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

No. 15-3930

LUZ GONZALEZ, 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, Luz Gonzalez, widow of veteran David Gonzalez, Jr., appeals through counsel that part of an August 25, 2015, Board of Veterans' Appeals (Board) decision that denied service connection for lung cancer.<sup>1</sup> Record (R.) at 2-21. The appellant argues that the Board (1) failed to provide an adequate statement of reasons or bases for prematurely denying service connection for lung cancer and (2) failed in its duty to assist by failing to obtain a medical opinion for lung cancer. Appellant's Brief at 3-12. For the following reasons, the Court will vacate that part of the August 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 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

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<sup>1</sup> The Board also remanded the issues of service connection for metastatic adenocarcinoma, service connection for the cause of the veteran's death, and entitlement to dependency and indemnity compensation benefits. These matters are not currently before the Court. *See Hampton v. Gober*, 10 Vet.App. 481, 482 (1997).

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 veteran is a Vietnam War veteran who served honorably in the U.S. Army from June 1966 to June 1969 as a gunner. R. at 589 (DD Form 214). The veteran received the Bronze Star Medal. R. at 589. Based on the veteran's service in Vietnam, he was presumed to be exposed to Agent Orange. R. at 12.

October 2008 treatment records reflect a diagnosis of "metastatic carcinoma primary unknown." R. at 286. The doctor also identified pulmonary nodules. R. at 286. After a review of the veteran's imaging, a doctor opined that the imaging likely represented "either a lung or gastrointestinal primary." R. at 244. Another doctor opined that the pulmonary nodules were "probably post inflammatory or post infectious, however, there [was] absolutely no way to exclude developing pulmonary metastases." R. at 211.

On December 17, 2008, the veteran filed for benefits based on service connection for "carcinoma cancer of the bone and lung." R. at 1015. On December 29, 2008, the veteran died. R. at 1027. The cause of death listed was metastatic adenocarcinoma of unknown primary. R. at 1027. In January 2009, the appellant filed for death benefits and to be substituted for her late husband. R. at 1325-37.

In August 2015, the Board issued a decision, wherein it denied service connection for lung cancer, to include as due to herbicide exposure. R. at 2-21. The Board denied the appellant's claim on a presumptive basis because it found that the veteran did not have primary lung cancer. R. at 14. The Board determined that a VA medical examination was not necessary because the veteran did not have "a current diagnosis of lung cancer." R. at 9. The Board also stated that "the weight of the competent evidence demonstrates that the lung cancer was a metastasis of presumed biliary cancer. Indeed, while the Veteran was diagnosed with metastatic adenocarcinoma with unknown primary, the primary origin was presumed to be biliary." R. at 14. The Board also remanded the appellant's metastatic adenocarcinoma claim for a medical

examination. This appeal ensued.

The Court concludes that the Board provided an inadequate statement of reasons or bases for failing to obtain a VA medical opinion. *See Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1990) (detailing that in each of its decisions, the Board is required to provide a written statement of the reasons or bases for its findings and conclusions adequate to enable an appellant to understand the precise basis for the Board's decision as well as to facilitate review in this Court). Here, the Board found that the veteran did not have a current diagnosis of lung cancer and therefore was not entitled to a VA examination. R. at 9. However, the Board then stated that veteran's "lung cancer was a metastasis of presumed biliary cancer." R. at 14. Even if it is true that the veteran did not have primary lung cancer, the Board found that the veteran both did and did not have lung cancer generally. *Cf.* R. at 9, 14.

The Board found that the veteran's cancer metastasized to the lungs and remanded the matter of metastatic adenocarcinoma for a medical opinion. Based on this finding, it is also unclear why the lung cancer claim was not remanded for an examination as inextricably intertwined with the other cancer claim given that the Board appears to have found that lung cancer was secondary to the remanded issue. *See Harris v. Derwinski*, 1 Vet.App. 180, 183 (1991) (holding that where a decision on one issue may have a "significant impact" upon another, the two claims are inextricably intertwined), *overruled on other grounds by Tyrues v. Shinseki*, 23 Vet.App. 166 (2009) (en banc), *aff'd*, 631 F.3d 1380, 1383 (Fed. Cir. 2011), *vacated and remanded for reconsideration*, 132 S. Ct. 75 (2011), *modified*, 26 Vet.App. 31 (2012). Remand is required for the Board to provide an adequate statement of reasons or bases, particularly in regards to the duty to assist and whether appellant's lung cancer claim is inextricably intertwined with the metastatic adenocarcinoma claim.

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.) at 409, 410, n. ("[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 August 25, 2015, Board decision on appeal is VACATED and the matter is REMANDED for readjudication.

DATED: February 28, 2017

Copies to:

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VA General Counsel (027)