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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-2729

ANTHONY A. KOMENDA, APPELLANT,

v.

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

Before MEREDITH, *Judge*.

MEMORANDUM DECISION

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

MEREDITH, *Judge*: The appellant, Anthony A. Komenda, through counsel appeals a December 28, 2018, Board of Veterans' Appeals (Board) decision that declined to reverse or revise June and October 1970 rating decisions, which assigned a noncompensable rating for a thyroglossal duct cyst excision scar, and a July 2001 rating decision, which assigned an earlier effective date of May 17, 2000, for his service-connected dysphagia, all on the basis of clear and unmistakable error (CUE), and denied entitlement to a total disability rating based on individual unemployability (TDIU). Record (R.) at 4-19. The appellant expressly limits his arguments on appeal to the Board's denial of entitlement to TDIU. *See* Appellant's Brief (Br.) at 1 n.1. Therefore, the Court finds that he has abandoned his appeal of the denial of his CUE motions, and the Court will dismiss the appeal as to the abandoned issues. *See Pederson v. McDonald*, 27 Vet.App. 276, 285 (2015) (en banc). This appeal is timely, and the Court has jurisdiction to review the Board's decision pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the following reasons, the Court will affirm the Board's decision denying entitlement to TDIU.

I. BACKGROUND

The appellant served on active duty in the U.S. Army from April 1968 to April 1970. R. at 1299. He is in receipt of disability benefits for dysphagia secondary to thyroglossal duct surgery rated 50% disabling; sleep apnea rated 50% disabling; bilateral hearing loss rated 20% disabling; tinnitus rated 10% disabling; residuals of a fractured nasal septum, status post rhinoplasty, rated 10% disabling; a thyroglossal duct cyst excision scar rated 10% disabling; a painful neck scar rated 10% disabling; and left ear otitis media and externa rated noncompensable. *See* R. at 6, 494-501. His combined evaluation for compensation was 90%, effective October 2014. R. at 499-501; *see* R. at 6.

He filed a formal application for entitlement to TDIU, through current counsel, in March 2015. R. at 1093-95. Later that year, a VA regional office (RO) denied his request, R. at 494-501; he filed a Notice of Disagreement (NOD), R. at 464-72; and the RO issued a Statement of the Case, R. at 382-403. In May 2016, VA afforded him an in-person medical examination for his dysphagia, R. at 199-200, scars, R. at 201-03, and nasal condition, R. at 203-05, and further requested an opinion on the effect of his service-connected disabilities on his ability to function in an occupational environment, R. at 205-07. Based on the in-person examination and a review of the appellant's medical records, the examiner opined that his service-connected disabilities "would not limit functional activities." R. at 206; *see* R. at 200, 203, 205 (noting that the appellant's esophageal condition, scars, and nasal condition do not impact his ability to work). The appellant filed a VA Form 9 in December 2016. R. at 151-52.

In December 2018, the Board issued the decision on appeal denying entitlement to TDIU based primarily on a January 2015 VA sleep apnea examination, a May 2016 VA hearing loss examination, and the May 2016 VA dysphagia examination and opinion. R. at 5-6, 13-16. This appeal followed.

II. ANALYSIS

The appellant avers that the Board erred by relying on the May 2016 VA opinion, which he alleges is inadequate because the examiner failed to discuss evidence of throat clearing, swallowing, and energy difficulties that he has experienced, and provided an inadequate rationale for his opinion. Appellant's Br. at 2-5. Further, he suggests that the Board's reasons or bases are inadequate because it failed to discuss favorable evidence and support its conclusion that he has

only "some degree of industrial impairment," and improperly discussed his prior unemployment status and non-service-connected disabilities. *Id.* at 4 (quoting R. at 16; citing 38 C.F.R. § 4.16(a); *Floore v. Shinseki*, 26 Vet.App. 376, 383 (2013)). The Secretary disputes these arguments and urges the Court to affirm the Board's decision. Secretary's Br. at 5-12.

TDIU may be assigned to a veteran who meets certain disability percentage thresholds and is "unable to secure or follow a substantially gainful occupation as a result of service-connected disabilities." 38 C.F.R. § 4.16(a) (2019). If a veteran fails to meet the percentage standards set forth in § 4.16(a) but is "unemployable by reason of service-connected disabilities," the matter should be submitted to the Director of the Compensation Service (Director) for extraschedular consideration. 38 C.F.R. § 4.16(b).

Whether a veteran is unable to secure or follow substantially gainful employment is a finding of fact that this Court reviews under the "clearly erroneous" standard. 38 U.S.C. § 7261(a)(4); *Bowling v. Principi*, 15 Vet.App. 1, 6 (2001). A finding of fact is clearly erroneous when the Court, after reviewing the entire evidence, "is left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948); see *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990). As with any material issue of fact or law, the Board must provide a statement of the reasons or bases for its determination "adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court." *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); see 38 U.S.C. § 7104(d)(1); *Gilbert*, 1 Vet.App. at 56-57.

First, regarding the appellant's argument related to the adequacy of the May 2016 VA opinion, there is a longstanding recognition of "the importance of issue exhaustion with respect to administrative tribunals" because "orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while [the agency] has opportunity for correction in order to raise issues reviewable by the courts." *Scott v. McDonald*, 789 F.3d 1375, 1377 (Fed. Cir. 2015) (quoting *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952)). Within the context of the VA system, the Court must apply a balancing test to determine whether the doctrine of issue preclusion should be invoked: "The test is whether the interests of the individual weigh heavily against the institutional interests the doctrine exists to serve." *Id.* at 1378 (quoting *Maggitt v. West*, 202 F.3d 1370, 1377 (Fed. Cir. 2000)). However, the

Court is not required "to . . . address procedural arguments when the [appellant] fails to raise them before the Board." *Id.* at 1381.

Here, as noted by the Secretary, the appellant was represented by current counsel during the adjudication of a prior request for entitlement to TDIU, R. at 1344-81 (Mar. 2012 Board decision denying TDIU), 1659-77 (Apr. 2011 Substantive Appeal), 1916-32 (Jan. 2011 NOD), 1969-74 (Sept. 2010 rating decision), and throughout the adjudication of his March 2015 application for TDIU, R. at 151-52 (Substantive Appeal), 464-72 (NOD), 494-501 (rating decision), 1093-95 (formal application). However, the appellant does not allege and there is no indication in the record that he raised the issue of the adequacy of the May 2016 opinion to the Board. Because the appellant failed to raise this issue below, thus depriving the Agency of the opportunity for correction and failing to raise an issue reviewable by this Court, *see Scott*, 789 F.3d at 1377, the Court, applying the balancing test of *Maggitt*, will not exercise its discretion to review the issue raised for the first time here. *See Dickens v. McDonald*, 814 F.3d 1359, 1361-62 (Fed. Cir. 2016) (affirming the Court's invocation of the doctrine of issue exhaustion where the appellant failed to raise a procedural argument to the Board).

Turning to the Board's reasons or bases for denying entitlement to TDIU, the Board acknowledged that the appellant's combined rating meets the criteria under 38 C.F.R. § 4.16(a) but concluded that the evidence preponderates against finding "that his service-connected disabilities alone preclude him from engaging in substantially gainful employment." R. at 15 (citing *Moore v. Derwinski*, 1 Vet.App. 356 (1991)). The Board summarized the January 2015 sleep apnea examination report, the May 2016 hearing loss and dysphagia examination reports, and the May 2016 VA opinion, and further indicated that, in a 2012 Board decision, it was noted that the appellant previously worked as a carpenter and "stated that he retired in 1998 after undergoing" surgery for a non-service-connected wrist condition. R. at 15-16. The Board then concluded that the evidence weighed against entitlement to TDIU, finding instead that the appellant's disability evaluations "accurately reflect the overall impairment to his earning capacity." R. at 16 (citing 38 C.F.R. § 4.1).

Regarding the appellant's contentions that the Board overlooked favorable evidence and provided no analysis for its conclusion that "[he] has some degree of industrial impairment as a result of his service-connected disabilities," R. at 16, the appellant does not explain why evidence of symptoms reported in 2004, 2006, and 2010, which was previously considered in a final 2012

Board decision, shows that he is precluded from engaging in substantially gainful employment during the appeal period, nor does he point to any evidence contrary to the Board's finding. *See Berger v. Brown*, 10 Vet.App. 166, 169 (1997); *see also Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000) (table). Thus, even assuming that the Board should have provided a more detailed statement of reasons or bases, the appellant fails to demonstrate prejudicial error. *See* 38 U.S.C. § 7261(b)(2) (requiring the Court to "take due account of the rule of prejudicial error"); *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) (holding that the harmless-error analysis applies to the Court's review of Board decisions and that the burden is on the appellant to show that he or she suffered prejudice as a result of VA error).

Additionally, the Court is not persuaded that the Board erroneously relied on his non-service-connected wrist condition to deny TDIU. Rather, as the Secretary contends, the Board acknowledged that consideration may not be given to non-service-connected disabilities, noted only that the 2012 decision reflected that the appellant previously stated that he stopped working in 1998 due to non-service-connected disabilities, and concluded that the evidence preponderates against finding that his service-connected disabilities alone preclude substantially gainful employment. Secretary's Br. at 10-11; *see* R. at 14, 16, 1377 (March 2012 Board decision); *see also Hilkert*, 12 Vet.App. at 151; *Berger*, 10 Vet.App. at 169. The Court thus concludes that he has not carried his burden of demonstrating error and will therefore affirm the Board's decision denying entitlement to TDIU.

III. CONCLUSION

The appeal of the Board's December 28, 2018, decision declining to reverse or revise June and October 1970 rating decisions, which assigned a noncompensable rating for a thyroglossal duct cyst excision scar, and a July 2001 rating decision, which assigned an effective date of May 17, 2000, for his service-connected dysphagia, all on the basis of CUE, is DISMISSED. After consideration of the parties' pleadings and a review of the record, the Board's decision denying entitlement to TDIU is AFFIRMED.

DATED: April 30, 2020

Copies to:

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VA General Counsel (027)