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

No. 15-2299

WAYNE S. BISHOP, APPELLANT,

v.

ROBERT A. McDONALD,  
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before GREENBERG, *Judge*.

**MEMORANDUM DECISION**

*Note: Pursuant to U.S. Vet. App. R. 30(a),  
this action may not be cited as precedent.*

GREENBERG, *Judge*: The appellant, Wayne S. Bishop, appeals through counsel a February 24, 2015, Board of Veterans' Appeals (Board) decision that granted a 70% disability rating, but no higher for post-traumatic stress disorder (PTSD), effective March 12, 2008. Record (R.) at 2-21. The appellant argues that the Board failed to correctly apply the provisions of 38 C.F.R. § 4.130. Appellant's Brief at 2-12. For the following reason, the Court will vacate the February 2015 Board decision and remand the matter for readjudication.

Justice Alito noted in *Henderson v. Shinseki* that our Court's scope of review in this appeal is "similar to that of an Article III court reviewing agency action under the Administrative Procedure Act, 5 U.S.C. § 706." 562 U.S. 428, 432 n.2 (2011); *see* 38 U.S.C. § 7261. The creation of a special court solely for veterans, and other specified relations such as their widows, is consistent with congressional intent as old as the Republic. *See Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 n., 1 L. Ed. 436 (1792) ("[T]he objects of this act are exceedingly benevolent, and do real honor to the humanity and justice of Congress."). "The Court may hear cases by judges sitting alone or in panels, as determined pursuant to procedures established by the Court." 38 U.S.C. § 7254. Accordingly, the statutory command of Congress that a single judge may issue a binding decision, pursuant to procedures established by the Court, is "unambiguous, unequivocal, and unlimited." *Conroy v.*

*Aniskoff*, 507 U.S. 511, 514 (1993); *see generally Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990).

The appellant is a Vietnam veteran who served on active duty in the U.S. Army from July 1969 to January 1972 as a helicopter repairman. R. at 185 (Form DD 214). In March 2008, the appellant filed for benefits based on service connection for PTSD. R. at 993-1002. An April 2008 "Mental Health Triage Note" reflects that the appellant was treated for combat-related mental symptoms including homicidal thoughts, violence, trouble controlling his temper, and isolation. R. at 957. Later that month, the appellant sought VA medical treatment complaining that he had been having dreams about Vietnam. R. at 952. The attending psychiatrist noted that the appellant lived with his wife, experienced behavior of violence and homicidal thoughts, had only a few close friends, and reported fleeting thoughts of suicide without plan or intent. R. at 953. A July 2008 VA "Mental Health Note" reflects the appellant's reports that he "had several episodes of intense anger related to work and daughter in law, but was able to remove himself from the situation without physical aggression." R. at 551. The appellant continued to receive treatment for PTSD through the autumn of 2008. *See* R. at 532-33; 522-24.

In November 2008, the appellant underwent a VA examination, wherein the examiner noted that, as a result of the treatment, the appellant had managed his temper better and had improved sleep with less nightmares. R. at 375. During the examination, the appellant reported a history of "assaultiveness" and inappropriate behavior. R. at 380-81. Specifically, he reported that a week before the examination, a man tapped him on the shoulder and the appellant turned around and hit him, knocking him to the ground. R. at 380. The appellant then apparently told the man: "If you get up you will never get up again." R. at 380. The appellant also spoke about becoming homicidal during a flashback in 1990, and that he had suicidal ideations on a "fleeting" basis. R. at 382. The examiner noted symptoms of recurrent and intrusive recollections of a stressor event; acting or feeling as if the traumatic event were recurring; intense psychological distress at exposure to cues that symbolize or resemble the traumatic event; markedly diminished interest or participation in significant activities; feelings of detachment or estrangement from others; restricted range of affect; a sense of a foreshortened future; difficulty falling or staying asleep; irritability or outbursts of anger; difficulty concentrating; hypervigilance; and exaggerated startle response. R. at 383-84. The

examiner diagnosed the appellant with chronic PTSD, a depressive disorder secondary to PTSD, and alcohol abuse also secondary to PTSD; the examiner found the appellant's PTSD to be mild, and that he had responded positively to treatment. R. at 385. The examiner assigned a Global Assessment of Functioning (GAF) score of 45, which reflected his current functioning, and that this score reflected the appellant's "serious symptoms of suicidal ideation and moderate difficulties in work, social and family functioning." R. at 387. However, the examiner also stated that during a flashback the appellant's GAF score would be 25 because of homicidal thoughts. R. at 387.

In January 2009, the appellant underwent another VA examination, wherein the examiner opined that the appellant's PTSD was due to his combat experiences. R. at 490. In a February 2009 rating decision, the regional office denied the appellant's PTSD claim. R. at 894-99. The appellant appealed. R. at 812-17, 852-57.

In September 2010, a decision review officer (DRO) granted the appellant service connection for PTSD and awarded a 30% disability rating, effective March 12, 2008. R. at 767-75. In December 2011, the appellant filed a claim of entitlement to an increased rating for his PTSD and requested entitlement to TDIU. R. at 745-52.

In November 2012, the appellant underwent another VA examination, in which the examiner noted that the appellant had occupational and social impairment with deficiencies in most areas, such as work, school, family relations, judgment, thinking, and mood. R. at 146. The examiner also found that the appellant had the following symptoms: depressed mood; anxiety; suspiciousness; panic attacks more than once a week; chronic sleep impairment; mild memory loss; flattened affect; difficulty in understanding complex commands; impaired judgment; impaired abstract thinking; disturbances of motivation and mood; difficulty in establishing and maintaining effective work and social relationships; difficulty in adapting to stressful circumstances, including work or a worklike setting; inability to establish and maintain effective relationships; and impaired impulse control manifested by unprovoked irritability with periods of violence. R. at 150. The examiner assigned a GAF score of 40 based upon "the presence of major impairment across multiple areas of functioning including: anger outbursts that led to current unemployment and that he currently frequently directed towards his wife, social isolation, suspiciousness, poor concentration, excessive guilt." R. at 144. Later that month, the appellant was granted an increased disability rating of 70% for PTSD, effective

November 5, 2012. R. at 89-97, 100-18. The appellant appealed to the Board. R. at 60-65.

In February 2015, the Board issued the decision currently on appeal, wherein it granted the appellant a 70% disability rating for the entire appeal period, but no higher, for PTSD. R. at 2-21. In denying a 100% rating, the Board "acknowledge[d] that the Veteran was noted to have hallucinations and that the Veteran was noted as homicidal when experiencing flashbacks. However, the Veteran's hallucinations were not found to be persistent and the Veteran otherwise denied homicidal ideations and was not found to be a persistent threat to others." R. at 16. The Board also found that the higher rating was not warranted because the appellant denied suicidal ideation, he was properly groomed, his speech was normal, he was alert and oriented, had a "long term, albeit strained relationship with his wife," and participated in activities. R. at 16. The Board also pointed to the appellant's GAF scores as evidence that the appellant's PTSD most closely approximated the requirements of a 70% disability rating for the entire appeal period. R. at 16.

The Court agrees with the appellant's general contention that the Board "failed, as required by § 4.130, to analyze [the appellant's] symptoms as noted in the record in terms of how those symptoms impacted [the appellant's] social or occupational functioning," and as a result, failed to adequately consider the severity of the appellant's PTSD. Appellant's Brief at 6; *Vazquez-Claudio v. Shinseki*, 713 F.3d 112, 117 (Fed. Cir. 2013) ("[A] veteran may only qualify for a given disability rating under § 4.130 by demonstrating the particular symptoms associated with that percentage, or others of similar severity, frequency, and duration."). Most notably, the Board failed to consider the severity of the appellant's homicidal ideation related to his flashbacks, and instead appears to have required that the appellant exhibit persistent homicidal ideation and be a persistent threat to others. *See* R. at 16. Not only is "persistent homicidal ideation" not a symptom associated with a 100% disability rating under § 4.130, the Board appears to have considered this symptom in a vacuum. There is no dispute that the appellant has (1) flashbacks; (2) develops homicidal ideation when these flashbacks occur; and (3) no ability to control when a flashback may occur. The Board's reasoning appears to reflect that unless the appellant constantly sought to kill people, he would not be entitled to a 100% rating. However, the evidence reflects that if the appellant were to have a single flashback while working, the outcome could be catastrophic. *See* R. at 387. It is therefore unclear based on the Board's statement of reasons or bases why the appellant is not entitled to a 100% disability rating

for PTSD. *See Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1990) (in each of its decisions, the Board is required to provide a written statement of the reasons or bases for its findings and conclusions adequate to enable an appellant to understand the precise basis for the Board's decision as well as to facilitate review in this Court). Although the appellant argues for reversal, remand is the appropriate remedy. *See Coburn v. Nicholson*, 19 Vet.App. 427, 431 (2006) (holding that remand is appropriate when "the Court finds that the Board decision is defective in its reasons or bases thereby preventing proper review by the Court"). The Court will therefore remand the matter for the Board to provide an adequate statement of reasons or bases for its treatment of the evidence.

On remand, the appellant may present, and the Board must consider, any additional evidence and arguments. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002). This matter is to be provided expeditious treatment on remand. *See* 38 U.S.C. § 7112; *see also Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 n., 1 L. Ed. 436 (1792) ("[M]any unfortunate and meritorious [veterans], whom Congress have justly thought proper objects of immediate relief, may suffer great distress, even by a short delay, and may be utterly ruined, by a long one . . . ." (internal quotation marks omitted)).

Based on the foregoing reason, the February 24, 2015, Board decision is VACATED and the matter is REMANDED for readjudication.

DATED: September 29, 2016

Copies to:

Kenneth M. Carpenter, Esq.

VA General Counsel (027)