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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 16-1301

WILLIE H. COLLIER, 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, Willie H. Collier, appeals through counsel a March 4, 2016, Board of Veterans' Appeals (Board) decision that denied him benefits based on service connection for type II diabetes mellitus (diabetes).[1] R. at 2-13. The appellant argues that the Board failed to provide an adequate statement of reasons or bases for finding that he had not visited the Korean Demilitarized Zone (DMZ) during his service. Appellant's Brief (App. Br.) at 1-7. For the following reason, the Court will vacate the Board's March 2016 decision on appeal, 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

[1] In addition, the Board remanded the matters of entitlement to service connection for a skin disorder of the feet, claimed as Athlete's foot and residuals of a sexually transmitted disease (STD), to include a skin disorder of the penis, scrotum, and thighs. These matters are not currently before the Court. *See Hampton v. Gober*, 10 Vet.App. 481, 482 (1997). The Board also found that new and material evidence had been received to reopen the appellant's service-connection claim for diabetes. The Court will not disturb this favorable finding. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007).

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).

From the beginning of the Republic statutory construction concerning congressional promises to veterans has been of great concern. "By the act concerning invalids, passed in June, 1794, vol. 3. p. 112, the secretary at war is ordered to place on the pension list, all persons whose names are contained in a report previously made by him to congress. If he should refuse to do so, would the wounded veteran be without remedy? Is it to be contended that where the law in precise terms, directs the performance of an act, in which an individual is interested, the law is incapable of securing obedience to its mandate? Is it on account of the character of the person against whom the complaint is made? Is it to be contended that the heads of departments are not amenable to the laws of their country?" *Marbury v. Madison*, 5 U.S. 137, 164, 2 L. Ed. 60,69 (1803).

The appellant served on active duty in the U.S. Air Force from August 1968 to August 1972, including time spent in Korea during the Vietnam War, as a security policeman. R. at 30 (DD Form 214). The appellant contends that he was exposed to Agent Orange while stationed in the DMZ for training. R. at 1408.

In April 2002, the appellant filed a claim for benefits based on service connection for his diabetes. R. at 1679-80. VA denied this claim in March 2003. R. at 1568-80. In August 2006, the appellant filed a request to reopen his claim. R. at 983. That same month, the appellant's physician provided an opinion diagnosing the appellant with diabetes and stating that Agent Orange exposure may be a possible cause of his diabetes. R. at 914-15.

In January 2007, the appellant submitted a statement in support of his claim, stating that he was present within the DMZ in 1969 and 1970 for weapons training. R. at 902. VA issued a decision in February 2009 denying the appellant's request to reopen his diabetes claim. R. at 539-41. The appellant appealed this decision to the Board. R. at 460-62. In October 2009, in conjunction with his appeal and at the request of VA, the appellant provided a 2-month window

of when his unit had training within the DMZ. R. at 426. VA noted that the appellant alleged service in the DMZ within this 2-month window and at other times between 1968 and 1970. *See* R. at 444, 902.

In August 2014, the Joint Services Records Research Center (JSRRC) stated that after researching available unit history it did not find any records of the appellant's unit going to the DMZ in March or April 1969. R. at 142-43.

In March 2016, the Board issued a decision reopening and subsequently denying the appellant's diabetes claim. R. at 1-15. The Board based its decision on the JSRRC's determination that the appellant's unit was not sent to the DMZ during March and April 1969. R. at 8. The Board noted that the appellant's assertions that he was sent to the DMZ were admissible, but found that the JSRRC's determination outweighed the appellant's assertions. R. at 8. This appeal ensued.

The Court concludes that the Board failed to satisfy the duty to assist. *See* 38 U.S.C. § 5103A(c)(2) ("Whenever the Secretary attempts to obtain records from a Federal department or agency under this subsection, the efforts to obtain those records shall continue until the records are obtained unless it is reasonably certain that such records do not exist or that further efforts to obtain those records would be futile.").

In January 2007, the appellant stated that he was in the DMZ in 1969 and 1970. R. at 902. In October 2009, VA noted that the appellant alleged service along the DMZ during "April 1968 and July." R. at 444. However, VA erred by limiting its request to the JSRRC to one 60-day window encompassing March and April 1969 and not seeking information for all the periods of time the appellant contended he was in the DMZ. *See* R. at 142-43; *see also Gagne v. McDonald*, 27 Vet.App. 397, 404 (2015) (finding that "the duty to assist requires VA to submit multiple 60-day record searches" when the period in question exceeds 60 days but is not indefinite). The Board was required to make multiple 60-day requests to ensure that the duty to assist was satisfied. *See id*. Remand is required for the Board to satisfy the duty to assist.

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 reason, and on review of the record, that part of the March 4, 2016, Board decision on appeal is VACATED and the matter is REMANDED for readjudication.

DATED: March 31, 2017

Copies to:
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