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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-1871

DENNIS R. SENNE, 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*: U.S. Navy veteran Dennis R. Senne appeals through counsel a February 21, 2019, Board of Veterans' Appeals decision denying service connection for a right knee condition. Record (R.) at 5-9. The appellant argues that the Board provided an inadequate statement of reasons or bases for discounting a private medical opinion. Appellant's Brief at 1-5. For the following reason, the Court will set aside the Board's February 2019 decision and remand the matter 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* Veterans' Judicial Review Act, Pub. L. No. 100-687, § 402, 102 Stat. 4105, 4122 (1988). Before the VJRA, VA rules, regulations, and decisions lived in "splendid isolation," generally unconstrained by judicial review for nearly 60 years. *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 Act of Mar. 23, 1792, ch. 11, 1 U.S. Stat 243 (1792) (repealed in part and amended by Act of Feb. 28, 1793, ch. 17, 1 Stat. 324 (1793)).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 he believed that the circuit court had erred in favor of the soldier based on "suspected imposition or mistake." *See id*.

Chief Justice John Jay[1] wrote a letter[2] to President George Washington on behalf of the Circuit Court for the District of New York[3] 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, 173 L. Ed. 2d 532 (2009) (Souter, J., dissenting) (stating that

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[1] 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.

[2] 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 at 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.

[3] 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).

congressional "solicitude for veterans is plainly reflected in the Veterans Judicial Review Act of 1988, 38 U.S.C. § 7251 et seq. [VJRA], as well as in subsequent laws that '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 (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").

II.

Justice Alito[4] 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[5] 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 honorably in the U.S. Navy from May 1958 to February 1961 as a brakeman. R. at 621 (DD Form 214). In March 1959, the appellant slipped and fell at an indoor pool. R. at 554. A treatment note records "multiple contusions and abrasions of . . . knees." R. at

[4] 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*. 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. In 2005, President George W. Bush chose Alito to replace retiring Supreme Court Justice Sandra Day O'Connor.

[5] 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).

554. The appellant's military separation examination did not reveal any knee conditions. R. at 544-45.

IV.

The appellant filed for service connected benefits based on a right knee condition in February 2015. R. at 631-32.

In March 2015, the appellant submitted a disability benefits questionnaire (DBQ) from a private examiner. R. at 634-43. The examiner diagnosed the appellant with "knee tendonitis/tendonosis." R. at 634. In response to the question asking the examiner to describe the "onset and course" of the appellant's right knee condition, the examiner answered that the condition began in 1959 when the appellant's "knee caught in J-bar on forklift [with] knee sprained." R. at 635. The examiner also noted that the appellant's right knee was deformed, R. at 637, and that at the site of the deformity the appellant experienced pain and swelling. R. at 638.

In April 2015, the appellant underwent a VA examination. R. at 519-22. The examiner first noted that there "are no imaging studies from the private sector or the VA which involve [the appellant's] knees." R. at 519. The examiner acknowledged the single in-service treatment record for a knee contusion after the appellant fell near the indoor pool, and stated that "there were no further visits seen for this episode after that date." R. at 519. The examiner also added that there were no records of "persistent knee issues," during the appellant's service, and the appellant's military separation examination did not reveal any musculoskeletal or lower extremity abnormalities. R. at 519-20. The examiner opined that the appellant's knee condition was "less likely than not . . . caused by, or a result of, the contusion on the knees on March 7, 1959[,] during the military service." R. at 519.

In July 2017, the appellant submitted a VA Form 9 stating that during service "an incident occurred where my knee was pin[n]ed between a J-Bar and a Fork Lift at Quonset Point, Rhode Island." R. at 35.

V.

In the February 2019 decision on appeal, the Board found that the appellant had a current knee condition and an in-service knee injury, but denied service connection because it found that there was no nexus between the two. R. at 5-9. The Board afforded low probative weight to the

appellant's private examiner's DBQ because the examiner did not provide a nexus statement, review the appellant' medical record, or provide an opinion regarding the etiology of the diagnosed tendonitis. R. at 8. The Board afforded greater probative weight to the April 2015 VA examination because it found that the examination was "based on an accurate medical history and provides an explanation that contains clear conclusions and supporting data." R. at 8. The Board then concluded that the preponderance of the evidence was against the appellant's claim for service connection for a right knee condition. R. at 9.

The appellant's lay testimony was addressed in the decision as follows:

> The Board has also considered the Veteran's inconsistent statements regarding his in-service knee injury. Service treatment records show the Veteran slipped and fell in the steam room at the indoor pool. In recent VA medical records and in his July 2017 [S]ubstantive [A]ppeal form, the Veteran stated that his knee injury occurred when his knee was pinned in a J-bar on a fork lift. . . . It is unclear why the Veteran's first report of his knee being injured by a J-bar did not occur until 2015, more than 50 years after service. Regardless of exactly how the Veteran injured his knee during service, the preponderance of the evidence remains against the claim.

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 decision makers 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 erred when it failed to address the credibility of the appellant's statements that he sprained his knee in an in-service forklift incident. *See Washington v. Nicholson*, 19 Vet.App. 362, 367-68 (2005) (holding that it is within the Board's province to determine the credibility and weight of the evidence before it). Although the Board addressed the appellant's statements regarding how the appellant hurt his knee, it never determined whether the appellant's statements were credible and simply concluded "[r]egardless of exactly how the

Veteran injured his knee during service, the preponderance of the evidence remains against the claim." R. at 8. Yet, the negative nexus opinion relied on by the Board to deny the appellant's claim is premised on the appellant suffering a knee contusion versus a knee sprain. *See* R. at 519. Without a credibility determination, the Court cannot review the Board's decision. Remand is warranted for the Board to provide a credibility determination regarding the appellant's statements and to otherwise provide an adequate statement of reasons or bases for its determination. *Washington*, 19 Vet.App. at 367-68; *see* 38 U.S.C. § 7104(d)(1).

To the extent that the Board determined that the appellant's current right knee condition is limited to right knee tendonitis, it is not clear how the Board reached this determination, given that the private examiner noted that the appellant has a right knee deformity, R. at 637, and the VA examiner noted that the appellant's right knee had not been the subject of an imaging study. R. at 519. On remand, the Board must adequately support its current disability determination. 38 U.S.C. § 7104(d)(1).

Because the Court is remanding the matter, 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, the Board's February 21, 2019, decision is SET ASIDE and the matter is REMANDED for readjudication.

DATED: April 27, 2020

Copies to:

Robert K. Dwyer, Esq.

VA General Counsel (027)