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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 16-0870

JIMMY L. HENDRIX, 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, Jimmy L. Hendrix, appeals through counsel that part of a February 1, 2016, Board of Veterans' Appeals (Board) decision that granted him an effective date of March 23, 2011, but no earlier, for a 50% disability rating for post-traumatic stress disorder (PTSD). Record (R.) at 2-13.[1] The appellant argues that the Board failed to consider favorable evidence that would entitle him to the earlier effective date. For the following reason, the Court will vacate the Board's February 1, 2016, decision 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 objects of this act are exceedingly benevolent, and do real honor to the humanity and

[1] The Board also dismissed the appellant's claim for an effective date earlier than March 12, 2009, for the grant of benefits based on service connection for PTSD. 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).

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 combat Vietnam War veteran who served on active duty in the U.S. Army from January 1968 to January 1973. R. at 379. The appellant has stated that he had served two tours of combat duty in Vietnam, and was regularly fired upon by the enemy and tasked with stacking the bodies of dead soldiers. R. at 390. The appellant has also described seeing cars explode and a fellow soldier die from friendly fire while the soldier slept next to him. R. at 407.

In August 2001 the appellant filed a claim for benefits based on service connection for PTSD. R. at 652-72. In a December 2001 rating decision the regional office (RO) denied this claim. R. at 627-30. The appellant did not appeal and the decision became final. In March 2009 the appellant filed a request to reopen his PTSD claim. R. at 522-23.

In a September 2009 rating decision the RO granted the appellant service connection for PTSD with a non compensable rating, effective March 2009. R. at 430-38. The appellant did not appeal and the decision became final.

On March 23, 2011, the appellant underwent an initial mental health evaluation, where the physician noted that the appellant had limited judgment and insight and his mood was "not that good." R. at 409, 411. The physician also noted the appellant's history of substance abuse and suicide attempts. R. at 410-11.

A May 2011 treatment note indicates the appellant's irritability, history of anger, difficulties with concentration, and continued substance abuse. R. at 406-07. The appellant also reported that he tried to kill himself "6 months ago" by smoking cocaine. R. at 407. In October 2011 the appellant sought an increased rating for PTSD. R. at 421-23.

In November 2011 the appellant underwent a VA examination, reporting an inability to maintain employment and symptoms of excessive irritation, distrust, mood liability, hyperarousal, excessive guilt, hopelessness, insomnia, decreased appetite, social withdrawal, and substance abuse. R. at 390-91. The appellant also reported a history of suicide attempts and violent behavior, including an incident where he cut his brother-in-law in the face. R. at 390. The examiner found that the appellant had occupational and social impairment with deficiencies in most areas such as work, school, family relations, thinking, and mood. R. at 394.

In a March 2012 rating decision the RO increased the appellant's disability rating for PTSD to 50%, effective October 2011. R. at 369-70. The appellant appealed. R. at 352-53. In an April 2012 rating decision, the RO found that the April 2009 rating decision contained clear and unmistakable error, and assigned a 30% disability rating for PTSD for the period from March 2009 to October 2011. R. at 338-42. In a January 2016 rating decision the RO increased the appellant's PTSD rating from 50% to 70%, effective October 2015. R. at 16-36.

In February 2016 the Board found that the appellant was entitled to an effective date of March 23, 2011, but no earlier, for his 50% disability rating for PTSD. R. at 2-13. The Board accepted the March 23, 2011, mental health evaluation as an informal claim for benefits, citing the regulation in place at the time which stated that a VA examination report may be considered an informal claim for an increased disability rating. R. at 11; 38 C.F.R. § 3.157(b)(2014). However, the Board also found that "the earliest date that it is factually ascertainable" that the appellant was experiencing symptoms commensurate with a 50% PTSD rating was March 23, 2011. R. at 12 (citing 38 C.F.R. § 3.400(o)(1)-(2)(2016)). This appeal follows.

The Court agrees with the appellant that the Board overlooked favorable evidence in finding that no evidence indicated that a PTSD rating in excess of 50% was factually ascertainable before March 23, 2011. *See Caluza v. Brown*, 7 Vet.App. 498, 506 (1995)(finding that the Board must account for and provide the reasons for its rejection of any material evidence favorable to the claimant), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996). As the Board correctly noted, the effective date for an increased disability rating "shall be the earliest date as of which it is

ascertainable that an increase in disability had occurred, if application is received within one year from such date." *See* 38 C.F.R. § 3.400(o)(1)-(2). However, the Board overlooked the appellant's May 2011 report of having attempted suicide "6 months ago," or around November 2010. R. at 407. Evidence that the appellant attempted suicide less than a year before March 23, 2011, is certainly relevant to whether a disability rating of 50% or higher for PTSD was "factually ascertainable" within the year before the informal claim for an increased rating was received, regardless of when VA received this evidence. *See McGrath v. Gober*, 14 Vet.App. 28, 35 (2000) (the information contained in a medical record is what is relevant in determining the effective date, not the date such record was received). Remand is required for the Board to address this favorable evidence. *Caluza*, *supra*.

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 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, that part of the Board's February 1, 2016, decision on appeal is VACATED and the matter is REMANDED for readjudication.

DATED: May 30, 2017

Copies to:

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