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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 15-3770

NORRIS FARRIS, 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, Norris Farris, appeals through counsel that part of a September 11, 2015, Board of Veterans' Appeals (Board) decision that denied entitlement to benefits based on service connection for a digestive disorder.[1] Record (R.) at 3-23. The appellant argues that (1) the Board erred when it provided an inadequate statement of reasons or bases in support of its negative credibility finding; and (2) the Board erred when it relied on an inadequate January 2013 medical examination. Appellant's Brief at 8-21. For the following reason, the Court will vacate that part of the September 2015 Board decision on appeal and remand the matter 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

[1]The Board also remanded the issues of entitlement to (1) a higher disability rating for post-traumatic stress disorder; (2) an earlier effective date for a total disability rating based on individual unemployability; and (3) an earlier effective date for dependents' educational assistance. These matters are not currently before the Court. *See Hampton v. Gober,* 10 Vet.App. 481, 482 (1997).

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 is a Vietnam War veteran who served honorably in the U.S. Army from October 1966 through October 1968 as a light weapons infantryman. R. at 520 (Form DD 214). The appellant received a Republic of Vietnam Campaign Medal and a Vietnam Service Medal with three Bronze Service Stars. R. at 520. In September 2004, the appellant applied for benefits based on service connection for a stomach disability. In April 2006, VA denied appellant's application. R. at 2181. The appellant testified in a September 2008 Board hearing that the hot sea rations served in the field bothered his stomach and once back on base camp he would eat Tums or Rolaids. R. at 1884-85. In 2012, the appellant provided a letter to VA that he never had stomach issues until his time in service. R. at 1642. The appellant stated that when he was overseas, he would receive treatment from the field medics but that they did not keep records. R. at 1642. The appellant indicated that while in Vietnam he would bring Rolaids or Tums into the field. while to help with his condition. R. at 1642. In June 1968, the appellant was treated for intestinal and gastric issues. R. at 3221. The appellant did not complain of any medical issues during his separation examination. R. at 3208-09; R. at 3185-86.

The Board issued the decision on appeal in September 2015, denying the appellant service connection for a digestive disorder. R. at 3-20. In reaching this decision, the Board discounted the appellant's narrative about his stomach condition and found it was not credible. R. at 18. The Board found that his assertions about his condition did not match his service separation examination and other accounts in the appellant's medical record. R. at 18. The Board relied upon a 2013 examination report that also discounted the appellant's past reports of his condition and found that the appellant's digestive disorders were less likely than not causally related to service. R. at 18. This appeal ensued.

Congress has provided the following liberalizing statute for combat veterans:

In the case of any veteran who engaged in combat with the enemy in active service

> with a military, naval, or air organization of the United States during a period of war, campaign, or expedition, the Secretary shall accept as sufficient proof of service-connection of any disease or injury alleged to have been incurred in or aggravated by such service satisfactory lay or other evidence of service incurrence or aggravation of such injury or disease, if consistent with the circumstances, conditions, or hardships of such service, notwithstanding the fact that there is no official record of such incurrence or aggravation in such service, and, to that end, shall resolve every reasonable doubt in favor of the veteran. Service-connection of such injury or disease may be rebutted by clear and convincing evidence to the contrary. The reasons for granting or denying service-connection in each case shall be recorded in full.

38 U.S.C. § 1154(b).

The Court concludes the Board erred in failing to determine whether the appellant was a combat veteran and therefore entitled to statutory protections afforded to lay testimony under 38 U.S.C. § 1154(b), even in cases where "there is no official record" that such injury or disability occurred. *See* 38 U.S.C. § 1154(b). The Board ignored the character of the appellant's service when it relied the appellant's separation examination and other accounts in the appellant's treatment records to deny the appellant service connection. *See* R. at 15-16. The appellant has alleged that all these conditions began during his service in Vietnam. *See* R. at 1884, 1642. Remand is required for the Board to determine whether the appellant is a combat veteran and thus entitled to an application of section 1154(b).

Because the Court is remanding the matter, it will not address the appellant's remaining arguments. *See Dunn v. West,* 11 Vet.App. 462, 467 (1988). 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 on remand. *See* 38 U.S.C. § 7112; *see also Hayburn's Case*, 2. U.S. (2 Dall.) 409, 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 short delay, and may be utterly ruined, by a long one.").

Based on the foregoing reasons, that part of the September 11, 2015, Board decision on appeal is VACATED and the matter is REMANDED for readjudication.

DATED: November 30, 2016

Copies to:

Christian A. McTarnaghan, Esq.

VA General Counsel (027)