

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 18-5628

GARY PHILBROOK, APPELLANT,

v.

DENIS McDONOUGH,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

On Remand from the U.S. Court of Appeals for the Federal Circuit

(Decided February 11, 2022)

Kenneth Carpenter, of Topeka, Kansas, for the appellant.

James M. Byrne, General Counsel; *Mary Ann Flynn*, Chief Counsel; *Selket N. Cottle*, Deputy Chief Counsel; and *Shondriette D. Kelley*, all of Washington, D.C., were on the brief for the appellee.

Before PIETSCH, GREENBERG, and TOTH, *Judges*.

TOTH, *Judge*: This case is before the Court on remand from the Federal Circuit. *Philbrook v. McDonough*, 15 F.4th 1117 (Fed. Cir. 2021). The Court remands to the Board for further consideration in line with the Federal Circuit's decision.

In a June 2018 decision, the Board denied a rating for total disability based on individual unemployability (TDIU) under federal provisions that prohibit the assignment of a TDIU rating to a veteran who "is incarcerated in a Federal, State or local penal institution or correctional facility for conviction of a felony." 38 U.S.C. § 5313(c); *accord* 38 C.F.R. § 3.341(b) (2021). In a May 2020 memorandum decision, this Court affirmed the Board's decision, holding that the plain language of the statute ("incarcerated" in a "correctional facility") covered the veteran's situation—confinement at the Oregon State Hospital after entering a stipulation of guilty except for insanity. Mr. Philbrook appealed to the Federal Circuit, which held that "the Oregon State Hospital is not a 'penal institution or correctional facility' under § 5313(c)" and reversed this Court's "decision that Mr. Philbrook was barred from receiving a TDIU rating as a matter of law." *Philbrook*, 15 F.4th at 1121.

Accordingly, the Court VACATES and REMANDS the Board's June 19, 2018, decision denying TDIU for readjudication.