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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 18-1454

ADAM J. MILLER, 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*: Adam J. Miller pro se appeals an August 17, 2017, Board of Veterans' Appeals decision that denied the appellant a total disability rating based on individual unemployability (TDIU). Record (R.) at 2-7. The Court will construe the appellant's arguments as a general allegation of error in the Board's decision. *See Calma v. Brown*, 9 Vet.App. 11, 15, (1996). For the following reason, the Court will vacate the August 2017 Board 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 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 currently service connected for post-traumatic stress disorder (PTSD) and has been in receipt of a 70% disability rating for this condition since April 17, 2008. R. at 2. He also suffers from acute myelitic leukemia. *See* R. at 1035-36.

In the August 2017 decision on appeal, the Board denied TDIU because it found that the appellant's PTSD did not prevent him from obtaining and retaining substantially gainful employment. R. at 2. The Board found that the 4 VA examiner's opinions were entitled to "significant probative weight." The Board stated that

> [t]here [are] no probative medical opinions of record suggesting that the Veteran is totally disabled or unemployable due to his service-connected PTSD, or that he is functionally incapable of doing any type of productive work. The Board acknowledges that the July 2009 VA examiner indicated that the Veteran's symptoms caused deficiencies in work and that that his medical disability was "clearly complicated significantly" by his PTSD symptoms. Significantly, however, at the time of the July 2009 VA examination the Veteran was still undergoing treatment for his leukemia. Moreover, in the examination, the Veteran denied that his unemployment was due to his PTSD symptoms. In addition, the November 2014 and July 2016 VA examiners found that the PTSD symptoms caused occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks, although generally functioning satisfactorily, with normal routine behavior, self-care, and conversation; and the April 2017 examiner found that there was no indication that the service-connected PTSD symptoms made the Veteran unable to secure or follow a substantially gainful occupation. As such, the Veteran's limitations from his PTSD are recognized by the 70 percent rating, which is assigned in recognition of significant interference with employment.

> Although the Veteran is competent to provide testimony or statements relating to symptoms or facts of events that he has observed and are within the realm of his personal knowledge, he is not competent to establish that which would require specialized knowledge or training, such as medical expertise. He may sincerely believe that he is unemployable due to his service-connected PTSD, but as a lay person, he is not competent to render a medical diagnosis or an opinion concerning unemployability.

R. at 6-7.

The Court concludes that the Board provided an inadequate statement of reasons or bases for its treatment of the July 2009 VA examination in multiple regards. *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."). First, the Board failed to explain why it was "significant" that the appellant was still undergoing treatment for leukemia at the time of this examination. The question is whether the appellant's service-connected PTSD renders him unemployable and the July 2009 VA examiner's opinion appears to suggest that the appellant's PTSD alone significantly interfered with his ability to work.[1] *See* R. at 1615-26. *See* 38 C.F.R. § 4.16(a) (2018). Second, the Board found it probative that the appellant did not report that he was unemployable because of his PTSD at the July 2009 examination, but then found he was not competent to testify regarding unemployability. *See* R. at 6-7. Remand is required for the Board to provide an adequate statement of reasons or bases for its treatment of the July 2009 VA examination. 38 U.S.C. § 7104(d)(1). If the Board determines that the examination lacks sufficient detail to adjudicate the matter of TDIU, it should return the examination for clarification. *See* 38 C.F.R. § 4.2 (2018) (VA is required to "return the [examination] report as inadequate for evaluation purposes" if the report "does not contain sufficient detail.").

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

[1] To the extent the Board found that the appellant's 70% disability rating was a recognition of his difficulty working, the Board did not explain why for at least the period relevant to the 2009 VA examination, TDIU was not warranted. *See* R. at

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, the Court will VACATE the August 17, 2017, Board decision on appeal and REMAND the matter for readjudication.

DATED: June 28, 2019

Copies to:

Adam J. Miller

VA General Counsel (027)