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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 15-3745

JOHN H. MCDOW, 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, John H. McDow, appeals through counsel that part of a September 3, 2015, Board of Veterans' Appeals (Board) decision that denied the appellant entitlement to (1) a rating in excess of 50% for generalized anxiety disorder (GAD) with post-traumatic stress disorder (PTSD) and (2) a total disability rating based on individual unemployability (TDIU) due to his service-connected disability. Record (R.) at 2-16. The appellant argues that the Board (1) erred by not affording the appellant an opportunity to submit additional evidence; (2) failed to provide an adequate statement of reasons or bases for denying the appellant a higher rating for his PTSD; (3) erred by not fully explaining why the appellant was not entitled to TDIU; and (4) failed to explain why VA obtained a new examination in June 2014, instead of seeking clarification of a favorable October 2013 examination. Appellant's Brief at 6-27. For the following reasons, the Court will vacate the Board's September 2015 decision and remand the matters 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 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 veteran who served on active duty in the U.S. Army from October 1947 to February 1951 as an infantryman. R. at 127 (DD Form 214). In 1947 the appellant became a prisoner of war after he was captured and tortured by Russian soliders. *See* R. at 109. In September 1950, the appellant had a "schizophrenic reaction" as a result of artillery barrages he encountered. *See* R. 1627.

In June 1951 the appellant was granted service connection for an anxiety reaction, and was awarded a 10% disability rating. R. at 262. In November 1971 the appellant's disability rating was increased to 30%. R. at 1803-04. In June 2005 VA redefined the appellant's disability as GAD with PTSD symptoms and maintained his 30% rating. R. 1395-1401. In October 2009, the appellant applied for an increased rating for his GAD and requested TDIU compensation. R. at 1131-40. In February 2013 the Board issued a decision denying the appellant a higher rating for his GAD with PTSD symptoms, and remanded the issue of TDIU entitlement. R. at 412-44. The appellant appealed the negative portion of this decision in March 2013. *See* R. at 343.

In August 2013 the Court granted a joint motion for remand (JMR), requiring the Board to reevaluate its decision regarding whether the appellant is entitled to a higher disability rating for his GAD. R. at 346-53. In conjunction with this JMR the appellant underwent a VA examination in October 2013. R. 1847-50. The examiner found that the appellant suffered from PTSD and that he had total occupational and social impairment. R. at 1847. The Board issued a decision in April 2014, remanding the issues for further development and requiring the appellant undergo a new examination because it found that the duty to assist was not satisfied. R. 201-07.

The appellant underwent another VA examination in June 2014. The June 2014 examiner reiterated most of the symptoms and issues that the October 2013 examiner found. *See* R. at 110-12.

The examiner noted that the appellant had a strained relationship with his live-in son. R. at 108. The examiner also noted that the appellant voluntarily left a job as a park ranger that he "loved" despite being offered a raise, because he was unable to socialize properly with various individuals. R. at 108. However, the examiner found that the appellant would not be precluded "from securing and following substantially gainful employment consistent with his education and occupational experience, if he would decide to work again he might perform better in a sedentary employment environment where he is not surrounded by to [sic] many people." R. at 113.

In September 2015 the Board issued its decision denying the matter of TDIU and an increased rating for the appellant's GAD. R. at 2-18. This appeal ensued.

The Court concludes that in denying the appellant a higher rating under Diagnostic Code (DC) 9400 and for denying the appellant's matter of TDIU, the Board provided an inadequate statement of reasons or bases for relying on the appellant's June 2014 VA examination. *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). Although the examiner stated that the appellant might be able to perform better in a sedentary work environment with less people around, it is unclear how he reached this conclusion. The appellant reported that he loved his job as a park ranger, but left because he struggled with interactions with people. R. at 108. The examiner did not find an improvement in the appellant's mental condition, and failed to explain why he believed the appellant would perform better in a sedentary environment. *See* R. at 103-13. Remand of both matters on appeal is required for the Board to provide an adequate statement of reasons or bases for its treatment of the appellant's October 2013 medical examination.

Because the Court is remanding the matter, it will not address the appellant's remaining arguments regarding this issue. *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, the September 3, 2015, Board decision on appeal is VACATED, and the matters are REMANDED for readjudication.

DATED: December 22, 2016

Copies to:

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VA General Counsel (027)