

**IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS**

THOMAS S. PRATT,
Appellant,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,
Appellee.

**BRIEF OF THE APPELLEE
SECRETARY OF VETERANS AFFAIRS**

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**IN THE UNITED STATES COURT OF APPEALS
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THOMAS S. PRATT,)	
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Appellant,)	
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v.)	Vet. App. No. 19-919
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ROBERT L. WILKIE,)	
Secretary of Veterans Affairs,)	
)	
Appellee.)	

**ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS**

**BRIEF OF THE APPELLEE
SECRETARY OF VETERANS AFFAIRS**

I. ISSUE PRESENTED

Whether the U.S. Court of Appeals for Veterans Claims (Court) should vacate the December 17, 2018, Board of Veterans' Appeals (Board) decision that denied Appellant's request for a change in the vocational rehabilitation training program under Chapter 31 of Title 38 of the United States Code because the Board did not provide an adequate statement of reasons or bases.

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

This Court has jurisdiction under 38 U.S.C. § 7252(a), which grants the United States Court of Appeals for Veterans Claims (the Court) exclusive jurisdiction to review Board decisions.

B. Nature of the Case

Appellant, Thomas S. Pratt, appeals the Board's decision denying a change in the vocational rehabilitation training program under Chapter 31 of Title 38 of the United States Code. [Record Before the Agency (R.) at 2-20].

C. Statement of Facts

Appellant served on active duty in August 1977 and from May 1978 to April 1981. [R. at 4 (2-20)].

In October 1984, the Veterans Administration (VA¹) Regional Office (RO) granted Appellant's claim of entitlement to service connection for residuals of frostbite to the hands in feet with a 10% rating, effective October 1982. [R. at 3446-47]. Appellant appealed his disability rating to the Board, and the Board denied the appeal. [R. at 3407-11].

Appellant applied for VA VR in June 1986. [R. at 3399-3400].

¹ This brief refers to the Veterans Administration and the Department of Veterans Affairs as VA.

In July 1997, Appellant's VR counselor issued a decision that did not approve Appellant's request to change his vocational goal to pharmacy. [R. at 578-79]. The counselor determined that Appellant's significant limitations in his upper and lower extremities meant that this goal was not suitable. *Id.* at 578. Appellant appealed this denial to the Board. [R. at 580]; [R. at 555-56];

Appellant filed an application for increased compensation due to unemployability (TDIU) March 2000. [R. at 2818-19]. He stated on his application that he became too disabled to work due to his service-connected cold injury residuals in April 1991. *Id.* at 2818. In December 2000, the RO determined that Appellant was entitled to a TDIU with a July 1991 effective date. [R. at 2760-62]; [R. at 2782-83].

In September 2001, the Board found that Appellant was not entitled to a change in VR rehabilitation program to the vocational goal of pharmacist. [R. at 2683-98]. Appellant appealed to this Court, and in January 2003 the parties agreed to remand the matter because the Board did not provide an adequate statement of reasons or bases on the issue of whether Appellant received adequate notice of how to substantiate his claim. [R. at 2657-62].

Appellant graduated from the University of Southern California School of Pharmacy with a Doctor of Pharmacy in May 2002. [R. at 2714]. The Nevada State Board of Pharmacy certified that Appellant is "entitled to practice Pharmacy in the State of Nevada" in February 2003. [R. at 2715].

The Board remanded the matter in November 2003. [R. at 2633-39]. A November 2005 Supplemental Statement of the Case (SSOC) indicates that VA was unable to determine whether the vocational goal of pharmacy is reasonably feasible because Appellant had declined requests to meet with VR counselor. [R. at 2495 (2494-96)]. A letter from December 2005 states that VA “cannot make the determination that pharmacist can be considered a suitable and reasonably feasible vocational goal or develop the necessary rehabilitation plan without full cooperation from the veteran.” [R. at 2478 (2477-78)].

In March 2007, the Board remanded the matter for the issuance of an SSOC. [R. at 2283 (2281-84)]. The RO issued the SSOC in May 2007. [R. at 2235-38]. The SSOC indicated that the VR officer needed to “meet with the veteran and review his current situation in order to consider making a favorable determination.” [R. at 2238 (2236-38)]. A September 2007 SSOC indicated that Appellant had met with the VR officer. [R. at 2208 (2207-11)]. The SSOC states that Appellant “is only licensed to practice in the state of Nevada and that renders him virtually unemployable (i.e., accept [sic] in a small number of positions) in California.” *Id.* The SSOC indicated that Appellant would not pursue a California license or move to Nevada. *Id.* at 2208-09. The SSOC concluded that the evidence did not “substantiate his claim that he should be allowed to change his vocational rehabilitation training program goal to that of pharmacist and that he is employable here in this state of California.” *Id.* at 2208.

In June 2009, the Board remanded the matter so that Appellant could clarify what VR benefits he was seeking. [R. at 2092-96]. Appellant's attorney responded with a letter stating that Appellant "requests that you approve a change in program and pay the benefits related to his obtaining his degree in pharmacology." [R. at 2016].

The RO issued an SSOC in February 2013. [R. at 1718-21]. The SSOC states that pharmacy is not a reasonably feasible vocational goal because the evidence does not show that he is employable in California because he does not have a California pharmacy license nor will he take any action to obtain one. *Id.* at 1719.

The Board denied Appellant's request to change VR programs in July 2013. [R. at 1612-35]. The Board made the finding of fact that Appellant "has not fully participated in his proposed change of vocational rehabilitation training program." *Id.* at 1615.

The Court vacated the Board's decision in June 2015. [R. at 1269-77]. The Court held that it 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)." *Id.* at 1276. The Court also held that 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." *Id.*

The Board denied Appellant's request to change his VR program in October 2016. [R. at 199-222]. The Board made the finding of fact that Appellant "did not concur in the proposed change to the vocational goal to pharmacist because he does not have a desire to obtain gainful employment through the VA vocational rehabilitation training program." *Id.* at 202. The Court vacated this decision in June 2018. [R. at 92-97]. The Court held that 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 VR plan." *Id.* at 96-97.

On remand, the Board issued the December 2018 decision that is now on appeal. [R. at 2-20]. The Board made the finding of fact that "[b]ecause no vocational goal was reasonably feasible, there was no change of circumstances that made rehabilitation more likely if a different long-range goal of pharmacist was established." *Id.* at 4. The Board also found that Appellant did not concur in the proposed change because he "rejected all of the options discussed by the VA counselor when attempting to establish an amended vocational goal of pharmacist." *Id.*

III. SUMMARY OF THE ARGUMENT

The Board did not provide an adequate statement of reasons or bases to support its finding that the vocational goal of pharmacist is not feasible. First, the Board did not adequately discuss the record when it determined that Appellant could not pursue pharmacy because his disabilities prevent him from being able

to obtain substantially gainful employment. Second, the Board failed to address the VR counselor's opinion that Appellant's proposed goal is not feasible because he is virtually unemployable as a pharmacist in California without a California pharmacy license.

The Court should reject Appellant's argument that reversal is warranted. Appellant has cited to no evidence that it is feasible for him to pursue the vocational goal of a pharmacist under his current circumstances, which is that he is unlicensed to practice pharmacy in California and refuses to obtain a California pharmacy license. Therefore, remand is the appropriate remedy.

IV. ARGUMENT

A. The Court Reviews the Board's Denial of Vocational Rehabilitation Benefits Under the Arbitrary and Capricious Standard of Review

The Board's decision as to what if any vocational rehabilitation benefits were due to Appellant is reviewed under the "arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law" standard. 38 U.S.C. § 7261(a)(3)(A); *see also Kandik v. Brown*, 9 Vet.App. 434, 438 (1996) ("Because of the high degree of discretion afforded the Secretary, the court may set aside those determinations only if they are found to be 'arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law.'").

The Court reviews the Board's findings of fact under the clearly erroneous standard. 38 U.S.C. § 7261(a)(4). A finding of fact is clearly erroneous "when although there is evidence to support it, the reviewing court is left with the definite

and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985) (explaining how an appellate court reviews factual findings under the "clearly erroneous" standard), *quoting United States v. United States Gypsum Co.*, 333 U.S. 564, 595 (1948); *see Padgett v. Nicholson*, 19 Vet.App. 133, 146 (2005) (quoting same). But "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Id.* at 574.

The Court also reviews the Board's decision to determine whether the Board supported its decision with a "written statement of [its] findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented on the record." 38 U.S.C. § 7104(d)(1). "The statement must be adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court." *Allday v. Brown*, 7 Vet.App. 517, 527 (1995).

B. The Court Should Vacate the Board's Decision Because it did not Adequately Explain Whether the Pharmacy Goal was Reasonably Feasible

The Secretary concedes that remand is warranted because the Board did not provide an adequate statement of reasons or bases for finding that Appellant could not change his VR program because the achievement of the vocational goal of pharmacy was not feasible. [R. at 4, 15-16 (2-20)]. "The term vocational goal means a gainful employment status consistent with a veteran's abilities, aptitudes, and interests." 38 C.F.R. § 21.35(h)(1). The term achievement of a

vocational goal means that the veteran's disabilities "when considered in relation to the veteran's circumstances" does not prevent him or her from successfully pursuing a VR program and "becoming gainfully employed in an occupation consistent with the veteran's abilities, aptitudes, and interests." *Id.* § 21.35(h)(2); 38 C.F.R. § 21.53(d). The achievement of a vocational goal is not feasible when the veteran's disability "when considered in relation to the veteran's circumstances at the time of the determination" prevent the veteran from achieving the goal or are expected to worsen within the time needed to achieve the goal so that it would not be feasible. *Id.* § 21.35(h)(3); 38 C.F.R. § 21.53(e). VA will develop an individualized written rehabilitation plan (IWRP) for each veteran eligible for rehabilitation services under Chapter 31. 38 C.F.R. § 21.80(a).

The veteran, a counseling psychologist (CP), or a VR counselor (VRC) may request a change in the plan at any time. 38 C.F.R § 21.94(a). "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." *Id.* § 21.94(b). A change may be made when achievement of the current goal is no longer reasonably feasible or 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" and the "veteran fully participates and concurs in the change." *Id.* § 21.94. The Board found that no vocational goal was reasonably feasible, so "there was no change in circumstances that made

rehabilitation more likely if a different long-range goal of pharmacist was established.” [R. at 4 (2-20)].

The Board did not provide an adequate statement of reasons or bases to support its finding that Appellant could not change his VR program because “no vocational goal was reasonably feasible when the Veteran requested a change in vocational goal to pharmacist.” [R. at 16 (2-20)]. Because the Board found that no vocational goal was reasonably feasible, it found that “there was no change of circumstances that made rehabilitation more likely if a different long-range goal of pharmacist was established.” *Id.* at 4; 38 C.F.R. § 21.94(b)(2). Essentially, the Board found that because Appellant had established entitlement to a TDIU with a 1991 effective date, he was unemployable due to his service-connected disabilities and no vocational goal was feasible. *Id.* at 16. The Secretary concedes that the Board’s statement of reasons or bases is inadequate for three reasons.

First, the Board did not provide an adequate statement of reasons or bases for relying on Appellant’s receipt of a TDIU as a factor supporting its finding that no vocational goal is reasonably feasible. [R. at 16 (2-20)]. It is true that the regulation authorizing TDIU awards states that the total rating may be assigned “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. § 4.16(a). It is also true that a “‘vocational goal’ means a gainful employment status consistent with a veteran’s

abilities, aptitudes, and interests.” 38 U.S.C. § 3101(8). But a VA regulation governing continuance of total disability ratings contemplates that some veterans will undergo VR while they are in receipt of a TDIU because the regulation states that a TDIU cannot be reduced only because a veteran is undergoing VR. 38 C.F.R. § 3.343(c)(1). Therefore, the Board did not adequately explain why it relied in part on Appellant’s TDIU award for finding that there is no feasible vocational goal because VA regulations contemplate the continued receipt of a TDIU while the veteran is in a VR program in some circumstances.

Second, the Board did not provide an adequate statement of reasons or bases for its explicit or implicit rejection of favorable evidence in the record on the issue of whether the pharmacy vocational goal is reasonably feasible under 38 C.F.R. § 21.53(d). For example, Appellant was able to complete a degree in pharmacy, which is evidence that he was able to undergo training to achieve the pharmacy goal even if it is not dispositive on whether he is capable of working as a pharmacist in California. [R. at 2714]; see 38 C.F.R. § 21.53(d)(2) (consideration of whether the veteran’s disabilities permit training for the goal). Although the Board did note that Appellant had some work as a pharmacist, it found that this was evidence against feasibility because of its duration. [R. at 16 (2-20)]. But in making this finding the Board did not address evidence that he did not leave those jobs due to his disabilities. [R. at 1719 (1717-23)] (“He noted that he left that position because his intern license expired in August, [sic] 2003.”). The record also contains medical evidence stating that his service-connected

disabilities would not preclude him from working as a pharmacist. [R. at 1882 (1881-82)]; [R. at 2398]. Therefore, the Secretary concedes that remand is warranted for the Board to address this evidence suggesting that Appellant's disabilities may not preclude work as a pharmacist.

Third, the Board did not address the most recent reason for which the VR counselor found that the pharmacy goal was not feasible, which is that it is very difficult to obtain employment as a pharmacist in California without a California pharmacy license so his "circumstances at the time of determination" would prevent him from "successfully achieving a vocational goal at that time." 38 C.F.R. § 21.35(h)(3). The 1997 decision did state that Appellant's service-connected disabilities would prevent him from working as a pharmacist. [R. at 578-79]. However, more recent SSOCs indicate that the reason that the pharmacy goal is not feasible is because of Appellant's California residence and Nevada pharmacy license, which makes him "virtually unemployable" in California. [R. at 2208 (2206-11)]. The VR counselor suggested that the pharmacy goal would be feasible if Appellant either moved to Nevada or pursued a California pharmacy license. *Id.* at 2209. However, he opined that the vocational goal of pharmacy is not currently feasible in Appellant's circumstances because there are too few pharmacy jobs available in California for pharmacists with out-of-state licenses. *Id.* at 2208. The Board did not address this basis for finding that Appellant's vocational goal is not feasible, and the Secretary asserts that remand is warranted for the Board to do so in the first instance.

The Secretary asserts that it is premature to review the Board's finding that Appellant did not concur in the change in the vocational plan because the Board did not adequately explain why the proposed vocational goal was not feasible. [R. at 17 (2-20)]. It is true that Appellant has indicated that he will not move to Nevada or pursue a California pharmacy license. If the vocational goal of pharmacist in California is not feasible absent a California pharmacy license, the Secretary asserts that it would be proper to find that Appellant did not concur in and participate in the proposed change of plan if he will not agree to perform the actions that the VR counselor recommends. 38 C.F.R. § 21.94(b)(3). However, if the Board were to find that it is reasonably feasible for him to pursue the pharmacy goal in California despite not having a California pharmacy license, those actions would be unnecessary. Therefore, the Secretary asserts that a more thorough feasibility decision is necessary before the Board can determine whether Appellant fully participated in and concurred in the change. 38 C.F.R. § 21.94(b)(3).

Appellant argues that the Board erred by imposing a requirement that he "desire to seek employment in pharmacology for him to concur in his own requested change in the vocational rehabilitation plan." (Appellant's Brief (App. Br.) at 12 (12-15)). The Board did state that Appellant informed VA that he "does not desire to obtain and maintain gainful employment in the area of pharmacology." [R. at 17 (2-20)]. The Court has held that Appellant's "desire" to obtain employment is not relevant under 38 C.F.R. § 21.94. [R. at 96 (92-97)].

The Board's mention of Appellant's subjective desire is regrettable because the Court held that this is not the proper standard. However, the Secretary asserts that whether Appellant agrees to undertake the necessary actions to make the vocational goal feasible is a relevant consideration under 38 C.F.R. § 21.94 because the regulation requires that the veteran "fully participates and concurs in the change." 38 C.F.R. § 21.94(b)(3). Neither of the Court's previous Memorandum Decisions state that Appellant is not obligated to undertake actions necessary to make a pharmacy goal feasible. [R. at 92-97]; [R. at 1269-77]. It would be fully consistent with the Court's holding for the Board to focus on Appellant's actions, *i.e.*, willingness to perform the actions necessary to make his vocational goal feasible rather than any subjective desire, to determine whether he participates in and concurs in the change in plan. *Id.* But as argued above, remand is warranted for the Board to provide an adequate statement of reasons or bases on this issue.

Appellant's argument that the Board erred in considering whether he was able to obtain employment as an actor misconstrues the Board's reasoning. (App. Br. at 15-16). A change in the long-range goal may be made when, *inter alia*, "[a]chievement of the current goal(s) is no longer reasonably feasible." 38 C.F.R. § 21.94(b)(1). The Board found that the "achievement of the vocational goal of actor . . . was no longer 'reasonably feasible' as contemplated by VA regulatory criteria." [R. at 15 (2-20)]. The Court's previous Memorandum Decision specifically found that Appellant's previous vocational endeavors are

relevant to “the question [of] whether the ‘achievement of the current goal is no longer reasonably feasible’ under 38 C.F.R. § 21.94(b)(1).” [R. at 1276 (1269-77)]. Therefore, the Board did not err in discussing whether the goal of actor was feasible because the issue of whether that goal remains feasible is relevant under section 21.94(b)(1).

Appellant also argues that the Board erred by relying on his receipt of a TDIU to deny his request for a change of program. (App. Br. at 16-18).² If the evidence establishes that Appellant’s disabilities prevent gainful employment, then no vocational goal is possible because vocational goal’s definition is “gainful employment status consistent with a veteran’s abilities, aptitudes, and interests.” 38 C.F.R. § 21.35(h)(1). But, as argued above, VA regulations contemplate that some veterans will undergo VR while receiving a TDIU. 38 C.F.R. § 3.343(c)(1). The Secretary concedes that the Board erred in finding that Appellant’s TDIU was a bar to having a reasonably feasible VR goal, and remand is warranted for the Board to discuss the evidence to determine whether Appellant is capable of gainful employment status. 38 C.F.R. § 21.35(h)(1).

² Appellant’s argument that he was not adjudged by VA to be unemployable in 1997 because VA did not grant entitlement to TDIU until 2000 is wrong because VA could not assign a 1991 effective date unless VA found that Appellant was unable to “secure or follow a substantially gainful occupation” in 1991. (App. Br. at 17); 38 C.F.R. § 4.16(a) (regulation governing TDIU); 38 U.S.C. § 5110(b)(2) (statute governing effective dates stating that the effective date for a rating increase “shall be the earliest date as of which it is ascertainable that an increase in disability had occurred, if the application is received within one year from such a date”).

Appellant also argues that the Board erred by making a finding of fact that was different than a finding of fact that it made in its 2016 decision. (App. Br. at 18-21). But the Court vacated that decision. [R. at 92-97]. Because the Court vacated the 2016 decision, it is legally void. See <https://www.merriam-webster.com/dictionary/vacate> (last accessed December 12, 2019) (defining vacate as “to make legally void”). Appellant does not cite to and the Secretary is unaware of any authority that would require the Board to maintain the same conclusions that it made in a legally void decision that the Court has vacated. Therefore, the Court should reject Appellant’s argument.

Appellant argues that the Board’s statement that there is no authority to reimburse him retroactively for training that VA has never approved is inextricably intertwined with the other reasons that the Board gave for denying his change of plan. (App. Br. at 21-22). The Secretary asserts that remand is warranted in this appeal, but notes that Appellant’s argument is unclear. If VA has never approved the education or training, VA would have no authority to pay for it because it is not approved, not because it is retroactive.

The Court should reject Appellant’s repeated assertions that reversal is warranted because “there is no factual dispute that requires remand to the Board.” (App. Br. at 22). This is incorrect because there is a factual dispute on the issue of whether the vocational goal of pharmacy is feasible and because the Board’s statement of reasons or bases on that issue is not adequate. *Washington v. Nicholson*, 19 Vet.App. 362, 371 (2005) (When the Board

incorrectly applies the law, fails to provide an adequate statement of reasons or bases for its determination, or where the record is not adequate, remand is the appropriate remedy). Appellant's theory of entitlement appears to be that his attainment of a degree and license in pharmacy is sufficient to make that goal reasonably feasible so that VA must approve his change in VR program. But the definition of a vocational goal is "gainful employment status," which is more than just educational attainment. 38 C.F.R. § 21.35(h)(1). Assuming that Appellant's disabilities do not physically prevent him from working as a pharmacist, the VR counselor found that the pharmacy goal is not feasible because he is virtually unemployable in California without a California pharmacy license, and the Board did not address that finding. [R. at 2208 (2206-11)]; 38 C.F.R. § 21.35(h)(3); *Byron v. Shinseki*, 670 F.3d 1202, 1205 (Fed. Cir. 2012) (remand is warranted when the Board "fails to make the relevant initial factual findings."). Although Appellant did temporarily work as a pharmacist in California, the evidence shows that this was because he had an intern license that has now expired. [R. at 1719 (1717-23)]. Appellant has cited to no evidence in the record suggesting that it is feasible for him to work as a pharmacist in California under his current circumstances. 38 C.F.R. § 21.35(h)(3); *Waters v. Shinseki*, 601 F.3d 1274, 1278 (Fed. Cir. 2010) (it is the appellant's burden to show prejudicial error). In addition, the record shows that Appellant has stated that he is unemployable due to his disabilities, and in arguing to VA that he was entitled to continued receipt of the TDIU he argued that his disabilities had gotten worse. [R. at 2819 (2818-19)]

(Appellant's statement that he had completed some schooling "since becoming too disabled to work"); [R. at 1848 (1848-49)] ("the medical evidence indicates my condition has gradually worsened"). Additional factfinding is necessary because if the evidence demonstrates that Appellant is incapable of gainful employment, then his requested vocational goal would not be feasible because the ability to become gainfully employed is part of any vocational goal. 38 C.F.R. § 21.53(b). Therefore, the Court should find that remand rather than reversal is warranted because Appellant has not shown within the meaning of the relevant regulations that the vocational goal of pharmacy is reasonably feasible.

CONCLUSION

For the foregoing reasons, the Court should vacate the Board's decision and remand the matter for readjudication.

Respectfully submitted,

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