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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 16-1320

DARRYL A. GAYDEN, 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, Darryl A. Gayden, appeals through counsel that part of a February 19, 2016, Board of Veterans' Appeals (Board) decision that denied a disability rating in excess of 20% for a lumber spine disability and a disability rating in excess of 10% for a right knee disability.¹ Record (R.) at 2-14. The appellant argues that the Board erred when it (1) provided the appellant with an inadequate medical examination; (2) failed to explain why the evidence did not support a separate rating for the right knee; and (3) failed to provide an adequate statement of reasons or bases for denying referral for extraschedular consideration. Appellant's Brief (Br.) at 6-17. For the following reasons, the Court will vacate that part of the February 2016 Board decision 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

¹The Board also remanded the issues of service connection for a left knee disability, hearing loss in the left ear, and tinnitus. These matters are not currently before the Court. *See Hampton v. Gober*, 10 Vet.App. 481, 482 (1997).

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 June 1983 to June 1993 as a public health specialist. R. at 661 (DD Form 214). The appellant's service treatment records indicate that he was treated for lower back pain and right knee tendonitis while in service. R. at 544-55.

In October 2010, the appellant filed claims for benefits based on service connection for a back injury and a right knee injury. R. at 614-25.

In May 2011, the appellant underwent a VA joints examination. R. at 561-66. The doctor noted that the appellant did not suffer from right knee flareups or incoordination but there was some fatigue and lack of endurance. R. at 563. He also indicated that the appellant's right knee "flexes with difficulty 90 degrees with 0 degrees of extension." R. at 563. Examination of the appellant's lumbar spine revealed that "[the appellant] flexes to 40 degrees and stops with pain. [The appellant] has 10 degrees of right and left flexion with pain [, and the appellant has] 30 degrees of right and left rotation with pain." R. at 561.

In January 2012, VA granted the appellant service connection for a lower back disability and a right knee disability and awarded 20% and 10% disability ratings, respectively. R. at 523-28. The appellant appealed. R. at 486-91.

In February 2016, the Board issued a decision denying the appellant a disability rating in excess of 20% for a back disability and in excess of 10% for a right knee disability. R. at 2-21. The Board relied on the May 2011 examination to support its denial of a higher rating for the right knee condition. R. at 15. The Board referenced the May 2011 examiner's finding that the appellant "flexes with difficulty [to] 90 degrees with 0 degrees of extension." R. at 15. The Board cited the same examiner's finding regarding the appellant's back injury. R. at 7, 14. The Board noted "[f]lexion to 40 degrees with pain [,] and extension was at 10 degrees with pain." R. at 7-15. This appeal ensued.

The Court concludes that the Board provided an inadequate statement of reasons or bases for its reliance on the May 2011 right knee examination to deny the appellant higher a disability rating for his right knee disability. *See Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1990) (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 examiner found that he appellant "flexes with difficulty 90 degrees." It appears that the examiner is noting right knee pain that limits the normal working movement of the right knee. *See Mitchell v. Shinseki*, 25 Vet.App. 32, 37 (2011) (holding that pain will be considered as functional loss only if it limits the ability "'to perform the normal working movements of the body with normal excursion, strength, speed, coordination [, or] endurance.'" (quoting 38 C.F.R. § 4.40)). The examiner, however, provided no indication of where the pain began. Remand is required for the Board to provide an adequate statement of reasons or bases for its reliance on the May 2011 right knee examination. *See Gilbert, supra*

The Court also concludes that the Board erred in failing to return the May 2011 back examination for clarification. *See* 38 C.F.R. § 4.2 (2016) (VA is required to "return the [examination] report as inadequate for evaluation purposes" if that report "does not contain sufficient detail"). The examiner stated that the appellant "flexes 40 degrees and stops with pain." R. at 561. The Board read this to mean that the appellant has "[f]lexion to 40 degrees *with* pain."

R. at 7 (emphasis added). Based on the Board's reading, it is unclear why the Board did not return the examination to clarify at what point the pain began and whether the pain limited the normal working movement of the appellant's lumbar spine. *See Mitchell, supra*. Remand is required for the Board to return the May 2011 back examination for clarification. *See* § 4.2.

Because the Court is remanding the appellant's claims on a schedular basis, it is premature to address the appellant's extraschedular arguments. *See Dunn v. West*, 11 Vet.App. 462, 467 (1998). 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 19, 2016, Board decision on appeal is VACATED and the matters are REMANDED for readjudication.

DATED: April 28, 2017

Copies to:

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