Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 16-1326

MARIUS A. GACHE, 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, Marius A. Gache, appeals through counsel a March 8, 2016, Board of Veterans' Appeals (Board) decision that denied him entitlement to a total disability rating based on individual unemployability (TDIU). Record (R.) at 2-13. The appellant argues that the Board erred by (1) relying on inadequate medical examinations to deny the appellant TDIU; (2) not understanding the demands of sedentary work when it found that the appellant was capable of sedentary employment; and (3) failing to adequately consider the appellant's occupational history and vocational training when it denied the appellant TDIU. Appellant's Brief at 10-28. For the following reason, the Court will vacate the Board's March 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

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. Navy from December 1960 to June 1982 primarily as an air officer and aviation safety officer. R. at 20 (DD Form 214). During service the appellant was involved in an airplane crash that resulted in a compression fracture to his T12 vertebrae. R. at 1165.

In January 2007, the appellant filed for benefits based on service connection for the residuals of a T12 compression fracture. R. at 1204-13. In December 2007, VA granted the appellant a noncompensable rating for T12 compression fracture. R. at 1156. The appellant appealed the disability rating. R. at 1010. VA ultimately granted the appellant a 20% disability rating for a T12 compression fracture. R. at 2246. The appellant is also service connected for the following conditions: Coronary artery disease/ischemic heart disease rated as 30% disabling, a cervical spine disability rated as 20% disabling, tinnitus rated as 10% disabling, bilateral hearing loss rated at a noncompensable level and post-traumatic stress disorder (PTSD) rated at a noncompensable level. R. at 2216.

In a January 2012 Board hearing, the appellant stated that he had to quit his job as a flight instructor because of his service-connected disabilities. R. at 2695. The appellant underwent a VA examination in April 2013, where the examiner found that the appellant's ability to work was

not affected by his back condition. R. at 2267. An addendum opinion to this examination was authored in June 2014, whereby the examiner found that "[a]fter considering all service connected conditions by separate or in conjunction; it is expected of people with similar medical diagnosis and radiological findings that they are capable of moderate to sedentary physical activity." R. at 3233.

In March 2016, the Board issued a decision denying the appellant entitlement to TDIU. R. at 2-13. In reaching its decision, the Board noted its reliance on the June 2014 examination because it "addressed the service-connected disabilities as an aggregate [and] show[ed] that the Veteran has not been rendered unemployable as a result of his service-connected disabilities." R. at 12. This appeal ensued.

The Court determines that the Board failed to provide an adequate statement of reasons and bases for its reliance on an inadequate June 2014 addendum opinion. *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). Although the June 2014 opinion found that an individual with all of the appellant's service-connected disabilities would not be precluded from moderate to sedentary physical activity, it is unclear how the examiner came to this finding as the opinion lacks any rationale. *See Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 304 (2008) (requiring an examination report to "contain not only clear conclusions with supporting data, but also a reasoned medical explanation connecting the two"). Remand is required for the Board to provide an adequate statement of reasons and bases for its treatment of the medical evidence. *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). 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 reason, and on review of the record, the March 8, 2016, Board decision

on appeal is VACATED and the matter is REMANDED for readjudication.

DATED: June 29, 2017.

Copies to:

Robert V. Chisholm, Esq.

VA General Counsel (027)