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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 18-2297

JAMES D. KENNEDY, 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*: James D. Kennedy appeals through counsel a March 29, 2018, Board of Veterans' Appeals decision that denied service connection for prostate cancer, including as secondary to Camp Lejeune contaminated water (CLCW) exposure. Record (R.) at 2-11. The appellant presents multiple arguments challenging the adequacy of a June 2017 VA examination report. Appellant's Brief at 8-24. On August 24, 2019, the Court issued a memorandum decision, wherein it vacated the March 2018 Board decision and remanded the matter for the Board to address the appellant's argument regarding the June 2017 VA examination report in the first instance. On September 3, 2019, the Secretary filed a motion for reconsideration which the Court will grant. The August 14, 2019, memorandum decision will be withdrawn and this decision will be issued in its stead. For the following reason, the Court will vacate the March 2018 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 served on active duty in the Marine Corps from June 1984 to April 1988 as a field wireman. R. at 353 (DD Form 214). From September 1984 to July 1985, he was stationed at Camp Lejeune, North Carolina. R. at 144. The appellant was diagnosed with prostate cancer in 2011 and has been seeking service connection based on exposure to contaminated water while at Camp Lejeune. R. at 587-91, 656-57.

In June 2017, Dr. Sheryl Anthos, a subject matter expert of the CLWC, found that the appellant's prostate cancer was less likely as not related to his exposure to contaminated water. R. at 144-56. The examiner stated that

Mr. Kennedy is a 52 year old USMC veteran who was at Camp Lejeune for approximately 10 months. He was diagnosed with prostate cancer in 2011 at the age of 46, 26 years after being at Camp Lejeune. Mr. Kennedy had scientifically supported risk factors for prostate cancer of age, obesity and ongoing smoking. Prostate cancer has one of the strongest relationships between advancing age and any malignancy. Certainly having a family member increases the risk of developing prostate cancer, but only 5-10% of cases of prostate cancer have a first degree relative that had the disease (meaning over 90% of cases DO NOT have a family history).

While a few occupational studies noted above suggest that after substantial occupational exposures for at least 5 years to TCE or PCE there may be an increased risk of developing prostate cancer, there are many more studies in the literature that have found no increase in risk after any amount of work place exposure. At the time that Mr. Kennedy was at Camp Lejeune, the contaminated wells were being shut down, thereby dramatically reducing potential exposure to TCE and PCE.

Therefore, with the possible exception of significant work place exposure (which is greater than the estimated CLCW exposure) to TCE or PCE for greater than 5 years, which is much longer than this veteran was at Camp Lejeune, the weight of scientific evidence in relation to this case supports that Mr. Kennedy's claimed Prostate cancer IS LESS LIKELY THAN NOT caused by or a result of his relatively brief exposure to CLCW.

R. at 151.

In December 2017, the appellant argued that the June 2017 VA opinion was inadequate because the examiner employed a higher burden of proof in rendering a negative nexus opinion, and requested that the Board consider this argument. R. at 35-36, 21.

In March 2018, the Board issued the decision on appeal where it denied service connection for prostate cancer. R. at 2-11. In reaching this determination, the Board relied heavily on the June 2017 VA examination. R. at 9-11. The Board did not address the appellant's argument regarding this examination, but found broadly that "[t]he examination adequately [provides] the findings necessary to a resolution to the appeal." R. at 4.

The Court concludes that the Board erred in failing to address the appellant's arguments regarding the adequacy of the June 2017 VA examination. *See Robinson v. Peake*, 21 Vet.App. 545, 552, (2008), *aff'd sub nom. Robinson v. Peake*, 557 F.3d 1355 (Fed. Cir. 2009) (holding that the Board is required to consider all issues raised by a claimant). The Board's one-sentence statement regarding the adequacy of the June 2017 VA examination is nonresponsive to the appellant's argument. The failure to address the appellant's argument below has deprived the veteran the meaningful opportunity to participate in the processing of his claim and is thus prejudicial error. *See Simmons v. Wilkie*, 30 Vet.App. 267, 281-82 (2018) ("When an error abrogates the essential fairness of the adjudication or deprives a claimant of a meaningful opportunity to participate in the processing of their claim, the error has the natural effect of being prejudicial.") (internal quotation marks omitted). Remand is required for the Board to properly address the adequacy of the June 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.").

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.").

The Secretary's motion for reconsideration is granted and the August 14, 2019, memorandum decision is withdrawn. For the foregoing reason, the March 29, 2018, Board of Veterans' Appeals decision is VACATED and the matter is REMANDED for readjudication.

DATED: September 30, 2019

Copies to:

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