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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 16-3293

DANNY R. ANDREWS, 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, Danny R. Andrews, appeals through counsel an August 8, 2016, Board of Veterans' Appeals (Board) decision finding that new and material evidence had not been submitted to reopen a claim of service connection for a low back disorder. Record (R.) at 2-9. The appellant argues that the Board provided an inadequate statement of reasons or bases for its finding that new and material evidence had not been submitted. Appellant's Brief at 4-9. For the following reason, the Court will vacate the August 2016 Board decision 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 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 is a Vietnam veteran who served on active duty in the U.S. Army from July 1967 to July 1969 as an infantryman. R. at 34 (DD Form 214). The appellant was awarded the Silver Star, the Bronze Star, and numerous other decorations. R. at 34. While deployed, the appellant sustained a "significant injury while pulling out another soldier that was up to his neck in mud." R. at 330.

In December 2006, the appellant filed for benefits based on service connection for a back condition. R. at 944-53. Treatment records from March 1996, March 1997, May 1998, July 2007, January 2008, May 2009, and June 2009, reflect low back pain. R-187, 229, 233, 331, 565, 958, 994. In January 2008, the appellant was diagnosed with a low back condition with lumbar degenerative joint disease (DJD), spondylolisthesis, and spondylolysis. R. at 333. In January 2008, the regional office (RO) denied the appellant's claim for service connection. R. at 307-19.

The appellant submitted VA treatment records from May 2009 and June 2009, which documented low back pain. R. at 7-8, 229-33. In January 2010, the appellant sought to reopen his claim. R. at 262. In March 2010, the RO denied his request. R. at 248-50. In March 2013, the RO issued a Statement of the Case in which it continued to deny the appellant's request to reopen the claim. R. at 94-95. The appellant perfected his appeal with the Board the same month. R. at 57.

In August 2016, the Board denied the appellant's request to reopen the claim for service connection because new and material evidence had not been received. R. at 2-9. The Board found that the new evidence was "not material because it does not relate to whether a current *low*

back condition is the result of injury during service." R. at 8. This appeal ensued.

The Court determines that the Board provided an inadequate statement of reasons or bases for finding that VA records merely evidenced a current 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); *see* R. at 8. The Board found that newly submitted VA records were not new and material, because they merely showed a fact already established. Yet, the Board ignored that these documents may be evidence of a nexus between the appellant's present disability and post service symptomatology. *See Brewer v. West,* 11 Vet.App. 228, 231(1998). The appellant has a current diagnosis of DJD in his lower back and VA has never considered a theory of continuity of symptomology.[1] *See* 38 C.F.R. § 3.303(b)(2017); *see also* § 3.309(a)(2017). Given the low threshold to open a claim, it is unclear why this evidence was not considered new and material. *See Shade v. Shinseki,* 24 Vet.App. 110 (2010) (noting the low threshold required when trying to reopen a claim through the admission of new evidence). Remand is required for the Board to provide an adequate statement of reasons or bases for its new and material evidence determination. *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). The Court encourages the appellant to submit a statement as to when his low back pain began. *See* § 3.303(b). 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 August 8, 2016, Board decision on appeal is VACATED

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[1]As this Court observed in *Greyzck v. West*, "the term osteoarthritis is a synonym of the terms *degenerative arthritis* and *degenerative joint disease*." 12 Vet.App. 288, 291 (1999) (emphasis in original) (citing STEDMAN'S MEDICAL DICTIONARY 9, 1267 (26th ed.1995)).

and the matter is REMANDED for readjudication.

DATED: October 31, 2017

Copies to:

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