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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 18-7310

DIMAS M. VALENTIN, 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*: Dimas M. Valentin appeals through counsel that part of an October 25, 2018, Board of Veterans' Appeals decision that denied entitlement to an effective date earlier than July 22, 2008, for the grant of a 10% evaluation for osteoarthritis of the left ankle service connection.[1] Record (R.) at 4. The appellant argues that (1) he reasonably raised a claim for residuals of a left ankle sprain when he applied for benefits in April 1996; (2) the Board misinterpreted the law and the record when it found that he did not submit a claim for an ankle disability before July 2008; and (3) the Board's failure to recognize his informal claim for a left ankle disability on the VA Form 21-526 in April 1996 prejudiced him because the claim remained pending on the date of the Board's decision on appeal. Appellant's Brief at 8. For the following reason, the Court will set aside that part of the October 2018 Board decision on appeal and remand the matter for readjudication.

[1] The Board also remanded claims for a left knee disability, kidney disability, and the severity of his left ankle disability in the October 2018 Board decision. These matters are not currently before the Court. *See Hampton v. Gober*, 10 Vet.App. 481, 482 (1997).

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. *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

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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

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, 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,

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riding. *See* RICHARD H. FALLON, JR., ET AL., HART AND WECHSLER'S the FEDERAL COURTS AND the FEDERAL SYSTEM (7th ed. 2015).

[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).

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. Marine Corps as a field radio operator from September 1977 to September 1980. R. at 984 (DD Form 214). He also served on active duty in the U.S. Army as a combat signaler from November 1990 to May 1991. R. at 1392 (DD Form 214). While in service, in 1980, the appellant suffered a sprain to his left ankle that required him to use crutches and apply an Ace wrap. R. at 1435-36.

IV.

The appellant applied for benefits in April 1996 for "medical problems" and submitted with his application medical records that included the June 1980 service treatment record documenting the left ankle injury. R. at 1435-36, 3707. His application also mentions high blood pressure, headaches, heartburn, and depression. R. at 3707.

The appellant was granted service connection and 10% disability rating for his left ankle with an effective date of July 22, 2008. R. at 1839-44.

V.

In the October 2018 decision on appeal, the Board found that the assignment of an effective date earlier than July 22, 2018, was not warranted. R. at 5. In reaching this determination, the Board failed to address the veteran's April 1996 VA Form 21-526. R. at 1693-84.

VI.

"Generally, the effective date of a claim for benefits is the date VA received the claim or the date on which entitlement arose, whichever is later. *See* 38 U.S.C. § 5110(a). To establish that an informal claim was filed before July 22, 2018, the claimant must satisfy the following elements: "(1) [A]n intent to apply for benefits, (2) an identification of the benefits sought, and (3) a communication in writing."' *Brokowski v. Shinseki,* 23 Vet.App. 79, 84 (2009). However, "[a] veteran's identification of the benefits sought does not require any technical precision and VA must fully and sympathetically develop a veteran's claim to its optimum before reaching the claim on

its merits." *Sellers v. Wilkie*, 30 Vet.App. 157, 162 (2018). The Court has also held that "a general statement of intent to seek benefits, coupled with a reasonably identifiable in-service medical diagnosis reflected in service treatment records in VA's possession prior to the RO making a decision on the claim[,] may be sufficient to constitute a claim for benefits. Whether service treatment records reasonably identify a claimed disability is a fact-specific inquiry." *Id* at 161. Further, "[t]he fact finder must determine, based on the totality of the service medical record, both qualitatively and quantitatively, whether the condition at issue would be sufficiently apparent to an adjudicator." *Id.* at 163.

"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 erred when it failed to assess whether the appellant's in-service left ankle injury was reasonably identifiable in the service treatment records the appellant supplied when he applied for benefits in April 1996. *See Sellers*, 30 Vet.App. at 164. If the condition was reasonably identifiable, the appellant's general statement of "medical conditions," coupled with the left ankle diagnosis, may suffice as an informal claim for benefits. *Id.* at 163. Remand is required for the Board to "determine, based on the totality of the service medical record, both qualitatively and quantitatively, whether the condition at issue would be sufficiently apparent to an adjudicator." *Id*.

Because the Court is remanding the appellant's claim, 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 October 25, 2018, Board decision is SET ASIDE and the matter is REMANDED for readjudication.

DATED: 4/30/2020

Copies to:

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