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

No. 17-0394

WAHAD ANSARI, APPELLANT,

v.

DAVID J. SHULKIN, M.D.,  
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, Wahad Ansari, appeals through counsel that part of a November 22, 2016, Board of Veterans' Appeals (Board) decision that denied him service connection for tinnitus.<sup>1</sup> Record (R.) at 2-9. The appellant argues that the Board (1) relied on an inadequate medical record and (2) provided an inadequate statement of reasons and bases for its decision. Appellant's Br. at 3-11. For the following reason, the Court will vacate that part of the Board's November 2016 decision on appeal and remand the appellant's tinnitus claim 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 honor to the humanity and justice of Congress."). "The Court may hear cases by judges sitting

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<sup>1</sup> The Board also remanded the issue of service connection for a back disability. This matter is not currently before the Court. *See Hampton v. Gober*, 10 Vet.App. 481, 482 (1997).

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 June 1989 to June 1993 as a plane captain. R. at 120 (DD Form 214). While in service, he was exposed to noise while sleeping and working in loud environments. R. at 509.

In June 2012, the appellant filed for benefits based on service connection for tinnitus. R. at 509.

In July 2013, the appellant underwent a VA hearing examination where he reported recurrent tinnitus that sounded like a high-pitch tone. R. at 260-64. The examiner concluded that the appellant's tinnitus was less likely than not caused by military noise exposure because the appellant's service records were silent for complaints of tinnitus. R. at 264.

In November 2016, the Board relied on the July 2013 examination to deny the appellant service connection for tinnitus. R. at 3-12. This appeal ensued.

The Court concludes that the Board provided an inadequate statement of reasons or bases for relying on the July 2013 VA examination to deny the appellant service connection for tinnitus. *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."); *Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1990) (finding that Congress mandated, by statute, that the Board provide a written

statement of reasons or bases for its conclusions that is adequate to enable the appellant to understand the precise basis for the Board's decision and to facilitate review in this Court). Specifically, in basing his negative opinion on a lack of in-service complaints, the examiner failed to consider a theory of delayed-onset tinnitus, despite VA's policy regarding this issue. *See* VA Training Letter 10-028, at 5 (stating that "[t]innitus can be triggered months or years after an underlying cause [such as hearing loss] occurs," and that "delayed-onset tinnitus must be considered"). Remand is warranted for the Board to provide an adequate statement of reasons or bases for relying on this examination, or provide a new examination that addresses a theory of delayed onset tinnitus. *See Gilbert, supra*.

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, and on review of the record, that part of the Board's November 22, 2016, decision on appeal is VACATED and that matter is REMANDED for readjudication.

DATED: November 30, 2017

Copies to:

Perry A. Pirsch, Esq.

VA General Counsel (027)