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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 18-4499

JERRIAN O. LOCKETT, APPELLANT,

v.

ROBERT L. WILKIE,
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*: Jerrian O. Lockett, appeals through counsel that part of an April 24, 2018, Board of Veterans' Appeals decision that denied service connection for a sleep disorder, headaches and an eye disability.¹ Record (R.) at 2-14. The appellant argues that the Board failed to (1) correctly apply *Saunders v. Wilkie*, 886 F.3d 1356, 1358 (Fed. Cir. 2018) when it denied service connection for headaches; (2) address whether the appellant was entitled to service connection for hepatitis, which the appellant claims is the cause of his sleep disorder; and (3) discuss his dry eye syndrome diagnosis. Appellant's Brief at 6-14. The Secretary concedes that remand is warranted for the eye disability claim, but the Secretary maintains that the remainder of the decision on appeal should be affirmed. Secretary's Brief at 5-16. For the following reasons, the Court will vacate that part of the April 2018 Board decision on appeal and remand the matters for readjudication.

¹ The Board also found that the veteran was entitled to service connection for low back and bilateral knee disabilities. The Court will not disturb these favorable findings. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007). Additionally, the Board remanded the issues of entitlement to service connection for (1) a bilateral leg disability; (2) a bilateral foot disability; and (3) a bilateral ankle disability. 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 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. Army from September 1980 to June 1986, as an equipment records and parts specialist. R. at 1354 (DD Form 214).

In June 2010, the appellant filed service-connection claims for an eye disorder, headaches and a sleep disorder. R. at 1344-52.

During a January 2012 VA examination, he complained that his eyes felt "sandy." R. at 827-28. The examiner assessed the appellant with "dry eye syndrome likely accounting for occasional blur." R. at 827.

In August 2015, the appellant submitted a statement attesting that during service he contracted hepatitis c and as a result was quarantined for a month. R. at 670. In January 2016, the

appellant submitted an additional statement clarifying that the incident happened in June 1983, and that he had contracted hepatitis b rather than c. R. at 630.

In February 2018, the veteran testified at a Board hearing that he suffered headaches two to three times a week, which prevented him from performing any activities. R. at 62. The appellant also reiterated the gritty sensations he experienced in his eyes. R. at. 60. Lastly, the veteran explained that he believed that the hepatitis he contracted during service led to his current sleep disability. R. at 58.

In April 2018, the Board issued a decision denying the sleep disorder, eye disorder and headache claims because the appellant did not have a current disability related to any of those claims. R. at 2-12. The Board found that a VA medical examination was not necessary to decide the appellant's sleep disorder claim. R. at 5. This appeal ensued.

The Court agrees with the Secretary that a remand is required for the Board to adequately address whether the appellant was entitled to service connection for dry eye syndrome. *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."). The Board acknowledged the January 2012 VA provider's assessment that the appellant's dry eye syndrome caused his blurry vision. R. at 10. Yet, the Board did not further address this evidence when it found that the appellant did not have a current diagnosis, other than refractive error related to his blurry vision. *See* R. at 11; *Abernathy v. Principi*, 3 Vet.App. 461, 465 (1992) (a mere list of the relevant evidence is not adequate to fulfill the Board's obligation to provide a statement of reasons or bases for its decisions). Remand is required for the Board to provide an adequate statement of reasons or bases for its determination. 38 U.S.C. § 7104(d)(1). Additionally, the appellant stated that his dry eye syndrome was likely caused by service. R. at 61. This statement requires the Board to also address whether the diagnosed dry eye syndrome is entitled to service connection. *See Robinson v. Peake*, 21 Vet.App. 545, 552 (2008) (holding that the Board is required to address all issues and theories that are reasonably raised by the record), *aff'd, sub nom. Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009).

The Court also concludes that the Board did not adequately address whether the appellant was entitled to service connection for a headache disorder. *See* 38 U.S.C. § 7104(d)(1). Despite the Federal Circuit's holding in *Saunders*, the Board relied on the lack of a diagnosis of a headache

condition to deny service connection. *See* R. at 9; *Saunders*, 886 F.3d at 1358 (holding that pain without an accompanying diagnosis may be enough to entitle a veteran to service connection if the pain results in functional impairment). However, because the veteran stated that he suffers from debilitating headache pain two to three times a week, R. at 62, it is unclear why the lack of a diagnosis was used as a rationale to deny service connection for headaches. *See Saunders*, 886 F.3d 1358. Remand is required for the Board to properly consider whether the appellant has a current headache disability pursuant to *Saunders*.

The Court further concludes that the Board provided an inadequate statement of reasons or bases for finding that a medical examination was not warranted for the appellant's sleep disorder claims. *See* 38 U.S.C. § 7104(d)(1); 38 U.S.C. § 5103A(d). The Board conceded that the appellant had reported trouble sleeping in service, R. at 9, allegedly had hepatitis in service, R. at 670, and had told the Board member that he believed that his hepatitis caused his current sleep difficulties, R. at 58. In denying an examination the Board erred in failing to address this evidence. *See* R. at 5. Instead, the Board found that the appellant was not competent to provide a current diagnosis or to opine on a nexus between his current symptoms and service. R. at 10. Remand is required for the Board to provide an adequate statement of reasons or bases for its duty-to-assist determination. 38 U.S.C. §§ 7104(d)(1); 5103A.

Because the Court is remanding the appellant's claims, 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. *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 April 24, 2018, Board decision on appeal is SET ASIDE and the matters are REMANDED for readjudication.

DATED: April 29, 2020

Copies to:

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VA General Counsel (027)