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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 18-4434

LOUIS P. KNIPP, 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*: Iraq War veteran Louis P. Knipp appeals, through counsel, that part of an August 7, 2018, Board of Veterans' Appeals decision that denied him service connection for a cervical spine disability and radiculopathy of the left upper extremity.[1] Record (R.) at 5-16. The appellant argues that the Board (1) provided an inadequate statement of reasons or bases for determining that the appellant's buddy statements were unreliable; (2) provided an inadequate statement of reasons or bases for using the lapse of time to deny the claim; and (3) relied on an inadequate July 2013 VA examination report. Appellant's Brief at 7-15. The Secretary concedes that the Board failed to provide an adequate statement of reasons or bases for failing to address the appellant's buddy statements, but contends that the appellant's other arguments are unavailing. Secretary's Brief at 5-10. For the following reason, the Court will set aside that part of the August 2018 Board decision on appeal and remand the matters for further development and readjudication.

I.

[1] The Board also remanded the appellant's claims for an initial compensable rating for rhinitis and service connection for hypertension. R. at 5. These claims are therefore not before the Court. *See Hampton v. Gober*, 10 Vet.App. 481, 483 (1997). And the Board denied service connection for a respiratory disability, other than the already service-connected allergic rhinitis. *Id.* The appellant presents no argument as to this claim and the Court deems it 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).

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

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, 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 October 2005 to August 2007 as a wheeled vehicle mechanic. R. at 1770 (DD Form 214). The appellant served in Iraq from March 2006 to July 2007 and was awarded many medals including the Iraq Campaign Medal. *Id*.

IV.

In July 2006, the appellant "fell and hit his head on a turret." R. at 4034. The appellant was "cleaned[,] stitched[,] . . . and given medication for the pain." *Id*.

In March 2013, the appellant filed for disability benefits. R. at 4131-32. In April 2013, the appellant underwent foraminotomy surgery for a "severe" cervical spine disability. R. at 2186.

In July 2013, the appellant underwent a VA examination. R. at 4053-65. The appellant reported waking up one day in December 2012 with numbness in the left arm, which led to the April 2013 foraminotomy. R. at 4055. The appellant could not "identify other provoking events." *Id*. At the time of the examination, the appellant reported "ongoing pain in the c[ervical] spine and left [upper extremity]," with "numbness around the incision site." *Id*. The examiner noted that the appellant's radiculopathy stemmed from the nerve roots in the appellant's cervical spine. R. at 4059. The examiner concluded that the appellant's cervical spine and left arm radiculopathy injury were not related to service because no neck injuries or problems were noted in his service treatment records, and the examiner found no nexus to service. R. at 4064.

That same month, the regional office denied the appellant's claim. R. at 4043-46. In August 2013, the appellant spoke with a VA employee about his July 2006 injury and noted that he experienced whiplash and almost lost consciousness. R. at 392. The appellant also alleged this incident caused left arm weakness. *Id*.

In June 2015, a fellow soldier submitted a statement corroborating the appellant's July 2006 accident, noting that

> [the appellant] hit his head very hard, his head flew backwards and he landed and twisted his body at the same time . . . . [The appellant] complained of back[,] neck[,] and arm pain. There were no x-rays taken at the time[,] we had no access to them.

R. at 2115. That same month, the appellant appeared before a Board member. R. at 2116-31. The appellant testified that when he fell in July 2006, he hit his head and it "snapped back really bad." R. at 2119.

V.

In August 2018, the Board denied the appellant service connection for a cervical spine injury and left arm radiculopathy. R. at 5-16. The Board found that the appellant's cervical spine disability and "associated left-sided radiculopathy" were not related to service. R. at 9-10. The Board relied on the July 2013 VA examination report and noted that the appellant's "more recent assertions of a whiplash or neck injury . . . are not credible." R. at 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), and where it "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 agrees with the parties that the Board failed to provide an adequate statement of reasons or bases addressing the appellant's June 2015 buddy statement corroborating the appellant's in-service incident. *See* 38 U.S.C. § 7104(d)(1); *see also 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 Board found that the appellant's statements regarding suffering whiplash during the July 2006 incident were "not credible," but failed to mention the June 2015 buddy statement that corroborated the incident. R. at 10. It's unclear how the buddy statement's corroboration affect the appellant's credibility. Remand of both matters on appeal is required for the Board to address this favorable evidence. 38 U.S.C. § 7104(d)(1); *see Caluza*, 7 Vet.App. at 506. On remand, the Board should address the June 2015 buddy statement's allegation that they "had no access to [x-rays] at the time [of the appellant's injury]," and how the statement affects its finding that a lack of in-service medical records made the appellant's statements unreliable. R. at 2115; *see also Buchanan v. Nicholson*, 451 F.3d 1331, 1337 (Fed. Cir. 2006) (holding that the Board cannot determine that lay evidence lacks credibility merely because it is unaccompanied by contemporaneous medical evidence.)

VIII.

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). 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.").

For the foregoing reasons, that part of the August 7, 2018, Board decision on appeal is SET ASIDE and the matters are REMANDED for further development and readjudication.

DATED: April 30, 2020

Copies to:

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