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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-4141

ROBERT H. WRIGHT, JR., APPELLANT,

V.

ROBERT L. WILKIE,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before ALLEN, *Judge*.

MEMORANDUM DECISION

*Note: Pursuant to U.S. Vet. App. R. 30(a),
this action may not be cited as precedent.*

ALLEN, *Judge*: Self-represented appellant Robert H. Wright, Jr., served the Nation honorably in the U.S. Army from December 1968 to September 1970, including service in the Republic of Vietnam.¹ In this appeal, which is timely and over which the Court has jurisdiction,² he contests a May 31, 2019, Board of Veterans' Appeals decision that denied (1) service connection for bilateral hearing loss and tinnitus and (2) entitlement to a total disability rating based on individual unemployability (TDIU).³ Because the Board did not provide adequate reasons or bases for its decision, the Court will set aside the Board's May 31, 2019, decision and remand these matters for further proceedings.

I. ANALYSIS

A. Bilateral Hearing Loss and Tinnitus

Because appellant is proceeding pro se, he's entitled to both a sympathetic reading of his informal brief and a liberal construction of his arguments.⁴ However, as an appellant, he still has

¹ Record (R.) at 1401.

² See 38 U.S.C. §§ 7252(a), 7266(a).

³ R. at 4-17.

⁴ *De Perez v. Derwinski*, 2 Vet.App. 85, 86 (1992).

the burden of showing error in the Board's decision.⁵ According to a liberal construction of appellant's arguments, appellant challenges the Board's consideration of the evidence, asserting that the Board failed to consider the fact that he used hearing protection in his postservice career.⁶ He asserts that his reports of in-service noise exposure without hearing protection and postservice noise exposure with hearing protection are favorable to his claim. The Secretary defends the Board's decision and urges that we should affirm because the Board considered appellant's 40 years of occupational noise exposure.⁷

Establishing service connection generally requires evidence of (1) a current disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a nexus between the claimed in-service disease or injury and the present disability.⁸ For all findings on a material issue of fact and law, the Board must support its decision with an adequate statement of reasons or bases that enables a claimant to understand the precise bases for the Board's decision and facilitates review in this Court.⁹ To comply with this requirement, the Board must analyze the credibility and probative value of evidence, account for evidence it finds persuasive or unpersuasive, and provide reasons for rejecting material evidence favorable to the claimant.¹⁰ If the Board failed to do so, remand is appropriate.¹¹

The Board found that appellant satisfied the first and second elements for establishing service connection because he had been diagnosed with bilateral hearing loss and tinnitus and "had hazardous noise exposure during active service."¹² However, the Board denied appellant's claims because "the preponderance of the evidence weighs against finding that the Veteran's bilateral hearing loss or tinnitus began during service or are otherwise related to an in-service injury, event, or disease."¹³ In other words, the Board found no link between his current hearing conditions and

⁵ See, e.g., *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000) (table); *Berger v. Brown*, 10 Vet.App. 166, 169 (1997).

⁶ Appellant's Brief (Br.) at 2.

⁷ Secretary's Br. at 9.

⁸ See *Hickson v. West*, 12 Vet.App. 247, 253 (1999); 38 C.F.R. § 3.303(a) (2019).

⁹ 38 U.S.C. § 7104(d)(1); *Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990).

¹⁰ *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table).

¹¹ *Tucker v. West*, 11 Vet.App. 369, 374 (1998).

¹² R. at 7, 9.

¹³ R. at 12.

service, i.e., the third element for establishing service connection has not been satisfied. The Board relied primarily on a September 2014 VA examiner's opinion that any in-service noise exposure appellant might have experienced did not cause appellant's hearing conditions. The Board concluded that the examiner provided an adequate rationale, specifically explaining that the examiner "noted that the Veteran had 40 years of occupational noise exposure after separation from active service while the Veteran worked as a lumberyard foreman."¹⁴ Yet the record reveals that the September 2014 VA examiner did not make such a note; in fact, the examiner did not mention appellant's occupational history at all.¹⁵ Because it is not clear whether the Board or the examiner relied on an accurate account of appellant's postservice noise exposure and how that knowledge would affect not only the Board's decision but also the examiner's etiological opinion, judicial review is frustrated. Accordingly, remand is warranted.¹⁶

On remand, the Board is required to reassess the evidence of record, including the adequacy of the September 2014 VA examination report to ensure that it was based on accurate factual premises.¹⁷ The Board must also provide a new statement of reasons or bases that accounts for all favorable evidence of record.¹⁸ Also on remand, appellant may submit additional evidence and argument and has 90 days to do so from the date of VA's postremand notice.¹⁹ The Board must consider any such additional evidence or argument submitted.²⁰ The Board must also proceed expeditiously.²¹

B. TDIU

Appellant argues that the Board erred when it denied TDIU because the evidence shows that his conditions, especially PTSD and neuropathy, prevent him from working in "industrial and social settings."²² Appellant cites "all submitted statements" in the record "especially [statements

¹⁴ R. at 10.

¹⁵ R. at 411-17.

¹⁶ See *Tucker v. West*, 11 Vet.App. 369, 374 (1998).

¹⁷ See *Reonal v. Brown*, 5 Vet.App. 458, 461 (1993).

¹⁸ See *Caluza*, 7 Vet.App. at 506; *Gilbert*, 1 Vet.App. at 52.

¹⁹ *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order); see *Clark v. O'Rourke*, 30 Vet.App. 92 (2018).

²⁰ *Kay v. Principi*, 16 Vet.App. 529, 534 (2002).

²¹ 38 U.S.C. §§ 5109B, 7112.

²² Appellant's Br. at 3.

of] Dr. Rashad."²³ Arguing that the Board did not err and that it provided adequate reasons or bases for denying TDIU, the Secretary urges the Court to affirm the Board's decision on this issue.

Appellant is currently service connected for PTSD, inactive prostate cancer, diabetes, and bilateral peripheral neuropathy of the upper and lower extremities.²⁴ TDIU is appropriate if a claimant's service-connected disabilities render him or her unable to secure and follow substantially gainful occupation.²⁵ The central inquiry in deciding entitlement to TDIU is "whether that veteran's service-connected disabilities alone are of sufficient severity to produce unemployability."²⁶ The Board's determination regarding TDIU must be based on the veteran's particular circumstances and "take into account the individual veteran's education, training, and work history."²⁷ The Court reviews the Board's TDIU determination for clear error.²⁸

In its decision, the Board acknowledged "the medical opinions relating that the Veteran is prohibited from gainful activity due to either PTSD or polyneuropathy, or that the Veteran has total occupational and social impairment from PTSD," but the Board found that other medical opinions of record indicating otherwise were more probative and supported the finding that appellant was not unemployable. The Board concluded that "[a]lthough the record reflects that the Veteran's work history involved physical occupational settings, the evidence of record does not support that the Veteran would be unable to secure and maintain substantially gainful sedentary or lower intensity employment."²⁹ In reaching its conclusion, the Board never explains what it understands "sedentary" to mean. Under this Court's decision in *Withers v. Wilkie*, such a failure is error.³⁰

Accordingly, remand is warranted because the Board provided inadequate reasons or bases for denying TDIU.³¹ On remand, the Board must fully explain its understanding of the term "sedentary" and how it applies to the appellant's specific disability picture as well as his

²³ Appellant's Br. at 2.

²⁴ R. at 632-33.

²⁵ 38 C.F.R. § 4.16(a) (2019).

²⁶ *Hatlestad v. Brown*, 5 Vet.App. 524, 529 (1993).

²⁷ *Pederson v. McDonald*, 27 Vet.App. 276, 286 (2015)(en banc); see *Ray v. Wilkie*, 31 Vet.App. 58, 70-71 (2019).

²⁸ 38 U.S.C. § 7261(a)(4); *Bowling v. Principi*, 15 Vet.App. 1, 6 (2001).

²⁹ R. at 16.

³⁰ 30 Vet.App. 139, 149 (2018).

³¹ *Id.*; see *Tucker v. West*, 11 Vet.App. 369, 374 (1998).

educational and occupational history.³² Moreover, we note that the Board emphasized that appellant is able to participate in recreational activities such as boating, fishing, shooting, and collecting coins.³³ It's not clear to us why those activities are relevant to the TDIU analysis. On remand, the Board should also explain how appellant's participation in these recreational activities relate to an ability to engage in substantially gainful employment in a competitive work environment on a daily basis.³⁴

II. CONCLUSION

After consideration of the parties' briefs, the governing law, and the record, the Court SETS ASIDE that portion of the May 31, 2019, Board decision and REMANDS these matters for further proceedings consistent with this decision.

DATED: April 27, 2020

Copies to:

Robert H. Wright, Jr.

VA General Counsel (027)

³² See *Withers*, 30 Vet.App at 149; see also *Ray*, 31 Vet.App at 70-71.

³³ R. at 14-16.

³⁴ See *Friscia v. Brown*, 7 Vet.App. 294, 297 (1995).