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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 18-6647

EDDIE L. HILLSMAN, 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 and Air Force Veteran Eddie L. Hillsman appeals through counsel a September 14, 2018, Board of Veterans' Appeals decision denying service connection for (1) bilateral hearing loss and (2) tinnitus. Record (R.) at 4-19. The appellant argues that the Board erred by (1) failing to provide an adequate statement of reasons or bases for its credibility finding in denying service connection for bilateral hearing loss, (2) failing to discuss favorable in-service evidence of tinnitus, and (3) failing to provide an adequate statement of reasons or bases for denying service connection for tinnitus. Appellant's Brief at 16-21. For the following reasons, the Court will set aside the Board's September 2018 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* 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 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 Act of Mar. 23, 1792, ch. 11, 1 U.S. Stat 243 (1792) (repealed in part and amended by Act of Feb. 28, 1793, ch. 17, 1 Stat. 324 (1793)).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*.

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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).

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) ("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[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 on active duty in the U.S. Navy from June 1955 to June 1959, and from September 1961 to August 1966 as an electrician; he also served in the same

[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).

position on active duty in the U.S. Air Force from September 1966 to November 1970 and in the U.S. Air Force Reserve until July 1993. R. at 1895, 1898, 1900, 1904, 1912 (DD Form 214).

In August 1966,[6] the appellant underwent an audiogram that revealed the following results:

HERTZ					
	500	1000	2000	3000	4000
Right Ear	30	20	20	25	20
Left Ear	10	10	25	35	35

R. at 7, 1635-36.

In August 1967, the appellant underwent an audiogram which revealed the following results:

HERTZ					
	500	1000	2000	3000	4000
Right Ear	10	5	5	20	20
Left Ear	5	15	20	30	30

R. at 8, 2933-35.

In October 1968, the appellant underwent an audiogram after avoiding exposure to hazardous noise for 48 hours. R. at 2939. The audiogram revealed the following results:

HERTZ					
	500	1000	2000	3000	4000
Right Ear	30	35	30	35	55
Left Ear	30	30	30	35	45

R. at 2939. After the October 1968 audiogram was conducted, the appellant was placed on a profile for hearing loss which stated: "No duty in hazardous area. Not to work in area where ear plugs are recommended or mandatory." R. at 2945.

[6] The Board has converted the appellant's audiometric readings taken before October 31, 1967, from American Standards Association (ASA) units to International Standard Organization (ISO) units. R. at 7.

In April 1970, the appellant was diagnosed with "[moderate] severe . . . hearing loss" after being exposed to jet engine noise and issued hearing aids. R. at 2948.

An April 7, 1970, audiogram revealed the following:

HERTZ					
	500	1000	2000	3000	4000
Right Ear	60	60	70	80	80
Left Ear	50	60	70	80	80

R. at 1644.

An August 10, 1970, audiogram revealed the following:

HERTZ					
	500	1000	2000	3000	4000
Right Ear	85	75	85	90	90
Left Ear	75	80	90	95	90

R. at 2943.

A February 1972 audiogram taken when the appellant reenlisted in the U.S. Navy revealed:

HERTZ					
	500	1000	2000	3000	4000
Right Ear	0	0	0	10	10
Left Ear	10	10	15	25	25

R. at 1714-15.

In August 1973, an audiogram revealed the following results:

HERTZ					
	500	1000	2000	3000	4000
Right Ear	10	5	5	5	20
Left Ear	15	15	5	15	20

R. at 1725-26.

In September 1988, the appellant was again given a profile for hearing loss. R. at 1870. The accompanying audiogram revealed the following:

HERTZ					
	500	1000	2000	3000	4000
Right Ear	10	10	15	25	40
Left Ear	15	20	30	40	45

R. at 1869-70.

In August 1992, the appellant underwent an audiogram that revealed the following results:

HERTZ					
	500	1000	2000	3000	4000
Right Ear	15	10	20	25	50
Left Ear	15	15	35	45	50

R. at 1863-64. The examiner stated: "Bilateral hearing loss unchanged from previous examination." R. at 1864.

An undated service treatment record states: "32 y/o . . . [complains of] hearing loss [and] right [ear] tinnitus." R. at 2959.

IV.

The appellant underwent a private hearing examination in September 2008. R. at 119. The audiogram revealed:

HERTZ					
	500	1000	2000	3000	4000
Right Ear	15	10	20	25	50
Left Ear	15	15	35	45	50

R. at 119. The examiner noted that the appellant had a long history of bilateral hearing loss due to noise exposure during military service. R. at 124. The examiner added that the appellant was given hearing aids when he left the military. R. at 124. The examiner diagnosed the appellant with bilateral hearing loss and tinnitus secondary to bilateral hearing loss. R. at 124.

The appellant filed a claim for service-connected benefits based on bilateral hearing loss and tinnitus in December 2008. R. at 2869.

In August 2010, the appellant submitted a statement in support of claim and alleged that his bilateral hearing loss began during his service in the Air Force while he was "working on the B52 flight line" in Thailand. R. at 2127.

In September 2010, the appellant underwent his first VA hearing examination. R. at 2075-78. The examiner stated that the audiology results were not reliable, declined to provide a diagnosis, and suggested that the results revealed "a non-organic hearing loss component," without explaining that term. R. at 2077.

The appellant underwent another private audiogram in October 2010. R. at 1045. The audiogram produced these results:

HERTZ					
	500	1000	2000	3000	4000
Right Ear	40	45	50	65	70
Left Ear	35	35	45	55	60

R. at 1045. The examiner diagnosed the appellant with mild to severe bilateral hearing loss. R. at 1045.

In December 2010, the appellant received new hearing aids from VA. R. at 1044.

In July 2011, the appellant underwent a private audiogram which revealed the following results:

HERTZ					
	500	1000	2000	3000	4000
Right Ear	45	45	60	70	80
Left Ear	40	30	50	65	70

R. at 812. The examiner opined that the appellant's hearing was "poorer" than it was in June 2010.

In July 2016, the appellant received VA treatment for his bilateral hearing loss. R. at 603. The examiner noted that the appellant reported difficulty understanding words around background noise even with his hearing aids. R. at 603. The appellant was provided an audiogram. R. at 688-89. There were no reports of concerns about the reliability of the test. R. at 603. The examination yielded the following results:

HERTZ					
	500	1000	2000	3000	4000
Right Ear	75	75	80	80	85
Left Ear	75	75	85	85	90

R. at 689.

In an August 2016 Notice of Disagreement (NOD), the appellant alleged that his "severe hearing loss [] started when [he] was working the flight [] line" in the Air Force. R. at 694.

In December 2017, a specialist rendered an opinion on the appellant's claims. R. at 33-36. The specialist acknowledged that the appellant was exposed to jet engine noise as a result of his in-service job as an aviation electrician and occupational noise as a result of working at a power plant after service. R. at 34. The specialist then opined that the appellant presented a "nonorganic overlay" to his hearing loss and explained that nonorganic hearing loss is "hearing loss that is feigned." R. at 34. He added that "the wide fluctuations in results of [the appellant's] hearing tests and inconsistency of behavioral and word recognition scores with the pure tone testing make it impossible to conclude that there is any level of organic hearing loss present." R. at 35. Not only in his post-service hearing tests, but also in his in-service hearing test results. R. at 35. He concluded stating: "[I]t is my medical opinion that it is less likely as not the Veteran's current hearing loss and tinnitus had their onset in service, were caused by service, or are related to military service. R. at 36.

V.

In the September 2018 decision on appeal, the Board denied service connection for bilateral hearing loss and tinnitus. R. at 4. Finding the December 2017 opinion "the most probative opinion of record," R. at 17, when analyzing the appellant's claim of service connection for bilateral hearing loss the Board relied heavily on the December 2017 specialist's finding that the appellant was feigning hearing loss. R. at 17-19. The Board did not provide an analysis of the credibility of the evidence of record regarding bilateral hearing loss, provide a separate analysis of the appellant's claim of service connection for tinnitus, or address the discrepancies between the appellant's VA and private treatment records and the December 2017 examiner's opinion. *See* R. at 4-19.

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 failed to provide an adequate statement of reasons or bases for its bilateral hearing loss decision when it did not offer its own credibility determination on the appellant's lay testimony and responses to audiometric testing. *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). The Board relied on the September 2017 examiner's statements that the appellant was feigning his hearing test results to deny the appellant's claims. *See* R. at 17-19. However, it is not the duty of the examiner to determine credibility, that responsibility rests with the Board. *Washington*, 19 Vet.App. at 367-68. 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 responses to audiological testing and to otherwise provide an adequate statement of reasons or bases for its decision. *Washington*, 19 Vet.App. at 367-68; *see* 38 U.S.C. § 7104(d)(1).

The Court also concludes that the Board failed to address favorable in-service evidence of tinnitus. *See Caluza v. Brown*, 7 Vet.App. 498, 506 (1995) (finding that the Board must account for and provide the reasons for its rejection of any material evidence favorable to the claimant), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996). The appellant reported tinnitus in service, but the Board did not address this evidence when it denied his claim. R. at 2959; *see also* R. at 4-19. Remand is warranted for the Board to discuss this favorable evidence and otherwise provide an adequate statement of reasons or bases for its decision regarding tinnitus. *Caluza*, 7 Vet.App. at 506; 38 U.S.C. 7104(d)(1).

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, the Board's September 14, 2018, decision is SET ASIDE and the matters are REMANDED for readjudication.

DATED: April 29, 2020

Copies to:

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VA General Counsel (027)