Guillot v. Nicholson

United States Court of Appeals for Veterans Claims

June 26, 2007, Decided

No. 05-3118

Reporter
2007 U.S. App. Vet. Claims LEXIS 1101 *

THOMAS E. GUILLOT, APPELLANT, v. R. JAMES NICHOLSON, SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Notice: DESIGNATED FOR ELECTRONIC PUBLICATION ONLY

PURSUANT TO U.S. VET. APP. R. 30(a), THIS ACTION MAY NOT BE CITED AS PRECEDENT.

Case Summary

Procedural Posture
Appellant veteran challenged a decision from the Board of Veterans' Appeals, which denied his claim for a total disability based on individual unemployability (TDIU) rating.

Overview
After the veteran received a 60 percent disability rating for a back disability, he sought a rating for TDIU. The Board concluded that the veteran's statements regarding his employment history and efforts to obtain a new position were inconsistent and his efforts to obtain a new job were partially impaired by this desire to care for his ill wife. On appeal, the court affirmed, holding that the Board's finding that there were no unusual or exceptional circumstances to support a TDIU rating was not clearly erroneous. The veteran failed to present medical evidence to support his unemployability, and his back disability was already adequately compensated by his 60 percent rating. The veteran's lay assertions of unemployability were not sufficient to warrant a TDIU rating. The court rejected the argument that the Board improperly refused to consider newly submitted evidence under U.S. Ct. Vet. App. R. 10(b) because the veteran did not submit a counter designation of additional material relevant to the appeal or a certification of appeal. Thus, the presumption of regularity applied.

Outcome
The court affirmed the Board's decision.

Judges: [*1] Before LANCE, Judge.

Opinion by: LANCE

Opinion

MEMORANDUM DECISION

LANCE, *Judge*: The appellant, Thomas E. Guillot, through counsel, appeals an August 24, 2005, Board of Veterans' Appeals (Board) decision. Record (R.) at 1-9. In that decision, the Board denied his claim for total disability based on individual unemployability (TDIU). The appellant has withdrawn his claim for an increased disability rating. R. at 2, 125. The Court, therefore, lacks jurisdiction over this claim, *Howard v. Gober*, 220 F.3d 1341, 1344 (Fed. Cir. 2000); *Ledford v. West*, 136 F.3d 776, 779 (Fed. Cir. 1998); *McCartt v. West*, 12 Vet. App. 164, 167 (1999), and deems any appeal thereof abandoned. *See Ford v. Gober*, 10 Vet. App. 531, 535 (1997) (issues or claims not argued on appeal are abandoned). Single-judge disposition is appropriate. *Frankel v. Derwinski*, 1 Vet. App. 23, 25-26 (1990). This appeal is timely, and the Court has jurisdiction over the case pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). For the reasons set forth below, the

Court will affirm the decision.

I. FACTS

The appellant served honorably in the U.S. Army from December 1955 to June 1956. R. at 75. In 1977 and 1988, he underwent back surgery. R. at 16, 64. He has been [*2] service connected for a herniated nucleus pulposus of the lumbosacral spine, postoperative, with left leg deficits, since September 1990. R. at 2, 76; *see* STEDMAN'S MEDICAL DICTIONARY 812, 1034, 1240 (27th ed. 2000) (defining "hernia" as a "[p]rotrusion of a part or structure through the tissues normally containing it"; "nucleus pulposis" as "the soft fibrocartilage cenral portion of the intervertebral disk"; and "lumbosacral" as "[r]elating to the lumbar vertebrae and the sacrum"). This condition is currently rated as 60% disabling. R. at 2, 76.

In February 1993, the appellant received a VA psychiatric examination. R. at 16-17. During this examination, the appellant stated that he was unemployed, and that he had an eighth grade education. R. at 16, 129. The examiner noted that the appellant had a 60 % disability rating for his back disability, and that he suffered from insomnia and recurring thoughts of a prior, work-related accident. R. at 17. The examiner provided current diagnoses of post-traumatic stress disorder (PTSD) and a spinal disc condition. R. at 17. The appellant apparently did not receive any further medical treatment until July 1997, when he visited a VA outpatient [*3] treatment facility for lower back pain. R. at 38.

In February 2000, the appellant sought emergency medical treatment for chest pains. R. at 37. He was discharged with diagnoses of coronary artery disease, hypertension, and hyperlipidemia. R. at 37. The treating physician's notations indicate that the appellant's prior medical history was significant for numerous lower back surgeries and resulting pain, particularly during times of exercise or stress. R. at 37.

In April 2002, the appellant was treated at a VA medical center (VAMC) in Salem, Virginia. R. at 55-59. The examining physician noted that the appellant had a history of obesity, coronary artery disease, lower back pain, hypothyroidism, and erectile dysfunction. R. at 55. The examiner also indicated that the appellant had recently experienced falls. R. at 59. The appellant was later treated at the Salem, Virginia, VAMC in August 2002. R. at 52-54. During this visit, the examiner noted that the appellant denied any recent episodes of falling, and that he was currently being monitored for PTSD. R. at 48.

In February 2003, the appellant sent a letter to the Roanoke, Virginia, VA regional office (RO) inquiring about a possible TDIU [*4] rating. R. at 19. Four months later, the RO received a another letter from the appellant. R. at 23-24. Therein, the appellant stated that he had "back and left leg pain . . . 99% of the time[,]" that exercise exacerbated this pain, and that he could not walk "50 feet without a lot of pain." R. at 24.

In July 2003, the appellant again visited the Salem, Virginia, VAMC. R. at 41-46. The examiner noted that the appellant complained of chronic lower back pain, and that he had problems with falls. R. at 43, 45. The examiner otherwise noted that the appellant was "presently functioning independently." R. at 43.

In September 2003, the appellant sent the RO another written statement. R. at 34. Therein, the appellant complained that he formerly made $ 35,000 to $ 40,000 annually, but that he currently received only $ 9,612 a year. R. at 34. He described his present situation as "a snowball effect" caused by his disability. R. at 34.

In October 2003, the RO received the appellant's formal claims application for an increased disability rating and TDIU. R. at 61. Therein, the appellant stated that he had not received medical treatment or earned any income in the past year; that he had been unemployed [*5] as a result of his disability since 1997; and that he had not sought any additional employment since that time. R. at 61. He also stated that his disability did not cause him to leave his last job. R. at 61.

In November 2003, the appellant received a VA compensation and pension examination (VACPE). R. at 64-67. During his VACPE, the appellant stated that his back pain had intensified, and that he had muscle spasms three to four times per week. R. at 65. When questioned about his employment status, the appellant stated that he had last worked for the Pinkerton Detective Agency in 1997, but that "[h]e stopped working because '[he] passed out on the job several times.'" R. at 65. He denied any such episodes recently, but noted that he often falls when stepping on small objects. R. at 65. The examiner's notes indicate that the appellant stated he regularly took aspirin for pain; that he could "walk unaided . . . [for] 150 yards by himself before he has to stop and rest"; that "he [did] not use a cane, crutch, . . . [or] back brace"; and that he could presently "feed himself, bathe himself, use the toilet, and dress and undress on his own." R. at 65-66. The examiner also noted that the appellant [*6] performed tests of his spinal flexibility, extension, and rotation "after fatiguing, all with pain." R. at 66-67. The examiner provided a diagnosis of moderate degenerative joint disease of the mid and lower lumbar spine, "post injury to the back with surgery on two occasions." R. at 67.

In January 2004, the RO denied both of the appellant's claims. R. at 72-76. The appellant later perfected an appeal from this decision to the Board. R. at 78, 118.

In March 2004, the appellant submitted another claims application, later construed as a statement in support of his original claim. R. at 115-16. Therein, the appellant stated that he had received medical treatment in the past year; that from 1998 to 2003 he had unsuccessfully sought employment "lot's of times [sic]" for "all kind's [sic]" of work; and that he left his last job as a result of his disability. R. at 115-16. That same month, the appellant provided the RO with another statement disputing some of the information in his November 2003 VACPE report. R. at 88.

On August 10, 2004, the appellant appeared at a hearing before the Board. R. at 121-34. During this hearing, the appellant testified that he had a seventh grade education. R. at 130. [*7] He also testified that he left his job as a land surveyor in Florida after being forced to unexpectedly relocate to Virginia, and that after leaving this position he had to care for his ill wife. R. at 126-27. The appellant further testified that he had sought employment since that time, but that potential employers would not hire him because of his disability. R. at 128. In particular, he testified that he could no longer work as a land surveyor as a result his disability (R. at 129), and that his most recent employer, the Pinkerton Detective Agency, had recently declined to rehire him because of his disability. R. at 132-33. He also testified that he sought employment as a truancy officer in 2000, but that a better qualified applicant was awarded the position. R. at 128.

On August 24, 2005, the Board issued the decision on appeal. R. at 1-9. The Board found that the appellant's statements regarding his prior employment history and efforts to obtain a new position were inconsistent. R. at 7-8. The Board also found that the appellant had not left his job as a land surveyor because of his disability, and that his efforts to find employment since that time were impaired, in part, by his [*8] desire to care for his ill wife. R. at 8. The Board additionally found that the appellant had not presented any medical evidence of unemployability due to his disability; that he was capable of performing the acts required for employment; and that his current rating adequately compensated his disability. R. at 8. Accordingly, the Board denied his TDIU claim. R. at 8.

II. ANALYSIS

A. TDIU Rating Claim

The Board's determination of whether to award a TDIU rating is a finding of fact reviewed under the "clearly erroneous" standard. 38 U.S.C. § 7261; *see Smallwood v. Brown*, 10 Vet. App. 93, 97 (1997). "A factual 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.'" *Hersey v. Derwinski*, 2 Vet. App. 91, 94 (1992) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395, 68 S. Ct. 525, 92 L. Ed. 746 (1948)). The Court may not substitute its judgment for the factual determinations of the Board on issues of material fact merely because the Court would have decided those issues differently in the first instance. *See id.* The Board is further required to include in its decision [*9] a written statement of the reasons or bases for its findings and conclusions 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, as well as to facilitate informed review in this Court. *See* 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 that it finds to be persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the claimant. *See Caluza v. Brown*, 7 Vet. App. 498, 506 (1995), *aff'd*, 78 F.3d 604 (Fed. Cir. 1996) (table); *Gabrielson v. Brown*, 7 Vet. App. 36, 39-40 (1994); *Gilbert, supra*.

A TDIU rating is "an alternative way to obtain a total disability rating without being rated 100% disabled under the rating schedule." *Norris v. West*, 12 Vet. App. 413, 421 (1999). In most cases, a veteran's disability compensation is strictly based upon the percentages assigned in the rating schedule. 38 C.F.R. § 4.1 (2006). [*10] These percentage ratings are designed to approximate "the average impairment in earning capacity resulting from [a disability] . . . in civil occupations." *Id.* Therefore, the rating schedule only authorizes a 100% disability rating for certain conditions, namely, those whose detrimental affect on employment is objectively and unquestionably severe. *See, e.g.* 38 C.F.R. § 4.84a, Diagnostic Code (DC) 6010 (2006) (tuberculosis of the eye); 38 C.F.R. § 4.88b, DC 6300 (2006) (cholera); 38 C.F.R. § 4.114, DC 7202 (2006) (inability to speak due to loss of tongue). However, the TDIU rating provisions also allow for an award of total disability "when there is present any impairment of mind or body which is sufficient to render it impossible for the average person to follow a substantially gainful occupation." 38 C.F.R. § 4.15 (2006). The applicable regulation provides, in part:

> Total disability ratings for compensation may be assigned, where the schedular rating is less than total,

> when the disabled person is, in the judgment of the rating agency, unable to secure or follow a substantially gainful occupation as a result of service-connected disabilities: *Provided that*, if there is only one such [*11] disability, this disability shall be ratable at 60 percent or more, and that, if there are two or more disabilities, there shall be at least one disability ratable at 40 percent or more, and sufficient additional disability to bring the combined rating to 70 percent or more.

38 C.F.R. § 4.16(a) (2006) (emphasis in original); *see also* 38 C.F.R. § 4.16(b) (2006) (entitling veteran who is unemployable as a result of a service-connected disability, but who fails to meet the threshold disability rating requirement, for extraschedular rating consideration). The appellant's 60% disability rating for his back disability meets the single disability percentage requirement for a TDIU rating. 38 C.F.R. § 4.16(a). Therefore, the only question remaining is whether the appellant is "unable to secure or follow a substantially gainful occupation as a result of [his] service-connected disabilit[y]." *Id.*

This Court has held that "[f]or a veteran to prevail on a [TDIU] claim . . ., it is necessary that the record reflect some factor which takes the claimant's case outside the norm," i.e, a "circumstance[] . . . that place[s] this veteran . . . in a different category than an[y] other veteran so rated." [*12] *Van Hoose v. Brown*, 4 Vet. App. 361, 363 (1993); *but see* 38 C.F.R. § 4.19 (2006) (precluding consideration of veteran's age); 38 C.F.R. § 4.16(a) (precluding consideration of veteran's non-service-connected disabilities). The Board concluded there are no such unusual or exceptional circumstances here. In support thereof, the Board found that the appellant had not presented any medical evidence of unemployability due to his back disability; that the appellant's back disability is already adequately compensated by his current rating; and that the appellant's lay assertions of unemployability were not sufficient to warrant a TDIU rating. R. at 8. The Court holds that the record plausibly supports these findings and conclusions, and that the Board did not clearly err in denying the appellant's request for a TDIU rating on this basis.

First, the Board found that the appellant had not presented any medical evidence to establish unemployability as a result of his back disability. R. at 8. The uncontested medical evidence of record indicates that the appellant is prone to falls, (R. at 45, 59, 65); that he regularly takes medication to alleviate his back pain (R. at 65, 88); that this pain [*13] is chronic (R. at 37, 43, 65); that "he does not use a cane, crutch, . . . [or] back brace"; and that he can presently "feed himself, bathe himself, use the toilet, and dress and undress on his own." R. at 65-66. The Board reviewed this evidence and concluded that none of the medical evidence conclusively indicates that the appellant is incapable "of performing the physical and mental acts required by employment," 4 Vet. App. at 363, or that he is otherwise unable to secure or follow a substantially gainful occupation. *See* Veterans Benefits Manual 5.4.1 (2006) (citing VA Manual M21-1MR, pt. VI, subpt. ii, 2.F.24(d) (defining a "substantially gainful occupation" as "that which is ordinarily followed by the nondisabled to earn their livelihood with earnings common to the particular occupation in the community where the veteran resides . . . ."); *but see Roberson v. Principi*, 251 F.3d 1378, 1385 (Fed. Cir. 2001) (holding that TDIU does not require a showing of 100% unemployability); *Moore v. Derwinski*, 1 Vet. App. 356, 358 (1991) (holding that marginal employment does not constitute a substantially gainful occupation for purposes of TDIU); 38 C.F.R. § 4.16(a) (same). The Court is not [*14] convinced that the Board clearly erred in making these findings and conclusions based on the medical evidence of record.

Second, the Board found that the appellant's back disability is already adequately compensated by his current rating. The appellant's condition is currently rated as 60% disabling under DC 5293, the provision in effect at the time his condition was initially service connected. *See* 67 Fed. Reg. 54,345-01 (Aug. 22, 2002) (revising DC 5293, effective September 23, 2003); 68 Fed. Reg. 51,454-01 (Aug. 27, 2003) (repealing DC 5293 and replacing it with DC 5235-5243, effective Sept. 26, 2003); *see also Karnas v. Derwinski*, 1 Vet. App. 308, 313 (1991) ("[W]here the law or regulation changes after a claim has been filed or reopened but before the . . . appeal process has been concluded, the version most favorable to appellant [sic] . . . will apply unless the Congress provided otherwise or permitted the Secretary . . . to do otherwise and [he] did so."). This rating requires"[p]ronounced [intervertebral disc syndrome]; with persistent symptoms compatible with sciatic neuropathy with characteristic pain and demonstrable muscle spasm, absent ankle jerk, or other neurological [*15] findings appropriate to site of diseased disc, little intermittent relief." DC 5293; *see* STEDMAN'S MEDICAL DICTIONARY 1213, 1602 (27th ed. 2000) (defining "sciatic" or "sciatica" as "[p]ain in the lower back and hip radiating down the back of the thigh into leg, . . . known to usually be due to herniated lumbar disk compromising a nerve root, most commonly the L5 or S1 root" and defining "neuropathy" as "[a] classical term for any disorder affecting any segment of the nervous system"). As this language makes clear, the appellant's complaints of chronic pain and muscle spasms are already accounted for in DC 5293. Furthermore, the only symptoms that are not accounted for, the appellant's limited mobility and susceptibility to falls, are not so severe as to constitute an exceptional or unusual circumstance justifying a TDIU rating. The appellant's various other ailments and diseases are also not service connected. Therefore, any contribution these disabilities play in the appellant's unemployability cannot be

considered. For these reasons, the Court holds that the Board did not clearly err in finding that the appellant's back disability is already adequately compensated by his current [*16] rating.

Third, the Board found that the appellant's lay assertions of unemployability were not sufficient to warrant a TDIU rating. The appellant's statements and sworn testimony indicate that he stopped attending school in the eighth grade (R. at 16, 130); that he has prior training as a map maker and in the security field (R. at 34, 132-133); that he is physically incapable of performing the acts required to be a land surveyor, his former profession, (R. at 129); that he failed to obtain a position as a truancy officer in 2000 because another applicant was found to be more qualified, (R. at 128); and that his most recent employer, the Pinkerton Detective Agency, declined to rehire him because of the absence of a position suitable to his disability. R. at 132-33. The appellant's lay testimony certainly suggests that he is no longer able to work as a land surveyor. However, it does not sufficiently demonstrate that his disability is a bar to substantially gainful employment in other occupations suitable to his education and experience. Indeed, the appellant's sworn testimony indicates that he was only rejected for employment on account of his disability by one firm in the security [*17] field, the Pinkerton Detective Agency. There is no evidence that he cannot work in any other security firm on account of his disability. *Cf. Friscia v. Brown*, 7 Vet. App. 294, 296 (1994) (noting that veteran with 70% rating for PTSD, who was also a distinguished graduate from a computer programming course with a 97.6% placement rate, had received 38 rejections from prospective employers and was the only graduate not yet employed). Furthermore, his own testimony establishes that he was capable of employment as a truancy officer, but that a more qualified candidate obtained this position. There is no indication that he failed to obtain this position as a consequence of his disability, or that the same would prevent him from doing so in the future. For these reasons, the Court holds that the Board did not clearly err in finding that the appellant's lay assertions of unemployability were not sufficient to warrant a TDIU rating.

B. The Appellant's Newly Submitted Evidence and Lack of Representation

The appellant raises two additional arguments with respect to the adjudication of his pending claim. First, he argues that the Board failed to consider evidence he submitted prior to its decision. [*18] Br. at 12 (citing 38 C.F.R. § 3.156 (2006) and 38 C.F.R. § 3.400 (2006)). Second, he argues that his lack of attorney representation limited his overall understanding of the claims adjudication process. Br. at 12-13. Neither of these arguments is persuasive.

With respect to his first argument, the Board noted that the appellant had submitted additional evidence in March 2005, but that this evidence had not been timely received under 38 C.F.R. § 20.1304(a) (2006). R. at 2. The Board therefore refused to consider this evidence in its decision. *Id.* The regulation relied upon by the Board provides, in part:

> An appellant and his or her representative, if any, will be granted a period of 90 days following the mailing of notice to them that an appeal has been certified to the Board for appellate review and that the appellate record has been transferred to the Board, or until the date the appellate decision is promulgated by the Board of Veterans' Appeals, whichever comes first, during which they may submit a request for a personal hearing, additional evidence, or a request for a change in representation. Any such request or additional evidence must be submitted directly to the Board and not [*19] to the agency of original jurisdiction. The date of mailing of the letter of notification will be presumed to be the same as the date of that letter for purposes of determining whether the request was timely made or the evidence was timely submitted. Any evidence which is submitted at a hearing on appeal which was requested during such period will be considered to have been received during such period, even though the hearing may be held following the expiration of the period.

38 C.F.R. § 20.1304(a). The certification of appeal to the Board is not part of the record. R. at 1-135.

Because the appellant failed to ensure that the certification of appeal to the Board was part of the record on appeal, the Court rejects his argument with respect to the Board's failure to consider his newly submitted evidence. Rule 10 of this Court's Rules of Practice and Procedure provides, in relevant part:

> Not later than 30 days after the Secretary serves the designation of the record on appeal, the appellant must file with the Clerk and serve on the Secretary either a counter designation of any additional material that was before the Secretary and the Board and that the appellant considers relevant to the [*20] appeal . . ., or a statement that the appellant accepts the content of the record as designated by the Secretary. . . . Failure to the appellant to do either will constitute the appellant's acceptance of the record as designated by the Secretary.

U.S. VET. APP. R. 10(b). The record was transmitted to the Court by the Secretary on May 9, 2006. Within 60 days thereof, the appellant did not submit a counter designation of additional material relevant to this appeal, including the certification of appeal to the Board. The Board explicitly

found that the appellant's new evidence was not submitted within the 90-day deadline prescribed in 38 C.F.R. § 20.1304(a) (2006). The Court must assume, absent clear evidence to the contrary, that the Board reviewed the certificate of appeal and properly determined that the evidence was not timely submitted in making this decision. *See Ashley v. Derwinski*, 2 Vet. App. 62, 64 (1992) ("The presumption of regularity supports the official acts of public officers and, in the absence of *clear evidence to the contrary,* courts presume that they have properly discharged their official duties."). Because the appellant has not submitted any evidence to the contrary, [*21] the Board's decision on this issue must be affirmed. The Court further notes that while 38 C.F.R. § 3.156 provides for favorable consideration of new and material evidence received prior to the issuance of a Board decision, a proper ruling addressing the novelty or materiality of this evidence is not currently before the Court.

Finally, the appellant argues that his lack of attorney representation limited his overall understanding of the claims adjudication process. Br. at 12-13. Aside from posing several general, rhetorical questions on this point, the appellant fails to articulate any specific error that was committed by VA in relation to his lack of representation. *See Locklear v. Nicholson*, 20 Vet. App. 410, 416 (2006) (arguments that are "far too terse to warranted detailed analysis by the Court" may be rejected). That being said, the Court notes that VA provided the appellant with a detailed letter informing him of his appellate rights (R. at 90-91), and that the record indicates he has otherwise actively participated in the adjudication of his claim. The Court therefore rejects this argument as well.

Accordingly, the Court will affirm the Board decision.

III. CONCLUSION

After consideration [*22] of the appellant's and the Secretary's briefs, and a review of the record, the Board's August 24, 2005, decision is AFFIRMED.

DATED: June 26, 2007