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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 16-3023

GARY W. EVANS, 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, Gary W. Evans, appeals through counsel a July 12, 2016, Board of Veterans' Appeals (Board) decision that denied service connection for (1) a bilateral hip disorder and (2) a bilateral knee disorder. Record (R.) at 2-10. The appellant argues that the Board erred when it (1) failed to consider a theory of service connection based on continuity of the appellant's symptoms and (2) when it relied on an inadequate medical examination. Appellant's Brief at 6-17. For the following reason, the Court will vacate the July 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 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 September 1974 to September 1994 as an ordnance journeyman. R. at 1033 (DD Form 214).

In June 2011, the appellant filed for benefits based on service connection for bilateral hip and knee disorders. R. at 1546-47. In his application, the appellant noted that the arthritis was likely caused by his 20 years working on steel decks from the ship and that the condition was continually worsening. R. at 1546-47. In an April 2012 statement, the appellant reported that his hips and knees worsen every year and that the years of climbing up and down ladders in service had "been tearing up [his] knees and hips." R. at 1483.

In January 2015, the appellant underwent a VA medical examination. R. at 118-34. The examiner diagnosed the appellant with osteoarthritis of the knees and hips and femoral acetabular impingement syndrome of the hips. R. at 119, 125. The examiner found that the appellant's arthritis was not related to service because there was no trauma noted in the appellant's service record or in his personal history that would cause the conditions. R. at 133. The examiner found that the appellant's current hip and knee conditions were not related to climbing up and down ladders or working and sleeping on steel slabs because "[e]xercise and activity is noted to be health [sic] for good for joints and muscles." R. at 134.

In July 2016, the Board relied on the January 2015 examination to deny service connection for the appellant's bilateral knee and hip conditions. R. at 2-17. This appeal ensued.

The Court concludes that the Board provided an inadequate statement of reasons or bases for relying on the January 2015 VA examination. *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's conclusion that the appellant's arthritis was not related to his 20 years of climbing stairs, sleeping on steel and concrete slabs, and carrying ammunition because "[e]xercise and activity is noted to be health [sic] for joints and muscles," is nonresponsive to the appellant's theory of service connection. *See* R. at 134. The appellant has not suggested that mere exercise and activity caused his arthritis. Instead, his theory is that 20 years of exercise and activity on hard surfaces has led to his arthritic joints. *See* R. at 1546, 1483. It requires no medical expertise to understand this distinction, and it is unclear how the Board could have found this opinion adequate for rating purposes. Remand is required for the Board to provide an adequate statement of reasons or bases for relying on the January 2015 VA examination or to provide a new examination that considers the appellant's theory of service connection. *See Gilbert, supra*.

Because the Court is remanding the matter, it will not address the appellant's remaining argument. *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 a short delay, and may be utterly ruined, by a long one.").

Based on the foregoing reason, the July 12, 2016, Board decision on appeal is VACATED and the matters are REMANDED for readjudication.

DATED: October 30, 2017

Copies to:

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