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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 16-1610

JAMES GRACE, JR., 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, James Grace, Jr., appeals through counsel that part of a February 1, 2016, Board of Veterans' Appeals (Board) decision that declined to refer for extraschedular consideration of the appellant's service-connected residuals of a left ankle sprain.[1] Record (R.) at 2-16. The appellant argues that the Board misapplied the law governing extraschedular consideration and that the matter should be remanded as inextricably intertwined with the remanded matter of TDIU. Appellant's Brief at 5-9. For the following reasons, the Court will vacate that part of the Board's February 1, 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

[1] The Board denied the appellant an increased rating on a schedular basis for the residuals of a left ankle sprain. The appellant does not present an argument as to the schedular determination, and the Court deems the matter 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). Additionally, the Board also remanded the matters of the appellant's entitlement to (1) benefits based on service connection for schizophrenia; and (2) a total disability rating based on individual unemployability. These matters are not before the Court. *See Hampton v. Gober*, 10 Vet.App. 481, 482 (1997).

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. Army from September 1975 to October 1975 as a trainee. R. at 70. In October 1975 the appellant injured his left ankle during exercise drills. R. at 70. In a September 1980 rating decision the regional office (RO) granted the appellant benefits based on service connection for a left ankle disability with a non compensable rating. R. at 1710. In a June 1990 rating decision the RO increased the appellant's disability rating for his left ankle to 10%. R. at 1482-83.

In March 2006 the appellant filed a claim for an increased rating for his left ankle condition. R. at 975. In a May 2007 rating decision the RO denied the appellant's claim. R. at 652. The appellant appealed. R. at 643-45.

In June 2009 the appellant underwent a VA examination complaining of daily and constant pain on a level of 10 out of 10 as well as difficulty standing for more than 30 minutes at a time, walking more than 2 miles, or climbing more than a flight of stairs. R. at 532. The examiner

noted moderate degenerative changes to the ankle after diagnostic imaging, but did not detect any joint effusion, inflammatory arthritis, or ankylosis. R. at 534, 537. The examiner opined that the appellant's left ankle disability did not "likely prevent[] him from doing his daily routine activities and sedentary jobs." R. at 539.

In April 2015 the appellant underwent a VA examination, complaining that his left ankle symptoms had gotten progressively worse, that his pain was at a level of 10 out of 10, and that his symptoms are aggravated by prolonged standing and walking. R. at 240. The examiner opined that the appellant's ankle disability had a mild to moderate effect on the appellant's daily activities, such as chores, shopping, sports, and exercise. R. at 242.

In February 2016 the Board denied the appellant a disability rating in excess of 10% for his left ankle disability, including a referral for extraschedular consideration. R. at 1-19. The Board noted the appellant's complaints of constant pain that interfered with his ability to stand or walk for extended periods. R. at 8-10. The Board rated the appellant's disability under diagnostic code 5271, finding that the limitation of motion of the appellant's ankle was moderate, and that his "functional loss based on pain does not however rise to the *marked* level of limitation on motion" as required for a 20% rating. R. at 10. The Board denied a referral for extraschedular consideration because it found that the appellant's disability picture, which was "primarily manifested by pain and associated limitation of motion," was adequately compensated by the schedular evaluation. R. at 11. This appeal followed.

The Court agrees with the appellant that the Board provided an inadequate statement of reasons or bases for finding that the appellant was not entitled to a referral for extraschedular consideration for his left ankle disability. *See* 38 U.S.C. § 7104(d)(1); *Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1990) (holding that Congress mandated, by statute, that the Board provide a written statement of reasons or bases for its conclusions that is adequate to enable the appellant to understand the precise basis for the Board's decision and to facilitate review in this Court); *see also* 38 C.F.R. § 3.321 (2017). The Board found that DC 5271 adequately compensated the appellant's disability picture, which it found to be "primarily manifested by pain and associated limitation of motion." R. at 11. However, DC 5271 is titled "[a]nkle, limited motion of," and

thus appears to solely compensate a veteran's limitation of motion.[2] *See* 38 C.F.R. § 4.71 (2017). However, the appellant's complaints at the June 2009 and April 2015 examinations were of constant pain and difficulty with walking and standing, symptoms that do not appear to be compensated by DC 5271. Remand is warranted for the Board to provide an adequate statement of its reasons for finding that the schedular criteria compensated the appellant's disability. *Gilbert, supra*.

Because the Court is remanding the appellant's claim, it will not address his remaining 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. *See* 38 U.S.C. ' 7112; *see also Hayburn's Case*, 2 U.S. (2 Dall.) 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.").

For the foregoing reasons, that part of the Board's February 1, 2016, decision on appeal is VACATED, and the matter is REMANDED for readjudication.

DATED: July 25, 2017

Copies to:

Robert V. Chisholm, Esq.

VA General Counsel (027)

[2] The *VA Adjudication Procedures Manual, M21-1MR* (M21-1MR) instructs adjudicators that the distinction between "moderate" and "marked" limitation of motion is based on the range of motion of the ankle on flexion and dorsiflexion. *See* M21-1MR, pt. III, subpt. iv, ch. 4, sec. A(b).