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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 18-3935

DEAN R. BUILTER, 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 War veteran Dean R. Builter appeals, through counsel, a July 5, 2018, Board of Veterans' Appeals decision that denied him an earlier effective date for a total disability rating based on individual unemployability (TDIU). Record (R.) at 4-19. The appellant argues that the Board erred by (1) overlooking that the appellant was employed out of charity from his employer; (2) improperly using only a portion of the definition for "protected work environment"; (3) conflating the two forms of marginal employment; and (4) using the incorrect date of claim.[1] Appellant's Brief at 13-28. The Secretary concedes that the Board articulated an incorrect standard for what qualifies as a "protected work environment," and concludes that remand, but not reversal, is the appropriate remedy. Secretary's Brief at 4-9. For the following reason, the Court will vacate the July 2018 Board decision and remand the matter 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

[1] The Board has found that the "current appeal arises from the [appellant's] May 2005 claim for an increased rating for his service-connected PTSD." R. at 7. The Court will not disturb this favorable finding. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007).

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. Army from May 1967 to January 1969 as an infantry indirect fire crewman. R. at 247 (DD Form 214). The appellant served in Vietnam as part of the 101st Airborne Division. R. at 1200.

In October 1990, the appellant was granted service connection for post-traumatic stress disorder (PTSD) with a 30% disability rating effective from June 1990. R. at 2722. In December 2005, the regional office (RO) increased his PTSD disability rating to 50%. R. at 2558. Since then, the appellant has appealed for a higher rating several times. R. at 2487, 2391, 1907-10.

At an October 2005 VA examination, the appellant reported trouble focusing at work, but noted that "his boss [was] lenient as he [would] leave certain things on the job undone," and that his boss would largely leave the appellant alone. R. at 2568. In November 2009, the appellant reported losing his job, R. at 2180, but he returned to work in June 2010. R. at 2124. Upon his return to work, the appellant "expresse[d] gratitude toward his current employer who . . . kept him on despite the fact that he [was] not really doing his job." R. at 2124.

In June 2013, the appellant's friend and employer submitted an affidavit describing the appellant's work performance and accommodations. R. at 1860. The employer noted that he "could easily get another guy to come and do his job more efficiently, but [he] know[s the appellant] has issues. If [the appellant] wasn't [his] friend[, he] would not keep him on as an employee." R. at 1860.

In July 2013, a VA psychiatrist noted that the appellant's PTSD symptoms "severely limit[ed] his ability to work with others, and that the appellant was only employed because of his childhood friend tolerating these symptoms. R. at 1862. The appellant also submitted an affidavit where he explained his work arrangement and accommodations with his close friend and employer and concluded he "could not work somewhere else because they would not provide [him] with the accommodations [he] need[s]." R. at 1863.

That same month, the appellant underwent an interview with a vocational consultant. R. at 1867-90. The consultant found that "it is clear that [the appellant's] employer makes concessions and accommodations for the [appellant] that other employers would not make." R. at 1878. The consultant concluded that the appellant "would not be able to obtain and retain substantially gainful employment," and that his current accommodations and concessions "would not be the norm within a competitive work environment." R. at 1887.

In February 2018, the appellant underwent an interview and vocational assessment with a new vocational consultant. R. at 47-60. Based on the continuing accommodations, the vocational consultant opined that the appellant was employed in a protected work environment, and that he was at least as likely as not precluded from securing substantially gainful employment since at least 2005. R. at 58.

In July 2018, the Board issued its decision denying the appellant TDIU before June 2013. R. at 4-19. The Board found that throughout the period before June 2013, although the appellant met the criteria for a 70% combined rating, the appellant was substantially gainfully employed, and was performing work that was not sheltered or marginal. R. at 4, 8-9. The Board relied on U.S. Department of Labor's and Social Security Administration's definition of a "protected environment," that the employment must be for a purely "therapeutic or charitable purpose." R. at 15-18. The Board found that the appellant's work was not in a protected environment because it did not meet this definition and his earned income exceeded the poverty threshold. This appeal ensued.

The Court concludes that the Board failed to provide an adequate statement of reasons or bases for its determination that the appellant's employment was not a protected work environment. *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 parties that the Board's definition of "protected environment" is inconsistent with the regulation. The Court notes that the Board found that the appellant met the criteria for his disability rating throughout the period on appeal, acknowledged the vocational consultants' finding that the employer's accommodations were ones that most employers were not tolerate, and that his employer was keeping the appellant employed out of friendship. R. at 8-14. It is unclear what else would be necessary for the appellant to meet VA's definition of "protected environment" under any standard.[2] Remand is required for the Board to provide an adequate statement of reasons or bases for its protected work environment standard. 38 U.S.C. § 7104(d)(1).

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, the July 5, 2018, Board decision is VACATED and the matter is REMANDED for further development and readjudication.

DATED: September 26, 2019

Copies to:

Zachary M. Stolz, Esq.

VA General Counsel (027)

[2] Although the appellant argues for reversal, the Court concludes that this would require the Court to provide its own definition of a "protected environment," which it will not do. *See Cantrell v. Shulkin*, 28 Vet.App. 382, 392-93 (2017) (declining to define the term "protected environment" for TDIU purposes).