IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

CLIFTON ARLINE, Appellant,	)	
vs.	)	Vet. App. No. 18-765
ROBERT L. WILKIE, Secretary of Veterans Affairs, Appellee.	)	

APPELLANT'S RESPONSE TO APPELLEE'S SUPPLEMENTAL BRIEF

I. The Board violated the law when it made the vocational determination that employers do not provide the accommodation Mr. Arline reported without basing that determination on vocational evidence.

The Secretary principally argues that the evidentiary record before the Board provided a plausible basis for its finding that the accommodations Mr. Arline reportedly received were incredible. *See* Secretary's Supp. Br. at 1-3. He urges the Court not to speculate on what Board findings "a different evidentiary record" might have led to. *Id.* at 3. This incorrectly assumes that the record that *was* before the Board contained *evidence* that no employer would provide the accommodations Mr. Arline said he received. Instead, the only support for the Board's finding that the reported accommodations were incredible was the Board's speculation about what happens in the workplace. *See* R-23-25.

"Speculation isn't substantial evidence." *Biestek v. Berryhill*, 139 S. Ct. 1148, 1159 (2019) (Gorsuch, J., dissenting). Nor can it supply a basis for a Board finding of

fact: "It is the Board's task to make findings based on evidence of record—not to supply missing facts." *Beaty v. Brown*, 6 Vet.App. 532, 537 (1994) (citing *Colvin v. Derwinski*, 1 Vet.App. 171, 175 (1991), *overruled on other grounds by Hodge v. West*, 155 F.3d 1356 (Fed. Cir. 1998)); *see* 38 U.S.C. § 7104(a). "[W]here the applicant has raised" at least "a serious question" about his entitlement to a benefit, "and the evidence affords no sufficient basis for the Secretary's negative answer," a "court is [not] bound to sustain a denial of disability benefits" founded on the agency's speculation. *Kerner v. Flemming*, 283 F.2d 916, 922 (2d Cir. 1960) (Friendly, J.).

"The principle that the government must support its allegations with substantial evidence, not conclusions and secret evidence, guards against arbitrary executive decisionmaking"; "[w]ithout it, [claimants] are left to the mercy of a bureaucrat's caprice," as Mr. Arline was in this case. *Biestek*, 139 S. Ct. at 1162-63 (Gorsuch, J., dissenting). On that principle, the Supreme Court rejected an agency's urging that "its findings must be presumed to have been supported . . . even though not formally proved." *ICC v. Louisville & N.R. Co.*, 227 U.S. 88, 93 (1913). Instead, a claimant must "know what evidence is offered or considered, and . . . [be] given an opportunity to test, explain, or refute." *Id.*

This is particularly true when it comes to matters implicating specialized knowledge. *See Colvin*, 1 Vet.App. at 175. "Requiring the Board to support its medical determinations with independent medical evidence"—not just its own, unsubstantiated conclusion—"'ensures that all medical evidence contrary to the

veteran's claim will be made known to him and be a part of the record before this Court.'" *Kahana v. Shinseki*, 24 Vet.App. 428, 434 (2011) (quoting *Colvin*, 1 Vet.App. at 175); *see also Faust v. West*, 13 Vet.App. 342, 357 (2000) (stating that, "as a general matter, VA should not consider in its decisions any evidence not made available to the claimant"). The same holds true for any determination requiring specialized knowledge. Here, that knowledge is vocational, not medical, because it concerns the characteristics of the workplace. *See Biestek*, 139 S. Ct. at 1152 (observing that a vocational expert has "expertise and current knowledge of [w]orking conditions and physical demands of various jobs; [k]nowledge of the existence and numbers of [those jobs] in the national economy; and [i]nvolvement in or knowledge of placing adult workers[ ] with disabilities[ ] into jobs" (internal quotation marks omitted)).

Where, as here, the Board considered no adverse vocational evidence, its "finding" that an employer would not provide the accommodations Mr. Arline reported should be held unlawful. *See* 38 U.S.C. §§ 7104(a), 7261(a)(4); *see also* Appellant's Br. at 20 ("The Board's surmising that no employer would provide such accommodations . . . lacked evidentiary support."). In rejecting Ms. Grunden's vocational opinion as premised on an incorrect factual basis because it was based on Mr. Arline's uncorroborated—yet uncontradicted—reports, the Board assumed the role of a competing vocational expert, opining on the question of how much accommodation an employer would provide. The Board's "finding" was just an unfounded opinion.

The Board exceeded its competence when it relied on its own speculation as a substitute for vocational evidence. Before the Board can decide that an event ordinarily would have been recorded, and thus draw a negative inference when a veteran's report of that event is uncorroborated, it must "consider the limits of its own competence" on a matter involving specialized knowledge. *Kahana*, 24 Vet.App. at 440 (Lance, J., concurring). Resolving a "disputed issue[] of fact" is beyond the Board's competence when an issue is "medically complex." *Id.* at 441-42 (Lance, J., concurring). So, although the Board can decide whether a claimed in-service injury like a compound fracture plausibly occurred without being recorded, it cannot do so in cases that "fall clearly on the side of being medically complex," like cancer or an ACL injury. *Id.* at 440-41 (Lance, J., concurring) (citing *Jandreau v. Nicholson*, 492 F.3d 1372, 1377 n.4 (Fed. Cir. 2007)). This same rationale applies to any area requiring expert knowledge, such as the vocational matter here, involving knowledge of accommodations in work environments.

Here, the opinion of the vocational expert, Ms. Grunden, was *itself* evidence helpful to deciding whether an employer plausibly would provide the accommodations Mr. Arline said he received. If the Board lacks the requisite expertise to decide whether a reported event occurred, expert evidence "may play a role in the Board's evaluation of credibility." *Miller v. Wilkie*, __ Vet.App.__, No. 18-2796, 2020 WL 236755, at *6 (Jan. 16, 2020). For example, "a medical opinion . . . could help the Board determine whether the veteran's reports [of an in-service injury]

were plausible," and thus "inform the Board's credibility analysis." *Id.* (citing *Kahana*, 24 Vet.App. at 437). Replace "medical" with "vocational," and "in-service injury" with "employer-provided accommodation," and the reasoning in *Miller* and *Kahana* still holds: expert evidence can be necessary to deciding whether a lay-reported event plausibly occurred. *See id.*; *Kahana*, 24 Vet.App. at 437.

The Board was not qualified to deem Ms. Grunden's opinion factually unfounded. Instead, she was positioned to help with its credibility determination because she was qualified to know what kinds of accommodations employers provide. Ms. Grunden—unlike the Board—had the requisite expertise to say whether the accommodations Mr. Arline reported were plausible. R-63-65 (Ms. Grunden's curriculum vitae); *see Biestek*, 139 S. Ct. at 1152. The fact that she rendered an opinion based on Mr. Arline's reports without questioning their veracity shows that they were credible and consistent with employer-offered accommodations. *See* R-57-62. Had she thought them incredible, she would have offered a different opinion, or no opinion at all. *See Miller*, 2020 WL 236755, at *7 ("If an examiner explains that the veteran's assertions are generally inconsistent with medical knowledge or implausible, the Board can weigh that when addressing the veteran's credibility.").

This does not mean that vocational evidence will be required in all cases. But apart from in cases of true, facial implausibility, the Board cannot assume the truth of a fact and then rely on that assumption to deem a vocational expert's opinion factually ill-premised. *Cf. Kahana*, 24 Vet.App. at 434. Instead, the Board must make a finding

that is based on independent evidence from a suitably qualified source, like an expert or a treatise. *Cf. id.* at 441 (Lance, J., concurring). The Secretary himself has agreed that "a vocational expert could be necessary under the facts of a particular case." *Smith v. Shinseki*, 647 F.3d 1380, 1386 (Fed. Cir. 2011) (internal quotation marks omitted).

Here, Mr. Arline provided a favorable, well-reasoned report of a qualified vocational expert. Once he did so, the Board was foreclosed from denying his claim "without producing evidence, as distinguished from mere conjecture, that [he] can perform work that would produce sufficient income to be other than marginal." *Bowling v. Principi*, 15 Vet.App. 1, 9 (2001) (emphasis omitted) (quoting *Beaty*, 6 Vet.App. at 537). However, the Board did not produce evidence. For all the foregoing reasons, no actual evidence shows that Mr. Arline's employer did not provide the accommodations he reported, and the Board clearly erred in finding that Mr. Arline's employment was not in a protected environment and not marginal. R-24-25.

Additionally, the Board failed to produce any evidence from a competent source to plausibly support its finding that Mr. Arline was *capable* of more than marginal employment. The Secretary argues that "the Board may have weighed the vocational report differently" had the VA medical examiner not opined that Mr. Arline was capable of substantially gainful employment. Secretary's Supp. Br. at 2-3. However, as this Court recently recognized, whether a veteran is "'unable to secure or

follow a substantially gainful occupation as a result of service-connected disabilities' . . . is not medical in nature." *Delrio v. Wilkie*, __ Vet.App. __, No. 17-4220, 2019 WL 6907193, at *6 (Dec. 19, 2019) (quoting 38 C.F.R. § 4.16). The Board found the examiner's opinion proved Mr. Arline was capable of "some forms of appropriate employment." R-25. But "it is not the province of medical examiners to opine on whether a veteran's service-connected disabilities preclude substantially gainful employment." *Delrio*, 2019 WL 6907193, at *6. Further, the VA examiner's opinion, like the Board's decision, was founded on an unqualified vocational assumption that Mr. Arline's employment was not marginal. *See* R-652 ("He was capable of working in such an environment for 38 years until his retirement last year."). In the absence of training or expertise in vocational matters, the examiner's assessment of Mr. Arline's employability was no better than a lay statement. *See Parks v. Shinseki*, 716 F.3d 581, 585 (Fed. Cir. 2013) ("[C]ompetency requires some nexus between qualification and opinion.").

Considering the foregoing, Mr. Arline agrees with the Secretary that the Court can resolve this appeal without interpreting the term "protected environment" in section 4.16(a). *See* Secretary's Supp. Br. at 2. The only evidence from a competent source—here, a vocational expert—shows that Mr. Arline's service-connected schizophrenia has prevented him from obtaining or maintaining employment that is more than marginal since 2006, so the Court can reverse the Board's denial of TDIU

on that basis. *See* Appellant's Br. at 29 (citing *Deloach v. Shinseki*, 704 F.3d 1370, 1380 (Fed. Cir. 2013)).

II. A "protected environment" is a workplace in which a veteran is protected from the economic consequences of the inability to perform the physical and mental acts required by substantially gainful employment.

The Board did not reach the question of whether and what kind of employer-provided accommodations constitute a "protected environment" because it assumed the accommodations Mr. Arline reported did not exist, which led to the unsupported finding that he was capable of more than marginal employment. *See* R-24-26. However, the single judge's allowing the Board to deem its own conjecture conclusive on what happens in the workplace eviscerated section 4.16 by eliminating a path to proving that a veteran's employment is marginal. *See* Appellant's Mot. for Panel Rev. at 1-2. It was impossible for Mr. Arline to prove that employer-provided accommodations rendered his work environment "protected" under section 4.16 because the Board decided, without evidence, that the accommodations were not provided. R-24. In affirming that unsupported and arbitrary decision, the single judge incorrectly narrowed the meaning of "protected environment" and thus marginal employment. *See Arline v. Wilkie*, No. 18-0765, 2019 WL 3047341, at *3 (Vet. App. July 12, 2019).

If the Court deems interpreting "protected environment" necessary, it should find the meaning of that term unambiguously encompasses an environment in which

a veteran is protected from the economic consequences of his or her inability to perform the physical or mental tasks required by substantially gainful employment. Because the regulation is not ambiguous, deference to the Secretary's interpretation of "protected environment" is not available. *See Auer v. Robbins*, 519 U.S. 452, 117 S. Ct. 905, 137 L.Ed.2d 79 (1997). The Secretary proposes that a "protected environment" is "a non-competitive workplace separated from workplaces in the open labor market and in which hiring and compensation decisions are motivated by a benevolent attitude toward the employee." Secretary's Supp. Br. at 13. However, this proposed interpretation overlooks the regulation's much broader plain language, this Court's interpretation of "substantially gainful employment," and the purpose of providing TDIU when employment is marginal, which is to compensate for the inability to earn.

First, "[m]arginal employment . . . on a facts found basis . . . includes *but is not limited to* employment in a protected environment *such as* a family business or sheltered workshop." 38 C.F.R. § 4.16(a) (emphases added). However, the interpretation of "protected environment" the Secretary proposes essentially shrinks the regulation's scope down to a "sheltered workshop." Secretary's Supp. Br. at 13 (quoting SSR No. 83-33). A sheltered workshop is only one in a "nonexhaustive list of examples of what may constitute employment in a protected environment." *Cantrell v. Shulkin*, 28 Vet.App. 382, 390 (2017). Equating a "protected environment" with a "sheltered workshop" would impermissibly render the regulatory phrase "such as" superfluous. *See Glover v. West*, 185 F.3d 1328, 1332 (Fed. Cir. 1999) ("[W]e attempt to give full

effect to all words contained within that statute or regulation, thereby rendering superfluous as little of the statutory or regulatory language as possible.").

Second, the meaning of "protected environment" is tethered to what it means to be "*unable* to secure or follow a substantially gainful occupation." 38 C.F.R. § 4.16(a) (emphasis added); *see Vazquez-Claudio v. Shinseki*, 713 F.3d 112, 115 (Fed. Cir. 2013) ("In construing regulatory language, we must read the disputed language in the context of the entire regulation as well as other related regulatory sections in order to determine the language's plain meaning."). The question of what constitutes a protected environment therefore cannot be limited to whether the *workplace* is "non-competitive" or segregated or whether the *employer's* motivation is benevolent. *But see* Secretary's Supp. Br. at 13. Instead, it must also contemplate "whether the *veteran* has the physical . . . [and] mental ability to perform the activities required by the occupation at issue." *Ray v. Wilkie*, 31 Vet.App. 58, 73 (2019) (emphasis added).[1] When the regulation is read as a whole, it reveals that a "protected environment" is one in which a veteran is protected from the economic consequences of his or her inability to perform the tasks a substantially gainful job requires. *See* 38 C.F.R. § 4.16(a); *Ray*, 31 Vet.App. at 71-73.

This reading of the regulation is bolstered by the purpose of providing the TDIU benefit, which is to compensate for "the . . . *inability* to earn." Definition of

[1] The Secretary's regulatory analysis is devoid of any reference to the Court's interpretation of section 4.16 in *Ray*. *See* Secretary's Supp. Br. at 4-13.

Marginal Employment in Consideration of Total Evaluations Based on Individual Unemployability, 55 Fed. Reg. 31,579, 31,579 (Aug. 3, 1990); *see Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) (explaining that the "history[] and purpose of a regulation" shed light on its plain meaning). An employer can protect a veteran from the consequences of "the . . . inability to earn" by providing accommodations, as Mr. Arline's supervisor did, because he was a veteran himself and understood Mr. Arline's situation. Definition of Marginal Employment, 55 Fed. Reg. at 31,579; *see* R-54. This admirably provided Mr. Arline with the dignity of going to work each day. Nevertheless, "the . . . inability to earn" remained, and TDIU exists to compensate him for that. Definition of Marginal Employment, 55 Fed. Reg. at 31,579. This inability—not the nature of the workplace as a whole or the employer's state of mind—"must be the determining factor when considering entitlement." *Id.*; *but see* Supp. Br. at 13.

In sum, according to the plain language and purpose of section 4.16, if a veteran is earning above the poverty threshold yet unable to perform the tasks his job requires, then the veteran's employment is marginal on a facts-found basis: his or her work shares only the economic component of substantially gainful employment, and not the non-economic, ability-based component. *See Ray*, 31 Vet.App. at 72-73; *see also* 38 C.F.R. § 4.16(a). The Court should reject the Secretary's proffered interpretation of "protected environment" as inconsistent with the plain language and purpose of section 4.16.

If the Court continues to find that the term "protected environment" ambiguous, as it did in *Cantrell*, it should nonetheless decline to defer to the Secretary's interpretation. *See Cantrell*, 28 Vet.App. at 390. In his *Cantrell* pleadings, the Secretary refused to define a "protected environment," taking the position that it was "abstract" or wholly discretionary. Secretary's Resp. to Court's Dec. 1, 2016 Order, *Cantrell*, 28 Vet.App. 382, at 3-5 (Dec. 16, 2016). Now, he argues for "[a] narrow reading" that is limited to a segregated workplace. Secretary's Supp. Br. at 11, 13. "[T]here is reason to suspect that the agency's interpretation does not reflect the agency's fair and considered judgment on the matter in question . . . when the agency's interpretation conflicts with a prior interpretation, or when it appears that the interpretation is nothing more than a convenient litigating position." *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012) (citations omitted) (internal quotation marks omitted). The Secretary's interpretation of "protected environment" is both. *See* Secretary's Br. at 14-15 (acknowledging that his interpretation advanced in this litigation might "conflict [with] his position in *Cantrell*"). Accordingly, it is unentitled to *Auer* deference. *Christopher*, 567 U.S. at 155.

Nor should the Court find that the Secretary's interpretation is entitled to special consideration under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *but see* Secretary's Supp. Br. at 15. Both its "timing" and lack of "consistency with earlier . . . pronouncements" deprive it of "power to persuade." *Young v. United Parcel Serv., Inc.*, 575 U.S. 206, 225 (2015) (quoting *Skidmore*, 323 U.S. at 140).

Because the existence of marginal employment on a facts-found basis—including in a "protected environment"—must be determined by reference to a veteran's inability to earn an income that is substantially gainful, it is consistent with section 4.16 to include in the interpretation of "protected environment" a workplace in which unreasonable accommodations close a gap between a veteran's abilities and the demands of his or her job. A "qualified individual" is a person "who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). It follows that someone who cannot perform the essential functions of the job unless *un*reasonable accommodations are provided is not "qualified," or capable of doing the job. *See id.* Under this Court's reasoning in *Ray*, that person is not capable of substantially gainful employment. *Ray*, 31 Vet.App. at 73. If an employer allows him or her to continue in the position anyway, then he or she is protected from the consequences of inability to perform the physical or mental tasks of the job. *See id.* at 72-73; *see also* Appellant's Mot. for Panel Rev. at 3 ("Such accommodations relieve a veteran from being required to perform all essential functions of a job as a barrier to remaining employed at a full salary.").

Considering the foregoing, the Court should interpret a "protected environment" to include unreasonable accommodations that allow a veteran to continue working at a substantially gainful level. Applying that interpretation here establishes that Mr. Arline is entitled to TDIU. Evidence from the only competent

source—Ms. Grunden—shows "[t]he special accommodations made by Mr. Arline's employer are not reasonable in most competitive occupations," and "[h]e would not have been able to maintain his job without the accommodations." R-61. The Board did not point to any evidence contradicting the factual basis of Ms. Grunden's opinion or the conclusion she reached. Nor did it point to evidence from a competent source showing that he was capable of more than marginal employment. Accordingly, Mr. Arline respectfully asks the Court to reverse the Board's denial of TDIU and remand with directions to grant that benefit.

Respectfully submitted,

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