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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 15-1306

JOE E. MORGAN, 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*: The appellant, Joe E. Morgan, appeals pro se a February 18, 2015, Board of Veterans' Appeals (Board) decision that (1) denied entitlement to benefits based on service connection for post-traumatic stress disorder (PTSD) and (2) found that the appellant failed to timely appeal the matter of a compensable rating for a service-connected corneal scar of the left eye with retained foreign body to include light sensitivity.¹ Record (R.) at 2-16. In an informal brief, the appellant argues that the Board (1) failed to support its decision with reliable medical evidence; (2) failed to consider third party lay statements; (3) made improper findings regarding the appellant's credibility; (4) erred in failing to order a VA mental health examination; and (5) failed to properly consider a reasonably raised claim of pain from photo-phobia light sensitivity. Appellant's Brief at 1-7. The Court will construe the appellant's informal brief as a general contention of error concerning the Board's decision. *See Calma v. Brown*, 9 Vet.App. 11, 15 (1996) (it is the Court's practice to liberally construe the pleadings of pro se appellants). The Secretary concedes that the Board erred in finding that the appellant had not timely appealed the matter of a compensable rating

¹ Additionally, the Board remanded to the agency of original jurisdiction (AOJ) the appellant's claims for benefits based on service connection for a psychiatric disorder other than PTSD, to include depression and anxiety. These matters are not currently before the Court. *See Hampton v. Gober*, 10 Vet.App. 481, 482 (1997).

for a service-connected corneal scar of the left eye with retained foreign body to include light sensitivity. Appellee's Brief at 11-12.

In an August 24, 2016, memorandum decision, the Court vacated that part of the Board's February 2015 decision denying the appellant benefits based on service connection for PTSD and remanded the matter for further adjudication. *Morgan v. McDonald*, No. 15-1306, 2016 WL 444631 (U.S. Vet. App. Aug. 24, 2016). The Court determined that the Board had erred in relying on its own unsubstantiated medical judgment rather than the opinion of a medical examiner in finding that the appellant's symptoms were not attributable to PTSD, and that remand was warranted for the Board to base its finding on objective medical evidence. *Morgan*, 2016 WL 444631, at *4. On September 14, 2016, the Secretary filed a motion for reconsideration, disputing the Court's determination that the Board erred in basing its finding on its own medical judgment, pointing out that the Board relied on the results of four separate medical examinations. Appellee's Motion for Reconsideration at 1-5. Because the Court agrees that reconsideration of the August 24, 2016, memorandum decision is warranted, the Court will grant the Secretary's September 14, 2015, motion for reconsideration, withdraw the Court's August 24, 2016, memorandum decision, and issue this decision in its stead. For the following reasons, the Court will reverse the Board's finding that the appellant failed to timely appeal the matter of a compensable rating for a service-connected corneal scar of the left eye, vacate the remainder of that part of the Board's February 2015 decision on appeal, and remand all matters on appeal 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 specified relations of veterans, 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).

The appellant served on active duty in the U.S. Army from August 1976 to May 1983, primarily as a wire system and telephone installer. R. at 388-89 (DD Form 214). In June 1981, the appellant was shot in the face with a blank round at close range during a training exercise by a service member who, according to Army investigators, mistakenly believed his rifle was equipped with a blank adapter that would have prevented any discharge after firing. R. at 310-42, 670-72. The appellant sought treatment for "[s]uperficial facial powder burns . . . secondary to blank explosion," and surgery was performed to remove "conjunctival and intracorneal" foreign bodies from both eyes. R. at 344. In January 1983, the appellant was deemed "not qualified for reenlistment" as a result of light sensitivity from a corneal scar in his left eye. R. at 689.

In July 1983, the appellant filed a claim for benefits based on service connection for a corneal scar in his left eye. R. at 803-06. In a January 1985 rating decision, the regional office (RO) granted the appellant service connection for a corneal scar and retained foreign body in his left eye, with a noncompensable rating. R. at 742-45. The appellant did not appeal and the decision became final.

In August 2002, the appellant filed a claim for benefits based on service connection for PTSD. R. at 699-04. In October 2002, the appellant submitted a statement in support of his PTSD claim with an attached PTSD questionnaire, stating that he has experienced "episodes of flashbacks" since service and suffers from panic attacks, depression, nervousness, "fits of anger," violent episodes, and "sleepless nights due to dreams of family members being shot and found dead in the woods." R. at 668-72. In November 2002, a court-appointed psychologist was asked to determine the appellant's fitness to stand trial and diagnosed the appellant with depression, anxiety, personality disorder not otherwise specified, and paraphilia.² R. at 592. At the time, he was incarcerated awaiting trial on charges stemming from the sexual abuse of his 13-year-old stepdaughter, after having been convicted in 1990 or 1991 for a similar offense involving the victim's older sister.³ R.

² "Paraphilia" is "a psychosexual disorder characterized by recurrent intense sexual urges, by sexually arousing fantasies, or by behavior involving use of a nonhuman object, the suffering or humiliation of oneself or one's partner, or children or other nonconsenting partners." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1380 (32d ed. 2012) [hereinafter DORLAND'S].

³ An Arkansas State inmate records search indicates that a "Joe E. Morgan" was convicted of "Sexual Assault 1st Degree" and sentenced in August 2003 to a 60-year term as a habitual offender. *See* http://adc.arkansas.gov/inmate_info/search.php (last visited Aug. 2, 2016).

at 545, 556. He initially attributed this conduct to a need to discipline the girls, but later blamed it on "demons" in his head. R. at 558. In a December 2002 rating decision, the RO denied the appellant's claim. R. at 674-78.

In May 2003, while still incarcerated, the appellant was treated at the Arkansas State Hospital, citing psychiatric symptoms such as auditory hallucinations, crying spells, and depression. R. at 554-59. In June 2003, the treating psychiatrist opined that the symptoms reported by the appellant and the manner of reporting is "characteristic of individuals who are feigning a mental disorder, and is rarely seen in clients responding truthfully," and for that reason the appellant was fit to stand trial. R. at 569. In July 2003, the same psychiatrist opined that the appellant was fit to stand trial and ordered him discharged from the state hospital and returned to the custody of the sheriff with a diagnosis of depressive disorder not otherwise specified and malingering. R. at 545-53. The psychiatrist also discussed the appellant's service history, in particular the incident where the appellant "was shot in the face with a blank round," and noted that the appellant "stated that he left the service because he did not feel that the incident was handled correctly by his superiors." R. at 547.

In a May 2003 rating decision, the RO denied the appellant's claim for benefits based on service connection for PTSD. R. at 644-50. In May 2004, the appellant submitted a formal disagreement. R. at 641-43. In April 2005, the appellant sent the RO a letter acknowledging receipt of the continued denial of his PTSD claim and describing further his symptoms of flashbacks, outbursts of anger and violence, and crying spells. R. at 580-85.

In a September 2010 rating decision, the RO reopened the appellant's claim for service connection for a corneal scar and retained foreign body to the left eye, but continued his non compensable disability rating. R. at 452-58. That same month, the appellant submitted a formal disagreement with the RO decision. R. at 444-49.

In June 2011, the appellant submitted a statement in support of his PTSD claim, contending that since his discharge from service he has suffered from "feeling[s] of apprehension and anxiety," "unresolved anger and frustration," nightmares, uncontrollable public crying, and an inability to communicate with his spouse. R. at 292-94. The appellant also attached statements from his wife, a friend, and his sister, each of whom confirmed his reported symptoms. R. at 295-99.

In September 2011, the appellant submitted a Substantive Appeal to the Board of the noncompensable rating for a corneal scar and retained foreign body to the left eye with light sensitivity. R. at 234-39. In November 2011, the RO issued a Statement of the Case (SOC) continuing its noncompensable rating for the appellant's left eye condition. R. at 221-33. In December 2011, the RO received a copy of the appellant's September 2011 Substantive Appeal. R. at 203-07. In June 2012, the appellant's representative submitted evidence of continued symptoms and treatment for his left eye while in prison. R. at 178-87.

In September 2012, the Board denied the appellant's claim for benefits based on service connection for PTSD, finding that there "is no competent evidence" that the appellant has a diagnosis of the condition. R. at 117-31. In July 2014, the parties entered into a joint motion for partial remand (JMPR) vacating the September 2012 Board decision and remanding the claim "for the Board to provide an adequate statement of reasons or bases for a determination as to whether Appellant is entitled to a VA examination." R. at 433-39.

In February 2015, the Board issued the decision on appeal. R. at 2-16. With regard to the appellant's claim for a compensable rating for a service-connected left eye condition, the Board found that the appellant failed to file a timely Substantive Appeal of this claim and thus "this issue is not before the Board for appellate consideration." R. at 5. With regard to the appellant's PTSD claim, the Board found that the appellant is not entitled to benefits based on service connection as he "is not reporting a contemporaneous medical diagnosis of PTSD, and all of his symptoms have already been attributed to diagnoses other than PTSD by mental health professionals," specifically the November 2002, May 2003, June 2003, and July 2003 psychological examinations of the appellant's fitness to stand trial. R. at 11-12. The Board also found that, because the appellant cannot offer competent evidence beyond his own lay diagnosis that his symptoms are attributable to PTSD, as opposed to the other psychiatric conditions for which he was diagnosed, the appellant was not entitled to a VA examination. R. at 14. The Board pointed to the "indications of 'malingering' in the medical records" as evidence that any examination ordered would have little probative value as it "is unclear that the Veteran would provide meaningful statements to any examiner." R. at 10. This appeal follows.

The Court determines, and the Secretary agrees, that the Board clearly erred in finding that

the appellant had not perfected his appeal with respect to his claim for a compensable rating for his service-connected left eye condition. *See Gilbert v. Derwinski*, 1 Vet.App. 49, 53 (1990) (holding that the Board's findings of fact are reviewed under the "clearly erroneous" standard of review); Appellee's Brief at 11-12. The record shows that in September 2011 the appellant submitted a Substantive Appeal to the Board of the noncompensable rating for the left eye. R. at 234-39. In December 2011, the RO received a second copy of the appellant's Substantive Appeal, in response to its issuance of the November 2011 SOC. R. at 203-07, 221-33. The record reflects that the appellant timely appealed his claim for a compensable rating for his left eye condition. Remand is required for the Board to adjudicate this claim.

With respect to the appellant's PTSD claim, the Court determines that the Board provided an inadequate statement of its reasons or bases for relying on the November 2002, May 2003, June 2003, and July 2003 private psychological examinations to deny the appellant's claim for PTSD. *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."); *Gilbert*, 1 Vet.App. at 56-57 (finding that Congress mandated, by statute, that the Board provide a written statement of reasons or bases for its conclusions that is adequate to enable the appellant to understand the precise basis for the Board's decision and to facilitate review in this Court). Although it is true that these examiners diagnosed the appellant with depressive disorder, anxiety disorder, malingering, and mood disorder, these examinations were provided solely in the context of determining whether he was mentally fit to stand trial. *See* R. at 545-53, 554-59, 565-71, 592-93. There's no indication from these examination reports that the appellant was examined for PTSD. It is thus unclear how the Board relied on these opinions to deny the appellant's PTSD claim. Remand is required for the Board to provide an adequate statement of reasons or bases for its determination. *Gilbert, supra*.

Because the Court is remanding the matter, 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 on remand. *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, (1) the Secretary's September 14, 2016, motion for reconsideration is granted; (2) the Court's August 24, 2016, memorandum decision is WITHDRAWN; (3) that part of the Board's February 2015, decision finding that the appellant failed to timely appeal the matter of a compensable rating for a service-connected corneal scar of the left eye is REVERSED; (4) the remainder of that part of the Board's February 2015 decision on appeal is VACATED; and (5) all matters on appeal are REMANDED for further development and readjudication.

DATED: November 29, 2016.

Copies to:

Joe E. Morgan

VA General Counsel (027)