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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 17-3009

BYRON R. HOWARD, APPELLANT,

v.

ROBERT L. WILKIE,
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*: Vietnam War veteran Byron R. Howard appeals through counsel a July 28, 2017, Board of Veterans' Appeals decision that denied an initial disability rating in excess of 10% for peripheral neuropathy of both the right lower and left lower extremities. Record (R.) at 2-12. The appellant argues that the Board misinterpreted and misapplied the law in determining that the medical evidence was more probative than the credited lay evidence regarding the severity of the appellant's symptoms. Appellant's Brief at 7-16. For the following reason, the Court will vacate the July 2017 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 is a Vietnam War veteran who served on active duty in the U.S. Army from November 1968 to July 1970 as an infantryman. R. at 1054 (DD Form 214). He earned the Vietnam Campaign Medal and the Vietnam Service Medal. R. at 1054.

In September 1996, the appellant filed for benefits based on service connection for peripheral neuropathy secondary to herbicide exposure. R. at 480. The regional office (RO) denied the claim in January 1997. R. at 460-61. During an April 2012 VA treatment session, the appellant reported "red burning legs" which could hurt him for 4-5 hours at a time. R. at 2356. The appellant explained in May 2012 that he experienced leg pain on a daily basis. R. at 2332. In June 2012, the appellant filed for benefits based on service connection for diabetes mellitus resulting from Agent Orange exposure, and sought to reopen his claim for peripheral neuropathy as secondary to diabetes mellitus. R. at 359. The appellant complained that he experienced nerve pain and burning in his legs that "st[ung] like bees." R. at 340, 361.

Treatment records from October 2012 show the appellant complaining of chronic, episodic weakness in his legs, during which he "can't hardly walk" and which occur typically in the evening in 2 hour intervals. R. at 1726.

Records from December 2012 reveal that the appellant experienced burning, throbbing pain on the bottom of both feet, so severe that it "takes his breath away." R. at 1553. The appellant also stated that he was unable to walk to the bathroom without the assistance of crutches and a

caregiver. R. at 1553. Later that month, the appellant stated that when in the shower his right foot is hit by water, the foot felt "as if it is going to explode." R. at 1508.

In December 2012, the RO granted service connection for diabetes mellitus associated with herbicide exposure. R. at 325-30. The RO denied the appellant's peripheral neuropathy claims because there was no diagnosis of the disorder. R. at 329. A February 2013 primary care note documented that the appellant experienced foot pain and a sensation like burning or needles, and that these problems were worsening over time. R. at 1418. Treatment records from April 2013 note that that appellant was "[u]nable to walk more than a few feet until his legs become so weak that he has to lower hi[m]self to the ground." R. at 1340. The care manager stated that the appellant had a peripheral nerve disease with normal monofilament tests. R. at 1352-53.

The appellant underwent a VA examination in July 2013. R. at 268-88. The examiner diagnosed sensory peripheral neuropathy of both lower extremities. R. at 280. The examiner identified pin-prick pain sensation in both feet and found the appellant's motor system normal. R. at 286. The examiner noted mild paresthesia, dysesthesias, or both, and mild numbness on both lower extremities. R. at 281-82. Also noted were decreased ankle reflexes bilaterally. R. at 283. All other testing revealed no abnormalities. *See* R. at 281-85. The examiner opined that the neuropathy was mild, without either complete or incomplete paralysis affecting the sciatic or femoral nerves. R. at 285-86.

In August 2013, a decision review officer granted service connection for peripheral neuropathy of the bilateral lower extremities, assigning a 10% disability rating to each leg disability effective June 2011. R. at 218-25. The Board issued a decision in August 2015 denying an initial rating in excess of 10% for peripheral neuropathy in both lower extremities. R. at 102-16. The Court remanded the decision in January 2017 for the Board to explain "*why* the appellant's symptoms amount to only mild incomplete paralysis under [Diagnostic Code] 8520 or why they do *not* amount to moderate incomplete paralysis." *Howard v. Snyder* 2017 WL 382976, at *1 (U.S. Vet. App. Jan. 27, 2017) (emphasis in original).

In July 2017, the Board once again denied an initial rating in excess of 10% for peripheral neuropathy of both the right lower and left lower extremities. R. at 2-12. The Board found that the appellant's symptoms "at most approximate the criteria for a 10% rating" because "the impairment caused [by those symptoms] is no more than mild in severity." R. at 9, 11. Although the Board acknowledged that the appellant had reported "severe" pain and weakness in his lower legs, it

ascribed a higher probative value to "convincing and consistent medical evidence showing predominantly normal results upon objective neurological testing." R. at 10-11. In particular, the Board attributed a high probative value to the report of the July 2013 VA examiner, who identified mild paresthesias, mild dyesthesias, mild numbness, and decreased ankle reflexes bilaterally, but found no other neurological symptoms – including pain – and concluded that there was neither incomplete nor complete paralysis of the appellant's sciatic nerve. R. at 9-10; *see also* R. at 281-86. The Board acknowledged that the examiner did not perform electromyographic testing. R. at 9; *see also* R. at 286. This appeal ensued.

Where there is incomplete paralysis of the sciatic nerve, a 10% rating is warranted for "mild" paralysis, a 20% rating is warranted for "moderate" paralysis, a 40% rating is warranted for "moderately severe" paralysis, and a 60% rating is warranted where there is "severe" paralysis, with marked muscular atrophy. 38 C.F.R. § 4.124a, Diagnostic Code (DC) 8520 (2018). Where the impairment is wholly sensory, the maximum rating is moderate. *Id.* The finder of fact must consider loss of reflexes, muscle atrophy, sensory disturbances, and pain. *See* 38 C.F.R. §§ 4.123, 4.124 (2018).

The Court concludes that the Board provided an inadequate statement of reasons or bases for finding that the impairment caused by the appellant's peripheral neuropathy was at most mild in severity. R. at 11; *see also* 38 U.S.C. § 7104(d)(1) ("Each decision of the Board shall include . . . a written statement of the Board's findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented in the record."). The Board's analysis relied almost exclusively on sensory symptoms and limited consideration of the appellant's nerve-related pain. The Board placed the greatest probative weight on the July 2013 VA examination report. R. at 10. The examiner noted that the appellant had experienced mild paresthesia, dyesthesias, or both; mild numbness; and decreased ankle movement on both lower extremities. R. at 281-82. While the examiner marked that the appellant did not suffer intermittent dull pain, he provided no opinion on whether the appellant suffered from non-intermittent or non-dull pain and no indication that he considered the appellant's lengthy history of complaints of pain. R. at 281. It is unclear, then, how the Board determined that this examination report was an adequate one upon which to rely. *See Stefl v. Nicholson*, 21 Vet.App. 120, 123 (2007) (a medical examination is adequate "where it is based upon consideration of the veteran's prior medical history and examinations and also describes the disability, if any, in sufficient detail so that the Board's

evaluation of the claimed disability will be a fully informed one" (internal quotation marks omitted)). The appellant has not only complained of pain that occurs daily and that may burst in severity for 4 to 5 hours at a time, but he has also complained of "red burning legs," pain that felt like bee stings, pain so severe that it "t[ook] his breath away," and pain that made his feet feel "as if [they were] going to explode." *See* R. at 340, 361, 1508, 1553, 2332, 2356. The Board has acknowledged that the pain reported by the appellant was "severe." R. at 10. Yet the Board found that the appellant's statements had far less probative value than the July 2013 examination report, which showed no abnormalities "upon objective neurological testing," but which appears to have ignored the appellant's reported history of pain. Remand is thus warranted for the Board to provide an adequate statement of reasons or bases for its findings. *See* 38 U.S.C. § 7104(d)(1).

Because the Court is remanding the appellant's claim, 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). 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 reason, the July 28, 2017, Board decision on appeal is VACATED and the matters are REMANDED for readjudication.

DATED: October 31, 2018

Copies to:

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