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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 18-3468

RANDALL E. UZUETA, 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*: Veteran Randall E. Uzueta appeals through counsel a May 23, 2018, Board of Veterans' Appeals decision that denied service connection for Parkinson's disease, to include as due to herbicide exposure. Record (R.) at 4-14. The appellant argues that the Board provided an inadequate statement of reasons or bases for finding that the appellant did not serve near the Korean demilitarized zone (DMZ) and that the appellant was not otherwise exposed to herbicides; failed to discuss a theory of direct service connection based on in-service pesticide exposure; and failed to ensure that the duty to assist was satisfied. Appellant's Brief at 8-21. For the following reason, the Court will vacate the May 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 U.S. Air Force from January 1968 until June 1969 as a cook. R. at 237 (DD Form 214). He was stationed at Taegu in South Korea. R. at 195.

In 2004 and 2005, the appellant began experiencing thinking and concentration problems and feeling shaky, lightheaded, and weak. R. at 479, 548. In February 2008, the appellant was diagnosed with Parkinson's disease. R. at 505.

In April 2010, the appellant filed for benefits based on service connection for Parkinson's disease. R. at 540-56. He stated that he was temporarily deployed to Seoul, Kimpo, and Inchon, where he was housed in huts with local farmers. R. at 550. The appellant said that the locals sprayed unknown herbicides and pesticides, "which may have contained Agent Orange," and that some of his temporary duty stations may have contained storage facilities for Agent Orange. R. at 550.

The Joint Services Records Research Center (JSRRC) issued a memorandum in November 2014. R. at 195. The JSRRC found that the Department of Defense had not identified any Air Force units that were exposed to Agent Orange in South Korea and that the appellant's personnel records did not show exposure to any herbicides in service. R. at 195. It concluded that "exposure to Agent Orange or other tactical herbicides cannot be conceded at this time." R. at 195.

The appellant submitted a January 2015 letter from his private physician, who wrote that "it is likely that [Parkinson's] disease may begin many years before the onset of motor symptoms so that exposure and first symptom onset may be decades apart." R. at 153.

At an April 2017 Board hearing, the appellant recounted handing herbicides to local farmers who then used the chemicals to control the weed population around their huts. R. at 22-23. He said that he was exposed to herbicides when he lived in the huts. R. at 22, 25.

In May 2018, the Board denied service connection for Parkinson's disease, to include as due to herbicide exposure. R. at 4-14. The Board found that the competent evidence of record did not reflect presumptive or actual exposure to herbicide agents. R. at 6-7, 10-11. As to the issue of presumptive exposure to herbicides, the Board noted that though the appellant stated that he served near the Korean DMZ, the appellant's unit was not listed as serving near the DMZ. R. at 10. The Board found that lay statements alone were insufficient to demonstrate service near the DMZ. R. at 11. With respect to actual exposure to herbicides, the Board noted that the JSRRC was unable to verify that the appellant was exposed to herbicides in service, or that he was stationed anywhere that used, stored, sprayed, or transported herbicide agents. R. at 10-11. The Board found that "[a]bsent corroborating evidence, the [appellant's] lay statements that he was exposed to herbicide agents [was] insufficient to establish actual exposure because he has not submitted any evidence that he possesses the expertise necessary to opine on the technical matter of herbicide agent exposure." R. at 11 (citing *Layno v. Brown*, 6 Vet.App. 465, 469-70 (1994)). Finally, the Board noted that neither the appellant nor the record suggested that the Parkinson's disease could be related to an in-service event other than herbicide exposure. R. at 11. This appeal ensued.

The Court concludes that the Board provided an inadequate explanation of reasons or bases for finding that the appellant had not been exposed to herbicides while in service. *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."). The Board found that the appellant's lay statements were insufficient to establish exposure to herbicides because "he ha[d] not submitted any evidence that he possesse[d] the expertise necessary to opine on the technical matter of herbicide agent exposure." R. at 11 (citing *Layno*, 6 Vet.App. at 469-70). Although lay statements are incompetent with respect to matters requiring medical expertise, they are competent evidence as to matters within the realm of the individual's personal knowledge. *See Layno*, 6 Vet.App. at 469-70 (holding

that "lay witnesses are competent to provide testimony that may be sufficient to substantiate a claim of service connection" where that testimony relates to a matter that he or she "has actually observed, and is within the realm of . . . personal knowledge"). The Board failed to address whether the appellant's accounts of in-service exposure were within the realm of his personal knowledge. Remand is thus warranted for the Board to provide an adequate statement of reasons or bases for its finding on the competence of the appellant's lay statements. *See* 38 U.S.C. § 7104(d)(1); *see also Layno*, 6 Vet.App. at 469-70.

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 May 23, 2018, Board decision on appeal is VACATED and the matter is REMANDED for readjudication.

DATED: November 25, 2019

Copies to:

Zachary M. Stolz, Esq.

VA General Counsel (027)