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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-0058

EDWARD S. AREL, 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 Edward S. Arel appeals, through counsel, that part of a November 21, 2018, Board of Veterans' Appeals decision that denied him service connection for left ear hearing loss and tinnitus.[1] Record (R.) at 4-12. The appellant argues that the Board erred by failing to ensure compliance with VA's duty to assist because the Board improperly relied on an inadequate medical examination for the left ear hearing and tinnitus claims. Appellant's Brief at 7-24. For the following reasons, the Court will set that part of the November 2018 Board decision aside and remand the matters 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 the enactment of the Veterans' Judicial Review Act (VJRA) in 1988. *See* Pub. L. No. 100-687, §

[1] The Board also denied the appellant service connection for right ear hearing loss; however, the appellant presents no argument as to this denial. The Court deems this claim 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).

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 Act of Mar. 23, 1792, ch. 11, 1 U.S. Stat 243 (1792) (repealed in part and amended by Act of Feb. 28, 1793, ch. 17, 1 Stat. 324 (1793)).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 desire to manifest, on all proper occasions and in every proper manner their high respect for the national legislature." *Id.*

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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).

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.

III.

The appellant served on active duty in the U.S. Army from July 1969 to July 1971 as a medical specialist. R. at 233 (DD Form 214). The appellant was deployed to Vietnam and earned

[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).

the Vietnam Service Medal, National Defense Service Medal, Army Commendation Medal, and Vietnam Campaign Medal with '60 Device, among other commendations. *Id.*

IV.

On the appellant's October 1971 separation examination report, the examiner marked the appellant's hearing thresholds at 0 decibels across all frequencies. R. at 219-20. The examiner also left blank the portion of the examination report pertaining to whispered and spoken voice testing. R. at 220.

In September 2012, the appellant filed disability benefits claims for hearing loss and tinnitus. R. at 509-14. In his statement in support of the claim, the appellant contended that during his active duty service, he was "assigned to the Aviation Battalion [and] spent many hours on aircraft[s] and working on the flight line." R. at 518.

In October 2013, the appellant underwent a VA examination for hearing loss and tinnitus, where he was diagnosed with bilateral hearing loss and tinnitus. R. at 274-78. The examiner conceded that the appellant's reports of in-service noise exposure were "highly probable"; but the examiner found that the appellant's hearing loss was less likely caused by service because the "service records showed no hearing loss or significant changes in hearing thresholds . . . during military service," and there was "no record of complaint or treatment of the hearing loss . . . in the service records." R. at 277. The examiner cited medical literature to support her conclusion that there was "insufficient scientific basis to conclude that permanent hearing loss directly attributable to noise exposure will develop long after noise exposure." *Id.*

Regarding the appellant's tinnitus, the examiner found it less likely than not caused by in-service noise exposure, because the appellant's "hearing was normal at enlistment and separation, there were no shifts in hearing threshold levels during service, and [there is] no objective evidence of noise injury during service." R. at 277-78.

In December 2013, the regional office denied the appellant's claims. R. at 243-52. In his February 2016 appeal to Board, the appellant explained that he was assigned to a helicopter aviation battalion, and his living quarters were "right next to the flight line." R. at 41. The appellant alleged he spent "many hours" working around aircrafts and on the flight light, and was exposed to automatic weapons fire, rocket fire, mortars, and mines as well. R. at 41, 518. The appellant noted that aside from his in-service acoustic trauma, he had not been "exposed to any other sounds

or noises". R. at 41. The appellant also asserted that he was never given a hearing examination upon separation from service. R. at 42.

V.

In November 2018, the Board denied the appellant's left ear hearing loss and tinnitus claims. R. at 4-12. Although the Board conceded that the appellant suffered acoustic in-service trauma, the Board adopted the October 2013 VA examiner's conclusion that "a prolonged delay between acoustic trauma and the onset of hearing loss" was "unlikely." R. at 8. The Board also found that the October 2013 examination report was "the only nexus evidence of record" and therefore "highly probative." R. at 9-10. 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).

When the Secretary undertakes to provide a veteran with a VA medical examination or opinion, he must ensure that the examination or opinion is adequate. *Barr v. Nicholson*, 21 Vet.App. 303, 311 (2007). A VA medical examination or opinion is adequate "where it is based upon consideration of the veteran's prior medical history and examinations," *Stefl v. Nicholson*, 21 Vet.App. 120, 123 (2007), "describes the disability . . . in sufficient detail so that the Board's 'evaluation of the claimed disability will be a fully informed one,'" *id.* (quoting *Ardison v. Brown*, 6 Vet.App. 405, 407 (1994)); s*ee also Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 301 (2008) ("[A] medical examination report must contain not only clear conclusions with supporting data, but also a reasoned medical explanation connecting the two."). VA is required to "return the [examination] report as inadequate for evaluation purposes" if the report "does not contain sufficient detail"). 38 C.F.R. § 4.2 (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 or bases for failing to address the appellant's statements that he was not examined upon separation. *See* 38 U.S.C. § 7104(d)(1). In his February 2016 appeal, the appellant contended that he was never given a hearing examination upon separation from service. R. at 42. The Board failed to address this evidence despite the fact that the appellant's separation examination reflects that no voice testing was performed and most likely no audiological testing was provided, given that the audiogram lists only zeros at all frequencies. Remand is required for the Board to provide an adequate statement of reasons or bases. *See* 38 U.S.C. § 7104(d)(1). Additionally, given that the October 2013 VA examiner's negative conclusion regarding hearing loss was based in part on normal hearing at separation, the Board must provide an adequate statement of reasons or bases for relying on this examination report. *See Reonal v. Brown*, 5 Vet.App. 458, 461 (1993) ("An opinion based upon an inaccurate factual premise has no probative value.").

The Court also concludes that the Board erred by failing to return the October 2013 VA tinnitus examination for clarification. *See* 38 U.S.C. § 7104(d)(1); 38 C.F.R. § 4.2 (2019). The examiner conceded that in-service noise exposure was highly probable, but provided a negative nexus opinion in part because there was "no objective basis of noise injury." R. at 277. It is unclear why objective evidence of a noise injury was necessary, given the concession of noise exposure. Remand is required for the Board seek clarification of the October 2013 VA tinnitus examination report. *See* 38 U.S.C. § 7104(d)(1); 38 C.F.R. § 4.2.

Because the Court is remanding the appellant's claims, 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). To the extent that the appellant argues about the October 2013 VA examiner misinterpreted the medical literature she relied on, s*ee McCray v. Wilkie*, 31 Vet.App. 253, 257 (2019), the appellant may present this argument on remand. 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 November 21, 2018, Board decision on appeal will be SET ASIDE and the matters REMANDED for further development and readjudication.

DATED: April 29, 2020

Copies to:

Zachary M. Stolz, Esq.

VA General Counsel (027)