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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 16-1696

DAREN L. MOORE, SR., 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, Daren L. Moore, Sr., appeals through counsel that part of a March 17, 2016, Board of Veterans' Appeals (Board) decision that denied a disability rating in excess of 10% prior to May 30, 2012, granted a 20% disability rating under DC 8514 from May 30, 2012, to November 13, 2013, and a 50% disability rating from November 13, 2013, all under Diagnostic Code (DC) 8514 for right upper extremity (RUE) diabetic neuropathy.¹ Record (R.) at 2-37. The appellant argues that the Board erred when it failed to (1) consider whether the appellant was entitled to higher disability ratings under other applicable diagnostic codes for the each of the time periods on appeal and (2) ensure compliance with a December 2015 joint motion for partial remand. Appellant's Brief at 7-16. For the following reasons, the Court

¹ The Board remanded the issues of (1) entitlement to ratings in excess of 10% for diabetic neuropathy prior to May 30, 2012, and in excess of 20% for each lower extremity on an extraschedular basis and (2) entitlement to ratings in excess of 10% for diabetic neuropathy prior to May 30, 2012, and in excess of 30% for RUE on an extraschedular basis. These matters are not currently before the Court. *See Hampton v. Gober*, 10 Vet.App. 481, 482 (1997). Additionally, the Board granted a 20% disability rating under DC 8520 for the period prior to December 31, 2008; a 40% disability rating under DC 8520 from December 31, 2008; and a 10% disability rating under DC 8527 from December 31, 2008, for right lower extremity diabetic neuropathy, and left lower extremity diabetic neuropathy. To the extent these findings are favorable, the Court will not disturb them. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007). To the extent that these findings are unfavorable, the appellant presents no argument as to these matters 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).

will reverse the Board's assignment of a 10% disability rating for the period prior to May 30, 2012, and 20% for the period from May 30, 2012, to November 13, 2013, for RUE diabetic neuropathy and remand the matter for VA to award a disability rating of 20% for the period prior to May 30, 2012, and 30% for the period from May 30, 2012, to November 13, 2013, for RUE diabetic neuropathy. The remainder of the March 2016 Board decision on appeal is vacated and the matter of the appellant's RUE diabetic neuropathy for all periods is remanded 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 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. Navy from August 1983 to March 1984 as an infantry man. R. at 1475 (DD Form 214). The appellant received a medical discharge after developing ketosis-prone diabetes mellitus while in service. R. at 1513-15.

In August 1984, the appellant filed for benefits based on service connection for diabetes and VA granted service connection with a 20% disability rating the following month. R. at 1474. In July 1985, the appellant sought treatment for tingling and numbness in his extremities and an examiner diagnosed the appellant with peripheral neuropathy. R. at 1449-50. In August 1985, VA granted service connection for peripheral neuropathy of the RUE with a 10% disability rating. R. at 1442-43. In April 2004, the appellant filed for an increased disability rating for RUE diabetic neuropathy. R. at 1296.

In March 2015, the Board denied the appellant an increased rating for his RUE peripheral neuropathy in excess of 10% prior to November 14, 2013, and in excess of 30% from November 14, 2013. R. at 131-52.

In December 2015, the Court granted a joint motion for partial remand, wherein the parties agreed that "the Board erred when it failed to consider that the appellant could be assigned separate evaluations via the application of DCs 8514, 8516, 8517 and 8521." R. at 69.

In March 2016, the Board denied a disability rating under DC 8514 in excess of 10% prior to May 30, 2012, granted a 20% disability rating under DC 8514 from May 30, 2012, to November 13, 2013, and granted a 50% disability rating from November 13, 2013, for RUE diabetic neuropathy. R. at 2-37. R. at 15-16. For the period prior to May 30, 2012, the Board found that the appellant's RUE diabetic neuropathy did not warrant a disability rating in excess of 10% because the evidence established "no more than mild incomplete paralysis of the median, ulnar, and musculocutaneous nerves." R. at 34. The Board also found that from May 30, 2012, to November 13, 2013, the appellant met criteria for a 20% disability rating based on moderate incomplete paralysis of the same nerves. R. at 35. Lastly, the Board stated that since November 14, 2013, the appellant suffered from a severe incomplete paralysis of those same nerves and met the rating criteria for a 50% disability rating. R. at 35. This appeal ensued.

The Court concludes that the Board clearly erred in its assignment of a 10% disability rating for the period prior to May 30, 2012, and a 20% disability rating for the period from May 30, 2012, to November 13, 2013. *Fenderson v. West*, 12 Vet.App. 119, 125 (1999) ("The degree of disability under the diagnostic code is a finding of fact subject to the 'clearly erroneous' standard of review."). Applying DC 8514, the Board found that mild and moderate incomplete paralysis warranted 10% and 20% disability ratings under this DC, respectively. *See* R. at 34-35. However, DC 8514 provides a 20% disability rating for a mild incomplete paralysis and a 30% disability

rating for moderate incomplete paralysis. 38 C.F.R. § 4.124a, DC 8514. The Court will therefore reverse the assignment of a disability rating of 10% prior to May 30, 2012, and the assignment of a 20% disability rating from May 30, 2012, to November 13, 2013, and remand the matter for both time periods for VA to assign the proper ratings.

The Court also concludes that the Board erred in failing to consider radicular group ratings for the appellant's RUE diabetic neuropathy for all periods on appeal. *Schafrath v. Derwinski*, 1 Vet.App. 589, 593 (1991) (Board must "acknowledge and consider" all relevant regulatory provisions). The Board found that the appellant had varying levels of paralysis of his radial, median, ulnar, and musculocutaneous nerves for all periods on appeal. *See* R. at 33-35. The rating schedule for diseases of the peripheral nerves contemplates radicular group ratings, and the Board erred in failing to consider whether the appellant was entitled to higher ratings under these group ratings. *See* 38 C.F.R. § 4.124a, DCs 8510-8513 (2016). Remand of the matter for all periods is required for the Board to consider all potentially applicable diagnostic codes. *See Schafrath, supra*.

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 a short delay, and may be utterly ruined, by a long one.").

Based on the foregoing reasons, the Board's assignment of a 10% disability rating for the period prior to May 30, 2012, and 20% for the period from May 30, 2012, to November 13, 2013, for RUE diabetic neuropathy is REVERSED and the matters are REMANDED for the Board to award a disability rating of 20% for the period prior to May 30, 2012, and a disability rating of 30% from May 30, 2012, to November 13, 2013, for RUE diabetic neuropathy. The remainder of the March 17, 2016, Board decision on appeal is VACATED and the appellant's RUE diabetic neuropathy claim for all periods on appeal is REMANDED for readjudication.

DATED: June 26, 2017

Copies to:

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