

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

Vet. App. No. 23-6158


Appellant,

v.

DENIS MCDONOUGH,
Secretary of Veterans Affairs,
Appellee.

APPELLANT'S BRIEF

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STATEMENT OF THE ISSUES

- I) The Board erred when it failed to issue a decision on TDIU.
- II) The Board erred when it failed to address unemployability in its decision regarding the effective date of the back.

STATEMENT OF THE CASE

The Veteran served in the United States Army from March 8, 1977 to January 7, 1991.

Mr. Garcia submitted form VA Form 21-4138 August 18, 2014, requesting the VA reopen claims and stating he had depression secondary to service-related conditions and that he is unemployable as a result of his service-related conditions. R at 2155. On April 14, 2015, a decision was provided based on that claim. R at 1869-1876. An NOD was filed May 20, 2015. R at 1844-1845. It listed “Individual Unemployability” as the Specific Issue of Disagreement and April 14, 2015, as the Notification/Decision Letter Date. On November 30, 2017, Mr. Garcia filed Form 21-4138 as well as Form 21-526EZ. The 4138 indicates the severity of his lumbosacral strain had gotten worse causing incapacitating episodes adding up to more than two weeks a year. It also stated activities of daily living are more difficult to complete. R at 1835. The 526EZ requested an increase for the lumbosacral musculoskeletal strain. R at 1830-1833.

On January 24, 2018, an informal conference was held. A report was filed. R at 1425-1426. The subject of the conference report was “Entitlement to individual

unemployability benefits.” The Agreed Upon Action(s) was a spine exam with medical opinion. *Id.* A deferred rating decision was given March 5, 2018. R at 1383. An examination for the back was given March 21, 2018. R at 1343-1355. A Statement of the Case was issued June 7, 2018. R at 1316-1336. The issue addressed was entitlement to individual unemployability. It was denied. Examinations were provided for service-connected conditions and examiners were asked to comment on how the condition affected Mr. Garcia’s ability to work. R at 1333.

Prior to this decision, on January 24, 2018, Mr. Garcia was issued a decision on his back and lower extremity radiculopathy. R at 1406-1409. The decision stated it was issued due to a claim filed for increase November 30, 2017. The June 7, 2018, Statement of the Case is clearly based on a different claim path despite the ongoing claim for unemployability and the fact that a claim for unemployability is a claim for increased compensation. *Rice v. Shinseki*, 22 Vet.App. 447, 448 (2009).

A decision was issued June 6, 2018, increasing the rating of the back to 20%. R at 1261-1263. The decision indicates it was issued based on a Notice of Disagreement filed May 20, 2015. A Notice of Disagreement with appeal to the BVA was filed July 18, 2018. R at 1295-1296. VA Form 9 was filed the same day. R at 1297. The Notice of Disagreement names the lumbosacral musculoskeletal strain with degenerative changes as the specific issue of disagreement. R at 1296. The Form 9 indicates that the case was decided incorrectly because he believed he should qualify for total disability and individual unemployability (TDIU) due to his awarded VA disabilities. R at 1297.

On July 18, 2018, Mr. Garcia appointed an attorney. R at 1292-1293. Prior to this, Mr. Garcia had attempted to navigate the system of VA disability benefits on his own. The POA filed a letter requesting it be treated as a letter of disagreement for any decision received in the last year, or if a statement of case has been issued, treated as a Form 9 on every issue in the rating to the BVA. R at 1286. Clearly, the POA was attempting to keep open any appeal rights Mr. Garcia may have had at that time. Even without this letter, Mr. Garcia had continually pursued the claims beginning May 20, 2015 and duplicitously filed November 30, 2017.

On October 10, 2018, the VA sent a notification letter indicating the lumbosacral musculoskeletal strain with degenerative changes had been increased to 20% effective March 21, 2018. R at 1253-1263. A Notice of Disagreement was filed May 2, 2019. R at 841-842. It lists as specific issues of disagreement, “lumbosacral musculoskeletal strain with degenerative changes, which is currently 10 percent disabling, is increased to 20 percent effective March 21, 2018” and “Individual Unemployability – back and bilateral extremities are to be treated as one condition for IU purposes. When combined, these conditions equal 40% and therefore qualify Mr. Garcia for IU.” R at 842.

A Statement of Case was issued June 29, 2019. It denied any change to the ratings of the lumbosacral strain. R at 737-754. This Statement of Case was indicated to be from a claim received November 30, 2017. R at 737. That date matches the filing of the 526EZ for increase.

The Board issued a decision May 17, 2022 granting a rating of 40% for the lumbar spine effective November 30, 2017. R at 541-549. This decision was appealed to this Court.

A Joint Motion for Partial Remand was issued March 16, 2022. R at 88-93. The case was remanded to give an adequate reasons and bases for the effective date of the May 17, 2022 decision. *Id.*

Finally, the Board issued the decision that we are addressing here granting an entitlement to 40% from March 1, 2017. R at 5 (5-11). The Board referenced the claim for increase from November 30, 2017. R at 8. However, it did not address that there was a previous claim for unemployability which included a rating for the back. This claim was addressed at the Informal Conference in January 2018 where it was agreed that a new examination was needed on the back, which would address entitlement to unemployability.

SUMMARY OF THE ARGUMENT

The Veteran asserts that the Board of Veterans Appeals (the Board) committed an error when it failed to issue a decision on TDIU. Specifically, the Veteran argues that the Board failed to consider relevant evidence, neglected to discuss the applicable laws and regulations, failed to address material evidence favorable to the appellant, and failed to provide adequate reasons and bases for its conclusions.

More specifically, the Board erred by not making a decision on TDIU when granting a rating of 40% on a back condition that qualified the Veteran for unemployability. Additionally, the increase in severity of the back is an indication that the Veteran may be unemployable due to the increased severity of the condition. The Board failed to discuss relevant and applicable caselaw such as *Comer v. Peake*, 552 F.3d 1362, 1367 (Fed. Cir.

2009), *Nailos v. McDonough*, 34 Vet. App. 279, 293 (U.S. 2021), and *Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009).

STANDARD OF REVIEW

The Court reviews findings of fact by the Board under the clearly erroneous standard. Service-connection determinations are issues of fact. *Futch v. Derwinski*, 2 Vet. App. 204, 206 (1992).

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). 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 *de novo* whether an applicable law or regulation was correctly applied. *Joyce v. Nicholson*, 19 Vet. App. 36, 42-46 (2005). 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*, 5 Vet. App. at 538. The Court should determine whether the Board’s decision is in accordance with the law.

ARGUMENT

I) The Board erred when it failed to issue a decision on TDIU.

Here, Mr. Garcia was granted a rating of 40% for the back with an effective date of March 1, 2017. That decision makes him eligible for unemployability under 38 CFR § 4.16 (having at least one disability rated at 40% rating and a combined overall rating of 70% or more). And because he was filing *pro se*, his claim for TDIU benefits is implicitly raised when clear evidence of unemployability is presented and the veteran seeks to obtain a higher disability rating. *Comer v. Peake*, 552 F.3d 1362, 1367 (Fed. Cir. 2009), *Roberson v. Principi*, 251 F.3d at 1384 (Fed. Cir. 2001), *Szemraj v. Principi*, 357 F.3d 1370, 1373 (Fed. Cir. 2004). Additionally, it is presumed that all veterans are seeking the maximum benefits to which they are entitled by law. *Nailos v. McDonough*, 34 Vet. App. 279, 293 (U.S. 2021). Therefore, the filing of the increase for his back leading to a rating that makes him eligible for TDIU would logically conclude that Mr. Garcia was seeking eligibility for TDIU on the date he was eligible. *Id.*

Mr. Garcia, as in *Comer* and *Roberson*, was a *pro se* veteran pursuing an increased disability rating. R at 1835 and R at 1830-1833. The Board accepted evidence Mr. Garcia was unemployable from March 1, 2017, as indicated by using that effective date for the back decision herein appealed. R at 9-10. Based on the precedent in *Comer* and *Roberson*, the Board should have issued a decision regarding Mr. Garcia's entitlement to TDIU benefits from that date. The Board is required to consider all relevant evidence of record and to consider, and discuss in its decision, all "potentially applicable" provisions of law

and regulation. *Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009); *Schafrath v. Derwinski*, 1 Vet. App. 589, 593 (1991); See 38 U.S.C. § 7104(a), (d)(1). Therefore, the Board's reference to the last day Mr. Garcia was able to work demonstrates he was unemployable, and the Board should have addressed in their decision the *potentially applicable* laws and regulations related to IU on the same date.

Additionally, consideration should have been given to the fact Mr. Garcia filed *pro se*. As such, the filing of a 526EZ for increase while he already has an appeal for unemployability which encompasses the increase claim, should not be held as a separate request. *Ingram v. Nicholson*, 21 Vet.App. 232, 256 (2007).

... *pro se* claim submissions are not subject to a strict pleading standard. See *Ingram v. Nicholson*, 21 Vet.App. 232, 256 (2007) ... ("[A] sympathetic reading of the appellant's pleadings cannot be based on a standard that requires legal sophistication beyond that which can be expected of a lay claimant ...") ... the RO should construe a claim based on the reasonable expectations of the non-expert, self-represented claimant and the evidence developed in processing that claim. *Clemons v. Shinseki*, 23 Vet. App. 1, 5 (U.S. 2009).

It should be understood as a continuation of the appeal already filed because Mr. Garcia, while wanting a higher rating for his back, should not be expected to know that his currently active appeals would have had the same outcome as filing a new claim for increase. Additionally, the pro-veteran VA disability system should not apply his mistake in such a way that would penalize him for lack of knowledge of the system and awareness of what rights he would be giving up by filing the claim for increase.

The Board erred in failing to address Mr. Garcia's request for TDIU. Mr. Garcia requests the Court remand this decision for an adequate reasons and bases for the eligibility to TDIU prior to November 30, 2017, as far back as filing for the unemployability claim.

II) ISSUE: *The back claim is inextricably intertwined and the evidence of the back causing him to be unemployable requires the Board to address unemployability in its decision regarding the effective date of the back.*

In 2014, when Mr. Garcia filed his claim for unemployability, he referenced his service-connected conditions. R at 2155. Those conditions include: bicipital tendonitis, right shoulder (non-dominant); bicipital tendonitis, left shoulder (dominant), chondromalacia, right knee, lumbosacral musculoskeletal strain with degenerative changes. R at 2283. The point is, Mr. Garcia included his back (lumbosacral musculoskeletal strain with degenerative changes) as part of the cause of him being unemployable. The claim for unemployability, with reference to his back as a cause for his inability to find and maintain gainful employment has been pursued since filing and receiving an unfavorable decision.

Under *Robinson v. Shinseki*, the Board has a duty to address all issues reasonably raised by the appellant or by the record. Here, Mr. Garcia gave testimony during the January 24, 2018, informal conference regarding the severity of his back condition and how it has caused him to be unable to find gainful employment. R at 1425-1426. The outcome of the conference was to acquire additional back examinations and to determine how it affects his ability to work. R at 1426. The evidence presented shows how the back is inextricably intertwined with individual unemployability, and that the appeals for unemployability are linked to the rating for the back. The decision from the Board here should have addressed the application for unemployability filed August 18, 2014.

While his claim for unemployability is being pursued, Mr. Garcia filed for an increase in his back rating. This claim is inextricably intertwined with his eligibility for unemployability. Given that the claim for unemployability is "... a particular type of claim for increased compensation." *Rice v. Shinseki*, 22 Vet.App. 447, 448 (2009). The current claim on appeal for unemployability would have encompassed the increase claim for the back. And the claim for an increase rating of the back impacts Mr. Garcia's eligibility for unemployability.

Finally, it is apparent how intertwined the issues of unemployability and the back are based on the dates of filings and the claims issued when looking at the procedural history. Mr. Garcia was issued a decision on June 6, 2018 increasing the rating of his back to 20%. R at 1261-1263. The decision states it was based on a Notice of Disagreement filed May 20, 2015. R at 1295-1296. The May 20, 2015 appeal only states the issue of disagreement as "Individual Unemployability." R at 1844-1845. A Notice of Disagreement with appeal to the BVA was filed July 18, 2018. R at 1295-1296. VA Form 9 was filed the same day. R at 1297. The Notice of Disagreement names the lumbosacral musculoskeletal strain with degenerative changes as the specific issue of disagreement. R at 1296. The Form 9 indicates that the case was decided incorrectly because he believed he should qualify for total disability and individual unemployability (TDIU) due to his awarded VA disabilities. R at 1297.

Meanwhile, nearly concurrently, Mr. Garcia has another decision stream addressing his back. He received a notification letter indicating the lumbosacral musculoskeletal strain with degenerative changes had been increased to 20% effective March 21, 2018. R at 1253-

1263. A Notice of Disagreement was filed May 2, 2019. R at 841-842. It lists as specific issues of disagreement, “lumbosacral musculoskeletal strain with degenerative changes, which is currently 10 percent disabling, is increased to 20 percent effective March 21, 2018” and “Individual Unemployability – back and bilateral extremities are to be treated as one condition for IU purposes. When combined, these conditions equal 40% and therefore qualify Mr. Garcia for IU.” R at 842.

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Finally, the Board issued the decision that we are addressing here granting an entitlement to 40% from March 1, 2017. R at 5 (5-11). The Board referenced the claim for increase from November 30, 2017. R at 8. However, it did not address that there was a previous claim for unemployability which included a rating for the back. This claim was addressed at the Informal Conference in January 2018 where it was agreed that a new examination was needed on the back, which would address entitlement to unemployability.

The issue of the back and unemployability are present in both appeal streams. Mr. Garcia requests the Court remand this decision to the Board for a finding on the inextricably intertwined TDIU claim and require the Board to address the continuously pursued appeal back to 2015.

CONCLUSION

For the above-referenced reasons, the Court should vacate the Board's Decision dated July 13, 2023, and remand this matter for further adjudication.

Respectfully Submitted,
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