

**IN THE UNITED STATES
COURT OF APPEALS FOR VETERANS CLAIMS**

MELVIN D. CARTER,)	
Appellant,)	
)	
v.)	Docket No. 20-220
)	
DENIS MCDONOUGH,)	
Secretary of Veterans Affairs,)	
Appellee.)	

MOTION FOR RECONSIDERATION AND PANEL REVIEW

Under Vet. App. R. 35(a)(1)(A), Mr. Carter moves the Court to reconsider its March 31, 2021, single-judge memorandum decision. If the Court does not reconsider, he moves for panel review under Rule 35(a)(1)(C).

Appealed Claim

Mr. Carter claimed TDIU, and his appeal was of the injuries that make him unemployable. He never claimed—or appealed a denial of—SMC(s). If his TDIU appeal were successful, the VA would have to grant him SMC(s).¹

Facts and Procedural History

The Appellant—Melvin Carter—claimed TDIU. The VA found him unemployable due to all his service-connected disabilities. He appealed the AOJ’s

¹ *Bradley v. Peake*, 22 Vet. App. 280, 293 (2008).

reasons for finding him unemployable by arguing his myxofibrosarcoma (MFX) alone makes him unemployable. The AOJ never responded. As part of his appeal, Mr. Carter argued the Board should order the AOJ to adjudicate his TDIU appeal. The Board refused because it surmised the TDIU reasons would not change Mr. Carter's rating. But the TDIU reasons change Mr. Carter's compensation level. Because he is unemployed for MFX alone and has a separate 60% coronary artery disease (CAD) rating, he is entitled to SMC at the 100/60 rate based on his appeal. He appealed to this Court.

Mr. Carter challenged the Board's finding² that "the award for a TDIU is unaffected by" what disabilities make Mr. Carter unemployable.³ His challenge was not limited to the Board's clearly erroneous finding but also alleged that the Board erred purely as a matter of law. He argued the Board misapplied:

- 38 U.S.C. § 1114(s) when it failed to adjudicate Mr. Carter's appeal that would affect his entitlement to SMC;⁴
- 38 C.F.R. § 20.202 by not considering Mr. Carter's SMC theory of entitlement when he appealed the VA's TDIU decision in an NOD and to the Board;⁵
- 38 C.F.R. § 3.103(a) by not providing him a written decision on his appeal and not giving him a decision addressing his TDIU;⁶

² R. 7.

³ Mr. Carter's opening brief (AB) 5-15.

⁴ AB 6.

⁵ AB 6.

⁶ AB 7.

- 38 C.F.R. § 19.26 by refusing to address Mr. Carter’s TDIU appeal;⁷
- 38 C.F.R. § 19.29, by failing to order the VA to issue either a new rating decision changing the TDIU reasons and granting Mr. Carter SMC(s) or an SOC complete enough to allow him to present his case before the Board, citing the relevant laws and regulations and explaining its determination;⁸
- 38 C.F.R. § 19.30 when it did not send Mr. Carter instructions for perfecting his TDIU appeal;⁹
- 38 C.F.R. § 19.35 by never certifying Mr. Carter’s TDIU appeal to the Board;¹⁰
- *Bradley v. Peake*¹¹ by not recognizing the importance of which injuries make Mr. Carter unemployable;¹²
- *Norris v. West*¹³ when it did not maximize Mr. Carter’s benefits by refusing to consider entitlement to SMC “as an ancillary benefit to basic disability compensation where the medical evidence indicates potential eligibility;”¹⁴
- 38 U.S.C. § 7104(d)(1) by not adequately explaining its refusal to order the AOJ to issue an SOC for Mr. Carter’s TDIU appeal;¹⁵ and
- 38 U.S.C. § 7104(d)(1) when it did not explain why it did not matter what injuries made Mr. Carter unemployable.¹⁶

⁷ AB 7.

⁸ AB 7.

⁹ AB 7.

¹⁰ AB 7.

¹¹ 22 Vet. App. 280, 293 (2008).

¹² AB 5-15, Mr. Carter’s reply brief (RB) 7.

¹³ 12 Vet. App. 413, 420 (1999).

¹⁴ AB 9-10.

¹⁵ AB 11-13.

¹⁶ AB 11-13.

After the briefing, Mr. Carter moved for oral argument. Several months later—without any new entries on this docketed appeal—the Court re-docketed Mr. Carter’s appeal as a petition.¹⁷ Because of the negative impact a petition—compared to an appeal remand—would have on his rights, Mr. Carter moved to dismiss the petition. Within a few days, the Court dismissed the petition, denied oral argument, and issued a one-sentence analysis of why the Court was dismissing his appeal: “The Court concludes that it does not have jurisdiction to address the appellant’s contention as part of this appeal because the appellant does not challenge any findings in the December 2019 Board decision.”¹⁸

The Court should reconsider its decision for several reasons. First, it overlooked when it has jurisdiction—this Court’s jurisdiction does not depend on whether an appellant challenges a finding.¹⁹ Second, if the Court misspoke and meant both holdings and findings, Mr. Carter challenged both.

This Court has jurisdiction over more than findings. Congress also required it to:

- (1) decide all relevant questions of law, interpret constitutional, statutory, and regulatory provisions, and determine the meaning or applicability of the terms of an action of the Secretary;
- (2) compel action of the Secretary unlawfully withheld or unreasonably delayed;

¹⁷ CAVC Docket # 21-1840.

¹⁸ Mem. Dec. 6.

¹⁹ 38 US.C. §§ 7252 and 7261.

(3) hold unlawful and set aside decisions, findings (other than those described in clause (4) of this subsection), conclusions, rules, and regulations issued or adopted by the Secretary, the Board of Veterans' Appeals, or the Chairman of the Board found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or

(D) without observance of procedure required by law.²⁰

Mr. Carter did not have to challenge any findings for this Court to have jurisdiction over his appeal. Nevertheless, he challenged the Board's finding that the injuries underlying his unemployability are irrelevant. They are relevant. And his entire brief argues the Board's erroneous finding is the byproduct of its misapplication of nearly a dozen laws and regulations.

The Court should reconsider its decision, address Mr. Carter's appeal, and remand to the Board with an order to provide him with an SOC.

The AOJ's TDIU decision injured Mr. Carter. He appealed to the Board, but the Board denied him the benefits he sought. The Board's decision is final. He has

²⁰ 38 U.S.C. § 7261(a)(1)-(3).

standing at this Court. His brief challenged the Board on issues of fact and law.

This Court has jurisdiction and must address Mr. Carter's appeal.

Mr. Carter appealed to the Board. The Board mislabeled Mr. Carter's appeal a "statement dated August 2018 requesting that VA clarify the disabilities on which the award of a TDIU was based."²¹ The Court cited the Board's misnomer rather than citing the record and calling it what it was—an appeal. Mr. Carter appealed—not requested clarification of—the AOJ's TDIU decision.²²

The Board's decision is final. The Board denied Mr. Carter's TDIU appeal that—if successful—would have led to the VA granting SMC(s). And it did so in a way that makes it impossible for Mr. Carter to receive the SMC(s) owed to him unless the Board's decision is vacated or reversed. The Board denied the claim because it considered it but did not act on it.²³ The VA denies a claim when, in its decision, it provides "sufficient information for a reasonable claimant to know that he would not be awarded benefits."²⁴ The Board's decision absolved the AOJ from ever responding to Mr. Carter's appeal. And the Court affirmed the Board's errors.

Mr. Carter has standing. His MFX and its residuals alone make him unemployable.²⁵ His other service-connected disabilities separately add up to a

²¹ R. 7.

²² Exhibit.

²³ *Andrews v. McDonald*, 646 F. App'x 1001, 1006 (Fed. Cir. 2016).

²⁴ *Adams v. Shinseki*, 568 F.3d 956, 963 (Fed. Cir. 2009).

²⁵ R. 218-223.

60% combined rating, and he should be entitled to SMC at the housebound rate under 38 U.S.C. § 1114(s). The difference between 100% without SMC(s) and 100% with SMC(s) is \$370.61 per month.²⁶ So which of Mr. Carter's disabilities make him unemployable is significant, and Mr. Carter is entitled to a decision on his appeal.

Mr. Carter raised issues of fact and law. In his brief, Mr. Carter argued the Board's finding that what disabilities make him unemployable was clearly erroneous. He also raised many questions of law and argued the Board legally erred by not applying the law correctly.

This Court has jurisdiction. The appealed decision is a final Board decision denying VA benefits.²⁷ The Board's decision contains a clearly erroneous finding that it does not matter what disabilities make Mr. Carter unemployable.²⁸ The Board's denial is a result of its numerous misapplications and non-applications of law.²⁹

²⁶ <https://www.va.gov/disability/compensation-rates/veteran-rates/>, <https://www.va.gov/disability/compensation-rates/special-monthly-compensation-rates/> (both last accessed July 22, 2020).

²⁷ 38 U.S.C. § 7252(a); *Ledford v. West*, 136 F.3d 776, 779-780 (Fed. Cir. 1998).

²⁸ 38 U.S.C. §§ 7252, 7261(a)(4).

²⁹ 38 U.S.C. §§ 7252, 7261(a)(1)-(3).

Conclusion

The Court should reconsider Mr. Carter's appeal and not dismiss it. If the appeal remains dismissed after the judge reconsiders, a panel should review the case and issue a new decision.

April 16, 2021.

Submitted,

/s/ Harold Hoffman

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