Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 21-4550

NICHOLAS C. POLIZZO, 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*: Iraq War combat veteran Nicholas C. Polizzo appeals through counsel that part of a May 18, 2021, Board of Veterans' Appeals decision that denied service connection for obstructive sleep apnea (OSA), to include as due to post-traumatic stress disorder (PTSD); and denied a disability rating (1) greater than 10% for right knee patellofemoral syndrome; (2) greater than 10% for right knee instability effective from October 13, 2020, through February 6, 2021; (3) greater than 10% effective before October 13, 2020, for left shoulder dyskinesis; and (4) greater than 20% effective beginning October 13, 2020, for left shoulder dyskinesis. Record (R.) at 5-32. The Board also granted a 20% disability rating, but no higher, for right knee instability, beginning February 7, 2021. [1] *Id*.

[1] To the extent that the Board granted a 20% disability rating for right knee instability beginning February 7, 2021, the Court will not disturb this favorable finding. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007). The Board also denied a disability rating in excess of 10% for a traumatic brain injury (TBI)/post-concussion syndrome with insomnia; and entitlement to specially adapted housing. However, because the appellant no longer wishes to pursue these claims, Appellant's Brief at 1, the Court shall deem these claims 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). Finally, the Board remanded the matter of matter a total disability rating based on individual unemployability (TDIU). This matter is not currently before the Court. *See Hampton v. Gober*, 10 Vet.App. 481, 482 (1997).

The appellant argues that the Board (1) relied on an inadequate medical examination; (2) failed to consider whether his in-service weight gain was an in-service event that caused his OSA; and (3) misapplied the regulations governing effective dates, meaning that he is entitled to an earlier effective date for the increased ratings for his right knee and left shoulder conditions . Appellant's Brief at 8-13. The appellant also moved for oral argument. *See* July 8, 2022, Motion for Oral Argument. For the following reasons, the Court will deny the appellant's motion for oral argument as unwarranted and set aside that part of the May 2021 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"). In the words of Justice Paterson, "[j]udges may die, and courts be at an end; but justice still lives, and, though she may sleep for a while, will eventually awake, and must be satisfied." *Penhallow v. Doane's Adm'r*, 3 U.S. 54, 79 (1795).

---

[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) (order), *rev'd sub nom. Wolfe v. McDonough*, 28 F.4th 1348 (Fed. Cir. 2022). We cite these decisions from our Court merely for their guidance and persuasive value.

III.

The appellant served on active duty in the U.S. Army from October 2000 to January 2010, as an ammunition specialist and an explosive ordinance device specialist, including service in Kuwait and Belgium and combat in Iraq. R. at 2430 (DD Form 214), 2392. The appellant earned many medals and commendations for his service, including an Iraq Campaign Medal with 4 Campaign Stars, a Global War on Terrorism Expeditionary Medal, a Global War on Terrorism Service Medal, three Overseas Service Ribbons, a Combat Action Badge, and an Air Assault Badge. *Id*.

The appellant's weight was recorded in January 2002 and April 2002 as 190 pounds and 200 pounds, respectively. R. at 2243, 2240. In September 2002, his weight was recorded as 220 pounds. R. at 2212. By January 2005, the appellant's weight had increased to 235 pounds. R. at 2280. In June 2008, his weight was recorded as 245 pounds R. at 2398.

---

[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).

IV.

In April 2010, the appellant applied for disability benefits seeking service connection for several conditions, including a right knee condition and a left shoulder condition. R. at 2365-74. During a June 2010 Compensation and Pension examination, R. at 262-76, the appellant reported that his right knee pain increased when he stood and when he drove for long periods. R. at 262. The examiner diagnosed the appellant with right patellofemoral syndrome with residual numbness to the right medial knee resulting from right arthroscopic knee surgery, R. at 271, but the examiner noted that the appellant did not suffer from flare-ups. R. at 266. His weight was recorded as 226 pounds. R. at 267. In August 2010, the regional office (RO) granted service connection for left shoulder dyskinesis, with a 10% disability rating; and right knee patellofemoral syndrome, with a 0% disability rating; both effective January 18, 2010. R. at 2092-96.

In June 2011, the appellant filed an informal claim seeking service connection for a sleep disorder, to include as secondary to PTSD. R. at 1995. In September 2012, the RO denied service connection for OSA (claimed as a sleep disorder). R. at 1798-1803.

In April 2014, the appellant underwent a VA knee examination, during which the examiner noted that the appellant underwent right knee arthroscopic surgery during service to repair a torn MCL and to remove a patellar spur; and since the surgery, he has suffered from residual numbness as well as right knee popping, grinding, and occasional giving out, requiring him to wear a brace during physical activities and flare-ups. R. at 1562. The examiner opined hat the appellant's right knee was stable. R. at 1569. In January 2015, the appellant's weight was recorded as 257 pounds R. at 1220.

In May 2019, the appellant underwent a VA sleep apnea examination. R. at 834-37. The examiner noted that the appellant was diagnosed with OSA in January 2012 and that he was obese, with a body mass index (BMI) of 34.6. R. at 836. The appellant reported that he snored and felt fatigued with excessive daytime sleepiness. R. at 834. The examiner listed the appellant's only symptom as persistent daytime hypersomnolence. R. at 835. The examiner concluded that the appellant's OSA was less likely than not related to service because the appellant did not suffer from OSA during service, he was not diagnosed with OSA until 2 years after service, and PTSD is not recognized as a risk factor for OSA. R. at 836-37 (citing RICHARD B. BERRY, *Fundamentals of Sleep Medicine-Obstructive Sleep Apnea Syndromes: Definitions, Epidemiology, Diagnosis, and Variants*, *in* FUNDAMENTALS OF SLEEP MEDICINE, at 237-61 (2012),

https://www.sciencedirect.com/article/pii/B9781437703269000336?via%3Dihub). The examiner opined that obesity and being male were the most likely etiologies of the appellant's OSA. *Id*.

In July 2019, the RO increased the appellant's disability rating for right knee patellofemoral syndrome from 0% to 10%, effective January 18, 2010. R. at 673-80.

In September 2019, the Board obtained an addendum medical opinion for the appellant's OSA. R. at 574-76. The examiner concluded that the appellant's OSA was not aggravated beyond its natural progression by his service-connected PTSD because PTSD is not a recognized risk factor for developing or aggravating OSA. R. at 575. The examiner attributed the appellant's OSA to him being a male and obese, which are "well-defined risk factors for OSA." R. at 575-76.

In October 2020, the appellant underwent a VA knee and lower leg conditions and shoulder and arm conditions examinations. R. at 244-50, 216-21. The appellant reported that his right knee and left shoulder conditions had worsened, and that pain limited a lot of his activities, limited his ability to exercise, and caused him to quit his job because the physical exertion required to perform his duties strained his knee and left shoulder. R. at 244-45, 216-17. He further reported that he must wear a knee brace that restricts his knee movements. R. at 245. The examiner diagnosed the appellant with right knee instability. R. at 249.

Also in October 2020, VA obtained a medical opinion concerning the appellant's OSA. R. at 224-27. The examiner noted a VA treatment record that stated the appellant weighed 224 pounds in July 2019. R. at 226. The examiner concluded that the appellant's OSA was less likely than not (1) related to service or any in-service event, disease or injury; (2) proximately due to the appellant's service-connected PTSD; and (3) aggravated beyond its natural progression by the appellant's service-connected PTSD; all because the medical literature did not support such a nexus. R. at 224, 226.

In November 2020, the RO increased the appellant's disability rating for left shoulder dyskinesis from 10% to 20%, effective October 13, 2020; and granted service connection for right knee instability, with a 10% disability rating, effective October 13, 2020. R. at 106-08.

V.

In May 2021, the Board denied service connection for OSA, to include as due to PTSD. R. at 8-11. The Board acknowledged that "while service connection is not available for obesity itself, obesity caused or aggravated by a service-connected disability may nevertheless be an

'intermediate step' for secondary service connection for any compensable disabilities caused or aggravated by obesity," R. at 10 (citing *Walsh v. Wilkie*, 2 Vet. App. 300 (2020)). The Board relied on the October 2020 VA examiner's opinion when it concluded that the appellant's obesity was not due to any of his service-connected disabilities and no competent medical opinion of record supported a relationship between OSA and PTSD. *Id*.

The Board also denied a disability rating (1) greater than 10% for right knee patellofemoral syndrome; (2) greater than 10% for right knee instability from October 13, 2020, through February 6, 2021; and (3) greater than 10% before October 13, 2020, and greater than 20% beginning October 13, 2020, for left shoulder dyskinesis. R. at 13-22. The Board also granted a 20% disability rating, but no higher, for right knee instability beginning February 7, 2021. *Id*. 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 service connection for OSA, to include as due to PTSD. 38 U.S.C. § 7104(d)(1). The Board acknowledged that appellant is currently obese and that "while service connection is not available for obesity itself, obesity caused or aggravated by a service-connected disability may nevertheless be an 'intermediate step' for secondary service connection for any compensable disabilities caused or aggravated by obesity," R. at 10 (citing *Walsh*, 32 Vet. App. 300): but the Board concluded that the appellant's obesity was not due to any of his service-connected disabilities. *Id*. In reaching this conclusion, however, the Board failed to discuss whether the appellant's service-connected right knee conditions caused or contributed to his obesity.

The record indicates that because he weighed 224 pounds in July 2019, throughout the entire period on appeal the appellant had kept most of the weight he had gained between 2004 and 2015. R. at 226. Moreover, the appellant is now service connected for multiple right knee conditions, R. at 5, and the September 2019 VA examiner attributed the appellant's OSA to obesity and being male, traits the examiner called "well defined risk factors" for OSA. R. at 575-76. Remand is therefore required for the Board to provide an adequate statement of reasons or bases explaining whether the appellant's right knee conditions caused his obesity and the appellant's obesity constitutes an "intermediate step" towards developing OSA. *See* 38 U.S.C. § 7104(d)(1); *Walsh*, 2 Vet.App. 300.

The Court also concludes that the Board provided an inadequate statement of reasons or bases for denying a disability rating (1) greater than 10% for right knee patellofemoral syndrome; (2) greater than 10% for right knee instability from October 13, 2020, through February 6, 2021; (3) greater than 20% for right knee instability beginning February 7, 2021; and (4) greater than 10% before October 13, 2020, and greater than 20% beginning October 13, 2020, for left shoulder dyskinesis. 38 U.S.C. § 7104(d)(1). In reaching these determinations the Board relied on the results of the June 2010, August 2014, and October 2020 VA examinations, R. at 15-16, 20-21, when it selected October 13, 2020, the date of the October 2020 VA examination, as the effective date for the appellant's increased disability ratings. It is unclear how the Board selected the October 13, 2020, effective date considering that (1) the appellant's VA treatment records and VA examinations document a progressive worsening of the appellant's right knee and left shoulder conditions before October 13, 2020, *compare* R. at 262-76, *with* R. at 1562, 244-50, 216-21; (2) during the October 2020 VA examination the appellant alleged that before the examination his conditions further worsened, R. at 244-45, 216-17; and (3) the October 2020 VA examiner's opinions are based on the appellant's reports and evidence that precede the date of the examination. R. at 220, 249. The Board concluded that the appellant's conditions were not more disabling then currently rated, R. at 18, 22, but the Board failed to address whether the worsening of these conditions was factually ascertainable before the October 2020 VA examination. *See* 38 U.S.C. § 5110(b); 38 C.F.R. §3.400(o) (2022). Remand is required for the Board to provide an adequate statement of reasons or bases explaining how the Board selected October 13, 2020, as the effective date for the increased disability ratings of each of his claims. 38 U.S.C. § 7104(d)(1).

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). 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.

The July 8, 2022, motion seeking oral argument is denied as unwarranted. For the foregoing reasons, that part of the May 18, 2021, Board decision on appeal is SET ASIDE, and the matters are REMANDED for readjudication.

DATED: February 14, 2023

Copies to:

David Hoeser, Esq.

VA General Counsel (027)