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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 16-0322

JAMES L. HUFF, 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, James L. Huff, appeals through counsel that part of a December 8, 2015, Board of Veterans' Appeals (Board) decision that denied him a total disability rating based on individual unemployability (TDIU) for the period prior to September 16, 2014, and declined referral for extraschedular consideration.[1] R. at 2-24. The appellant argues that the Board misapplied and misinterpreted relevant law when it (1) denied the matter of TDIU for the period prior to September 16, 2014, and (2) declined referral for extraschedular consideration. Appellant's Brief (App. Br.) at 1-27. For the following reasons, the Court will vacate that part of the Board's December 2015 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

[1] The Board also remanded the matter of service connection for hypertension. This matter is not currently before the Court. *See Hampton v. Gober*, 10 Vet.App. 481, 482 (1997). The Board also denied the appellant entitlement to an increased rating for his service-connected (1) diabetes mellitus with erectile dysfunction and left eye nonproliferative diabetic retinopathy; (2) peripheral neuropathy of the right upper extremity; and (3) peripheral neuropathy of the left upper extremity. The appellant presents no arguments 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).

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).

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 is a Vietnam veteran who served on active duty in the U.S. Marines from July 1966 to September 1969 as a supply clerk. R. at 532 (DD Form 214).

In October 1970, the appellant was granted service connection for arthralgia of his knees bilaterally. R. at 1930. In October 2002, VA granted the appellant service connection for diabetes mellitus type II (diabetes) and right patellofemoral syndrome. R. at 1603. In March 2005, the appellant was granted service connection for peripheral neuropathy of both upper and lower extremities. R. at 1452.

In September 2006, the appellant submitted a request for TDIU benefits. R. at 1272. In support of this request the appellant submitted a statement to VA stating that he "stopped full time work in March of this year [2006]. I work part time in insurance sales at the present. The flexibility allows me to work on the good days and rest on the bad." R. at 1410. In August 2007, VA denied the appellant's request and the appellant appealed this decision. R. at 1220, 1199.

In November 2011, the appellant underwent a VA examination. R. at 667-70. The examiner found that the appellant's ability to work was affected by his diabetic peripheral neuropathy, stating that "employment which would require prolonged standing or walking would not be recommended. Additionally employment which would require fine motor use/dexterity of the hands to include repetitive use would not be recommended. Sedentary employment with the appropriate restrictions is still possible." R. at 670. The examiner also found that the appellant's bilateral knee disability interfered with his ability to sit and stand. R. at 679.

In October 2015, VA granted the appellant service connection for tinnitus, right ear hearing loss and TDIU benefits effective September 14, 2014. R. at 69-70. The appellant appealed the effective date of his TDIU award. *See* R. at 2.

In December 2015, the Board issued a decision denying the appellant's request for TDIU benefits prior to September 14, 2014, and referral for extraschedular consideration generally. R. at 2. Regarding the matter of TDIU, the Board found that "there is no evidence of record that indicates that the Veteran's employment [between June 13, 2006, and August 31, 2007] was marginal," and relied on the November 2011 VA examiner's finding that the appellant was able to do sedentary work. R. at 19-20. Regarding the appellant's request for extraschedular consideration, the Board considered "the impact of his service-connected disabilities on his occupational functioning " and found that "the medical evidence of record does not show that the Veteran is unable to work due to his diabetes mellitus and peripheral neuropathy." R. at 18. This appeal ensued.

The Court agrees with the appellant that the Board provided an inadequate statement of reasons or bases for its finding that the appellant's service-connected disabilities did not meet the scheduler requirements under 38 C.F.R. § 4.16(a) for TDIU, for the period of June 13, 2006, to August 31, 2007. *See 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 Board erred when it stated that "there is no evidence of record that indicates the Veteran's employment during this time period was marginal." R. at 19; *see* 38 C.F.R. § 4.16(a) (2016) ("Marginal employment may also be held to exist, on a facts found basis (includes but is not limited to employment in a protected environment such as a family business or sheltered workshop.").

Yet, in October 2006, the appellant stated that he had "stopped full time work in March of this year. I work part time in insurance sales at the present. The flexibility allows me to work on the good days and rest on the bad." R. at 1410. Although the appellant stated that his part-time work was flexible, the Board failed to determine whether this flexible part-time work environment amounted to a protected work environment. *See* 38 C.F.R. § 4.16(a). Rather than determine whether the appellant worked in a protected environment, the Board concluded cursorily that the appellant's work during this time was not marginal. R. at 19. Remand is required for the Board to provide an adequate statement of reasons or bases for whether the appellant's work environment between June 13, 2006, to August 31, 2007 was protected.

The Court also determines that the Board erred in failing to return the November 2011 examination for clarification. 38 C.F.R. § 4.2 (2016) (VA is required to "return the [examination] report as inadequate for evaluation purposes" if that report "does not contain sufficient detail"). Although the November 2011 VA examiner found that the appellant was able to do sedentary work with the proper restrictions, the examiner did not elaborate further. *See* R. at 667-70. Instead, he found the appellant incapable of performing a job requiring "fine motor use/dexterity of the hands to include repetitive use," yet that he was capable of sedentary employment with restrictions. R. at 670. Furthermore, the examination report states that the appellant has difficulty sitting and standing as a result of his bilateral knee disability. R. at 679. Not only is it unclear what type of employment the examiner was referring to, depending on the employment restrictions required, the examination raises but does not answer the question of whether the appellant can only work in a protected work environment. *See* 38 C.F.R. § 4.16(a). As Justice Brandeis eloquently stated, "the logic of words should yield to the logic of realities," and it is unclear what work environment the November 2011 examiner was envisioning when he provided his opinion. *Di Santo v. Pennsylvania*, 273 U.S. 34, 42-43 (1927). Remand is required for the Board to return the November 2011 examination for clarification. *See Gilbert*, *supra*; *see also* 38 C.F.R. § 4.2 (2016).

In addition, the Court agrees with the appellant's contention that the Board failed to properly consider the collective impact of his service-connected disabilities when it found that the disabilities did not warrant referral for extraschedular consideration. *See 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"). Although the Board found that there was no collective impact from the appellant's service-connected disabilities that warranted

extraschedular consideration, the Board failed to address the November 2011 examination that noted that the appellant's bilateral knee disability, peripheral neuropathy, and diabetes interfered with his ability to sit, stand, and walk. *See* R. at 670, 679. The appellant's disabilities therefore appear to be working against each other. *See* R. at 670, 679; *see also Yancy v. McDonald*, 27 Vet.App. 484, 495 (2016) (finding that the Board must consider the collective impact of all service-connected disabilities brought on appeal or reasonably raised by the record.); *Johnson*, *supra.* Remand is required for the Board to properly consider whether referral for extraschedular consideration is warranted. *See* 38 C.F.R. § 3.321 (2016).

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 reasons, and on review of the record that part of the December 8, 2015, Board decision on appeal is VACATED and the matter REMANDED for readjudication.

DATED: April 27, 2017

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