember, the Board places no time limit on filing a motion for reconsideration, and you can do this at any time. However, if you also plan to appeal this decision to the Court, you must file your motion within 120 days from the date of this decision.

**How do I file a motion to vacate?** You can file a motion asking the Board to vacate any part of this decision by writing a letter to the Board stating why you believe you were denied due process of law during your appeal. *See* 38 C.F.R. 20.904. For example, you were denied your right to representation through action or inaction by VA personnel, you were not provided a Statement of the Case or Supplemental Statement of the Case, or you did not get a personal hearing that you requested. You can also file a motion to vacate any part of this decision on the basis that the Board allowed benefits based on false or fraudulent evidence. Send this motion to the address on the previous page for the Litigation Support Branch, at the Board. Remember, the Board places no time limit on filing a motion to vacate, and you can do this at any time. However, if you also plan to appeal this decision to the Court, you must file your motion within 120 days from the date of this decision.

**How do I file a motion to revise the Board's decision on the basis of clear and unmistakable error?** You can file a motion asking that the Board revise this decision if you believe that the decision is based on "clear and unmistakable error" (CUE). Send this motion to the address on the previous page for the Litigation Support Branch, at the Board. You should be careful when preparing such a motion because it must meet specific requirements, and the Board will not review a final decision on this basis more than once. You should carefully review the Board's Rules of Practice on CUE, 38 C.F.R. 20.1400-20.1411, and *seek help from a qualified representative before filing such a motion*. See discussion on representation below. Remember, the Board places no time limit on filing a CUE review motion, and you can do this at any time.

**How do I reopen my claim?** You can ask your local VA office to reopen your claim by simply sending them a statement indicating that you want to reopen your claim. However, to be successful in reopening your claim, you must submit new and material evidence to that office. *See* 38 C.F.R. 3.156(a).

**Can someone represent me in my appeal?** Yes. You can always represent yourself in any claim before VA, including the Board, but you can also appoint someone to represent you. An accredited representative of a recognized service organization may represent you free of charge. VA approves these organizations to help veterans, service members, and dependents prepare their claims and present them to VA. An accredited representative works for the service organization and knows how to prepare and present claims. You can find a listing of these organizations on the Internet at: <http://www.va.gov/vso/>. You can also choose to be represented by a private attorney or by an "agent." (An agent is a person who is not a lawyer, but is specially accredited by VA.)

If you want someone to represent you before the Court, rather than before the VA, you can get information on how to do so at the Court's website at: <http://www.uscourts.cavc.gov>. The Court's website provides a state-by-state listing of persons admitted to practice before the Court who have indicated their availability to the represent appellants. You may also request this information by writing directly to the Court. Information about free representation through the Veterans Consortium Pro Bono Program is also available at the Court's website, or at: <http://www.vetsprobono.org>, [mail@vetsprobono.org](mailto:mail@vetsprobono.org), or (855) 446-9678.

**Do I have to pay an attorney or agent to represent me?** An attorney or agent may charge a fee to represent you after a notice of disagreement has been filed with respect to your case, provided that the notice of disagreement was filed on or after June 20, 2007. *See* 38 U.S.C. 5904; 38 C.F.R. 14.636. If the notice of disagreement was filed before June 20, 2007, an attorney or accredited agent may charge fees for services, but only after the Board first issues a final decision in the case, and only if the agent or attorney is hired within one year of the Board's decision. *See* 38 C.F.R. 14.636(c)(2).

The notice of disagreement limitation does not apply to fees charged, allowed, or paid for services provided with respect to proceedings before a court. VA cannot pay the fees of your attorney or agent, with the exception of payment of fees out of past-due benefits awarded to you on the basis of your claim when provided for in a fee agreement.

**Fee for VA home and small business loan cases:** An attorney or agent may charge you a reasonable fee for services involving a VA home loan or small business loan. *See* 38 U.S.C. 5904; 38 C.F.R. 14.636(d).

**Filing of Fee Agreements:** If you hire an attorney or agent to represent you, a copy of any fee agreement must be sent to VA. The fee agreement must clearly specify if VA is to pay the attorney or agent directly out of past-due benefits. *See* 38 C.F.R. 14.636(g)(2). If the fee agreement provides for the direct payment of fees out of past-due benefits, a copy of the direct-pay fee agreement must be filed with the agency of original jurisdiction within 30 days of its execution. A copy of any fee agreement that is not a direct-pay fee agreement must be filed with the Office of the General Counsel within 30 days of its execution by mailing the copy to the following address: Office of the General Counsel (022D), Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420. *See* 38 C.F.R. 14.636(g)(3).

The Office of the General Counsel may decide, on its own, to review a fee agreement or expenses charged by your agent or attorney for reasonableness. You can also file a motion requesting such review to the address above for the Office of the General Counsel. *See* 38 C.F.R. 14.636(i); 14.637(d).