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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 15-3557

JOSE A. COLON-DELGADO, APPELLANT,

V.

ROBERT D. SNYDER,
ACTING 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, Jose A. Colon-Delgado, appeals, through counsel, that part of an August 20, 2015, Board of Veterans' Appeals (Board) decision that denied a disability rating in excess of 30% for post-traumatic stress disorder (PTSD) prior to June 4, 2004, and in excess of 50% from June 4, 2004.¹ The appellant argues that the Board provided an inadequate statement of reasons or bases for denying a higher disability rating for both periods on appeal. Appellant's Brief at 7-20. For the following reasons, the Court will vacate that part of the August 2015 Board decision on appeal 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

¹The Board also remanded the matter of an initial disability rating in excess of 10% prior to March 6, 2006, and in excess of 60% as of March 6, 2006, for ischemic heart disease. This matter is not currently before the Court. *See Hampton v. Gober*, 10 Vet.App. 481, 482 (1997).

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 War veteran who served on active duty in the U.S. Army from January 1966 until November 1967 as an ammunition specialist. Record (R.) at 2689 (DD Form 214). While deployed, the appellant worked on morgue duty where he identified cadavers and prepared the bodies for transport to the United States. R. at 2696. During that time, the appellant was exposed to badly destroyed bodies. R. at 2696. The appellant also served on guard duty and was attacked on one occasion. R. at 2696. In January 1992, the appellant was first diagnosed with PTSD. R. at 2697.

In November 1997, the appellant underwent a psychiatric examination. R. at 2681-88. During the examination, the appellant discussed the events in Vietnam. R. 2681-87. The appellant informed the physician that he suffered from nightmares and insomnia. R. at 2681. He told the physician that on some occasions he felt like he was back in Vietnam. R. at 2681. The appellant acknowledged feeling anxious and having flashbacks when he heard helicopter sounds. R. at 2681. He also stated that he felt aggressive toward his students and feared losing control in the classroom. R. at 2686. The doctor noted the appellant's difficulty with his family and that he did not have any friends. R. at 2686. The doctor stated that the appellant was severely impaired both emotionally and socially. R. at 2688.

In June 2002, the appellant attended a VA PTSD examination, wherein he was diagnosed with PTSD with depression. R. at 2276-77. The doctor remarked that the appellant recalled the events in Vietnam vividly. R. at 2276. The appellant described being irritable, having a poor frustration tolerance, and feeling remorseful for being verbally aggressive with his family. R. at 2276-77. The appellant also described an incident at work that almost cost him his job. R. at 2276. The doctor provided a global assessment of functioning (GAF) score of 60. R. at 2277. The doctor found the appellant's level of impairment to be mild to moderate and cited the fact that the appellant was married to support this finding. R. at 2277.

In January 2005, the appellant underwent another VA PTSD examination. R. at 1475-78.

The physician noted the appellant's inability to concentrate, insomnia, anxiety, and displeasure with daily tasks. R. at 1475-76. The physician also found evidence of intrusive, recurrent, and distressing thoughts about the appellant's experiences in Vietnam that interfered with the appellant's daily activity. R. at 1476-77. The physician concluded that the appellant's PTSD seriously impaired both the appellant's social and work capacity. R. at 1477.

In August 2015, the Board issued its decision on appeal denying the appellant a rating in excess of 30% prior to June 4, 2004, and in excess of 50% thereafter. R. at 4-23. In denying a disability rating in excess of 30% for the period prior to June 4, 2004, the Board relied, in part, on the January 2002 VA examination. R. at 9-14. The Board indicated that the examiner found that the appellant maintained a relationship with his wife and children despite the reports of his verbal aggression at home. R. at 12-14. The Board continued that the examiner assigned a GAF score of 60 to the appellant's condition and found the score to be congruent with a 30% rating. R. at 12-14. In the decision, however, the Board found GAF scores from 50-70 to be within the purview of a 50% rating. R. at 19.

In denying a rating in excess of 50% from June 4, 2004, the Board discounted a January 2005 VA examination. R. at 18. The Board stated "although the January 2005 examiner indicated that the [appellant's] symptoms seriously interfered with his employment and social function, there is no indication that such impairment resulted in deficiencies in most areas." R. at 18. The Board based this on the fact that the appellant was married and had a job. R. at 18. Specifically, the Board noted that the examiner did not find deficiencies in the appellant's judgement or thinking and that the examiner provided no explanation as to the appellant's difficulties in work and family in light of the appellant's 34-year marriage. R. at 18. The Board concluded that the appellant had not demonstrated deficiencies in most areas to warrant a higher rating. R. at 19. This appeal ensued.

The Court concludes that the Board provided an inadequate statement of reasons or bases for relying on the January 2002 VA examination to deny a higher disability rating, specifically because the examiner failed to adequately describe the appellant's then current disability in sufficient detail. *See 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 Stefl v. Nicholson*, 21, Vet.App. 102, 123 (2007) (

finding that to be adequate, a medical opinion must "describe the [appellant's] condition in sufficient detail so that the Board's evaluation of the claim may be fully informed"). The examiner appears to have wrongly minimized the severity of the appellant's PTSD through omission. *See Nieves-Rozriguez v. Peake*, 22 Vet.App 294, 304 (2008). Although the examiner repeatedly noted the extreme detail with which the appellant was able to describe his traumatic in-service experiences, unlike every other examiner of record, the examiner failed to even address the obvious PTSD symptom associated with the appellant's vivid description of his stressor events—recurring thoughts of the incidents. The record reflects that examiners have found this symptom to be central to his disability. *See* R. at 2681-88, 1475-78, 1378-79, 220.

Further, to the extent that the examiner relied on the facts that the appellant had maintained his job as a teacher and had a stable relationship with his wife to find that his impairment was only mild to moderate, the Court concludes that the examiner also omitted relevant facts in making these generalization. First, the examiner acknowledged that the appellant reported an incident at school where he nearly lost his job, but failed to address this instance further in finding that the appellant had no issues maintaining employment.² R. at 2276-77. Second, the record reflects that the appellant isolated himself at home and has communication problems with his wife. R. at 2276, 2686. The mere fact that a marriage is stable does not eliminate the possibility that he has severe impairment of social functioning—even with his wife. Remand is required for the board to provide an adequate statement of reasons or bases for its decision, including its reliance on any medical evidence. *See Gilbert, supra*.

The Court next concludes that the Board provided an inadequate statement of reasons or bases for its treatment of the January 2005 examination in denying the appellant a higher rating for PTSD from June 4, 2004. *See Gilbert, supra*. The examiner found that the appellant's recurring, intrusive, and distressing thoughts about his experiences in Vietnam significantly impaired his daily activities. R. at 1476-77. When the examination is read as a whole, *see Acevedo v. Shinseki*, 25

² The Court notes that the appellant has stated that his co-workers were aware of his disability and attempted to work with him and accommodate his condition. R. at 2686. Thus, simply because there was no official documentation related to this incident does not follow that the incident did not occur. On remand, the Board should ensure that it provides an adequate statement of reasons or bases if it finds the appellant's reports of the work incident not credible. *See Gilbert, supra*.

Vet.App. 286, 293 (2012), it is clear that the examiner found that these disturbing thoughts caused depression and anxiety with irritability, an inability to concentrate, nightmares, insomnia, and avoidance behavior. R. at 1476-77. The examiner then summarized that these symptoms caused serious impairment in the appellant's social and occupational functioning. R. at 1477. It is unclear what else the Board required from the examiner to assign this examination more probative value. Remand is required for the Board to provide an adequate statement of reasons or bases for its treatment of the January 2005 examination. *See Gilbert, supra*

Because the Court is remanding the matter, 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.) 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 reasons, that part of the August 20, 2015, Board decision is VACATED and these matters are REMANDED for readjudication.

DATED: January 31, 2017

Copies to:

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