DEPARTMENT OF VETERANS AFFAIRS
CLAIMS INTAKE CENTER
PO BOX 4444
JANESVILLE, WI 53547-4444

20 August 2019

This is a claim of Clear and Unmistakable Error under provisions of 38 USC 5109(a). I respectfully request the VA to call a clear and unmistakable error on part of the 12 July 2019 decision and correct it. In the decision letter dated 12 July 2019 I was denied entitlement to individual unemployability.

From the 12 July 2019 decision -
"We took this evidence into consideration, but other evidence shows your disabilities do not prevent you from all employment." (Attachment 1). 38 CFR 3.102 - states in part "… By reasonable doubt is meant one which exists because of an approximate balance of positive and negative evidence which does not satisfactorily prove or disprove the claim…".
The rating examiner failed to apply this section of 38 CFR because two differing opinions of equal weight exist in equipoise and by VA regulation, Federal Law and controlling Court Decisions require that the issue is to be decided in favor of the Veteran.

38 CFR 4.3 - states in part "…When after careful consideration of all procurable and assembled data, a reasonable doubt arises regarding the degree of disability such doubt will be resolved in favor of the claimant…".
The rating examiner failed to apply this section of 38 CFR because two differing opinions of equal weight exist in equipoise and by VA regulation, Federal Law and controlling Court Decisions require that the issue is to be decided in favor of the Veteran.

38 CFR 4.2 states in part"…It is the responsibility of the rating specialist to interpret reports of examination in the light of the whole recorded history, reconciling the various reports into a consistent picture so that the current rating may accurately reflect the elements of disability present. Each disability must be considered from the point of view of the veteran working or seeking work…".
The rating examiner failed to apply this section of Federal law because they failed to consider the finding by my primary care physician that confirms that I am incapable of maintaining employment due to my Service Connected disabilities.

M21-1,III.iv.5.A.3.e Requires that "The rating activity may not rely upon its own unsubstantiated medical conclusions to reject expert medical evidence provided by the claimant." M21-1 cites US CAVC opinions Shipwash V. Brown and Colvin V. Derwinskias governing legal opinions re: the unsubstantiated medical conclusions of the rating activity.
The rating examiner applied their own medical conclusions when despite my primary care physician stating that I am unable to work, the VA examiner decided that I am capable of working and failed to provide the medical opinion to me stating such.

In the 12 July 2019 decision -
The rating examiner stated "the evidence of record does not show that you terminated your employment due to your service connected disabilities." (Attachment 1). This is irrelevant. M21-1, IV.ii.2.F.4.c. requires that "The following factors have no bearing on a determination of whether SC disability renders a Veteran unemployable: voluntary withdrawal from the labor market.".

You have violated the tenets of basic VA case law within 38 CFR 4.6:

38 CFR § 4.6 - Evaluation of evidence.

"The element of the weight to be accorded the character of the veteran's service is but one factor entering into the considerations of the rating boards in arriving at determinations of the evaluation of disability. Every element in any way affecting the probative value to be assigned to the evidence in each individual claim must be thoroughly and conscientiously studied by each member of the rating board in the light of the established policies of the Department of Veterans Affairs to the end that decisions will be equitable and just as contemplated by the requirements of the law."

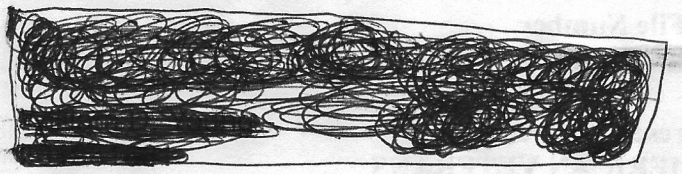
That violation has been to my detriment as the manifested outcome was an illegal denial of TDIU.

The rating examiner has manipulated the reason I receive SSDI. The Social Security Administration found me to be totally disabled by my Service Connected depression in 2005. (Attachment 2), M21-1, IV.ii.2.F.2.i. requires that under "Notes:
Although decisions by SSA regarding a Veteran's unemployability are not controlling for VA determinations, SSA's record may indicate the level of impairment of the Veteran's SC disability.
When reviewing SSA records, pay close attention to what disability resulted in an award of SSA benefits, and whether that disability is one for which SC has been awarded.".
M21-1 cites US CAVC opinion Murincsak v. Derwinski. The Court also indicated that the Secretary's duty to assist includes obtaining this evidence from the SSA, and giving it appropriate consideration and weight in its determination to award or deny appellant a total disability rating based on unemployability. At a minimum, the decision of the administrative law judge at the SSA "is evidence which cannot be ignored and to the extent its conclusions are not accepted, reasons or bases should be given therefor."

On 18 December 2018 Vocational Rehabilitation letter issued (Attachment 3), stating unequivocally that my Service Connected disabilities make me ineligible for training. M21-1 IV.ii.2.F.2.j. states "The VR&E records may document the Veteran's participation in a training program, or show that training was not feasible or was unsuccessful." This will forever put me in a position of substandard earning potential and zero assistance from that segment of Veterans Administration Benefits. For VA Benefits purposes, a veteran who is unfit for retraining after a Vocational Rehabilitation evaluation, due to their Service Connected disabilities, is by default unsuitable for employment earning more than the poverty level.

This decision would be manifestly different if 38 CFR had been followed correctly and the correct rating decision had been made. These errors in application of 38 CFR have manifested a detrimental outcome to me by being denied individual unemployability that I am entitled to because of the symptoms that I suffer from daily due to my Service Connected disabilities that prevent me from any employment. Please correct these errors that will subsequently approve me for individual unemployability and apply the earliest effective date possible.

Respectfully submitted,



Attachment #1 12 July 2019 Decision
Attachment #2 SSDI Award
Attachment #3 VA Vocational Rehabilitation Letter

Attachment #1

[redacted]

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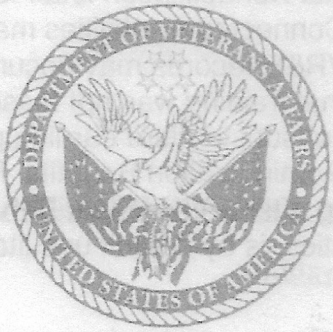

DEPARTMENT OF VETERANS AFFAIRS
Veterans Benefits Administration
Regional Office

[redacted]

VA File Number
[redacted]

Represented By:
DISABLED AMERICAN VETERANS
Rating Decision
07/12/2019

INTRODUCTION

The records reflect that you are a veteran of the Peacetime. You served in the Army from October 27, 1981 to October 26, 1985. You filed a claim for increased evaluation that was received on June 5, 2019. Based on a review of the evidence listed below, we have made the following decision(s) on your claim.

DECISION

The claim for entitlement to individual unemployability remains denied.

EVIDENCE

- Rating Decision, dated May 9, 2019
- VA letter, dated May 10, 2019
- Vocational Rehabilitation and Employment Division letter, received on June 05, 2019
- VA Form 20-0995 Supplemental Claim Application, received on June 05, 2019
- Salisbury VAMC treatment records dated August 2017 to July 2018

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REASONS FOR DECISION

Entitlement to individual unemployability.

The claim for individual unemployability is considered reopened. (38 CFR 3.156) Entitlement to individual unemployability remains denied because the evidence does not show that you are unable to secure or follow a substantially gainful occupation as a result of service-connected disabilities. (38 CFR 4.16, 38 CFR 4.18)

Entitlement to individual unemployability remains denied because the evidence does not show that you are unable to secure or follow a substantially gainful occupation as a result of service-connected disabilities.

Total disability ratings for compensation based on individual unemployability may be assigned where the schedular rating is less than total if it is found that the disabled person is unable to secure or follow a substantially gainful occupation as a result of 1) a single service-connected disability ratable at 60 percent or more, or 2) as a result of two or more disabilities, provided at least one disability is ratable at 40 percent or more, and there is sufficient additional service-connected disability to bring the combined rating to 70 percent or more. For the purposes ofone60 percent disability, or one 40 percent disability in combination, the following will be considered as one 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); multiple injuries incurred inaction; or multiple disabilities incurred as a prisoner of war. Prior employment or unemployment status is immaterial if your disabilities render you unemployable (specified under38 C.F.R.§§3.340, 3.341, 3.343, and 4.16).

Letter from Vocational Rehabilitation and Employment Division shows that your primary physician stated you are unable to work and that your service connected conditions. We took this evidence into consideration, but other evidence shows your disabilities do not prevent you from all employment. Additionally, the evidence of record does not show that you terminated your employment due to your service connected disabilities.

Favorable Findings:
There were no favorable findings.

REFERENCES:

Title 38 of the Code of Federal Regulations, Pensions, Bonuses and Veterans' Relief contains the regulations of the Department of Veterans Affairs which govern entitlement to all veteran benefits. For additional information regarding applicable laws and regulations, please consult your local library, or visit us at our website, www.va.gov.

Next, the Administrative Law Judge must determine at step four whether the claimant has the residual functional capacity to perform the requirements of his past relevant work (20 CFR 404.1520(f)). The term past relevant work means work performed (either as the claimant actually performed it or as it is generally performed in the national economy) within the last 15 years or 15 years prior to the date that disability must be established. In addition, the work must have lasted long enough for the claimant to learn to do the job and have been SGA (20 CFR 404.1560(b) and 404.1565). If the claimant has the residual functional capacity to do his past relevant work, the claimant is not disabled. If the claimant is unable to do any past relevant work or does not have any past relevant work, the analysis proceeds to the fifth and last step.

At the last step of the sequential evaluation process (20 CFR 404.1520(g)), the Administrative Law Judge must determine whether the claimant is able to do any other work considering his residual functional capacity, age, education, and work experience. If the claimant is able to do other work, he is not disabled. If the claimant is not able to do other work and meets the duration requirement, he is disabled. Although the claimant generally continues to have the burden of proving disability at this step, a limited burden of going forward with the evidence shifts to the Social Security Administration. In order to support a finding that an individual is not disabled at this step, the Social Security Administration is responsible for providing evidence that demonstrates that other work exists in significant numbers in the national economy that the claimant can do, given the residual functional capacity, age, education, and work experience (20 CFR 404.1512(g) and 404.1560(c)).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After careful consideration of the entire record, the Administrative Law Judge makes the following findings:

1. The claimant meets the insured status requirements of the Social Security Act through December 31, 2005.

2. The claimant has not engaged in substantial gainful activity since June 19, 2005, the amended alleged onset date (20 CFR 404.1520(b) and 404.1571 *et seq.*).

3. The claimant has the following severe impairments: arthritis with significant pain and depression (20 CFR 404.1520(c)).

The above impairments cause significant limitation in the claimant's ability to perform basic work activities.

The record shows that the claimant is required to use prescribed Methadone three times a day for pain which causes the claimant significant drowsiness during the day. He has arthritis of the back and of the shoulders complicated by injuries in multiple motor vehicle accidents. The claimant has been noted by consulting physicians of record to be preoccupied with his pain and

See Next Page

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to have physical difficulty with posturing and with sitting (Exhibit B3F). In addition to Methadone, the claimant is prescribed Baclofen and Hydrocodone for his pain and back spasms (Exhibit B-7E).

4. The claimant does not have an impairment or combination of impairments that meets or medically equals one of the listed impairments in 20 CFR Part 404, Subpart P, Appendix 1 (20 CFR 404.1520(d)).

The Administrative Law Judge has carefully evaluated the claimant's physical impairment under Section 1.00 *Musculoskeletal System* of the Listing of Impairments, and is unable to find that the severity criteria of that section, or of any other section of the Listings, is met or equaled.

Regarding the claimant's depression, the Administrative Law Judge has evaluated the claimant's symptoms under Section 12.04 *Affective Disorders* of the Listing of Impairments and has found that the claimant's depression is a severe disorder. The State Agency consultants defined the claimant's depressive symptoms as sleep disturbance, psychomotor agitation or retardation, decreased energy, and difficulty concentrating or thinking (Exhibit B-5F). In addition, the Administrative Law Judge credits the claimant's hearing testimony regarding suicidal ideation, which the claimant also noted to David C. Johnson, M.A., a licensed psychological associate, on July 23, 2005 (Exhibit B3F). Following Mr. Johnson's evaluation of the claimant's mental status, he assessed the claimant with social withdrawal and detachment from others. Mr. Johnson also noted that the claimant would have difficulty keeping with the pace of others in a job setting similar to the claimant's past work as a computer programmer (Exhibit B-3F).

The State Agency evaluated the claimant by means of a Mental Residual Functional Capacity Assessment and determined that the claimant's mental ability was moderately limited in 11 areas out of 20 areas evaluated (Exhibit B-8F). Further, the State Agency determined that the claimant has the following degree of limitation in the broad areas of functioning set out in the disability regulations for evaluating mental disorders and in the mental disorders listings in 20 CFR, Part 404, Subpart P, Appendix 1: mild restriction of activities of daily living; moderate difficulties in maintaining social functioning; moderate difficulties in maintaining concentration, persistence or pace; and no episodes of decompensation. The record does not establish the "C" criteria of Section 12.04 (Exhibit B-5F and B-9F).

There is no evidence to contradict the findings of Mr. Johnson and the determinations of the State Agency consultants. Therefore, the Administrative Law Judge concurs with their opinions and finds that the claimant's mental impairment is severe and in combination with the effects of significant narcotic pain medication, precludes the claimant from the consistent performance of basic work tasks. The claimant has been prescribed Citalopram Hydrobromide (Prozac) for depression for the past 10 years (Exhibit B-7E).

5. After careful consideration of the entire record, the Administrative Law Judge finds that the claimant does not have the residual functional capacity to perform basic work activities on a sustained basis for a normal 8-hour work day

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Attachment #3

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Department of Veterans Affairs
Vocational Rehabilitation and Employment Division
210 Franklin Road S. W.
Roanoke, VA 24011

12/18/2018

[redacted]

In Reply Refer: 314-28
VA File Number:
Last 4 digits: [redacted] / 00

Dear [redacted]

This letter contains important information about your VA benefits. Please read it carefully.

The evidence of record in your case indicates that your VA Primary Care Physician has indicated that you are unable to work and that your SCDs are permanent in nature. Since VR&E is an employment program and you have indicated that you have no independent living needs, in accordance with CFR 21.198, all action on your claim will be discontinued 30 days from the date of this letter.

If you do not agree with this decision, you have 30 days to let us know. If you contact us within 30 days of this letter you may:

1. **Meet with a staff member to review the basis for the decision, including any relevant written documentation or material; and**
2. **Submit to the VA, any material or information you may have which is relevant to the decision.**

Remember, if you disagree with our decision and want to take advantage of the opportunity to discuss it with the staff or submit additional information, you must do so within 30 days. After that date, you will be discontinued from evaluation and planning status as we are unable, at this time, to develop a plan of services for you. You have one year to appeal our decision to the Board of Veterans Appeals.

Please call me at 434-592-5785, send an email to Mildred.Hall@va.gov or write to me at the address above to schedule an appointment or to request additional information about this determination.

Respectfully,

Mildred Hall

Mildred Hall, MS, CRC
Rehabilitation Counselor

Enclosure: VA Form 21-4138
VA Form 4107

cc: DISABLED AMERICAN VETERANS