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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 15-3624

THOMAS WALKER, 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, Thomas Walker, appeals through counsel that part of an August 4, 2015, Board of Veterans' Appeals (Board) decision that declined referral for extraschedular consideration of the appellant's tinnitus claim.[1] Record (R.) at 2-10. The appellant argues that the Board (1) provided an inadequate statement of reasons or bases for its application of 38 C.F.R. § 3.321 and (2) committed prejudicial error by failing to discuss the collective impact of his service-connected injuries, when choosing not to refer his claim for extraschedular consideration. Appellant's Brief at 3-12. For the following reasons, the Court will vacate that part of the Board's August 2015 decision denying referral for an extraschedular consideration 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, is consistent with congressional intent as old

[1]The Board also remanded the matter of entitlement to an initial disability rating in excess of 30% for post-traumatic stress disorder (PTSD). That matter is not currently before the Court. *See Hampton v. Gober*, 10 Vet.App. 481, 482 (1997).

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 served on active duty in the U.S. Army from September 1966 to September 1973. *See* R. at 1196. During service, a mortar shell exploded next to the right side of his head, causing significant damage to the right side of his face, hearing loss, and tinnitus. *See* R. at 806-08. The appellant is currently service connected for sleep apnea, PTSD, right chin sensory neuropathy, tinnitus, multiple scars, lost teeth, and a retained foreign body in his cervical spine. *See* R. at 1198-97. The appellant has stated that his tinnitus causes ringing in his ears at an intolerable level. R. at 806. He has also alleged that he has memory loss related to his PTSD, cannot maintain effective working relationships with his peers, and cannot leave his home unless he absolutely has to. R. at 660, 695.

In August 2015, the Board denied the appellant a disability rating in excess of 10% for tinnitus on an extraschedular basis. In reaching this determination, the Board found that, regardless of the severity of the ringing in the appellant's ears, the rating schedule encompassed this symptom. R. at 7. The Board did not address the collective impact of the appellant's service-connected disabilities. This appeal ensued.

The Court agrees with the appellant's contention that the Board failed to provide an adequate statement of reasons and bases in failing to address whether the collective impact of his service-connected disabilities did not warrant referral for extraschedular consideration. *Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1990) (detailing that 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); *see also Johnson v. McDonald*, 762 F.3d 1362, 1365 (Fed. Cir. 2014) (noting that the Board is required to base extraschedular consideration on the "collective impact of multiple disabilities").

The appellant has reported memory issues, difficulty maintaining work relationships, difficulty leaving his home and other difficulties interacting with people as a result of his PTSD. *See* R. at 660, 695. He has also discussed how his service-connected tinnitus and hearing loss have made it difficult to interact with people. R. at 806. However, the Board failed to address the collective impact of these service-connected conditions, particularly on his ability to establish work relationships, when it denied referral for extraschedular consideration. *See Johnson, supra*. Remand is required for the Board to properly consider whether the appellant is entitled to referral for extraschedular consideration. *See* 38 C.F.R. § 3.321 (2016).

Because the Court is remanding the appellant's claim, it will not address his remaining arguments. *See Dunn v. West*, 11 Vet.App. 462, 467 (1998) (remand of the appellant's claim under one theory moots the remaining theories advanced on appeal). However, 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). The remanded matter is to be provided expeditious treatment. *See* 38 U.S.C. § 7112; *see also Hayburn's Case*, 2 U.S. at 410 n. ("[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)).

For the foregoing reason, and on review of the record, that part of the August 4, 2015, Board decision on appeal is VACATED, and the matter is REMANDED for readjudication.

DATED: November 30, 2016

Copies to:

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