Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 15-2192

ROBERT R. KLOTTER, 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, Robert R. Klotter, appeals through counsel that part of a February 25, 2015, Board of Veterans' Appeals (Board) decision that (1) found that there was no clear and unmistakable error (CUE) in an April 1993 rating decision that denied service connection for left leg circulatory and vascular problems, and (2) denied entitlement to an effective date prior to October 8, 2010, for a grant of entitlement to service connection for chronic venous insufficiency and vascular compromise.[1] Record (R.) at 3-13. The appellant argues that the Board committed prejudicial error by failing to provide an adequate statement of reasons or bases for its finding that the regional office (RO) did not commit CUE when it denied the appellant's claim in April 1993. Appellant's Brief at 1. For the following reasons, the Court will vacate that part of the Board's February 2015 decision on appeal and remand the matters 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

[1]Additionally, the Board denied entitlement to benefits based on service connection for bilateral lower extremity peripheral neuropathy. The appellant does not appeal this 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).

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. Navy from September 1961 to April 1964 as a first aid attendant. R. at 328. The appellant's entrance examination revealed that the appellant's vascular system, feet, and lower extremities were normal. R. at 1417-18. In March 1962, the appellant was seen at the U.S. Naval Hospital Corps School in Great Lakes, Illinois, after his car was hit by a drunk driver; the appellant was thrown from the car and his left knee was injured. R. at 1463. The treatment provider noted that the appellant's leg had a cast on it. R. at 1463. The next day, the appellant was seen for a followup; the examiner noted "pain + swelling above cast." R. at 1464. In April 1962, the appellant complained of pain radiating down his left leg. R. at 1471. A May 1962 clinical record from the U.S. Naval Hospital Corps School indicated a medical history of "[fracture] [left] tibula 1 [month] ago." R. at 1498. In October 1963, a sick call treatment record indicated that the appellant complained of a bony mass in his left leg below the knee, that it had grown in size since his cast was shattered in an automobile accident, and that he was wearing a cast for an ankle fracture." R. at 1469. The appellant was diagnosed with left tibial bony protuberance below the knee. R. at 1469. An x-ray report from later that month showed a "small osteoma presenting laterally." R. at 1465.

In April 1964, the appellant underwent a separation examination, wherein no abnormalities were noted regarding his vascular system, feet, and lower extremities. R. at 1422-23. A March 1984 VA treatment record noted a past medical history of vein thrombosis in 1978. R. at 1387-88. In September 1992, the appellant filed a claim for benefits based on service connection for "[c]irculation & vascular problems of left leg which was broken (crushed) in service at Great Lakes

Naval Training Center in 1961 or 1962." R. at 1490. On the same day, the appellant was diagnosed with post-phlebetic syndrome and with venous stasis of the left leg, secondary to a crush injury. R. at 1404, 1407. An October 1992 VA treatment record noted that the appellant had suffered a "crush injury" to his left leg in 1961. R. at 1403.

In April 1993, the regional office (RO) denied the appellant's claim. R. at 1367-71. The rating board reasoned that there was no indication that the appellant had a broken leg or evidence of circulation or vascular problems while in service. R. at 1371. The rating board also found that there was "no treatment for any left leg problems following service until February 1984, almost 20 years after service." R. at 1371. The appellant filed a Notice of Disagreement, but then did not appeal after receiving a Statement of the Case (SOC) from the RO; thus, his claim became final. R. at 1359-65, 1350-58.

In October 2010, the appellant sought to reopen his claims for "DVT for left leg[,] right knee replacement 2nd to left knee [service-connected] conditions[,] left knee arthritis[, and] left tibia fracture residuals," and submitted new evidence in support of his claim. R. at 782. In August 2011, the RO found that the appellant had submitted new and material evidence to reopen the appellant's claim, and subsequently granted service connection for chronic venous insufficiency and vascular compromise, effective October 8, 2010. R. at 376. The appellant appealed and indicated that he believed he was entitled to an earlier effective date based on CUE in the April 1993 rating decision. R. at 344, 194-224, 161-62. In September 2013, the RO granted service connection for left knee arthritis and bony prominence due to proximal left tibia contusion/possible fracture, effective October 8, 2010. R. at 57-67. Three days later, the RO issued a Supplemental SOC, wherein it declined to grant an earlier effective date for left lower extremity chronic venous insufficiency and vascular compromise, and found that there was no CUE in the April 1993 rating decision. R. at 68-72.

In February 2015, the Board found that there was no CUE in the April 1993 rating decision. R. at 3-13. The Board concluded that the allegations made by the appellant did not rise to the level of CUE. First, it discussed the appellant's allegation that the duty to assist had been breached by VA's failure to provide the appellant with a medical examination in 1993, but noted that this was an insufficient basis to establish CUE. R. at 12 (citing *Cook v. Principi*, 318 F.3d 1334 (Fed. Cir.

2002)). The Board then concluded that all of the appellant's other arguments "show only disagreement with how the facts at the time were weighed or evaluated, an argument that does not rise to the level of [CUE]." R. at 12 (citing *Russell v. Principi*, 10 Vet.App. 310, 313-14 (1992)). This appeal ensued.

The Court concludes that the Board failed to provide an adequate statement of reasons or bases for its conclusion that the April 1993 RO did not commit CUE. *See* 38 U.S.C. § 7104(d)(1); *Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1990) (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 April 1993 rating board cited 2 reasons for its denial of the appellant's claim. First, the rating board found that there were no "x-rays confirming that there was a broken left leg and there is no indication of circulation or vascular problems of the left leg in service." R. at 1371. It is unclear how the rating board made this determination in light of the evidence of record indicating that the appellant had a cast on his left leg at the time he was involved in the automobile accident in 1961. *See* R. at 1463-64. Second, the rating board found that there was "no treatment for any left leg problems following service until February 1984, almost 20 years after service." R. at 1371. Yet, even the Board acknowledged that this is not true. *See* R. at 11 ("VA treatment records note treatment for a left leg thrombosis as early as 1978."). Thus, both of the stated reasons for the rating board's decision were directly contradicted by evidence that was of record at the time the decision was rendered. Although the Board discussed various errors with the April 1993 decision, it failed to address the fact that the entire basis for the negative determination was in error. *See* R. at 3-13. Remand is required for the Board to provide an adequate statement of reasons or bases for its finding that there was no CUE in the April 1993 rating decision. *See Gilbert, supra*.

The Court also determines that because the matter of CUE has been remanded, the matter of an earlier effective date for chronic venous insufficiency and vascular compromise must also be remanded as inextricably intertwined. *See Harris v. Derwinski*, 1 Vet.App. 180, 183 (1991) (holding that where a decision on one issue may have a "significant impact" upon another, the two claims are inextricably intertwined), *overruled on other grounds by Tyrues v. Shinseki*, 23 Vet.App. 166 (2009) (en banc), *aff'd*, 631 F.3d 1380, 1383 (Fed. Cir.2011), *vacated and remanded for reconsideration*,

132 S. Ct. 75 (2011), *modified*, 26 Vet.App. 31 (2012).

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). 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.").

Based on the foregoing reasons, that part of the Board's February 25, 2015, decision on appeal is VACATED and the matter is REMANDED for readjudication.

DATED: September 28, 2016

Copies to:

Travis J. West, Esq.

VA General Counsel (027)