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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 15-2815

EMERSON E. MARTIN, 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, Emerson E. Martin, appeals through counsel that part of a May 29, 2015, Board of Veterans' Appeals (Board) decision that denied him a disability rating in excess of 20% for a lumbosacral strain, and referral for extraschedular consideration.¹ Record (R.) at 2-21. The appellant argues that the Board (1) erred in relying on a VA examination that did not properly reflect the appellant's functional loss in his lower back; (2) failed to account for the appellant's symptomatology under 38 C.F.R. § 3.321; and (3) erred in failing to remand the matter of extraschedular consideration with the matter of TDIU as inextricably intertwined. Appellant's Brief at 5-17. For the foregoing reasons, the Court will vacate that part of the Board's May 29, 2015, decision on appeal and remand the matter for readjudication.

¹ The Board also granted the appellant a *separate* 10% disability rating for post arthroscopic surgery of the right knee with mild degenerative changes based on removal of symptomatic semilunar cartilage, but otherwise denied an increased rating for the appellant's right knee. The Court will not disturb this favorable finding. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007). The appellant does not argue that an increased rating for the right knee is warranted and the court deems the matter abandoned. *See Pederson v. McDonald*, 27 Vet.App. 276, 285 (2015) (en banc) (holding that, where an appellant abandons an issue or claim, the Court will not address it). The Board also remanded the matter of the appellant's entitlement to a total disability rating based on individual unemployability (TDIU). R. at 22-25. This matter is not before the Court. *See Hampton v. Gober*, 10 Vet.App. 481, 482 (1997).

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, 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 April 1981 to March 1990, primarily as a material control, accounting, and equipment records specialist. R. at 85.

In a May 1990 rating decision, the regional office (RO) granted the appellant service connection for a lumbosacral strain and awarded a disability rating of 10%. R. at 1573-75. In a June 2003 rating decision the RO increased the disability rating to 20% for the appellant's lower back condition, effective March 28, 2003. R. at 1330-39.

In April 2007 the appellant underwent a VA examination, reporting that twice a year he experienced month-long flareups in his back, and was unable to exercise, walk, or stand for a prolonged period. R. at 1187. The examination revealed forward flexion at 90 degrees, which remained unchanged after repetitive testing. R. at 1188. In January 2011 the Board noted the appellant's reports that his condition had worsened and remanded the matter for a contemporaneous examination. R. at 1061-70.

In February 2011 the appellant underwent a VA examination, reporting daily flareups of pain with walking and standing, radiating pain down his left buttock and an inability to walk more than 15 minutes or 50 feet. R. at 1927-29. The examination revealed forward flexion to 70 degrees with pain. R. at 1927. The examiner opined that "[i]t is certainly feasible" that the appellant could have experienced the "pain and loss of motion" he described, but "[t]o try to address this is a matter of mere speculation." R. at 1928. In June 2013 the Board denied the appellant's claim for an increased

rating for a lumbosacral strain. R. at 732-50. In March 2014 the parties entered into a joint motion for partial remand (JMPR) before the Court, remanding the matter for an examination that adequately addressed the appellant's functional limitations during flareups. R. at 697-707.

In December 2014 the appellant underwent a VA examination, reporting week-long flareups after carrying or lifting heavy objects. R. at 113. The examiner noted that the appellant was able to perform repetitive-use testing and found that "pain, weakness, and fatigability" do not limit the functional ability of the appellant's lumbar spine with repeated use over time. R. at 113. The examiner found that his back disability affected his ability to walk more than 50 yards at a time, stand for more than 20 minutes, sit for more than 30 minutes, climb a flight of stairs, or perform tasks requiring frequent and repetitive bending. R. at 117. The examination revealed forward flexion to 85 degrees without pain and 60 degrees with pain during flareups. R. at 114.

In May 2015 the Board denied the appellant's claim for a rating in excess of 20% for his lumbosacral strain. R. at 2-21. Relying on the December 2014 examination, the Board found that there has been no evidence of forward flexion of the appellant's thoracolumbar spine less than 30 degrees, or favorable ankylosis of the entire thoracolumbar spine, as required for a 30% rating. R. at 5-6, 11-3; 38 C.F.R. § 4.71a, Diagnostic Codes (DC) 5237 (2016). The Board also found that the forward flexion even during flareups of pain was 60 degrees, and therefore did not warrant a higher disability rating, and that there was no additional functional impairment or loss due to flareups or pain. R. at 13-14. The Board also found that the rating criteria reasonably described and compensated the appellant's symptomatology, and thus a referral for extraschedular consideration was not warranted. R. at 21. This appeal follows.

The Court determines that the Board provided an inadequate statement of its reasons or bases for not returning the December 2014 examination for clarification. *See* 38 U.S.C. § 7104(d)(1); *Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1990) (detailing that, in each of its decisions, the Board is required to provide a written statement of the reasons or bases for its findings and conclusions adequate to enable an appellant to understand the precise basis for the Board's decision as well as to facilitate review in this Court); 38 C.F.R. § 4.2 (2016) ("If a diagnosis is not supported by the findings on the examination report or if the report does not contain sufficient detail, it is incumbent upon the rating board to return the report as inadequate for evaluation purposes."). The December

2014 examiner found that the appellant's service-connected back disability affected his ability to "perform tasks that require frequent and repetitive bending of the lumbar spine." R. at 117. However, in the same report the examiner found that the appellant's pain, weakness, and fatigability do not "limit his functional ability with repeated use over time." R. at 113. The Court will therefore remand the matter for the Board to provide an adequate statement of reasons or bases for relying on the December 2014 VA examination or return the examination for clarification. *See* 38 C.F.R. § 4.2.

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). Moreover, the Court determines that it would be premature at this time to address whether the appellant is entitled to a referral for extraschedular consideration. 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, that part of the Board's May 29, 2015, decision on appeal is VACATED and the matter is REMANDED for readjudication.

DATED: November 30, 2016

Copies to:

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