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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 17-2569

RICKY A. MAHONEY, 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*: U.S. Marine Corps veteran Ricky A. Mahoney appeals, through counsel, a July 17, 2017, Board of Veterans' Appeals decision that denied him entitlement to service connection for arthritis of the neck, back, hands, and knees, to include as secondary to service-connected disabilities. Record (R.) at 1-11. The appellant argues that the Board failed to (1) ensure the duty to assist was fulfilled because it relied on inadequate VA medical opinions, which did not sufficiently address the issue of aggravation, and (2) discuss relevant evidence, made findings that were contrary to the record, and applied incorrect standards for aggravation. Appellant's Brief at 10-23. For the following reasons, the Court will vacate the July 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. Marine Corps from June 1972 to May 1974 as a rifleman. R. at 3781 (DD Form 214). When he entered the Marine Corps, the appellant noted "swollen or painful joints." R. at 3787-88. At some point during service, the appellant underwent surgery to remove osteochondroma from his feet bilaterally; this surgery led to his eventual discharge and service-connected benefits. *See* R. at 2828, 2890, 2894, 2910, 6104.

In January 1973, service treatment records (STRs) show that the appellant complained of severe mid-back pain after falling off a ladder while on leave. R. at 3808. The physician concluded that the appellant had a "very mild low back strain." R. at 3808.

The appellant sought treatment for joint pain at VA medical centers several times during the 1990s and early 2000s. In October 1992, the appellant saw a VA physician, who noted that the appellant had a "[history] suggestive of RA¹ [with] low back pain." R. at 6175. The appellant saw a VA physician in October 1996 because the "right side of [his] neck [had] been hurting for 2 month[s]." R. at 6165. The appellant continued to experience back pain and sought VA treatment for another visit in October 1999. R. at 3136. The examiner noted that the appellant did not report

¹ The record does not indicate whether RA is referring rheumatoid arthritis, reactive arthritis, or something else.

any specific trauma incident that may have caused the pain. R. at 3136. The appellant continued to experience pain in October 2003 in his lower back, knees, and feet. R. at 3088.

In August 2007, the appellant filed for service-connected benefits for arthritis of the neck, back, hands, and knee, alleged to be secondary to his service-connected arthritis of his feet. R. at 6518. The appellant also injured his left knee at work in November 2007, and underwent a total knee replacement (TKR) on his left knee that same year, and again in 2009. R. at 1209, 2056.

At a January 2008 VA examination, the appellant reported "chronic swelling and pain in both feet over the last 20 years"; arthritis in hands and knees "since the 1980s"; onset of back pain in 2000; and onset of neck pain in 2001. R. at 2890. The appellant showed a limited range of motion in all affected joints. R. at 2891. The examiner noted that the appellant had "significant gait and functional limitations on standing and walking involving his left knee." R. at 2892. The examiner concluded that the appellant's neck, back, hands, and knee pain is "less likely than not" secondary to his bilateral foot condition because the onset was "more related to his age" and cited a work injury to the appellant's left knee in November 2007. R. at 2894.

The appellant visited a VA rheumatologist in August and September 2009 for joint discomfort. R. at 2498, 2533. The appellant reported pain in his wrists and bilateral knees, significant swelling of the bilateral ankles, and small joint swelling of fingers on bilateral hands, but more so on the left hand. R. at 2533. The rheumatologist noted lower back pain and "instability as he ambulates." R. at 2533. The rheumatologist also commented that the appellant had a "history of intermittent inflammatory arthritis and osteoarthritis. One wonders about the possibility of a reactive arthritis given his history of bilateral pain and swelling and inflammatory arthritis when he was a Marine at Guantanamo." R. at 2499.

The appellant testified at an April 2011 Board hearing that the surgeon who performed his TKR in November 2007 explained that the arthritis from his feet caused arthritis to spread to his knees, back, and further up his body, and that his gait has changed as a result of the arthritis in his feet. R. at 5397. The appellant recounted his in-service diagnosis of foot arthritis, which required surgery and led to his eventual discharge. R. at 5401. The appellant alleges he began having knee pain and problems since basic training and infantry training, but thought the pain was normal and "part of the job." R. at 5400-01. The appellant testified that there has not been a time since 1974 where his knees have not caused him problems, and that his condition keeps getting "worse and worse." R. at 5410-11.

The appellant underwent a VA examination in February 2013. R. at 2035-74. The examiner concluded that the appellant's condition was less likely than not related to his service, and rationalized that all the appellant's symptoms occurred after his military years, and that the appellant denied any specific injury or trauma during service. R. at 2073. The examiner did not opine on secondary service connection or aggravation. *See* R. at 2035-74. The same examiner issued an addendum to the February 2013 examination report in April 2013, and noted that the January 1973 STR revealed mild low back pain, which is unlikely to lead to DJD of the lumbar spine; the examiner did not change the diagnoses or medical opinions from the February 2013 examination report. R. at 2075.

The Board remanded the case in January 2015 with instructions for the VA examiners to review additional medical records, administer another examination, and properly address the issue of aggravation. R. at 3642.

The appellant underwent another VA examination in September 2016. R. at 1195. The appellant reported a long history of back pain, having had difficulty for years straightening out his fingers on his left hand, pain in both knees with an inability to extend his twice-surgically-repaired left knee, and stiffness and pain in his neck. R. at 1195, 1201, 1209, 1216. The examiner concluded that she was not able to determine a baseline level of severity, and that to attempt to determine the baseline would be "speculation." R. at 1221. Ultimately, the examiner opined that the appellant's conditions were less likely than not related to his service because the conditions started "many years post military discharge," and that the appellant's condition is "most likely secondary to natural progression of age related degeneration and also wear and tear from his construction job post military service. [The appellant] is [serviced-connected] for a bilateral foot condition[,] which would not have caused [degenerative joint disease (DJD)] of his multiple joints." R. at 1222. The same examiner issued an addendum in February 2017 with the same conclusion, stating "there is no nexus" between the appellant's current conditions and the DJD of multiple joints. R. at 41. Asked to provide additional rationale for baseline level of severity and aggravation, the examiner restated that "there is no nexus" between existing conditions. R. at 41.

In July 2017, the Board issued a decision denying entitlement to service connection for arthritis of the neck, back, hands, and knees, to include as secondary to service-connected disabilities. R. at 1-11. The Board concluded that "given [the] lack of [a] clear in-service injury, the extended interval since separation from service, and also the non-service-related etiologies,

there is complexity to this case such that the Board will attribute the greatest probative value to the conclusions of the VA examinations as indicated." R. at 10. The Board found that the appellant was not competent to opine on etiology, and thus found his opinion to not be probative. R. at 10. This appeal ensued.

The Court concludes that the Board failed to ensure substantial compliance with its January 2015 remand order. *See Dymment v. West*, 13 Vet.App. 141, 146-47 (1999) (it is substantial compliance with remand orders, not absolute compliance, that is required). The Board ordered a VA medical opinion that adequately considered a theory of aggravation. R. at 3642. Yet, neither the September 2016 examination report, nor the February 2017 addendum provide any rationale for why the appellant's service-connected foot condition did not aggravate the conditions on appeal. *See Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 304 (2008) (concluding that a medical opinion is not entitled to any weight "if it contains only data and conclusions"). Remand is required for the Board to ensure substantial compliance with the January 2015 remand order. *See Stegall v. West*, 11 Vet.App. 268, 271 (1998).

Because the Court is remanding the appellant's claims, 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 reasons the July 17, 2017, Board decision is VACATED and the matters REMANDED for further development and readjudication.

DATED: December 28, 2018

Copies to:

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