

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

DANIEL R. WHITTAKER,

Appellant,

v.

DENIS McDONOUGH,
Secretary of Veterans Affairs,

Appellee.

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Vet. App. No. 20-4406

JOINT MOTION FOR PARTIAL REMAND

Pursuant to U.S. Vet. App. Rules 27 and 45(g)(2), Appellant, Daniel R. Whittaker, and Appellee, Denis McDonough, Secretary of Veterans Affairs (Secretary), through undersigned counsel, respectfully move this Court to vacate the June 3, 2020, Board of Veterans' Appeals (Board) decision to the extent that it denied entitlement to an effective date earlier than January 25, 2018, for the grant of service connection for posttraumatic stress disorder (PTSD), a total disability rating due to individual unemployability (TDIU), and basic eligibility to Dependents' Educational Assistance (DEA), and to remand the matters for readjudication in accordance with this motion.

The Court lacks jurisdiction over that part of the Board's decision that assigned an effective date of January 25, 2018, for the grant of service connection for PTSD, TDIU, and DEA, as these are favorable findings to Appellant. *Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007) (explaining that the Court is not permitted to reverse the Board's favorable findings of fact).

BASES FOR REMAND

The parties agree that the Board erred because it provided an inadequate statement of reasons or bases when it failed to adequately analyze whether an effective date prior to January 25, 2018, was warranted for the award of service connection for PTSD, and incidentally for TDIU and DEA. 38 U.S.C. § 7104(d)(4).

The relevant factual and procedural history in this case indicates that Appellant was discharged from his active duty in February 1976 for other than honorable conditions. [Record (R.) at 790]. He first submitted a claim for entitlement to service connection for PTSD in January 2004. [R. at 1504-09]. In July 2004, the Agency of Original Jurisdiction (AOJ) issued a denial related to the character of his discharge. [R. at 1468-69]. In a December 2017 decision, however, the Board for Correction of Naval Records upgraded Appellant's military discharge, noting that "upon request, the Department of Veterans Affairs be informed that Petitioner's application was received by the Board on 5 April 2016." [R. at 827 (823-27)].

Via a December 2017 communication through legal counsel, Appellant advised the AOJ that his military discharge had been upgraded. [R. at 821]. Further, Appellant submitted an application for disability benefits on August 1, 2018, requesting entitlement to service connection for, *inter alia*, "PTSD" and "unemployability." [R. at 786 (782-86)]. The AOJ treated this application as a new claim, which it granted in a January 25, 2019, rating decision. [R. at 333-

40]. In the decision on appeal, the Board, relying on 38 U.S.C. § 5110(i) and 38 C.F.R. § 3.400(g)(3), determined that the appropriate effective date was January 25, 2018, one year prior to that rating decision.

Remand is warranted because the Board did not address whether Appellant's December 2017 communication, [R. at 821], could be construed as an intent to file claim under 38 C.F.R. § 3.155(b), which could result in the assignment of an earlier effective date under 38 C.F.R. § 3.400(g)(1) or (2)¹. The parties note that Appellant filed a formal claim for service connection for PTSD in August 2018, [R. at 786 (782-86)], thus within one year of the December 2017 communication. 38 C.F.R. § 3.155(b). On remand, this issue should be addressed.

Remand is further required for the Board to adequately explain its reliance on 38 C.F.R. § 3.400(g)(3) – which applies to reopened claims – as opposed to section 3.400(g)(1) – which applies to original claims. The parties note that the January 2019 rating decision made no mention of reopening a previously denied claim, nor did it address new and material (or new and relevant) evidence.

¹ 38 C.F.R. § 3.400(g) Correction of military records (38 U.S.C. 5110(i); Pub. L. 87-825). Where entitlement is established because of the correction, change or modification of a military record, or of a discharge or dismissal, by a Board established under 10 U.S.C. 1552 or 1553, or because of other corrective action by competent military naval, or air authority, the award will be effective from the latest of these dates:

- (1) Date application for change, correction, or modification was filed with the service department, in either an original or a disallowed claim; [. . .]
- (2) Date of receipt of claim if claim was disallowed; or
- (3) One year prior to date of reopening of disallowed claim.

Clarification is needed on this issue because, if the January 2019 rating decision granted a “new” claim, as opposed to reopening a previously disallowed claim, then 38 C.F.R. § 3.400(g)(1) is the applicable regulatory provision – not subsection (g)(3), *i.e.*, the provision applied by the Board. On remand, the Board should provide an adequate statement of reasons or bases for its assignment of an effective date under the applicable provisions of 38 C.F.R. § 3.400(g).

The effective date of the awards of TDIU and DEA are inextricably intertwined and thus must be remanded with Appellant’s claim of entitlement to an effective date earlier than January 25, 2018, for the grant of service connection for PTSD.

The parties agree that this joint motion and its language are the product of the parties’ negotiations. The Secretary further notes that any statements made herein shall not be construed as statements of policy or the interpretation of any statute, regulation, or policy by the Secretary. Appellant also notes that any statements made herein shall not be construed as a waiver as to any rights or VA duties under the law as to the matter being remanded except that, pursuant to Rule 41(c)(2), the parties agree to unequivocally waive further Court review of and any right to appeal to the U.S. Court of Appeals for the Federal Circuit of the Court’s order on this Joint Motion. The parties respectfully ask that the Court enter mandate upon the granting of this motion.

The Court should vacate the Board decision and remand the appeal for readjudication consistent with the foregoing. On remand, Appellant may submit

additional argument to the Board consistent with a notice letter that will be sent by the Board. In any subsequent decision, the Board must set forth adequate reasons or bases for its findings and conclusions on all material issues of fact and law presented on the record. See 38 U.S.C. § 7104(d)(1); *Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990). The Board shall incorporate copies of this joint motion and the Court's order into Appellant's record. The Board shall provide this claim expeditious treatment as required by 38 U.S.C. § 7112.

WHEREFORE, the parties respectfully move the Court to vacate the June 3, 2020, Board decision to the extent that it denied entitlement to an effective date earlier than January 25, 2018, for the grant of service connection for PTSD, TDIU, and DEA, and to remand the matters in accordance with this motion.

Respectfully submitted,

November 29, 2022
Date

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