United States Court of Appeals for Veterans Claims

Vet. App. No. 19-919

THOMAS S. PRATT,

Appellant,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,

Appellee.

BRIEF FOR APPELLANT

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that Appellant's vocational rehabilitation would be more likely if a different long-range goal from actor was established, despite no change in the facts of the case between its October 2016 decision and the December 2018 decision, and with no statement of reasons and bases provided in the December 2018 decision?

IV. Whether the Court should remand that portion of the Board's decision that denied Appellant's requested change to his vocational rehabilitation claim on the basis that the Department of Veterans Affairs (VA) has no authority to reimburse Appellant retroactively for past education and training that was not approved by the VA, because that contention is inextricably intertwined with the previous issues and should not be adjudicated until the Board's bases for disapproval of Appellant's requested change to his vocational rehabilitation plan either are reversed by this Court or are remanded by this Court to the Board for re-adjudication?

STATEMENT OF THE CASE

Thomas S. Pratt, the Appellant, appeals the December 17, 2018 decision of the Board of Veterans' Appeals (Board) which denied him his requested change in his vocational rehabilitation training program under Chapter 31 of Title 38, U.S. Code. Record Before the Agency ("R.") at 3-18. Appellant had previously pursued a vocational rehabilitation goal as an actor, then requested a change in his vocational rehabilitation plan to pharmacist in 1997. Since 1997, the VA has denied Appellant's requested change and continues to deny it to this day.

I. STATEMENT OF THE FACTS

Appellant served on active duty in the US Army from May 2, 1978 to April 27, 1981. R. at 1379. An October 1982 Rating Decision granted service connection for residuals from frostbite of hands and feet at 10% disability rating. A June 24, 1997, Rating Decision changed Appellant's service-connected condition from 10% for residuals from frostbite to a 40% rating for peripheral neuropathy in both hands and feet effective June 27, 1991. R. at 3054-3056.

On July 17, 1997, after Appellant applied for a change in his vocational rehabilitation plan from being an actor to going to pharmacy school, the Los Angeles Regional Office Vocational Rehabilitation and Counseling (VR&C) office notified Appellant that it was not authorizing his request because that office erroneously believed his vocational rehabilitation eligibility had expired the previous November. R. at 734. The VR&C office did this because it was unaware Appellant's 10% rating had increased to 40% the previous month.

On July 31, 1997, the VR&C office, having now become aware of his new 40% disability rating, wrote Appellant that although his vocational rehabilitation eligibility limitation no longer applied due to his new 40% disability rating, the VR&C office was denying his pharmacy school request anyway. Specifically, the office stated that it denied Appellant's request because that office had determined that (1) Appellant was found to have a serious employment handicap based on his service-connected disabilities and their impairments upon his employability; (2) a program of training did appear necessary at that time in order to assist Appellant in obtaining skills that could be utilized

to become suitably employed again; and (3) the pharmacist vocational goal was not recommended as the most suitable vocational goal for him to pursue "due to the significant limitations from your disabilities, related to both upper and both lower extremities." R. at 631-632.

On September 10, 1997, Appellant timely filed a Notice of Disagreement with that determination to deny him vocational rehabilitation benefits to pay for pharmacy school. R. at 687.[1] In January 1998, the Regional Office issued a Statement of the Case (SOC) explaining that the VA had found Appellant's goal of becoming a pharmacist not feasible in light of his problems with extremity numbness and decreased dexterity. R. at 677-683. The Regional Office also noted Appellant's failure to meet with his vocational rehabilitation counselor and stated the law that, in seeking a change of a vocational rehabilitation plan, a veteran is required to "fully [participate]" in any change under 38 C.F.R § 21.94(b)(3). R. at 681.

A November 2000 Rating Decision increased Appellant's disability ratings to 80% and granted a rating of total disability for individual unemployability (TDIU) backdated effective to June 1991. R. at 2782-2787.

On February 27, 2006, Appellant agreed to meet with his VR&C counselor and stated that his previous refusals to meet stemmed from an EEOC complaint Appellant

[1] While awaiting the Regional Office's determination on the availability of his vocational rehabilitation benefits, Appellant applied to and was accepted at the University of Southern California's School of Pharmacy, where he attended from Fall Semester 1998 to completion of the program in Spring Semester 2002. R. at 659-664.

had filed and had been pending against the Long Beach VA Medical Center (VAMC), where he had applied for a job as a pharmacist. R. at 2455. Appellant's letter of March 28, 2006 documented his March 8, 2006 meeting with his VR&C counselor and his telephone conference with his VR&C counselor on March 27, 2006. R. at 2449-2450.

II. PROCEDURAL HISTORY OF THE CURRENT CASE

Subsequently, over the years there have been a number of Regional Office decisions, Board decisions, and Court opinions over Appellant's request for a change in his vocational rehabilitation program from actor to pharmacists and his ensuing claim for reimbursement for his expenses incurred in pursuing pharmacy school. The most recent and relevant decisions are as follows:

1. On July 3, 2013, the Board issued a decision denying Appellant the change to pharmacist that he sought in his vocational rehabilitation plan. R. at 1612-1633 (Board Docket No. 98-02 188A). In denying Appellant's requested change, the Board relied in part upon Appellant's previous vocational rehabilitation goal of actor and his efforts toward becoming an actor, stating

> Given the unique history of the Veteran's case, both procedurally and factually, his full participation in establishing the feasibility of his change of vocational goal was crucial. Specifically, the Veteran had previously utilized his benefits to pursue a vocational goal as an actor, despite advisories about the potential infeasibility of this goal, and had abandoned his pursuit of this vocation after he was unsuccessful in his vocational goal.

R. at 1631 (emphasis added). The Board also attempted to characterize Appellant's unwillingness to meet with the VR&C counselors while his employment discrimination claim against that Regional Office was pending, and his disagreement with the

counselors' demand that he "take action to indicate his willingness to utilize his pharmacology degree ... and engage in his chosen profession" (R. at 1631), as a lack of participation in vocational rehabilitation efforts:

> Full participation is a requisite element for establishing the feasibility in a change of vocational rehabilitation program. However, as outlined above, the Veteran has not fully participated with counselor's efforts to establish that he actually desires to obtain employment as a pharmacist, and thus, by his lack of participation, has failed to establish the feasibility of his desired vocational goal.

R. at 1632 (emphasis added). Appellant timely appealed that decision to the Court on August 27, 2013.

2. On June 30, 2015, the Court issued its opinion in *Pratt v. McDonald*, 2015 U.S. App. Vet. Claims LEXIS 896 (CAVC Docket Number 13-2555)[2] (R. at 1269-1277) vacating that portion of the July 3, 2013 Board decision that denied Appellant's requested change in his vocational rehabilitation program, and remanding that request back to the Board because "the Board provided an inadequate statement of reasons or bases for finding Appellant had not fully participated in his proposed change of a vocational goal, that is, in pursuing pharmacy as his goal." R. at 1276. In vacating and remanding this claim in order for the Board to provide an adequate statement of reasons or bases for determining whether Appellant was entitled to a change in his vocational rehabilitation

[2] This opinion involved a second issue as well, namely Appellant's appeal of the VA's July 2005 discontinuation of his TDIU status, and the subsequent procedural history of that appeal. In this 2015 opinion, the Court reversed that portion of the Board's July 2013 decision pertaining Appellant's reduction in TDIU because of numerous legal errors by the Board that rendered its TDIU reduction void *ab initio* (R. at 1275-76) and remanded that matter to the VA to reinstate his TDIU benefits (R. at 1277).

training program, the Court stated that (1) Appellant's prior vocational rehabilitation attempts were irrelevant to the proposed change (other than to the question of whether those prior vocational rehabilitation goals were no longer reasonably feasible), and (2) as a matter of fully participating and concurring in the change of vocational rehabilitation plan as required by 38 C.F.R. §21.94, the Board impermissibly required Appellant to establish that he actually desired to obtain employment. *Id.*

3. As directed by the Court, on October 19, 2016 the Board issued a new decision. The Board again denied Appellant's requested change in his vocational rehabilitation plan. R. at 199-220 (Board Docket No. 98-02 188A). In denying Appellant's request, the Board stated

> Although the Veteran may have fully participated in the proposed vocational change by virtue of obtaining the pharmacy degree and licensure and meeting with the VA rehabilitation counselor in March 2006 in this case, he did not concur in the proposed change to the vocational goal because he did not have a desire to obtain and sustain gainful employment as a pharmacist.

R. at 220 (emphasis added). *This was in direct contradiction of the Court's June 30, 2015 remand order which had specifically directed the Board not to require Appellant to establish that he actually desired to obtain employment*. R. at 1276. On February 8, 2017, Appellant timely appealed that decision to this Court.

4. On June 29, 2018, the Court issued its opinion in *Pratt v. O'Rourke*, 2018 U.S. App. Vet. Claims LEXIS 870 (CAVC Docket No. 17-415) (R. at 92-97) vacating and remanding the Board's October 19, 2016 decision. The Court concluded "that the Board failed to ensure compliance with the [Court's] June 2015 remand." R. at 96. The

Court remarked that the Board continued to use criteria which the Court had specifically directed it not to use:

> In June 2015, the Court held that the Board applied the wrong standard when it determined that the appellant did not fully participate under 38 C.F.R. § 21.94, because the Board had imposed an additional requirement that the appellant "'actually desire[] to obtain employment." [] The Board used the same rationale in making its determination in the decision on appeal, yet applied it to find that the appellant did not concur in the change. [] There is no requirement under 38 C.F.R.§ 21.94 that the appellant desire to obtain employment in pharmacology for him to concur in the proposed change in [vocational rehabilitation] plan.

R. at 96-97 (emphasis added). The Court remanded this claim back to the Board again for re-adjudication. R. at 97.

5. On December 17, 2018 the Board issued the currently-appealed decision, again denying Appellant's request for the change to pharmacist in his vocational rehabilitation plan. R. at 3-18 (Board Docket No. 98-02 188A). In denying Appellant's request for this change to his vocational rehabilitation plan, the Board stated that the criteria for approval of a change in Appellant's vocational rehabilitation benefits were not met because (a) "no vocational goal was reasonably feasible when [Appellant] requested a change in vocational goal to pharmacist"[3] (R. at 16), (b) "vocational rehabilitation was not shown to have been more likely if a different long-range goal (from actor to pharmacist) was established[,]" (R. at 16), (c) "Appellant did not concur in the proposed change to the vocational rehabilitation" (R. at 16-17), and (d) the Board believed it has no

[3] The Board noted that Appellant has been granted TDIU status in November 2000 effective back to 1991. The Board erroneously assumed that TDIU status meant no employment was possible for Appellant. R. at 15. This will be addressed in a later section of this Brief.

authority to retroactively reimburse Appellant for the expenses related to obtaining his pharmacy degree when such training was not approved by the VA (R. at 17). Appellant timely appealed this decision on February 11, 2019, and it is this appeal which now stands before the Court.

SUMMARY OF THE ARGUMENT

In its most recent decision, the Board listed five reasons as to why it refuses to approve Appellant's request for change in his vocational rehabilitation plan to pharmacist. Appellant's assignment of error in each reason is addressed below.

First, the Board denied Appellant's request for a change to pharmacist in his vocational rehabilitation plan because the Board erroneously imposed a requirement on Appellant that he desire to seek employment in pharmacology for him to concur in his own requested change in the vocational rehabilitation plan. This Court has twice ruled on this issue in Appellant's request and both times has twice explicitly rejected the Board's previous attempts to impose this requirement. Yet the Board imposed this requirement a third time without any changes in fact or law to justify imposing it again over the Court's previous reversals of this error.

Second, the Board denied Appellant's request for a change to pharmacist to his vocational rehabilitation plan because of his failed previous vocational rehabilitation endeavor to become an actor. However, Appellant's inability to gain employment as an actor, which led to his current request for change to pharmacist for his vocational rehabilitation plan, has already been considered by the Court in its 2015 opinion on Appellant's appeal of a July 2013 Board decision, an opinion in which the Court

specifically rejected the Board's use of that criteria, reversing and remanding that portion of the Board decision that used such criteria. Yet the Board used this criteria a second time without any changes in fact or law to justify imposing it again, despite the Court's previous reversal over this error.

Third, in deciding that no vocational rehabilitation goal was reasonably feasible because Appellant had been awarded TDIU status, the Board erroneously created its own legal standard for TDIU of "total unemployability" when the actual legal and regulatory standard is "unable to secure or follow a substantially gainful occupation" per 38 C.F.R. §4.16(a). Additionally, the Court of Appeals for the Federal Circuit has previously rejected using a "total unemployability" standard in defining and applying that regulation. *Roberson v. Principi*, 251 F.3d 1378, 1385 (Fed. Cir. 2001).

Fourth, the Board's December 2018 decision denied Appellant's requested change in his vocational rehabilitation plan because it stated that vocational rehabilitation was not shown to be more likely if a different long-range goal from Appellant's previous goal of actor was chosen. However, contrary to that conclusion, in its previous decision of October 2016 the Board had conceded that Appellant's vocational rehabilitation was more likely if a different long-range goal from actor was chosen. Yet, in this currently-appealed December 2018 decision, the Board provided no statement of reasons and bases for its change in that determination.

Finally, the Board contends that the VA has no authority to retroactively reimburse a claimant for vocational rehabilitation expenses incurred in training that was not approved for vocational rehabilitation. However, this issue is inextricably

intertwined with the preceding issues and must be re-adjudicated anew after the Court makes its determinations as to reversal and/or remand on those issues.

STANDARD OF REVIEW

A remand by this Court confers on Appellant, as a matter of law, the right to compliance with its remand orders. *Stegall v. West*, 11 Vet. App. 268, 271 (1998).

The Board must provide an adequate statement of reasons or bases for its findings and conclusions on all material issues of law and fact presented on the record. *See* 38 U.S.C. § 7104(d)(1); *Gilbert v. Derwinski*, 1 Vet. App. 49, 57 (1990).

Legal errors committed by the Board are reviewed under the *de novo* standard. 38 U.S.C § 7261(a); *see Butts v. Brown*, 5 Vet. App. 532, 538 (1993) (*en banc*). The Court may set aside a Board decision or finding that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *See* 38 U.S.C. §7261(a)(3)(A); *Butts v. Brown*, *supra*.

The Court shall hold unlawful and set aside or reverse a finding of material fact adverse to the claimant made in reaching a decision in a case if the finding is clearly erroneous. 38 U.S.C. §7261(a)(4). *Forcier v. Nicholson*, 19 Vet. App. 414, 421 (2006) ("[A] factual finding 'is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed.'") (internal citations omitted).

"[T]he Court will reverse a Board decision that is clearly erroneous when 'the court is left with the definite and firm conviction that a mistake has been committed'."

Romanowsky v. Shinseki, 26 Vet. App. 289, 297 (2013) (citing to *U.S. v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)) (emphasis added); *see also Deloach v. Shinseki*, 704 F.3d 1370, 1380 (Fed. Cir. 2013) ("[W]here the Board has performed the necessary fact-finding and explicitly weighed the evidence, the Court of Appeals for Veterans Claims should reverse when, on the entire evidence, it is left with the definite and firm conviction that a mistake has been committed.").

ARGUMENT

I. THE BOARD CONTINUES TO APPLY CRITERIA EXPRESSLY REJECTED BY THIS COURT IN ITS PREVIOUS OPINIONS ON APPELLANT'S CLAIM.

As stated above, Appellant has appealed this claim to this Court several times prior to this current appeal. In at least two previous opinions on Appellant's claim, the Court has directed the Board not to impose certain requirements or use certain criteria in making its decisions on Appellant's vocational rehabilitation claim, yet the Board in the currently-appealed decision continues to violate or ignore the directions of this Court.

A. The Board erroneously imposed a requirement that Appellant must seek employment as a pharmacist in order for him to concur in his requested change in the vocational rehabilitation plan, despite the two previous Court decisions on Appellant's claim directing the Board NOT to impose such a requirement.

The Court itself has *twice* explicitly rejected the Board's previous attempts to impose a requirement on Appellant that he desire to seek employment in pharmacology for him to concur in his own requested change in the vocational rehabilitation plan.

As mentioned in the Procedural History section of this Brief, the Court's June 2015 opinion in *Pratt v. McDonald*, *supra* (R. at 1269-1277) involved Appellant's appeal

of the Board's 2013 denial (R. at 1612-1633) of the vocational rehabilitation plan change request that is currently the subject of this appeal. In that 2015 opinion, the Court stated

> the Board found that "the Veteran is now seeking a vocational goal for which he has the requisite training and licensure," but denied his proposed change because it found that the appellant had "not fully participated with [the] counselor's efforts to establish that he actually desires to obtain employment as a pharmacist." R. at 43. There is no requirement under 38 C.F.R. § 21.94 that the appellant fully participate to establish that he "actually desires to obtain employment," merely that he participate and concur in the proposed change. The Board found that the appellant obtained his degree and licensure to become a pharmacist and thus it is unclear how the appellant did not fully participate in the proposed change. Remand is required for the Board to provide an adequate statement of reasons or bases for determining whether the appellant is entitled to a vocational rehabilitation training program.

2015 U.S. App. Vet. Claims LEXIS 896 at *15-16; R. at 1276 (emphasis added).

Subsequently, in its October 19, 2016 decision (R. at 199-220), the Board failed to abide by that 2015 ruling, forcing the Court to address this issue again. In June 2018, in the Court's opinion of *Pratt v. O'Rourke*, *supra,* arising out of Appellant's appeal of that 2016 Board decision, the Court again specifically stated that "there is no requirement under 38 CFR §21.94 that the appellant desire to obtain employment in pharmacology for him to concur in the proposed change in [vocational rehabilitation] plan" (R. at 96-97) and "The Court concludes that the Board failed to ensure compliance with the June 2015 remand." (R. at 96). 2018 U.S. App. Vet. Claims LEXIS 870, *10

Now, for a third time, the Board denies Appellant's requested change to his vocational rehabilitation plan for the same reason, stating that "the Veteran did not concur in the proposed change to the vocational rehabilitation plan." R. at 16. Not only

is this patently erroneous on its face because Appellant specifically requested this change, but it flouts the Court's previous remand instructions.

In support of its contention that Appellant did not concur in the proposed change, the Board's currently-appealed December 17, 2018 decision cites to the March 2006 counseling session with a VA counselor at the VR&C office, in which the counselor demanded that Appellant obtain licensure as a pharmacist in the state in which he resided (California), seek employment that did not require licensure in his state of residence (California), or seek employment in the state in which Appellant was licensed as a pharmacist (Nevada). R. at 17. The Board then states that Appellant's rejection of all three options constituted lack of concurrence in the change in his vocational rehabilitation program. *Id.*

This is particularly shocking because, as explained above, the Court has explicitly stated *twice* to the Board that the Board cannot impose *this* requirement upon *this* vocational rehabilitation change request by *this* Appellant. The Court's June 2015 opinion in *Pratt v. McDonald* explicitly directed the Board not to impose this requirement; the Court's June 2018 opinion in *Pratt v. O'Rourke* enforced the Court's June 2015 opinion in *Pratt v. McDonald* and remanded Appellant's case back for the Board's improper imposition of this requirement a second time. Yet the Board seems to be either unwilling or unable to abide by this Court's rulings on this matter because it imposed this requirement a third time in the currently-appealed decision.

A remand by this Court confers on Appellant, as a matter of law, the right to compliance with its remand orders. *Stegall v. West*, 11 Vet. App. 268, 271 (1998).

Therefore, Appellant respectfully requests the Court again take steps to ensure the Board's compliance with its two previous remand orders, either by reversing the Board's decision and granting Appellant's requested change to his vocational rehabilitation plan and directing the VA to reimburse him for his expenses associated with that plan, or by remanding Appellant's case to the Board for this issue again with explicit instructions not to repeat this legal error.

B. In reaching its conclusion that no vocational rehabilitation goal was feasible when Appellant requested the change in vocational rehabilitation goal, the Board erroneously continued to use criteria explicitly rejected by the Court's prior decisions.

The Board stated that "the specific facts of this case now present a more complicated employment and vocational history that show that no vocational goal was reasonably feasible when the Veteran requested a change in vocational goal to pharmacist." R. at 16. In support of this contention, and of its reason for the denial of Appellant's 1997 request for this change in his vocational rehabilitation plan, the Board considered Appellant's inability to gain employment as an actor despite having completed a vocational rehabilitation program to become an actor. *Id.*

However, Appellant's inability to gain employment as an actor, which led to his current request for change to pharmacist for his vocational rehabilitation plan, has already been considered by the Court in its 2015 decision on Appellant's claim. In that decision, the Court specifically rejected the Board's use of that criteria. *Pratt v. McDonald*, *supra*. In rejecting that argument because it rendered the Board decision's reasons and bases inadequate, the Court stated

> [i]t is unclear why the appellant's previous vocational rehabilitation endeavors are relevant to participating in change of plan under 38 C.F.R. § 21-94(b)(3), … Simply because the appellant attempted multiple vocational endeavors prior to the pharmacy goal is irrelevant to a proposed change other than to the question whether the "achievement of the current goal is no longer reasonably feasible" under 38 C.F.R. § 21.94(b)(1).

R. at 1276; 2015 U.S. App. Vet. Claims LEXIS 896, *15 (R. at 1269-1277) (emphasis added).

Despite the Court's clear holding that previous vocational rehabilitation endeavors are an inadequate reason or basis for denial of Appellant's request for a change in his vocational rehabilitation plan, reversing the Board's previous decision that used this criteria, the Board once again seeks to use this criteria as justification to deny Appellant's requested change. This is a clear legal error that requires reversal of the Board's decision or a remand to correct this error.

Therefore, Appellant respectfully requests the Court again take steps to ensure the Board's compliance with its previous remand orders, either by reversing the Board's decision and granting Appellant's requested change to his vocational rehabilitation plan and directing the VA to reimburse him for his expenses associated with that plan, or by remanding Appellant's case to the Board for this issue again time with explicit instructions not to repeat this legal error again.

II. THE BOARD REJECTED APPELLANT'S REQUESTED CHANGE TO PHARMACIST IN HIS VOCATIONAL REHABILITATION PLAN BY ERRONEOUSLY ASSUMING NO EMPLOYMENT WAS POSSIBLE WHEN APPELLANT APPLIED FOR HIS CHANGE IN HIS PLAN.

In the currently-appealed Board decision of December 2018, the Board stated that "As a preliminary matter, the Board notes that, as a result of restoration of the TDIU

rating, the Veteran has been in receipt of a TDIU effective from June 27, 1991." R. at 15. The Board further stated, "A TDIU reflects total unemployability due to service-connected disabilities, so necessarily demonstrates that achievement of any vocational goal is not reasonably feasible; therefore, a change in the vocational rehabilitation training program to the goal of pharmacist is not warranted." *Id.*

First, the Board errs in confusing the effective date of Appellant's TDIU with the date his TDIU was granted – a date which was *after* his application for the change to pharmacist in his vocational rehabilitation plan. Appellant has not had a TDIU rating *since* June 1991; that was merely the effective date of his TDIU rating, a rating and effective date which were *established* in November 2000, three years after Appellant applied for this change in his vocational rehabilitation plan and two years after he had started pharmacy school. R. at 2782-2787. Appellant had filed his change in his vocational rehabilitation plan in 1997 and the VA denied his requested change in July 1997 (R. at 631-32), prior to the November 2000 grant of TDIU. Therefore, the Board was factually incorrect when it considered Appellant to have been rated as TDIU at the time when he applied for this change in his vocational rehabilitation plan.

Secondly, the Board's statement that TDIU reflects that Appellant has "total unemployability" is incorrect. The correct legal standard is that TDIU may be assigned "where the schedular rating is less than total, when the disabled person is … <u>unable to secure or follow a substantially gainful occupation</u> as a result of service-connected disabilities[.]" 38 C.F.R. §4.16(a) (emphasis added). The Federal Circuit has rejected defining the term "unable to secure or follow a substantially gainful occupation" as

requiring the veteran to be 100% unemployable. *Roberson v. Principi*, 251 F. 3d 1378, 1385 (Fed. Cir. 2001) ("Requiring a veteran to prove that he is 100 percent unemployable is different than requiring the veteran to prove that he cannot maintain substantially gainful employment"). Thus, the Board applied an incorrect legal standard, which renders that portion of its decision inadequate.

Therefore, Appellant respectfully requests the Court again take steps to ensure the Board's compliance with its previous remand orders, either by reversing the Board's decision and granting Appellant's requested change to his vocational rehabilitation plan and directing the VA to reimburse him for his expenses associated with that plan, or by remanding Appellant's case to the Board for this issue again with explicit instructions not to repeat this legal error again.

III. THE BOARD PROVIDES NO REASONS OR BASES FOR CHANGING ITS PREVIOUS CONCLUSION THAT VOCATIONAL REHABILITATION WAS SHOWN TO HAVE BEEN MORE LIKELY IF A DIFFERENT LONG-RANGE GOAL WAS ESTABLISHED.

The regulation concerning changes in vocational rehabilitation plans is located at 38 C.F.R. §21.94. Subsection (b) states in relevant part:

> **(b)** Long-range goals. A change in the statement of a long-range goal may only be made following a reevaluation of the veteran's rehabilitation program by the CP or VRC. A change may be made when: **(1)**… or **(2)** The veteran's circumstances have changed or new information has been developed which makes rehabilitation more likely if a different long-range goal is established[.]

In denying Appellant's requested change to his vocational rehabilitation plan, this current Board decision stated that

> the Veteran's circumstances had changed and new information was developed when he requested a change in the vocational plan from actor … however, vocational rehabilitation was not shown to have been more likely if a different long-range goal (from actor to pharmacist) was established.

R. at 16. The purported justification that the Board gives in the currently-appealed decision is that Appellant "is now in receipt of TDIU benefits and was unemployable due to service-connected disabilities effective from 1991." *Id.* As discussed in the previous section, this latter statement confuses the effective date of Appellant's TDIU with the date his TDIU was actually granted, which was after his application for the change to pharmacist in his vocational rehabilitation plan.

However, *the Board previously conceded in its October 2016 decision that Appellant's vocational rehabilitation is more likely if a different long-range goal from actor was established.* The Board stated in its 2016 decision that "[i]n light of the unfavorable job market for actors and the subsequent education and employment in the area of pharmacology, the Board finds that vocational rehabilitation would be more likely if a different long-range goal from actor was established." R. at 218. In fact, the Board made this determination in its October 2016 decision *after* the Court's June 2015 opinion which had directed the Board to restore Appellant's TDIU rating. *Pratt v. McDonald*, *supra* (R. at 1269-1277).

This means the Board changed from its 2016 position, which conceded the greater likelihood of vocational rehabilitation via Appellant's requested plan to go to pharmacy school, to its 2018 position denying the greater likelihood of vocational rehabilitation

despite no change in the facts of this case and with no justification or statement of reasons and bases given. This is clearly erroneous for the following reasons.

First, the Board provides no statement of reasons or bases for this finding. The Board must provide an adequate statement of reasons or bases for its findings and conclusions on all material issues of law and fact presented on the record. *See* 38 U.S.C. § 7104(d)(1); *Gilbert v. Derwinski*, 1 Vet. App. 49, 57 (1990). The Board's failure to explain this change of position renders its change unexplainable and unsupportable.

Second, not only does the Board's decision on this issue lack an adequate statement of reasons and bases for the Board's changing of its position, it also smacks of being arbitrary, capricious, and/or not otherwise in accordance with law, for which the Court may set aside a Board decision or finding. 38 U.S.C. §7261(a)(3)(A). This statute mandates that this Court *shall* hold unlawful and set aside all decisions, findings, conclusions issued or adopted by the Board of Veterans' Appeals that are found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *Id.*

Finally, 38 U.S.C. §7261(a)(4) states that the Court shall hold unlawful and set aside or reverse a finding of material fact adverse to the claimant made in reaching a decision in a case if the finding is clearly erroneous. *Forcier v. Nicholson*, 19 Vet. App. 414, 421 (2006) ("[A] factual finding 'is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed.'") (internal citations omitted).

In *Gilbert v. Derwinski*, *supra*, the Court stated that in order for a finding of material fact made by the Board to be set aside, this Court must conclude that the finding

is "clearly erroneous." *Id.* at 52. The Court stated the definition of "clearly erroneous" as follows:

> The Supreme Court has defined the "clearly erroneous" standard as follows "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." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

Gilbert, 1 Vet. App. at 52. Here, the Board's finding in the currently-appealed decision is clearly erroneous because it contradicts the Board's previous favorable finding for Appellant with zero explanation as to why the Board has changed this favorable finding despite no change in the facts of the case.

Therefore, Appellant respectfully requests the Court address this legal error, either by reversing the Board's decision and granting Appellant's requested change to his vocational rehabilitation plan and directing the VA to reimburse him for his expenses associated with that plan, or by remanding Appellant's case to the Board for this issue again with explicit instructions not to repeat this legal error again.

IV. THE BOARD CONTENDS THAT THE VA HAS NO AUTHORITY TO RETROACTIVELY REIMBURSE APPELLANT FOR EXPENSES INCURRED IN TRAINING NOT APPROVED FOR VOCATIONAL REHABILITATION.

After several Board decisions and two Court remands, the Board raises for the first time the contention that "[t]here is no authority to reimburse the Veteran retroactively for past education and training that was never approved by VA." R. at 17 (emphasis added). However, this issue of retroactive reimbursement is inextricably intertwined with the other reasons the Board gives for denying Appellant's request for the change in his

vocational rehabilitation plan. Claims are said to be "inextricably intertwined" where the decision on one claim could have a "significant impact" upon another claim. *Harris v. Derwinski*, 1 Vet. App. 180, 183 (1991). Thus, this issue cannot be adjudicated until the other bases for approval or disapproval of his claim are finally decided. Therefore, Appellant respectfully requests that this Court take up this issue after it has ruled upon the preceding issues, and either direct the Board to reimburse Appellant for his expenses that he incurred in his vocational rehabilitation plan for pharmacist if the Court reverses the Board on the previous issues, or remand this issue to the Board with directions for the Board to re-adjudicate this issue once it has re-adjudicated any other issues the Court directs it to re-adjudicate.

V. CONCLUSION.

A remand by this Court confers on Appellant, as a matter of law, the right to compliance with its remand orders. *Stegall v. West*, *supra*. The Board has demonstrated a continual inability or unwillingness to abide by the Court's previous remand orders. There is no factual dispute that requires remand to the Board or Regional Office for development or adjudication.

Appellant respectfully requests that the Court reverse the Board's decision and grant Appellant's requested change of vocational goal to pharmacist and thus direct payment of his vocational rehabilitation expenses he incurred for pharmacy school. Alternatively, should the Court determine such reversal in the entirety is not warranted, then Appellant respectfully requests that this Court reverse those portions of the Board

decision that it determines require reversal and remand the remaining issues back to the Board for re-adjudication as explained above.

Respectfully submitted,

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