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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-2512

HYMAN HUMPHREY, 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*: Vietnam War veteran Hyman Humphrey pro se appeals a March 25, 2019, Board of Veterans' Appeals decision that denied the appellant service connection for eczema (previously claimed as a skin disorder).[1] Record (R.) at 3-13. The appellant argues that the Board failed to apply the benefit of the doubt rule. Appellant's Informal Brief at 2. The Secretary concedes that the Board erred by determining that VA satisfied its duty to assist, and that remand is required for the appellant to be scheduled for a new medical examination. Secretary's Brief at 5-10. For the following reason, the Court will set the March 2019 Board decision aside and remand the claim for further development and 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

[1] The Board also remanded the appellant's claim for a disability rating in excess of 30% for "service-connected other specified trauma and stressor (previously denied as PTSD)" and a total disability rating based on individual unemployability (TDIU). These matters are not before the Court. *See Hampton v. Gober*, 10 Vet.App. 481, 483 (1997).

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 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

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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).

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").

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.

[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.* 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).

III.

The appellant served on active duty in the U.S. Army from February 1970 to September 1971 as a military policeman. R. at 1260 (DD Form 214). The appellant served in Thailand during the Vietnam War and earned the National Defense Service Medal, Vietnam Service Medal with '60 device, and the Vietnam Campaign Medal with 2 stars. *Id.* The appellant's August 1971 separation examination revealed no abnormality in the appellant's skin. R. at 1105-06.

IV.

In January 2006, the appellant sought private treatment for "itchy, dry skin." R. at 1057.

In July 2015, the appellant applied for disability benefits for a skin condition. R. at 990-92. That same month, the appellant attended a VA Agent Orange Group, where it was noted that Agent Orange was sprayed around the perimeter of several Royal Thai Air Force bases, and that the appellant's duties as a military policeman would have exposed him to Agent Orange at these bases. R. at 959-60. In September 2015, the regional office (RO) denied the appellant's claim on a presumptive basis. R. at 816-21.

In August 2016, the appellant clarified that he was seeking service connection for eczema on the basis of Agent Orange exposure. R. at 780-83. That same month, a private physician opined that the appellant's eczema was likely related to the appellant's Agent Orange exposure in Thailand, though he could not "say exactly how long this condition preexisted its diagnosis or definitively state its cause." R. at 745. In October 2016, the RO denied the appellant's claim. R. at 776-79.

Between 2014 and 2017, the appellant sought treatment for eczema, and his private treatment records from that period note that the appellant had a history of eczema. R. at 608-55, 170-73.

V.

In March 2019, the Board denied the appellant's claim for service connection for eczema, previously claimed as a skin condition. R. at 3-13. The Board conceded that the appellant was exposed to Agent Orange, but found that because eczema was not a listed condition, the appellant was not entitled to service connection on a presumptive basis. R. at 6-7. The Board denied the appellant service connection for eczema on a direct basis, R. at 9, reasoning that the appellant's service treatment records were silent for any complaints or diagnosis, *id*. The Board also found

that a new VA medical examination "would serve no useful purpose in this case, since the requirement of an in-service disease or injury to establish the claim cannot be met upon additional examination." R. at 8. This appeal ensued.

VI.

"The Secretary shall make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate the claimant's claim for a benefit under a law administered by the Secretary." 38 U.S.C § 5103A(a). "In the case of a claim for disability compensation, the assistance provided by the Secretary under subsection (a) shall include providing a medical examination or obtaining a medical opinion when such an examination or opinion is necessary to make a decision on the claim." 38 U.S.C. § 5103A(d)(1).

This Court has held that to determine whether the duty to assist requires that a VA medical examination be provided, or medical opinion obtained with respect to a veteran's claim for benefits, four factors are to be considered: (1) Whether there is competent evidence of a current disability; (2) whether there is evidence establishing that an event, injury, or disease occurred in service, or evidence establishing certain disease manifesting during an applicable presumption period; (3) whether there is an indication that the disability or symptoms may be associated with the veteran's service or with another service-connected disability; and (4) whether there otherwise is sufficient competent medical evidence of record to enable a decision on the claim. *McLendon v. Nicholson*, 20 Vet.App. 79, 81 (2006). The Court reviews the conclusion that the Board reaches when the Court applies the facts to the third factor of *McLendon* under the "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" standard of review. *McLendon*, 20 Vet.App. at 83.

"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 agrees with the Secretary that the Board clearly erred in determining that a medical examination was not warranted here. *See* 38 U.S.C. §§ 7261(a)(4) (the Court reviews findings of fact for clear error), 5103A(d). The Court will adopt the Secretary's reasoning and remand the matter for VA to provide the appellant a medical examination that considers whether direct service connection is warranted based on the appellant's conceded exposure to Agent Orange. *See McLendon*, 20 Vet.App. at 81-83 (2006).

VIII.

For the foregoing reason, the March 25, 2019, Board decision is SET ASIDE and the matter is REMANDED for further development and readjudication. The Court also orders that the appellant's informal brief and the Secretary's brief be incorporated into the record so both parties' contentions are fully addressed on remand.

DATED: April 29, 2020

Copies to:

Hyman Humphrey

VA General Counsel (027)