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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 17-3405

JOHN REILLY, 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*: The appellant, John Reilly, appeals through counsel an August 22, 2017, Board of Veterans' Appeals decision that denied service connection for hepatitis C, non-Hodgkin's lymphoma, and diabetes mellitus, type II. Record (R.) at 2-10. The appellant argues that the Board relied on inadequate medical examinations, provided inadequate statements of reasons or bases on the issues of the appellant's credibility and competence, inappropriately relied on the lack of in-service diagnosis of hepatitis C as negative evidence against him where that disease was not discovered until after he left service, and failed to consider theories of direct service connection for lymphoma and diabetes. Appellant's Brief at 8-25. For the following reasons, the Court will vacate the August 2017 Board decision and remand the matters for further development and 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. Army from March 1972 until February 1975 as an indirect fire infantryman. R. at 1343 (DD Form 214). In February 1974, the appellant was diagnosed with hepatitis A. R. at 436-40. A March 1974 record documented levels of 820, 760, and 680 of the liver enzyme SGPT during the appellant's treatment in January and February 1974. R. at 438. A medical report written after the appellant was in a March 1976 car accident noted elevated levels of LDH and SGOT, which are markers of liver function. R. at 296. The appellant denied using drugs or parenteral medication, or receiving blood transfusions. R. at 438. In November 1997, the appellant was diagnosed with non-Hodgkin's lymphoma. R. at 793-95. While undergoing interferon therapy, he was diagnosed with hepatitis C. R. at 773.

In February 2009, the appellant applied for benefits based on service connection for non-Hodgkin's lymphoma and a sleep disorder. R. at 1003-05. In March 2009, he claimed service connection for diabetes secondary to the sleep disorder. R. at 975. That month, the appellant submitted a statement in which he advanced the theory that he "was exposed to" non-Hodgkin's lymphoma in 1977 while at a VA hospital getting treatment for an in-service tear duct condition. R. at 984; *see also* R. at 338. The regional office (RO) denied service connection for non-Hodgkin's lymphoma, a sleep disorder, and diabetes in June 2009. R. at 870-73.

In July 2009, the appellant applied for benefits based on service connection for hepatitis. R. at 866. The RO denied service connection for hepatitis in May 2010. R. at 688-93. The appellant underwent a VA examination in November 2013. R. at 81-85. The examiner opined that it was less likely than not that the appellant's hepatitis C was incurred in or caused by his service. R. at 85. The examiner stated that the appellant denied predisposing factors for hepatitis C and that the "hepatitis C virus is distinct from the hepatitis A virus and is not a sequel to hepatitis A infection." R. at 85.

In July 2015, the appellant submitted a statement in which he argued that he contracted hepatitis C from a fellow soldier who was a drug user. R. at 383. He wrote that he believed that the drug user either shaved with the appellant's razor or accidentally poked him with a needle while "shooting up." R. at 383. The appellant also asserted that his hepatitis A diagnosis may have been incorrect. R. at 383. He intimated that his lymphoma and diabetes may have been connected to his hepatitis. R. at 383.

The appellant testified at a Board hearing in April 2016. R. at 331-52. The appellant stated that although he was told in February 1974 that he had hepatitis A that would clear within 6 months, at the time of his separation in February 1975 still had liver problems and weakness. R. at 334. He said that he went to a VA hospital again in 1977, but VA "never followed up" on his hepatitis. R. at 338. The appellant testified that he believed that his non-Hodgkin's lymphoma was related to hepatitis which had been misdiagnosed and had gone untreated for 20 to 30 years. R. at 338, 340; *see also* R. at 383. He also implied that his hepatitis caused weight gain, leading to diabetes. R. at 339. He stated that he believed that he was misdiagnosed with hepatitis A, and in fact was initially informed by an in-service doctor that he had hepatitis B. R. at 341-42.

In May 2016, in light of the appellant's July 2015 statement that he may have contracted hepatitis C from a drug-using soldier, the Board remanded the claims for an addendum opinion by the November 2013 VA examiner on the etiology of the appellant's hepatitis C. R. at 313-15. The Board reasoned that "the possibility of this happening and his being misdiagnosed is of great possibility." R. at 315. The Board requested the "[i]f the examiner cannot provide an opinion without resorting to speculation, the examiner should provide an explanation as to why this is so and note what, if any, additional evidence would permit such an opinion to be made." R. at 315.

The appellant underwent a VA examination in August 2016, although not with the November 2013 examiner. R. at 74-79. The examiner opined that it was less likely than not that

the appellant's hepatitis C was incurred in or caused by his service. R. at 76. The examiner stated that there was no evidence of the appellant having hepatitis C before 1998. The examiner noted that while the 1976 post-vehicle-accident lab results showed elevated LDH and SGOT levels, those results "are very non-specific" and could have been caused by acute muscle injury or the rupture of red blood cells secondary to the vehicle accident. R. at 76. The examiner concluded that "[i]t would be mere speculation to state that these elevated blood tests were due to hepatitis C. It is less likely than not that their elevations were due to hepatitis C." R. at 76. The examiner added that it was not clear whether the appellant had received a blood transfusion after the 1976 accident. R. at 76. The examiner dismissed the appellant's statement that he caught hepatitis C from a fellow soldier as "mere speculation" because the appellant had no knowledge of someone using his razor or recollection of being stuck with a needle, even though "one generally knows when he gets stuck." R. at 76.

In August 2017, the Board denied service connection for hepatitis C, and for both non-Hodgkin's lymphoma and diabetes mellitus as secondary to hepatitis C. R. at 2-10. The Board reasoned that there was no diagnosis of hepatitis C in service or for many years afterwards and that there was no treatment for symptoms associated with hepatitis C in service. R. at 8. The Board concluded that "the competent medical evidence," including the November 2013 and August 2016 VA examination reports, "is against a finding that the in-service diagnosis of hepatitis A is related to the later diagnosis of hepatitis C." R. at 8-9. The Board found that the appellant was not credible with respect to blood exposure in service. R. at 9. The Board found that service connection for non-Hodgkin's lymphoma and diabetes mellitus was not warranted because the appellant claimed these conditions as secondary to hepatitis C, which was not granted service connection. R. at 10. This appeal ensued.

The Court concludes that the Board erred by not returning the August 2016 VA examination opinion for clarification. *See* 38 C.F.R. § 4.2 (2018) (VA is required to "return the [examination] report as inadequate for evaluation purposes" if the report "does not contain sufficient detail"). The examiner stated that it would be "mere speculation" to conclude that elevated SGOT and LGH enzyme levels found after a 1976 car accident were caused by hepatitis C, because the level of the "more specific" SGPT enzyme was not measured. R. at 76. The examiner, however, never discussed a March 1974 service treatment record that noted the appellant had SGPT levels of 820, 760, and 680 during his early 1974 medical treatment. R. at 438. Remand

is warranted for the Board to return the examination opinion for clarification on whether the 1974 SGPT test results permit the examiner to make an opinion on whether the appellant's hepatitis C was caused by or incurred in service. *See* 38 C.F.R. § 4.2.

As classified by the Board, the appellant's non-Hodgkin's lymphoma and diabetes mellitus claims were for service connection secondary to the hepatitis C claims. *See* R. at 2. Because the issues of secondary service connection are inextricably intertwined with the hepatitis C matter, the lymphoma and diabetes claims must be remanded. *See Harris v. Derwinski*, 1 Vet.App. 180, 183 (1991) (holding that where a decision on one issue may have a "significant impact" upon another, the two claims are inextricably intertwined), *overruled on other grounds by Tyrues v. Shinseki*, 23 Vet.App. 166 (2009) (en banc), *aff'd*, 631 F.3d 1380, 1383 (Fed. Cir. 2011), *vacated and remanded for reconsideration*, 132 S. Ct. 75 (2011), *modified*, 26 Vet.App. 31 (2012). The Board should also ensure that the matter of direct service connection for non-Hodgkin's lymphoma is fully adjudicated. The appellant has also stated that he was exposed to the non-Hodgkin's lymphoma at a VA hospital in 1977. R. at 984.

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). If the appellant would like to raise a theory of direct service connection for diabetes mellitus, type II, then he should do so on remand. 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 August 22, 2017, Board decision on appeal is VACATED and the matters are REMANDED for readjudication.

DATED: December 28, 2018

Copies to:

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