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

No. 16-0010

GARY B. LEE, APPELLANT,

v.

DAVID J. SHULKIN, M.D.,  
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, Gary B. Lee, appeals through counsel a November 20, 2015, Board of Veterans' Appeals (Board) decision that denied him entitlement to benefits based on service connection for a low back disability, with lower extremity neuropathy and a cervical spine disability, with upper extremity neuropathy.<sup>1</sup> Record (R.) at 2-22. The appellant argues that the Board provided an inadequate statement of reasons or bases for denying him service connection for his lower back and cervical spine disabilities. Appellant's Brief at 1-17. For the following reasons, the Court will vacate in part, and affirm in part, the Board's November 2015 decision on appeal and remand the matter of service connection for the appellant's low back disability for readjudication

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

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<sup>1</sup>The Board also remanded the matter of entitlement to an increased rating for his service-connected migrainous vertigo. This matter is not currently before the Court. See *Hampton v. Gober*, 10 Vet.App. 481, 482 (1997). Additionally, the Board denied the appellant (1) a compensable rating for his service-connected pseudofolliculitis barbae prior to August 25, 2012; (2) a rating in excess of 10% for his service-connected pseudofolliculitis barbae after August 25, 2012; and (3) a rating in excess of 10% for right groin iliopsoas muscle pull. The appellant presents no argument as to these matters and the Court deems them 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).

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 veteran who served on active duty in the U.S. Navy from January 1980 to January 1982, as an equipment repairman. R. at 159 (DD Form 214). In April 1980, the appellant received treatment for a back injury and was diagnosed with a muscle sprain of his lower back. R. at 2972.

In September 1986, the appellant underwent a medical examination for his lower back. R. at 3366-67. The examiner noted that the appellant injured his back in July 1984 and June 1986. R. at 3366. A computed tomography (CT) scan was performed and based on this test the examiner opined that "[t]he findings are suspicious for early lateralizing herniated nucleus pulposus to the right at L5-S1 level." R. at 3367. In October 1991, the appellant sought treatment for his back and neck following an automobile accident and returned for treatment in December 1991 after reinjuring his back lifting a chair. R. at 1732-33. In February 1997, an x-ray of the appellant's back revealed Schmorl's nodes of L4 and L5 levels of the spine, and "slight leaning scoliosis." R. at 3364. In January 2001, the appellant filed for benefits based on service connection for a lower back and cervical spine condition. R. at 3387-91.

In January 2012, the Board remanded the appellant's claim for benefits based on service connection for his cervical spine and lower back disabilities, for medical examinations. *See* R. at 811-35. In August 2012, the appellant underwent VA examinations of his lower back and cervical spine. R. at 717-31, 750-60. The examiner noted that the appellant's current lower back injury was likely not caused by or due to service, particularly because the appellant injured his back numerous times after service and had provided inconsistent statements regarding the etiology of his lower

back condition. R. at 719. The examiner failed to discuss the September 1986 physician's findings regarding the appellant's herniated nucleus pulposus within his back. *See* R. at 717-31. The examination report of the appellant's cervical spine noted that the appellant's condition was less likely than not caused by or due to service, particularly because the appellant never received treatment for the condition in service. R. at 760.

In November 2015, the Board issued a decision denying the appellant entitlement to benefits based on service connection for his lower back and cervical spine conditions. R. at 2-21. In making its decision regarding both of the appellant's claimed spinal conditions, the Board relied on the August 2012 examiner's etiology opinion. R. at 14-15. The Board found the appellant's lay testimony not competent regarding the etiology of his cervical spine condition. R. at 16. This appeal ensued.

The Court discerns no clear error in the Board's finding that the appellant's current cervical spine condition is unrelated to service. *See Hicks v. Brown*, 8 Vet.App. 417, 422 (1995) (Court reviews Board's rating decisions for clear error); *see also United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948). The Board properly relied on the findings of the August 2012 examiner who stated that the appellant had no history of a head or neck injury, or treatment for neck pain while in service. R. at 16, 760. Furthermore, the Board properly discounted the appellant's lay testimony as not competent because "the etiology of a cervical spine injury falls outside the realm of common knowledge of a layperson." R. at 16. The appellant has failed to satisfy his burden of persuasion that the Board erred when it found that his current cervical spine condition was not the result of an in-service incident. *See Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (the appellant bears the burden of persuasion on appeals to this Court), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000) (table).

The Court also concludes that the Board provided an inadequate statement of reasons or bases for its reliance on the August 2012 medical examination to deny the appellant service connection for his lower back condition. *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, it is unclear whether the August 2012 examiner considered the appellant's 1986 CT scan results.

In September 1986, a private physician read a CT scan to include "early lateralizing herniated nucleus pulposus" in the appellant's back. R. at 3367. Although the September 1986 examiner noted multiple post-service lower back injuries, the Court does not possess the requisite medical knowledge to ascertain the etiology of the September 1986 findings. *See* R. at 15. Remand is required for the Board to provide an adequate statement of reasons or bases for its reliance on the August 2012 examination or for it to provide a new examination that adequately considers the appellant's medical history. *See Stefl v. Nicholson*, 21, Vet.App. 120, 123 (2007) (finding that a medical examination is adequate "where it is based upon consideration of the veteran's prior medical history").

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). The remanded matter is 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, that part of the November 20, 2015, Board decision on appeal regarding the appellant's lower back condition is VACATED and the matter is REMANDED for readjudication. That part of the decision denying the appellant's cervical spine claim is AFFIRMED.

DATED: February 24, 2017

Copies to:

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