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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 18-2729

JASON A. GARDNER, 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*: Veteran Jason A. Gardner appeals through counsel that part of a March 19, 2018, Board of Veterans' Appeals decision that denied disability ratings in excess of 30% for a generalized anxiety disorder (GAD) and in excess of 10% for tension headaches.¹ Record (R.) at 2-38. The appellant argues that the Board provided an inadequate statement of reasons or bases for its determinations on both issues. Appellant's Brief at 9-29. For the following reasons, the Court will vacate that part of the March 2018 Board decision on appeal and remand the 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 The Board granted a rating of 30% for gastroesophageal reflux disease (GERD). The Court will not disturb this favorable finding. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007). The Board denied service connection for post-traumatic stress disorder (PTSD). The appellant presents no arguments relating to GERD or PTSD, and the Court deems these matters 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). The Board remanded the matters of a skin condition, a cervical strain, and left knee patellofemoral syndrome. These matters are not currently before the Court. *See Hampton v. Gober*, 10 Vet.App. 481, 482 (1997).

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. Navy from December 2008 until October 2009, including a combat tour in Iraq between March and September 2009. R. at 1102, 682 (DD Form 214). In July 2009, he sought medical treatment for tension headaches that started after he suffered a head injury. R. at 775-76.

In October 2009, the appellant filed for benefits based on service connection for headaches. R. at 1105-21. At a November 2009 VA general medical examination, the appellant reported daily headaches that varied in severity. R. at 1093. The appellant stated that the headaches usually lasted for several hours and that he did not believe that they were migraines. R. at 1093. The appellant added that he experienced tiredness. R. at 1093.

The appellant underwent a VA PTSD examination in November 2009. R. at 1099-1104. He reported difficulty sleeping and chronic irritability or outbursts of anger. R. at 1101. The examiner found that the appellant had "at least minimal attention deficits secondary to sleep deprivation." R. at 1102.

In December 2009, the regional office (RO) granted service connection for primary insomnia and for tension-type headaches, assigning 10% and noncompensable ratings, respectfully, effective October 2009. R. at 1047-57. At a February 2010 traumatic brain injury examination, the appellant reported getting at least 1 headache per day with a pain level of 3 to 7 on a scale of 1 to 10 and lasting for hours. R. at 1020. He also reported fatigue. R. at 1020. The appellant said that his headaches were not migraines and that Tylenol eased the pain. R. at 1020.

In his March 2011 appeal to the Board, the appellant complained of depression, anxiety, being constantly stressed about work, and being "disassociated with others most of the time." R. at 622-24. He said that he experienced memory loss that caused him "stop whatever it is [he was] doing, to think about [what] it is [he had] to accomplish." R. at 622. The appellant stated that his tension headaches were becoming more frequent and painful. R. at 622.

The appellant underwent a VA PTSD examination in April 2012. R. at 589-609. He reported difficulty falling or staying asleep, depressed mood, and anxiety. R. at 596-97. The examiner checked off a box stating that the appellant's symptoms caused occupational and social impairment as a result of transient or mild symptoms which decrease work efficiency and ability to perform occupational tasks only during periods of significant stress. R. at 592.

The appellant underwent a VA mental disorders examination in July 2015. R. at 422-26. He reported that he had been married for 11 years, had 2 children, enjoyed good family and social relationships, and had worked in the same position for the past 10 years. R. at 424. The examiner marked that the appellant had experienced depressed mood, anxiety, chronic sleep impairment, mild memory loss, and impairment of short-and-long-term memory. R. at 425. The examiner checked off a box stating that the appellant's symptoms caused occupational and social impairment with 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. R. at 423.

The appellant filed for an increased rating for secondary insomnia in April 2015. R. at 502-03. In a July 2015 rating decision, the RO recharacterized the appellant's primary insomnia as GAD and increased the appellant's disability rating to 30%, effective April 2015. R. at 369.

The appellant and his wife testified at a Board hearing in September 2017. R. at 41-67. The appellant's wife stated that the two had "a great relationship" before his service, but that upon his return, he was withdrawn, "snappy," and "wouldn't really talk to me like he used to." R. at 47-48.

She stated that their daughter has said "more than once that she's scared of her daddy . . . scared to approach him with just common, little girl things; wanting her daddy to pay attention to her, play with her." R. at 48. The appellant's wife added that their daughter struggled to connect with him. R. at 48. The appellant described severe headaches that sometimes caused dizziness and always caused light sensitivity. R. at 64-65. When these happened, he had to "find some kind of place that's a little bit sheltered and it's not as bright, and a quiet area, and just take a minute to breathe, calm down." R. at 65. He reported getting headaches whenever work got stressful, which was almost every day. R. at 64. He said that he did not consider his headaches to be "close to" migraines. R. at 65.

In March 2018, the Board denied disability ratings in excess of 30% for GAD and in excess of 10% for tension headaches. R. at 2-38. The Board listed symptoms enumerated in the 50% mental disorders rating criteria that did not manifest during the appeal period. R. at 18-19. Next, the Board noted that the April 2012 and July 2015 examiners found that the appellant experienced short-and-long-term memory loss, disturbances in mood, irritability, sleep impairment, and concentration and memory issues. R. at 19. Citing the checked boxes on the examination reports, the Board found that these symptoms were not shown to have contributed to occupational and social impairment with reduced reliability and productivity. R. at 19. Then, the Board found that despite the lay testimony of the appellant and his wife that he struggled with "readjusting to family life" and communicating with his wife and daughter, the clinical evidence from the July 2015 VA examination report "show[ed] that the [appellant] was functioning well within his family and at work." R. at 19. The Board concluded that the appellant did not experience symptoms similar in severity, frequency, and duration to those listed in the 50% rating. R. at 19-20.

With respect to the appellant's headache claim, the Board remarked that his tension headaches were rated by analogy to the diagnostic code for migraine headaches, which permits compensable ratings only where headaches manifest in "characteristic prostrating attacks." R. at 25; *see also* 38 C.F.R. § 4.124a, Diagnostic Code (DC) 8100 (2019). Although "characteristic prostrating attacks" is not defined by regulation or caselaw, the Board defined "prostration" as "extreme exhaustion or powerlessness." R. at 27 (citing DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1531 (32d ed. 2012) [hereinafter DORLAND'S]). The Board noted that the appellant's headaches were relieved by medication and from his sitting in a quiet and dimly lit space. R. at 27. The Board then found that the appellant's headaches did not manifest in characteristic prostrating

attacks because the November 2009 and February 2010 VA examinations "did not produce findings prostrating attacks of . . . headache pain," and the appellant consistently reported that he did not believe he suffered from migraines. R. at 27. However, the Board did find that the appellant experienced "significant symptoms and his headaches occur[red] with the type of frequency" that approximated the 10% rating criteria. R. at 28. This appeal ensued.

The Court concludes that the Board provided an inadequate statement of reasons or bases for finding that a rating in excess of 30% for GAD was not warranted because it did not sufficiently discuss the frequency and duration of the impairment caused by the appellant's symptoms. *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 concluded that the appellant's symptoms were not of the same severity, frequency, and duration as those listed in the 50% criteria, the Board analyzed only the severity of the appellant's symptoms. *See* R. at 19-20. The Board's statement of reasons or bases is thus inadequate. *See Vazquez-Claudio*, 713 F.3d at 118. Remand is warranted for the Board to adequately address the severity, frequency, and duration of the appellant's psychiatric symptoms. *Id.*

The Court also concludes that the Board provided an inadequate statement of reasons or bases for finding that the appellant's tension headaches did not manifest in characteristic prostrating attacks. *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 Board defined "prostration" as "extreme exhaustion or powerlessness." R. at 27 (citing DORLAND'S at 1531). The Board, however, never discussed whether the appellant experienced "extreme exhaustion or powerlessness," despite noting evidence of frequent headaches that required medication, a quiet space, and dim lighting for relief. *See* R. at 27; *see also* R. at 64-65, 1020, 1093. Instead, the Board found that the appellant did not suffer characteristic prostrating attacks because the November 2009 and February 2010 VA examiners did not produce findings of such attacks and because the appellant denied having migraines. R. at 27. The VA examiners, however, never addressed whether the appellant experienced prostrating attacks, extreme exhaustion, or powerlessness. *See* R. at 1020-21, 1092-93. The examiners' most relevant findings were that the appellant experienced fatigue. *See* R. at 1020, 1093. It is thus unclear how the Board determined

that the VA examination reports' lack of findings on characteristic prostrating attacks supported a finding that such attacks, as defined by the Board, did not occur. *See* R. at 27. It is also unclear how the appellant's denying migraine headaches was relevant to the inquiry into the severity of the appellant's service-connected tension headaches. Remand is required for the Board to discuss whether the appellant experienced characteristic tension headache attacks that caused "prostration" as defined by the Board. *See* 38 U.S.C. § 7104(d)(1).

Because the Court is remanding the appellant's claims, 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 March 19, 2018, Board decision on appeal is VACATED and the matters are REMANDED for readjudication.

DATED: October 31, 2019

Copies to:

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