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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 16-1994

RICHARD G. STANIS, 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. Stanis, appeals through counsel that part of an April 29, 2016, Board of Veterans' Appeals (Board) decision that declined to refer the appellant's service-connected bilateral hearing loss claim for extraschedular consideration.¹ The appellant argues that the Board erred in failing to consider the collective impact of the appellant's service-connected disabilities. *See* Appellant's Brief at 10-13. For the following reason, that part of the April 2016 decision on appeal is vacated and the matter 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 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

¹ The Board also denied the appellant a compensable rating for bilateral hearing loss on a schedular basis. The appellant does not present any argument as to this determination 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).

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. Army from February 1954 to January 1956 as a light weapons infantryman instructor. R. at 431 (DD Form 214). In April 2007, the regional office granted the appellant service connection for bilateral sensorineural hearing loss and tinnitus with 0% and 10% disability ratings, respectively. R. at 368-69.

The appellant has stated that he has difficulty hearing soft noises because of his hearing loss. *See, e.g.*, R. at 304. The appellant has also alleged that loud noises worsen his tinnitus. *See, e.g.*, R. at 181.

In April 2016, the Board issued the decision currently on appeal, denying a compensable rating for bilateral hearing loss. R. at 2-13. The Board declined referral for extraschedular consideration because it found that "there is no additional hearing impairment that has not been attributed to the service-connected bilateral sensorineural hearing loss." R. at 12.

The Court concludes that the Board failed to adequately consider the "collective impact of the appellant's service-connected disabilities." *See Johnson v. McDonald*, 762 F.3d 1362, 1365 (Fed. Cir. 2014) (noting that the Board is required to determine whether the "collective impact of multiple [service-connected] disabilities" warrants referral for extraschedular consideration). The appellant's service-connected hearing disabilities appear to be working against each other. The appellant has complained of an inability to hear soft noises because of his hearing loss, but also

that loud noises negatively affect his tinnitus. *See* R. at 304, 181. The Board, in error, failed to address the interplay of the appellant's service-connected hearing disabilities. Remand is required for the Board to adequately determine whether referral for extraschedular consideration is warranted. *See Johnson, supra*.

Because the Court is remanding the appellant's claim, 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). 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 reason, that part of the April 29, 2016, Board decision is VACATED and the matter is REMANDED for readjudication.

DATED: July 28, 2017

Copies to:

Robert V. Chisholm, Esq.

VA General Counsel (027)