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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 16-0577

FRED A. COPELAND, 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, Fred A Copeland, appeals through counsel a February 1, 2016, Board of Veterans' Appeals (Board) decision that denied him entitlement to a total disability rating based on individual unemployability (TDIU) prior to August 31, 2010. Record (R.) at 3-9. The appellant argues that the Board erred by failing to (1) comply with a prior remand order and (2) determine whether the appellant was employed in a "protected work environment." Appellant's Brief at 6-13. For the following reasons, the Court will vacate the Board's February 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 is a Vietnam veteran who served in the U.S. Army from June 1968 to August 1969 as an infantryman. R. at 627 (DD Form 214). During service, the appellant was wounded by shrapnel from a land mine that killed numerous other soldiers. R. at 557.

In August 2005, the appellant filed for benefits based on service connection for PTSD. R. at 575. In January 2006, the appellant noted that he enjoyed his workplace, but did not enjoy interacting with his coworkers. R. at 207. The appellant also noted that he found it difficult to be around people as a result of his anxiety. R. at 207.

In February 2006, VA granted the appellant a 30% rating for PTSD. R. at 550. The appellant appealed this decision requesting a higher rating. R. at 538. In February 2007, the appellant reported that he was still employed only because he worked in a "solitary condition." R. at 75. In May 2007, the appellant stated that he would be unable to work in an environment that required interaction with others. R. at 499. The appellant was fired from his job in August 2010. R. at 53. The appellant was granted a 70% rating in June 2012. R. at 848. The appellant filed a request for TDIU in November 2012. R. at 78. In March 2013, the appellant reiterated that he would not have been able to stay in his job if he was not allowed to work in a solitary environment. R. at 53.

In April 2013, the appellant underwent a private psychological examination from which the examiner opined that the appellant was "provided with special accommodations in his job given

his symptoms of PTSD, and, in a sense, his period of employment was likely what should be considered a 'sheltered work environment.'" R. at 93. In June 2014, the appellant was granted TDIU effective August 2010. R. at 19. The appellant appealed the effective-date determination and in July 2015, the parties agreed to a joint motion for remand with the Court, requiring the Board to address the April 2013 private examination regarding the appellant's work environment. R. at 1260.

In February 2016, the Board issued a decision denying the appellant an effective date before August 2010 for his grant of TDIU benefits. R. at 3-9. In its decision, the Board noted that it would "not presume that the [appellant's] occupation [was] isolated" and determined that the appellant was substantially gainfully employed before August 31, 2010, because "the totality of evidence … fails [to] show that [the appellant's] employment would fall under the aegis of a 'sheltered work environment.'" R. at 7-8. This appeal ensued.

The Court determines that the Board provided an inadequate statement of reasons or bases for denying the appellant an earlier effective date for his grant of TDIU benefits. *See Gilbert v. Derwinski*, 1 Vet.App. 49, 53 (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 failed to adequately discuss whether the appellant's work environment prior to August 2010 was a *protected work environment*, instead focusing its discussion too narrowly on whether the appellant's work environment was a *sheltered work environment*. *See* R. at 3-9; *see also* 38 C.F.R. § 4.16 (2017) (noting that a *sheltered* work environment is just one type of *protected* work environment that VA should consider when making a marginal employment determination on "a facts found basis").

Furthermore, the Court is unsure why the Board stated that it would not "presume" that the appellant's occupation is isolated, R. at 8, as no presumption is required given the lay testimony and medical evidence provided by the appellant. *See* R. at 53,75, 93, 207, 499. If the Board deemed the appellant credible, it is unclear why it felt a presumption was needed. *See* R. at 6-8; *Washington v. Nicholson*, 19 Vet.App. 362, 367-68 (2005) (holding that it is within the Board's province to determine the credibility and weight of the evidence before it). Remand is required for to Board to provide an adequate statement of reasons or bases for its effective date determination for the grant of TDIU benefits. *See* 38 C.F.R. § 4.16.

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 February 1, 2016, Board decision on appeal is VACATED and the matter is REMANDED for readjudication.

DATED: July 31, 2017

Copies to:

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VA General Counsel (027)