

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

**Vet. App. No. 19-2729**

**ANTHONY A. KOMENDA,**

**Appellant,**

**v.**

**ROBERT L. WILKIE,**

**SECRETARY OF VETERANS AFFAIRS,**

**Appellee.**

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**AMENDED APPELLANT'S BRIEF**

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## **I. STATEMENT OF THE ISSUES**

**A. Whether the Board of Veterans' Appeals commits remandable error when it relies on an inadequate examination record and provides inadequate reasons and bases for doing so to deny Appellant's claim for entitlement to a total disability rating due to individual unemployability (TDIU).**

## **II. STATEMENT OF THE CASE**

### **A. Jurisdiction**

Appellant Anthony A. Komenda (Komenda) invokes this Court's appellate jurisdiction granted through 38 U.S.C. § 7252 (2018).

### **B. Nature of the Case / Result Below**

Komenda appeals the Board's decision of December 28, 2018, which denied entitlement to a total disability rating due to individual unemployability.

[R 5, 5-17 (2018 Board Decision)]<sup>1</sup>

### **C. Relevant Facts**

Komenda is a veteran with honorable service in the U.S. Army from April 23, 1968, to April 13, 1970. [R 1299 (DD214)] For his service, Komenda was

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<sup>1</sup> Komenda elects not to appeal the portions of the decision that found that (1) rating decisions from June and October of 1970, which assigned a noncompensable rating for a thyroglossal duct cyst excision scar, were not clearly and unmistakably erroneous; and (2) a rating decision from July of 2007 which assigned an effective date of May 17, 2000, for service connection for dysphagia was not clearly and unmistakably erroneous.

awarded the National Defense Service Medal, the Sharp Shooter M-14, and the Aircraft Crewman Badge. [Id.]

In the decision now before this Court, Komenda seeks TDIU. [R 5, 5-17 (2018 Board Decision)]. In denying Komenda's claim, the Board relies on an examination from 2016 to conclude that the evidence preponderates against TDIU, despite the fact that Appellant meets the percentage rating criteria. [R 14, 5-17 (2018 Board Decision)]

### **III. ARGUMENTS & AUTHORITIES**

#### **A. The Board erred when it relied on an inadequate examination record and provided inadequate reasons and bases to deny Komenda's claim for entitlement to TDIU.**

Komenda is service connected with a combined evaluation of 90 percent effective October of 2014 and has two conditions – sleep apnea and dysphagia – which are each rated as 50 percent disabling. [Id; R 188, 188-190 (May 2016 Rating Decision)]. Accordingly, Komenda meets the TDIU percentage criteria. [Id.]; 38 C.F.R. § 4.16(a). Despite meeting the percentage rating criteria, however, the Board denies Appellant's TDIU claim, principally relying on an examination from 2016. [Id.] The examination is inadequate, however, as is the Board's analysis.

The Board concludes that the evidence preponderates against TDIU because the examiner found that Appellant lives on an acreage and is able to ride a lawn mower, hunt (using deer stands) and fish, and because other

individuals who have the same types of service-connected disabilities are functional in work activities. [Id.] This rationale is wholly inadequate and meaningless as it relates to whether or the extent to which *Appellant's* service-connected symptoms produce unemployability.

The examiner (and Board) ignore favorable evidence in the record regarding the effect of Appellant's dysphagia on his ability to work. For example, Appellant coughs, hacks, and excessively clears his throat for one to two hours after waking each morning. [R 3196, 3196-3196 (Affidavit of Jacob Komenda)] He has difficulty swallowing and has "very, very frequent throat clearing and irritation." [R 2698, 2698-2699 (January 2006 ENT Consult Note)]. His dysphagia prevents him from eating enough calories to have enough energy to perform physical activities. [R 2210, 2210-2211 (Continuation sheet VA Form 21-8940)].

Rather than examining or asking Appellant whether, or the degree to which, Komenda's service-connected disabilities limit his ability to work, the examiner opines generally that such conditions "would not limit functional activities." [R 244, 244-245 (May 13, 2016 examination)]. Rather, the examiner deems Appellant's level of physical fitness and "well tanned" skin to be persuasive evidence that Appellant's service-connected disabilities do not render him unemployable. [Id.]

The Board concludes that Appellant has “some degree of industrial impairment as a result of his service-connected disabilities” but provides no analysis or rationale to support this position. The Board also notes that Appellant retired in 1998 for non-service connected reasons. This information is irrelevant (and inaccurate), however, because under the plan language of the regulation, “the existence or degree of nonservice-connected disabilities or previous unemployability status **will be disregarded** where the percentages ... are met and ... service-connected disabilities render the veteran unemployable.” 38 C.F.R. § 4.16(a) (emphasis added).

Because the central question with regard to TDIU “is whether Appellant’s service-connected disabilities alone are of sufficient severity to produce unemployability,” the Board’s analysis inadequate. *Floore v. Shinseki*, 26 Vet. App. 376, 383 (2013) (quoting *Hatlestad v. Brown*, 5 Vet. App. 524, 529 (1993)). Focus on non-service connected issues frustrates judicial review, because even when non-service connected disabilities affect an Appellant’s employability, the Board must still decide whether Appellant’s service-connected disabilities are sufficiently incapacitating to render him unemployable. *Id.* Accordingly, this claim must be remanded. *Stegall v. West*, 11 Vet. App. 268, 270-71 (1998).

Finally, included in the obligation of sympathetic development of veterans’ claims is the obligation to weigh and consider all of the evidence, which the Board fails to do here. See *Madden v. Gober*, 125 F.3d 1477, 1481; (Fed. Cir.

1997); *Hogan v Peake*, 554 F.3d 1295, 1298 (Fed. Cir. 2008). For the foregoing reasons, this claim should be remanded for proper development of the record and a medical examination consistent with the requirements of *McLendon v. Nicholson*, 20 Vet. App. 79, 83 (2006), an adequate statement of its reasons and bases consistent with *Moore v. Derwinski*, 1 Vet. App. 401, 404 (1991) and proper development and review of the record consistent with the VA's duties and obligations.

#### **IV. CONCLUSION**

The Board erred when it relied on an inadequate examination record and provided inadequate reasons and bases for to deny Komenda's TDIU claim.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify, to the best of my knowledge and ability, under penalty of perjury under the laws of the United States, that copy of the forgoing was served electronically to the attorney of record for the party below:

Jessica Grunberg, Esq.  
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on this the 19<sup>th</sup> day of December, 2019.

By: /s/ Neely L. Fedde  
Neely L. Fedde, Esq.