BOARD OF VETERANS' APPEALS

DEPARTMENT OF VETERANS AFFAIRS
WASHINGTON, DC 20420

IN THE APPEAL OF
SHIRLEY L. SCHWARZ

IN THE CASE OF
DAVID L. SCHWARZ

DOCKET NO. 12-07 243) DATE *December 3, 2014*
) *TDV*
)

On appeal from the
Department of Veterans Affairs Regional Office in Portland, Oregon

THE ISSUE

Entitlement to an effective date prior to April 5, 2009, for a total disability rating for compensation purposes based upon individual unemployability due to service-connected disability (TDIU), for accrued benefit purposes.

REPRESENTATION

Appellant represented by: Mary Anne Royle, Attorney at Law

ATTORNEY FOR THE BOARD

C. Lawson, Counsel

IN THE APPEAL OF [redacted]
SHIRLEY L. SCHWARZ

IN THE CASE OF
DAVID L. SCHWARZ

INTRODUCTION

The Veteran served on active duty from January 1956 to April 1957. He died in July 2012.

This matter came to the Board of Veterans' Appeals (Board) on appeal from a December 2010 rating decision by a Regional Office (RO) of the Department of Veterans Affairs (VA) which granted the Veteran a TDIU effective from June 5, 2009. The Veteran perfected an appeal of the effective date determination and subsequently died in July 2012. The appellant, who is his surviving spouse, applied for accrued benefits later that month, and was been substituted in as the claimant for the purposes of this appeal. In April 2014, the Board granted an April 5, 2009, effective date for TDIU. The RO had assigned a June 5, 2009 effective date prior to this. In July 2014, the United States Court of Appeals for Veterans Claims (Court) vacated the Board's April 2014 decision to the extent it denied an effective date prior to April 5, 2009, for TDIU, and remanded the case to the Board for further consideration.

FINDING OF FACT

Prior to April 5, 2009, the Veteran's service-connected disabilities did not render him unable to engage in substantially gainful employment.

CONCLUSION OF LAW

The criteria for an effective date prior to April 5, 2009 for the grant of a TDIU are not met. 38 U.S.C.A. § 5110 (West 2002); 38 C.F.R. §§ 3.400, 4.16 (2014).

REASONS AND BASES FOR FINDING AND CONCLUSION

VA has duties to notify and assist claimants in substantiating a claim for VA benefits. 38 U.S.C.A. §§ 5100 , 5102, 5103, 5103A, 5107, 5126; 38 C.F.R. §§ 3.102, 3.156(a), 3.159 and 3.326(a). *See also Pelegrini v. Principi,* 18 Vet. App. 112(2004); *Quartuccio v. Principi*, 16 Vet. App. 183(2002); *Mayfield v. Nicholson*, 444 F.3d 1328(Fed. Cir. 2006); *Dingess v. Nicholson*, 19 Vet. App. 473(2006).

This appeal arises from the Veteran's disagreement with the effective date following the award of TDIU. Once service connection/TDIU was granted, the claim was substantiated, additional notice is not required, and any defect in the notice is not prejudicial. *Dingess v. Nicholson*, 19 Vet. App. 473 (2006); *Hartman v. Nicholson*, 483 F.3d 1311(Fed. Cir. 2007); *Dunlap v. Nicholson*, 21 Vet. App. 112(2007). No additional discussion of the duty to notify is therefore required.

VA also has a duty to assist the Veteran, and now the claimant, in the development of the claim, which is not abrogated by the initial grant. The duty to assist has been met. VA has obtained service treatment records; assisted the claimant in obtaining evidence; and examined the Veteran for service-connected disability in June 2009. The VA examiner in 2009 provided an opinion as to the Veteran's unemployability due to service-connected disability and a rationale for that opinion. The examiner physically evaluated the Veteran, reviewed the claims file, and cited to relevant treatises. This examination was therefore adequate. Resolution of this claim turns on when this claim actually was filed in relation to when there was the required indication of unemployability on account of service-connected disability. The medical and other evidence in the file permits the Board to make these determinations, without obtaining a "retrospective" medical opinion. See *Chotta v. Peake*, 22 Vet. App. 80, 84-86 (2008). All known and available records relevant to the issues on appeal have been obtained and associated with the Veteran's claims file; and the claimant has not contended otherwise. The RO complied with the a prior April 2010 Board remand (at which time the issue was entitlement to TDIU)

by referring the Veteran's TDIU claim for consideration of an extraschedular rating under 38 C.F.R. § 4.16(b) and readjudicating the claim.

Entitlement to a TDIU requires impairment so severe that it is impossible for the average person to follow a substantially gainful occupation. Consideration may be given to the Veteran's level of education, special training, and previous work experience in arriving at a conclusion, but not to his age or to impairment caused by disabilities that are not service connected. See 38 U.S.C.A. § 1155 (West 2002); 38 C.F.R. §§ 3.340, 3.341, 4.16, 4.18, 4.19 (2014). In reaching such a determination, the central inquiry is "whether the Veteran's service-connected disabilities alone are of sufficient severity to produce unemployability." See *Hatlestad v. Brown*, 5 Vet. App. 524, 529 (1993).

The law provides that a total disability rating may be assigned where the schedular rating is less than total when the disabled person is unable to secure or follow a substantially gainful occupation as a result of service-connected disabilities, provided that, if there is only one such disability, this disability shall be ratable at 60 percent or more, or 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. See 38 C.F.R. § 4.16(a).

The initial grant of service connection was in June 2009, when service connection was granted for thoracic syrinx with associated degenerative changes, status post old thoracic spine fractures, rated 40 percent effective from the June 25, 2004, date of claim. In an April 2010 decision, the Board granted an earlier effective date of November 7, 2003, for the grant of service connection and denied a rating in excess of 40 percent prior to November 20, 2009, and in excess of 50 percent from that date. The Veteran did not appeal the April 2010 Board decision.

In the April 2010 decision, the Board also granted separate 10 percent ratings for radiculopathy of both lower extremities. In a May 2010 rating decision, the RO

assigned June 5, 2009, as the effective date for those disabilities. In a January 2013 rating decision, the effective date was changed to November 7, 2003. As shown in the RO's January 2013 rating decision, this resulted in combined ratings of 50 percent from November 7, 2003, and 60 percent from November 20, 2009. The Veteran met the criteria for schedular consideration of TDIU from November 20, 2009, as his disabilities are of common etiology and totaled 60 percent. VA's Director of Compensation and Pension found in June 2013 that an extraschedular rating for TDIU was warranted from June 5, 2009, but not prior to that date.

The Joint Motion in July 2014 indicated that the TDIU effective date matter must be decided as though the TDIU claim were filed in connection with the original claim for service connection for back disability in November 2003, as to treat it is a claim for an increased rating afterwards would deprive the appellant of applicable regulations governing assignment of an effective date for TDIU. The April 2010 Board decision that assigned the November 2003 effective date is final; thus, November 7, 2003, is the date of claim.

The assignment of effective dates of awards is generally governed by 38 U.S.C.A. § 5510 and 38 C.F.R. § 3.400. Generally, for an original claim, the effective date can be no earlier than the date of claim. 38 U.S.C.A. § 5110; the effective date of an award based on an original claim shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application therefor. 38 C.F.R. § 3.400.

After a review of the evidence, the Board finds that the Veteran's service-connected disabilities did not warrant a TDIU rating earlier than April 5, 2009. An effective date earlier than April 5, 2009 is not warranted, because the preponderance of the evidence indicates that the Veteran was not unemployable due to service-connected disabilities prior to that date.

The evidence of record includes the June 5, 2009, VA examination. At that time, the Veteran reported that he had been incapacitated for the past 2 months due to his service-connected disabilities. The Veteran reported at the time that he had had a recent flare-up of pneumonia, which had made it more difficult for him with his back. This is the first indication that the Veteran was unemployable due to service-connected disabilities.

The September 2008 report from H. H. Rinehart, M.D. indicating that since service, the Veteran's work ability had been "in shambles" (due to service-connected disability) does not reasonably indicate that the Veteran's unemployability due to his service-connected disabilities arose prior to April 5, 2009.

The Board notes that a May 2009 letter from T. L. Gritzka, M.D. indicates that the Veteran was working in June 1994 and that he retired following a work injury in 1994, as he was close to a normal retirement age of about 65. Prior to that time, he would work for a while until his back pain became so severe that he would quit and take time off to recover. He had a high school education and some additional training in service.

A July 2010 letter from Dr. Rinehart indicating that the Veteran had suffered from radicular pain in his lower extremities since at least April 2000 does not show unemployability due to service-connected disabilities.

An August 2010 letter from Dr. Rinehart indicates that when he first met the Veteran in the late 1990's, he was unemployable due to back pain on a continual basis, and that after the 1st quarter of 1994, he stopped working for a company as a welder, as he was missing work 1-3 days a week due to back pain.

A January 2014 report from Dr. Rinehart indicates that the Veteran was unemployable after 1994.

The representative argued in January 2011 that the proper effective date for the Veteran's TDIU should be December 1, 2003 based on the Veteran's TDIU application and the July and August 2010 letters from Dr. Rinehart. She asserted in March 2012 that the Veteran's 2003 claim was for all benefits to which he was entitled by law, that his back and radiculopathy conditions existed at the time of that claim, and that the date entitlement arose was not the date the symptoms were identified, but the date he filed his claim. The date entitlement to TDIU arises, however, cannot be earlier than the date that service-connected disabilities preclude all forms of substantially gainful employment.

The representative also noted that the Veteran had not worked throughout the pendency of the claim filed in 2003. However, the Veteran had retired in 1994, at about the age of 65, explaining his failure to work after that point. The VA examination on June 5, 2009 shows (by the Veteran's own admission) that the Veteran's incapacitation began on April 5, 2009, and this is when it is first at least as likely as not shown that he was unemployable due to service-connected disabilities. Unemployability due to service-connected disabilities is what is at issue, not whether there were symptoms or problems earlier.

As such, the earliest effective date that can be assigned for TDIU is April 5, 2009. 38 U.S.C.A. § 5110(b)(2); 38 C.F.R. § 3.400(o)(2). As the July 2014 Joint Motion noted, for an original claim, the effective date can be as early as the date of claim. However, it does not have to be that early. It should be later if entitlement does not arise until later. In this case, entitlement to TDIU did not arise before April 5, 2009, as there was not at least a relative equipoise of evidence showing unemployability due to service-connected disabilities prior to that date.

The statements in support of earlier unemployability from Dr. Rinehart are less probative than the Veteran's own very specific and credible statement on VA examination on June 5, 2009 that his incapacitation began 2 months beforehand. Furthermore, as Dr. Gritzka noted in May 2009, the Veteran had *retired* in June

1994, following a work injury to his *cervical* spine, *at close to a normal retirement age*. Also, he had had *cervical spine* discectomy shortly before he retired, according to both Dr. Gritzka and the VA examiner. Dr. Rinehart does not mention this. Dr. Gritzka's notation that the Veteran had worked through back pain and then retired at close to a normal retirement age after a neck injury is more probative than Dr. Rinehart's August 2010 notation that the Veteran was unemployable due to back pain on a continual basis in April 1994 and in the late 1990's. Dr. Rinehart wrote in August 2010 that he first met the Veteran in the late 1990's. In January 2014, he wrote that he first saw the Veteran in the mid-1990's. His recent reports do not appear to be reliable and they are accorded very little probative value. Records from Dr. Rinehart from June 2005 to March 2006 contain the Veteran's indications that pain was not completely interfering with his ability to do normal work at those times; and according to an April 2000 record from Dr. Rinehart, the Veteran then had a sawmill and was cutting firewood with his grandson and making some picture frames, and the Veteran described himself as a retired welder and millwright in June 2005. These all undermine Dr. Rinehart's reports of the Veteran's unemployability since the 1990's, including Dr. Rinehart's January 2014 report that the Veteran's severe back pain and opioid medications that he was prescribed to treat the condition prevented his employment, including in sedentary work, from the 1990's.

ORDER

Entitlement to an effective date prior to April 5, 2009 for the grant of a TDIU is denied.

_____

M. E. LARKIN
Veterans Law Judge, Board of Veterans' Appeals

YOUR RIGHTS TO APPEAL OUR DECISION

The attached decision by the Board of Veterans' Appeals (BVA or Board) is the final decision for all issues addressed in the "Order" section of the decision. The Board may also choose to remand an issue or issues to the local VA office for additional development. If the Board did this in your case, then a "Remand" section follows the "Order." However, you cannot appeal an issue remanded to the local VA office because a remand is not a final decision. *The advice below on how to appeal a claim applies only to issues that were allowed, denied, or dismissed in the "Order."*

If you are satisfied with the outcome of your appeal, you do not need to do anything. We will return your file to your local VA office to implement the BVA's decision. However, if you are not satisfied with the Board's decision on any or all of the issues allowed, denied, or dismissed, you have the following options, which are listed in no particular order of importance:

- Appeal to the United States Court of Appeals for Veterans Claims (Court)
- File with the Board a motion for reconsideration of this decision
- File with the Board a motion to vacate this decision
- File with the Board a motion for revision of this decision based on clear and unmistakable error.

Although it would not affect this BVA decision, you may choose to also:

- Reopen your claim at the local VA office by submitting new and material evidence.

There is *no* time limit for filing a motion for reconsideration, a motion to vacate, or a motion for revision based on clear and unmistakable error with the Board, or a claim to reopen at the local VA office. None of these things is mutually exclusive - you can do all five things at the same time if you wish. However, if you file a Notice of Appeal with the Court and a motion with the Board at the same time, this may delay your case because of jurisdictional conflicts. If you file a Notice of Appeal with the Court ***before*** you file a motion with the BVA, the BVA will not be able to consider your motion without the Court's permission.

How long do I have to start my appeal to the court? You have **120 days** from the date this decision was mailed to you (as shown on the first page of this decision) to file a Notice of Appeal with the Court. If you also want to file a motion for reconsideration or a motion to vacate, you will still have time to appeal to the court. *As long as you file your motion(s) with the Board within 120 days of the date this decision was mailed to you,* you will have another 120 days from the date the BVA decides the motion for reconsideration or the motion to vacate to appeal to the Court. You should know that even if you have a representative, as discussed below, *it is your responsibility to make sure that your appeal to the Court is filed on time.* Please note that the 120-day time limit to file a Notice of Appeal with the Court does not include a period of active duty. If your active military service materially affects your ability to file a Notice of Appeal (e.g., due to a combat deployment), you may also be entitled to an additional 90 days after active duty service terminates before the 120-day appeal period (or remainder of the appeal period) begins to run.

How do I appeal to the United States Court of Appeals for Veterans Claims? Send your Notice of Appeal to the Court at:

Clerk, U.S. Court of Appeals for Veterans Claims
625 Indiana Avenue, NW, Suite 900
Washington, DC 20004-2950

You can get information about the Notice of Appeal, the procedure for filing a Notice of Appeal, the filing fee (or a motion to waive the filing fee if payment would cause financial hardship), and other matters covered by the Court's rules directly from the Court. You can also get this information from the Court's website on the Internet at: http://www.uscourts.cavc.gov, and you can download forms directly from that website. The Court's facsimile number is (202) 501-5848.

To ensure full protection of your right of appeal to the Court, you must file your Notice of Appeal **with the Court**, not with the Board, or any other VA office.

How do I file a motion for reconsideration? You can file a motion asking the BVA to reconsider any part of this decision by writing a letter to the BVA clearly explaining why you believe that the BVA committed an obvious error of fact or law, or stating that new and material military service records have been discovered that apply to your appeal. It is important that such letter be as specific as possible. A general statement of dissatisfaction with the BVA decision or some other aspect of the VA claims adjudication process will not suffice. If the BVA has decided more than one issue, be sure to tell us which issue(s) you want reconsidered. Issues not clearly identified will not be considered. Send your letter to:

Director, Management, Planning and Analysis (014)
Board of Veterans' Appeals
810 Vermont Avenue, NW
Washington, DC 20420

Remember, the Board places no time limit on filing a motion for reconsideration, and you can do this at any time. However, if you also plan to appeal this decision to the Court, you must file your motion within 120 days from the date of this decision.

How do I file a motion to vacate? You can file a motion asking the BVA to vacate any part of this decision by writing a letter to the BVA stating why you believe you were denied due process of law during your appeal. *See* 38 C.F.R. 20.904. For example, you were denied your right to representation through action or inaction by VA personnel, you were not provided a Statement of the Case or Supplemental Statement of the Case, or you did not get a personal hearing that you requested. You can also file a motion to vacate any part of this decision on the basis that the Board allowed benefits based on false or fraudulent evidence. Send this motion to the address above for the Director, Management, Planning and Analysis, at the Board. Remember, the Board places no time limit on filing a motion to vacate, and you can do this at any time. However, if you also plan to appeal this decision to the Court, you must file your motion within 120 days from the date of this decision.

How do I file a motion to revise the Board's decision on the basis of clear and unmistakable error? You can file a motion asking that the Board revise this decision if you believe that the decision is based on "clear and unmistakable error" (CUE). Send this motion to the address above for the Director, Management, Planning and Analysis, at the Board. You should be careful when preparing such a motion because it must meet specific requirements, and the Board will not review a final decision on this basis more than once. You should carefully review the Board's Rules of Practice on CUE, 38 C.F.R. 20.1400 -- 20.1411, and *seek help from a qualified representative before filing such a motion.* See discussion on representation below. Remember, the Board places no time limit on filing a CUE review motion, and you can do this at any time.

How do I reopen my claim? You can ask your local VA office to reopen your claim by simply sending them a statement indicating that you want to reopen your claim. However, to be successful in reopening your claim, you must submit new and material evidence to that office. *See* 38 C.F.R. 3.156(a).

Can someone represent me in my appeal? Yes. You can always represent yourself in any claim before VA, including the BVA, but you can also appoint someone to represent you. An accredited representative of a recognized service organization may represent you free of charge. VA approves these organizations to help veterans, service members, and dependents prepare their claims and present them to VA. An accredited representative works for the service organization and knows how to prepare and present claims. You can find a listing of these organizations on the Internet at: http://www.va.gov/vso. You can also choose to be represented by a private attorney or by an "agent." (An agent is a person who is not a lawyer, but is specially accredited by VA.)

If you want someone to represent you before the Court, rather than before the VA, you can get information on how to do so at the Court's website at: http://www.uscourts.cavc.gov. The Court's website provides a state-by-state listing of persons admitted to practice before the Court who have indicated their availability to the represent appellants. You may also request this information by writing directly to the Court. Information about free representation through the Veterans Consortium Pro Bono Program is also available at the Court's website, or at: http://www.vetsprobono.org, mail@vetsprobono.org, or (888) 838-7727.

Do I have to pay an attorney or agent to represent me? An attorney or agent may charge a fee to represent you after a notice of disagreement has been filed with respect to your case, provided that the notice of disagreement was filed on or after June 20, 2007. *See* 38 U.S.C. 5904; 38 C.F.R. 14.636. If the notice of disagreement was filed before June 20, 2007, an attorney or accredited agent may charge fees for services, but only after the Board first issues a final decision in the case, and only if the agent or attorney is hired within one year of the Board's decision. *See* 38 C.F.R. 14.636(c)(2).

The notice of disagreement limitation does not apply to fees charged, allowed, or paid for services provided with respect to proceedings before a court. VA cannot pay the fees of your attorney or agent, with the exception of payment of fees out of past-due benefits awarded to you on the basis of your claim when provided for in a fee agreement.

Fee for VA home and small business loan cases: An attorney or agent may charge you a reasonable fee for services involving a VA home loan or small business loan. *See* 38 U.S.C. 5904; 38 C.F.R. 14.636(d).

Filing of Fee Agreements: In all cases, a copy of any fee agreement between you and an attorney or accredited agent must be sent to the Secretary at the following address:

Office of the General Counsel (022D)
810 Vermont Avenue, NW
Washington, DC 20420

The Office of the General Counsel may decide, on its own, to review a fee agreement or expenses charged by your agent or attorney for reasonableness. You can also file a motion requesting such review to the address above for the Office of the General Counsel. *See* 38 C.F.R. 14.636(i); 14.637(d).