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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 16-0889

JIMMIE R. MCAFEE, 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, Jimmie R. McAfee, appeals through counsel that part of a February 8, 2016, Board of Veterans' Appeals (Board) decision that denied service connection for hypertension, to include as secondary to post-traumatic stress disorder (PTSD).[1] Record (R.) at 2-14. The appellant argues that the Board erred when it failed to provide an examination that (1) adequately considered whether his PTSD aggravated his hypertension and (2) addressed whether the appellant's hypertension was a result of his in-service herbicide exposure. Appellant's Brief (Br.) at 4-11. For the following reason, the Court will vacate that part of the February 2016 Board decision regarding hypertension as secondary to PTSD and remand the matter for further development and 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,

[1]The Board also denied the appellant entitlement to a compensable rating for erectile dysfunction. The appellant presents no argument as to this matter, and the Court deems it 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 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).

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 is a Vietnam War veteran who served on active duty in the U.S. Air Force from June 1968 to August 1972. R. at 3805. He is therefore presumed to have been exposed to Agent Orange. *See* 38 C.F.R. § 3.307(a)(6)(i) (2016).

In March 2007, VA awarded the appellant service connection for PTSD. R. at 3473-76. In January 2008, the appellant filed for benefits based on service connection for hypertension. R. at 3224-27.

In May 2014, the parties agreed that "remand [was] warranted so that the Board [could] obtain an addendum to the July 2009 VA examination report, or additional medical opinion, that address[ed] whether the Appellant's claimed hypertension [was] aggravated by his service-connected PTSD" and filed a joint motion for partial remand (JMR). R. at 331-35. The Court granted that motion. R. at 337.

In August 2015, VA obtained a medical opinion that addressed the relationship between

the appellant's PTSD and his hypertension. R. at 49. The examiner based her opinion on a review of the available records and the medical literature on the etiology of hypertension. R. at 49. She stated that "PTSD has not been established as a secondary cause of hypertension, and there is no evidence that the [appellant's] PTSD has permanently worsened his hypertension beyond its natural progression." R. at 49. The examiner then concluded that the appellant's hypertension was less likely than not more severe than it would have been if the appellant did not have PTSD. R. at 49

In February 2016, the Board issued its decision denying service connection for hypertension on both a direct and a secondary basis. R. at 2-14. The Board found that the August 2015 medical opinion complied with the May 2014 JMR and relied on the examiner's finding that "there was no evidence that the [appellant's] PTSD had permanently worsened his hypertension beyond its natural progression" to deny the appellant's claim on a secondary basis. R. at 7. This appeal ensued.

The Court concludes that the Board failed to ensure substantial compliance with its May 2014 remand order. *See Dyment* v. West, 13 Vet.App. 141, 146-47 (1999) (it is substantial compliance, not absolute compliance, that is required). The May 2014 JMR required that the Board obtain a medical opinion that considered whether the Appellant's hypertension was aggravated by his service-connected PTSD. R. at 331-37. The August 2015 VA examiner opined that "there is no evidence that the [appellant's] PTSD has permanently worsened his hypertension beyond its natural progression." R. at 49. But, there is no requirement of permanent worsening for an appellant to be entitled to service connection due to aggravation, only that the worsening is not caused by natural progression. *See* 38 C.F.R. § 3.310(b) (stating "[a]ny increase in severity of a non-service-connected disease or injury that is proximately due to or the result of a service-connected disease or injury and not due to the natural progress of the non-service-connected disease will be service connected"). Because the examiner employed the wrong standard in finding no aggravation, the medical opinion failed to comply with the remand order. Remand is required for the Board to ensure compliance with the May 2014 JMR. *See Stegall v. West*, 11 Vet.App. 268, 271 (1998) (the Board errs when it fails to ensure compliance with the terms of a remand).

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 February 8, 2016, Board decision on appeal is VACATED and the matter is REMANDED for further development and readjudication.

DATED: April 28, 2017

Copies to:

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VA General Counsel (027)