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**UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS**

No. 15-3125

DOUGLAS M. BERKOWITZ, 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, Douglas M. Berkowitz, appeals through counsel that part of a June 25, 2015, Board of Veterans' Appeals (Board) decision that denied him entitlement to a disability rating in excess of 20%, from April 20, 2011, to March 31, 2015, for degenerative disc disease (DDD), L5-S1.<sup>1</sup> Record (R.) at 3-23. The appellant argues that the Board (1) erred when it improperly interpreted and applied the law; (2) inadequately disregarded favorable findings; (3) relied on an inadequate VA examination; and (4) misinterpreted 38 C.F.R. § 3.321 when it failed to properly account for the appellant's symptomatology. Appellant's Brief at 6-15. For the following reasons, the Court will vacate the Board's June 2015 decision and remand the matter for further adjudication.

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

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<sup>1</sup>The Board also remanded the matters of (1) entitlement to a disability rating in excess of 10%, after March 31, 2015, for DDD L5-S1; (2) whether the regional office's (RO) rating reduction from 20% to 10% for service-connected DDD, L5-S1, effective March 31, 2015, was proper; (3) whether the RO's rating reduction from 40% to 10% for service-connected right lower lumbar radiculopathy, effective March 31, 2015, was proper; and (5) whether the RO's rating reduction from 40% to 10% for service-connected left lower lumbar radiculopathy, effective March 31, 2015, was proper. These matters are not currently before the Court. *See Hampton v. Gober*, 10 Vet.App. 481, 482 (1997).

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. Air Force from June 1960 to June 1980. R. at 2066 (DD Form 214). The appellant received an Air Force Commendation Medal. R. at 2066.

In July 1980, the appellant applied for benefits based on service connection for lower back pain. R. at 2064-65. In September 1980, VA granted the appellant service connection for DDD and awarded a 10% disability rating. R. at 588. The appellant filed for an increased rating for his DDD based on convalescence from a January 2009 surgery. R. at 1192-93. VA granted the appellant a temporary increase for convalescence. R. at 1164. In March 2011, the Board remanded the appellant's claim for a new examination because the appellant claimed that his condition had increased in severity. R. at 114-15.

In April 2011, the appellant underwent a VA spine examination. R. at 1046-54. The examiner noted a forward flexion range of motion (ROM) of 80 degrees. R. at 1047. The examiner also found objective evidence of pain during ROM testing and objective evidence of pain following repetitive motion. R. at 1047. The examiner, however, did not indicate at what degree pain began on flexion. *See* R. at 1046-54.

In July 2012, the RO increased the appellant's lower back disability rating to 20%—effective April 2011. R. at 158. In March 2014, the appellant applied for increased rating. R. at 138-39. In August 2014, the appellant underwent another VA spine examination. R. at 90-128. During the examination, the doctor indicated the appellant's flexion ROM ended at 75 degrees. R. at 92. The doctor also found objective evidence of pain began at 30 degrees. R. at 92. Additionally, the doctor indicated that the amount of additional ROM lost due to pain was approximately 50 degrees. R. at 111-12.

In June 2015, the Board denied an increased rating for the appellant's lower back disability for the period April 20, 2001, to March 31, 2015. R. at 2-25. The Board found that during this period "there [was] no evidence of forward flexion of the thoracolumbar spine 30 degrees or less or favorable ankyloses of the entire thoracolumbar spine." R. at 5. This appeal ensued.

The Court concludes that the Board erred in relying on an examination that failed to account for functional loss due to pain. *See DeLuca v. Brown*, 8 Vet.App. 202, 206 (1995) (holding that the disabling effect of pain must be considered and reflected in the rating); *see* C.F.R. § 4.40 (2016). The Board relied on the 2011 examination in finding that the appellant had ROM limited to 80 degrees. R. at 16. Although the examiner found the appellant had objective evidence of pain on motion, he provided no indication as to where the pain began. R. at 16; *see Deluca, supra*.

The Court also concludes that the Board failed to consider favorable evidence. *See Caluza v. Brown*, 7 Vet.App. 498, 506 (1995) (finding that the Board must account for and provide the reasons for its rejection of any material evidence favorable to the claimant), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996). Although the Board relied on the August 2014 examiner's finding that the appellant was limited to 75 degrees on forward flexion, the Board failed to address the more important finding of the examiner—that pain began at 30 degrees. Furthermore, the Board failed to discuss the examiner's finding that the appellant had an additional 50 degrees of functional loss due to pain. R. at 111-12. Remand is required for the Board to discuss the favorable evidence. *See Caluza, supra*.

Because the Court is remanding the matters, 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., 1 L. Ed. 436 (1792) ("[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, and on review of the record, that part of the Board's June 25, 2015, decision denying the appellant a rating in excess of 20% for a lower back disability is VACATED and the matters are REMANDED for readjudication.

DATED: November 30, 2016

Copies to:

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