

No. 21-4193

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

**FRANKLIN A. GREEN,
Appellant,**

v.

**DENIS MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS
Appellee.**

**APPEAL FROM FINAL DECISION OF THE BOARD OF VETERANS'
APPEALS**

**REPLY BRIEF OF APPELLANT,
FRANKLIN A. GREEN**

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I. REPLY ARGUMENT

1. The Board's February 22, 2021 decision is not moot.

In his brief, the Secretary argues that, “relief has become moot since entitlement to TDIU has been granted by the AOJ since this appeal was initiated, and the effective date assigned for that entitlement has been appealed to the Board. The Court should therefore dismiss this appeal, as no controversy remains.”¹ The Secretary notes that during the pendency of the appeal, “in a December 2021 rating decision, the RO granted entitlement to TDIU effective April 21, 2021, the date on which Appellant met the schedular criteria for TDIU under 38 C.F.R. § 4.16(a).”² The Secretary believes that “no issue remains over which this Court has jurisdiction.”³ The Secretary concedes that “the Board made no findings of fact with regard to the merits of Appellant’s TDIU claim, denying entitlement as a matter of law on the basis that he had not been in receipt of service-connected compensation for any disability at the time of the AOJ decision on appeal.”⁴

38 U.S.C. §7261(b) requires the Court to take due account of the rule of prejudicial error. The rule of prejudicial error requires federal courts to review cases for errors of law, without regard to errors that do not affect the parties’

¹ Secretary’s Brief at 5.

² Secretary’s Brief at 6.

³ Secretary’s Brief at 7.

⁴ *Id.*

substantial rights.⁵ In conducting a prejudicial error analysis, the Court is applying a statutory mandate to consider whether an error “affects a substantial right so as to injure an interest that the statutory or regulatory provision involved was designed to protect such that the error affects ‘the essential fairness of the [adjudication].’”⁶ “In assessing the prejudicial effect of any error of law or fact, the Court is not confined to the findings of the Board but rather may examine the entire record before the agency as well as the record of proceedings.”⁷ The statute requires the Veterans Court to “review the record of proceedings before the Secretary and the Board” in determining whether a VA error is prejudicial.”⁸

The Secretary concedes that the Board denied TDIU as a matter of law because Mr. Green was not service connected for any disabilities at the time of the decision.⁹ The Court has jurisdiction to review this error of law by the Board, without deference to the Board’s conclusions.¹⁰

⁵ *Shinseki v. Sanders*, 556 U.S. 396, 407, 129 S.Ct. 1696, 173 L. Ed. 2d 532 (2009).

⁶ *Mayfield v. Nicholson*, 19 Vet. App. 103, 116 (2005) (quoting *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 553-54, 104 S.Ct. 845, 78 L. Ed. 2d 663 (1984)).

⁷ *Vogan v. Shinseki*, 24 Vet. App. 159, 164 (2010).

⁸ *Newhouse v. Nicholson*, 497 F.3d 1298, 1301 (Fed. Cir. 2007).

⁹ R. at 19.

¹⁰ *Butts v. Brown*, 5 Vet. App. 532, 539 (1993) (en banc)

This conceded error of law by the Board is not moot. The Board's error is a critical issue that could substantially affect Mr. Green's entitlement to an earlier effective date for TDIU. As the Secretary noted, Mr. Green received a rating decision that assigned an effective date of April 21, 2021 for entitlement to TDIU.¹¹ The Board decision currently on appeal, however, covers the period on appeal prior to February 22, 2021, the date of the Board decision.¹² If the Court were to find the issue of TDIU moot, the Board decision would foreclose an effective date prior to February 2021 for entitlement to TDIU; Mr. Green contends he is entitled to an effective date at least as early as August 2017, when he applied for TDIU, and since which time he has continuously pursued appeals.¹³ If the Court does not address the Board's error of law- reversing the Board's denial of TDIU prior to February 2021- there is no circumstance under which the AOJ will ignore a Board decision that, as a matter of law, found that there is no entitlement to TDIU prior to February 2021.¹⁴ Said another way, the failure to reverse the Board's denial of TDIU prior to February 2021 is an affirmance of the Board's decision to deny TDIU as a matter of law.

The Secretary doesn't address this issue in his response. He does not address the unfairness of letting the Board make an error of law, not just

¹¹ Secretary's Brief at 6.

¹² R. at 5.

¹³ R. at 1084-1088; R. at 445-447.

¹⁴ *See e.g.*, 38 C.F.R. §20.1104.

adjudicating TDIU when it lacked jurisdiction to do so, but also by limiting the effective date of TDIU to some date on/after the date of the Board decision. Unless and until the Court makes a decision on the Board's lack of jurisdiction and erroneous conclusion of law, the decision will stand, and Mr. Green will lose entitlement to an earlier effective date. This error is substantial and would cause Mr. Green to potentially lose years in retroactive benefits. This error is prejudicial and is patently unfair.¹⁵

Absent action by the Court, when the Board denied entitlement to TDIU in the absence of an AOJ determination on the downstream element of the claim, finality attached to that issue. Once finality attaches, a veteran's ability to seek further adjudication is strictly limited to narrow and difficult alternatives.¹⁶

Mr. Green respectfully asks the Court to reject the Secretary's argument that TDIU has been rendered moot and adjudicate his appeal on the merits.

2. The Secretary does not address how the Board has jurisdiction over entitlement to TDIU.

In his opening brief, Mr. Green argued that the Board may not address an issue until the AOJ makes an initial determination of the claim, because doing so would deprive the veteran of the statutory right to one review on

¹⁵ See *Mayfield*, 19 Vet. App. at 116.

¹⁶ See *Routen v. West*, 142 F.3d 1434, 1438 (Fed. Cir. 1998).

appeal to the Secretary.¹⁷ When the RO has not made a final decision on a veteran's TDIU claim- whether express or implied- those claims are not ripe for adjudication by the Board.¹⁸ Entitlement to TDIU is a downstream issue that is decided by VA *only* after entitlement to disability compensation has been granted.¹⁹

In the instant appeal, the Board granted service connection for an acquired psychiatric disorder, an upstream element of a claim.²⁰ The entitlement to a schedular psychiatric disorder rating, to include a TDIU rating, are both downstream elements of Mr. Green's claim because both concern compensation level, an issue that the AOJ has not yet adjudicated.²¹ Mr. Green argued that because the AOJ has not initially- or finally- adjudicated the entitlement to a TDIU rating, and because TDIU is a downstream element of Mr. Green's entitlement to service connection for an acquired psychiatric disorder, the Board did not have jurisdiction to adjudicate entitlement to TDIU.²²

¹⁷ Appellant's Opening Brief at 5; *Disabled Am. Veterans v. Sec'y of Veterans Affairs*, 327 F.3d 1339, 1342 (Fed. Cir. 2003) (quoting 38 U.S.C. § 7104(a)).

¹⁸ *Id.*; *Roberson v. Principi*, 251 F.3d 1378, 1383 (Fed. Cir. 2001).

¹⁹ *See Evans v. West*, 12 Vet. App. 396, 399 (1999).

²⁰ *Grantham v. Brown*, 114 F.3d 1156, 1159 (Fed. Cir. 1997).

²¹ *Id.*

²² Appellant's Opening Brief at 7.

The Secretary does not address Mr. Green’s argument: that the Board did not have jurisdiction over entitlement to TDIU. Instead, he states that “the November 2017 rating decision . . . included an explicit denial of entitlement to TDIU. Appellant then explicitly appealed this denial in his January 2018 NOD and his September 2019 AMA NOD. Therefore, the Board properly had jurisdiction to adjudicate the issue because the AOJ had addressed it and it was appealed.”²³ This response does not address how the Board could have jurisdiction of compensation level, a downstream element of a claim that the AOJ had not yet adjudicated.

The Secretary seems to argue that because Mr. Green appealed the AOJ’s denial of entitlement to TDIU, that he created jurisdiction before the Board to adjudicate the issue. Although a claimant may file an NOD as to a claim adjudicated below, nothing in an NOD could confer jurisdiction upon the Board over a claim.²⁴ It is axiomatic that in the absence of legislation authorizing otherwise, jurisdiction cannot be conferred- nor can the lack of jurisdiction be waived- by the parties.²⁵

The Secretary then argues that the Board’s determination “is not the first adjudication of TDIU, as it arose from a rating decision that addressed

²³ Secretary’s Brief at 9.

²⁴ *See Godfrey v. Brown*, 7 Vet. App.398, 408-410 (1995).

²⁵ *See Johnson v. Brown*, 7 Vet. App. 25, 27 (1994).

entitlement to TDIU.”²⁶ This is irrelevant. The AOJ denied TDIU because Mr. Green was not service connected for any disabilities, the foundational requirement for determining entitlement to a TDIU rating. These AOJ determinations could not have logically concerned the downstream element of TDIU or a rating for a psychiatric disability before there was an adjudication of the upstream element of service connection.²⁷ The key point here is that though the AOJ could adjudicate the upstream element of service connection, it could not adjudicate entitlement to TDIU without first making a final determination on a rating for the Board’s grant of service connection for a psychiatric disability. As such, the Board could not adjudicate entitlement to TDIU because evidence pertaining to the downstream rating element has not yet been fully developed.

The Secretary argues that, “to the extent there are factual errors in the Board’s consideration of TDIU based on its own grant of service connection for an acquired psychiatric disability, Appellant has failed to show how this has resulted in any harm to him.”²⁸ The Secretary fails to show how the Board’s lack of jurisdiction over entitlement to TDIU is harmless. This Court has found that, “to hold that a lack of jurisdiction could be harmless error is inconsistent

²⁶ Secretary’s Brief at 10.

²⁷ *Grantham*, 114 F.3d at 1159.

²⁸ Secretary’s Brief at 12.

with the well-established doctrine that parties cannot consent to agency jurisdiction and that the absence of jurisdiction cannot be waived.”²⁹

A finding that the Board’s error in denying TDIU before the AOJ rated the service-connected psychiatric disorder was harmless will have the effect of attaching finality to the Board’s denial of a TDIU rating, and narrowly limiting Mr. Green’s ability to fully maximizing his benefits.³⁰

Because the AOJ did not reach the merits of the downstream TDIU rating, the Board did not have jurisdiction to over the downstream issues. Mr. Green respectfully asks the Court to reject the Secretary’s undeveloped arguments.³¹

Mr. Green requests the Court find that because the Board’s denial of TDIU was issued without jurisdiction, it is a complete nullity and without legal effect.³² Rendering the Board’s extra-jurisdictional and improper original ratings determination void is the only way to cure the harm visited upon Mr. Green.

If the Court finds that the Board did have jurisdiction, Mr. Green argues that the Board erred when it found that he was not service connected for any

²⁹ *Jarrell v. Nicholson*, 20 Vet. App. 326, 334 (2006) (en banc).

³⁰ *See Morgan v. Wilkie*, 31 Vet. App. 162 (2019).

³¹ *MacWhorter v. Derwinski*, 2 Vet. App. 133, 136 (1992); *see also Brewer v. West*, 11 Vet. App. 228 (1998); *Locklear v. Nicholson*, 20 Vet. App. 410, 416 (2006).

³² *Breslow v. Brown*, 5 Vet. App. 560, 562 (1993).

disabilities.³³ The Board denied TDIU because “the Veteran was not service-connected for any disability at the time of the AMA appeal.”³⁴ It is unclear how the Board determined that Mr. Green is not entitled to TDIU because he is not service connected for any disabilities, when, in the same decision, the Board granted service connection for a psychiatric disorder. A Board decision that finds that a veteran is not service connected for any disability has no plausible basis in the record when that very Board decision service connects his psychiatric disorder. As such, remand is warranted.

II. RELIEF REQUESTED

For the foregoing reasons, as well as those raised in the opening brief, the Board’s decision denying entitlement to TDIU was in error. Therefore, the Board’s February 22, 2021 decision should be vacated, and this matter remanded for further adjudication.

Date: July 21, 2022

Respectfully submitted,
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³³ Appellant’s Opening Brief at 17-20.

³⁴ R. at 19.

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the United States of America that on July 21, 2022, I caused Appellant's opening brief to be served on the Appellee by and through the Court's E-Filing system:

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