

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 18-2097

VICTOR M. NORIEGA, 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*: Vietnam veteran Victor Noriega, through counsel, appeals that part of a January 3, 2018, Board of Veterans' Appeals decision that denied service connection for bilateral hearing loss.¹ Record (R.) at 2-10. The appellant argues that the Board erred in relying on an inadequate February 2012 VA medical opinion and for failing to afford the appellant the combat presumption. Appellant's Brief at 7-15. For the following reason, the Court will vacate that part of the January 2018 Board decision on appeal 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

¹ The Board also remanded the appellant's tinnitus claim. This matter is not currently before the Court. *See Hampton v. Gober*, 10 Vet.App. 481, 482 (1997). Further, a bilateral shoulder condition claim was dismissed in the January 3, 2018, Board decision. Because the appellant presents no argument as to the dismissal of this matter, the Court deems the issue abandoned. *See Pederson v. McDonald*, 27 Vet.App. 276, 285 (2015) (en banc) (holding that, where an appellant abandons an issue or claim, the Court will not address it).

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 June 1968 to June 1971 as an airframe repairman. R. at 1294 (DD Form 214). During his service, Mr. Noriega received a Vietnam Service medal with two Bronze Stars and a Vietnam Campaign Medal with 1960 Device. *Id.*

He has testified that his hearing loss started in service when he was close to rocket explosions in Vietnam. R. at 576, 1342, 1380, 1819.

In January 2011, the appellant filed for benefits based on service connection for hearing loss. R. at 2005.

In the January 2018 decision on appeal, the Board denied service connection for hearing loss, although in-service noise exposure was conceded. R. at 2-10, 6. There is no discussion as to whether the appellant was a combat veteran and therefore whether his lay testimony was entitled to the evidentiary benefit of 38 U.S.C. § 1154(b).

Pursuant to section 1154(b),

in the case of any veteran who engaged in combat with the enemy in active service with a military, naval, or air organization of the United States during a period of war, campaign, or expedition, the Secretary shall accept as sufficient proof of service connection of any disease or injury alleged to have been incurred in or

aggravated by such service satisfactory lay or other evidence of service incurrence or aggravation of such injury or disease, if consistent with the circumstances, conditions, or hardships of such service, notwithstanding the fact that there is no official record of such incurrence or aggravation in such service, and, to that end, shall resolve every reasonable doubt in favor of the veteran. Service connection of such injury or disease may be rebutted by clear and convincing evidence to the contrary.

In cases where noise exposure has been conceded, the Board must still determine whether a veteran is entitled to the combat presumption afforded under section 1154(b), because a failure to do so results in an analysis that "conflates the question of whether [a veteran] was exposed to acoustic trauma with the issue of whether he suffered permanent hearing loss while on active duty." *Reeves v. Shinseki*, 682 F.3d 988, 998-99 (Fed. Cir. 2012). In *Reeves*, the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) concluded that "although the record contained evidence of the cause of [the veteran's] disability—acoustic trauma mortar blasts . . . —he still had the right to invoke the section 1154(b) presumption in order to show that he incurred the *disability itself* while in service." *Id.* at 999 (emphasis in original). If a veteran is "able to use the section 1154(b) presumption to show that he incurred a permanent hearing disability in service, it presumably would [be] far easier for him to establish that there was a nexus between his military service and [a hearing disability]." *Id.*

The Court concludes that the Board erred in failing to determine whether the appellant was a combat veteran and thus entitled to the combat presumption afforded under section 1154(b). Although noise exposure has been conceded, the appellant has testified that his *hearing loss* began in service. *See*, e.g., R. at 576, *see also Reeves*, 682 F.3d at 999. As noted by the Federal Circuit in *Reeves*, if a veteran is "able to use the section 1154(b) presumption to show that he incurred a permanent hearing disability in service, it presumably would [be] far easier for him to establish that there was a nexus between his military service and [a hearing disability]." Remand is required for the Board to consider whether the appellant is a combat veteran and thus entitled to the combat presumption. *See* 38 U.S.C. § 1154(b).

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 January 3, 2018, Board decision on appeal is VACATED and the matter is REMANDED for readjudication.

DATED: August 14, 2019

Copies to:

Marc A. Lipscomb, Esq.

VA General Counsel (027)