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

No. 16-1471

TONI L. JENKINS, 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, Toni L. Jenkins, appeals through counsel that part of a March 17, 2016, Board of Veterans' Appeals (Board) decision that denied service connection for (1) hepatitis C and (2) diabetes mellitus (DM) as secondary to hepatitis C.<sup>1</sup> Record (R.) at 2-12. The appellant argues that (1) the Board erred when it provided an inadequate statement of reasons or bases for relying on a December 2014 VA examination to deny the appellant service connection for hepatitis C and (2) the issue of entitlement to service connection for DM should be remanded as inextricably intertwined with the hepatitis C claim. Appellant's Brief at 6-12. For the following reasons, the Court will vacate that part of the March 2016 Board decision on appeal 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 such as their widows, is consistent with congressional intent as old as the Republic. *See Hayburn's Case*, 2 U.S. (2

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<sup>1</sup> The Board also denied the appellant service connection for DM on a direct basis. The appellant presents no argument as to this matter, 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).

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 U.S. Army veteran who served on active duty from August 1978 to August 1982 as an armor crewman. R. at 729 (DD Form 214). In November 1981, a routine chest x-ray revealed evidence of a mediastinal mass on the right side, and the appellant underwent a "sternotomy [sic] with resection of a large caseating mass with involvement of the thymus gland."<sup>2</sup> R. at 1876.

In July 2005, the appellant filed for benefits based on service connection for hepatitis C and DM. R. at 2127-28.

In September 2014, the Board remanded the claims for a medical nexus opinion. R. at 733. The December 2014 medical examiner issued a medical opinion in which she opined that the appellant's hepatitis C was less likely than not related to service, reasoning that "postoperative notes were negative for an indication of and/or necessity for intraoperative anesthesia and/or postoperative blood transfusions, blood products and/or improper use of needles." R. at 277-85. The surgical record, which is displayed in the December 2014 medical opinion, indicates that the appellant was administered several anesthetics as well as an IV. R. at 282.

In March 2016, the Board issued a decision denying the appellant service connection for both hepatitis C and DM. R. at 2-12. The Board primarily relied on the December 2014 medical opinion and cited the examiner's finding that surgical notes were negative for "an indication of and/or necessity for intraoperative anesthesia and/or postoperative blood transfusions, blood products and/or improper use of needles" in reaching the conclusion that the hepatitis C was

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<sup>2</sup> "Sternotomy" is an operation of cutting through the sternum. STEDMAN'S MEDICAL DICTIONARY 1836 (28th ed. 2006).

unrelated to service. R. at 10-11. Additionally, in regard to the appellant's DM, the Board concluded that there was no evidence to support service connection on a direct basis and that because service connection for hepatitis C has not been established, service connection on a secondary basis was not warranted. R. at 12. This appeal ensued.

The Court concludes that the Board failed to provide an adequate statement of reasons or bases for relying on the December 2014 medical opinion to deny the appellant's hepatitis C claim. *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). The December 2014 examiner stated that "postoperative notes were negative for an indication of and/or necessity for intraoperative anesthesia and/or postoperative blood transfusions, blood products and/or improper use of needles." R. at 283-84. But, the surgical record indicates that the appellant *was* administered several anesthetics with a needle. R. at 282. Further, it is unclear to the Court how a lack of a notation regarding improper needle use on the surgical report amounts to negative evidence given that the understanding of proper needle use was presumably different in 1981. Remand is required for the Board to provide an adequate statement of reasons or basis for its reliance on the December 2014 examination. *See Gilbert, supra*.

The Court also determines that the issue of service connection on a secondary basis for DM must be remanded as inextricably intertwined with the matter of service connection for hepatitis C. *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). Because the appellant's theory of service connection for DM is secondary to his hepatitis C claim, any decision on the hepatitis C claim could naturally have a "significant impact" on any entitlement to service connection for DM. *See Harris, supra*. The Court will remand this matter as well.

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 March 17, 2016, Board decision on appeal is VACATED and the matter is REMANDED for readjudication.

DATED: March 31, 2017

Copies to:

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