

JERMAINE W. MERRITT  
7014 STEELE VIEW CIR  
Waxhaw, NC 28173-0185



## BOARD OF VETERANS' APPEALS

FOR THE SECRETARY OF VETERANS AFFAIRS

WASHINGTON, DC 20038

Date: August 20, 2025

SS XXX XX 3455

JERMAINE W. MERRITT  
7014 STEELE VIEW CIR  
Waxhaw, NC 28173-0185

Dear Appellant:

The Board of Veterans' Appeals made a decision on your appeal.

<i>If your decision contains a</i>	<i>What happens next</i>
Grant	The Department of Veterans Affairs (VA) will contact you regarding next steps, which may include issuing payment. Please refer to VA Form 4597, which is attached for additional options.
Remand	Additional development is needed. VA will contact you regarding next steps.
Denial or Dismissal	Please refer to VA Form 4597, which is attached for your options.

If you have any questions, please contact your representative, if you have one, or check the status of your appeal at <http://www.vets.gov>.

Sincerely yours,

**Outbound Operations**  
Office of the Clerk of the Board  
Board of Veterans' Appeals

Enclosures (1)  
CC: AMY R FOCHLER, Attorney

AMY R FOCHLER, Attorney  
11535 Carmel Commons Blvd, STE 101  
Charlotte, NC 28226-5314



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## **BOARD OF VETERANS' APPEALS**

**FOR THE SECRETARY OF VETERANS AFFAIRS**

IN THE APPEAL OF  
**JERMAINE WINSLOW COREY**  
**MERRITT**

Represented by  
Amy R. Fochler, Attorney

SS XXX XX 3455  
Docket No. 221121-298589

DATE: August 20, 2025

### **ORDER**

Entitlement to a total disability rating based on individual unemployability (TDIU) prior to November 13, 2015, is granted.

### **FINDING OF FACT**

From June 8, 2012, to November 13, 2015, the Veteran meets the schedular criteria for a TDIU, as he has been unable to secure and follow substantially gainful employment due to his service-connected obstructive sleep apnea (OSA), diabetes mellitus type 1 (DM), bilateral upper extremity diabetic peripheral neuropathy, and bilateral lower extremity diabetic peripheral neuropathy.

### **CONCLUSION OF LAW**

The criteria for entitlement to a TDIU from June 8, 2012, to November 13, 2015, have been met. 38 U.S.C. § 1155, 5107; 38 C.F.R. §§ 3.102, 3.340, 3.341, 3.400, 4.16(a).

## **REASONS AND BASES FOR FINDING AND CONCLUSION**

The Veteran had active service in the United States Navy from December 1996 to December 2000.

The rating decision on appeal was issued in November 2022 and constitutes an initial decision; therefore, the modernized review system, also known as the Appeals Modernization Act (AMA), applies.

In the November 2022 VA Form 10182, Decision Review Request: Board Appeal (Notice of Disagreement), the Veteran elected the Evidence Submission docket.

Therefore, the Board may only consider the evidence of record at the time of the November 2022 agency of original jurisdiction (AOJ) decision on appeal, as well as any evidence submitted by the Veteran [or representative] with, or within 90 days from receipt of, the VA Form 10182. 38 C.F.R. § 20.303. If evidence was submitted either (1) during the period after the AOJ issued the decision on appeal and prior to the date the Board received the VA Form 10182, or (2) more than 90 days following the date the Board received the VA Form 10182, the Board did not consider it in its decision. 38 C.F.R. §§ 20.300, 20.303, 20.801.

If the Veteran would like VA to consider any evidence that was submitted that the Board could not consider, the Veteran may file a Supplemental Claim (VA Form 20-0995) and submit or identify this evidence. 38 C.F.R. § 3.2501. If the evidence is new and relevant, VA will issue another decision on the claim[s], considering the new evidence in addition to the evidence previously considered. *Id.* Specific instructions for filing a Supplemental Claim are included with this decision.

### **Entitlement to a total disability rating based on individual unemployability (TDIU) prior to November 13, 2015**

The Veteran contends that he has been unable to secure and follow substantially gainful employment prior to November 13, 2015, due to his service-connected disabilities, excluding MDD.

VA will grant TDIU when the evidence shows that a veteran is precluded, by reason of service-connected disabilities, from obtaining and maintaining any form of gainful employment consistent with his education and occupational experience. 38 C.F.R. §§ 3.340, 3.341, 4.16. TDIU is granted only when it is established that the service-connected disabilities are so severe, standing alone, as to prevent the retaining of gainful employment. If there is only one such disability, it must be rated at least 60 percent disabling to qualify for benefits based on individual unemployability. 38 C.F.R. § 4.16 (a). If there are two or more such 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. 38 C.F.R. § 4.16 (a).

Entitlement to a total rating must be based solely on the impact of service-connected disabilities on the ability to keep and maintain substantially gainful employment. 38 C.F.R. §§ 3.340, 3.341, 4.16. 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).

Where these percentage requirements are not met, entitlement to benefits on an extraschedular basis may be considered when a veteran is unable to secure and follow a substantially gainful occupation by reason of service-connected disabilities, and consideration is given to the veteran’s background including his employment and educational history. 38 C.F.R. §§ 3.321 (b), 4.16(b). The Board does not have the authority to assign an extraschedular TDIU rating in the first instance. *Bowling v. Principi*, 15 Vet. App. 1 (2001). Rather, the issue must be referred to the Director of Compensation Service for such assessment in the first instance. *Kuppamala v. McDonald*, 27 Vet. App. 447, 457 (2015). Thereafter, the Board has jurisdiction to review the entirety of the Director’s decision denying or granting an extraschedular rating and is authorized to assign an extraschedular rating when appropriate. *Kuppamala*, 27 Vet. App. at 457.

For VA purposes, the term unemployability is synonymous with inability to secure and follow a substantially gainful occupation. VAOPGPREC 75-91, 57 Fed. Reg. 2,317 (Jan. 21, 1992). Consideration may be given to the veteran’s education, special training, and previous work experience, but not to his or her age or to the impairment caused by nonservice-connected disabilities. 38 C.F.R. §§ 3.341, 4.16,

4.19; *Van Hoose v. Brown*, 4 Vet. App. 361 (1993). A high rating in itself is recognition that the impairment makes it difficult to obtain or keep employment, but the ultimate question is whether the Veteran is capable of performing the physical and mental acts required by employment, not whether he or she can find employment. *Van Hoose*, 4 Vet. App. at 363.

The ability to work sporadically or obtain marginal employment is not substantially gainful employment. 38 C.F.R. § 4.16 (a); *Moore v. Derwinski*, 1 Vet. App. 356, 358 (1991). Marginal employment, i.e., earned annual income that does not exceed the poverty threshold for one person, is not considered substantially gainful employment. 38 C.F.R. § 4.16 (a).

Whether a veteran is unemployable requires the Board to “consider both that person’s abilities and his employment history.” *Faust v. West*, 13 Vet. App. 342, 354 (2000). *But see Camacho v. Nicholson*, 21 Vet. App. 360, 367 (2007) (holding that employer restrictions on driving due to insulin dependency does not constitute a regulation of activities).

Attention should be given to the veteran’s history, education, skills, and training; whether the veteran has the physical ability (both exertional and nonexertional) to perform the types of activities required by the occupation at issue (e.g., lifting, bending, sitting, standing, walking, climbing, as well as auditory and visual limitations); and whether the veteran has the mental ability to perform the activities required by the occupation at issue (e.g., memory, concentration, ability to adapt to change, handle work place stress, get along with coworkers, and demonstrate reliability and productivity). *Ray v. Wilkie*, 31 Vet. App. 58, 73 (2019).

The test of individual unemployability is whether the Veteran, as a result of his service-connected disability alone, is unable to secure or follow any form of substantially gainful occupation that is consistent with his education and occupational experience. 38 C.F.R. §§ 3.321, 3.340, 3.341, 4.16.

Prior to November 13, 2015, the Veteran was service-connected for OSA rated at 50 percent since June 8, 2012, DM rated at 20 percent since June 8, 2012, and 40 percent since September 15, 2014, bilateral upper peripheral neuropathy individually rated at 10 percent since June 8, 2012, and 30 percent since August 1,



2022, and bilateral lower peripheral neuropathy individually rated at 10 percent since June 8, 2012, and 30 percent since August 1, 2022. *See* April 2025 Codesheet. The Veteran's combined evaluation for compensation purposes is 80 percent since June 8, 2012. 38 C.F.R. § 4.25. As such, he has met the threshold criteria for a TDIU since June 8, 2012. The remaining inquiry is whether he is unable to secure or follow substantially gainful occupation due solely to his service-connected disabilities excluding MDD as early as June 8, 2012.

The Veteran last worked full time in September 2010 as an airport coordinator. *See* July 20200 VA Form 21-8940. His education includes two years of college and training for CPCC from August 1, 2012, to February 1, 2012. The record indicates that the Veteran made efforts in 2010 to start his own nonprofit mentoring business, as well as sporadic work in construction in 2012 earning minimal income. *See* VA Treatment Records.

In an August 2013 VA examination for diabetes mellitus, the examiner noted that the Veteran experienced functional impairment due to poorly controlled DM1 with multiple dose insulin requirement. *See* August 2014 VA Examination.

In a September 2014 VA examination for OSA, the Veteran reported falling asleep while sitting before he started using his CPAP machine. *See* September 2014 VA Examination. His OSA was first diagnosed in 2011.

In reviewing the Veteran Social Security Administration (SSA) records, the Veteran's history was noted in June 2011 with complaints of always feeling tired and experiencing excessive daytime sleepiness. *See* SSA Records.

In a July 2022 private vocational evaluation, the vocational expert reviewed the Veteran's claim file and provided a summary of same. *See* July 2022 Private Vocational Evaluation. The expert opined that the Veteran lacked the ability to concentrate on his work and complete tasks due to his daytime fatigue and would be off task at a level not within industry standards. Additionally, his bilateral upper and lower peripheral neuropathy may impact his ability to handle, finger, and feel. This expert opined within a reasonable degree of vocational certainty that the Veteran's service-connected disabilities likely resulted in his inability to secure or

maintain substantially gainful employment at any exertional level as of June 20, 2011.

In an August 2022 VA examination for diabetic sensory-motor peripheral neuropathy, the Veteran reported feeling like something is crawling on his feet, as well as bilateral hand numbness, tingling, and a feeling of needle sticks. *See* August 2022 VA Examination. After evaluating the Veteran, the examiner concluded that the Veteran's bilateral upper and lower peripheral neuropathy impairs his ability to work and that he would not be suited for work as a result.

The totality of the evidence indicates that the Veteran has functional limitations due to his service-connected disabilities which render him unable to secure or maintain substantially gainful employment from June 8, 2012, to November 13, 2015. The combination of the Veteran's poorly controlled diabetes mellitus type 1, inability to focus due to excessive daytime somnolence and fatigue, as well as his difficulty with handling, fingering, and feeling, would impact his reliability and productivity and result in diminished work performance that would not be tolerated by an employer.

(Continued on next page.)

As such, when weighing the evidence in favor of and against the Veteran's claim, affording the Veteran the benefit of the doubt, the Board finds that a TDIU is warranted June 8, 2012, to November 13, 2015, as June 8, 2012 is the earliest date on which the evidence demonstrates that the Veteran met the requirements of 4.16(a) and was unable to secure or maintain substantially gainful employment. In short, the Board has resolved reasonable doubt in the Veteran's favor and finds that a TDIU is warranted from June 8, 2012, to November 13, 2015. This constitutes a full grant of the benefits sought on appeal.



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Paulette Vance Burton  
Veterans Law Judge  
Board of Veterans' Appeals



Attorney for the Board

C. Popa

*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.*

## If you disagree with VA's decision

**Choose one of the following review options** to continue your case. If you aren't satisfied with that review, you can try another option. Submit your request before the indicated deadline in order to receive the maximum benefit if your case is granted.

Review option	Supplemental Claim <b>Add new and relevant evidence</b>	Higher-Level Review Not Available <b>Ask for a new look from a senior reviewer</b>	Board Appeal Not Available <b>Appeal to a Veterans Law Judge</b>	Court Appeal <b>Appeal to Court of Appeals for Veterans Claims</b>
Who and what	A reviewer will determine whether the new evidence changes the decision.	Because your appeal was decided by a Veterans Law Judge, you cannot request a Higher-Level Review.	You cannot request two Board Appeals in a row.	The U.S. Court of Appeals for Veterans Claims will review the Board's decision. You can hire an attorney to represent you, or you can represent yourself.
Estimated time for decision	 <b>About 4-5 months</b>	Please choose a different option for your next review.	Please choose a different option for your next review.	Find more information at the Court's website: <a href="https://uscourts.cavc.gov">uscourts.cavc.gov</a>
Evidence	 You must submit evidence that VA didn't have before that supports your case.			
Discuss your case with VA				
Request this option	Submit VA Form 20-0995 Decision Review Request: Supplemental Claim <a href="https://va.gov/decision-reviews">VA.gov/decision-reviews</a>			File a Notice of Appeal <a href="https://uscourts.cavc.gov">uscourts.cavc.gov</a>  Note: A Court Appeal must be filed with the Court, not with VA.
Deadline	You have <b>1 year</b> from the date on your VA decision to submit VA Form 20-0995.			You have <b>120 days</b> from date on your VA decision to file a Court Appeal.
How can I get help?	A Veterans Service Organization or VA-accredited attorney or agent can represent you or provide guidance. Contact your local VA office for assistance or visit <a href="https://va.gov/decision-reviews/get-help">VA.gov/decision-reviews/get-help</a> . For more information, you can call the White House Hotline <b>1-855-948-2311</b> .			

### **What is new and relevant evidence?**

In order to request a Supplemental Claim, you must add evidence that is both new and relevant. New evidence is information that VA did not have before the last decision. Relevant evidence is information that could prove or disprove something about your case.

VA cannot accept your Supplemental Claim without new and relevant evidence. In addition to submitting the evidence yourself, you can identify evidence, like medical records, that VA should obtain.

### **What is the Duty to Assist?**

The Duty to Assist means VA must assist you in obtaining evidence, such as medical records, that is needed to support your case. VA's Duty to Assist applied during your initial claim, and it also applies if you request a Supplemental Claim.

If you request a Higher-Level Review or Board Appeal, the Duty to Assist does not apply. However, the reviewer or judge will look at whether VA met its Duty to Assist when it applied, and if not, have VA correct that error by obtaining records or scheduling a new exam. Your review may take longer if this is needed.

### **What if I want to file a Court Appeal, but I'm on active duty?**

If you are unable to file a Notice of Appeal due to active military service, like a combat deployment, the Court of Appeals for Veterans Claims may grant additional time to file. The 120-day deadline would start or resume 90 days after you leave active duty. Please seek guidance from a qualified representative if this may apply to you.

### **What if I miss the deadline?**

Submitting your request on time will ensure that you receive the maximum benefit if your case is granted. Please check the deadline for each review option and submit your request before that date.

If the deadline has passed, you can either:

- Add new and relevant evidence and request a Supplemental Claim. Because the deadline has passed, the effective date for benefits will generally be tied to the date VA receives the new request, not the date VA received your initial claim. Or,
- File a motion to the Board of Veterans' Appeals.

### **What if I want to get a copy of the evidence used in making this decision?**

Call 1-800-827-1000 or write a letter stating what you would like to obtain to the address listed on this page.

### **Motions to the Board**

Please consider the review options available to you if you disagree with the decision. In addition to those options, there are three types of motions that you can file with the Board to address errors in the decision. Please seek guidance from a qualified representative to assist you in understanding these motions.

#### **Motion to Vacate**

You can file a motion asking the Board to vacate, or set aside, all or part of the decision because of a procedural error. Examples include if you requested a hearing but did not receive one or if your decision incorrectly identified your representative. You will need to write a letter stating how you were denied due process of law. If you file this motion within 120 days of the date on your decision letter, you will have another 120 days from the date the Board decides the motion to appeal to the Court of Appeals for Veterans Claims.

#### **Motion to Reconsider**

You can file a motion asking the Board to reconsider all or part of the decision because of an obvious error of effect or law. An example is if the Board failed to recognize a recently established presumptive condition. You will need to write a letter stating specific errors the Board made. If the decision contained more than one issue, please identify the issue or issues you want reconsidered. If you file this motion within 120 days of the date on your decision letter, you will have another 120 days from the date the Board decides the motion to appeal to the Court of Appeals for Veterans Claims.

#### **Motion for Revision of Decision based on Clear and Unmistakable Error**

Your decision becomes final after 120 days. Under certain limited conditions, VA can revise a decision that has become final. You will need to send a letter to VA requesting that they revise the decision based on a Clear and Unmistakable Error (CUE). CUE is a specific and rare kind of error. To prove CUE, you must show that facts, known at the time, were not before the judge or that the judge incorrectly applied the law as it existed at the time. It must be undebatable that an error occurred and that this error changed the outcome of your case. Misinterpretation of the facts or a failure by VA to meet its Duty to Assist are not sufficient reasons to revise a decision. Please seek guidance from a qualified representative, as you can only request CUE once per decision.

#### **Mail to:**

Board of Veterans' Appeals  
PO Box 27063  
Washington, DC 20038

#### **Or, fax:**

1-844-678-8979