Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 17-4485

DONALD J. DESROSIERS, 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 Donald J. Desrosiers appeals, through counsel, a September 28, 2017, Board of Veterans' Appeals decision that denied him service connection for multiple sclerosis (MS), to include as due to herbicide exposure. Record (R.) at 2-7. The appellant argues that the Board (1) failed to ensure the VA's duty to assist was satisfied when it relied on a March 2017 VA opinion; (2) failed to address all arguments before it and provided an inadequate statement of reasons or bases for its decision; (3) violated the duty to assist because the hearing officer failed to fully explain the issues or suggest the submission of evidence which may have been advantageous; and (4) failed to explain its determination regarding the date of the claim. Appellant's Brief at 9-26. For the following reasons, the Court will vacate the September 2017 Board decision and remand the matter 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 July 1968 to July 1971 as an aviation communication equipment repairman. R. at 3255 (DD Form 214). The appellant served in Vietnam for 1 year installing portable aircraft towers, R. at 2775, and is presumed to have been exposed to Agent Orange. R. at 5, 3255.

In 1978, the appellant reported pain in his C-7 spine. R. at 2704. The appellant reportedly experienced "symptoms suggestive of MS" from 1985 to 1990, including difficulty walking, stating that "sometimes I just couldn't walk, and I'd just drop." R. at 2440.

In May 1999, the appellant sought treatment for left arm numbness, which he had been experiencing for at least 2 years. R. at 2800. In addition to the left arm numbness, the appellant also reported numbness on the 4th and 5th fingers of his right hand, but no symptoms in his feet. R. at 2800. The examiner opined that the weakness was the result of "an early ulnar neuropathy." R. at 2800.

In December 2000, the appellant was diagnosed with MS. R. at 3111.

In December 2001, the appellant filed a claim for disability benefits for MS, R. at 3164, but was denied in September 2002 based on a lack of a diagnosis in-service, or within the applicable presumptive period. R. at 3139.

In April 2003, the appellant requested a review of his records for exposure to Agent Orange. R. at 3134. In an August 2003 treatment record, the appellant denied any family history of MS, and noted that his symptoms began in 1985 to 1990, beginning with difficulty walking. R. at 2440.

In August 2007, the appellant's treating physician noted that the appellant suffered from "primarily spinal MS," experiencing pain in 1978. R. at 2617; *see also* R. at 2704.

In September 2009, the appellant submitted another claim for MS. R. at 2903-04. The regional office (RO) denied the claim for a lack of new and material evidence to substantiate the claim manifested on or before July 1978, the end of the applicable presumptive window. R. at 2151.

In May 2013, the appellant attended a Board hearing regarding whether new and material evidence had been received to reopen his MS claim. R. at 1687-91. The appellant contended that his MS was related to his military service, and testified about his history of numbness and falling starting in 1995, but did not present any new evidence showing the relation between his MS and military service. R. at 1688-89. Agent Orange was not discussed by either party. *See* R. at 1687-91.

In September 2016, the appellant's representative requested that the Board obtain a medical opinion "to include a review of all the records to include whether any of his signs and symptoms during service and after service led to the manifestations or early signs and symptoms of his diagnosed [MS]." R. at 1217.

In March 2017, the Board decided to reconsider the December 2001 claim on the merits because additional service treatment records had been received, R. at 1210, and remanded the claim to obtain a medical opinion with instructions to "specifically address the onset of the [appellant's] symptomatology, and his presumed exposure to herbicide agents during service in Vietnam." R. at 1213.

Later in March 2017, the appellant underwent a VA examination where the examiner noted that the appellant's symptoms began in 1995. R. at 39-48. The examiner stated that the condition was less likely than not caused by the appellant's service, and reasoned that "on a temporal basis," the 20-year gap between the first signs of symptoms and the appellant's separation from service would not link the appellant's MS to service. R. at 39. The examiner went on to opine that the appellant's MS was not related to herbicide exposure because "to [his] knowledge, there is not

known relationship between herbicide exposure and the subsequent development of MS." R. at 39. The examiner did not cite any medical literature in reaching his conclusion. R. at 39-48.

In the September 2017 Board decision on appeal, the Board found that although the appellant had a diagnosis of multiple sclerosis and was presumably exposed to Agent Orange, the one nexus opinion of record showed that the appellant's disability was less likely than not incurred in or caused by Agent Orange exposure. R. at 5. The Board therefore denied the claim. R. at 7. This appeal ensued.

The Court concludes that the Board provided an inadequate statement of reasons or bases for relying on the March 2017 VA examination. *See* 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."). Although the examiner found that the appellant's MS symptoms began in 1995, the examiner failed to address why cervical spine pain, reported in 1978, was not an MS symptom. The examiner failed to adequately consider the appellant's medical history when providing a negative nexus opinion. *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)). Remand is required for the Board to adequately explain its reliance on the March 2017 VA examination.

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 reasons, the September 28, 2017, Board decision is VACATED and the matter is REMANDED for further development and readjudication.

DATED: June 28, 2019

Copies to:

Zachary M. Stolz, Esq.

VA General Counsel (027)