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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 15-4639

GARLAND H. ROBINSON, 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, Garland H. Robinson, appeals through counsel a November 30, 2015, Board of Veterans' Appeals (Board) decision that denied the appellant's motion for clear and unmistakable error (CUE) in a May 1981 Board decision that denied him entitlement to benefits based on service connection for thoracic lordoscoliosis.[1] Record (R.) at 2-9. The appellant argues that the Board erred in shifting the burden of establishing aggravation of a preexisting condition on the appellant. Appellant's Brief at 5-11. For the foregoing reasons, the Court will vacate the Board's November 30, 2015, decision 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, 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

[1] "Thoracic lordoscoliosis" is an "abnormally increased" sideways curvature of the spinal column towards the chest area. DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1074, 1681, 1920 (32d ed. 2012) [hereinafter DORLAND'S].

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. Marine Corps from March 1977 to January 1978, primarily as a rifleman. R. at 733 (DD 214). The appellant's February 1977 entrance examination does not indicate any musculoskeletal abnormalities. R. at 120-24. In August 1977 the appellant sought in-service treatment for lordoscoliosis, which was characterized as a congenital defect. R. at 118. That same month an orthopedist noted that the appellant "has had pain in [his] back since entering" service, and that since then his back pain and spinal curvature has increased. R. at 107. A September 1977 radiographic report confirms a diagnosis of scoliosis of the lumbar spine. R. at 106. In December 1977 a Naval Medical Board found that the appellant had thoracic lordoscoliosis that preexisted service and was "symptomatic with training activities." R. at 115. The Medical Board found that the appellant was unfit for duty and recommended discharge. R. at 117.

In January 1980 the appellant filed a claim for benefits based on service connection for scoliosis over the curvature of his back. R. at 724-27. In May 1981 the Board denied the appellant service connection for thoracic lordoscoliosis, finding that it

> is considered a constitutional or developmental condition and service connection may not be granted. Such condition is usually developed during youth or shortly thereafter as opposed to a condition or disorder brought about by a traumatic experience. Service physicians by physical examination and x-ray evidence diagnosed the veteran's disorder shortly after his entrance in service as a congenital condition which existed prior to his entry in the service. Moreover, there is an absence of objective evidence to indicate an aggravation by way of a traumatic occurrence during the veteran's short term of service.

R. at 42-43. As judicial review of Board decisions was unavailable at the time, the appellant did not appeal.[2]

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[2] Judicial review of Board decisions was not available until passage of the Veterans' Judicial Review Act (VJRA) in 1988. *See* VJRA, Pub. L. No. 100-687, § 402, 102 Stat. 4105, 4122 (1988).

In May 2014 the appellant filed a motion arguing that the May 1981 Board decision contained CUE as the Board failed to apply the second prong of the presumption of soundness statute, impermissibly placing the burden of proving aggravation on the appellant. R. at 126-36; *See* 38 U.S.C. § 1111.[3]

In November 2015 the Board denied the appellant's CUE motion. R. at 2-9. Relying on the December 1977 Medical Board report, the Board found that the May 1981 Board decision does not contain CUE as the Board properly found that there was "affirmative evidence that the back condition pre-existed service and was not aggravated." R. at 6. This appeal follows.

The Court agrees with the appellant that the Board provided an inadequate statement of its reasons or bases for finding that the May 1981 Board decision did not contain CUE. *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, the Board failed to properly review the May 1981 Board's application of the evidentiary burdens in the presumption-of-soundness statute. 38 U.S.C. § 1111. The May 1981 Board based its decision in part on a lack of "objective evidence to indicate an aggravation by way of a traumatic occurrence" during service. R. at 43. However, the relevant statute in place in 1981 provided that the Secretary must establish by "clear and unmistakable evidence" that a preexisting condition was not aggravated in service. *See* 38 U.S.C. § 311. By basing its decision on a lack of evidence of aggravation, the 1981 Board misapplied the presumption-of-soundness statute, which may form the basis of a CUE motion. *See Russell v. Principi*, 3 Vet.App. 310, 313 (1992)(en banc). Remand is required for the Board to

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[3] Section § 1111 of title 38, U.S. Code reads: "[E]very veteran shall be taken to have been in sound condition when examined, accepted, and enrolled for service, except as to defects, infirmities, or disorders noted at the time of the examination, acceptance, and enrollment, or where clear and unmistakable evidence demonstrated that the injury or disease existed before acceptance and enrollment and was not aggravated by such service." The statute was previously codified as Section § 311 of title 38, U.S. Code, but in 1991 was renumbered as 38 U.S.C. § 1111. *See* Department of Veterans Affairs Codification Act, Pub. L. No. 102-83, § 5(a), 105 Stat. 378, 406 (1991).

provide an adequate statement of its reasons or bases for finding that the May 1981 Board decision did not contain CUE.

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 on remand. *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 November 30, 2015, decision is VACATED, and the matter is REMANDED for readjudication.

DATED: December 19, 2016

Copies to:

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