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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 14-0068

LOUIS J. TRENKAMP, APPELLANT,

V.

ROBERT A. MCDONALD,
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*: Louis J. Trenkamp appeals through counsel the November 21, 2013, Board of Veterans' Appeals (Board) decision that denied entitlement to benefits based on service connection for his degenerative disc disease (DDD) of the lumbar spine. Record (R.) at 3-16. The appellant argues that the Board failed to (1) ensure that VA satisfied the duty to assist; (2) provide an adequate statement of reasons or bases for concluding that VA had satisfied the duty to assist; (3) ensure clarity and completeness in the December 2008 Board hearing record; and (4) consider and discuss the appellant's entitlement to VA benefits for DDD of the cervical spine. Appellant's Brief (Br.) at 8. Review by a single judge is authorized by 38 U.S.C. § 7254(b) and is appropriate here. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). As noted by Justice Alito in the U.S. Supreme Court's decision in *Henderson v. Shinseki*, the 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, ___, 131 S. Ct. 1197, 1201 n.2 (2011) (citing 38 U.S.C. § 7261). Because the Board clearly erred in finding that VA satisfied its duty to assist the appellant in gathering evidence to corroborate his claim for benefits, the Court will vacate the Board's November 2013 decision and remand the matter for further development.

The appellant served honorably on active duty as a general vehicle repairman in the U.S.

Army from February 1966 until February 1969. R. at 486. For the period September 1967 until September 1968, during the Vietnam War, the appellant served in the Republic of Vietnam. R. at 376. During his deployment to Vietnam, the appellant was working under a jeep "when a chain broke and the jeep fell on him." R. at 263. On June 10, 1968, the appellant was treated by Captain Waters for a left radius fracture caused by the jeep incident. *Id.* On October 29, 1968, Captain Risings, the doctor later identified by the appellant during his separation examination as his treating physician, indicated that the appellant suffered a fracture of his left radius and ulna. R. at 915, 916. Immediately before he was discharged, the appellant underwent a separation medical examination, and the subsequent report does not note any abnormalities of the appellant's back. R. at 912-15. In February 1969, the appellant filed for VA disability benefits in connection with his left wrist and hearing loss. R. at 857. He was found to have residual effects from his left wrist fracture and was assigned a 10% disability rating. R. at 857-58.

On May 5, 2005, the appellant again filed for VA benefits, claiming that he suffered from DDD and that the condition was caused by the jeep falling on him in Vietnam. R. at 829. In 2008, the appellant testified during a Board hearing that he "went on disability from Monsan[t]o" in 1986. R. at 534. In 2010, the appellant underwent a VA medical examination during which he told the neurologist that "[h]e last worked in 1989 running a chemical vat for Monsanto Chemical Company [be]for[e] his back condition and had a private disability claim and a social security claim. . . ." R. at 506. Then in 2011, the appellant wrote a letter to VA summarizing his position on his claim, and again stating that "[m]y company gave me [d]isability [r]etirement in 1986." R. at 312.

On November 21, 2013, the Board issued a decision that denied entitlement to benefits for lack of service connection of his DDD of the lumbar spine. R. at 3-16. In that decision, the Board member discussed the 2010 VA medical examination and wrote that the appellant "had filed both a private disability claim and a social security claim in connection with [a back] injury." R. at 12. In the Board's statement of reasons or bases for its conclusion that VA had fulfilled the duty to assist, the Board listed numerous holders of relevant records that the VA sought records from; Monsanto Chemical Company is absent from this list. *See* R. at 5-7. This appeal ensued.

"Congress has expressed special solicitude for the veterans' cause," and has imposed a "statutory duty to help the veteran develop his or her benefits claim." *Shinseki v. Sanders*, 556 U.S.

396, 412 (2009). This duty includes making "reasonable efforts to obtain relevant records" that the veteran "adequately identifies." 38 U.S.C. § 5103A(b)(1); *Loving v. Nicholson*, 19 Vet.App. 96, 102 (2005). The scope of the duty to assist applies broadly; even potentially relevant documents are included. *See Talley v. Brown*, 6 Vet.App. 72, 74 (1993) (stating that relevant documents are necessary for an informed Board decision even if the documents cannot fully resolve the matter in question).

The Court concludes that the Board erred in finding that the Secretary satisfied his duty to assist the appellant in gathering evidence to corroborate his claim for benefits. *See* 38 U.S.C. § 5103A(a)(1). During a VA examination in 2010 the appellant told the neurologist that "[h]e last worked in 1989 running a chemical vat for Monsanto Chemical Company [be]for[e] his back condition and had a private disability claim and a social security claim. . . ." R. at 506. While discussing this examination in the November 2013 Board's decision, the Board member specifically acknowledged the relevant records when he wrote that the appellant "had filed both *a private disability claim* and a social security claim in connection with [a back] injury." R. at 12 (emphasis added). In a letter to the VA in 2011, the appellant again stated that "[m]y company gave me [d]isability [r]etirement in 1986," a point he had previously made in his 2008 Board hearing. R. at 312, 534.

The Court concludes that the appellant adequately identified the Monsanto records and that VA has failed to show that reasonable efforts have been made to obtain the disability claims records from Monsanto or that such efforts would be futile. *See* 38 U.S.C. § 5103A(b)(1); 38 C.F.R. § 3.159(c)(1) (2014) ("VA will make reasonable efforts to obtain relevant records not in the custody of a Federal department or agency, to include . . . private medical care providers, [and] current or former employers"). Remand is required for the Board to ensure that VA satisfies its duty to assist, to include making reasonable efforts to obtain these records, before readjudicating the appellant's claim.

Because the Court is remanding the appellant's claim, the Court will not address his remaining arguments. *See Dunn v. West*, 11 Vet.App. 462, 467 (1998) (remand of the appellant's claim under one theory moots the remaining theories advanced on appeal). 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 desires an additional Board hearing he should request one on remand. This matter is to be provided expeditious treatment on remand. *See* 38 U.S.C. § 7112; *see also Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 n., 1 L. Ed. 436 (1792) ("[M]any unfortunate and meritorious [veterans], whom [C]ongress 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 . . . ." (internal quotation marks omitted)).

After consideration of the parties' briefs and a review of the record, the Board's November 21, 2013, decision is VACATED, the Board's determination that VA's duty to assist was satisfied is REVERSED, and the matter is REMANDED for further development consistent with this opinion.

DATED: March 23, 2015

Copies to:

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