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

No. 16-0861

RICHARD G. POUNTAIN, APPELLANT,

v.

DAVID J. SHULKIN, M.D.,  
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, Richard G. Pountain, appeals through counsel that part of a February 1, 2016, Board of Veterans' Appeals (Board) decision that declined referral of his bilateral hearing loss claim for extraschedular consideration.<sup>1</sup> Record (R.) at 2-17. The appellant argues that the Board erred when it provided an inadequate statement of reasons or bases for denying referral for extraschedular consideration based on the collective impact of the appellant's service-connected disabilities. Appellant's Brief at 7-10. For the following reason, the Court will vacate that part of the February 2016 Board decision on appeal and remand the matter for readjudication.

Justice Alito noted in *Henderson v. Shinseki* that our Court's scope of review in this appeal

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<sup>1</sup> The Board also granted a 50% disability rating for bilateral hearing loss from March 5, 2014, to October 20, 2014, and denied a disability rating in excess of 60% for the period after October 21, 2014, and denied a rating in excess of 20% prior to March 5, 2014, all on a schedular basis. The appellant presents no argument as to these matters, and the Court deems them 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). Further, to the extent that the Board's grant of a 50% disability rating constitutes a favorable finding, the Court will not disturb it. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007). The Board also found new and material evidence to reopen a claim for a low back disorder and granted service connection for degenerative disc disease of the lumbar spine. The Court will not disturb these favorable findings. *See Medrano, supra*. Lastly, the Board remanded the issue of service connection for leg pain and neuropathy, to include as secondary to a lower back disorder. This matter is not currently before the Court. *See Hampton v. Gober*, 10 Vet.App. 481, 482 (1997).

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).

From the beginning of the Republic statutory construction concerning congressional promises to veterans has been of great concern. "By the act concerning invalids, passed in June, 1794, vol. 3. p. 112, the secretary at war is ordered to place on the pension list, all persons whose names are contained in a report previously made by him to congress. If he should refuse to do so, would the wounded veteran be without remedy? Is it to be contended that where the law in precise terms, directs the performance of an act, in which an individual is interested, the law is incapable of securing obedience to its mandate? Is it on account of the character of the person against whom the complaint is made? Is it to be contended that the heads of departments are not amenable to the laws of their country?" *Marbury v. Madison*, 5 U.S. 137, 164, 2 L. Ed. 60, 69 (1803).

The appellant served on active duty in the U.S. Air Force from June 1968 to September 1992 as a telecommunication operations supervisor. R. at 1189 (DD Form 214); *see* R. at 1319. In April 1992, the appellant complained of a hissing sound in both ears after he was exposed to high-pitched fans. R. at 1324.

A few months prior to his discharge in September 1992, the appellant filed for benefits based on service connection for bilateral hearing loss. R. at 1371-78. Later that year, VA granted the appellant service connection for this condition with a non compensable rating. R. at 1326.

In May 2005, the appellant requested an increased rating for his hearing loss. R. at 1193-94. In June 2005, the appellant submitted a statement explaining that he no longer attends church and that his condition makes it difficult to enjoy life because he "[does] not know what is going

on." R. at 1172.

In March 2010, the appellant filed for another increased disability rating for his hearing loss. R. at 1130. In a May 2010 statement, the appellant complained of becoming "more and more isolated from others" and having a "social life [that] is almost non-existent." R. at 1097. His wife added in a May 2010 statement that the appellant "is less and less inclined to go to public functions where there are any crowds or multiple conversations." R. at 1099.

A September 2010 rating decision granted the appellant a 20% disability rating for his bilateral hearing loss. R. at 1024-25. The appellant filed a Notice of Disagreement (NOD) and submitted a statement supporting the NOD, which provided that his hearing had become so bad that he "avoid[ed] social situations completely." R. at 1013, 1015.

In February 2016, the Board declined to refer the matter for extraschedular consideration. R. at 13. The Board concluded that the schedular rating criteria, which considers difficulty hearing, adequately contemplated the appellant's manifestations of bilateral hearing loss. R. at 13. The Board found that the evidence of record failed to show anything unique or unusual about the appellant's disability that would render the schedular criteria inadequate. R. at 13. This appeal ensued.

The Court concludes that the Board provided an inadequate statement of reasons or bases as to why it did not refer the matter of extraschedular consideration for the appellant's bilateral hearing loss. *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). The Board declined referral for extraschedular consideration after finding that the appellant's "hearing loss" was adequately contemplated under the schedular rating criteria. R. at 12-13. But, the Board failed to address the appellant's social avoidance and isolation that resulted from his difficulties communicating. *See* R. at 1015, 1099, 1097, 1172; *see Doucette v. Shulkin*, \_\_ Vet.App. \_\_, No. 15-2818, 2017 WL 877340, at \*5 (U.S. Vet. App. Mar. 6, 2017) (holding that the rating criteria for hearing loss does not necessarily "contemplate *all* functional impairment due to a claimant's hearing loss" and that the Board is therefore required to address whether the rating criteria contemplate such non-hearing related symptoms as "social isolation due to difficulties communicating" (emphasis in original)). Remand is required for the Board to provide an adequate statement of reasons or

bases for whether referral for extraschedular consideration is warranted and whether these symptoms were contemplated by the rating schedule. *See Gilbert, supra*. On remand, the Board should also consider the collective impact of the appellant's service-connected disabilities. *See Johnson v. McDonald*, 762 F.3d 1362, 1365 (Fed. Cir. 2014).

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 (1988). 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 409, 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.").

Based on the foregoing reason, that part of the February 1, 2016, Board decision on appeal is VACATED and the matter of extraschedular consideration is REMANDED for readjudication.

DATED: March 20, 2017

Copies to:

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