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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 18-6026

MICHELLE K. MERCURIO, 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. Marine Corps veteran Michelle K. Mercurio appeals through counsel a September 27, 2018, Board of Veterans Appeals decision (1) denying service connection for (a) hallux valgus (bunions), and (b) vertigo, and (2) finding that new and martial evidence sufficient to reopen claims for left and right breast fibroadenoma (tumors) had not been received. Record (R.) at 4-19.[1] The appellant argues that the Board erred by (1) relying on an inadequate examination, (2) providing an inadequate statement of reasons and bases for denying service connection for bunions, (3) providing an inadequate statement of reasons or bases for finding that new and material evidence had not been submitted to reopen her breast tumor claim, and (4) failing to remand the matter of vertigo as inextricably intertwined with the matters of bilateral hearing loss and tinnitus. Appellant's Brief at 5-18.

The Secretary concedes that remand is warranted for the matter of service connection for bunions because the Board erred by relying on an inadequate examination and by failing to address

[1] The Board determined that new and material evidence had been submitted to reopen a claim of service connection for status post stress fracture right femur. The Court will not disturb this favorable finding. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007). The Board also remanded the matters of service connection for status post stress fracture right femur, bilateral hearing loss, tinnitus, migraines, carpal tunnel syndrome, low back strain, a left knee disability, and residuals of a cervical spine strain. R. at 5. These matters are not before the Court. *See Hampton v. Gober*, 10 Vet.App. 481, 482 (1997).

a theory of secondary service connection. Secretary's Brief at 6-7. The Secretary also concedes that remand is warranted for the matter of vertigo because it is inextricably intertwined with the remanded bilateral hearing loss and tinnitus claims. Secretary's Brief at 8-9.

For the following reasons, the Court will set aside those parts of the September 2018 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* 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[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, 173 L.Ed.2d 532 (2009) (Souter, J., dissenting) (stating that 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").

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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 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.

[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 honorably in the U.S. Marine Corps as an Air Intelligence Officer from August 1999 until December 2003. R. at 2766 (DD Form 214). The appellant's entrance examination notes a preservice history of bilateral breast tumors. R. at 2454-56. In May 2002, the appellant underwent surgery to have breast tumors removed. R. at 2323-24. In July 2003, a new breast tumor was found via ultrasound. R. at 2299.

IV.

Before she seperated from service, the appellant filed for service connection for bilateral breast tumors, among other conditions. R. at 2792. On her initial claim form, she reported that she had breast tumors in the past, but she also stated that two additional tumors were now present. R. at 2792.

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[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 district 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.

[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).

In January 2004, the regional office (RO) denied the appellant's service connection claim for bilateral breast tumors. R. at 2762. The RO found that the condition had existed prior to service and determined that there was no evidence that the condition had permanently worsened because of service. R. at 2762. The appellant did not appeal this decision and it became final.

In July 2011, the appellant requested service-connected benefits for vertigo. R. at 2701. In April 2012, the appellant requested service-connected benefits for bunions. R. at 2668.

In December 2015, the appellant appealed to the Board multiple matters including the denial of service connection for breast tumors and bunions, R. at 1390-95, stating that she was exposed to radiofrequency radiation and extreme stress while serving and argued that these factors aggravated her pre-existing breast tumors. R. at 1392. She also submitted an article that listed environmental toxins (such as radiation) and stress as causes of tumors. R. at 1404-07.

In May 2018, the appellant was seen by a private examiner. R. at 36-37. The examiner found that the appellant had a "continuously enhancing mass" in her right breast. R. at 37.

V.

In the September 2018 decision on appeal, the Board found that new and material evidence had not been submitted to reopen the appellant's bilateral breast tumor claim. R. at 12. The Board stated:

> Since the January 2004 rating decision, the Veteran has submitted evidence of ongoing fibroadenomas and has argued that the development of new fibroadenomas during service evinces an aggravation of her bilateral breast fibroadenoma during service. The record at the time of the January 2004 rating decision included evidence of current right and left breast fibroadenoma discovered during service. As such, this evidence is essentially duplicative of the evidence of record at the time of that denial. Thus, the additional evidence does not relate to an unestablished fact that may provide a reasonable possibility of substantiating the claim.

R. at 12 (citing *Shade v. Shinseki*, 24 Vet. App. 110 (2010)). The Board concluded that the criteria for reopening the claim had not been met. R. at 12.

The Board also found that the appellant had a current diagnosis of bunions, but the Board determined that it did not begin during service and was not related to an in-service event. R. at 12. The Board relied on a July 2015 VA examination in making its determination. R. at 12. The Board did not address secondary service connection. *See* R. at 12-13.

The Board then denied service connection for vertigo. R. at 13-14. The Board conceded that the appellant has a current diagnosis of the condition, but found that there was no evidence of the condition in-service. R. at 14.

VI.

Section 3.156(a), title 38, Code of Federal Regulations, provides:

> A claimant may reopen a finally adjudicated legacy claim by submitting new and material evidence. New evidence is evidence not previously part of the actual record before agency adjudicators. Material evidence means existing evidence that, by itself or when considered with previous evidence of record, relates to an unestablished fact necessary to substantiate the claim. New and material evidence can be neither cumulative nor redundant of the evidence of record at the time of the last prior final denial of the claim sought to be reopened, and must raise a reasonable possibly of substantiating the claim.

38 C.F.R. § 3.156(a) (2019).

"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 failed to provide an adequate statement of reasons and bases for its finding that the appellant had not submitted new and material evidence to reopen her claim for bilateral breast tumors. 38 U.S.C. § 7104(d)(1); *see also* 38 C.F.R. § 3.156(a). In January 2004, the RO denied service connection for the appellant's bilateral breast tumors because it found that the tumors pre-existed service and no evidence showed that the condition had permanently worsened in service. R. at 2762. In December 2015, the appellant submitted lay testimony alleging that she was exposed to radiation and extreme stress while serving and a medical article asserting that those exposures can cause benign tumors. R. at 1392, 1404-07. She also submitted evidence of a May 2018 medical examination that found that she had a "continuously enhancing mass" in her right breast. R. at 37. This evidence was not before the RO when it made its January 2004

decision and appears to be material to the RO's finding of no permanent worsening. In its September 2018 decision, the Board did not discuss any of the new evidence the appellant submitted. *See* R. at 9-12. Remand is warranted for the Board to properly determine whether new and material evidence has been submitted to reopen the appellant's bilateral breast tumors claim. 38 C.F.R. § 3.156(a).

The Court agrees with the parties that the Board erred when it relied on an inadequate examination and failed to provide an adequate statement of reasons and bases for denying service connection for bunions. 38 U.S.C. § 7104(d)(1). The Court also agrees with the parties that the Board erred when it did not remand the matter of vertigo as inextricably intertwined with the matters of bilateral hearing loss and tinnitus. *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). Given the Secretary's concession of error in these matters, the Court will remand the matters for readjudication. *See Massie v. Shinseki*, 25 Vet.App. 123, 126 (2011). To ensure that the parties' contentions are fully addressed by the Board on remand, the Court orders that the appellant's and the Secretary's briefs be incorporated into the claims file.

Because the Court is remanding the 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 reasons that part of the Board's September 27, 2018, decision on appeal is SET ASIDE and the MATTERS are remanded for readjudication.

DATED: April 28, 2020

Copies to:

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