EXTRA-SCHEDULAR IU

“A NEW HOPE”
EXTRA-SCHEDULAR IU: A NEW HOPE

- Very few grants of extra-schedular individual unemployability (IU or TDIU)

- VA usually reluctant to grant
EXTRA-SCHEDULAR IU: A NEW HOPE

• 38 C.F.R. § 3.321(b)

• Exceptional cases -- . . . . . . To accord justice, . . . where schedular evaluations are found to be inadequate,

• upon field station submission, [VA] is authorized to approve on the basis of the criteria set forth in this paragraph an extra-schedular evaluation
EXTRA-SCHEDULAR IU: A NEW HOPE

- Consider such factors such as
  - marked interference with employment or
  - frequent periods of hospitalization
  - as to render impractical the application of the regular schedular standards.
EXTRA-SCHEDULARG IU: 
A NEW HOPE

- 38 C.F.R § 4.16(b)

- It is the established policy of the Department of Veterans Affairs that all veterans who are unable to secure and follow a substantially gainful occupation by reason of service-connected disabilities shall be rated totally disabled.

- Rating board will include a full statement as to the veteran's service-connected disabilities, employment history, educational and vocational attainment and all other factors having a bearing on the issue.
EXTRA-SCHEDULAR IU: A NEW HOPE

BENNETT v. SHINSEKI -- 12-0590, July 2, 2013

- Appeal of denial of IU

- 9/87 – RO granted SC for herniated nucleus pulposus (HNP) L5" and assigned a 10% disability rating, effective April 1, 1987.

- 2/05 – MRI - of lumbar spine revealed multilevel discogenic disease with a "prominent" bulging disc causing moderate to severe lateral recess narrowing."
Facts from *Bennett* case

- Referred to Dr. M at the Ohio Neurosurgical Institute.
- Dr. M’s impressions were that the veteran had "lumbar facet arthropathy, lower back pain, and lumbar sprain/strain."
- 6/06 - claim for increase for back disability. He stated he had retired early from his job in 2003 "because of increasing back pain."
- 10/05 and 2/06 – claims for TDIU. Stated his back forced him to retire from his job.
Facts from *Bennett* case

- Veteran stated he could not walk, sit, or stand for long periods and could only do "minimal" lifting and "limited" bending and stooping.

- Reported difficulty sleeping due to pain.

- Employer stated veteran took early retirement – no sick leave in the year prior to retirement.
7/06 VA Exam

- Able to perform his own activities of daily living, including eating, grooming, bathing, toileting, and dressing.

- Flare-ups associated with physical activity at least four to five times a week. Pain on a level of 9 out of a scale of 10.

- Physical exam - "significant pain with range of motion testing."

- Repetitive motion testing of lumbar spine was "nearly impossible" and produced "worsening pain, weakness, fatigability and lack of endurance."
7/06 VA Exam

- X-rays of the back showed degenerative changes in the lumbar spine with scoliosis.

- Further opined -- "back pain subjectively has worsened to the point of being quite severe as well as caused his medical retirement from his civilian job."

- On July 20, 2006, the RO increased the veteran’s disability rating to 40% for his low back.
More facts from *Bennett*

- IU claim denied. The veteran appealed the RO decision.

- 12/10 - Board denied rating greater than: 40% for low back disability; and 10% for radiculopathy of the left lower extremity.

- BVA concluded that "referral of the [TDIU] claim to the Director of the VA Compensation and Pension Service for extra-schedular compensation is warranted" because "this case presents unusual or exceptional circumstances" as "there is evidence indicating that [the veteran] stopped working in 2003 due to his back disability."
1/11 VA Exam

- No incapacitating episodes of back pain in past year.
- But - experiencing multiple flare-ups each day that are severe.
- Flare-ups precipitated by prolonged walking, prolonged standing, prolonged sitting.
- During flare-ups - limitation of motion and functional impairment with pain on ambulation, stiffness, fatigue, spasms, weakness, decreased motion, and numbness in his extremities.
The diagnosis was "[l]umbar spine degenerative disk disease and scoliosis with radiculopathy."

Examiner opined – veteran "is precluded from physical and sedentary employment at this time due to service-connected condition, as he is unable to engage in prolonged standing, prolonged walking or prolonged sitting."
C&P Review of IU Claim

- 8/11 - C&P Director denied entitlement to TDIU under 38 C.F.R. § 4.16(b).

- Director denied because
  - "the objective physical findings on [that] medical examination and in the other available treatment records do not demonstrate that the [appellant's] service[[-]connected conditions alone prevent him from engaging in all types of work related activities."
C&P Review of IU Claim

- Director noted
  - lack of evidence of "significant medical treatment in recent years"
  - lack of "objective" evidence showing that the "appellant's disability interfered with his past employment or caused him to retire from work."

- 11/11 – BVA denied IU claim
CAVC ANALYSIS

- CAVC noted: Board gave two reasons for rejecting the 2011 VA examiner's opinion that the veteran was precluded from physical and sedentary employment because he could not perform prolonged standing, prolonged walking, or prolonged sitting.
CAVC ANALYSIS

• First, VA examiner’s opinion not competent medical evidence since based on veteran’s lay statements alone.

• Here, the VA examiner did discuss the veteran’s self-reported limitations on his ability to perform various physical activities, such as walking, standing, and sitting.

• The VA examiner did not simply restate the veteran’s lay descriptions. The VA examiner reviewed the veteran’s claims file, medical records, back x-rays, and conducted a physical examination, including range-of-motion testing.
CAVC ANALYSIS

- When VA examiner rendered an opinion that veteran was unemployable -- the examiner "added medico-evidentiary value" to the appellant's lay statements, thereby satisfying the CAVC’s test for competence

- Medical opinion based on more than just transcription of veteran’s statements and explained can be competent evidence.
CAVC ANALYSIS

Important:

- BVA found VA examiner's 2011 opinion was contradicted by the VA examiner's statement that the veteran could perform the activities of daily living.

- This rationale is not a sufficient basis upon which to reject the 2011 VA examiner's opinion.
  - It does not follow that the physical activities required for eating, dressing, grooming oneself, or performing household activities can be equated with prolonged sitting, prolonged walking, and prolonged standing on a daily basis.
CAVC ANALYSIS

- After rejecting the 2011 favorable medical opinion, the Board concluded that the veteran was not entitled to TDIU under § 4.16(b) because
  - he failed to either show that the “schedular ratings [for his disabilities] are an inadequate basis upon which to rate his [disabilities]” (R. at 12),
  - or that the circumstances involved in his claim are “so exceptional as to warrant deviation from the standard rating criteria.”
CAVC ANALYSIS

Important - Here, the Board appears to have conflated the standards for an extraschedular disability rating under 38 C.F.R. § 3.321(b) and TDIU under § 4.16(b).

BVA pointed to a number of factors that supported its conclusions that the veteran failed to show that the schedular ratings for his disabilities were inadequate and that his claim did not involve exceptional circumstances warranting deviation rating criteria:
CAVC ANALYSIS

- Assignment of less than the highest schedular ratings for the veteran’s disabilities and his failure to appeal these ratings;
- The "absence of evidence" of medical treatment, other than medication, from 2005 until the present;
- The "absence" of "objective" evidence showing that the veteran’s service-connected conditions interfered with his ability to perform his last job; and
- "The absence of evidence from his employer indicating his disabilities played a role in his ultimate termination of employment."
CAVC ANALYSIS

- CAVC held *none of the above factors provide a sufficient basis upon which to deny the TDIU claim.*

- There is no requirement under § 4.16(b) that a claimant must receive the highest disability rating allowable for each of his SC disabilities.

- The only criteria for entitlement to TDIU under § 4.16(b) is that a claimant's unemployability is attributable to his SC disability.
CAVC ANALYSIS

- § 4.16(b) contains no requirement that a claimant receive medical treatment as a prerequisite for TDIU.

- the "absence of evidence" of medical treatment for the appellant's disability is not a sufficient basis upon which to determine that the appellant is employable.
CAVC ANALYSIS

- Finally, there is no requirement under § 4.16(b) that a veteran provide "objective" evidence from his employer showing that his disabilities either "interfered" with work or "played a role in his termination from employment."

- Thus the "absence" of this evidence cannot provide a basis for denying the appellant's claim.
CAVC ANALYSIS

The issue before the Board was whether in 2005, at the time that the veteran applied for TDIU, and at any time during the pendency of that claim, was he unemployable because of his service-connected disabilities.

The Board has not provided a sufficient reason for denying the veteran’s claim based on his previous employment that ended two years prior to filing his TDIU claim.
CAVC ANALYSIS

Additionally, even if the Board's inquiries into these areas were key to its ultimate conclusion regarding the appellant's employability, the Board never found that the veteran's statements were not credible, and VA law generally does not require that a claimant submit "objective" evidence to corroborate his lay statements.

See Jandreau v. Nicholson, 492 F.3d 1372, 1376 (Fed. Cir. 2007) ("[C]ompetent lay evidence can be sufficient in and of itself" to support a finding of service connection).

Under § 3.321(b) an extraschedular rating is available "in exceptional cases where the rating is inadequate."
CAVC ANALYSIS

• Under § 4.16(b), the Board does not have to review the disability rating schedule and make any such determination or look to see whether the claimant's disability picture is exceptional in any way.

• TDIU may be assigned when the veteran essentially is unemployable (i.e., "unable to secure or follow a substantially gainful occupation") as a result of his service-connected disabilities.
CAVC ANALYSIS

- BVA has given insufficient reasons for rejecting the 2011 VA examiner's opinion that SC conditions cause veteran to be unemployable.

- Also Board has improperly denied the appellant's claim by imposing requirements that do not exist for establishing entitlement to TDIU under § 4.16(b).

- For these reasons, the Court is firmly convinced that the Board made a mistake and finds that the Board's conclusion that the appellant is not entitled to TDIU is clearly erroneous.
CAVC ANALYSIS

The Court has considered the Secretary’s argument that the Board decision should be vacated and the matter remanded because the Board relied on the Director of the Compensation and Pension Service's conclusion that the appellant was not entitled to TDIU, and, in turn, the Director failed to consider the 2006 VA examiner's opinion.
CAVC ANALYSIS

- The Court is not persuaded by this argument.
  - Once the Director has made a determination regarding TDIU, the Board has jurisdiction to review that determination on a *de novo* basis.

- It is clear that in exercising its *de novo* authority, the Board considered the evidence, including the 2006 VA examiner's opinion, and gave a statement of reasons or bases for its conclusion that the appellant was not entitled to TDIU.
CAVC ANALYSIS

- After consideration of the appellant's and the Secretary's pleadings, and a review of the record, the Court REVERSED the November 21, 2011, Board decision denying the appellant entitlement to TDIU and remanded the matter for further proceedings consistent with the decision.
VA Fast Letter 13-13

- Issued on 6/17/2013

- It is clear that the Court and VA are viewing TDIU claims from different interpretations of law

- VA will no longer presume a TDIU claim for increase for all SC disabilities.

- VA will require a vet with multiple SC disabilities to specify at least 1 disability as the cause of his/her unemployability

- VA is NOT required to provide a general medical examination in connection with every TDIU claim
In order for a TDIU claim to be considered

- Vet must complete Form 21-8940 (Veteran’s Application for Increased Compensation Based on Unemployability)
- A vet with multiple SC disabilities must specify at least 1 disability as the reason for his/her unemployability

VA can deny a claim for TDIU if Form 21-8940 has not been submitted or filled out properly
GEIB v. SHINSEKI, 733 F.3d 1350 (Fed. Cir. 2013)

- WWII veteran

Fed Cir -

- Agreed with CAVC that VA not required to obtain single medical opinion that addressed the impact of all SC disabilities on vet’s ability to engage in substantially gainful employment.
GEIB v. SHINSEKI, FEDERAL CIRCUIT DECISION

- Fed. Cir. -
  - Although the VA is expected to give full consideration to “the effect of combinations of disability,” 38 CFR 4.15, neither the statute nor the relevant regulations require the combined effect to be assessed by a medical export.

- Applicable regulations place responsibility for the ultimate TDIU determination on the VA, not a medical examiner. See 38 CFR 4.16(a)
CAVC holds that need for a combined-effects medical examination report or opinion with regard to multiple-disability TDIU entitlement is to be determined on a case-by-case basis, and depends on the evidence of record at the time of decision by the RO or BVA.
Although BVA recognized that cumulative effects of disabilities can prevent substantially gainful employment, BVA addressed effects of vet’s disabilities individually, and never explained what the cumulative functional impairment of all his SC disabilities might be and why they do not prevent substantially gainful employment.
Judge Bartley wrote separately, stating that where there are multiple compensable disabilities, especially affecting different body systems, expert opinion on overall functional impairment, including occupational impairment, caused by the combination of SC disabilities is necessary for adequately reasoned decision regarding TDIU.