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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 15-4387

TEODULO A. ARANAS, 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, Teodulo A. Aranas, appeals through counsel an October 9, 2015, Board of Veterans' Appeals (Board) decision that denied a disability rating in excess of 20% for diabetes mellitus (DM).¹ Record (R.) at 2-18 The appellant argues that the Board erred when it denied his claim referral for extraschedular evaluation. Appellant's Brief at 5-10. For the following reasons, the Court will vacate the October 2015 Board 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

¹The Board also remanded the matter of service connection for an eye disability other than diabetic retinopathy with pseudophakia status post cataract extraction, to include as secondary to service-connected type II DM. This matter is not currently before the Court. *See Hampton v. Gober*, 10 Vet.App. 481, 482 (1997). The Board also denied an initial compensable rating for service-connected nonproliferative diabetic retinopathy, with pseudophakia. The appellant presents no argument and the Court deems it abandoned. *See Pederson v. McDonald*, 27 Vet.App. 276, 285 (2015) (holding that, where an appellant abandons an issue or claim, the Court will not address it).

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 and served on active duty in the U.S. Navy from December 1960 to May 1985. R. at 3740 (DD Form 214). The appellant received the Navy and Marine expeditionary Medal, the Armed Forces Expeditionary Medal, and the Vietnam Gallantry Cross with Palm. R. at 3740. In March 2003, the regional office (RO) denied the appellant benefits based on service connection for type II DM. R. at 3206-15. In March 2008, the appellant requested his claim for service connection be reopened. R. at 2851. In a March 2009 rating decision, the RO granted the appellant service connection for his DM and awarded a 20% disability rating.

In October 2013, the appellant underwent another VA examination for his DM. R. at 782-800. The examiner noted the appellant's prescriptions for hypoglycemic agents and insulin for use more than once a day. R. at 792.

In October 2014, the Board remanded the appellant's increased rating claim for a new examination. R. at 254-60. As part of the remand order, the Board ordered the examiner to specifically comment on the appellant's insulin usage, diet, and regulation of activities and provide reasons for any opinion given. R. at 259. In January 2015, the appellant underwent another VA examination. R. at 103-05. The examiner filled out a "Diabetes Mellitus Disability Benefits Questionnaire." R. at 103-05. In the "Medical History" section of the questionnaire, the examiner indicated that the appellant's DM required insulin but did not require a regulation of activities. R. at 103. The examination is absent any rationale to support these finding. R. at 104.

In October 2015, the Board issued its decision on appeal denying the appellant an increased rating for this service-connected DM. In reaching its decision, the Board found that under the applicable diagnostic-code (DC), the appellant's symptomatology did not warrant a rating in excess of 20%. R. at 8-13. The Board relied on the January 2015 examination in which the examiner found that the appellant "did not require regulation of his activities." R. at 11. The Board acknowledged the appellant met two requirements of the higher rating, insulin and diet restriction, but failed to meet the third—regulation of activities. R. at 12. This appeal ensued.

The Court concludes that the Board failed to ensure substantial compliance with the October 2014 remand order. *See Dymment v. West*, 13 Vet.App 141, 146-47 (1999)(holding that substantial compliance with remand orders is required). The Board instructed that the examiner must provide reasons for any opinion given. R. at 259. The 2015 VA examiner found that the appellant was not required to regulate activities but failed to provide reasons for this finding—in violation of the October 2014 remand order. R. at 103-11. The appellant has stated that the examiners have told him to avoid strenuous activities. R. at 72. The mere fact that he rides a bicycle for exercise or walks with his wife does not rule out the possibility that his activities had to be regulated as a result of his diabetes. R. at 72. Without an examiner's explanation for finding that the appellant did not have to regulate his activity, the Court cannot conclude that this examination substantially complied with the October 2014 remand order. Remand is required for the Board to ensure compliance with the October 2014 remand order. *See Stegall v. West*, 11 Vet.App 268, 271 (1988).

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 (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.) 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 a short delay, and may be utterly ruined, by a long one" (internal quotation marks omitted)).

Based on the foregoing reasons, the Court VACATES that part of the October 9, 2015, decision currently on appeal, and REMANDS the matter for readjudication.

DATED: December 29, 2016

Copies to:

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VA General Counsel (027)