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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 16-2668

JEREMY D. LOWE, 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, Jeremy D. Lowe, appeals through counsel that part of an April 11, 2016, Board of Veterans' Appeals (Board) decision that denied the appellant a disability rating in excess of 10% for a right knee disability.¹ Record (R.) at 2-31. The appellant argues that the Board provided an inadequate statement of reasons and bases for (1) its reliance on VA medical examinations and (2) awarding less probative weight to the appellant's lay testimony regarding his knee instability. Appellant's Brief at 6-17. For the following reason, the Court will vacate that part of the Board's April 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 congressional

¹The Board also denied the appellant entitlement to (1) restoration of a 100% rating for neurological impairment of the right hand; (2) a rating in excess of 50% for neurological impairment of the right hand; and (3) a disability rating in excess of 10% for a low back disability. 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).

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 an Iraq war veteran and Purple Heart recipient who served on active duty in the U.S. Army from September 2003 to March 2004, and from December 2004 to January 2007 as a wheeled vehicle mechanic. R. at 2439 (DD Form 214). While in service the appellant suffered shrapnel wounds to his right knee. R. at 2163.

In December 2006, the appellant filed for benefits based on service connection for residuals of his right knee injury. R. at 2452-53. In August 2008, the appellant underwent a VA examination that failed to test the appellant's right knee during weight-bearing activities. *See* R. at 1913-21. In September 2008, VA granted the appellant service connection for his right knee condition, and awarded him a 10% disability rating. R. at 2148. The appellant appealed the disability rating. R. at 2077-79.

In March 2009 and May 2013, the appellant underwent VA examinations that failed to test the appellant's right knee during weight-bearing activities. *See* R. at 1861-66, 1208-15.

In April 2016, the Board issued its decision denying the appellant an increased rating for his right knee condition. R. at 2-31. The Board noted its reliance on the August 2008, March

2009, and May 2013 VA examinations to deny the appellant an increased rating. R. at 17-21. This appeal ensued.

The Court concludes that the Board erred in relying on inadequate August 2008, March 2009, and May 2013 examinations to deny the appellant a rating in excess of 10% for his right knee disability. *See Hicks v. Brown*, 8 Vet.App. 417, 421 (1995) (finding that Board reliance on inadequate examinations frustrates judicial review). Specifically, the examiners failed to test the appellant's knee "on both active and passive motion, [and] in weight-bearing and non-weight-bearing" positions, and to explain why such testing could not or should not be done, as required by regulation. 38 C.F.R. § 4.59 (2017) (final sentence); *see Correia v. McDonald*, 28 Vet.App. 158, 169-70 (2016) ("[T]o be adequate, a VA examination of the joints must, wherever possible, include the results of the range of motion testing described in the final sentence of § 4.59."). Remand is required for the Board to provide an adequate statement of reasons and bases for its reliance on these examinations. *See* 38 U.S.C. § 5103(a); *see also Correia, supra*.

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 (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). The remanded matter is to be provided expeditious treatment. *See* 38 U.S.C. § 7112; *see also Hayburn's Case*, 2 U.S. 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" (internal quotation marks omitted)).

For the foregoing reason, and on review of the record, that part of the April 11, 2016, Board decision on appeal is VACATED and that matter is REMANDED for readjudication.

DATED: September 28, 2017

Copies to:

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VA General Counsel (027)