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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 18-6232

CHRISTOPHER L. FULKS, 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. Army veteran Christopher L. Fulks appeals, through counsel, an August 21, 2018, Board of Veterans' Appeals decision denying service-connection for (1) a hiatal hernia and gastroesophageal reflux disability, to include as due to an undiagnosed illness, and (2) a migraine and tension headache disability, to include as due to an undiagnosed illness. Record (R.) at 4-18. The appellant argues that the Board clearly erred by finding that the Secretary satisfied VA's duty to assist when it relied on an inadequate examination and addendum opinion, (2) otherwise failed to provide an adequate statement of reasons or bases for its decision, and (3) failed to ensure that the duty to assist was satisfied when it neglected to obtain Vista scanning records. Appellant's Brief at 8-15. The Secretary concedes that remand is warranted regarding the matter of service connection for migraine and tension headaches because the Board relied on an inadequate examination to deny the claim. Secretary's Brief at 10-12. The Secretary also attached the Vista records that the appellant alleges were not obtained by the Board. *See* Secretary's Brief at Exhibit 1, 2. On December 19, 2019, the appellant filed an opposed motion to strike that part of the Secretary's Brief that included these Vista records. The Court will deny this motion to strike as moot.

For the following reasons, the Court will set aside the Board's August 2018 decision, 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* 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[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*.

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").

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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).

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 September 1982 to August 1986 and from November 1990 to June 1991 as an aircraft power train repairer, to include service in the Persian Gulf. R. at 1068, 1085 (DD Form 214).

IV.

In July 2002, the appellant received medical treatment for abdominal pain. R. at 1033. One month later he was diagnosed with GERD. R. at 1037.

In November 2004, the appellant was diagnosed with GERD with grade 3 esophagitis and a hiatal hernia. R. at 1059-60.

[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).

In October 2012, the appellant filed claims for service-connected benefits for "chronic multi-symptom gulf war undiagnosed illness," headaches, and a gastrointestinal disorder. R. at 1070-81.

In June 2013, the appellant submitted lay testimony from family members regarding the etiology of his gastrointestinal condition. R. at 42, 43, 45, 46. The appellant's ex-wife stated that, when the appellant returned from the Persian Gulf, he had stomach pain that still persisted when they were divorced in 1999. R. at 42. She added that the appellant took Tums and Maalox for the condition, but the treatment was ineffective. R. at 42. The appellant's father also stated that, when the appellant returned from his deployment overseas, he had abdominal pain and headaches. R. at 43. The appellant's sister wrote that he had "horrible pain in his abdomen." R. at 45. The appellant's mother stated that the appellant's severe stomach pain required surgery, but the surgery did not resolve the problem. R. at 46.

In August 2013, the appellant underwent a VA esophageal conditions examination. R. at 897-904. The examiner opined that the appellant's GERD and hiatal hernia were less likely than not incurred in service because the "diagnosis was not established until 11 years after his separation," and because there were no service treatment records (STRs) "detailing GI symptoms or trauma of any kind during or following his deployment to Iraq." R. at 916. The examiner added that the appellant "did not provide a history of attempting to control his symptoms on his own with OTC medications or home remedies prior to seeking medical treatment." R. at 916. The examiner also offered a negative nexus opinion regarding the appellant's headaches. R. at 917.

In October 2013, after additional STRs from November 1990 to June 1991 were added to the record, addendum opinions for the appellant's claims were obtained. R. at 871-75. The examiner concurred with the August 2013 examiner's opinion and also opined that the appellants GERD and hiatal hernia were less likely than not related to service because the appellant's STRs did not evidence in-service complaints of the condition while serving. R. at 873.

In a March 2015 formal appeal to the Board, the appellant stated that he self-medicated for GERD while on active duty. R. at 336.

The appellant appeared before the Board in June 2018. R. at 21-35. He testified that he had experienced GERD symptoms since service and had treated the symptoms with over-the-counter medications. R. at 27.

V.

In the decision on appeal the Board concluded that GERD and hiatal hernia are structural gastrointestinal disorders and therefore are excluded from qualifying as medically unexplained chronic multisymptom illness (MUCMI) under 38 C.F.R. §3.317(a)(2)(i)(B)(3). R. at 9 (citing *Atencio v. O'Rourke*, 30 Vet.App. 74 (2018)). Service connection for GERD and hiatal hernia was also denied on a direct basis because the Board found "no probative medical evidence of record establishing a relationship between [the appellant's] current GERD and hiatal hernia and his period of active service." R. at 10. Although the Board acknowledged the appellant's lay statements, it found the August and October 2013 VA opinions to be more probative than the lay testimony. R. at 12-13. The Board also denied service connection for headaches on a direct basis and a presumptive basis as a MUCMI. R. at 14-17.

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).

VII.

The Court concludes that the Board erred when it failed to return the August 2013 VA examination for clarification. 38 C.F.R. § 4.2. The examiner noted the appellant's ex-wife's statement about the appellant's stomach pain and his use of Tums and Maalox up to 1999, *see* R. at 917, but the examiner found without explanation that the appellant "did not provide a history of attempting to control his symptoms on his own with OTC medications or home remedies prior to seeking medical treatment." R. at 916. Additionally, since this examination, the appellant has reported that he took over the counter medications since shortly after service. R. at 27. Notably, the Board did not find either the appellant's or his ex-wife's testimony not credible. *See* R. at 12-13. Remand is warranted for the Board to return the August 2013 Board examination for clarification. 38 C.F.R. § 4.2.

The Court agrees with the parties that remand is warranted for the matter of headaches because the August and October 2013 medical examinations were inadequate for rating purposes. Given the Secretary's concession of error for this matter, the Court will set aside this portion of the Board's decision and remand the matter 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 and Secretary's briefs be incorporated into the claims file.

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). The Board is instructed to incorporate the Vista records in question with proper redaction. *See* Appellant's Brief at 13-14. 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 appellant's December 19, 2019, motion to strike a portion of the Secretary's brief is denied as moot, the Board's August 21, 2018, decision is SET ASIDE and the matters are REMANDED for readjudication.

DATED: April 30, 2020

Copies to:

Glenn R. Bergmann, Esq.

VA General Counsel (027)