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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 18-3002

JAMES H. SMITH, APPELLANT,

V.

ROBERT L. WILKIE,
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*: James H. Smith appeals pro se a May 21, 2018, Board of Veterans' decision that (1) granted a 50% disability rating, but no higher[1] for service-connected major depressive disorder with alcohol abuse and (2) denied a total disability rating based on individual unemployability (TDIU). Record (R.) at 2-15. The appellant argues that the Board erred in both matters. *See* Appellant's Informal Brief at 1-4. The Secretary concedes that remand of the TDIU matter is warranted for multiple reasons.[2] *See* Secretary's Brief at 13-19. For the following reasons, the Court will vacate that part of the Board's May 2018 decision on appeal and remand both matters 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

[1] To the extent this finding is favorable, the Court will not disturb it. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007).

[2] Although the Secretary suggests the appellant did not appeal the denial of a higher rating for depression, the appellant stated he was appealing the "[p]ropriety of the evaluation for other Depressive Disorder including IU." Appellant's Informal Brief at 1.

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. Army from January 1960 to April 1983 as a recruiter and armorer unit supply man. R. at 1358 (DD Form 214). He is service connected for multiple conditions other than depression, including a back disability, glaucoma, bilateral hearing loss and tinnitus. *See* R. at 12.

In May 2018 the Board issued the decision on appeal where it granted a 50% rating but no higher for major depressive disorder with alcohol abuse and denied TDIU. R. at 3-15. The Board noted that during the August 2016 VA examination, the appellant reported taking 5 to 6 shots per day. R. at 8.

The Court first concludes that the Board failed to consider the frequency, severity, and duration of the appellant's alcohol use in denying a higher rating for major depressive disorder. *See Vazquez-Claudio v. Shinseki,* 713 F.3d 112, 118 (Fed. Cir. 2013) (holding that "a veteran may only qualify for a given disability rating under § 4.130 by demonstrating the particular symptoms associated with that percentage, or others of similar severity, frequency, and duration"). Although the Board acknowledged that the appellant drank 5 to 6 shots per day, it failed to consider whether

the frequency, severity, and duration of this symptom warranted a higher rating. *See id.* Remand is required for the Board to provide an adequate statement of reasons or bases for its determination regarding the severity of the appellant's disability. *See* 38 U.S.C. § 7104(d)(1) ("Each decision of the Board shall include . . . a written statement of the Board's findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented in the record.").

The Court agrees with the Secretary's concessions of Board error regarding TDIU. First, the Secretary correctly acknowledges that the Board failed to address favorable evidence. *See Caluza v. Brown*, 7 Vet.App. 498, 506 (1995)(finding that the Board must account for and provide the reasons for its rejection of any material evidence favorable to the claimant), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996). The appellant's private psychiatrist found in April 2016 that the appellant suffered from "major impairment in several areas," including "in work [ ] and house work." R. at 227. Additionally, an October 2016 VA addendum opinion reflected difficulty working, *see* R. at 281, yet the Board did not address either of these examinations in denying TDIU.

Second, the Secretary is correct that the Board failed to support the finding that "[w]hile the evidence above shows some functional impairment related to the Veteran's depressive disorder, the evidence fails to show that the Veteran's depressive disorder renders him unable to work." R. at 13. There is no reasoned analysis to support this finding; the Board merely listed evidence without explaining how it reached its negative employability determination. *See Abernathy v. Principi,* 3 Vet.App. 461, 465 (1992) (merely listing the relevant evidence is not adequate to fulfill the Board's obligation to provide a statement of reasons or bases for its decisions).

Third, the Board failed to adequately explain its finding that the appellant was capable of performing sedentary work. The Board acknowledged that the January 2016 VA examiner concluded that the appellant's back disability would make it difficult for him to do tasks involving bending and heavy lifting, as well as prolonged sitting, walking, and standing. R. at 13. The Board then concluded without explanation that "[n]o evidence of record shows that the Veteran was unable to perform sedentary tasks with breaks during the period on appeal due to his back disability." *Id.*

As the Court has recently held in *Withers v. Wilkie*, 30 Vet.App. 139 (2018),

> [w]here a veteran's ability to perform sedentary work is a basis for the Board's decision, the meaning of sedentary work must be determined from the particulars of the medical opinion in which it is used. That is, the Board must explain this meaning—to the extent that it is not apparent from the Board's overall discussion of the opinion—as well as how the concept of sedentary work factors into the veteran's overall disability picture and vocational history, and the veteran's ability to secure or follow a substantially gainful occupation.

Id. at 147. The Board did not perform the analysis required by *Withers*. Notably, no medical examiner ever expressly found that the appellant is capable of sedentary work, so it is not apparent from how the Board reached its determination. Remand is required for the Board to provide an adequate statement of reasons or bases for its TDIU determination. 38 U.S.C. § 7104(d)(1).

On remand, the Board is also reminded that when determining the employability of a claimant, the Board must assess whether "the disabled person is . . . unable to secure or follow a substantially gainful occupation as a result of service-connected disabilities." 38 C.F.R. § 4.16(a) (2018). To make this finding the Board must discuss the claimant's "educational and occupational history when determining whether his or her service-connected disabilities preclude maintaining substantially gainful employment." *Pederson v. McDonald*, 27 Vet.App. 276, 287 (2015). The question is "whether the veteran is *capable* of performing the physical and mental acts required by employment, not whether the veteran can find employment." *Ray v. Wilkie*, 31 Vet.App. 58, 72 (2019) (emphasis in original) (citing *Van Hoose v. Brown*, 4 Vet.App. 361, 363 (1993)).

Because the Court is remanding these matters, 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 reasons, that part of the May 21, 2018, Board decision on appeal is VACATED and the matters are REMANDED for readjudication.

DATED: June 28, 2019

Copies to:

James H. Smith

VA General Counsel (027)