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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 18-0345

HARVEY C. JOHNSTON, 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*: The appellant through counsel appeals a September 22, 2017, Board of Veterans' Appeals decision that denied service connection for bilateral hearing loss. Record (R.) at 2-10. The appellant argues that the Secretary failed to meet his burden in finding that the presumption of soundness had been rebutted. For the following reason, the Court will reverse the Board's finding that the presumption of soundness had been rebutted, otherwise vacate the September 22, 2017, Board decision and remand the matter for readjudication consistent with this decision.

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 served on active duty in the U.S. Air Force from August 1958 to June 1962 as a warehousing specialist. R. at 109 (DD Form 214). Upon the appellant's entry into service, the appellant's ears were found to be normal and he scored a 15/15 on a whisper voice test; no audiometric results were documented in the entrance examination. R. at 51-52. A month later, hearing loss was documented. R. at 42.

In December 2009 the appellant filed for benefits based on service connection for bilateral hearing loss. R. at 426-66.

In September 2017, the Board denied service connection for bilateral hearing loss. R. at 2-10. The Board found that the presumption of soundness applied. R. at 8. The Board then stated that

> [i]n this case, the presumption of soundness is rebutted as the Veteran's bilateral hearing loss both existed prior to active service and was not aggravated by such service. In this regard, it is highly probative that the August 1958 audiogram, dated just ten days after enlistment, revealed hearing loss consistent with 38 C.F.R. § 3.385. Additionally, he reported ENT trouble in the Report of Medical History upon enlistment. There is no documented event or injury, nor has he claimed any, within the ten days from the date of enlistment and the August 1958 audiogram that otherwise would have resulted in documented hearing loss. As such, the August 1958 audiogram is clear and unmistakable evidence that bilateral hearing loss existed prior to entrance to active service.
>
> Moreover, service treatment records, the July 2010 VA examiner's opinion, and even the December 2012 private physician's opinion all document that several in-

> service audiograms documented stable and consistent bilateral hearing loss, which is probative evidence that the Veteran's pre-existing bilateral hearing loss was not aggravated by active service. Moreover, the July 2010 examiner concluded, based upon a full and accurate review of the record, including service treatment records, that the Veteran's hearing loss, which existed at enlistment, was less likely as not permanently aggravated by active service. This is highly probative evidence which weighs against the claim.

R. at 9.

The Court concludes that the Board clearly erred in determining that the presumption of soundness had been rebutted. *See Gilbert v. Derwinski*, 1 Vet.App. 49, 53 (1990) (holding that the Board's findings of fact are reviewed under the "clearly erroneous" standard of review). The Board found that the appellant's hearing was tested upon entrance,[1] and that he did not demonstrate hearing loss upon entrance. R. at 8. The Board then found that "in-service audiograms documented stable and consistent bilateral hearing loss, which is probative evidence that the Veteran's pre-existing bilateral hearing loss was not aggravated by active service." R. at 9. Yet, the in-service audiograms do not demonstrate clear and unmistakable evidence of no aggravation. *See Wagner v. Principi*, 370 F.3d 1089, 1096 (Fed. Cir. 2004). Rather, they merely evidence hearing loss that was not noted upon entrance. At most, they establish that the appellant's hearing did not worsen between in-service audiograms, not that his hearing did not worsen during his service. VA has not satisfied its burden to provide clear and unmistakable evidence that there was no in-service aggravation and the Court will therefore reverse the finding that the presumption of soundness has been rebutted. *See id.* Remand is required for the Board to readjudicate the matter with the appellant being afforded the presumption of soundness for his hearing condition. *See* 38 U.S.C. § 1111.

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.").

[1] The Board noted that although audiometric results were not documented in the entrance examination, the appellant scored a 15/15 on the whisper voice test. R. at 5.

For the foregoing reason, the Board's finding that the presumption of soundness had been rebutted is REVERSED, the September 22, 2017, Board decision is otherwise VACATED, and the matter is REMANDED for readjudication.

DATED: June 28, 2019

Copies to:

Patrick A. Berkshire, Esq.

VA General Counsel (027)