

UNITED STATES COURT OF VETERANS APPEALS

No. 95-822

ANDREW M. COLLARO, APPELLANT,

v.

TOGO D. WEST, JR.,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before NEBEKER, *Chief Judge*, and IVERS and HOLDAWAY, *Judges*.

ORDER

This case comes to the Court on remand from the U.S. Court of Appeals for the Federal Circuit, arising out of a January 1997 order of this Court which dismissed the veteran's claim for lack of jurisdiction. The veteran appeals from a May 10, 1995, Board of Veterans' Appeals (BVA or Board) decision which granted a total schedular rating for schizophrenic reaction. For the reasons stated below, the Court will vacate and remand the Board's May 10, 1995, decision for readjudication consistent with this order.

In its opinion, the Federal Circuit mandated that this Court take jurisdiction over this matter when it stated, "[W]e vacate the judgment of the Court of Veterans Appeals and remand the case with instructions that the [C]ourt consider the merits of Collaro's constitutional and statutory claims." The Court recognizes the Federal Circuit's mandate and holds that we have jurisdiction. The Court also recognizes the Federal Circuit's guidance in *Ledford v. West*, and holds that the veteran must first assert his claims under the Constitution and Administrative Procedures Act (APA) to the Secretary. See *Ledford v. West*, ___ F.3d ___, No. 97-7061 (Fed. Cir. Feb. 12, 1998).

In *Ledford*, the Federal Circuit explicitly accepted the government's position that, "[W]hile the doctrine of exhaustion of administrative remedies is not jurisdictional, [the veteran] had to first present his constitutional and APA challenges to the agency before presenting them to the Court of Veterans Appeals." *Id.* at ___, slip op. at 8. The simple fact that the arguments are constitutional does not relieve the veteran of the responsibility to exhaust available administrative remedies. The resulting greater efficiency allows the agency to satisfy the veteran's claim, thereby ultimately decreasing the likelihood of the need to address the constitutional claims. *Id.* at ___, slip op. at 10.

In this case, as in *Ledford*, the veteran claims that, in 1981, the Secretary unlawfully changed the characterization of his disability rating from TDIU to schedular and that a subsequent reduction in his schedular rating from 100% to 70% was made without regard to the clear and convincing evidence standard prescribed in 38 C.F.R. § 3.343(c). See also VA Circular 21-80-7 (Sept. 9, 1980). Because the 1981 reduction from 100% to 70% was made in the context of a schedular rating, in order to determine the need to explore the 1981 action by the Secretary, the Board may first wish

to determine whether the evidence relied upon for that reduction would satisfy the requirement for clear and convincing evidence of employability under 38 C.F.R. § 3.343(c).

On consideration of the foregoing, it is

ORDERED that the May 10, 1995 decision of the Board is VACATED, and the matter is REMANDED for readjudication consistent with this order.

DATED: October 15, 1998

PER CURIAM.