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**UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS**

No. 15-4247

DOUGLAS K. FREEMAN, APPELLANT,

v.

ROBERT A. McDONALD,  
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, Douglas K. Freeman, appeals through counsel that part of a September 1, 2015, Board of Veterans' Appeals (Board) decision that denied him (1) a disability rating in excess of 30% for post-traumatic stress disorder (PTSD) for the period prior to January 18, 2012; and (2) a disability rating in excess of 50% for PTSD for the period from January 18, 2012.<sup>1</sup> Record (R.) at 2-19. The appellant argues that the Board erred in (1) failing to apply favorable evidence retrospectively; (2) failing to provide reasons or bases for rejecting favorable material evidence; (3) failing to properly interpret and apply the law; and (4) prematurely adjudicating the matter of a referral for extraschedular consideration after having remanded the matter of TDIU. Appellant's Brief at 6-20. For the foregoing reason, the Court will vacate that part of the Board's September 1, 2015, decision on appeal and remand the matter of PTSD for the entire period on appeal 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

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<sup>1</sup> The Board also remanded the matter of a total disability rating based on individual unemployability (TDIU). R. at 19-21. This matter is not before the Court. *See Hampton v. Gober*, 10 Vet.App. 481, 482 (1997).

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, 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).

The appellant is a veteran of the Vietnam War who served on active duty in the U.S. Marine Corps from September 1965 to September 1969, primarily as an aircraft mechanic, and was awarded a Navy Achievement Medal with a "V" device. R. at 57 (DD Form 214), 258. The appellant stated that while stationed at Da Nang Air Base he was "subject to frequent rocket attacks," recalling in particular taking heavy fire during the Tet Offensive of January 1968. R. at 258-59. The appellant also stated that he nearly lost his life during one rocket attack, and saw another mechanic fall to his death when an airplane canopy closed in on him. R. at 259.

In March 2009 the appellant filed a claim for benefits based on service connection for PTSD. R. at 322-25. In June 2009 the appellant underwent a VA examination, reporting nightmares associated with seeing an accidental death in service, low energy, hyperstartle response, a history of suicidal ideation, and avoidance of crowds. R. at 258. The examiner noted that the appellant had below-average hygiene, had a steady relationship with his common law wife, and was able to manage his finances. R. at 263. The examiner also noted that the appellant had lost his job as a machinist 3 years prior to the examination, and felt that it was hard to find work in the area where he lived. R. at 258. The examiner found that the appellant's PTSD symptoms aggravated his social isolation and avoidance, but did not significantly affect his employability, and resulted only in "mild and decreas[ed] work efficiency and ability to perform occupational tasks, mainly during periods of significant stress." R. at 263.

In a July 2009 rating decision the regional office (RO) awarded the appellant benefits based on service connection for PTSD with a 30% disability rating effective the date of his claim. R. at

240-47. The appellant appealed. R. at 225. A July 2010 mental health treatment note indicates that the appellant exhibited affective disturbance, anger, avoidance, flashbacks, nightmares, poor motivation, sleep disturbance, social isolation and alienation, exaggerated startled response, and intrusive thoughts. R. at 167-70.

In January 2012 the appellant underwent another VA examination, reporting symptoms of avoidance of people, places, and activities that recall past trauma, diminished interest or participation in activities, and restricted range of affect that made him unable to have loving feelings. R. at 374. The appellant also reported nightmares and flashbacks occurring 15 to 20 times a month and difficulty establishing and maintaining effective work and social relationships. R. at 375. The examiner diagnosed the appellant with PTSD, worsened after appellant recently lost his mother; alcohol dependence; and a personality disorder not otherwise specified. R. at 370-71. The examiner found that the appellant's symptoms amount to occupational and social impairment with reduced reliability and productivity, but that it was impossible to determine which symptoms were attributable to which diagnosis as "the symptoms were inextricably intertwined." R. at 371-72. The examiner also found that the appellant's personality disorder "likely cause[d] him substantial problems in relationships, both at home and in would-be employment settings". R. at 371. The examiner also found that the appellant's PTSD symptoms caused "clinically significant distress or impairment in social, occupational, or other important areas of functioning." R. at 374.

In July 2014 the Board found that the appellant was entitled to a disability rating of 30%, but no higher, for his PTSD for the period prior to January 18, 2012, and was entitled to a rating of 50%, but no higher, for the period from that date. R. at 69-93. In April 2015 the Court granted the parties' joint motion for remand (JMR), which determined that remand was warranted for the Board to consider a November 2008 treatment record wherein the appellant reported past suicidal thoughts, anxiety, low moods, loss of energy, flashbacks, and avoidance. R. at 60-61, 65. The JMR also determined that remand was warranted for the Board to fully consider the findings of the January 2012 examiner, in particular that the personality disorder "likely cause[d] substantial problems" in work and social relationships and his PTSD symptoms "cause[d] significant distress or impairment in social, occupational or other areas of functioning." R. at 61-62.

In September 2015 the Board denied the appellant a disability rating (1) greater than 30% for his PTSD for the period prior to January 18, 2012; and (2) greater than 50% from that date. R. at 2-19. With respect to the period prior to January 18, 2012, the Board relied primarily on the findings of the June 2009 examiner, who "did not endorse a higher degree of occupational and social impairment than decreased work efficiency and ability to perform occupational tasks, mainly during periods of significant stress." R. at 14. With respect to the period beginning January 18, 2012, the Board relied on the findings of the January 2012 examiner that the appellant's "PTSD and other diagnoses resulted in occupational and social impairment with reduced reliability and productivity." R. at 16. The Board also found that the appellant's symptoms are "consistent with those listed in the schedular criteria" and thus referral for extraschedular consideration is not warranted. R. at 18. Finally, the Board found that the issue of the appellant's PTSD symptoms affecting his employability was raised at the June 2009 and January 2012 examinations, and the Board remanded the issue of TDIU for further development. R. at 20. This appeal follows.

With respect to all periods on appeal, the Court concludes that the Board provided an inadequate statement of reasons or bases for prematurely determining that the appellant's PTSD symptoms are "contemplated by the schedular criteria." R. at 18. The Board remanded the matter of TDIU for further development, noting that the appellant had stated at both the June 2009 and January 2012 examinations that he had not worked since 2005, and stated at the January 2012 examination that his PTSD symptoms "likely caused substantial problems in would be employment settings." R. at 20. Any further development by the Board addressing the effects of the appellant's PTSD or his other disabilities on employability will also naturally address the appellant's PTSD symptomatology. Because it is possible that the evidence gathered for the matter of TDIU might alter the appellant's disability picture, the Court determines that the development of evidence and the adjudication of whether the appellant is entitled to TDIU may have a significant impact on the matter of whether the appellant is entitled to a higher rating for PTSD, schedular or otherwise. *Harris v. Derwinski*, 1 Vet.App. 180, 183 (1991) (holding that where a decision on one issue may have a "significant impact" upon another, the two claims are inextricably intertwined), *overruled on other grounds by Tyrues v. Shinseki*, 23 Vet.App. 166 (2009) (en banc), *aff'd*, 631 F.3d 1380, 1383 (Fed. Cir. 2011), *vacated and remanded for reconsideration*, 132 S. Ct. 75 (2011), *modified*, 26 Vet.App.

31 (2012). Remand is required for the Board to ensure that these matters are adjudicated together. *See Harris, supra*.

Because the Court is remanding the appellant's claim for the potential development of evidence, it is premature to address the appellant's remaining arguments. 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 on remand. *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 Board's September 1, 2015, decision on appeal is VACATED and the matter is REMANDED for readjudication.

DATED: November 30, 2016

Copies to:

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