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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 16-1567

BERNARD W. MIKKELSEN, 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, Bernard W. Mikkelsen, appeals through counsel that part of a March 30, 2016, Board of Veterans' Appeals (Board) decision that denied him an initial disability rating in excess of 10% for post-concussion headaches with temporal vision loss and distortion for the period prior to August 18, 2011, and in excess of 40% for the period beginning August 18, 2011.[1] Record (R.) at 2-25. The appellant argues that the Board (1) failed to properly define "prostrating attacks" or independently analyze the medical evidence; (2) erred in requiring that the appellant's headaches cause severe economic inapdabtibility; (3) provided an inadequate statement of reasons or bases for denying higher ratings for post concussion headaches; (4) failed to consider the combined effects of the appellant's disabilities in declining to refer the matter for extraschedular consideration; and (5) erred in failing to remand the appellant's higher ratings claims as inextricably intertwined with the matter of TDIU. Appellant's Brief at 7-23. The Secretary concedes that remand of the appellant's headache claim prior to August 18, 2011, is

[1] The Board also remanded the matter of the appellant's entitlement to a total disability rating based on individual unemployability (TDIU). That matter is not currently before the Court. *See Hampton v. Gober*, 10 Vet.App. 481, 482 (1997).

warranted but argues that the remainder of the decision on appeal should be affirmed. Secretary's Brief at 9-11. For the following reasons, that part of the Board's March 30, 2016, on appeal is vacated and the appellant's headache claim for both periods is remanded 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).

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 War era veteran who served on active duty in the U.S. Air Force from November 1965 through February 1969, primarily as an airframe repairman. R. at 934 (DD Form 214). In October 1968, while stationed in Thailand, the appellant was beaten with a stick by a taxi driver and knocked unconscious for three minutes, suffering a head injury and lacerations to his face and scalp. R. at 72.

In November 2006 the appellant filed for benefits based on service connection for headaches and temporal vision loss. R. at 888-97. In July 2007 the appellant underwent a VA

examination reporting a temporary loss of vision on a weekly and sometimes daily basis. R. at 763-65. In August 2007 the appellant underwent a VA examination after having suffered a stroke, and indicated through nodding that he experienced headaches in service. R. at 747-48. The appellant's wife told the examiner that he had recently sought emergency room care for his headaches. R. at 747.

In October 2007 a VA examiner opined that the appellant's loss of vision was related to his headaches, and that his headache condition was caused by service. R. at 740-42, 1366. In a January 2008 rating decision the regional office (RO) granted the appellant benefits based on service connection for post concussion headaches with temporal vision loss and awarded a 10% disability rating. R. at 699-711. In March 2008 the appellant told a VA neurologist that he experienced dizzy spells and fainting which he attributed to headaches and dehydration. R. at 1292. In January 2009 the appellant appealed the January 2008 rating decision. R. at 609-11.

In October 2009 the appellant reported to a VA examiner that he suffered from weekly headaches, vision loss, image distortions "lasting up to 30 min[utes]," and that he was only able to work 4 hours a day. R. at 417. In June 2011 the Board remanded the appellant's claim for an increased rating for headaches. R. at 493-94.

In August 2011 the appellant underwent a VA examination reporting weekly loss of vision, visual distortions, headaches associated with "visual aura," and a lack of stamina during headaches. R. at 293, 297, 300. In April 2012 the RO increased the appellant's disability rating for headaches to 40% under Diagnostic Code (DC) 8045, effective August 18, 2011. R. at 254-69; *see also* 38 C.F.R. § 4.124a (2016). In April 2013 the Board remanded the appellant's increased rating claim. R. at 226-33.

In July 2014 the appellant underwent a VA examination, reporting that once or twice a week he would experience 30-minute episodes of vision loss and visual distortions. R. at 172, 179. The appellant also reported suffering from 30-minute severe headaches bi-weekly. R. at 179. The examiner found that the appellant's symptoms were "suggestive of migranous phenomenon" with vision loss and that the appellant's condition affected his ability to work consistently. R. at 175.

In March 2016 the Board denied the appellant a disability rating in excess of 10% for headaches with vision loss for the period prior to August 18, 2011, and in excess of 40% for the period beginning August 18, 2011. R. at 2-25. For the period prior to August 18, 2011, the Board

relied on the October 2009 examination in finding that the appellant only had mild weekly headaches and did not have "characteristic prostrating attacks occurring, on an average, once a month over the last several months" required for a 30% disability rating under DC 8100. R. at 15 (citing 38 C.F.R. § 4.124a). For the period beginning August 18, 2011, the Board relied on the July 2014 examiner's finding that "there is no evidence that [the appellant] has very frequent completely prostrating and prolonged attacks productive of severe economic inadaptability" under DC 8100 to deny a higher rating. R. at 19 (citing 38 C.F.R. § 4.124a). This appeal follows.

With respect to both time periods on appeal, the Court agrees with the appellant that the Board provided an inadequate statement of its reasons or bases for finding that the appellant was not entitled to an increased rating for migraine headaches. *See* 38 U.S.C. 7104(d)(1); *Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1990) (holding 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 Court agrees with the appellant's argument that the Board failed to independently analyze whether the appellant's headaches were prostrating, a factor which is relevant to a higher rating under DC 8100. *See* 38 C.F.R. § 4.124a. The Board merely adopted the conclusions of the October 2009 and July 2014 medical examiners, and made no attempt even to define "prostration."[2] *See Ohland v. Derwinski*, 1 Vet.App. 147 (1991) (Board's reasoning is flawed when it fails to explain the criteria it used in determining whether the evidence fell into a particular rating category). This lack of analysis frustrates judicial review. *See Allday v. Brown*, 7 Vet.App. 517, 527 (1995) (Board's statement "must be adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court"). Remand is required for the Board to provide its own independent analysis as to whether the appellant experienced prostrating headaches during both time periods.

With respect to the period prior to August 18, 2011, the Court agrees with the Secretary's concession that the Board failed to consider potentially favorable evidence in denying the appellant a rating in excess of 10%. *See Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (holding that the Board must account for and provide the reasons for its

[2] VA's *Adjudication Procedures Manual* (M21–1MR) defines prostrating under DC 8100 as "causing extreme exhaustion, powerlessness, debilitation or incapacitation with substantial inability to engage in ordinary activities." *See* M21-1, pt. III, Subpt. iv, Ch. 4, Sec. G(7)(b).

rejection of any material evidence favorable to the claimant). Specifically, the Board failed to address the report from the August 2007 examination that the appellant sought emergency room care for his headaches, the appellant's March 2008 report of dizziness and fainting from headaches, and the report from the October 2009 examination that appellant's headaches and loss of vision required him to lie down. R. at 417, 747, 1292. Remand is required for the Board to address this favorable evidence.

On remand, the Court should consider whether TDIU is warranted for both time periods on appeal as TDIU is "part and parcel" of an increased-rating claim. *See Rice v. Shinseki*, 22 Vet.App. 447, 453–55 (2009) ("'[TDIU] is implicitly raised whenever a[ ] veteran, who presents cogent evidence of unemployability, seeks to obtain a higher disability rating.'" (emphasis added) (citing *Comer v. Peake*, 552 F.3d 1362, 1367 (2009))).

Because the Court is remanding the appellant's claims, it will not address the appellant's remaining arguments. *See Dunn v. West*, 11 Vet.App. 462, 467 (1998). Further, because the Court is remanding the headache matter on a schedular basis for both time periods on appeal, it is premature to address arguments pertaining to extraschedular consideration. 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. *See* 38 U.S.C. § 7112; *see also Hayburn's Case*, 2 U.S. (2 Dall.) 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.")

For the foregoing reasons, that part of the Board's March 30, 2016, decision on appeal is VACATED and the matters are REMANDED for further development and readjudcation.

DATED: June 20, 2017

Copies to:

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