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**UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS**

No. 15-3593

JOE B. OSBORNE, APPELLANT,

v.

ROBERT D. SNYDER,  
ACTING 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, Joe B. Osborne, appeals through counsel that part of an August 3, 2015, Board of Veterans' Appeals (Board) decision that denied him (1) an increased disability rating for his neurological symptoms in his right lower extremity, which includes paresthesia of the right lateral fifth toe, for the period prior to December 17, 2014; (2) an increased rating in excess of 20% for his neurological symptoms in his right lower extremity, which includes paresthesia of the right lateral fifth toe, for the period from December 17, 2014; and (3) a compensable rating for the neurological symptoms in his left lower extremity. Record (R.) at 8-19. The appellant argues that the Board failed to provide an adequate statement of reasons or bases for denying (1) an increased rating for the appellant's neurological symptoms in his right lower extremity, which includes paresthesia of the right lateral fifth toe, for the period prior to December 17, 2014, under any applicable diagnostic code; (2) an increased rating for the appellant's neurological symptoms in his right lower extremity, which included paresthesia of the right lateral fifth toe, for the period after December 17, 2014, under any applicable diagnostic code; and (3) a compensable rating for the appellant's neurological symptoms in his left lower extremity. Appellant's Brief at 1-15. For the following reasons, the Court will vacate the Board's August 3, 2015, decision

and remand the matters 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 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 veteran who served on active duty in the U.S. Army from June 1962 to September 1982, as a medical specialist and as a telecommunications specialist. R. at 1035 (DD Form 214). In 1969, the appellant injured his back after falling from a telephone pole he was servicing. R. at 750. In December 1982, the appellant was granted service connection for a lower back disability, including paresthesia of his right lateral fifth toe. R. at 983. In June 2006, the appellant was awarded a 10% disability rating for a lower back sprain and a 10% rating for paresthesia in his right lateral fifth toe. R. at 853.

In October 2012, the Board recategorized the appellant's lower back sprain as osteoarthritis of the lumbar spine and increased the appellant's disability rating to 40%. R. at 352. In October 2014, the Board remanded the appellant's requests for an increased rating for his lumbar spine osteoarthritis, right lateral fifth toe paresthesia, and a separate compensable rating for his radiculopathy secondary to his service-connected lumbar spine osteoarthritis for additional medical examinations. R. at 137-39.

In December 2014, the appellant underwent a VA examination for his peripheral nerve conditions. R. at 72. The examiner found that the appellant experienced "a sharp shooting pain that radiate[d] from his right hip to his right lateral foot," as well as "numbness, tingling, and stinging pain in his right foot," which limited the appellant's ability to carry or lift things. R. at 73, 79. The

examiner failed to perform muscle strength testing on the appellant. R. at 74. Nevertheless, the examiner diagnosed the appellant with incomplete paralysis of his right sciatic nerve. R. at 76-77.

In August 2015, the Board issued a decision granting an increased rating for the neurological symptoms in the right lower extremity for the period after December 17, 2014, but denied an increased rating for the period prior to December 17, 2014, and denied a compensable rating for the neurological symptoms the appellant experienced in his left lower extremity. R. at 10-11. In reaching its decision regarding the neurological symptoms in the appellant's right lower extremity, for the period prior December 17, 2014, the Board noted that the appellant suffered from "diminished muscle strength" and suffered from pain. R. at 10. In reaching its decision regarding the neurological symptoms in the appellant's right lower extremity, for the period after December 17, 2014, the Board noted that the appellant suffered from "diminished muscle strength" and possessed no "sensory functioning in [his] toes." R. at 10. In denying a compensable rating for the appellant's left lower extremity, the Board found that these symptoms resulted from the appellant's service-connected back disability (R. at 10), and were mild in nature (R. at 16). This appeal ensued.

The appellant's neurological symptoms in his right lower extremity are rated under Diagnostic Code (DC) 8520. 38 C.F.R. § 4.124a (2016). For all diseases of the peripheral nerves, the rating schedule instructs:

The term "incomplete paralysis," with this and other peripheral nerve injuries, indicates a degree of lost or impaired function substantially less than the type picture for complete paralysis given with each nerve, whether due to varied level of the nerve lesion or to partial regeneration. When the involvement is wholly sensory, the rating should be for the mild, or at most, the moderate degree. The ratings for the peripheral nerves are for unilateral involvement; when bilateral, combine with application of the bilateral factor.

38 C.F.R. § 4.124a. The rating criteria for disabilities of the sciatic nerve are as follows:

8520 Paralysis of:

Complete; the foot dangles and drops, no active movement possible of muscles below the knee, flexion of knee weakened or (very rarely) lost	80
Incomplete:	
Severe, with marked muscular atrophy	60
Moderately severe	40

Moderate	20
Mild	10
8620 Neuritis.	
8720 Neuralgia.	

*Id.* VA's *Adjudication Procedures Manual* (M21-1MR) instructs rating specialists to determine the severity of a peripheral nerve condition using the following table:

Degree of Incomplete Paralysis	Description
Mild	subjective symptoms or diminished sensation
Moderate	absence of sensation confirmed by objective findings
Severe	more than sensory findings are demonstrated, such as atrophy, weakness, and diminished reflexes

M21-1MR, pt. III, subpt. iv, ch. 4, § G(4)(b).

The Court determines that the Board provided an inadequate statement of its reasons or bases for finding that the neurological symptoms of the appellant's right lower extremity were at most "mild or moderate" and thus that the appellant was not entitled to a disability rating in excess of 10% prior to December 17, 2014, and thereafter a disability rating in excess of 20%. *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).

The Board noted that the appellant's neurological symptoms were characterized by both sensory as well as nonsensory symptoms. R. at 10. Specifically, the Board detailed that for the period prior to December 17, 2014, the appellant suffered from diminished muscle strength and pain; and for the period after December 17, 2014, the appellant suffered from diminished muscle strength and a loss of sensory functioning in the his toes. R. at 10. The Board, however, failed to further discuss the sensory and nonsensory symptoms the appellant experiences even though the M21-1MR instructs an adjudicator to find incomplete paralysis severe for peripheral nerve disabilities that are

manifested by sensory *plus other nonsensory symptoms*. See M21-1MR, pt. III, subpt. iv, ch. 4, § G(4)(b). Although VA's adjudication manual is not binding on the Board, the Board's finding that the appellant's symptoms were merely mild or moderate, without further discussing of the appellant's sensory and nonsensory symptoms, frustrates judicial review because the Board's findings appears inconsistent with VA's instructions to adjudicators regarding how to determine the severity of peripheral nerve disabilities. See *Patton v. West*, 12 Vet.App. 272, 282 (1999) ("The [Board] cannot ignore provisions of the Manual M21-1 . . . that are favorable to a veteran when adjudicating that veteran's claim." (internal citations omitted)). Remand of the appellant's right lower extremity neurological disability claim for the entire period on appeal is warranted for the Board to provide an adequate statement of reasons or bases for its determination regarding the severity of the appellant's neurological condition within his right lower extremity.

The Court also concludes that the Board provided an inadequate statement of reasons or bases for denying the appellant a compensable rating for the neurological symptoms he experienced in his left lower extremity. See *Gilbert*, 1 Vet.App. at 56-57 (1990). The Board noted that the appellant suffered from "at most mild symptoms" in his left lower extremity. R. at 16. DC 8520 provides a 10% disability rating for incomplete paralysis exhibited through mild symptoms. 38 C.F.R. § 4.124a (2016). It is unclear based on this Board's findings why the appellant was not entitled to a 10% rating. Remand is required for the Board to provide an adequate statement of reasons or bases for its findings regarding the mild neurological symptoms the appellant experienced in his left lower extremity.

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). Further, the remanded matters are to be provided expeditious treatment. See 38 U.S.C. § 7112; see also *Hayburn's Case*, 2 U.S. 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 . . . ." (internal quotation marks omitted)).

For the foregoing reasons, and on review of the record, the August 3, 2015, Board decision on appeal is VACATED, and the matters are REMANDED for readjudication.

DATED: January 31, 2017

Copies to:

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