

*Designated for electronic publication only*

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

No. 19-5355

HENRY WILSON, JR., APPELLANT,

V.

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

Before BARTLEY, *Chief Judge*.

**MEMORANDUM DECISION**

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

BARTLEY, *Chief Judge*: Self-represented veteran Henry Wilson, Jr., appeals a May 10, 2019, Board of Veterans' Appeals (Board) decision that denied entitlement to a total disability rating based on individual unemployability due to service-connected disability (TDIU). Record (R.) at 5-11. For the reasons that follow, the Court will set aside the May 2019 Board decision and remand the matter for further development, if necessary, and readjudication consistent with this decision.

**I. FACTS**

Mr. Wilson served on active duty in the U.S. Air Force from September 1962 to September 1982. R. at 554. He is currently service connected for hypertensive heart disease, assigned a 60% evaluation, and hypertension, assigned a 10% evaluation; his cumulative evaluation is 60%. *See* R. at 123.

Mr. Wilson underwent a VA examination in May 2010. R. at 3913-22. The examiner noted that Mr. Wilson's hypertension medication has changed over time as needed to control his blood pressure, but opined that the condition was "stable." R. at 3913. As for Mr. Wilson's heart disease, a cardiac stress test was contraindicated because he had undergone lumbar spine surgery

the prior month. R. at 3915. His estimated METs<sup>1</sup> level was 3-4, and it was noted that he developed "general tiredness and fatigue" with activity, R. at 3915, lacked stamina, and could only perform "low impact activities," R. at 3922. The examiner documented Mr. Wilson's report of chest pain occurring one to two times per month, lasting 10-15 minutes, as well as his report that he walks up to one mile three times weekly, although at a slow place due to back pain. R. at 3918.

VA treatment records from the following month reflect that he underwent a cardiac stress test two days earlier that reflected normal ventricular function and "no evidence of damage or jeopardy that would indicate the presence of significant underlying coronary disease." R. at 3829, 3853. He reported walking daily for exercise and denied any chest pains, palpitations, or shortness of breath. R. at 3853.

In January 2011, Mr. Wilson filed a formal request for TDIU. R. 3883-84. He reported that he had finished high school and completed several years of college, R. at 3884, and had last worked full-time in 2002, when he retired from a position in the field of aircraft quality control, R. at 3883. He stated that he did not leave that job due to his service-connected disabilities, *id.*, but that since his retirement he had neck, back, and prostate surgeries, R. at 3884.

Mr. Wilson underwent another VA examination in March 2011. R. at 3824-30. The examiner documented Mr. Wilson's report that he walked one mile three times a week, although very slowly because of his back pain, and experienced chest pain one to two times per month, lasting 10-15 minutes. R. at 3824. The examiner noted that Mr. Wilson remained unable to perform a treadmill test following his 2010 back surgery and estimated his METs level as 3-5, "related primary to his lower back condition, not a cardiac condition." *Id.* However, the examiner opined that there was evidence of hypertension-related renal failure. R. at 3828.

As for the effects of Mr. Wilson's service-connected disabilities on his functioning, the examiner noted Mr. Wilson's report that he "decided to stop working" in 2002 because "[h]e was concerned about his elevated blood pressure" and opined that Mr. Wilson "is unable to work in a physical occupation due to his service[-]connected hypertension and hypertensive heart disease." R. at 3828. But he opined that the recent normal heart studies indicated that Mr. Wilson "is able to work in a sedentary occupation despite these service[-]connected conditions." *Id.* In an April

---

<sup>1</sup> For VA benefits purposes, "[o]ne MET (metabolic equivalent) is the energy cost of standing quietly at rest and represents an oxygen uptake of 3.5 milliliters per kilogram of body weight per minute." 38 C.F.R. § 4.104, Note 2 (2019).

2012 addendum opinion, the VA examiner opined that Mr. Wilson's cardiac METs "would be estimated at 7-10," based on the 2010 test results. R. at 3820. The examiner revised his assessment of Mr. Wilson's functioning and opined that the service-connected disabilities would not preclude physical or sedentary work. *Id.*

In a May 2012 rating decision, a VA regional office (RO) denied entitlement to TDIU. R. at 3799-803. Mr. Wilson filed a timely Notice of Disagreement, relating his understanding that his non-service-connected disabilities should be considered in any TDIU evaluation and his intent to submit evidence related to his neck, back, and prostate disabilities. R. at 3785. He also submitted a letter from his private physician, who stated that Mr. Wilson's "multiple medical diagnoses," including back, neck, knee, and gastroesophageal conditions, "would prevent him from being employable." R. at 2844.

The RO issued a Statement of the Case in February 2014, continuing its denial of TDIU. R. at 2816-31. In April 2014, Mr. Wilson submitted a timely Substantive Appeal, asserting that his hypertension renders him unable to "deal with pressures of work." R. at 2759. That same month, he submitted a letter from a VA physician, who opined that Mr. Wilson was unemployable because of his non-service-connected back condition. R. at 359. In October 2016, he submitted a letter from a second private physician, who stated that Mr. Wilson "currently suffers from hypertension and left ventricular hypertrophy" and is not "fit for employment at this time." R. at 345.

Mr. Wilson testified before the Board in March 2017 that he retired in part because he was unable to control his blood pressure, even with medication. R. at 326-27. He explained that, when he was working, he had to seek treatment at a VA emergency room multiple times because of his high blood pressure symptoms. R. at 333. He further testified that his hypertension medication made him "drowsy." R. at 327.

In August 2017, the Board remanded the matter to, among other things, obtain a new VA examination. R. at 262-68. Mr. Wilson underwent the ordered examination in January 2019. R. at 57-65. The examiner compared the results of a May 2018 exercise stress test, where Mr. Wilson performed at a METs level of 7, with interview-based METs results of 3-5, and opined that the exercise stress test more accurately reflected his current cardiac limitations due solely to his service-connected heart condition. R. at 61-62. The examiner also documented Mr. Wilson's report that he walked 3 miles 3 to 4 times per week "at an easy pace." R. at 58. The examiner

considered the evidence of record, including laboratory results and prior medical opinions, and opined that Mr. Wilson "would be expected to function adequately in sedentary work setting, semi[-]sedentary work settings[,] and very light physical labor." R.at 63. The examiner further opined that, based on laboratory findings, there was no evidence of hypertension-related renal disease, *id.*, and that Mr. Wilson's hypertension does not affect his employability, R. at 65.

In the May 2019 decision on appeal, the Board found that Mr. Wilson met the schedular requirements for TDIU because his heart disease is a single disability with a 60% evaluation. R. at 7. The Board found that the April 2012 and January 2019 VA medical opinions were "highly[ ]probative," R. at 10, and weighed against his claim, R. at 11. The Board further found that Mr. Wilson's non-service-connected back condition had "an impact" on his employability. *Id.* Ultimately, the Board denied the claim. R. at 5. This appeal followed.

## **II. JURISDICTION AND STANDARD OF REVIEW**

Mr. Wilson's appeal is timely, and the Court has jurisdiction to review the May 2019 Board decision pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). Single-judge disposition is appropriate in this case. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990).

TDIU will be awarded when a veteran is unable to secure or follow a substantially gainful occupation as a result of service-connected disabilities. 38 C.F.R. § 4.16 (2019); *see Hatlestad v. Brown*, 5 Vet.App. 524, 529 (1993) ("[T]he central inquiry in determining whether a veteran is entitled to a TDIU rating is whether the veteran's service-connected disabilities alone are of sufficient severity to produce unemployability."). The Board's determination of the appropriate degree of disability, including entitlement to TDIU, is a finding of fact subject to the "clearly erroneous" standard of review. 38 U.S.C. § 7261(a)(4); *see Smallwood v. Brown*, 10 Vet.App. 93, 97 (1997). "A factual finding 'is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Hersey v. Derwinski*, 2 Vet.App. 91, 94 (1992) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

As with any finding on a material issue of fact and law presented on the record, the Board must support its TDIU determination with an adequate statement of reasons or bases that enables the claimant to understand the precise basis for that determination and facilitates review in this Court. 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). To comply with this requirement, the Board must analyze the credibility and probative value of evidence, account for evidence that it finds persuasive or unpersuasive, and provide reasons for its rejection of material evidence favorable to the claimant. *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table).

### III. ANALYSIS

Under a liberal construction of his brief, *see De Perez v. Derwinski*, 2 Vet.App. 85, 86 (1992), Mr. Wilson argues that the Board did not fully consider all functional effects of his service-connected disabilities. Appellant's Informal Brief (Br.) at 3. The Secretary disputes this argument, asserting that the Board's decision is plausible and supported by the record. Secretary's Br. at 11; *see also id.* at 14-18. The Court agrees with Mr. Wilson.

As noted above, the Board found the January 2019 VA opinion highly probative as to Mr. Wilson's capacity for occupational functioning. R. at 10-11. The January 2019 VA examiner opined that Mr. Wilson's service-connected disabilities would permit sedentary through very light physical work. R. at 63. Said another way, the January 2019 VA examiner opined that Mr. Wilson's service-connected disabilities leave him *unable* to perform tasks more strenuous than very light physical work.

In the May 2019 decision on appeal, the Board acknowledged that this Court's holding in *Ray v. Wilkie*, 31 Vet.App. 58, 73 (2019), "requires consideration of [Mr. Wilson's] history, education, skill, and training, and physical and mental ability to perform the activities required by an occupation." R. at 7. The Board also recited Mr. Wilson's education and experience as reported on his TDIU application. R. at 7. However, the Board did not discuss, as is required under *Ray*, whether Mr. Wilson's specific education, training, skill, and experience would permit employment consistent with his functional impairment, as documented by the January 2019 VA examiner. *See* R. at 10-11; *Ray*, 31 Vet.App. at 73; *Cathell v. Brown*, 8 Vet.App. 539, 544 (1996) (the Board is required to consider and discuss the veteran's educational and occupational history and explicitly relate these factors to the disabilities of the individual veteran).

Without an analysis of such factors, the Court is unable to effectively review the Board's conclusion that Mr. Wilson's service-connected disabilities did not preclude substantially gainful employment. *See* 38 U.S.C. § 7104(d)(1); *Ray*, 31 Vet.App. at 74; *Allday*, 7 Vet.App. at 527. And, the Court is unable to conclude that the Board's inadequate discussion did not prejudice Mr.

Wilson. *See* 38 U.S.C. § 7261(b)(2); *Southall-Norman v. McDonald*, 28 Vet.App. 346, 356 (2016) (remanding where the Court was unable to conclude that a reasons or bases error was harmless). Accordingly, remand is warranted for the Board to readjudicate Mr. Wilson's entitlement to TDIU in accordance with this decision. *See* Ray, 31 Vet.App. at 74; *see also Hensley v. West*, 212 F.3d 1255, 1263 (Fed. Cir. 2000) (stating that "appellate tribunals are not appropriate fora for initial factfinding").

Per *Quirin*, the Court will provide additional guidance to the Board on remand. *See Quirin v. Shinseki*, 22 Vet.App. 390, 396 (2009) (holding that, to provide guidance to the Board, the Court may address an appellant's other arguments after determining that remand is warranted). In his March 2017 testimony before the Board, Mr. Wilson asserted that his hypertension medication caused side effects that interfered with his employment and that the stress of working interfered with control of his blood pressure. R. at 326-27. As Mr. Wilson notes, Appellant's Informal Br. at 3 (requesting consideration of all factors associated with his service-connected disabilities), his testimony is relevant favorable evidence that the Board should have considered, *see Caluza*, 7 Vet.App. at 506, and must address on remand, *see Robinson v. Peake*, 21 Vet.App. 545, 552 (2008) (requiring the Board to address all issues explicitly raised by the claimant or reasonably raised by the record), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1335 (Fed. Cir. 2009).

In accordance with *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order), Mr. Wilson is free to submit any additional arguments and evidence on remand, including any additional arguments he made to this Court; the Board must consider any such evidence or argument submitted. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002). The Court reminds the Board that "[a] remand is meant to entail a critical examination of the justification for the [Board's] decision," *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991), and must be performed in an expeditious manner in accordance with 38 U.S.C. § 7112.

#### **IV. CONCLUSION**

Upon consideration of the foregoing, the May 10, 2019, Board decision is SET ASIDE and the matter is REMANDED for further development, if necessary, and readjudication consistent with this decision.

DATED: April 28, 2020

Copies to:

Henry Wilson, Jr.

VA General Counsel (027)