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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-7214

TIMOTHY DAVIS, APPELLANT,

V.

DENIS MCDONOUGH,
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*: Vietnam War veteran Timothy Davis appeals through counsel that part of a July 25, 2019, Board of Veterans' Appeals decision that granted an effective date of January 7, 2016, but no earlier, for (1) the award of a 70% disability rating for schizoaffective disorder, alternatively diagnosed as bipolar disorder, with post-traumatic stress disorder (PTSD); (2) a total disability rating based on individual unemployability (TDIU); and (3) dependents' educational assistance (DEA) benefits.[1] Record (R.) at 5-10. The appellant argues that the plain language of 38 U.S.C. § 5108 requires VA to reopen a previously denied claim when "new and material evidence is presented or secured with respect to a claim which has been previously disallowed," regardless of whether an application has been filed. Appellant's Brief at 5-15. Alternatively, the appellant argues that a November 1998 VA examination reasonably raised a claim for reopening the previously disallowed claim for compensation benefits for disability resulting from psychiatric disability other than PTSD. *Id.* at 16-18. He also contends that the TDIU and DEA benefits matters should be remanded as inextricably intertwined with the appellant's psychiatric disorder claim. *Id.* at 18. This matter was assigned to a panel, but it has

[1] To the extent the Board's determinations were favorable, the Court will not disturb them. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007).

been returned for single-judge disposition. For the following reason, the Court will set aside that part of the July 2019 Board decision on appeal and remand the matters for readjudication.

I.

The Veterans Administration was established in 1930 when Congress consolidated the Bureau of Pensions, the National Home for Disabled Volunteer Soldiers, and the U.S. Veterans' Bureau into one agency. Act of July 3, 1930, ch. 863, 46 Stat. 1016. This Court was created with the enactment of the Veterans' Judicial Review Act (VJRA) in 1988. *See* Pub. L. No. 100-687, § 402, 102 Stat. 4105, 4122 (1988). Before the VJRA, for nearly 60 years VA rules, regulations, and decisions lived in "splendid isolation," generally unconstrained by judicial review. *See Brown v. Gardner*, 513 U.S. 115, 122 (1994) (Souter, J.).

Yet, the creation of a special court solely for veterans is consistent with congressional intent as old as the Republic. Congress first sought judicial assistance in affording veterans relief when it adopted the Invalid Pensions Act of 1792, which provided "for the settlement of the claims of widows and orphans . . . and to regulate the claims to invalid pensions," for those injured during the Revolutionary War. Act of Mar. 23, 1792, ch. 11, 1 U.S. Stat 243 (1792) (repealed in part and amended by Act of Feb. 28, 1793, ch. 17, 1 Stat. 324 (1793)). The act, though magnanimous, curtailed the power of the judiciary, by providing the Secretary of War the ability to withhold favorable determinations to claimants by circuit courts if the Secretary believed that the circuit court had erred in favor of the soldier based on "suspected imposition or mistake." *See id.*

Chief Justice John Jay[2] wrote a letter[3] to President George Washington on behalf of the Circuit Court for the District of New York[4] acknowledging that "the objects of this act are exceedingly benevolent, and do real honor to the humanity and justice of Congress." *See Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 n., 1 L. Ed. 436 (1792). Jay also noted that "judges desire to manifest, on all proper occasions and in every proper manner their high respect for the national legislature." *Id.*

This desire to effect congressional intent favorable to veterans has echoed throughout the Supreme Court's decisions on matters that emanated from our Court. *See Shinseki v. Sanders*, 556 U.S. 396, 416, 129 S. Ct. 1696, 1709 (2009) (Souter, J., dissenting) ("Given Congress's understandable decision to place a thumb on the scale in the veteran's favor in the course of administrative and judicial review of VA decisions"); s*ee also Henderson v. Shinseki*, 562 U.S. 428, 440, 131 S. Ct. 1197, 1205 (2011) (declaring that congressional solicitude for veterans is plainly reflected in "the singular characteristics of the review scheme that Congress created for the adjudication of veterans' benefits claims," and emphasizing that the provision "was enacted as part of the VJRA [because] that legislation was decidedly favorable to the veteran").

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[2] John Jay served as the first Secretary of State of the United States on an interim basis. II DAVID G. SAVAGE, GUIDE TO THE U.S. SUPREME COURT 872 (4th ed. (2004)). Although a large contributor to early U.S. foreign policy, Jay turned down the opportunity to assume this position full time. *Id.* at 872, 916. Instead, he accepted a nomination from President Washington to become the first Chief Justice of the Supreme Court on the day the position was created by the Judiciary Act of 1789. *Id.* Jay resigned his position in 1795 to become the second Governor of New York. *Id.* He was nominated to become Chief Justice of the Supreme Court again in December 1800, but he declined the appointment.

[3] The Supreme Court never decided *Hayburn's Case*. *See* 2 U.S. (2 Dall.) 409, 409 (1792). The case was held over under advisement until the Court's next session and Congress adopted the Invalid Pensions Act of 1793, which required the Secretary of War, in conjunction with the Attorney General, to "take such measures as may be necessary to obtain an adjudication of the Supreme Court of the United States." Act of Feb. 28, 1793, ch. 17, 1 Stat. 324 (1793). *Hayburn's Case* has often been cited as an example of judicial restraint, *see, e.g.*, *Tutun* v. *United States*, 270 U.S. 568 (1926), but Supreme Court historian Maeva Marcus has argued persuasively to the contrary. *See* Maeva Marcus & Robert Teir, *Hayburn's Case: A Misinterpretation of Precedent*, 1988 WIS. L. REV. 527. After all, Jay's letter included by Dallas, the Court Reporter, in a note accompanying the decision to hold the matter under advisement, is nothing more than an advisory opinion that compelled Congress to change the law in order to make the judiciary the final voice on the review of a Revolutionary War veteran's right to pension benefits. *See Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 n.

[4] At this time, each Justice of the Supreme Court also served on circuit courts, a practice known as circuit riding. *See* RICHARD H. FALLON, JR., ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND the FEDERAL SYSTEM (7th ed. 2015).

II.

Justice Alito[5] observed in *Henderson v. Shinseki* that our Court's scope of review 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. at 432 n.2 (2011); *see* 38 U.S.C. § 7261. "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. The statutory command that a single judge[6] may issue a binding decision is "unambiguous, unequivocal, and unlimited," *see Conroy v. Aniskoff*, 507 U.S. 511, 514 (1993). The Court's practice of treating panel decisions as "precedential" is unnecessary, particularly since the Court's adoption of class action litigation. *See Wolfe v. Wilkie*, 32 Vet.App. 1 (2019). We cite decisions from our Court merely for their guidance and persuasive value.

III.

The appellant served on active duty in the U.S. Navy from December 1965 to July 1967. R. at 15,118. He served in the Vietnam War aboard the U.S.S. *Franklin D. Roosevelt*. *Id.*

IV.

The appellant initially sought service connection for a psychiatric disorder in May 1968. R. at 17,933-36. In January 1976, the Board denied service connection for a nervous disorder. R. at 17,293-98. In December 1990, the appellant sought to reopen his claim. R. at 16,703-04. In a February 1995 decision, the Board denied a request to reopen a claim for service connection for an acquired psychiatric disorder, other than PTSD, and reopened and denied a claim for service connection for PTSD on the merits. R. at 16,390-408. In October 1997, the Court remanded the appellant's PTSD claim, but found that the appellant had not appealed the Board's determination

[5] Justice Alito was born in Trenton, New Jersey. SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/about/biographies.aspx (last visited Mar. 4, 2020). He began his career as a law clerk, then became assistant U.S. attorney for the district of New Jersey before assuming multiple positions at the Department of Justice. *Id.* He then became a U.S. attorney for the district of New Jersey. *Id.* Before his nomination for the Supreme Court, he spent 16 years as a judge on the U.S. Court of Appeals for the Third Circuit. *Id.* In 2005, President George W. Bush chose Alito to replace retiring Supreme Court Justice Sandra Day O'Connor. *Id.*

[6] From 1989 to 1993, West (the publisher of this Court's decisions) published this Court's single-judge decisions in tables in hard-bound volumes of West's *Veterans Appeals Reporter*. Since 1993, West has published this Court's single-judge decisions electronically only. I believe the Court should publish all its decisions in print form. *See*, e.g., *Passaic Cty. Bar Ass'n v. Hughes*, 401 U.S. 1003 (1971).

that he had not submitted new and material evidence to reopen his claim for acquired psychiatric disorder, other than PTSD. R. at 16,357-61.

In an April 1998 decision, the Board remanded the appellant's PTSD claim, noting that "the most recent psychiatric evaluations of record were in 1991." R. at 16,337. The Board then ordered a new psychiatric examination, instructing the examiner to

> determine the diagnosis of *any* currently manifested psychiatric disorder(s). The diagnosis must be based on examination findings, all available medical records and any special testing deemed appropriate by the examiner. A multiaxial evaluation based on the current DSM-IV diagnostic criteria is required. If a diagnosis of PTSD is made, the specific stressor(s) to which it is related must be set forth.

R. at 16,339 (italics added).

In 1998, an examiner diagnosed the appellant with bipolar 1 disorder with psychotic features, explaining the following:

> This disorder appears long-standing and severe, potentially present prior to his military service but definitely present within one year following his discharge as suggested by the significant levels of anxiety and irritability that prompted his visit to the University Drive VAMC and referral for psychiatric evaluation. This was followed by admission to the Highland Drive VAMC where he received a diagnosis of schizophrenia. It is likely that his military service exacerbated this [condition], as suggested by the need for psychiatric evaluation mentioned in the letter written in May of 1967 by a Navy district legal officer to the veteran's mother.

R. at 16,289. The examiner also diagnosed the appellant with mild PTSD and a personality disorder. R. at 16,290. The appellant was then awarded service connection for PTSD in January 1999, effective December 3, 1990. R. at 16,260-65.

In June 2016, the appellant filed for TDIU benefits, alleging that his PTSD and schizoaffective disorder prevented him from securing and following substantially gainful employment. R. at 15,047-61. In a January 7, 2019, decision, the Board relied on the November 1998 VA examination report to grant service connection for schizoaffective disorder, alternatively diagnosed as bipolar disorder R. at 136-42. The following month, the regional office implemented the Board's decision, also granting the appellant TDIU and DEA benefits; an effective date of May 19, 2016, was assigned for the grant of service connection for the appellant's schizoaffective disorder as well as for the other two benefits awarded. R. at 121-29. The appellant appealed the effective-date determinations. R. at 38-39.

V.

In the Board decision on appeal, the Board granted an effective date of January 7, 2016, but no earlier, for all three issues on appeal. R. at 5-10. The Board concluded that

> the November 1998 VA examination does not qualify as a claim for service connection. A "claim" is defined broadly to include a formal or informal communication in writing requesting a determination of entitlement or evidencing a belief in entitlement to a benefit. 38 C.F.R. § 3.1(p); *Brannon v. West*, 12 Vet. App. 32, 34-5 (1998). There is nothing in the VA examination report, including statements made by the Veteran during the examination, to indicate his belief of entitlement to service connection for a psychiatric disorder other than PTSD or a desire for a determination on that issue.

R. at 8. This appeal ensued.

VI.

"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." 38 U.S.C. § 7104(d)(1). This statement of reasons or bases serves not only to help a claimant understand what has been decided, but also to ensure that VA decisionmakers do not exercise "naked and arbitrary power" in deciding entitlement to disability benefits. *See Yick Wo v. Hopkins*, 118 U.S. 356, 366 (1886) (Matthews, J.).

VII.

The Court concludes that the Board provided an inadequate statement of reasons or bases for denying an effective date earlier than January 7, 2016. 38 U.S.C. § 7104(d)(1). The Board's decision is unclear about how it assessed the scope of the appellant's claims for service connection for mental disorders in the late 1990s. The baseline for assessing the scope of such claims comes from the Court's holdings in *Clemons v. Shinseki* and *Delisio v. Shinseki*. *See Clemons*, 23 Vet.App. 1, 5 (2009); *see also DeLisio*, 25 Vet.App. 45, 53 (2011) ("Overall, the scope of the claim will be based on a sympathetic assessment of 'the claimant's description of the claim; the symptoms the claimant describes; and the information the claimant submits or that the Secretary obtains in support of the claim,' i.e., information gathered upon investigation." (quoting *Clemons*, 23 Vet.App. at 5)). As we discussed, the appellant sought service-connected benefits for a psychiatric disorder that he believed was PTSD though he had filed claims for both PTSD and an acquired

psychiatric condition other than PTSD It is true that when the Board in 1997 ruled against him on both claims, he appealed to the Court only the part of the decision concerning PTSD. The confusion arises because after the Court remanded that claim to the Board, the Board appeared to have considered the remanded claim to be broader than one limited to PTSD. That is so because, on remand from the Court, the Board in its 1998 decision ordered a broad psychiatric evaluation, to include discussion of "*any* currently manifested psychiatric disorder." R. at 16,339 (emphasis added). Following the Board's discussion, the examiner then provided a medical opinion that ultimately led to a grant of service connection for both PTSD and a schizoaffective disorder.

So, regardless of the effect of the appellant's failure to appeal the earlier adverse decision on an acquired psychiatric condition other than PTSD, the Board in 1998 appeared to have returned to the baseline rule of *Clemons* and *DeLisio* in terms of the scope of the appellant's claim. Stated differently, given that a claimant does not possess medical expertise and the scope of the claim includes "information gathered upon investigation," *see DeLisio*, 25 Vet.App. at 53, the Board appeared to consider the scope of the claim as one for a general psychiatric disorder when it ordered a new examination in January 1998. To the extent the appellant did not appeal the Board's finding that he had not submitted new and material evidence to reopen his acquired psychiatric disorder claim, other than PTSD, a claimant is still required to request service connection for a specific psychiatric condition. *See Clemons*, 23 Vet.App. at 5. Or, at least, the Board in 1998 appears to have proceeded on this basis after remand from this Court. Given how the Board in 1998 treated the claim on remand from this Court, remand is now required for the Board to provide an adequate statement of reasons or bases for its effective-date determination for the grant of service connection for schizoaffective disorder. 38 U.S.C. § 7104(d)(1).

Further, because the effective-date determination for the appellant's service-connected schizoaffective disorder may have a "significant impact" on the effective date determination for the other two matters on appeal, the Court will remand these matters 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 matters, 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.").

VIII.

For the foregoing reason, that part of the July 25, 2019 Board decision on appeal is SET ASIDE and the matters are REMANDED for readjudication.

DATED: August 17, 2021

Copies to:

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