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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-0045

MELVIN JEROME, 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*: U.S. Army veteran Melvin Jerome appeals through counsel an October 3, 2018, Board of Veterans' Appeals decision denying (1) an initial disability rating greater than 50% for post-traumatic stress disorder (PTSD), and (2) a total disability rating based on individual unemployability (TDIU) effective before September 18, 2007. Record (R.) at 4-12. The appellant argues that the Board failed to provide an adequate statement of reasons or bases for denying (1) an initial disability rating greater than 50%, and (2) TDIU before September 18, 2007. Appellant's Brief at 6-26. The Secretary concedes that the Board failed to provide an adequate statement of reasons or bases for denying TDIU before September 18, 2007. Secretary's Brief at 5-8. For the following reasons the Court will set aside the Board's October 2018 decision 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 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 honorably on active duty in the U.S. Army from June 1974 to October 1985 and from June 1992 to December 2000 as a fabric repair specialist, an administrative specialist, and a traffic management coordinator. R. at 2908 (DD Form 214).

In August 2004, the appellant filed for service-connected benefits based on PTSD after being diagnosed with the condition at a VA hospital. R. at 2725.

In September 2004, the appellant told a VA examiner that his sleep "remains poor," because he was "unable to fall asleep and finds himself pacing around the house, checking doors or [performing] other safety checks." R. at 1671.

Also in September 2004, a VA examiner found that the appellant "endorsed severe psychological and physiological reactivity when" reminded of his trauma. R. at 1667. The appellant also described extreme avoidance behaviors, being less interested in activities he once enjoyed, feeling detached from others, and not having anyone to confide in except his spouse and mother. R. at 1667. The examiner noted that the appellant was hypervigilant and constantly double-checked locks in his home. R. at 1668. The examiner also added that the appellant had been unemployed since October 2003 and "described difficulty interacting with co-workers and supervisors during his previous job experiences." R. at 1668. The examiner opined that the

appellant was showing signs of "severe major depression." R. at 1668. The examiner diagnosed the appellant with a "secondary diagnosis of major depressive disorder, recurrent, severe," and attributed the depression to the appellant's "traumatic experiences in the military." R. at 1668.

In October 2004, the appellant submitted a lay statement describing disturbing dreams and flashbacks of a helicopter crash he witnessed while deployed to Honduras in 1985. R. at 2055. He also said that he yelled at his wife for "no apparent reason," and explained that he was unable to trust people like he used to and remained hypervigilant. R. at 2055.

In July 2005, the appellant underwent a comprehensive psychological evaluation. R. at 1824-26. The psychologist opined that "[d]ue to [the appellant's] limited frustration tolerance and self-reported concerns regarding his self-control . . . it is not advisable that he work with the public at this time." R. at 1826.

In November 2005, a VA psychiatrist opined that the appellant was "unable to seek or maintain gainful employment at this point in time." R. at 175. The psychiatrist then stated that it was likely that the appellant would be able to find employment in the future, after he completed vocational rehabilitation. R. at 175.

In December 2005, VA found the appellant "medically infeasible for Vocational Rehabilitation" due in part as a result of the "severity of the residuals of PTSD." R. at 161.

In June 2006, the appellant was admitted to the hospital by his treating psychologist because of "increased PTSD and depression symptoms" related to marital difficulty and financial stressors. R. at 1481. During the appellant's intake evaluation, the examiner noted that while the appellant was at his psychiatrist's office, he had a dissociative episode and did not know why he was there or how he got there. R. at 1481. He endorsed both suicidal and homicidal ideation. R. at 1481.

In September 2006, the appellant and his wife separated. R. at 1470. He stated that she left him, in part, because she "did not understand his PTSD." R. at 1470.

In the October 2018 decision on appeal, the Board denied an initial disability rating greater than 50% for the appellant's PTSD. R. at 4-12. The Board first acknowledged that the appellant reported moderate occupational impairment, but noted that he was returning to school. R. at 8. Then the Board stated that the appellant reported not having any friends other than his wife and mother and only attending church as his only social activity. R. at 8. The Board conceded that the appellant's "service-connected psychiatric disabilities have fluctuated in severity to some degree

through the appeal period," but found that "they most closely parallel the symptoms described in the criteria for the 50 percent disability rating for the entire appeal period." R. at 9. After making this concession, the Board added that "the appellant has experienced some symptoms in the criteria for [a] 70 percent disability rating, namely suicidal ideation in June and July of 2006, these symptoms were of very short duration." R. at 9. To support this finding, the Board stated that in the months after the appellant's inpatient treatment, "his mental status exams were within normal range and he returned to work full-time. R. at 9. The decision states:

Considering the Veteran's records as a whole, his symptoms have not caused occupational and social impairment with deficiencies in most areas, such as work, school, family relations, judgement, thinking, and mood. Other than the records from June and July 2006, the Veteran's medical records have indicated linear and goal directed thought process, reality based thought content, and good insight and judgment. The veteran is married, attends church, and although he stopped working in 2007, he stated this was due to his back disability.

R. at 9.

Regarding TDIU effective before September 18, 2007, the Board noted that the appellant was eligible for schedular consideration of TDIU for that period, and acknowledged the November 2005 letter from the appellant's treating psychiatrist stating that the appellant "was unable to seek and maintain employment at this time." R. at 11. However, it was then noted that the appellant returned to work at the Post Office in November 2006 and the Board found that evidence "more probative of his ability to obtain and maintain gainful employment for the period prior to September, 18, 2007." R. at 11.

The Court concludes that the Board provided an inadequate statement of reasons or bases for its degree-of-disability determination regarding the appellant's PTSD. *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 first conceded that the appellant experienced PTSD symptoms noted in the next higher rating criteria, but then determined that a higher initial disability rating was not warranted because the appellant's symptoms were of "very short duration." R. at 9. This conclusion seems to have been based on a diminishing symptom of suicidal and homicidal ideation during the appellant's June 2006 inpatient hospital stay and subsequent improvement in the appellant's condition. *See* R. at 9. But it is unclear to the Court how a diminishing symptom in June 2006 is probative of an appeal period that begins 2 years prior, in

August 2004. Remand is warranted for the Board to provide an adequate statement of reasons or bases for its degree of disability determination. 38 U.S.C. § 7104(d)(1)

The Court further concludes that the Board failed to address favorable evidence of the appellant's PTSD symptomatology throughout the period on appeal. *See Caluza v. Brown*, 7 Vet.App. 498, 506 (1995) (finding that the Board must account for and provide the reasons for its rejection of any material evidence favorable to the claimant), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996). In reaching its conclusion, the Board did not discuss the appellant's September 2004 diagnosis of severe major depression or multiple reports of nightly rituals of checking locks. *Compare* R. at 7-10, *with* R. at 1667-68, 1671.

Regarding social impairment, the Board offered only one sentence of analysis which concluded that the appellant was married and attended church. R. at 9. The Board failed to address the evidence that the appellant lashed out at his spouse because of his irritability, reported having no friends, and stated that he was no longer able to trust people because of his hypervigilance. R. at 2055. The Board also failed to address evidence that the appellant and his spouse separated in September 2006 because she "didn't understand his PTSD." R. at 1470.

Regarding occupational impairment, the Board explained that the appellant had exhibited moderate occupational impairment, but was planning on going back to school. R. at 8. The Board then noted that the appellant returned to work as a mail handler in November 2006. R. at 9. However, the Board failed to address evidence that the appellant was unemployed as a result of his irritability and conflicts with co-workers since 2003. R. at 1668. The Board also failed to address evidence that the appellant's treating physician found him unable to work unless he completed a vocational rehabilitation program but that his vocational rehabilitation counselor determined that he was "medically infeasible for Vocational Rehabilitation due in part to the residuals of his PTSD." R. at 175, 161. While this evidence of occupational impairment is relevant to a TDIU determination, it is also relevant to the Board's degree of disability determination during the period on appeal.

The Board's failure to address favorable evidence of the appellant's PTSD symptomatology frustrates judicial review. Remand is warranted for the Board to address the favorable evidence of the appellant's PTSD symptoms and provide an adequate statement of reasons or bases for its decision. *Caluza*, 7 Vet.App. at 506; *see* 38 U.S.C. § 7104(d)(1).

The Court agrees with the parties that the Board did not provide an adequate statement of reasons or bases for denying TDIU effective before September 18, 2007. *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."). Although the Board acknowledged the appellant's treating physician's letter stating that he could not seek and maintain employment, the Board dismissed the letter because the appellant returned to work in November 2006. R. at 11. In doing so, the Board failed to explain why evidence of employment from 2006 was probative evidence regarding the entire period on appeal. *See* R. at 10-12. Additionally, the Board did not address the conflicting evidence that the appellant's treating psychiatrist determined that the appellant "might" be able to return to work after completing a vocational rehabilitation program, R. at 175, but the vocational rehabilitation counselor determined that the appellant was "medically infeasible for Vocational Rehabilitation." R. at 161. Remand is warranted for the Board to provide an adequate statement of reasons or bases its TDIU determination. 38 U.S.C. § 7104(d)(1). On remand, the Board should also carefully apply the Court's holding in *Ray v. Wilkie*, 31 Vet.App. 58, 67-76 (2019).

Because the Court is remanding the matters on appeal, 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 the Board's October 3, 2018, decision is SET ASIDE and the matters are REMANDED for readjudication.

DATED: April 28, 2020

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