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

No. 15-2930

JAMES MARKSON, 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, James Markson, appeals through counsel that part of an April 10, 2015, Board of Veterans' Appeals (Board) decision that denied an initial compensable rating for hypertension.<sup>1</sup> Record (R.) at 3-11. The appellant argues that the Board (1) failed to provide an adequate statement of reasons or bases for denying his request for referral for extraschedular consideration; (2) committed prejudicial error by attributing his symptoms to left ventricular hypertrophy instead of hypertension; and (3) failed to provide an adequate statement of reasons and bases for denying the matter of a total disability rating based on individual unemployability (TDIU). Appellant's Brief at 3-12. For the following reasons, the Court will vacate that part of the Board's April 2015 decision denying referral for an extraschedular evaluation and remand the matter for readjudication. That portion of the April 2015 decision pertaining to the matter of (TDIU) is affirmed.

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<sup>1</sup>The Board also denied the appellant entitlement to a compensable disability rating for hypertension on a schedular basis. The appellant presents no argument as to this matter and the Court deems it 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). Additionally, the Board remanded the matters of entitlement to (1) service connection for left ventricular hypertrophy as secondary to hypertension and (2) an increased evaluation for post-traumatic stress disorder (PTSD). These matters are not currently before the Court. *See Hampton v. Gober*, 10 Vet.App. 481, 482 (1997).

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, 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 Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990).

The appellant is a Vietnam veteran who served on active duty in the U.S. Air Force from March 1966 to May 1970. R. at 16 (DD Form 214). In December 2007, the appellant was granted service connection for post-traumatic stress disorder (PTSD) and awarded a 50% rating for the disability, effective March 28, 2008. R. at 530-31. In March 2012, the appellant was awarded service connection for hypertension, secondary to his service-connected PTSD, but was assigned a noncompensable rating. R. at 1756-7.

In April 2015, the Board denied the appellant a compensable rating for his service-connected hypertension, finding that he did not show a history of diastolic blood pressure predominately at or above 100. R. at 3-11. The Board also denied the appellant referral for an extraschedular evaluation. R. at 9-10. In reaching its conclusion, the Board found that "the medical evidence fails to show anything unique or unusual about the disabilities at issue that would render the schedular criteria inadequate. The Veteran's hypertension symptoms are contemplated in the current assigned noncompensable evaluation." R. at 9. This appeal ensued.

The Court agrees with the appellant's contention that the Board failed to consider whether the collective impact of his service-connected disabilities warranted referral for extraschedular consideration. *See Johnson v. McDonald*, 762 F.3d 1362, 1365 (Fed. Cir. 2014) (noting that the Board is required to base extraschedular consideration on the "collective impact of multiple disabilities"). Outside of its conclusory statement that the impact of the service-connected

disabilities are contemplated in the currently assigned evaluation, the Board failed to provide any additional discussion of the collective impact of the appellant's service-connected disabilities. The appellant is prejudiced by this failure because the record reflects that there is an interplay between his service-connected PTSD and his service-connected hypertension, particularly at night. *See* 38 U.S.C. § 7261(b) (stating that the Court must take "due account of the rule of prejudicial error"). Remand is required for the Board to provide an adequate statement of reasons or bases for whether referral for extraschedular consideration is warranted. *See* 38 C.F.R. § 3.321 (2016).

The Court, however, is not persuaded that the Board erred when it failed to address evidence that the appellant's service-connected disabilities "impacted" his ability to work in denying TDIU. Appellant's Brief at 9. *See Hilkert v. West.*, 12 Vet. App. 145, 147 (1999) (applicants bear the burden of persuasion), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000) (table). Although the Board erred in limiting their TDIU analysis to just the appellant's hypertension disability (*see* R. at 10), the appellant fails to cite any evidence of unemployability and therefore any error is harmless. *See* 38 U.S.C. § 7261.

Because the Court is remanding the matter of referral for extraschedular consideration, it will not address the appellant's remaining arguments regarding this issue. *See Dunn v. West*, 11 Vet.App. 462, 467 (1998) (remand of the appellant's claim under one theory moots the remaining theories advanced on appeal). However, 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). The remanded matter is to be provided expeditious treatment. *See* 38 U.S.C. § 7112; *see also Hayburn's Case*, 2 U.S. 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 . . . ." (internal quotation marks omitted))

For the foregoing reason, and on review of the record, that part of the April 10, 2015, Board decision on appeal denying extraschedular referral for extraschedular consideration is VACATED and the matter is REMANDED for readjudication. The remainder of the decision on appeal is AFFIRMED.

DATED: November 30, 2016

Copies to:

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