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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 15-4534

MICHAEL H. NORRIS, 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, Michael H. Norris, appeals through counsel a March 16, 2015, Board of Veterans' Appeals (Board) decision that denied him an effective date earlier than January 25, 1999, for benefits based on service connection for anxiety and schizoaffective disorders, to include whether a July 1977 rating decision contained clear and unmistakable error (CUE). Record (R.) at 2-21. The appellant argues that the Board erred in (1) concluding that the July 1977 rating decision did not have to address its rejection of the issues of presumption of soundness and aggravation; and (2) engaged in post hoc rationalization to justify the reasoning of the July 1977 rating decision. Appellant's Brief at 10-18. For the foregoing reasons, the Court will reverse the Board's finding that the presumption of soundness was applied in the July 1977 rating decision, vacate the Board's March 16, 2015, 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, 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 February 1973 to December 1974, primarily as a mechanic. R. at 37 (DD Form 214). The appellant's January 1973 entrance examination does not indicate any mental health issues. R. at 1146-49, 1627-28. In February 1973 the appellant asked to see the "MHCS," or mental health clinic, for "problems." R. at 1151. In April 1973 the appellant sought in-service treatment for diarrhea and nerves, and was prescribed valium. R. at 1633. In May 1973 the appellant was diagnosed with a character and behavior disorder. R. at 1635-36. In October 1973 the appellant sought treatment in service for continued diarrhea related to nerves, and a social worker found that he had "related problems of confusion and anxiety centered around the duties and various tasks that are given him at his unit." R. at 1640. A March 1974 treatment note indicates "malaise." R. at 1151. The appellant's December 1974 separation examination notes trouble sleeping, depression, and excessive worry. R. at 1171.

In March 1977 the appellant applied for benefits based on service connection for a nervous condition, adding in an attached note that he had received mental health treatment in service. R. at 3089-92. In April 1977 the appellant told a VA doctor that his feelings of nervousness began in 1968 when his father died, and that he continued to seek mental health treatment in service. R. at 3073.

In a July 1977 rating decision the regional office (RO) denied the appellant's claim, finding that his mental condition in service was diagnosed as a "character/behavior disorder, not a disability under the law," and that there is no evidence it is related to his current anxiety disorder. R. at 1116. The appellant did not appeal and the decision became final.

In January 1999 the appellant filed an application for benefits based on service connection for depression. R. at 2981-84. In July 1999 the RO granted the appellant a non-service-connected disability pension, but did not adjudicate his compensation claim. R. at 2957-59, 2961. In April

2006 the appellant filed another claim for benefits based on depression. R. at 2924-28, 2939-40. In August 2007 the RO granted the appellant service connection for a nervous disorder with a 100% rating, effective April 18, 2006. R. at 2575-85. The appellant appealed, requesting an earlier effective date. R. at 2556-61.

In May 2014 the Board granted the appellant an effective date of January 25, 1999, for his condition, but found that an earlier effective date was not warranted as the July 1977 rating decision did not contain CUE. R. at 1784-1817. In December 2014 the parties entered into a joint motion for partial remand (JMPR), finding that when reviewing the July 1977 rating decision for CUE the Board failed to properly apply the aggravation prong of the presumption-of-soundness statute. R. at 1762-66; 38 U.S.C. § 1111.¹

In March 2015 the Board found that the July 1977 rating decision did not contain CUE and thus the appellant was not entitled to an effective date earlier than January 25, 1999, for his anxiety and schizoaffective disorder. R. at 2-21. The Board found that the presumption of soundness applied to the appellant as there was no psychiatric condition noted on his entrance examination. R. at 16. However, the Board disputed the appellant's contention that the RO failed to properly apply the presumption in 1977 as "the RO was not required to provide a statement of reasons or bases for their decision." R. at 17. The Board also found that the RO's July 1977 rating decision did not fail to properly apply the aggravation prong of 38 U.S.C. § 1111, concluding that "at the time of the 1977 rating decision, reasonable minds could conclude that there was clear and unmistakable evidence that any pre-existing disability was not aggravated during service." R. at 20-23. This appeal follows.

The Court determines that the Board clearly erred in finding that the RO had applied the presumption of soundness in the July 1977 rating decision. *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). In its July 1977 rating decision, the RO noted that the appellant suffered from "nervous breakdowns" prior to service, and that while in service he was treated for a "character/behavior" disorder, which it deemed "not a disability under the law." R. at 1116. The RO

¹ Section § 1111 of title 38, U.S. Code reads: "[E]very veteran shall be taken to have been in sound condition when examined, accepted, and enrolled for service, except as to defects, infirmities, or disorders noted at the time of the examination, acceptance, and enrollment, or where clear and unmistakable evidence demonstrated that the injury or disease existed before acceptance and enrollment and was not aggravated by such service."

did not find, based on "clear and unmistakable evidence," that the appellant's in-service condition "existed before acceptance and enrollment and was not aggravated by such service," but found instead that the appellant's in-service condition was not a compensable disability. R. at 1116. Thus, the Board clearly erred in finding that the RO had applied the presumption of soundness, and remand is warranted for the Board to determine whether the July 1977 rating decision contains CUE.

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 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, the Board's finding that the July 1977 rating decision applied the presumption of soundness is REVERSED, the Board's March 16, 2015, decision is VACATED, and the matter is REMANDED for readjudication.

DATED: November 30, 2016

Copies to:

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