

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

Vet. App. No. 22-5870


Appellant,

v.

DENIS MCDONOUGH,
Secretary of Veterans Affairs,
Appellee.

APPELLANT'S BRIEF

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STATEMENT OF THE ISSUES

I) The Board of Veterans' Appeals (Board) erred when it failed to provide adequate reasons and bases for its decision by citing case law that is both outdated and no longer precedential to render entitlement to TDIU moot. R-5. The Board is required to include in its decision a written statement of the reasons or bases for its findings and conclusion on all material issues of fact and law presented on the record; that statement must be adequate to enable an appellant to understand the precise basis for the Board's decision.

In its decision, the Board relied on precedential case law when it rendered the Veteran's claim for entitlement to TDIU moot. The Board reasoned that, based on relevant case law, the Veteran's claim to TDIU is moot because he is already rated at 100% totally disabled for his myelodysplastic syndrome. R-7. The issue at hand in the case law cited by the Board was a jurisdictional one and the holdings of which are not on point with the instant case, thus the case law is not precedential in the context of determining if the Veteran's claim for TDIU is moot. Furthermore, The caselaw in question based its holding on a General Counsel opinion from 1999 that was subsequently withdrawn in November 2009, well before the August 2022 Board Decision.

II) The Board erred when it failed fulfill its duty to maximize benefits for the Veteran. Per VA regulations, proceedings before the VA are ex parte in nature, and it is the obligation of the VA to assist a claimant in developing the facts pertinent to the claim and to render a decision which grants every benefit that can be supported by law while protecting the interests of the Government. Furthermore, the Secretary of the VA is required to maximize benefits.

In this case, the Veteran was granted service connection for his myelodysplastic syndrome and granted 100% and, thus, deemed totally disabled. However, the Veteran was not deemed to be permanently disabled. R-607. VA regulations allow Veterans that are deemed 100% disabled on a permanent and total basis to avail themselves to various ancillary benefits. VA regulations also allow for entitlement to TDIU to be granted on a permanent and total basis. In its decision from August 2022, the Board ordered entitlement to TDIU to be moot without considering whether the Veteran should be deemed unemployable due to his myelodysplastic syndrome leaving the Veteran only totally disabled and not on a permanent basis.

III) The Board erred when it failed to ensure compliance with terms of the previous remand. A remand by the Board imposes upon the Secretary of VA a concomitant duty to ensure compliance with the terms of the remand, and that the Board itself commits error as a matter of law in failing to ensure this compliance.

In a previous Board decision from November 2021, entitlement to TDIU was remanded with explicit instructions that any doctor reports regarding employability should be considered. R-712. The subsequent rating decision from November 2021, did not address the multiple doctor reports regarding the Veteran's employability. R-607. Nor did the Board decision August 2022. R-5.

IV) The Board erred when it failed to address material evidence favorable to the Veteran. The Board must provide a statement of the reasons or bases for its determination, adequate to enable an appellant to understand the precise basis for the Board's decision, as well as to facilitate review in the Court. Additionally, To comply with this requirement,

the Board must analyze the credibility and probative value of the evidence, account for the evidence it finds persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the claimant.

In this case, the Veteran had multiple reports from doctors discussing the limitations that his myelodysplastic syndrome has on his employability. More specifically, a letter from his primary care physician from December 2014 and an employability assessment from Dr. Robert Townsend from February 2018. R- 2559, R-1550. Neither of these reports were discussed in any portion of the Board decision from August 2022. R-5.

STATEMENT OF THE CASE

The Veteran served in the United States Marine Corps from March 1977 to April 1970. R-5. The Veteran filed a VA Form 21-8940 claiming TDIU due to his myelodysplastic syndrome. R-2164. The VBA issued a decision in October 2017 denying entitlement to TDIU. R-1582. In September 2018, the Veteran filed a VA Form 9 appealing the denial to the BVA. R-1228. Entitlement to TDIU was subsequently rendered moot in a decision dated June 21, 2022. R-362. The Veteran then appealed this decision in a Notice of Disagreement on August 2, 2022. R-18. The BVA subsequently ordered that the Veteran's claim to TDIU was dismissed in its decision from August 26, 2022. R-5.

SUMMARY OF THE ARGUMENT

In its decision, dated August 26, 2022, the Board states, "If a veteran is totally disabled as a result of a particular service-connected disability or combination of disabilities pursuant to the rating schedule, there is no need, and no authority, to rate

him/her otherwise totally disabled on any other basis.” The Board cites *Herlehy v. Principi*, 15 Vet. App. 33, 35 (2001) as a precedential authority in support of its holding. R-7.

The Board is required to include in its decision a written statement of the reasons or bases for its findings and conclusion on all material issues of fact and law presented on the record; that statement must be adequate to enable an appellant to understand the precise basis for the Board’s decision.

The Court in *Herlehy* based its holding on a 1999 General Counsel Opinion, *Vet. Aff. Op. Gen. Couns. Prec. 6-99*, which concluded that a “ a claim for a TDIU rating for a particular service-connected disability mat not be considered when a schedular 100-percent rating is already in effect for another service-connected condition.” This General Counsel Opinion was subsequently withdrawn in November 2009 following the Court’s ruling in *Bradley v. Peake*, 22 Vet. App. 280 (2009).

Furthermore, the Board erred when it failed to fulfill its duty to maximize benefits for the Veteran. The Secretary is required to maximize benefits for the Veteran. *Bradley v Peake*, 22 Vet. App. 152, 157 (2009). This duty is derived from 38 C.F.R § 3.103(a), which requires the VA to issue decisions that grant every benefit that can be supported in law while protecting the interests of the Government.

In this case, the Veteran was granted service connection for his myelodysplastic syndrome and rated at 100% totally disabled, without being deemed permanently disabled. R-607. Entitlement to TDIU can be granted on a permanent and total basis, which allows Veterans to avail themselves to a variety of ancillary benefits. In its decision from August

2022, the Board rendered TDIU moot and did not consider whether the Veteran should be deemed permanently disabled. R-5.

Additionally, the Board erred when it failed to ensure compliance with the terms of a previous remand. A remand by the Board imposes upon the Secretary of VA a concomitant duty to ensure compliance with the terms of the remand, and that the Board itself commits error as a matter of law in failing to ensure this compliance. *Stegall v. West*, 11 Vet. App. 268, 270-71 (1998).

The Board issued a decision in November 2021 remanding entitlement to TDIU with explicit instructions that state, “The AOJ should any remaining claims at issue. This includes TDIU. The AOJ is advised to review the Veteran’s medical reports from his doctors discussing his unemployability.” R-712. Following the November 2021 remand, a rating decision was issued that did not address neither entitlement to TDIU nor any of the multiple doctor’s reports regarding the Veteran’s employability. R-607. Also, the Board failed to address any doctor reports in its decision from August 2022. R-5.

Furthermore, the Board erred when failed to address material evidence favorable to the Veteran. The Board must provide a written statement of the reasons or bases for its determination, adequate to enable an appellant to understand the precise basis for the Board's decision, as well as to facilitate review in the Court. Additionally, To comply with this requirement, the Board must analyze the credibility and probative value of the evidence, account for the evidence it finds persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the claimant.

In this case, the Veteran has multiple reports from doctors discussing how his myelodysplastic syndrome significantly hinders his ability to maintain employment or prevents him from doing so at all. The Veteran's primary care physician authored a letter discussing the limitation the Veteran's condition puts on his ability to secure and maintain a job. R-2559. Also, there is private medical opinion from Dr. Robert Townsend where he concludes that the Veteran is unemployable due too his condition. R-1550. Neither of these reports are discussed in the Board decision from August 2022.

STANDARD OF REVIEW

The Court reviews findings of fact under the clearly erroneous standard. 38 U.S.C. § 7104(c). The Court has held that a 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.” *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990). Findings regarding the degree of impairment resulting from a disability are findings of fact. *Brambley v. Principi*, 17 Vet.App. 20, 22-23 (2003). Findings regarding the proper effective date of an award are also reviewed under the clearly erroneous standard. *Livesay v. Principi*, 15 Vet.App. 165, 170 (2001). This Court also reviews claimed legal errors by the Board under the de novo standard, where the previous Board decision is not entitled deference. 38 U.S.C. § 7261(a)(1); see *Butts v. Brown*, 5 Vet.App. 532 (1993) (en banc). The Court will set aside a conclusion of law made by the Board when that conclusion is determined to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *Butts*, at 538.

ARGUMENT

I) The Board of Veterans' Appeals (Board) erred when it failed to provide adequate reasons and bases for its decision that the Veteran's TDIU claim is moot by relying on non-precedential and/or outdated authorities.

In its decision, dated August 26, 2022, the Board ordered that the Veteran's appeal for TDIU is rendered moot. R-5. The Board cites *Herlehy v. Principi*, 15 Vet. App. 33, 35 (2001) as precedential authority and states, "If a veteran is totally disabled as a result of a particular service-connected disability or combination of disabilities pursuant to the rating schedule, there is no need, and no authority, to rate him/her otherwise totally disabled on any other basis." R-7.

The Board is required to include in its decision a written statement of the reasons or bases for its findings and conclusion on all material issues of fact and law presented on the record; that statement must be adequate to enable an appellant to understand the precise basis for the Board's decision. 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1990).

The issue before the Court in *Herlehy* was not the same or similar issue regarding mootness as in the instant case. Rather, the Court was tasked to render a ruling on a jurisdictional matter. As such, *Herlehy* is not on point with the instant case and is not precedential. Furthermore, the Court in *Herlehy* cited a 1999 General Counsel Opinion, *Vet. Aff. Op. Gen. Couns. Prec. 6-99*, that concluded that "a claim for a TDIU rating for a particular service-connected disability may not be considered when a schedular 100-percent rating is already in effect for another service-connected condition." This General Counsel Opinion was subsequently withdrawn in November 2009 due to the Court's ruling in

Bradley v Peake, 22 Vet. App. 152, 157 (2009). and is no longer precedential. As such, the holding that the Board cited in *Herlehy* is inherently flawed and should not be considered controlling.

The Appellant respectfully requests that the Board's decision be remanded for further adjudication and so that further development can take place.

II) The Board erred when it failed in its duty to maximize the Veteran's benefits.

In its decision, the Board failed to address whether the Veteran should be deemed permanently disabled and rendered TDIU moot thus depriving the Veteran the opportunity to pursue additional and ancillary benefits available to permanently disabled Veterans.

The Secretary is required to maximize benefits for the Veteran. *Bradley v Peake*, 22 Vet. App. 152, 157 (2009). This duty is derived from 38 C.F.R § 3.103(a), which requires the VA to issue decisions that grant every benefit that can be supported in law while protecting the interests of the Government. Furthermore, VA regulations allow entitlement to TDIU to be granted on a permanent and total basis.

In a rating decision, dated November 22, 2021, the Veteran was granted a 100% rating for his myelodysplastic syndrome, but only on a total basis and not on a permanent and total basis. R-607. Subsequently, the Board did not consider whether the Veteran should be deemed permanently disabled through TDIU and merely cited outdated and inapplicable authorities to render entitlement to TDIU moot. In order to fulfill its duty to maximize benefits, the Board was required to consider if the Veteran was entitled to TDIU on a permanent basis.

The Appellant respectfully requests that the Board's decision be remanded for further adjudication and so that further development can take place

III) The Board committed an error as a matter of law when it failed to ensure compliance with the terms of the remand.

In its decision, the Board, without any further analysis or explanation, simply states, "The Board finds that [the] VBA has substantially complied with the prior remand directives." R-6. This is in reference to a BVA decision from November 2021 that ordered a remand for entitlement to service connection for TDIU. R-711.

A remand by the Board imposes upon the Secretary of VA a concomitant duty to ensure compliance with the terms of the remand, and that the Board itself commits error as a matter of law in failing to ensure this compliance. *Stegall v. West*, 11 Vet. App. 268, 270-71 (1998).

The remand instructions from the November 2021 Board decision, as it relates to the entitlement to TDIU state, "The AOJ should any remaining claims at issue. This includes TDIU. The AOJ is advised to review the Veteran's medical reports from his doctors discussing his unemployability." R-712.

In a subsequent rating decision, dated November 22, 2021, the Veteran was granted service connection for his myelodysplastic syndrome, however, the decision is completely silent for any discussions or analysis regarding entitlement to TDIU, including any medical reports from his doctors. R-607. The remand instructions were explicitly clear and they were simply not followed. The Veteran's record contains multiple doctor reports regarding his employability as it relates to his myelodysplastic syndrome. The Veteran submitted a

private medical report from Dr. Robert Townsend that discusses the Veteran's unemployability being due to his myelodysplastic syndrome. R-1550. Furthermore, the primary care physician whom has been treating the Veteran for many years, authored a letter stating that the Veteran is unable to sustain a regular job and that he believes that he will not be able to return to work. R-2559.

Neither of these medical reports, or any reports for that matter, were considered in compliance with the Board remand instructions from November 2021. As such, the Board erred as a matter of law by not ensuring compliance with the remand instructions. Simply stating that the VBA has substantially complied with the prior remand instructions without any further analysis is not ensuring substantial compliance.

The Appellant respectfully requests that the Board's decision be remanded for further adjudication and so that further development can take place.

IV) The Board of Veterans' Appeals (Board) erred when it failed to address material evidence favorable to the appellant.

In its decision, the Board did not address multiple medical reports from private doctors that discuss and concluded that the Veteran's myelodysplastic syndrome prevents him from being able to maintain employment. R-5.

The Board must provide a statement of the reasons or bases for its determination, adequate to enable an appellant to understand the precise basis for the Board's decision, as well as to facilitate review in the Court. 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet. App. 517, 527 (1995); *Gilbert v. Derwinski*, 1 Vet. App. 49, 56-57 (1990). To comply with this requirement, the Board must analyze the credibility and probative value of the

evidence, account for the evidence it finds persuasive or unpersuasive, and provide the reasons for its rejection of any 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). A remand is the appropriate remedy "where the Board has ... failed to provide an adequate statement of reasons or bases for its determinations." *Tucker v. West*, 11 Vet. App. 369, 374 (1998).

The Veteran has a medical report from Dr. Robert Townsend from February 2018 that concludes that the Veteran is not capable of maintaining substantially gainful employment due to his myelodysplastic syndrome. R-1551. Additionally, the Veteran's long-standing primary care provider authored a letter in December 2014 discussing how the Veteran's myelodysplastic syndrome has a profound impact on his potential employability. R-2559. Neither of these medical reports were discussed in the November 22, 2021 rating decision. R-607. Nor was it addressed in the Board decision from August 26, 2022. R-5.

The Appellant respectfully requests that the Board's decision be remanded for further adjudication and so that further development can take place.

CONCLUSION

For the above-referenced reasons, the Court should reverse the August 26, 2022 Board decision ordering entitlement to TDIU is moot for further adjudication and case development.

Respectfully Submitted,

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