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**UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS**

No. 17-1386

GEORGE A. STERBA, APPELLANT,

v.

ROBERT L. WILKIE,  
ACTING 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 appeals through counsel that part of an April 12, 2017, Board of Veterans' Appeal (Board) decision that granted a 70% disability rating, but no higher, for post-traumatic stress disorder (PTSD) with a nervous disorder from February 21, 2008.<sup>1</sup> Record (R.) at 2-22. The appellant argues that the Board provided an inadequate statement of reasons or bases for denying a higher rating for PTSD and that the denial of a higher rating and extraschedular referral was premature in light of the remand of TDIU for further development. Appellant's Brief at 6-14. For the following reason, that part of the April 2017 Board decision on appeal is vacated and the matter on a schedular and extraschedular basis is remanded for further development and 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

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<sup>1</sup> To the extent this finding is favorable, the Court will not disturb it. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007). The Board also remanded the matter of a total disability rating based on individual unemployability (TDIU) for further development. That matter is not currently before the Court. *See Hampton v. Gober*, 10 Vet.App. 481, 482 (1997).

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 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 veteran who served on active duty in the U.S. Army from November 1965 to October 1967 as a medical Corpsman and earned the Combat Medical Badge.<sup>2</sup> R. at 859.

In April 2017 the Board granted the appellant a 70% disability rating, but not higher, for PTSD with a nervous disorder as well as referral for extraschedular consideration from February 21, 2008. R. at 20. The Board also remanded TDIU to obtain "an opinion from a VA psychiatrist to address the functional impairment caused by the Veteran's service-connected PTSD from February 21, 2008." R. at 22. This appeal ensued.

The Court concludes that the Board erred in failing to remand the appellant's entitlement to a disability rating in excess of 70% for PTSD and referral for extraschedular consideration with the matter of TDIU as inextricably intertwined. *See Harris v. Derwinski*, 1 Vet.App. 180, 183

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<sup>2</sup> The appellant also served in the U.S. Army Reserve component from the end of his tour of active duty until 1971. R. at 914.

(1991) (holding that where a decision on one issue may have a "significant impact" upon another, the two claims are inextricably intertwined), *overruled on other grounds by Tyrues v. Shinseki*, 23 Vet.App. 166 (2009) (en banc), *aff'd*, 631 F.3d 1380, 1383 (Fed. Cir. 2011), *vacated and remanded for reconsideration*, 132 S. Ct. 75 (2011), *modified*, 26 Vet.App. 31 (2012). Because the matter of TDIU was remanded for a medical opinion to determine the functional impairment caused by the appellant's PTSD, any development and subsequent determination of entitlement to TDIU may have a "significant impact" on the appellant's entitlement to a higher rating for PTSD. *See id.* The Court will therefore remand the PTSD matter on a schedular and extraschedular basis for the Board to remand as inextricably intertwined with TDIU. *See id.*

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 12, 2017, Board decision on appeal is VACATED and the appellant's PTSD claim, on a schedular and extraschedular basis, is REMANDED for further development and readjudication.

DATED: March 30, 2018

Copies to:

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