

*Designated for electronic publication only*

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

No. 15-3533

KIMANI CHISM, 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, Kimani Chism, appeals through counsel a July 24, 2015, Board of Veterans' Appeals (Board) decision that denied him entitlement to total disability based on individual unemployability (TDIU).<sup>1</sup> Record (R.) at 2-12. The appellant argues that the Board erred in finding that referral for TDIU on an extraschedular basis was not warranted. Appellant's Brief at 8-23. For the foregoing reasons, the Court will vacate that part of the Board's July 24, 2015, decision denying the appellant entitlement to an award of TDIU 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 as the Republic. *See Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 n., 1 L. Ed. 436 (1792) ("[T]he

---

<sup>1</sup> The Board also denied the appellant's claim for a disability rating in excess of 30% for asthma. The appellant raises no argument with respect to this claim and the Court deems the matter abandoned. *See Pederson v. McDonald*, 27 Vet.App. 276, 285 (2015) (en banc) (holding that, where an appellant abandons an issue or claim, the Court will not address it).

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. Navy from May 1990 through June 1994, primarily as an electrician's mate. R. at 47 (DD Form 214).

In March 2007 the appellant applied for benefits based on service connection for asthma. R. at 655-64. In May 2007 the appellant underwent a VA examination, reporting that while lying flat he experienced shortness of breath and that he suffered weekly asthma attacks. R. at 1137. The appellant also reported that "he contracts infections easily" as a result of his respiratory infection, requiring frequent bedrest, medical attention, and antibiotics. R. at 1137. The examination revealed an abnormal lung with expiratory wheezing, and the examiner opined that as a result of his condition the appellant could not perform strenuous labor or "work involving dusty conditions or chemical aerosols." R. at 1137.

In a June 2007 rating decision the regional office (RO) awarded the appellant benefits based on service connection for asthma with a 30% disability rating. R. at 627-30. In July 2007 the appellant appealed. R. at 594. That same month, the appellant applied for TDIU, stating that he last worked as an electrician in 2005 and had 1 year of education or training in graphic design. R. at 580-83. The appellant also submitted a March 2007 letter from a private physician who recommended that he cease work as an electrician for fear he could be exposed to conditions that would worsen his asthma. R. at 565. In February 2008 the RO denied the appellant TDIU. R. at 554-58. The appellant appealed. R. at 477.

In March 2011 the appellant testified before the Board that he suffered from daily asthmatic attacks lasting 30 minutes to an hour and would wake up 2 to 3 hours a night wheezing, coughing, and losing his breath. R. at 436. He also stated that because of his asthma he has not been able to make as much money as he used to, that his quality of life had decreased, and that he must always

carry an inhaler. R. at 436. In October 2011 the Board remanded the matter of TDIU for an examination to determine the severity of his asthma. R. at 407-12.

In November 2011 the appellant underwent a VA examination complaining of almost daily asthma attacks. R. at 261. The examiner found that the appellant's respiratory condition affected his ability to work, but that his asthma has improved since he acted on the advice of his pulmonologist to cease work as an electrician, noting that he has not worked since 2005. R. at 270. In November 2013 the Board remanded the matter of TDIU for a new examination to determine whether the appellant was unemployable as a result of his service-connected disabilities. R. at 316-34.

In December 2014 the appellant underwent a VA examination. R. at 687-94. The examiner noted that the appellant suffered from daily exacerbation of his asthma, which caused wheezing, productive cough, and sleeplessness, and that in November 2014 the appellant was hospitalized for close to 24 hours after an asthma attack. R. at 687. The examiner also noted that the appellant's asthma affected his ability to work as the asthma could be triggered by "[e]xcessive exposure to dust, outdoor allergens or extreme cold temperatures." R. at 692. The examiner found that although the appellant's asthma affected his ability to work, the appellant

does qualify for some type of employment, he's currently enrolled at [Savannah College of Art and Design] for Graphic Design and may gain some low level employment in his field of study or gain employment as a customer service representative, administrative clerk, librarian assistant, etc., which requires no certification and is mainly sedentary and does not exacerbate his asthma; therefore, it is less likely as not that the veterans' service connected asthma prevent him from obtaining and retaining gainful employment, outside of his skill trade of electrician.

R. at 693-94.

In July 2015 the Board denied the appellant entitlement to TDIU. R. at 1-15. Relying on the December 2014 examination, the Board found the appellant employable as a result of

his continuing education in graphic design, the Veteran would be able to work in sedentary employment in an environment that does not trigger or exacerbate his asthma. Therefore, the Board finds that the case does not present an exceptional or unusual disability picture, or of any other factor which would allow for assignment of an extraschedular rating, such as frequent hospitalizations or marked interference with employment. Accordingly, referral of this issue for consideration of an extraschedular rating is not warranted.

R. at 12. This appeal follows.

The Court determines that the Board provided an inadequate statement of its reasons or bases for relying on the December 2014 VA examination in denying the appellant entitlement to TDIU. *See* 38 U.S.C. § 7104(d)(1); *Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1990) (finding that Congress mandated by statute that the Board provide a written statement of reasons or bases for its conclusions that is adequate to enable the appellant to understand the precise basis for the Board's decision and to facilitate review in this Court). Specifically, the December 2014 examiner failed to address the appellant's asthma symptomatology as it relates to his employability. *See Stefl v. Nicholson*, 21 Vet.App. 120, 123 (2007) (a medical examination is adequate "where it is based upon consideration of the veteran's prior medical history and examinations and also describes the disability, if any, in sufficient detail so that the Board's evaluation of the claimed disability will be a fully informed one" (internal quotation marks omitted)). The December 2014 examiner acknowledged that the appellant's asthma caused wheezing, productive coughs, and sleeplessness and in the prior month resulted in hospitalization for close to 24 hours – symptoms which persisted even after the appellant ceased work as an electrician in 2005. R. at 687. The examiner also acknowledged that although he is no longer able to work as an electrician, because of his ongoing graphic design studies he would be able to maintain sedentary employment. R. at 693-94. The examiner failed to discuss the extent to which the appellant's current asthma symptoms, in particular his sleeplessness, affected his ability to secure sedentary employment. Remand is warranted for the Board to provide an adequate statement of its reasons or bases for relying on this examination.

Because the Court is remanding the appellant's claim, it will not address the appellant's remaining arguments. *See Dunn v. West*, 11 Vet.App. 462, 467 (1998). 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.) 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.").

For the foregoing reasons, that part of the Board's July 24, 2015, decision denying the appellant's claim for TDIU benefits is VACATED and the matter is REMANDED for readjudication.

DATED: December 19, 2016

Copies to:

Robert V. Chisholm, Esq.

VA General Counsel (027)