

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

<b>DOROTHY M. SEGUI,</b>	)	
	)	
Appellant,	)	
	)	
v.	)	Vet. App. No. 18-4746
	)	
<b>ROBERT L. WILKIE,</b>	)	
Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

**JOINT MOTION FOR PARTIAL REMAND**

Under U.S. Vet. App. Rule 27, Appellant, Dorothy M. Segui, and Appellee, Robert L. Wilkie, Secretary of Veterans Affairs, through their undersigned representatives, respectfully move the Court to vacate that part of the May 10, 2018, Board of Veterans' Appeals (Board) decision that denied entitlement to an effective date prior to May 30, 2006, for a total disability rating based on individual unemployability resulting from service-connected disabilities (TDIU) for purposes of accrued benefits, and remand the matter for further proceedings consistent with this motion.

Appellant does not challenge the portions of the Board's decision that denied entitlement to: (1) a rating in excess of 20% for a lumbosacral spine disability; (2) a rating in excess of 20% for degenerative joint disease (DJD) of the left and right knees; (3) a rating in excess of 10% for DJD of the left and right hip; (4) a rating in excess of 10% for DJD of the left and right elbows; and (5) special monthly compensation based on the need for regular aid and attendance of another person,

all for the purposes of accrued benefits. The parties respectfully request that the Court dismiss the appeal as to those claims. See *Pederson v. McDonald*, 27 Vet.App. 276, 285 (2015) (en banc).

### **BASES FOR REMAND**

The parties agree that partial vacatur and remand are warranted because the Board erred by providing an inadequate statement of reasons or bases for its finding that the record does not reasonably raise the issue of entitlement to TDIU prior to May 30, 2006. See 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990).

Generally, an appeal for a higher disability rating, when coupled with evidence of unemployability, raises the issue of entitlement to TDIU. See *Comer v. Peake*, 552 F.3d 1362, 1367 (Fed. Cir. 2009) (holding that “VA must consider whether a TDIU award is warranted whenever ‘a veteran submits evidence of a medical disability and makes a claim for the highest rating possible, and additionally submits evidence of unemployability’”) (quoting *Roberson v. Principi*, 251 F.3d 1378, 1384 (Fed. Cir. 2001)). As the Court has explained, a request for TDIU is not a separate claim for benefits, but rather involves an attempt to obtain an appropriate disability rating as part of the initial adjudication of a claim or as part of an increased rating claim. *Rice v. Shinseki*, 22 Vet.App. 447 (2009).

In May 1992, the Veteran, Joseph J. Segui, Jr., filed a claim for an increased rating for his musculoskeletal disabilities. [Record Before the Agency (R.) at 2874-75 (May 27, 1992, Statement in Support of Claim)]. While this claim was pending,

a VA vocational rehabilitation and counseling officer denied entitlement to vocational rehabilitation benefits because “there is no current reasonable feasibility that rehabilitation services will lead to employment,” and the Veteran “is not in need of independent living services.” [R. at 2873 (June 1, 1992, Letter from Vocational Rehabilitation and Counseling Officer)].

In its decision, the Board addressed the June 1992 vocational rehabilitation letter and found “the letter does not indicate that the Veteran was unable to secure and maintain substantial gainful employment due to service-connected disabilities alone.” [R. at 25 (1-32)]. The Board also found that the June 1992 letter “does not include either an explicit claim for a TDIU or an informal claim for a TDIU reasonably raised by the record in connection with a claim for an increased rating.” *Id.* The parties agree that in finding that the June 1992 letter did not reasonably raise the issue of TDIU, the Board conflated the issue of whether TDIU was reasonably raised with whether Appellant established entitlement to TDIU. Entitlement to TDIU is warranted when a claimant meets certain schedular requirements and VA finds he is “unable to secure or follow a substantially gainful occupation as a result of service-connected disabilities.” 38 C.F.R. § 4.16(a). However, TDIU is reasonably raised when there is evidence of a medical disability, a claim for the highest rating possible, and evidence of unemployability. *Roberson*, 251 F.3d at 1384.

The parties agree that the June 1992 vocational rehabilitation letter was evidence of unemployability and reasonably raised the issue of entitlement to TDIU

because an increased rating claim was pending as of the date of the letter. See *Roberson*, 251 F.3d at 1384. Thus, remand is warranted for the Board to address whether the reasonably raised claim for TDIU remained pending prior to May 30, 2006. See *Tucker v. West*, 11 Vet.App. 369, 374 (1998) (explaining that remand is the appropriate remedy where the Board provided an inadequate statement of reasons or bases); see also *Locklear v. Shinseki*, 24 Vet.App. 311, 316 (2011); *Ingram v. Nicholson*, 21 Vet.App. 232, 248 (2007).

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

Upon remand, the Board must "reexamine the evidence of record, seek any other evidence the Board feels is necessary, and issue a timely, well-supported decision in this case." *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991). Appellant shall be free to submit additional evidence and arguments in support of her claim. *Kutscherousky v. West*, 12 Vet.App. 369, 372 (1999). In any subsequent decision, the Board must set forth adequate reasons or bases for its findings and

conclusions on all material issues of fact and law presented on the record. See 38 U.S.C. § 7104(d)(1); *Gilbert*, 1 Vet.App. at 57. The Court has noted that a remand confers on the appellant a right to VA compliance with the terms of the remand order and imposes on the Secretary a concomitant duty to ensure compliance with those terms. See *Stegall v. West*, 11 Vet. App. 268, 271 (1998). The terms of this joint motion are enforceable. See *Forcier v. Nicholson*, 19 Vet.App. 414, 425 (2006). The Board shall incorporate copies of this joint motion and the Court's order into Appellant's record. The Secretary will afford this case expeditious treatment as required by 38 U.S.C. § 7112.

**WHEREFORE**, the parties respectfully move the Court to vacate the part of the May 10, 2018, Board decision that denied entitlement to an effective date prior to May 30, 2006, for TDIU, and remand the matter for further proceedings in accordance with the Court's order and this joint motion.

Respectfully submitted,

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