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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 15-3398

JOHN H. GREENE, 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, John H. Greene, appeals through counsel that part of a July 27, 2015, Board of Veterans' Appeals (Board) decision that denied him entitlement to a disability rating in excess of 20% from October 2007 to present, for degenerative disc disease (DDD) of the lumbar spine.¹ Record (R.) at 2-36. The appellant argues that the Board (1) erred when it improperly interpreted and applied the law; (2) inadequately disregarded favorable finding; (3) relied on inadequate VA examinations; and (4) misinterpreted 38 C.F.R. § 3.321 when it failed to properly account for the appellant's symptomatology. Appellant's Brief at 7-18. For the following reasons, the Court will vacate the Board's July 2015 decision and remand the matter for further adjudication.

Justice Alito noted in *Henderson v. Shinseki* that our Court's scope of review in this appeal

¹ The Board granted a rating of 20%, but no higher, for DDD of the lumbar spine from July 16, 2005, to July 31, 2007. To the extent this finding is favorable, the Court will not disturb it. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007). The appellant also does not challenge the disability rating for this period and the Court therefore deems this matter 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 denied the appellant entitlement to service connection for bilateral hearing loss and tinnitus. The appellant also presents no arguments as to these matters and the Court deems them abandoned. *See id.* Finally, the Board also remanded the issue of service connection for hypertension, sleep apnea, left knee disorder, and increase ratings for surgical scars on the back and anterior trunk. These matters are not currently before the Court. *See Hampton v. Gober*, 10 Vet.App. 481, 482 (1997).

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 specified relations of veterans, 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 served on active duty in the U.S. Navy from June 1976 to October 1986 as an aviation technician. R. at 2049, 2051 (DD 214). The appellant received the Navy Expeditionary Medal. R. at 2051. During service, the appellant began experiencing lower back pain from lifting heavy objects associated with repairing airplanes. R. at 1680.

In March 2000, the appellant filed for benefits based on service connection for a lumbar strain. R. at 2372-73. In May 2005, VA granted the appellant service connection and awarded a 10% disability rating for this condition. R. at 1679.

In July 2010, the appellant underwent a VA back examination, wherein the examiner found that the appellant's ROM of the thoracolumbar spine on forward flexion to be 45 degrees. R. at 1020-26. The examiner also found that there was objective evidence of pain on forward flexion ROM beginning at 20 degrees. R. at 1024. In August 2010, the RO increased the appellant's disability rating to 20%. R. at 988-93. In September 2010, the appellant appealed the decision and in January 2011, the Board remanded the lumbar claim for a new examination. R. at 885-97.

In March 2013, the appellant underwent an examination. R. at 427-34. The following month the appellant submitted a statement expressing his concerns about the examination and the examiner, indicating that he had difficulty understanding the examiner's statements and questions because she was soft spoken and had an accent. R. at 355-57. Additionally, during the examination, the examiner did not respond to the appellant's questions nor did she acknowledge his complaints of pain during the examination. R. at 357. In August 2013, the Board remanded the appellant's back disability claim for a new examination from a different examiner that "set forth the extent of any

functional loss present for the service-connected lumbar spine disability due to weakened movement, excess fatigability, incoordination, or pain on use." R. at 341-43. The Board also instructed the examiner to express the degree of additional ROM lost due to functional impairment on use. R. at 343-44.

In July 2014, the appellant underwent an examination—conducted by the same examiner from the March 2013 examination. R. at 243-54.

The appellant was again examined in January 2015. R. at 91-101. The examiner found that there was "[p]ain noted on exam but does not result in/cause functional loss[.]" R. at 93. However, there is no explanation for this finding despite the fact that the examiner also found evidence of pain on forward flexion, extension, right lateral flexion, left lateral flexion, right lateral rotation, and left lateral rotation. R. at 93. The examiner also stated the he could not determine whether the pain limited functional ability with repeated use without merely speculating. R. at 93.

In the July 2015 Board decision on appeal, the Board denied entitlement to a disability rating in excess of 20% for the appellant's DDD for the period from October 1, 2007. R. at 35. In reaching this conclusion, the Board found substantial compliance with the August 2013 remand order. R. at 32-33. The Board also relied on the January 2015 examination as well as the July 2010 examination. R. at 27-34. This appeal ensued.

The Court concludes that the Board failed to ensure substantial compliance with the August 2013 remand order. *See Dymont v. West*, 13 Vet.App. 141, 146-47 (1999)(holding the Board must ensure substantial compliance with remand orders). Although two VA examinations have been provided since the August 2013 remand order, neither examination followed the terms of the remand order. *See* R. at 91, 243. The Board instructed VA to provide an examination from a different medical provider than the March 2013 examiner because the appellant could not understand the doctor. R. at 343. In violation of the remand order, however, the same physician provided the July 2014 examination. R. at 243-54.

The appellant was then provided another examination in January 2015. R. at 91-101. Although the examiner opined that the appellant's lumbar spine pain did not cause any functional loss, he provided no rationale for this conclusion. *See Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 301 (2008)(requiring an examination report to "contain not only clear conclusions with supporting data, but also a reasoned medical explanation connecting the two"). This is especially troubling

given that the examiner found pain on *every* ROM measurement. R. at 93. Remand is required for the Board to ensure compliance with the August 2013 remand order and for appellant to receive an examination that complies with the remand. *See Stegall v. West*, 11 Vet.app 268, 271 (1988)(holding that a veteran, as a matter of law, has a right to compliance with remand orders).

The Court also concludes that the Board failed to consider favorable evidence. *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). Although the Board was correct that July 2010 VA back examiner indicated that forward flexion of the thoracolumbar spine was limited to 45 degrees, it ignored that the examiner also found that the appellant experienced pain beginning at 20 degrees—a symptom warranting a 40% rating. R. at 1023-24; *see* 38 C.F.R. § 4.71(a), Diagnostic Code 5243 (2016). Remand is required for the Board to discuss the favorable evidence and to substantially comply with the August 2013 remand order. *See Caluza, supra*.

Because the Court is remanding the matters, it will not address the appellant's remaining arguments pertaining to the schedular rating. *See Dunn v. West*, 11 Vet.App. 462, 467 (1998). Additionally, because the Court is remanding the matter for the Board to consider the appropriate schedular rating, it is premature to address the other arguments pertaining to extraschedular consideration. 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., 1 L. Ed. 436 (1792) ("[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, and on review of the record, that part of the Board's July 27, 2015, decision denying the appellant a disability rating in excess of 20% for a lower back disability is VACATED and the matters are REMANDED for readjudication.

DATED: November 30, 2016

Copies to:

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