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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 15-3389

TODD N. VANDERVORT, 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, Todd N. Vandervort, appeals through counsel a June 5, 2015, Board of Veterans' Appeals (Board) decision that denied him entitlement to a disability rating in excess of 10% for his left knee disability. Record (R.) at 2-15. The appellant argues that the Board erred by denying the him a separate rating under 38 C.F.R. § 4.71(a) diagnostic code (DC) 5257; and failing to provide an adequate statement of reasons or bases for not awarding a higher rating under § 4.71(a) DC 5258. Appellant's Brief at 6-13. For the following reasons, the Court will vacate the Board's June 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 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 *Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990).

The appellant served in active service in the Army from August 1979 to July 1981. See R. at 34. In December 2008, he filed an application for compensation for pain in his left knee. R. at 448. In February 2009, VA conducted a joints examination that revealed that the appellant was suffering from left knee patellofemoral pain. R. at 423-29. During this examination, the examiner noted the appellant's use of Motrin (R. at 423), a nonsteroidal anti-inflammatory drug (NSAID) used in part to reduce inflammation. DORLAND'S ILLUSTRATED MEDICAL DICTIONARY, 910 (32d ed. 2012) (hereinafter DORLAND'S). The examiner also noted that the appellant suffered from episodes of knee locking several times a year and complained of pain in his left knee. R. at 423-26. In April 2009 the regional office (RO) granted service connection for left knee patellofemoral pain syndrome and awarded a 10% rating for the disability, effective December 12, 2008. R. at 413.

In October 2009, the appellant attended a second VA joints examination. R. at 332-37. The examiner noted the appellant's complaints of pain in his left knee daily, having locking within his knees several times a week, and use of naproxen, a NSAID used in part to reduce inflammation. R. at 333; DORLAND'S at 1232. The RO continued the 10% rating in November 2009. R. at 324. In March 2010, the appellant underwent surgery to partially remove his left medial meniscus. R. at 278. A follow-up consultation, two weeks after the surgery, revealed a palpable effusion in the appellant's left knee. R. at 242. In April 2010, in a second surgical follow-up, the examiner once again noted a palpable effusion of the appellant's left knee. R. at 222.

In February 2013, the Board remanded the left knee claim for a new examination to assess the appellant's current left knee disability. R. at 29. This examination occurred in March 2013. R. 96-107.

In June 2015, the Board denied the appellant a rating increase. R. at 14. On the issue of whether the appellant deserved a separate rating under DC 5258, the Board found that he

did not exhibit frequent episodes of locking or effusion into the joint of his left knee during the appeal period. During the February 2009 VA examination, the Veteran reported experiencing episodes of locking several times a year, but less than monthly, and the examiner noted that he did not experience any effusions. At the October 2009 VA examination, the *Veteran reported experiencing locking several times per week*; however, he reported no complaints of left knee swelling. The March 2013 VA

examination noted that *the Veteran had frequent episodes of pain*, but not frequent episodes of locking or effusion into the left knee joint. . . . Thus, as there is no evidence showing that the Veteran had frequent episodes of locking and effusion into the left knee joint during the appeal period, a separate or higher rating under DC 5258 is not warranted.

R. at 11 (emphasis added). The Board denied a separate rating under § 4.71(a) DC 5259, finding that the appellant was "not entitled to a separate rating for symptomatic removal of semilunar cartilage at any point during the appeal period because to grant such a rating would constitute pyramiding," since he was already being compensated for pain under § 4.71(a) DC 5260. R. at 11. This appeal ensued.

The Court concludes that the Board provided an inadequate statement of reasons or bases for denying the appellant a separate rating under DC 5258. *See 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). The Board based its denial of the appellant's request for a separate rating under DC 5258 on the belief that the appellant showed no evidence of "frequent episodes of locking" nor evidence of effusion in the left knee joint. R. at 11.

However, the Board acknowledged that the appellant's February 2009 and October 2009 examination reports both noted that the appellant complained of locking of his left knee, up to several times per week. R. at 11. Additionally, not only were effusions noted on both the March and April 2010 orthopedic consultations, each examiner also indicated that the appellant was taking anti-inflammatory medication. *See* R. at. 242; R. at. 222; R. at 423; R. at 333.

The Court also concludes that the Board provided an inadequate statement of reasons or bases for denying appellant a separate rating under DC 5259. *See Gilbert*, 1 Vet.App. at 56-57 (1990). The Board denied a separate rating under DC 5259 because it found that:

[T]he Veteran is not entitled to a separate rating for symptomatic removal of semilunar cartilage at any point during the appeal period because to grant such a rating would constitute pyramiding. . . . Here, the March 2013 VA examiner reported that the only symptom associated with the Veteran's meniscectomy is pain. There is no evidence in the record that this surgery resulted in any other symptom. The Veteran is already compensated for pain because this symptom is contemplated

within his rating for painful motion under DC 5260. Thus, a separate rating under DC 5259 is not warranted.

R. at 11. Pain, however is not compensated under DC 5259; instead, this DC merely contemplates removal of the semilunar cartilage, a procedure the appellant underwent in March 2010. R, at 278. Remand is required for the Board to provide an adequate statement of reasons or bases for its findings regarding the appellant's claim for separate ratings under DCs 5258 and 5259.¹

Because the Court is remanding the appellant's claim, it 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). The remanded matter is to be provided expeditious treatment. *See* 38 U.S.C. § 7112; *see also Hayburn's Case*, 2 U.S. 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" (internal quotation marks omitted)).

For the foregoing reasons, and on review of the record, the June 5, 2015, Board decision is VACATED and the matter is REMANDED for readjudication.

DATED: November 30, 2016

Copies to:

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VA General Counsel (027)

¹The Court notes that the Board erred in using appellant's March 2013 VA examination as a basis for denial. R. at 11. The relevant time period for whether DC 5258 is applicable is the time period prior to appellant's March 2010 surgery. On remand the Board may not use the March 2013 VA examination in evaluating appellant's compensation under DC 5258.