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

No. 16-3193

CURTIS J. WASHINGTON, APPELLANT,

v.

PETER O'ROURKE

ACTING 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, Curtis J. Washington, appeals through counsel that part of a May 19, 2016, Board of Veterans' Appeals (Board) decision that declined to refer the appellant's service-connected right knee and lumbar spine disability claims for extraschedular consideration. Record (R.) at 2-41. The Board also remanded the appellant's service-connection claim for an acquired psychiatric disorder, including as secondary to the appellant's service-connected disabilities. R. at 37-38.<sup>1</sup> The appellant argued that the Board failed to refer the appellant's knee and spine claims for extraschedular consideration despite evidence that those service-connected disabilities caused the appellant to develop a mental illness. Appellant's Brief at 14-30. On March 14, 2018, the Court issued a memorandum decision affirming the May 2016 Board decision.

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<sup>1</sup> This matter was remanded along with a headache claim and the matter of total disability rating as a result of individual unemployability (TDIU). These matters are not currently before the Court. *See Hampton v. Gober*, 10 Vet.App. 481, 482 (1997). The Board granted service connection for patellofemoral syndrome of the right knee, at a noncompensable rating before May 16, 2003, and a disability rating in excess of 10% as of that date; limitation to the extension of the right knee, with a disability rating of 40% as of June 25, 2010; degenerative disc disease (DDD) of the lumbar spine, with a disability rating of 20% before June 25, 2010, and of 40% as of that date; and radiculopathy of the right lower extremity and of the left lower extremity with separate disability ratings of 10%, but no higher. The Court does not have the jurisdiction to review these favorable findings. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007). To the extent that the Board granted service connection and compensable ratings, the Court will not disturb these favorable findings in any manner detrimental to the appellant.

On April 4, 2018, the appellant filed a motion for reconsideration. The appellant argues that his "chronic psychiatric disorder was related to or caused by his service connected lumbar spine and right knee disabilities," and psychiatric symptoms are not compensated as part of his spine and knee disability ratings, thus warranting referral for extraschedular consideration. Appellant's Brief at 16, 20; *see also Thun v. Peake*, 22 Vet.App. 111, 115 (2008), *aff'd sub nom. Thun v. Shinseki*, 572 F.3d 1366 (Fed. Cir. 2009); 38 C.F.R. § 4.71a, Diagnostic Code (DC) 5003, 5010, 5257, 5260, 5261, 5235-5243 (2015), DC 5292, 5293, 5295 (2003). The appellant cites *Johnson v. McDonald* for the proposition that his disabilities are exceptional and in tandem warrant a combined-effects analysis. 762 F.3d 1362, 1365-66 (Fed. Cir. 2014). The Court agrees that reconsideration is warranted and will grant the motion, withdraw its March 14, 2018, memorandum decision, and issue this decision in its stead. For the following reasons, the Court will vacate that part of the May 2016 Board 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 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 such as their widows, 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).

From the beginning of the Republic statutory construction concerning congressional promises to veterans has been of great concern. "By the act concerning invalids, passed in June, 1794, vol. 3. p. 112, the secretary at war is ordered to place on the pension list, all persons whose names are contained in a report previously made by him to congress. If he should refuse to do so, would the wounded veteran be without remedy? Is it to be contended that where the law, in precise terms, directs the performance of an act, in which an individual is interested, the law is incapable

of securing obedience to its mandate? Is it on account of the character of the person against whom the complaint is made? Is it to be contended that the heads of departments are not amenable to the laws of their country?" *Marbury v. Madison*, 5 U.S. 137, 164, 2 L. Ed. 60, 69 (1803).

The appellant served on active duty in the U.S. Navy from December 1985 until January 1994 as a ships system operator. R. at 559 (DD Form 214). In November 1993, a physical evaluation board found the appellant unfit for duty as a result of lower back pain and chronic unresolved patellofemoral syndrome. R. at 3351. The appellant was discharged from duty in January 1994. R. at 559.

In April 1999, the appellant filed for benefits based on service connection for lower back and right knee injuries, along with a headache disorder. R. at 3334-47. In 2002, the appellant quit his job as a heavy equipment operator as a result of back pain. R. at 2392. In August 2004, the regional office (RO) granted the appellant service connection for a lumbar spine disability and right knee patellofemoral syndrome. R. at 3050-54.

The appellant attended a VA examination in September 2004. R. at 1890-98, 2675-76. The appellant reported depressive feelings as a result of chronic back pain and unemployment. R. at 1895-97, 2676. He stated that he is "unable to work and unable to do the things he used to enjoy." R. at 2676. VA began treating the appellant with antidepressants. R. at 1894. In September 2005, a private physician diagnosed the appellant with major depression secondary to chronic pain and lifestyle changes. R. at 1749-53. In August 2006, the appellant attended another VA examination. R. at 1729-34. The physician diagnosed the appellant with depression, evidenced by "severe social and occupational d[y]sfunction." R. at 1733. In October 2006, the Social Security Administration decided that the appellant was totally disabled as a result of low back pain radiating to his right leg and "depression so severe that [the appellant is] unable to perform any work existing in significant numbers in the national economy." R. at 1632. In November 2007, the appellant's VAMC provider diagnosed him with dysthymia. R. at 3834-38.

In June 2009, the appellant filed for benefits based on service connection for depression or a mood disorder, secondary to injuries sustained in service. R. at 2656.

VA examined the appellant in June 2010. R. at 2077-82, 2391-403. The VA examiner noted that the appellant suffered from constant back and leg pain, requiring the appellant to use a cane to stand and walk, and precluding the appellant from doing physical work. R. at 2392. Furthermore, the appellant's pain caused decreased concentration, strength, stamina, and mobility. R. at 2398.

In May 2016, the Board declined referral of the appellant's service-connected right knee and lumbar spine disability claims for extraschedular consideration. R. at 2-41. The Board acknowledged five medical opinions that document a psychiatric disorder secondary to chronic pain and the appellant's service-connected disabilities. R. at 32-33. The Board remanded the acquired psychiatric disorder claim, ordering a VA examiner to opine as to whether "any diagnosed acquired psychiatric disorder has been caused or made chronically worse by [the appellant's] service-connected disabilities." R. at 37-38. However, the Board found that all the symptoms resulting from the appellant's back and knee disabilities were contemplated by the rating schedule. R. at 28. The Board also found that "at no time during the period at issue has the [appellant's] right knee or lumbar spine disability been shown to be so exceptional or unusual as to warrant the referral for consideration of any higher ratings on an extra[.]schedular basis." R. at 27. In addition, the Board found that extraschedular consideration was not appropriate under a collective-impact analysis because all the appellant's service-connected symptoms have been addressed by the rating schedule. R. at 28; *see Johnson*, 762 F.3d 1362 (Fed. Cir. 2014). Finally, the Board noted that the matter of entitlement to TDIU, based in part on the combined effects of the knee and spine disabilities, had been remanded by the decision. R. at 28. This appeal ensued.

The Court concludes that in declining to refer the matters on appeal for extraschedular consideration, the Board failed to address whether the appellant's depression is a symptom of his right knee or lumbar spine disabilities. *See* 38 U.S.C. § 7104(d)(1) ("Each decision of the Board shall include . . . a written statement of the Board's findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented in the record."); *Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1990) (finding that Congress mandated, by statute, that the Board provide a written statement of reasons or bases for its conclusions that is adequate to enable the appellant to understand the precise basis for the Board's decision and to facilitate review in this Court). Specifically, the Board's failure to make a finding as to whether the appellant's depression is a symptom of his service-connected disabilities frustrates judicial review. *See Gilbert*, 1 Vet.App. at 56-57.

Although the appellant argues that *Johnson* is applicable here, it is not: here, there is no contention that the combined effect of the appellant's *service-connected* disabilities warrant extraschedular consideration. *See Johnson*, 762 F.3d at 1365-66 (referral for extraschedular evaluation may be based on "the collective impact of a veteran's 'service-connected disability or

disabilities"). To the extent he is already service connected for knee and back conditions, he has not argued that the combination of psychiatric symptoms caused by his knee and back have produced a greater overall disability, but merely that his physical disabilities have caused psychiatric symptoms.

For the foregoing reasons, Court's March 14, 2018, memorandum decision is WITHDRAWN; the May 19, 2016, Board decision on appeal is VACATED; and the matter is REMANDED for readjudication.

DATED: July 23, 2018

Copies to:

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