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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 16-0498

KENNETH GILYARD, 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, Kenneth Gilyard, appeals through counsel that part of a December 30, 2015, Board of Veterans' Appeals (Board) decision that denied him an increase of his initial 10% disability rating for his service-connected left knee arthritis.¹ Record (R.) at 2-19. The appellant argues that the Board failed to give an adequate statement of reasons and bases for denying him (1) a separate rating under 38 C.F.R. § 4.71 (a) Diagnostic Code (DC) 5257; and (2) a separate rating under § 4.71 (a) DC 5259. Appellant's Brief at 5-10. For the following reasons, the Court will vacate in part the Board's December 30, 2015, decision and remand the matter for readjudication.

¹The Board also found that new and material evidence had not been submitted to reopen his migraine headache claim. The appellant presents no argument as to that matter and the Court deems it 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). Additionally, the Board remanded the matters of entitlement to (1) a disability rating in excess of 30% for service-connected total left knee replacement (previously left knee arthritis) on and after June 1, 2015; (2) an initial rating in excess of 10% for service-connected right shoulder strain; (3) an initial compensable rating for service-connected right shoulder scar associated with shoulder strain; (4) service connection for carpal tunnel syndrome (CTS), upper right extremity, to include as secondary to a service-connected disability; and (5) service connection for post-traumatic stress disorder (PTSD). These matters are not currently 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 Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990).

The appellant is a veteran who served in the U.S. Air Force from September 1980 to May 1993. R. at 1439 (DD Form 214).

In June 2006, the appellant filed a claim for benefits based on service connection for his left knee disability. R. at 1274. In November 2008, the regional office (RO) denied service connection for the appellant's left knee disability. R. at 1232-43. In September 2011, the appellant filed a supplemental claim for benefits based on service connection for his left knee disability. *See* R. at 2340. In March 2012, the appellant had an MRI (magnetic resonance imaging) taken of his left knee. The MRI revealed that the appellant's left knee had a large patellofemoral joint effusion, lateral patellar subluxation, and fragmentation of the posterior horn of the medial meniscus. R. at 1200.

In June 2012 the RO granted service connection for the appellant's left knee disability and awarded a 10% rating for left knee arthritis. R. at 2340. In December 2015, the Board issued a decision denying the appellant's claim for an increased rating for his left knee arthritis. R. at 2-24. In its decision the Board found

that a 10 percent rating is proper prior to Veteran's total knee replacement in April 2014. This is because there is no evidence of ankyloses in the knee, *no evidence of subluxation* or instability, no evidence of dislocated or removed cartilage and no evidence that flexion was limited to anywhere near the extent required for a compensable rating. The Board acknowledges the pain the Veteran experienced and that his motion was limited due to his disability. As such, a 10 percent disability rating to compensate for this loss of function was warranted.

R. at 12 (emphasis added). This appeal ensued.

The Court finds that the Board failed to consider favorable evidence when it denied the appellant a separate rating under DC 5257. *See Caluza v. Brown*, 7 Vet.App. 498, 506 (1995) (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) (table). To be awarded a separate rating under DC 5257, the appellant needed to show that he suffered "recurrent subluxation or lateral instability" in his left knee. 38 C.F.R. § 4.71 DC 5257. Although the Board found that there was no evidence of subluxation (R. at 12), the appellant's March 2012 MRI showed lateral patellar subluxation in his left knee. R. 1200. The Board failed to address this finding in its decision. Remand is required for the Board to address this favorable evidence and to determine whether the appellant is entitled to a separate rating under DC 5257. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) ("Where the Board has incorrectly applied the law, failed to provide an adequate statement of reasons or bases for its determinations, or where the record is otherwise inadequate, a remand is the appropriate remedy.")

Because the Court is remanding the appellant's claims, it will not address his 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, that part of the Board's December 30, 2015, decision on appeal is VACATED and the matter is REMANDED for readjudication.

DATED: November 30, 2016

Copies to:

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