BOARD OF VETERANS' APPEALS

FOR THE SECRETARY OF VETERANS AFFAIRS

IN THE APPEAL OF
[redacted]
Represented by
Gordon A. Graham, Agent

[redacted]
Docket No. 17-60 894
Advanced on the Docket

DATE: February 27, 2020

ORDER

Restoration of a 20 percent rating for service-connected residuals of myelodysplastic syndrome with anemia (MDS) is granted.

Entitlement to a rating in excess of 40 percent for MDS is moot.

Entitlement to special monthly compensation (SMC) at the housebound rate under 38 U.S.C. § 1114(s) from December 17, 2017, is granted.

Entitlement to a total disability rating based on individual unemployability (TDIU) prior to December 17, 2017, is denied.

FINDINGS OF FACT

1. The reduction of the 100 percent rating for the Veteran's MDS was not based on improvement in the Veteran's ability to function under the ordinary conditions of life and work.

2. Beginning December 17, 2017, the Veteran has had a single service-connected disability rated as 100 percent disabling and additional service-connected disabilities independently ratable at 60 percent, separate and distinct from the 100 percent service-connected disability and involving different bodily systems.

3. Prior to December 17, 2017, neither the Veteran's service-connected scars nor sarcoma rendered him unable to obtain or maintain substantially gainful employment.

CONCLUSIONS OF LAW

1. The reduction of the rating for residuals of myelodysplastic syndrome with anemia from 100 percent to 40 percent was not proper and is void ab initio. 38 U.S.C. § 1155; 38 C.F.R. §§ 3.105(e), 3.344.

2. The claim for entitlement to a rating in excess of 40 percent for residuals of myelodysplastic syndrome with anemia is moot and is dismissed. 38 C.F.R. § 20.101(a).

3. Beginning December 17, 2017, the criteria for special monthly compensation at the housebound rate have been met. 38 U.S.C. §§ 1114(s), 5107; 38 C.F.R. §§ 3.102, 3.350.

4. The criteria for a TDIU prior to December 17, 2017, have not been met. 38 U.S.C. §§ 1155, 5107; 38 C.F.R. §§ 3.340, 3.341, 4.16, 4.18, 4.25.

REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

The Veteran served on active duty in the U.S. Navy from December 1966 to September 1970.

This matter comes before the Board of Veterans' Appeals (Board) on appeal from a January 2017 rating decision of a Department of Veterans Affairs (VA) RO.

In September 2018, the Veteran testified at a hearing before the undersigned Veterans Law Judge (VLJ); a transcript is of record.

The Board remanded the claims on appeal in July 2019 for additional development. The Board's remand directives have been substantially completed. *See Stegall v. West*, 11 Vet. App. 268 (1998).

This appeal has been advanced on the Board's docket pursuant to 38 C.F.R. § 20.900(c); 38 U.S.C. § 7107(a)(2).

1. Whether the reduction of the Veteran's disability rating for residuals of MDS from 100 percent to 40 percent effective April 1, 2017, was proper and whether an increased rating is warranted.

By way of history, in October 2014, the RO granted service connection for MDS and assigned a 100 percent rating, effective April 22, 2014. By a September 2016 rating decision, the RO proposed to reduce the Veteran's MDS to a noncompensable rating. In a January 2017 rating decision, the RO decreased the Veteran's MDS from 100 percent disabling under diagnostic code (DC) 7703 (leukemia) to 10 percent disabling, effective April 1, 2017. In a May 2017 notice of disagreement (NOD), the Veteran disagreed with the reduction of his 100 percent rating and stated that it should be restored. He also requested reassignment under DC 7704 (polycythemia vera) due to monthly phlebotomies secondary to MDS. He further stated that he has anemia due to his monthly phlebotomies, and he filed a claim for entitlement to a TDIU.

In November 2017, the RO increased the Veteran's MDS to 40 percent disabling under DC 7704, effective April 1, 2017. In December 2017, the Veteran filed a claim for a graft versus host disease, erythema, and loss of bone density as secondary to myelodysplastic syndrome with anemia, and dry mouth secondary to graft versus host disease. In June 2018, the RO granted service connection for such conditions. However, it does not appear that the Veteran has filed a NOD to the June 2018 decision. Therefore, such issues are not currently before the Board.

In October 2018, VA amended the Schedule of Ratings for the Hemic and Lymphatic Systems. In pertinent part, a new DC was added specifically for MDS, DC 7725. In a December 2019 rating decision, the RO awarded a 100 percent rating for the Veteran's MDS under DC 7725 effective August 29, 2019.

As a preliminary matter, the Board notes that in cases where a veteran's disability rating is reduced, the issue is whether the reduction of the disability rating was proper and generally does not include a claim for an increased rating. *Dofflemyer v. Derwinski*, 2 Vet. App. 277, 279-80 (1992); *see also Schafrath v. Derwinski*, 1 Vet. App. 589, 596 (1991) ("this is a reduction case, not an increase case"). Here, the reduction issue did not arise from a claim for an increased rating nor has the Veteran since appealed an increased rating issue. In this regard, and as noted above, the January 2017 rating decision reduced the disability rating of MDS from 100 percent to 10 percent effective April 1, 2017. The Veteran then filed a NOD in May 2017, in response to the reduction. A November 2017 rating decision increased the evaluation to 40 percent, effective April 1, 2017, but the Veteran did not appeal from that decision. However, during the pendency of this appeal, the Veteran filed a claim for TDIU based, in part, on his MDS, and such could be interpreted as a claim for increase. Additionally, the rationale provided by the RO, during the appeal period, also discussed the claim as one for increase. *See* November 2017 Statement of the Case (SOC); June 2018 Supplemental Statement of the Case (SSOC). Moreover, at the September 2018 hearing, the Veteran and his representative provided testimony as to why an increased rating is warranted. Accordingly, the Board will consider the propriety of the reduction as well as a claim for increase.

With regards to the rating reduction, the Veteran contends that his rating should not have been reduced because he still is undergoing "other therapeutic procedures" for his MDS.

When the propriety of a rating reduction is at issue, the focus is on the actions of the RO in effectuating the reduction, both in terms of compliance with the special due process considerations applicable to reductions, and in terms of whether the evidence at the time of the decision reducing the evaluation supported the reduction. In most cases, violations of the set of due process considerations applicable to rating reductions, or failure of the evidence to meet the standards for reducing an evaluation, render the underlying reduction void ab initio, rather than merely voidable. The burden is on VA to justify a reduction in a rating. *See Brown v. Brown*, 5 Vet. App. 413 (1993) (finding that the Board is required to establish, by

a preponderance of the evidence and in compliance with 38 C.F.R. § 3.344, that a rating reduction is warranted).

The provisions of 38 C.F.R. § 3.105(e) allow for the reduction in evaluation of a service-connected disability when warranted by the evidence, but only after following certain procedural guidelines. The RO must issue a rating action proposing the reduction and setting forth all material facts and reasons for the reduction. The Veteran must then be given 60 days to submit additional evidence and to request a predetermination hearing. Then a rating action will be taken to effectuate the reduction. 38 C.F.R. § 3.105(e). The effective date of the reduction will be the last day of the month in which a 60-day period from the date of notice to the Veteran of the final action expires. 38 C.F.R. § 3.105(e), (i)(2)(i).

Here, the requirements pursuant to 38 C.F.R. § 3.105(e) were properly carried out by the RO.

On September 22, 2016, the RO notified the Veteran of a proposed rating reduction, setting forth all material facts and reasons for the reduction, namely that the Veteran did not attend his scheduled VA examination. At that time, the RO instructed the Veteran to submit within 60 days any additional evidence to show that his rating should not be reduced, and to request a predetermination hearing if desired. In October 2016, he submitted argument and requested the VA examination be rescheduled but did not request a predetermination hearing. The RO took final action to reduce the disability rating in a January 2017 rating decision, and the rating was reduced from 100 to 10 percent, effective April 1, 2017. The RO informed the Veteran of this decision by letter dated January 6, 2017. Subsequently, in a November 2017 rating decision, the RO increased the rating to 40 percent effective April 1, 2017.

Based on these facts, the Board finds that the procedure for discontinuing the Veteran's 100 percent evaluation for his MDS was appropriately completed in this case in accordance with 38 C.F.R.§ 3.105(e).

Reducing a rating also brings concurrent substantive requirements that must be followed. Although the regulatory requirements under 38 C.F.R. § 3.344(a) and (b)

apply only to reductions of ratings that have been in effect for more than five years, the U.S. Court of Appeals for Veterans Claims (Court) has held that several general regulations are applicable to all rating reduction cases, regardless of whether the rating at issue has been in effect for five or more years. The Court has stated that certain regulations "impose a clear requirement that VA rating reductions, as with all VA rating decisions, be based upon review of the entire history of the veteran's disability." *Brown*, 5 Vet. App. at 420 (referring to 38 C.F.R. §§ 4.1, 4.2, and 4.13).

Ratings that have been in effect for less than five years, such as the Veteran's 100 percent rating, require improvement before an evaluation is reduced. 38 C.F.R. § 3.344(c). Implicit in the regulations is that any improvement must be of such a nature as to warrant a change in the evaluation; the rating agency must determine whether the improvement actually reflects an improvement in the veteran's ability to function under the ordinary conditions of life and work. *Brown*, 5 Vet. App. at 421.

The Court has stated that both decisions by the RO and by the Board that do not apply the provisions of 38 C.F.R. § 3.344, when applicable, are void ab initio (i.e., at their inception). *Lehman v. Derwinski*, 1 Vet. App. 339 (1991); *Peyton v. Derwinski*, 1 Vet. App. 282 (1991); *Dofflemyer*, 2 Vet. App. at 277; *Brown,* 5 Vet. App. at 413; *see also Hayes v. Brown*, 9 Vet. App. 67, 73 (1996) (where VA reduces the appellant's rating without observing applicable laws and regulations the rating is void ab initio and the Court will set aside the decision).

Upon review of all the evidence of record, the Board finds that the rating reduction is void ab initio because the RO did not address whether there was "an actual improvement in the Veteran's ability to function under the ordinary conditions of life and work." *Brown*, 5 Vet. App. at 421.

Specifically, a review of the rating decision that effectuated the reduction, as well the subsequent SOC and SSOCs, shows that the RO appears to have essentially analyzed the issue of reduction of the 100 percent rating just as it would a claim for an increased rating. In this regard, the Veteran never was notified of the provisions at 38 C.F.R. § 3.344, and the RO's analyses in its January 2017 rating decision, the November 2017 SOC, and the June 2018 and December 2019 SSOCs, only

discussed the ratings criteria under Diagnostic Codes 7700, 7703, and 7704. The RO failed to discuss the provisions of 38 C.F.R. § 3.344 in its analyses. Of particular note, neither the January 2017 rating decision, the November 2017 SOC, nor the June 2018 and December 2019 SSOCs discussed the issue of whether there was "an actual improvement in the Veteran's ability to function under the ordinary conditions of life and work." *Id.* In summary, it does not appear that the RO's analysis was in compliance with 38 C.F.R. § 3.344 and *Brown*.

Since the rating decision that accomplished the reduction of the 100 percent evaluation for the Veteran's service-connected MDS did not properly apply the provisions of 38 C.F.R. § 3.344, the reduction is void ab initio. The appropriate remedy in this case is a restoration of the 100 percent evaluation effective on the date of the reduction. *See Hayes*, 9 Vet. App. at 73 (improper reduction reinstated effective date of reduction).

With regards to the claim for an increased rating, given the restoration of the Veteran's 100 percent disability rating for MDS from April 1, 2017, the issue of entitlement to an increased rating for MDS during the periods subsequent to the rating reduction is rendered moot.

To the extent that the Veteran has contended that he should receive a separate rating for anemia under DC 7700 and for iron overload (treated with phlebotomies) under DC 7704, the Board finds that such an award would constitute impermissible pyramiding. *See* September 2018 Amended Brief for Substantive Appeal; 38 C.F.R. § 4.14. Specifically, by restoring the Veteran's 100 percent rating for MDS under DC 7703, he is being compensated for any symptomatology related to his treatment of MDS, to include anemia and iron overload. The note following DC 7703 provides, in essence, that six months following cessation of treatment for MDS, if there has been no recurrence, the veteran's disability is to be rated based on residuals. Thus, the Veteran cannot receive a total rating for his treatment of MDS as well as separate ratings for residuals of his MDS. Accordingly, separate ratings for the Veteran's anemia and iron overload, in addition to his total rating for MDS, is prohibited.

In sum, the Veteran's total rating for MDS is restored effective the date of the reduction and the claim for an increased rating is rendered moot.

2. Entitlement to SMC at the housebound rate under 38 U.S.C. § 1114(s) from December 17, 2017.

VA has a "well-established" duty to maximize a claimant's benefits. *See Buie v. Shinseki*, 24 Vet. App. 242, 250 (2011); *AB*, 6 Vet. App. at 38; *see also Bradley v. Peake*, 22 Vet. App. 280 (2008). This duty to maximize benefits requires VA to assess all of a claimant's disabilities to determine whether any combination of disabilities establishes entitlement to SMC under 38 U.S.C. § 1114. *See Bradley*, 22 Vet. App. 280, 294 (2008) (finding that SMC "benefits are to be accorded when a Veteran becomes eligible without need for a separate claim").

SMC is payable at the housebound rate where the Veteran has a single service-connected disability rated as 100 percent and, in addition: (1) has a service-connected disability or disabilities independently ratable at 60 percent, separate and distinct from the 100 percent service-connected disability, and involving different anatomical segments or bodily systems, or (2) is permanently housebound by reason of service-connected disability or disabilities. 38 U.S.C. § 1114(s); 38 C.F.R. § 3.350(i).

The Board's decision above restores the 100 percent disability rating throughout the duration of the appeal for the Veteran's service-connected MDS. In addition to other service-connected disabilities rated 10 percent or less, the Veteran is service connected for maculopapular, rated 60 percent disabling from December 17, 2017. Thus, for the period since December 17, 2017, the Veteran has had a service-connected disability rated as total and additional anatomically distinct service-connected disabilities, which are independently ratable at 60 percent or above. Accordingly, entitlement to SMC at the housebound rate under 38 U.S.C. § 1114(s) is granted, effective December 17, 2017.

3. Entitlement to a TDIU prior to December 17, 2017.

The Board previously determined that the claim for TDIU was raised as part-and-parcel of the Veteran's increased rating claim for MDS on appeal. *See Rice v. Shinseki*, 22 Vet. App. 447, 453-55 (2009); July 2019 Board remand.

Total disability ratings for compensation may be assigned when a veteran is unable to secure and follow a substantially gainful occupation. *See* 38 U.S.C. § 1155; 38 C.F.R. §§ 3.340, 3.341, 4.16. In reaching such a determination, the central inquiry is "whether the Veteran's service-connected disabilities alone are of sufficient severity to produce unemployability." *Hatlestad v. Brown*, 5 Vet. App. 524, 529 (1993); *see Van Hoose v. Brown*, 4 Vet. App. 361, 363 (1993) (the ultimate question is whether the Veteran is capable of performing the physical and mental acts required by employment, not whether he can find employment). Consideration may be given to the Veteran's level of education, special training, and previous work experience when arriving at this conclusion; factors such as age or impairment caused by nonservice-connected disabilities are not to be considered. 38 C.F.R. §§ 3.341, 4.16, 4.19.

Section 4.16(a) provides a rating hurdle for schedular consideration of a TDIU. If there is only one such disability, this disability shall be ratable at 60 percent or more; 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. *Id.*

For the purpose of one 60 percent disability or one 40 percent disability, disabilities of one or both upper extremities, or of one or both lower extremities, including the bilateral factor, if applicable; disabilities resulting from common etiology or a single accident; disabilities affecting a single body system, e.g. orthopedic, digestive, respiratory, cardiovascular-renal, neuropsychiatric; and multiple injuries incurred in action, will be considered as one disability. *Id.*

As a result of the Board decision above, the Veteran's schedular rating of 100 percent for MDS has been restored, and he is in receipt of SMC from December 17, 2017. Nevertheless, receipt of a 100 percent evaluation for a service-connected

disability does not necessarily moot the issue of entitlement to a TDIU. *Bradley*, 22 Vet. App. at 293-94. In *Bradley*, the Court held that, although no additional disability compensation may be paid when a total disability rating is already in effect, a separate award of a TDIU predicated on a single disability other than that which was the basis for the 100 percent rating may form the basis for an award of special monthly compensation. Here, the issue of TDIU is moot from December 17, 2017, as the Veteran is already in receipt of SMC for that period. As the Veteran is not in receipt of SMC prior to December 17, 2017, the issue of TDIU is not rendered moot, and the Board must determine whether, excluding the disorder for which a 100 percent rating is in effect, the Veteran has additional service-connected disorders which individually render him unemployable.

Prior to December 17, 2017, the Veteran was service-connected for: (1) MDS, rated 100 percent from April 22, 2014; (2) Sarcoma of the right deltoid, rated 10 percent disabling from August 17, 2009; and (3) scars associated with MDS, rated noncompensable from October 25, 2016.

Although the Veteran meets the schedular criteria for TDIU prior to December 17, 2017, there is no evidence of record to indicate, and the Veteran has not contended, that his sarcoma or scars affect his ability to obtain or maintain a substantially gainful employment. *See* July 2017 Veteran's Application for Increased Compensation Based on Unemployability (VA 21-8940). At the 2009 VA examination for his sarcoma, the Veteran's shoulder range of motion was within normal limits. While the examiner noted that the condition may limit the Veteran's ability to perform heavy lifting and carrying, he did not find that it would preclude all types of employment. Moreover, a review of the record shows that the Veteran worked as a home inspector, a field which would not necessarily require heavy lifting and carrying. *See* July 2017 VA 21-8940. At the October 2016 VA examination for the Veteran's MDS, his scars were noted as nontender. The Veteran has not reported any symptomatology related to his scars or his sarcoma.

In light of the foregoing, the Board finds that neither the Veteran's service-connected scars nor sarcoma would preclude substantially gainful employment. Accordingly, entitlement to a TDIU prior to December 17, 2017, is denied.

C. CRAWFORD
Veterans Law Judge
Board of Veterans' Appeals

Attorney for the Board E. Mortimer, Associate Counsel

The Board's decision in this case is binding only with respect to the instant matter decided. This decision is not precedential, and does not establish VA policies or interpretations of general applicability. 38 C.F.R. § 20.1303.